ABOUT THE AUTHOR

Michael T. White is a Missouri native who received his undergraduate and juris doctorate degrees from the University of Missouri. Although he principally represents developers and owners, he is capable of viewing land use questions from the perspective of government. He served as a member of the Jackson County Legislature and as County Executive of Jackson County, an elective office. He also served as President of the Missouri Association of Counties. Since beginning his practice in 1966, he has been involved in land use and economic development matters. Many of these assignments have resulted in litigation which he has handled through the appellate courts of Missouri. While serving as the first General Counsel for the Kansas City TIF Commission, he successfully defended Missouri's tax increment financing statute in *Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co.*, 781 S.W. 2d 70 (Mo. banc 1989). Upon leaving the County Executive's office, he entered the private practice of law and today is Chairman of White Goss, a Professional Corporation (www.whitegoss.com).

PREFACE

When I embarked upon the task of pulling together all of the land use law in Missouri, I had no idea that the undertaking would be as large as it has turned out to be. The subject matter tends to overlap with other areas of the practice, including, but not limited to, real estate transactional law, criminal law, environmental law, and even anti-trust law. Thus, one practitioner's version of what should be included in a compendium of land use law will differ from another's, and they may both be right. However, I have allowed my own practice to be my guide in this respect, and have tried to include those areas with which I have most frequently come into contact in representing developers. I acknowledge that each chapter in this book has been written from the point of view of the property owner's counsel. I do not apologize for the bias – I believe there is a need for a work such as this, which takes the perspective of the land user rather than that of the government. It is my hope that the work will become more accurate and authoritative with time and amendments.

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Chapter 5
MISSOURI ECONOMIC DEVELOPMENT LAW

§1. Public Purpose

There is no single statute which controls the definition of public purpose in Missouri. The courts have consistently held that as long as governmental action is designed to fulfill a public purpose, the wisdom of the governmental action is not subject to review. The determination of whether a benefit is for a public purpose is a legislative decision which will not be overturned in the absence of bad faith, fraud or abuse of authority. Economic development has been recognized by Missouri Courts as a valid public purpose.

Public funding should be guided by custom, used for government's support, or directly promote the welfare of the community. *Dysart v. City of St. Louis*, 11 S.W.2d 1045, 1047 (Mo. banc 1928). To qualify as a public purpose a measure must produce some benefit or convenience to the public--direct and immediate benefit or convenience. *Id.* It should be equally accessible to all upon the same reasonable terms and conditions. *Id.* No hard and fast rules exist for determining whether specific purposes and uses are public or private. *Cape Motor Lodge, Inc. v. City of Cape Girardeau,* 706 S.W.2d 208, 213 (Mo. banc 1986). A municipal purpose is one which comprehends all activities essential to the comfort, convenience, safety and happiness of the citizens of the municipality. *Id.* at 214. The determination of whether an expenditure is for a public purpose is a legislative decision, which will not be overturned by the courts in the absence of bad faith, fraud, or abuse of authority. *State on inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City, Mo.,* 270 S.W.2d 44, 52 (Mo. banc 1954) (not overturn unless determination was "arbitrary or was induced by fraud, collusion or bad faith"); *Brawley v. McNary*, 811 S.W.2d 362 (Mo. banc 1991); *Farmers' Elec. Co-op., Inc.*, *supra; Siegel v. City of Branson*, 952 S.W.2d 294, 296 (Mo. App. S.D. 1997) (campground; not overturn unless arbitrary, unreasonable or clearly erroneous). It has long been held that the determination of a public purpose for redevelopment is a legislative finding which will not be disturbed by the courts in the absence of fraud. *Land Clearance for Redevelopment Authority v. City of St. Louis*, 270 S.W.2d 58, 64 (Mo. banc 1954) (will not overturn unless "legislative finding was arbitrary or was induced by fraud, collusion or bad faith"); *See also, Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L. Ed. 27 (U.S. 1954) ("Once the question of the public purpose has been decided, the amount and character of land to be taken for the [redevelopment] project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."). A legislative finding of blight coupled with a legislative proposal that the blighted land will be acquired via eminent domain for purpose of clearance and subsequent sale upon terms and restrictions in the public interest will be accepted by courts as conclusive that the contemplated use is public unless arbitrary or induced by fraud, collusion or bad faith. *State, on inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City, Mo.,* 270 S.W.2d 44, 52 (Mo. banc 1954); *State*

ex rel. U.S. Steel v. Koehr, 811 S.W.2d 385, 388-89 (Mo. banc 1991). "Public function" is not a static concept and a court will not be guided solely by previous usages. *Laret Inv. Co. v. Dickmann*, 134 S.W.2d 65, 68 (Mo. banc 1939).

(1) Taxes and Eminent Domain. "The term 'public purposes' . . . denotes those objects and purposes for which taxes may be levied and for which real estate may be taken under power of eminent domain. It is a term of classification in contrast to those objects and purposes which, under the constitution and laws of the state must be left in private hands." *Bowman v. Kansas City*, 233 S.W.2d 26, 32 (Mo. banc 1950). "[T]he term 'public purposes', as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality." *State ex rel. City of Excelsior Springs v. Smith*, 82 S.W.2d 37, 39 (Mo. 1935); *State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 103 (Mo. banc 1941). In determining whether land condemned is taken for 'public purpose' as authorized by law, the words 'purpose' and 'motive' are distinguishable. *City of Kirkwood v. Venable*, 173 S.W.2d 8, 12 (Mo. 1943) overruled by *Bueche v. Kansas City*, 492 S.W.2d 835 (Mo. banc 1973) on other grounds. "Public Use" does not mean that the entire city must benefit from the use. *City of Smithville v. St. Luke's Northland Hospital Corp.*, 972 S.W.2d 416 (Mo. App. W.D. 1998). A public highway is an obvious public use. *State ex rel. Coffman v. Crain*, 308 S.W.2d 451 (Mo. App. 1958). The justification for granting the power of eminent domain to a private utility is the willingness of that utility to trade with the general public. *Phillips Pipeline Co. v. Brandstetter*, 263 S.W.2d 880 (Mo. App. 1954).

(2) Public Funds. 'Public purpose' as regards expenditure of municipal funds, means a purpose within the frame of governmental and proprietary power given to the particular municipality to be exercised for the welfare of its inhabitants and others coming within the municipal care, and involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion. *Greensboro-High Point Airport Authority v. Johnson*, 36 S.E.2d 803, 809 (N.C. 1946). 'Public funds' means funds belonging to the state or any county or political subdivision of the state, more especially taxes, customs, moneys, etc. raised by operation of some general law and appropriated by the government to the discharge of its obligations, or for some public governmental purpose. *State ex rel. St. Louis Police Relief Ass'n v. Igoe*, 107 S.W.2d 929, 934 (Mo. 1937).

(3) Economic Development as a Valid Public Purpose. The Missouri Constitution recognizes economic development as a valid public purpose for which public funds may be expended. Article VI, §27(b) of the Missouri Constitution provides that any county, city or incorporated town or village, by a majority vote of the governing body, may issue revenue bonds for manufacturing, commercial, warehousing and industrial development purposes, to be retired solely from the revenues derived from the lease or other disposal of the facility, and specifically provides that the projects may be leased or otherwise

disposed of pursuant to law to private persons or corporations. Mo. Const. Art. VI, §27(b). Missouri courts have recognized this principle. The condemnation of land to remedy an unsightly and unhealthy condition did not establish that the land was being condemned for a private purpose. *City of Kirkwood v. Venabele*, 173 S.W.2d 8 (Mo. 1943). (Case distinguishes between purpose and motive.) "[I]mproved employment and stimulation of the economy serve essential public purposes." *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666, 675 (Mo. banc 1978). Issuance of revenue bonds pursuant to the port authority act serves the essential public purposes of improving employment and stimulating the economy. *State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d 592, 596 (Mo. banc 1980). "Industry will not be attracted to blighted, unsanitary and undeveloped area absent incentives to offset the burdens." *State ex rel. Atkinson v. Planned Indus. Expansion Authority of St. Louis*, 517 S.W.2d 36, 46 (Mo. banc 1975). "The concept of urban redevelopment has gone far beyond 'slum clearance,' and the concept of economic underutilization is a valid one. . . . Industrial development is a proper public purpose." *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146, 151 (Mo. banc 1987). In *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 910 (Mo. App. 1991), the court went out of its way to reaffirm this principle:

[W]e note that after the trial, the court met with the parties in chambers to explain the reasons for its rulings. During this discussion, the court stated "economic underutilization is not a basis to declare something blighted." [The appellate court then went on to quote the above language from Tierney.] Thus, the trial court's remark is unfounded.

A joint agreement between a city and a university to build a multi-use center was held to be for a public purpose in *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208 (Mo. banc 1986); *See also, Burks v. City of Licking*, 980 S.W.2d 109 (Mo. App. S.D. 1998) (purchase of property by City and donation to state for prison site served valid public purpose of promoting economic development).

(4) Trend Toward Liberalization. The trend in judicial decisions in Missouri is decidedly towards a broadening of the concept of public purpose where economic development is concerned. *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666, 675 (Mo. banc 1978) citing 37 Am. Jur., Municipal Corporations, §132. ("The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving public purpose."). *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146, 151 (Mo. banc 1987) (" . . . the concept of urban redevelopment has gone far beyond 'slum clearance, ..."). In *Aaron v. Target*, 357 F.3d 768 (8th Cir. 2004), the 8th Circuit reversed the granting of a preliminary injunction by the district court against the use of eminent domain by the Land Clearance for Redevelopment Authority of the City of St. Louis. Target had a long-term lease on the store it occupied, but wanted to build a new one. The owners agreed, but demanded more rent. The city approved a redevelopment plan to demolish the store and convey the property to Target by passage of an ordinance

on December 21, 2002. The Redevelopment Authority made an offer to purchase, which remained open until April 10, 2003. On April 4, 2003, the owners filed suit in Federal Court to enjoin the procedure as an unconstitutional taking. In holding that Younger abstention should apply, the 8th Circuit ruled that there were sufficient state proceedings under way when the Federal Court action was filed, noting that condemnation proceedings were initiated by the passage of the redevelopment ordinance. The court observed that litigation was sure to follow if the owners did not respond affirmatively to the offer and that the suit was filed by the owners on the last day on which they could be sure no action would be started in state court. Thus, a race to the courthouse was not allowed to determine whether there were sufficient state proceedings for Younger purposes. The court pointed out that Missouri law allows constitutional challenges to be raised in a state court condemnation proceeding. "There is an extensive body of Missouri appellate cases deciding whether a taking is for a private purpose. Federal abstention in this case would permit Missouri's condemnation procedures to run their course. **Eminent domain is an appropriate tool to help neighborhoods remain economically viable, attract industry, and encourage future growth."** Id. at 778. (Emphasis supplied.) The opinion rejected the bad faith exception to abstention in spite of evidence that Target told the city it couldn't reach agreement on price and might abandon the site even though no discussions had taken place between the parties, that Target authored the blight study, and that Target presented a redevelopment plan to the city without the owners' knowledge.

The concept of public purpose no longer includes public use in the literal sense. *Kelo v. City of New London, Conn.* 545 U.S. 469, 125 S.Ct. 2655 (2005), 2005WL1469529 examined the use of eminent domain by a private entity, the New London Development Corporation, to revitalize an area declared 'distressed' by the state. The plaintiffs' properties were not blighted, but were condemned to assemble the larger property. The Fifth Amendment to the Constitution provides that private property shall not be taken for public use, without just compensation. Inherent in the clause, is the requirement that a taking must be for a public use. The court held 5 to 4 that a public purpose is a public use and that further, economic development is a valid public purpose. Lack of blight of the specific properties at issue did not tempt the court to second guess the legislative plan for the redevelopment of the larger area. *See also, U.S. v. 14.02 Acres of Land,* 547 F.3d 943 (9th Cir. 2008) (condemnation benefiting partnership of public and private entities was for a public use.)

(5) Examples.

- ***Aid to the Poor***. *Jennings v. City of St. Louis,* 58 S.W.2d 979 (Mo. 1933) (bonds to provide relief of poor people held to be public purpose).
- ***Athletic Fields, Arena and Horseracing Track***. *Aquamsi Land Co. v. City of Cape Girardeau*, 142 S.W.2d 332, 335 (Mo. 1940) (held to be a public purpose).
- ***Condemnation for Airport***. *City of Kansas City v. Hon,* 972 S.W.2d 407 (Mo. App. W.D. 1998) (condemnation of land around airport to prevent incompatible uses held to be a public purpose).

- ***Fire Patrol Service***. Fire patrol service not valid on the ground that service benefits insurance companies and thus is a use of public monies for private purposes. *State ex rel. Kansas City Inc. Agents Ass'n v. Kansas City*, 4 S.W.2d 427 (Mo. 1928).
- ***Industrial Development***. Authority's issuance of revenue bonds to finance facilities to be leased to private company held to be public purpose. *State ex rel. Jardon v. Industrial Development Authority Of Jasper County,* 570 S.W.2d 666 (Mo. 1978). If the primary purpose of the act is public, special benefits do not deprive government action of its public character. *State ex rel. Atkinson v. Planned Indus. Expansion Auth. Of St. Louis,* 517 S.W.2d 36 (Mo. banc 1975).
- ***Lease of Public Property to Private Interest***. *St. Louis Terminals Corp. v. City of St. Louis,* 535 S.W.2d 593 (Mo. App. 1976). The low lease rate and fact that the terminal made a profit from the operation of a dock is not relevant due to other benefits to the city (such as increased flow of goods). *See also, J.C. Nichols Company v. City of Kansas City,* 639 S.W.2d 886, 891 (Mo. App. 1982).
- ***Multi-Use Center***. Joint agreement between city and university to build multi-use center held to be for a public purpose. *Cape Motor Lodge, Inc. v. City of Cape Girardeau,* 706 S.W.2d 208, 214 (Mo. banc 1986).
- ***National Parks***. *Vrooman v. City of St. Louis*, 88 S.W.2d 189, 193 (Mo. 1935) (contribution of city funds to a national park held to be a public purpose despite argument that United States is a "corporation" under constitutional prohibition against gifts to corporations).
- ***Neighborhood Preservation***. *J.C. Nichols Company v. City of Kansas City,* 639 S.W.2d 886 (Mo. App. W.D. 1982) (neighborhood preservation a sufficient public purpose to lease property to a private entity).
- ***Public Market***. The maintenance of a public market by the city was held to be a public purpose in *Woodmansee v. Kansas City*, 144 S.W.2d 137 (Mo. 1940).
- ***Redevelopment of Blighted Area***. Declaration of blight declares public use. *State ex rel. U.S. Steel v. Koehr,* 811 S.W.2d 385 (Mo. banc 1991).
- ***Reimbursement to Developer***. *Christopher Lake Development Co. v. City of St. Louis County,* 35 F.3d 1269 (8th Cir. 1994) (reimbursement of developer's disproportionate expense in building storm sewer held to be a public purpose).

(6) Constitutional Aid Limitations.

The Missouri Constitution generally prohibits a political subdivision from assisting any private individual or entity. That some individual or private entity might profit from an economic incentive does not divest an act of its public purpose. Incidental private benefits will not deprive the purpose of its public character if the primary object is public. The Constitution does not require the courts to determine whether the

> **private benefit is greater than the public benefit. Obviously, where the local government receives consideration for the expenditure, there is no "grant" of public funds.**

Missouri's Constitution, like that of many other states, prohibits aid to private interests. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 St. Louis U. Publ. L. Rev. 143 (1993). Article VI, §23 of the Missouri Constitution provides that:

> No county, city or other political corporation or subdivision of the state shall lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual except as provided in this constitution.

Under this provision, the City of St. Louis could not deed air space over a public road as a gift to allow a children's hospital to expand. *St. Louis Children's Hospital v. Conway,* 582 S.W.2d 687 (Mo. banc. 1979).

Article VI, §25 is similar to Article VI, §23. Both originally appeared in the Constitution of 1875, although §25 has been amended in 1966 and 1984. §25 provides in relevant part as follows:

> No County city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a)….

The differences between the two sections is shown in the following table:

	Art. VI sec 23	Art VI, sec 25
Who	No County city or other political corporation or subdivision of the state	No County city or other political corporation or subdivision of the state
What	Shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money **or thing of value**	shall **be authorized to** lend its credit or grant public money **or property**
To Whom	to or in aid of any corporation, association or individual	to any private individual, association or corporation
Exception	**except as provided in this constitution.**	

The term "grant," as used in the cited constitutional sections, has been treated by the Missouri Supreme Court as synonymous with "give away." *St. Charles City-County Library Dist. v. St. Charles Library Bldg. Corp.,* 627 S.W.2d 64, 69 (Mo. App. E.D. 1981) *citing St. Louis Children's Hosp. v. Conway*, 582 S.W.2d 687, 691 (Mo. banc 1979). In addition to the clauses in article VI, the prohibition is found in Article III, §39 which states that the general assembly shall not have the power (1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person,

association, municipal or other corporation; (2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;… (4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law; (5) To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual to this state or any county or municipal corporation;….

(a) A benefit to a private company does not necessarily deprive a measure of its public character. (Primary Purpose Test). The public purpose test has been stated as follows: "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 expenditure is illegal, even though it may incidentally serve some public purpose. . . . If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent." *State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 102 (Mo. banc 1941) citing *Bates v. Bassett*, 15 A. 200, 202 (Vt. 1888); *Curchin v. Missouri Indus. Development Bd.*, 722 S.W.2d 930, 934 (Mo. banc 1987). No violation of the aid limitation clauses occurs where the expenditure of public funds is for a public purpose. *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281, 291 (Mo. banc 1977). Even a grant of public money or lending of public credit to a private entity will not violate the constitution if such loan or grant is spent for a public purpose such as improving the environment. *State ex inf. Danforth ex rel. Farmers Electric Coop, Inc. v. State Environmental Improvement Authority*, 518 S.W.2d 68, 74 (Mo. banc 1975) (construing §§260.005-260.090 R.S.Mo.) An expenditure from the public treasury is for a public purpose if it is "for the support of government or for some of the recognized objects of government, or directly to promote the welfare of the community." *Dysart v. City of St. Louis*, 11 S.W.2d 1045, 1047 (Mo. banc 1928). Nor are the constitutional prohibitions violated "'simply because incidental benefits may accrue to private interests.'" *Brawley v. McNary*, 811 S.W.2d 362, 367 (Mo. banc 1991) citing *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666, 674 (Mo. banc 1978); *State ex rel. City of Boonville v. Hackmann*, 240 S.W. 135, 137 (Mo. banc 1922) (". . . the benefit to the general public renders insignificant the incidental benefits accruing to the private interests."). The constitution does not require the courts to determine whether the public or private citizens benefit "more" by reason of the expenditure; if the primary purpose is public, that special benefits may accrue to some private persons does not deprive the government action of its public character. *State ex rel. Atkinson v. Planned Indus. Expansion Authority of St. Louis*, 517 S.W.2d 36, 46 (Mo. banc 1975); *Brawley v. McNary*, 811 S.W.2d 362, 367 (Mo. banc 1991); *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385, 389 (Mo. banc 1991); *State ex inf. Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44, 53 (Mo. banc 1954); *Land Clearance for Redevelopment Auth. of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58, 64-65 (Mo. banc 1954); *State ex inf. Danforth ex rel. Farmers' Electric Co-op., Inc. v. State Env. Improvement Auth.*, 518 S.W.2d 68, 74 (Mo. 1975) ("The

public purpose being apparent, it is unimportant that incidental benefits may accrue to private interests."). Public purpose has no relation to the urgency of public need, or the extent of the public benefit. *State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 103 (Mo. banc 1941).

- ***Industrial Development.*** If the primary purpose of the act is public, special benefits do not deprive government action of its public character. *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36, 46 (Mo. banc 1975) (acquisition of property by eminent domain). The Kentucky Supreme Court, faced with a similar state constitutional provision, upheld a law which inter alia, conveyed to Toyota, cost-free, a 1,600 acre tract. *Hayes v. State Property and Bldgs. Com'n.,* 731 S.W.2d 797 (Ky. 1987).
- ***Lease of Public Property to Private Interest.*** *St. Louis Terminals Corp. v. City of St. Louis, 535 S.W.2d 593 (Mo. App. 1976)* (a low lease rate and fact that a private terminal made a profit from the operation of a dock is not relevant due to other benefits to the city such as increased flow of goods); *See also, J.C. Nichols Company v. City of Kansas City*, 639 S.W.2d 886, 891 (Mo. App. 1982) (upholding city's lease of public property to private company and finding that neighborhood preservation was a sufficient "public purpose" to permit city, under its charter, to enter into the lease.).
- ***Markdown of the Government's Cost.*** The disposal of property in a redevelopment area, even though it may be sold for less than the authority has invested in it, does not violate the constitutional prohibition against a grant of public property to a private person. MO CONST Art. VI, §§23 and 25; *State, on inf. of Dalton v. Land Clearance for Redevelopment Auth. of Kansas City, Mo.,* 270 S.W.2d 44, 52-53 (Mo. banc 1954) (permitting LCRA to sell acquired property to developer for fair value, an amount less than acquisition, demolition and clearance cost); *Land Clearance for Redevelopment Auth. of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58 (Mo. banc 1954) (holding that LCRA sale of acquired property to developer did not violate Missouri Constitution).
- ***No Grant if Government Receives Consideration***. It is noted in McQuillin, Municipal Corporations, §39.31 that:

  > . . . if consideration is received by the municipality, this can take the matter out of the classification of a donation. . . . The acquisition of property in the construction of buildings to be leased to private interests does not violate the constitutional prohibition against the loaning of credit by municipalities, at least where the purpose is to attract industry or trade to a community, to provide employment and stabilize the community.

- ***Classic Consideration***. Where there is classic consideration, such as where the city purchases a police car, there is no "grant." *See, State ex inf. McKittrick v. Southwestern Bell Telephone Co.*, 92 S.W.2d 612, 613 (Mo.

banc 1936) *citing State ex rel. Kelly v. Hackmann*, 205 S.W. 161 (Mo. banc 1918) ("[O]nly gratuitous grants are prohibited by the Constitution."). In *St. Charles City-County Library Dist. v. St. Charles Library Bldg. Corp.,* 627 S.W.2d 64 (Mo. App. E.D. 1981) the court upheld a transfer of property where consideration for the transfer was present. *Id.* at 69. The provision of the LCRA Act which authorizes any public body for "reasonable consideration" to take actions in furtherance of the law does not require a city to receive legal consideration in order to participate in a project. *State, on inf. of Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44, 57-58 (Mo. banc 1954). In *St. Louis Children's Hosp.* there was no contention that the private entity provided any consideration for a transfer of property from the city to the private entity. *St. Louis Children's Hosp. v. Conway*, 582 S.W.2d 687, 690 (Mo. banc 1979). Accordingly, the court struck down the transfer of property. *Id.* at 691.

A company has a right not to locate in a particular locale. It gives up that right when it contracts to do so. The surrender of such right arguably constitutes valid consideration to the city in return for its expenditure of public funds especially when coupled with jobs and economic development. *See, State ex rel. State Highway Commission v. Eakin,* 357 S.W.2d 129, 134 (Mo. banc 1962) (Commission's condemnation of private property for use by a private pipeline company did not violate Missouri constitutional prohibition of grants to private parties when in return pipeline company abandoned an easement interfering with State's highway. Court stated: "[A] formal consideration passes to the State for the relocation of Phillips' pipe lines; to-wit: The surrender of a portion of Phillips' existing private right of way easement interfering with the proposed highway interchange. This involved factors closely connected with the safety and welfare of the traveling public and a *right Relator could not compel Phillips to surrender without making some provision therefor*." (emphasis added)); *Hayes v. State Property and Bldgs. Com'n.,* 731 S.W.2d 797, 800 (Ky.1987) (finding that incremental taxes which would never have existed *but for* the inducement of the facility to locate in Kentucky was sufficient consideration for state's transfer of property to private property.

- ***Sports Stadium.*** In *Moschenross v. St. Louis County*, 188 S.W.3d 13 (Mo.App. E.D. 2006) the county had pledged the proceeds of sports and entertainment tax, subject to annual appropriation, to pay bonds issued by the Missouri Development Finance Board to finance the new Cardinals' baseball stadium. Plaintiffs, supporters of the financing, sued in declaratory judgment to determine the lawfulness of the scheme in the face of an initiative that had been passed at the instigation of some of the defendants. These defendants claimed that the pledge violated the prohibition against lending the public credit in aid of a private party. Article VI, §23, Missouri Constitution. In rejecting the claim, the Eastern

District relied on the primary effect test, citing the numerous public benefits resulting from the arrangement, such as increased economic impact, taxes, jobs and personal income, concluding that "the primary purpose of the development at issue in the present case is to increase convention and sports activity in the county and city, thereby resulting in economic benefits to the public." 188 S.W.3d @ 22.

§2. —Tax Relief or Direct Assistance (Art. X, §7)

Article X, §7 of the Missouri Constitution permits the General Assembly to grant partial relief from taxation for the reconstruction, redevelopment, and rehabilitation of obsolete, decadent or blighted areas and of the improvements thereon for periods not exceeding 25 years. Relief may be in the form of tax abatement or tax exemption. Article X, §6 of the Missouri Constitution provides that government property, non-profit cemeteries, and inventories held for resale shall be exempt and property used for religious purposes, schools, agricultural and horticultural societies and purposes purely charitable may be exempted from taxation by general law. When property which is otherwise exempt is partially used for non-exempt purposes, the courts have become liberal in allowing the exemption on the portion of the property which is still used for exempt purposes.

Article X, §7 of the Missouri Constitution provides:

> For the purpose of encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment, and rehabilitation of obsolete, decadent, or blighted areas, the general assembly by general law may provide for such partial relief from taxation of the lands devoted to any such purpose, and of the improvement, thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe; provided, however, that in the case of forest lands, the limitation of twenty-five years herein described shall not apply.

(Originally enacted, 1945. Amended August 3, 1976.)

(1) Abatement. §353.110, granting tax abatement to urban redevelopment corporations, is authorized by Art. X, §7 of the Constitution and does not conflict with Art. X, §6 which provides for certain exemptions from property taxes. *Land Clearance for Redevelopment Auth. of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58 (Mo. 1954).

Article X, §6 of the Constitution provides that the property of the state and political subdivisions shall be exempt from taxation. (See §17(6) herein.)

(2) Exemption. Tax abatement which reduces the amount of taxes paid for a specified period must be distinguished from tax exemption which relieves the property of

paying any tax. Article X, §6 of the Missouri Constitution provides that government property, non-profit cemeteries, and inventories held for resale shall be exempt and property used for religious purposes, schools, agricultural and horticultural societies and property used for purposes purely charitable may be exempted from taxation by general law. Stating that this language in the Constitution encompasses more than almsgiving, the Missouri Supreme Court held in *Bader Realty & Inv. Co. v. St. Louis Housing Auth.*, 217 S.W.2d 489 (Mo. banc 1949), that property of the St. Louis Housing Authority was exempt under Art. X, §6 even though the Housing Authority charged rent to its tenants. *Id*. at 492-93. The Court found the Housing Authority to be a public charity. The exemption of not-for-profit cemeteries from taxation is from general taxes and not from special tax bills. *Lakewood Park Cemetery Ass'n v. Metropolitan St. Louis Sewer Dist.*, 530 S.W.2d 240 (Mo. banc 1975). Property owned by a land clearance for redevelopment authority is exempt from taxation. *Land Clearance for Redevelopment Auth. of Kansas City v. Waris*, 790 S.W.2d 454, 455 (Mo. banc 1990). A retirement community which operated as a not-for-profit corporation, and which charged rent to its tenants was held not to be charitable, and therefore, not exempt from property taxes in *Bethesda Barclay House v. Ciarleglio*, 88 S.W.3d 85 (Mo. App. E.D., 2002).

(a) Historical Development of Partial Exemption Rule. Application of the exemption is complicated by arrangements when property otherwise exempt is partially used for non-exempt purposes. The case law interpreting Article X, §6 of the Missouri Constitution and §137.100(5) of the Missouri Statutes has undergone considerable development. The current state of the law was established in *Barnes Hospital v. Leggett*, 589 S.W.2d 241 (Mo. banc 1979), which authorizes a partial exemption for property where the property is used in part for exempt purposes and in part for non-exempt purposes.

(i) Pre-Barnes: Property Not Exempt If Any Portion Used for Non-Exempt Purpose. Prior to Barnes Hospital, the Missouri courts did not follow the partial exemption rule. Rather, the general rule was that if any part of the property was used for a non-exempt purpose, the whole property was taxable. *Wyman v. City of St. Louis*, 17 Mo. 335 (1852); *Evangelical Lutheran Synod v. Hoehn*, 196 S.W.2d 134 (Mo. 1946); *Missouri Goodwill Industries v. Gruner*, 210 S.W.2d 38 (Mo. 1948); *City of St. Louis v. State Tax Commission*, 524 S.W.2d 839 (Mo. banc 1975). For example, in Wyman, the court held that an entire building was taxable where certain floors were used for exempt purposes and the remaining floors were used for either partly or exclusively non-exempt purposes. Under the primary versus incidental use analysis the court in *St. John's Mercy Hospital v. Leachman*, 552 S.W.2d 723 (Mo. banc 1977), held that a hospital was not entitled to real property tax exemption for a building in which 56% of the usable space was leased to physicians in private practice and the remaining space was devoted to hospital purposes because Missouri did not follow the partial exemption rule. *Id*. at 726.

(ii) Relaxation of Strict Rule: Property Exempt If Only Small Portion Used for Non-Exempt Purpose. Although the courts paid lip service to the strict exclusivity rule set forth in Wyman and its progeny, the Missouri Supreme Court, in practice, diluted the strict exclusivity requirements. In *State ex rel. Spillers v. Johnston*, 113 S.W. 1083 (Mo. 1908), the court stated that:

> The phrase 'exclusively used' has reference to the primary and inherent use as over against a mere secondary and incidental use . . . If the incidental use . . . does not interrupt the exclusive occupation of the building for school purposes, but dovetails into or rounds out those purposes, then there could fairly be said to be left an exclusive use in the school on which the law lays hold.

Id. at 1085.

Thus, in *St. Louis County v. Christian Hospital Northwest St. Louis County*, 589 S.W.2d 246 (Mo. banc 1979), the court held that offices which comprised only 2.6% of the total floor space in the hospital facility did not deprive the hospital of its exemption. Avoiding the partial exemption issue, the exemption was applied to the doctor's offices as well. *Id*. at 248, 249. The court reasoned that the presence of the physicians enhanced the hospital's purpose of serving its patients. *Id*.

(iii) Barnes: Partial Exemption Rule. In *Barnes*, the Missouri Supreme Court overruled the decisions which relied on the strict exclusivity of use test. 589 S.W.2d at 244. The court held that Mo. Const. Article X, §6 and §137.100 R.S.Mo. "authorize a partial exemption of a building or tract, where that building or tract is used in part for charitable purposes and in part for noncharitable purposes." *Id*. In *Barnes Hospital*, a building was used in part for medical teaching, research, and hospital functions and in part for offices for private medical practice. That portion of the building used exclusively for charitable purposes qualified for exemption from taxation. *Id*.

On remand from the Supreme Court, the trial court in *Barnes Hospital* conducted a hearing to determine the percentage of exempt versus nonexempt uses and found that 16.6% of the hospital property was occupied by faculty members also engaged in private practice and should be taxable. On appeal, the Missouri Court of Appeals in *Barnes Hospital v. Leggett*, 646 S.W.2d 889 (Mo. App. 1983) (*Barnes II*) reversed the trial court's finding and held that the entire property should be treated as exempt from property taxes. *Id*. at 893. The Court of Appeals stated that the phrase "used exclusively" should not be construed in its narrowest sense, but "has reference to the primary and inherent use as against a mere secondary incidental use." *Barnes II*, 646 S.W.2d at 892.

(iv) Application of Partial Exemption Rule After Barnes. In *Village North, Inc. v. State Tax Comm'n of Missouri*, 799 S.W.2d 197 (Mo. App. 1990), an exempt skilled nursing facility occupied 9.4% of an elderly housing facility. Citing Barnes, the court held that the skilled nursing facility was tax exempt and ordered the Tax Commission to grant the partial exemption sought. *Id*. at 200.

(b) Lease of a Portion of Exempt Owner's Property Does Not Defeat Exemption. In *United Cerebral Palsy Ass'n of Greater Kansas City v. Ross*, 789 S.W.2d 798 (Mo. banc 1990), the court held that where a charitable organization owns real property and occupies a portion of the property while leasing the remainder to other charitable organizations without the intention of making a profit, the entire property is entitled to exemption from real property taxes. *Id*. at 801, because its use was purely charitable, regardless of the number of charities using it.

(3) Grant of Land to Facilitate Economic Development. The Missouri Constitution provides that "No . . . city . . . shall . . . grant public money or thing of value to or in aid of any corporation . . . except as provided in this constitution." MO. Const. Art. 6, §23. Additionally, the Missouri Constitution provides that "No . . . city . . . shall be authorized to . . . grant public money or property . . . to any private . . . corporation except as provided in Article VI, §23(a) . . .." MO. Const. Art. 6, §25. §23(a) allows cities to acquire and furnish industrial plants.

Although at first blush these Sections appear to prohibit a City from granting property (something of value) to a private entity, say an economic development corporation, even if the grant is to facilitate construction of a new distribution center. But if this can be considered a public purpose, case law suggests that the grant does not violate the constitutional prohibitions. In *State ex rel. Mitchell v. City of Sikeston,* 555 S.W.2d 281 (Mo. banc 1977), the Missouri Supreme Court noted that even if a political subdivision were to enter into a financing arrangement which could be characterized as 'lending credit,' if such financing were done to further a public purpose, then no violation of Sections 23 or 25 would occur: "[N]o violation of §23 or 25, Art. VI, Missouri Constitution occurs where the expenditure of public funds is for a public purpose." *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281, 291 (Mo. banc 1977) citing *State ex rel. Farm Elec. Coop., Inc. v. State Env. I. A.,* 518 S.W.2d 68 (Mo.banc 1975); *State ex rel. City of Boonville v. Hackmann,* 293 Mo. 313, 240 S.W. 135 (Mo.banc 1922). In *Sikeston*, a third class city endeavored to purchase a power plant with bond proceeds, retiring the bonds with the revenues from the sale of surplus energy generated by the plant. Finding that the construction of the plant and the sale of excess energy constituted a public purpose, the court found that the financing arrangement did not violate §§23 and 25.

Additionally, in *State ex rel. Farm Elec. Coop.v. State Env. I.A.*, 518 S.W.2d 68 (Mo.banc 1975), the Missouri Supreme Court considered whether the financing mechanism authorized under the Environmental Improvement Authority Act (Authority could issue bonds to finance pollution control facilities which it in turn would lease or sell to private persons, firms, municipal corporations, etc.; and the bonds were to be paid for from the revenues derived from the sale or lease of the pollution control facilities), violated the lending of public credit prohibition under §23 or 25. The court first noted that "(i)t has long been recognized in Missouri . . . that the constitutional prohibitions noted are not violated when money and property are expended or utilized to accomplish a 'public purpose'." *State ex rel. Farmer's Elec. Coop.*, 518 S.W.2d at 74. It then explained that the "determination of what constitutes a public purpose is primarily for the legislative department and it will not be overturned unless found to be arbitrary and unreasonable." *Id*. Finding that pollution control under the Act was a public purpose, the court held that (1) "it is unimportant that incidental benefits may accrue to private interests" and (2) "even if the activities of the Authority, in receipt and disposition of funds, were to be construed as a 'lending of credit' or 'grant of public money,' the same would not be proscribed by [Sections] §§23 and 25 of Art. VI of the Missouri Constitution in view of the obvious 'public purpose.'" *Id*. at 75.

Consequently, under these cases it would appear that even if a city were to grant public money or property to a private party, if it were done for a public purpose, and the private benefits were merely incidental, then no constitutional violation would occur. However, in *St. Louis Children's Hospital v. Conway,* 582 S.W.2d 687 (Mo. banc 1979), the Missouri Supreme Court appeared to ignore its prior public purpose holdings and invalidate a city's grant of land to a not-for-profit corporation as unconstitutional. In *Conway*, a hospital (a not-for-profit private corporation) desired to expand its facility, but was landlocked by a public road owned by the City of St. Louis and a City-owned park. Because the city wanted the hospital to expand, it devised a scheme whereby ordinance it vacated a portion of the road, deeded it to the hospital in exchange for a surface easement for the public traffic, and allowed the hospital to build its expansion over the road and part of the park. The *Conway* court held that the City of St. Louis violated Art. 6, §§23 and 25's constitutional prohibitions regarding the giving of public property to private corporations:

> There is no question but what the people of the city of St. Louis and other areas greatly benefit from the services rendered by the Barnes Hospital Group and *St. Louis Children's Hospital* in particular; however, the hospital is, nevertheless, a private not a public institution and the services rendered are essentially the same as any other hospital. And with all due respect for the special services rendered to children by the instant hospital, it must be observed that other private corporations also render benefits to the communities in which they are situated. But those benefits cannot be utilized to convert a private corporation or association into a public corporation for the purpose of allowing a municipal government to give its property away without, in effect, completely obliterating the prohibition against giving public property to private persons or associations as provided in our constitution.

Conway, 582 S.W.2d at 690. It is hard to reconcile this decision with the public purpose cases discussed above, except to note that the ordinance authorizing the city's grant did not include an express finding by the city that the grant was for a public purpose (it merely noted that the ordinance was "to accommodate construction for an addition to [the hospital]." If the City of St. Louis had declared that the grant to facilitate the expansion was a public purpose, perhaps the court would not have found the constitutional violations. Additionally, it is worth noting that in *Conway* the city of St. Louis gave the ground to the hospital for no consideration. A city may be well served by a development agreement in which the city "sells" the land in exchange for the private entity's decision to invest in the city; thus creating valid consideration for the land--investment and jobs.

§3.—Eminent Domain (Art. VI, §21)

> **The Missouri Constitution specifically authorizes local governments to take private property for the reclamation of blighted, substandard or insanitary areas.**

> Article VI, §21 of the Missouri Constitution has provided since 1945:
> *Reclamation of blighted, substandard or insanitary areas*. Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking *or permitting the taking*, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest. (Emphasis supplied)

Everything included in §21, with the possible exception of the power to vest title to property taken by eminent domain in a private individual, could probably be accomplished under the general police powers of a local government. The constitution, even in Art. VI, §21, with does not grant the power of eminent domain, but rather limits it. *State ex rel. State Highway Comm'n v. James*, 205 S.W.2d 534 (Mo. 1947).

§4.—Issuance of General Obligations for Neighborhood Improvements (Art. III, §38(c))

> **The issuance of a special type of general obligation bond without an election in conjunction with neighborhood improvement districts to improve public infrastructure is specifically authorized by the Missouri Constitution.**

Article III, §38(c) Mo. Const. (approved at election, 1990) provides that the General Assembly may authorize cities and counties to create neighborhood improvement districts and incur indebtedness and issue general obligation bonds to pay all or part of the cost of public improvements within the districts. The cost shall be levied and assessed by the governing body as a special assessment which may be used to pay the general obligation bonds. The district must be approved by a vote of the electors voting within the district or a petition signed by a portion of the owners of record within the district that is equal to the percentage of voter approval required for the issuance of general obligation bonds under Art. VI, §26 Mo. Const. with The total amount of indebtedness for all such districts shall not exceed 10% of the assessed valuation of the governmental unit. *See* §9 herein wherein §§67.453 *et seq.* R.S.Mo. implementing this article, are discussed.

§5.—Issuance of Revenue and General Obligation Bonds and Tax Credits for Economic Development (Art. VI, §23(a) Mo. Const.)

> **The Missouri Constitution generally prohibits a political subdivision from assisting any private individual or entity. Thus all expenditures of public funds must serve a public purpose. Incidental private benefits will not deprive the purpose of its public character if the primary object is public. The Constitution does not require the courts to**

> **determine whether the private benefit is greater than the public benefit. The determination of whether a benefit is for a public purpose is a legislative decision which will not be overturned in the absence of bad faith, collusion, fraud or abuse of authority. Obviously, where the local government receives consideration for the expenditure, there is no "grant" of public funds.**
>
> **The Missouri Constitution specifically authorizes the issuance of general obligation bonds, if approved at an election, by any city, county or incorporated town or village to build industrial plants to be disposed of to private entities. The Constitution also allows any city or incorporated town or village to issue revenue bonds with or without a public vote for the purpose of constructing industrial plants, to be retired solely from the revenues derived from the lease or other disposition of the plants. Article VI, §27(b) provides that such revenue bonds may be issued without a public vote for "commercial" purposes.**

(1) Loan to Authority. A loan of city money to a land clearance for redevelopment authority is not a violation of Art. VI, §§23, 25, Mo. Const. *Land Clearance for Redevelopment Authority v. City of St. Louis*, 270 S.W.2d 58 (Mo. 1954).

(2) Disposal of Property. The disposal of property in a redevelopment area, even though it may be sold for less than the authority has invested in it, does not violate the constitutional prohibition against a grant of public property to a private person. *State ex inf. Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44 (Mo. 1954); *Land Clearance for Redevelopment Auth. of St. Louis v. City of St. Louis*, 270 S.W.2d 58 (Mo. 1954).

(3) Direct Financial Assistance to Induce Economic Development.

(a) Constitutional Aid Limitations. Missouri's Constitution, like that of many other states, prohibits aid to private interests, regardless of whether such aid serves a public purpose. Rubin, Constitutional Aid Limitation Provisions and the Public Purpose Doctrine, 12 St. Louis U. Publ. L. Rev. 143 (1993). Article VI, §23 of the Missouri Constitution provides that:

> No county, city or other political corporation or subdivision of the state shall . . . lend its credit or grant public money *or thing of value* to *or in aid of* any corporation, association or individual except *as provided in this Constitution*. (emphasis supplied)

Similarly, Art. VI, §25 provides that:

> No county, city or other political corporation or subdivision of the state *shall be authorized* to lend its credit or grant public money or *property* to any *private* individual, association or corporation . . . . (emphasis supplied).

In McQuillin, §39.26, it is noted that:

> A municipality has no power to donate money, issue bonds, subscribe to the stock, or otherwise aid a private corporation, with the exception of charitable purposes, under the constitutions of some states, *and this is so notwithstanding the municipality may be incidentally benefited by the location of the company in the municipality or otherwise*. This includes aid to fraternal associations, aid to manufacturing plants, as by encouraging the establishment and operation of private manufacturing or industrial plants within or near its limits . . . . (emphasis supplied)

The differences are highlighted thusly:

	Art. VI sec 23	Art VI, sec 25
Who	No County city or other political corporation or subdivision of the state	No County city or other political corporation or subdivision of the state
What	Shall lend its credit or grant public money **or thing of value**	Shall **be authorized to** lend its credit or grant public money **or property**
To Whom	To **or in aid of** any corporation, association or individual	To any private individual, association or corporation
Exception	**Except as provided in this constitution.**	

The term "grant," as used in the cited constitutional sections, has been treated by the Missouri Supreme Court as synonymous with "give away." *St. Charles City-County Library Dist. v. St. Charles Library Bldg. Corp.*, 627 S.W.2d 64, 69 (Mo. App. 1981) (citing *St. Louis Children's Hosp. v. Conway*, 582 S.W.2d 687, 691 (Mo. banc 1979)). In *St. Louis Children's Hosp.* there was no contention that the private entity provided any *consideration* for a transfer of property from the city to the private entity. Accordingly, the court struck down the transfer of property.

Missouri's Constitution specifically allows cities to issue industrial development revenue bonds (Art. VI, §27 Mo. Const.) and general obligation bonds (Art. VI, §23(a) Mo. Const.) and lease or sell the development to private entities. The sale of land acquired by an LCRA to private developer at a price less than the LCRA paid, does not violate Art. VI, §§23 and 25. *State ex inf. Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44 (Mo. 1954).

However, the Kentucky Supreme Court, faced with a similar state constitutional provision, upheld a law which *inter alia*, conveyed to Toyota, cost-free, a 1,600 acre tract. *Hayes v. State Property and Bldgs. Com'n.*, 731 S.W.2d 797 (Ky. 1987). In so doing, the court created a public purpose exception to the aid limitation provisions. The corollary is that, if the primary object of the expenditure is not to serve a public municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose. *Curchin v. Missouri Indus. Development Bd.*, 722 S.W.2d 930 (Mo. banc 1987).

Kansas has no anti-gift clauses in its Constitution similar to those of Missouri, but a

body of Kansas case law has reached the same result by requiring a public purpose for public expenditures. *Duckworth et al. v. The City of Kansas City, Kansas*, 758 P.2d 201 (Kan. 1988). (Holding that the state may appropriate public money for private individuals so long as the appropriation promotes the public welfare.) In *Duckworth*, it was also stated:

> In *Ullrich v. Board of Thomas County Comm'rs*, 234 Kan. 782, 676 P.2d 127 (1984), **[***5]** this court recognized that, as a general rule, HN1 the state legislature may appropriate public money for private **[*388]** individuals so long as the appropriation promotes the public welfare. In *Ullrich*, this court stressed that the wisdom of a particular public policy could not be decided by the courts, but must be resolved by the legislature….In *State, ex rel., v. City of Pittsburg*, 188 Kan. 612, 364 P.2d 71 (1961), and *State ex rel. Tomasic v. City of Kansas City*, 237 Kan. 572, 701 P.2d 1314 (1985), this court upheld the constitutionality of governmental assistance of private economic development for the purpose of promoting the overall economic welfare of the general public. Although both cases involve the grants of industrial revenue bonds rather than the issuance of loans by a city, the analysis for constitutional purposes is identical.

758 P.2d @ 202-203.

(b) No Grant if Government Receives Consideration. Contrary to the statement by McQuillan, *supra*, no violation of the constitutional provisions noted above occurs "where the expenditure of public funds is for a public purpose." *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. banc 1977); *State ex inf. Danforth ex rel. Farmers' Elec. Co-op., Inc. v. State Envtl. Improvement Auth.*, 518 S.W.2d 68 (Mo. banc 1975). Nor are the constitutional prohibitions violated simply because incidental benefits may accrue to private interests. *Brawley v. McNary*, 811 S.W.2d 362 (Mo. banc 1991); *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666 (Mo. banc 1978).

An expenditure from the public treasury is for a public purpose if it is "for the support of government or for some of the recognized objects of government, *or directly to promote the welfare of the community*." *Dysart v. City of St. Louis*, 11 S.W.2d 1045 (Mo. banc 1928); *Brawley*, *supra*.The constitution does not require the courts to determine whether the public or private citizens benefit "more" by reason of the expenditure; if the primary purpose is public, that special benefits may accrue to some private persons does not deprive the government action of its public character. *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975); *Brawley*, *supra*.

The determination of whether an expenditure is for a public purpose is a legislative decision, which will not be overturned by the courts in the absence of bad faith, fraud, or abuse of authority. *Brawley*, *supra*; *Farmers' Elec. Co-op., Inc.*, *supra*. In *State ex rel. Jardon*, *supra*, the court specifically held that: "We agree with the above reasoning that improved employment and stimulation of the economy serve essential public purposes." 570 S.W.2d at 675. *See also*, *Burks v. City of Licking*, 980 S.W.2d 109 (Mo. App. S.D. 1998) (purchase of property by City and donation to state for prison site served valid public purpose of promoting economic development); *Tierney v. Planned Expansion*

Authority of Kansas City, 742 S.W.2d 146 (Mo. banc 1987). However, jobs and economic development may not save an outright gift to a private company from a challenge that it violates the prohibition against a grant of public funds to a private company in Art. VI, §§23, 25, Mo. Const.

(i) Classic Consideration. Where there is classic consideration, such as where the city purchases a police car, there is no "grant." In *St. Charles City-County Library Dist.*, the court upheld a transfer of property where consideration for the transfer was present. It is noted in McQuillin, Municipal Corporations, §39.31 that:

> . . . if consideration is received by the municipality, this can take the matter out of the classification of a donation. . . . The acquisition of property in the construction of buildings to be leased to private interests does not violate the constitutional prohibition against the loaning of credit by municipalities, at least where the purpose is to attract industry or trade to a community, to provide employment and stabilize the community.

The provision of the LCRA Act which authorizes any public body with "reasonable consideration" to take actions in furtherance of the law does not require a city to receive legal consideration in order to participate in a project. *State, on inf. of Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44 (Mo. 1954).

(ii) Performance by Company. A company has a right not to locate in a particular locale. It gives up that right when it contracts to do so. The surrender of such right arguably constitutes valid consideration to the city in return for its expenditure of public funds especially when coupled with jobs and economic development.

(4) General Obligation Bonds. Article VI, §23(a) of the Missouri Constitution provides that by a two-thirds vote of those voting, any city, county or incorporated town or village may become indebted for and may purchase, construct, extend or improve plants to be leased or otherwise disposed of to private persons or corporations for manufacturing, warehousing and industrial development purposes but that such indebtedness shall not exceed 10% of the assessed value of the jurisdiction.

(5) Revenue Bonds - With Public Vote.

(a) Utilities, Manufacturing Plants and Airports. Article VI, §27 of the Missouri Constitution provides that any city, or incorporated town or village by a majority vote of the voters voting (and any joint board commission officer or officers established by a joint contract between municipalities or political subdivisions in Missouri, by a favorable vote of the majority of the voters voting in each of the municipalities or political subdivisions which are to participate in a project) may issue and sell revenue bonds to pay the cost of purchasing, constructing, extending or improving (1) revenue producing water, gas or electric light works, heating or power plants; (2) plants to be leased or otherwise disposed of to private persons or corporations for manufacturing and industrial development purposes; or (3) airports to be owned by the municipality or cooperating municipalities or political subdivisions to be retired solely from the revenues derived from the operation of the utility or lease of the plant.

(b) Utilities and Airports. Article VI, §27(a) of the Missouri Constitution provides that any county, city or incorporated town or village by a majority vote of the voters voting may issue revenue bonds for the purpose of purchasing, constructing, extending or improving (1) revenue producing water, gas or electric light works, heating or power plants; or (2) airports to be owned exclusively by the county, city or incorporated town or village, the cost of operation and maintenance and the principal and interest on the bonds to be payable solely from the revenues derived from the operation of the utility or airport. Note that under this section, the local government may not lease the airport or utility to a private individual.

(6) Revenue Bonds - Without Public Vote - Manufacturing, Warehousing, Industrial and Commercial. Article VI, §27(b) of the Missouri Constitution provides that any county, city or incorporated town or village, by a majority vote of the governing body, may issue revenue bonds for manufacturing, commercial, warehousing and industrial development purposes, to be retired solely from the revenues derived from the lease or other disposal of the facility, and specifically provides that the projects may be leased or otherwise disposed of pursuant to law to private persons or corporations.

(7) Tax Credits.

(a) Missouri Constitution. The Missouri Constitution strictly controls real property tax relief. Article X of the Missouri Constitution sets forth the powers of the state and local governments with respect to taxation. §1 states: "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purpose." Much of the article deals with property taxes. Intangible taxes are mentioned in §4(c) which deals with assessment and collection thereof. Income taxes are mentioned in §4(d) which simply provides that the state may borrow by reference provisions of the Internal Revenue Code. §6.1 sets forth property which may be and property which shall be exempt from taxation. §6.1 provides: "All law exempting from taxation property other than the property enumerated in this article, shall be void."

The following property shall be exempt per §6.1:

- Property of the state, counties and other political subdivisions;
- Non-profit cemeteries;
- Personal property held as industrial inventories by manufactures and refiners;
- Personal property held as goods, etc. for resale by the distributors, wholesalers or retail merchants or establishments;

The following property may be exempt by general law:

- Property not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies (§6.1);
- Household goods, furniture, wearing apparel and articles of personal use used by a person in his home.

- A portion of the assessed value of real property actually occupied by the owner as a homestead (§6(a));
- Intangible property (§6(b));
- For the purpose of encouraging forestry in lands that are devoted exclusively to such purpose and for the reconstruction, redevelopment, and rehabilitation of obsolete, decadent, or blighted areas. (§7).

There are no similar limitations on relief from income taxes or sales taxes. The general assembly has enacted numerous laws which grant tax credits against state income taxes to private businesses to incent certain behavior and laws which exempt certain sales such as machinery used in manufacturing from sales taxes. The only constitutional questions then, are whether such tax exemptions and tax credits violate Article 3, §39(1) which prohibits the *general assembly* from giving or lending the credit of the *state* in aid of any person, association, municipal or other corporation, or §39(2) which prohibits the pledging of the credit of the *state* for the payment of the liabilities of any individual association or corporation. Although tax credits and exemptions do grant money to private individuals, they arguably do so for a public purpose.

Local governments often enter into reimbursement agreements with developers (see §43 herein). Some cities have adapted policies abating utility or earnings taxes to attract and retain businesses. As is the case with state government, the question is whether these provisions violate the constitution, specifically the prohibition on debt without a public vote (Article VI, §26(a)) or the provisions of the constitution which prohibit local government from lending credit or granting public money to a private corporation as set forth in Article VI, §25. Economic development has been held to be a public purpose. *Tierney v. Planned Expansion Authority of Kansas City,* 742 S.W.2d 146 (Mo. banc 1987).

(b) Federal Constitution. The United States Court of Appeals, Sixth Circuit, in the case of *Cuno v. DaimlerChrysler, Inc.*, 383 F.3d 379 (6th Cir. 2004), amended by 386 F.3d 738 (6th Cir. 2004) held that Ohio's investment tax credit violated the Commerce Clause of the United States Constitution. (Article I, §8, cl. 3). Ohio had granted DaimlerChrysler property tax abatement of 100% for ten years and granted a non-re-fundable investment tax credit of 13.5% against the state's corporate franchise tax for certain qualifying investments, e.g., if the taxpayer "purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in Ohio." The investment tax credit was generally 7.5% of the excess of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county over the county average new manufacturing machinery and equipment investment for that county. The court noted: "any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere." The court examined three United States Supreme Court cases: *Boston Stock Exchange v. State Tax Commission*, 97 S.Ct. 599 (1977) (holding unconstitutional amendments to New York Securities Transfers Act that aimed to offset the competitive advantage that the transfer tax otherwise created for out-of-state exchanges that did not tax transfers); *Maryland v.*

Louisiana, 101 S.Ct. 2114 (1981) (striking down a Louisiana statute that imposed a first-use tax on natural gas extracted from the continental shelf in an amount equivalent to the severance tax imposed on natural gas extracted in Louisiana. Taxpayers subject to the first-use tax were entitled to a direct tax credit on any Louisiana severance tax owed in connection with the extraction of natural resources within the state. The severance tax credit favored those who both owned off-shore gas and engaged in Louisiana production and that the obvious economic effect was to encourage natural gas owners involved in the production of off-shore gas to invest in mineral exploration and development within Louisiana rather than to invest in further off-shore development or production in other states.); *Westinghouse Electric Corp. v. Tully*, 104 S.Ct. 1856 (1984) (invalidating a New York franchise tax that gave corporations an income tax credit based on a portion of their exports shipped from New York. The court found that the tax scheme penalized increases in the export shipping activities in other states.). In comparing the tax credit to a direct subsidy, the *Cuno* court held:

> Although the defendants likened the investment tax credit to a direct subsidy, which would no doubt have the same economic effect, the [United States Supreme] Court has intimated that attempts to create location incentives through the state's power to tax are to be treated differently from direct subsidies despite their similarity in terms of end-result economic impact. The majority in *New Energy* noted in dicta that subsidies do not "ordinarily run afoul of [the Commerce Clause]" because they are not generally "connect[ed] with the State's regulation of interstate commerce". *New Energy Co.,* 486 U.S. at 278; S*ee also West Lynn Creamery,* 512 U.S. at 199 n. 15 ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that '[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." (quoting *New Energy Co.,* 486 U.S. at 278)). Thus, the distinction between a subsidy and a tax credit, in the constitutional sense, results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax. In short, while we may be sympathetic to efforts by the City of Toledo to attract industry into its economically depressed areas, we conclude that Ohio's investment tax credit cannot be upheld under the Commerce Clause of the United States Constitution.

Cuno 386 F.3d @ 746. However, the United States Supreme Court reversed, holding that the taxpayer plaintiffs had no standing. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 126 S.Ct. 1854 (2006). First, the court mentioned that the principle underlying the Article III standing requirement, is the need for a case or controversy. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so" 126 S.Ct. @ 1860-1861**.** "Article III standing ... enforces the ... case-or-controversy requirement." Citing *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98. 126 S.Ct. @ 1861. The plaintiffs principally claimed standing by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit "depletes the funds of the State of Ohio to which the Plaintiffs contribute

through their tax payments" and thus "diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on" them. 126 S.Ct. @ 1862.

The court noted that it has historically denied taxpayer standing to those challenging federal expenditures. The animating principle was announced in *Frothingham v. Mellon,* decided with *Massachusetts v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). In turning aside a claim that improper federal appropriations would "increase the burden of future taxation and thereby take [the plaintiff's] property without due process of law," the *Frothingham* Court observed that a federal taxpayer's "interest in the moneys of the Treasury ... is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.*"Id., at 486-487, 43 S.Ct. 597.* In other words, the alleged injury to a taxpayer, simply by virtue of their status as a taxpayer, is hypothetical. Indeed, the court noted that it isn't clear that the tax breaks granted by Ohio do in fact deplete the treasury. "The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues. In this very action, the Michigan plaintiffs claimed that they were injured because they lost out on the added revenues that would have accompanied *DaimlerChrysler's* decision to expand facilities in Michigan." 126 S.Ct. @ 1862. The court applied the same reasoning to State taxpayers. Although federal taxpayers did successfully assert standing in *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947, the court distinguished a first amendment challenge from one under the Commerce Clause. *Flast* held that because "the Establishment Clause ... specifically limit[s] the taxing and spending power conferred by Art. I, §8," "a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause. *Id.,* at 105-106, 88 S.Ct. 1942. Noting that only the Establishment Clause has supported federal taxpayer suits since *Flast,* the court stated:

> Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Art. I, §8, plaintiffs' reliance on *Flast* is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to " 'contribute three pence ... for the support of any one [religious] establishment.' " 392 U.S., at 103, 88 S.Ct. 1942 (quoting 2 Writings of James Madison 186 (G. Hunt ed.1901)). 126 S.Ct. @ 1864-1865

(8) Annual Appropriation "Debt." Under Missouri law, an obligation to pay money which is subject to annual appropriation is not considered debt under the constitutional provisions relating to the amount and method of approval of debt. In *Moschenross v. St. Louis County*, 188 S.W.3d 13 (Mo.App, E.D. 2006) the Eastern District examined the method used by the county to help finance the new Cardinals baseball stadium. The court held that since the payments to help retire bonds, which were to be made over 30 years, were subject to annual appropriation by the county council, they were not debt subject to the 20-year limitation in Article VI, §26(f) of the Constitution, stating:

> The coalition defendants erroneously base their claim on the premise that the county's obligation was "indebtedness" which would be subject to the limitations contained in Article VI, §26(f). Debt has been defined as an unconditional promise to pay a fixed sum at a specified time. *Drury v. City of Cape Girardeau*, 66 S.W.3d 733, 740 (Mo. banc 2002). The agreement in the present case was merely to request annual appropriations for repayment of the bonds, subject to the approval of the county council. Therefore, the performance of the contract depends upon action by the county council before any unconditional indebtedness arises. This is distinguishable from an absolute agreement to incur debt, which has been determined to violate the debt-limitation provisions of Article VI, §26 of the Constitution. *New Liberty Medical & Hospital Corp. v. E.F. Hutton & Co.*, 474 S.W.2d 1 (Mo. banc 1971). Thus, the financing agreement in the instant case did not result in a "debt" incurred by the county longer than twenty years.
>
> Moreover, as the coalition defendants note, it has been determined that Article VI, §26(f) applies only to general obligation bonds. *Spradlin v. City of Fulton,* 924 S.W.2d 259, 264 (Mo. banc 1996). Michael Lause, an expert on public finance, testified at trial. He had worked on a number of bond issues. Lause discussed several different types of bonds categorized by the type of credit or revenue source behind the bonds. He defined the bonds at issue in the present case as annual appropriations bonds, not general obligation bonds. Therefore, the provisions of Article VI, §26(f) would not apply to the bonds at issue in the present case regardless of whether the county's obligation could be considered "debt."

188 S.W.3d @ 20-21.

§6. —Statutes

Various statutes are summarized for the convenience of the reader. These summaries are not always complete nor detailed. For a specific matter, the text of the act in question must be consulted.

§7. —Linked Deposit Program (30.750 - 30.767 R.S.Mo.)

> **The Linked Deposit program provides one-year low interest loans to certain businesses by depositing state funds at a discounted interest rate with those lending institutions which agree to make the loans.**

(1) Eligibility. A number of entities are eligible under the statute, but we have here focused on those most likely to be involved in traditional economic development. For example:

(a) Eligible Job Enhancement Business. A "new, existing or expanding firm operating in Missouri which employs ten or more employees on a yearly average and

which as nearly as possible, is able to establish or retain at least one job in Missouri for each $25,000 received from a linked deposit loan." §30.750(5) R.S.Mo.

(b) Eligible Marketing Enterprise. A business operating in Missouri in the process of marketing its goods to increase manufacturing, transportation, mining, communications, "or other enterprises in this state" which has proposed its marketing plan to the Department of Economic Development and been approved thereby, is headquartered in the state, maintains offices or operating facilities and transacts business in this state and is organized for profit and employees less than 25 employees. §30.750(8) R.S.Mo.

(c) Eligible Small Business. A person engaged in an activity with the purpose of obtaining a gain, employs less than 25 employees, is headquartered in the state, maintains offices or operating facilities in the state and is organized for profit. §30.750(11) R.S.Mo.

(2) Linked Deposit. A linked deposit is a certificate of deposit placed by the state treasurer with an eligible lending institution (one that is eligible to make commercial loans, is a public depository of state funds and which agrees to participate in the linked deposit program, §30.750(6) R.S.Mo.) at up to 3% below current market rates that are determined and calculated by the state treasurer, provided the deposit rate is not below 2%, and the institution agrees to lend the value of such deposit according to the deposit agreement to an eligible business at below the present borrowing rate applicable to such business at the time of the deposit of state funds in the institution. §30.750(15) R.S.Mo.

(a) Lending Institution Receiving Linked Deposits; Requirements and Limitations. An eligible lending institution desiring to receive a linked deposit shall accept and review applications for linked deposit loans from eligible businesses. The lending institution shall apply all usual lending standards to determine credit worthiness. No linked deposit loan made to an eligible small business shall exceed $100,000 and no service of separate loans may be made which exceeds such limit to any eligible small business. §30.756.1 R.S.Mo.

(b) Deposit Agreement. The lending institution shall enter into a deposit agreement with the treasurer to facilitate the purposes of the act. The agreement shall reflect the market conditions prevailing in the eligible lending institution's lending area, the length of time for which the lending institution will lend funds upon receiving a linked deposit and include provisions for a linked deposit for an eligible business to mature within a period not to exceed one year. The treasurer may renew such linked deposit for additional periods of time not to exceed one year each for job enhancement businesses, marketing enterprises and small businesses. §30.758.3 R.S.Mo.

(c) Length of Time of Deposit. The period for which such linked deposit is placed with an eligible lending institution shall coincide with the period for which the linked deposit is used to provide loans. The agreement shall further provide that the state shall receive market interest rates on any linked deposit or any portion thereof for any period of time for which there is no corresponding linked deposit loan outstanding to an eligible borrower. §30.758.4 R.S.Mo.

(3) Use of Proceeds. An eligible farming operation, small business or job enhancement business shall certify on its loan application that the reduced rate loan will be used exclusively for necessary production expenses or the expenses listed in subsection 2 of §30.753 or the refinancing of an existing loan for such listed expenses. Whoever knowingly makes a false statement concerning such application is guilty of a Class A misdemeanor. §30.756.2 R.S.Mo.

(4) Certification by Lending Institution to State Treasurer. The eligible financial institution shall forward to the state treasurer a linked deposit loan package, in the form and manner as prescribed by the state treasurer. The package shall include such information as required by the state treasurer, including the amount of each loan requested. The institution shall certify that each applicant is an eligible business and shall certify the applicable present borrowing rate. §30.756.4 R.S.Mo.

(5) Loan Package Acceptance or Rejection. The state treasurer may accept or reject a linked deposit loan package or any portion thereof. §30.758.1 R.S.Mo. Upon acceptance of the linked deposit loan package or any portion thereof, the state treasurer may placed linked deposits with the eligible lending institution. When necessary, the treasurer may place linked deposits prior to acceptance of a linked deposit loan package. §30.758.2 R.S.Mo.

(6) Loans to be at Fixed Rate of Interest Set by Rules. Upon the placement of the linked deposit with an eligible lending institution, such institution is required to lend such funds to each approved eligible borrower listed in the linked deposit loan package. The loan shall be at a fixed rate of interest which is below the present borrowing rate applicable to each eligible borrower, as determined pursuant to rules and regulations promulgated by the treasurer. The loan agreement shall specify that the eligible borrower shall use the proceeds as required by §§30.750 - 30.765 R.S.Mo. and that in the event the loan recipient does not so use the proceeds, the remaining proceeds shall be immediately returned to the lending institution and that any proceeds used by the borrower shall be repaid to the institution as soon as practicable. §30.760.1 R.S.Mo.

§8. —Neighborhood Assistance Act—Ch. 32 R.S.Mo.

Tax credits are available to businesses that provide or contribute to certain types of assistance to neighborhoods under the Neighborhood Assistance Act. The Director of the Department of Economic Development reviews proposals to improve the neighborhood by providing community services, crime prevention, education, job training, physical revitalization or economic development and determines whether the business's proposal is eligible for tax credits. Businesses providing or investing in homeless assistance projects or affordable housing are also eligible for a 55% tax credit if approved by the Missouri Housing Development Commission.

The Neighborhood Assistance Act is promulgated under Chapter 32 "State Department of Revenue" in §§32.105 through 32.125 R.S.Mo. Pursuant to §32.110 R.S.Mo., the director of the Department of Economic Development is authorized to promulgate rules and regulations for establishing criteria for evaluating proposals and for establishing priorities for approval of such proposals by business firms to be eligible to receive the tax credits offered by the Act. Various rules have been promulgated in 4 C.S.R. 85-2.010 through 4 C.S.R. 85-2.050.

(1) Tax Credit. Any business firm which engages in physical revitalization, economic development, job training or education, community services or crime prevention shall receive a tax credit if approved by the Director of the Department of Economic Development (Director), and the proposal has the endorsement of the applicable local government which has adopted an overall community or neighborhood development plan with which the proposal is consistent. §32.110 R.S.Mo. The tax credit cannot exceed fifty percent (50%) of the total amount contributed, or seventy percent (70%) for contributions made to "special program priorities." §32.115.2 R.S.Mo. Credits approved for economic development projects may not exceed four million dollars from within any one fiscal year's allocation, except that for fiscal years 2005, 2006, and 2007 credits approved for economic development projects shall not exceed six million dollars. §32.105(9) R.S.Mo.

(a) Taxes Against Which Credit May Be Used. The tax credits must be applied against seven taxes set forth in the Act in the priority of first, the annual tax on gross premium receipts of insurance companies, and last, the annual tax on gross receipts of express companies. §32.115.1 R.S.Mo.

(b) Amount. For neighborhood assistance, the credit shall not exceed 50% of the total amount contributed during the taxable year except that a tax credit of up to 70% is allowed for contributions to programs where the activities are within the scope of special program priorities with the approval of the Governor as defined in regulations promulgated by the Director. §§32.115.2(1), (2) R.S.Mo. Tax credits for contributions in rural communities as defined in §62.160 R.S.Mo., shall also be equal to 70% of the amount contributed. The 70% tax credit shall not exceed an annual cap as established from time to time by the legislature. §32.105(9) R.S.Mo. The credit may exceed $250,000 annually and not be limited if community services, crime prevention, education, job training, physical revitalization or economic development is rendered in an area defined as impoverished, economically distressed or blighted, or a neighborhood experiencing problems endangering its existence as a viable and stable neighborhood or if the community services, etc. are limited to impoverished persons. §32.115.2(5) R.S.Mo. A maximum authorization of $500,000 in tax credits will be permitted per project and no more than 5% of the credits authorized for the project will normally be allowed for administrative and operating expenses. In unusual circumstances, a higher percentage may be allowed at the discretion of the Department of Economic Development (4 C.S.R. 85-3.050(5)).

For affordable housing proposals, the amount of the tax credit shall not exceed 55% of the total amount invested and may be carried forward for the next ten succeeding calendar or fiscal years until used. If the units are condominiums, expenditures applicable to the entire structure shall be prorated on the basis of square footage to determine the

credit. §32.115.3 R.S.Mo. The funds are limited by a statewide cap. §32.110 R.S.Mo. The total amount of tax credits used for market rate housing in distressed communities pursuant to §§32.100 - 32.125 R.S.Mo. shall not exceed 30% of the total amount of all tax credits authorized pursuant to §§32.111 and 32.112 R.S.Mo. §32.115.5 R.S.Mo.

(c) Lenders Ineligible. Credits will not be granted to any financial institution for activities which are part of the normal course of the business. §32.115.2(4) R.S.Mo.

(d) Carry Forward. Any tax credit not used may be carried over to the next succeeding five calendar or fiscal years. §32.115.2(4) R.S.Mo.

(e) Assignment. The tax credits are assignable by a notarized endorsement thereof naming the transferee. §32.105(9).

(f) Development Tax Credit. The development tax program is derived from the neighborhood assistance program. 32.100-32.125, R.S.Mo. Donations are made to a not-for-profit corporation which acquires real [existing buildings] and personal property which is leased to the new or expanding business. New buildings may not be purchased with contributed funds. Job targets must be achieved within two years of the execution of the lease. Donations must be in the form of cash or property which must be appraised. 4 CSR 85 - 2.030 and 2.040. The not-for-profit corporation must retain ownership of the property for at least five years. The lease payments are determined by the Department of Economic Development based on the cost to operate and maintain us the assets, the projected cash flow of the business and the amount of the contribution. Lease payments are made to the Department of Economic Development.

(2) Proposal. The proposal shall set forth the program to be conducted, the neighborhood area to be served, why the program is needed, the estimated amount to be contributed to the program and the plans for implementing the program. If the contribution can better serve the purposes of the Act by being made to a neighborhood organization, a tax credit can be allowed for such contribution. §32.110 R.S.Mo. A neighborhood organization is defined in the Act as one which performs community services or economic development activities in the state, and is exempt from federal income taxation, incorporated in the state as a not-for-profit corporation, designated as a community development corporation by the United States government, or contributing funds to purchase buildings or equipment used to sell agricultural food products. §32.105(15) R.S.Mo.

(3) Affordable Housing. Any business firm which provides affordable housing assistance activities in the state or market rate housing in a distressed community shall receive a tax credit as provided in §32.115 if the Missouri Housing Development Commission (Commission) or its designee approves a proposal. The proposal shall set forth the program of affordable housing, location and number of units, the neighborhood area to be served, why the program is needed, the scheduling, amount of investment, implementation plans and a list of business firms proposing to provide affordable housing assistance activities. Proposals for affordable housing shall require land use agreements restricting the property to affordable housing use for a period of time deemed reasonable by the Commission. These restrictions shall require the owner of the units to certify that all tenants are income eligible and the rentals are in compliance with the law. In 2009, via

HB 191, the legislature increased the income threshold for an owner-occupier to double that of a renter. §32.105 R.S.Mo. In approving the proposal, the Commission may authorize the use of tax credits and shall establish specific requirements regarding the degree of completion of the activities necessary to be eligible for the tax credits. If, in the opinion of the Commission, a firm's investment can be more consistently with the purposes of the Act, made through contributions to a neighborhood organization, tax credits may be allowed for such contribution. The Commission is authorized to promulgate rules and regulations, including the certification of eligibility for tax credits. §32.111 R.S.Mo.

(4) Homeless Assistance Projects. Any business firm which provides a homeless assistance project for low income persons shall receive a tax credit as provided in §32.115 if approved by the Division of Community Development within the Department of Economic Development. The project must be located in a city with a population of 400,000 or more inhabitants, located in more than one county (Kansas City). §32.117.1 R.S.Mo. The amount of the credit shall not exceed 55% of the value of the project benefits. §32.117.4 R.S.Mo.

(a) Rules. Rules promulgated to implement the Neighborhood Assistance Act are subject to review by the Joint Committee on Administrative Rules pursuant to the procedures set forth in §32.125 R.S.Mo.

(5) Definitions.

(a) Business Firm. Includes a person, firm, partner, corporation or shareholder in an S corporation doing business in the State of Missouri, subject to state income tax or annual corporation franchise tax or an insurance company subject to a gross premium tax or other financial institution paying taxes or any political subdivision of the state or an express company paying an annual tax on gross receipts. §32.105(3) R.S.Mo.

(b) Community Services. Any type of counseling and advice, emergency assistance or medical care furnished to individuals or groups in the State of Missouri. §32.105(5) R.S.Mo.

(c) Crime Prevention. Any activity which aids in the reduction of crime in the State of Missouri. §32.105(6) R.S.Mo.

(d) Distressed or Blighted. 4 C.S.R. 85-2.015(1)(B). Areas of the state that either--

(i) have already been designated by the state as an enterprise zone under §135.200, R.S.Mo. or that meet the eligibility criteria and qualify to be designated as an enterprise zone;

(ii) are designated as urban redevelopment areas under Chapter 353, R.S.Mo. or that qualify to be designated; or

(iii) are designated as blighted or conservation areas under the Real Property Tax Increment Allocation Redevelopment Law, §§99.805(1) and (2), R.S.Mo. or that qualify to be designated (4 C.S.R. 85-3.050(1)(B)).

(e) Economic Development. Acquisition, renovation, improvement, or the furnishing or equipping of existing buildings and real estate in distressed or blighted

areas when such activity creates or retains jobs. Only neighborhood organizations may apply to conduct economic development projects. Prior to the approval of a project, the organization shall enter into a contract with the Department. §32.105(9) R.S.Mo. See also 4 C.S.R. 85-2.015(1)(A).

(f) Physical Revitalization. Furnishing financial assistance, labor, material or technical advice to aid in the physical improvement or rehabilitation of any part or all of a neighborhood area. §32.105(16) R.S.Mo.

(6) Applications. Applications will be accepted from any locally based not-for-profit organization wishing to conduct an economic development project. 4 C.S.R. 85-2.015(2). Applicants may not administer more than one Neighborhood Assistance Economic Development Project at a time. 4 C.S.R. 85-2.015(3). A project may include more than one building provided that the proposal meets all other eligibility requirements as set forth in this rule. Id. Applications will be accepted by the Department of Economic Development at any time of the year and will be approved on an individual case-by-case basis as all the necessary requirements are met and as credits become available. 4 C.S.R. 85-2.015(4). Applicants must obtain a nonbinding commitment from a prospective business(es) willing to locate to the facility and demonstrate that at least one job will be created or retained for every $10,000 in credits requested. 4 C.S.R. 85-2.015(6). Eligible types of businesses/jobs include retail, commercial and service as well as manufacturing. Id. Applicants must agree to retain ownership of all properties acquired under this provision of the Neighborhood Assistance Act for a minimum of five years and agree to contractual conditions with the Department of Economic Development governing the use or eventual disposition, or both, of those properties. 4 C.S.R. 85-2.015(7). Contract conditions will include, but not be limited to, lease terms and arrangements for the first five years, and a clause stipulating that the eventual purchase price will be no less than 75% of the fair market value of the facility, excluding the value of leasehold improvements. Id.. Eligible donations may include cash, real estate, materials, equipment, supplies, technical assistance or labor and will be valued and documented according to existing Neighborhood Assistance rules contained in 4 C.S.R. 85-2.030 and 4 C.S.R. 85-2.040. 4 C.S.R. 85-2.015(8).
Auth.: §32.110, R.S.Mo. (Cum. Supp. 1990). Original authority §32.100, R.S.Mo. (1977), amended 1980, 1989, 1990.

(7) Illustration.

(a) Source of Funds. If rent is 50% of market, project gains $.50 from Fed and Donor from each $1.00 of donation (Donors $.28; Fed $.22). If rent is fair market value, project gains nothing and NFP gains $.50. If rent is 0, project gains $1.00 from: 50% State, 22% Fed, 28% Donor.

§9. —Neighborhood Improvement District Act (67.453-67.475 R.S.Mo.)

The Neighborhood Improvement District Act implements Art. III, §38(e) of the Missouri Constitution and authorizes cities and counties in Missouri to establish neighborhood improvement districts for the

purpose of improving public infrastructure. The districts may be established by election or by petition of 2/3rd of the owners of the property in the district. The statute authorizes the city or county to issue temporary notes or long-term general obligation bonds which are secured by special assessments against the benefited properties. The assessments may be made on the basis of area, lineal measure, or any other reasonable method and may not exceed 20 years.

(1) Basic Structure and Purpose. The Neighborhood Improvement District Act was passed in 1991 to implement the provisions of the 1990 Missouri constitutional amendment allowing special improvement districts to be created and bonds issued which could be backed in part by the general credit of the local government. Art. III, §38(c), Mo. Const. The Act is codified in Chapter 67 R.S.Mo. which sets forth the miscellaneous powers of political subdivisions. The act withstood constitutional challenge in *Spradlin v. City of Fulton*, 924 S.W.2d 259 (Mo. banc 1996). The court held that the constitution does not require multiple parcels or multiple residences to create a neighborhood improvement district. The court further held that the constitution, Art. III, §38(c), authorizes a city to issue its neighborhood improvement district bonds without citywide voter approval. The city may pledge any portion of its general revenues to secure the bond payments if the special assessments prove inadequate since no new citywide tax supports the city's pledge. It is unclear whether the bond holders have a lien on anything other than the special assessments if not specifically granted in the bond documents. The court left undecided whether §38(c) provides the city an additional 10% debt limit above that provided by Art. VI, §26. Although the act is not designed strictly for redevelopment and offers no actual subsidy or tax abatement (beyond lending the general obligation credit of the city), it could be used in conjunction with the other acts which will be discussed, as a redevelopment tool. The basic structure and funding mechanism of the Act is as follows:

The Act allows the governing body of any city or county to make improvements which confer benefits upon property within a proposed neighborhood improvement district, to issue temporary notes or general obligation bonds for the purpose of making such improvements, and to retire such indebtedness by special assessments on the property benefited. In 1995, §67.458 R.S.Mo. was amended to allow the governing bodies of two or more adjoining counties to form NIDs to improve streets.

(2) Method of Establishment.

(a) By Election. The governing body may submit the question of creating a neighborhood improvement district to all *qualified voters* residing within the district. If the requisite majority approves the proposition, the governing body may then establish the district. Note that it is not incumbent upon the governing body to then establish the district, although it is difficult to imagine a situation where the governing body, having submitted the question to the voters and receiving the requisite majority, would not then proceed to establish the district. The requisite majority is the same as that required under Art. VI, §26 of the Constitution for the approval of general obligation bonds which used to be a two-thirds majority but now stands at four-sevenths due to a 1988 amendment.

(b) By Petition. The other method of establishing a district is by petition signed by two-thirds of the owners by area of all of the property in the proposed district. §67.457.3 R.S.Mo. In 2007, via Senate bill 22, the Legislature provided that: "Each owner of record of real property located in the proposed district is allowed one signature. Any person, corporation, or limited liability partnership owning more than one parcel of land located in such proposed district shall be allowed only one signature on such petition." Again, the governing body retains the right to not establish the district. §67.457.4 R.S.Mo.

(c) Notice to be Filed of Record. In 2013, via CCS #2 SCS HCS HB 1035, the legislature added a requirement that the clerk of the governing body creating a neighborhood improvement district file a notice with the recorder of deeds in the county where the land is located. The notice must contain the name of each owner property in the district, the governing body establishing the district, the title of any official or agency responsible for collecting the assessments listed as a grantee, a legal description of the property within the district and the identifying number or a copy of the ordinance creating the district. §67.457 R.S.Mo.

(3) Assessment. The cost of the improvements will be apportioned among the properties in accordance with the benefits that accrue to the property by linear foot, square foot, "or any other reasonable assessment plan determined by the governing body of the city or county. . . ." §67.459 R.S.Mo. These assessments are treated as a lien to the same extent as a tax upon real property. §67.469 R.S.Mo. The assessments will be payable in not more than 20 substantially equal annual installments, the first installment to be payable after the first collection of general property taxes following the adoption of the assessment ordinance unless adopted too late to permit its collection at such time. The rate shall be set by the governing body not to exceed the allowable rate in §108.170 R.S.Mo. §67.463.4 R.S.Mo. The special assessments shall be collected and paid over to the city treasurer or county treasurer in the same manner as taxes of the city or county are collected and paid. §67.463.5 R.S.Mo.

Once a district has been approved, the governing body shall make findings as to the project name, the nature of the improvement, the estimated cost, boundaries, method of assessment, and that the final cost and the amount of general obligation bonds issued therefor shall not, without a new election or petition, exceed the estimated cost by more than 25%. §67.457.4 R.S.Mo. Once the findings have been made and plans prepared, the governing body shall order the assessments to be made, and the clerk of the city or county shall by publication and mail, notify the public and the property owners of the proposed assessment and a public hearing to be held thereon. §67.461 R.S.Mo.

(4) Public Hearing. A public hearing shall be held on the improvement, and the governing body may at the hearing amend the proposed improvements or assessments and thereupon order that the improvement be made. §67.463.1 R.S.Mo.

(5) Limitation of Actions to Challenge Assessments. No suit to set aside the special assessments or question the validity of the proceedings shall be brought after 90 days from the date that notice is mailed to property owners. §67.465 R.S.Mo.

(6) Temporary Notes and General Obligation Bonds. After an improvement has been authorized, the governing body may issue temporary notes to pay the cost of an improvement in an amount not to exceed the estimated cost and *such notes shall be general obligations of the city or county*. General obligations of the city or county shall be issued or sold as provided in §67.455 to retire such notes. §67.471 R.S.Mo. A separate fund or account shall be created in the city or county treasury for each project and bond or note proceeds shall be deposited therein. If the project comes in under budget, any proceeds remaining in the project account shall be credited on a pro rata basis to the assessments against the property. §67.473 R.S.Mo. The total amount of the general obligation bond debt incurred hereunder shall not exceed 10% of the assessed valuation of all taxable, tangible property within the city or county. §67.475 R.S.Mo. The average maturity of NID bonds or notes shall not exceed one hundred twenty percent of the average economic life of the improvements which are financed and such improvement shall include provisions for maintenance of the project during the term of the bonds or notes. §67.456. The annual assessment for maintenance shall not exceed the estimated annual maintenance cost by more than twenty-five percent. §67.457.2 R.S.Mo.

(7) Citizen Advisory Committee. Any city with a population of 350,000 or more inhabitants shall appoint a citizen advisory committee composed of residents of each council district with respect to proposed neighborhood improvement districts. §67.475 R.S.Mo.

(8) Special Assessment Lien. In 2005, via HB 58, the Legislature provided that special assessments from Neighborhood Improvement Districts which are delinquent are subject to sale to discharge the lien on the fourth Monday in August of each year. §140.150.1 R.S.Mo. The entry in the back tax book by the County Clerk constitutes a levy upon the delinquent lands for the purpose of enforcing the lien of delinquent unpaid special assessments as provided in §67.469 R.S.Mo. In the same House Bill it was provided that a special assessment in a Neighborhood Improvement District shall be a lien on the property on which it is assessed and that the lien may be foreclosed in the same manner as a tax upon real property by land tax sale pursuant to Chapter 140 R.S.Mo. or by judicial procedure at the option of a governing body. §67.469 R.S.Mo. In 2013, via CCS #2 SCS HCS HB 1035, the legislature provided that certain first class counties, charter counties, and the city of St. Louis may also foreclose on those liens by a land tax sale under the provisions of law that govern land tax bills in those counties, and allows the Jackson County collector to also collect a fee when collecting special assessments for neighborhood improvement districts. Sections 67.463 and 67.469 R.S.Mo.

§10. —Regional Recreation Districts (67.792 *et seq*. R.S.Mo.)

Regional Recreation Districts may be established for the purpose of purchasing and maintaining land to be used for public parks and recreational facilities. After an election approving the creation of a recreational district, the governing body of the county shall appoint a

board of directors which shall have the power to submit the question of an annual tax to support the district to the voters thereof.

Pursuant to §§67.792 *et seq.* a Regional Recreation District ("RRD") may be established. If an RRD is created, it shall be a body corporate and a political subdivision of the state. §67.792.2 R.S.Mo.

(1) Creation of District. One hundred or more persons residing in the proposed district may file with the county clerk a petition requesting the creation of an RRD. The contents of the petition are set forth in §67.793 R.S.Mo. They must include a request that the question be submitted to the voters residing within the limits of the RRD.

(2) Procedure. Upon the filing of the petition, the county clerk shall present it to the governing body of the county who shall set it for hearing not less than 30 days nor more than 40 days after the filing. §67.794 R.S.Mo.

(3) Election. If the governing body of the county finds that the petition and notice meet the requirements of the Act and that the boundaries are reasonable, it shall order the submission of the question. §67.795 R.S.Mo. The ballot language is set forth in the Act. §67.796 R.S.Mo. If a majority of the votes cast on the proposal by the qualified voters voting therein are in favor of the proposal, the district shall be deemed organized. §67.796 R.S.Mo.

(4) Board of Directors. After the election, the governing body of the county shall appoint a board of directors consisting of seven persons chosen from the residents of the district. The directors shall hold office for three year terms except those first appointed of which two shall hold office for one year, two for two years and three for three years. Upon the expiration of the initial terms, the vacancies are filled by election for terms of three years.

(5) Powers. The board shall have the power to purchase or otherwise secure ground to be used for parks and recreational grounds and facilities. §67.797 R.S.Mo.

(6) Taxation. An RRD may by a majority vote of its board of directors impose an annual tax for the establishment and maintenance of public parks and recreational facilities and grounds not to exceed 60 cents per year per $100 of assessed valuation except that no such tax shall be effective unless the board of directors submits the question to the voters of the district. §67.799.1 R.S.Mo.

§11. —Community Improvement Districts (67.1401 *et seq.* R.S.Mo.)

Community Improvement Districts may be established in any city or county by petition of more than 50% of the owners of real property within the boundaries of a proposed district for the purpose of abating a public nuisance, constructing public improvements, or to encourage economic development in the district. Depending on whether the

district is formed as either a political subdivision or a not-for-profit corporation, the district shall have the power to issue revenue obligations, and levy ad valorem taxes, special assessments, business license taxes, sales and use taxes to fund improvements and accomplish the purposes of the district. Once a district is formed, the city may not reduce services within the district without reducing them citywide.

In the 1997 regular session of the legislature, the Missouri General Assembly passed, and the governor signed, Senate Bill 21 enacting the Missouri Museum District Act and the Community Improvement District Act ("CIDA"). Senate Bill 21 was entitled "An Act Relating to Sales Taxes for Economic Development and Tourism." It could be argued that the act violates the single subject rule and the clearly identifiable title rule of the Constitution. (Article III, §23 of the Missouri Constitution provides that no bill shall contain more than one subject which shall be clearly expressed in its title.) Immediately after the regular session of the legislature, the Missouri Supreme Court decided *Carmack v. Director, Missouri Dept. of Agriculture*, 945 S.W.2d 956 (Mo. banc 1997), which held that a portion of the 1995 Omnibus Economic Development Bill did not relate to economic development and therefore struck the provision. To dispel any doubts about the constitutionality of Community Improvement Districts, The CIDA was reenacted in 1998 in H.B. 1636.

(1) Formation. The governing body of any "municipality or county may form a district on petition of (a) more than 50% of the owners by assessed value of real property located within the proposed district and (b) more than 50% per capita of the owners of real property within the proposed district. Once a petition to establish a CID has been verified by the City Clerk, the City shall hold a public hearing and then adopt an ordinance establishing the district. A CID may be organized either as a political subdivision or as a not-for-profit corporation. §67.1421 R.S.Mo. A "Municipality" is defined as any city, village, incorporated town, or county of this state, or in any unincorporated area that is located in any county with a charter form of government and with more than one million inhabitants. §67.1401.1(9) R.S.Mo.

(2) Powers/Eligible Uses of Funds. The CID shall have the power: (a) to levy and collect special assessments and property and sales taxes (see §4, infra); (only if the CID is a political subdivision) (b) to borrow money from any public or private source and issue obligations and provide security for the repayment of the same; (c) to enter into one or more agreements with the City for the purpose of abating any public nuisance within the boundaries of the proposed district including, but not limited to, the stabilization, repair or maintenance or demolition and removal of buildings or structures, provided that the City has declared the existence of a public nuisance; (d) to provide assistance to or construct public improvements; and (e) to support business activity and economic development in the proposed district including the promotion of business activity, development and retention, and the recruitment of developers and businesses.

If the CID is located in a blighted area or includes a blighted area, it shall also have the power to (a) contract with any private property owner to demolish and remove,

renovate, rehabilitate any building or structure owned by such private property owner; and (b) expend revenues or loan its revenues pursuant to a contract, provided that the City has determined that the action to be undertaken under the contract is reasonably anticipated to remediate blighting conditions and will serve a public purpose. §67.1460 R.S.Mo.

The City shall not decrease the level of publicly funded services in the CID existing prior to the creation of the district or transfer the financial burden of providing the services to the CID unless the services at the same time are decreased throughout the entire City. The City shall not discriminate in the provision of the publicly funded services between areas included within the CID and areas not so included. §67.1461 R.S.Mo.

(3) Governance. CIDs are governed by a board of directors. If the CID is a not-for-profit corporation, the election and qualification of members to its board of directors shall be in accordance with Chapter 355, R.S.Mo. If the CID is a political subdivision, the members will either be elected or appointed by the City as set forth in the petition establishing the proposed district. Additionally, (a) the board of directors of a CID shall consist of at least five but no more than thirty directors; In 2007, via Senate Bill 22, the Legislature provided that: "If there are fewer than five owners of real property located within the distict, the board may be comprised of up to five legally authorized representatives of any of the owners of real property located within the district." (b) the CID shall submit a proposed annual budget to the City each fiscal year; (c) the CID shall submit a report to the City Clerk and the Missouri Department of Economic Development stating the services provided, revenues collected and expenditures made by CID during its fiscal year and indicating the district's indebtedness; and (d) the CID may be terminated by the City upon petition, notice and public hearing. §67.1451.

(4) Sources of Revenue. CIDs may utilize special assessments, real property taxes or business license taxes to fund improvements and accomplish any power, duty or purpose of the district. §64.1460.1 R.S.Mo. Taxes and special assessments shall be collected on or before the 15th day of each month by the City or county collector and shall be distributed to the CID prior to the first day of the succeeding month. §67.1551.2 R.S.Mo.

(a) Property Taxes. Only CIDs which are political subdivisions have the power to levy real property taxes. Further, the political subdivision must exist in a county seat of a first-class county containing a population of at least two hundred thousand, or in Kansas City. §67.1461.1(9)(10) R.S.Mo. The taxes must be approved by either by (a) registered voters, if any, living in the CID, or (b) if no registered voters, then by the property owners within the CID. The CID authorizes different property classes and levy rates for each class based upon the level of the benefit to be provided. §§67.1531 - 1541 R.S.Mo.

(b) Special Assessments. The CID may levy special assessments upon petition of (a) the owners of more than 50% by assessed value of the real property within the CID and (b) more than 50% per capita of the owners of real property within the CID. §67.1520 R.S.Mo.

(c) Sales and Use Taxes. Any district formed as a political subdivision may impose a sales and use tax on all retail sales made in the district which are subject to sales taxes under Chapter 144 R.S.Mo., except motor vehicles, trailers, boats, outboard motors, sales to or by public utilities and providers of communications, cable or video services, in increments of $1/8^{th}$ of one percent up to one percent, by majority vote of the qualified voters of the district. §67.1545.1 R.S.Mo. The board of directors submits the question to the voters by passing a resolution including the ballot language set forth in §67.1545.2 R.S.Mo. In 2007, via SB 22, the Legislature added: "Notwithstanding the provisions of Chapter 115, R.S.Mo., an election for a district sales and use tax under this section shall be conducted in accordance with the provisions of the section." The Missouri Department of Revenue shall collect the tax. §67.1545.4 R.S.Mo.

(d) Business License Taxes. A district may levy a business license tax if it is a political subdivision located in the county seat of a county of the first classification containing a population of at least two hundred thousand, or in Kansas City. §67.1461.1(9)(10).

(5) Borrowing Authority. Pursuant to resolution, the CID may issue revenue obligations payable solely from the proposed district's revenues and pledged assets. The revenue obligations may be sold publicly or privately. The CID may issue general obligations if approved by the qualified voters as required by the constitution. The obligations of the CID shall be exempt from Missouri state taxation. §67.1470 R.S.Mo.
The City, the LCRA, the Port Authority, the TIF Commission, the IDA or the PIEA may enter into a cooperative agreement with a CID to issue obligations and loan the proceeds of such obligations to the CID for the purpose of carrying out the powers and duties of the district.

(6) Advantages of CIDs. Major decisions and limitations made "up-front"—created only when majority of owners specify by petition:

- area of district
- maximum assessment or tax
- method of assessments
- duration of the district

Control retained by the affected community

Flexibility

- may use either assessments or taxes, or both
- assessments may use any formula which allocates costs to properties in relation to the benefit received
- expressly allows for different levels of assessment in different areas of District to provide a "package" of services/improvements appropriate to each subarea
- may fund private capital improvements identified in petition, located in blighted area
- Allows creation of business license tax

(7) Voting Rights. Section 67.1401 (14) R.S.Mo. defines "Qualified voters", as:

(a) For purposes of elections for approval of real property taxes:

a. Registered voters; or

b. If no registered voters reside in the district, the owners of one or more parcels of real property which is to be subject to such real property taxes and is located within the district per the tax records for real property of the county clerk, or the collector of revenue if the district is located in a city not within a county, as of the thirtieth day prior to the date of the applicable election;

(b) For purposes of elections for approval of business license taxes or sales taxes:

a. Registered voters; or

b. If no registered voters reside in the district, the owners of one or more parcels of real property located within the district per the tax records for real property of the county clerk as of the thirtieth day before the date of the applicable election; and

(c) For purposes of the election of directors of the board, registered voters and owners of real property which is not exempt from assessment or levy of taxes by the district and which is located within the district per the tax records for real property of the county clerk, or the collector of revenue if the district is located in a city not within a county, of the thirtieth day prior to the date of the applicable election;

In the case of *Day v. Robinwood West Community Improvement District*, 693 F.Supp.2d 996, 2010 WL 584027 (E.D.Mo. 2010) plaintiff claimed that to the extent not resident property owners were allowed to vote on electing directors, and imposing taxes, the statute violated the equal protection clause of the 14th amendment. In granting partial summary judgment, the federal district court ruled that Defendant unconstitutionally applied Mo.Rev.Stat. § 67.1401.2(14)(c) to permit District landowners to cast multiple votes in the election of members of the District's Board of Directors, and that § 67.1401.2(14)(c) is facially unconstitutional, insofar as it causes persons voting as registered voters to be subject to certain requirements not imposed on persons voting as nonresident landowners. Instead of completely invalidating the statute, however, the Court enjoined any application of § 67.1401.2(14)(c) permitting voting in CID elections by persons who do not meet the age requirement in Mo.Rev.Stat. § 115.133.1 and by persons who are disqualified from registering to vote under Mo.Rev.Stat. § 115.133.2. The court also ruled that only persons and not legal entities could vote in any CID elections. In footnote 10 of the opinion, the court stated:

FN10. Somewhat curiously, the scope provision of the Comprehensive Election Act of 1977, of which § 115.137 is a part, provides that the Act does not apply to public

elections in Missouri "for which ownership of real property is required by law for voting." Mo.Rev.Stat. § 115.005. Although one might read this provision as negating § 115.137.2, the Court concludes that given that § 115.137 is titled as an exception-"Registered voters may vote in all elections-exception"-this provision instead reinforces § 115.005, to the extent that it specifically points out a circumstance in which the Act's general requirements for registered voters do not apply.

(8) Comparison of CID with SBDs and NIDs

	CID	Special Business District (Ch. 71 R.S.Mo.)	Neighborhood Improvement District (Ch. 67 R.S.Mo.)
Eligible Uses of Funds	• Public capital improvements • Private capital improvements, located in blighted area • Special services	• Public capital improvements • Special services	• Public capital improvements
Formation	• By governing body of City, on petition of majority owners by assessed value or number. §67.1421 R.S.Mo.	• By governing body of City, on petition by one or more property owners	• By governing body of City, upon either: (a) approval of voters in district (4/7 vote on general, primary election dates; 2/3 vote on all other dates); or (b) petition signed by 2/3 of owners of property in district, by area. 67.457.3 R.S.Mo.
Powers and Limitations	• Petition for district formation must specify: - area and duration of district - maximum rate of taxes - method and maximum rate of assessment - types of services - types of improvements Petition may also specify other limitations, including: - maximum borrowing authority - exclusive methods of revenue generation - eligible uses of funds	• City makes all decisions for district	• Election ballot or petition for district formation must specify: - general nature of improvement - estimated cost - boundaries - method of assessment • City makes all other decisions, including classifications and assessment methods
Governance	• Program managed by district board, with annual report to City	• Advisory board of commissioners, with final	• Governed by City

	CID	Special Business District (Ch. 71 R.S.Mo.)	Neighborhood Improvement District (Ch. 67 R.S.Mo.)
	• District board to consist of 5-30 members, appointed by City or elected by "qualified voters" of district, depending on petition; petition may identify original members. Alternatively, district may be governed by a nonprofit corp. • Annual levy of taxes, assessments set by Board (within petition limits) • District may be terminated by City, upon petition of majority of property owners, by value and per capita	authority in City governing body	
Borrowing Authority	• District board may issue obligations payable solely from district revenues and assets pledged • District obligations are not general obligations of the district, unless approved by supermajority of voters in district (constitutional super-majority consists of 4/7 vote on primary or general election dates; 2/3 vote on all other dates)	• District may issue general obligation bonds, with approval of supermajority* of voters of the district • District may issue revenue bonds to finance revenue-producing facilities, payable from revenue generated by those facilities	• City must issue general obligation bonds to pay for improvements within district if special assessments are inadequate. However, the approval of the bonds does not create any new tax.
Sources of Revenue	• Special assessments - approved by petition - any reasonable method of assessment • Taxes - on real property and/or business license	• Special assessments 71.800.3 - limited to districts located in Kansas City - 3 types only: 1. Land Area = max. of 5 cents per sq. ft. 2. Improvements Area =	• Special assessments only • Assessment on per lineal foot or square foot, or any other reasonable assessment method • Approved by vote of people in district or petition of property owners

	CID	Special Business District (Ch. 71 R.S.Mo.)	Neighborhood Improvement District (Ch. 67 R.S.Mo.)
	- approved by qualified voters: (a) registered voters, if any, living in district, or (b) if none, then property owners • Authorizes different property classes and levy rates for each class based on level of benefit	max. of one-half of one cent per sq. ft. 3. Lineal Frontage Abutting Public Streets = max. of $12 per lineal foot - approved by qualified voters: residents and property owners in district • Real property taxes - maximum of 85 cents per $100 assessed valuation - approved by qualified voters and property owners • Business license taxes - if City already imposes tax on business licenses, then additional tax cannot exceed 50% of current tax - approved by qualified voters: those persons and entities with license to do business in district	

The material in §§(6) and (7) provided by John Crawford of KCEDC.

§11.1 —Economic Development Sales Tax (67.1303 *et seq.* R.S.Mo.)

Certain cities and counties may impose a sales tax of up to ½% for economic development purposes, if approved by a public vote. At least 20% of the revenue generated must be used for projects directly related to long-term economic development. Any such county or city must establish an economic development tax board of eleven (11) members, which shall develop economic development plans, projects or economic development areas and make recommendations to the governing body concerning the adoption or amendment of such plans, projects, or areas.

Per a new statute added in 2004, [SB 1155] certain cities and counties are authorized to impose, by order or ordinance, a sales tax on all retail sales made in the city or county which are subject to sales tax under Chapter 144, R.S.Mo. not to exceed one-half of one percent.

(1) Election. The order or ordinance imposing the tax shall not become effective unless the governing body of the city or county submits to the voters of the city or county at a state general or primary election a proposal to authorize the governing body to impose the tax which shall be in addition to all other sales taxes imposed by law, and shall be stated separately from all other charges and taxes. §67.1303.1 R.S.Mo.

(2) Uses of Tax. No revenue generated by the tax shall be used for any retail development project. At least twenty percent of the revenue generated by the tax shall be used solely for projects directly related to long-term economic development, including, but not limited to, the following:

(a) Acquisition of land;
(b) Installation of infrastructure for industrial or business parks;
(c) Improvement of water and wastewater treatment capacity;
(d) Extension of streets;
(e) Providing matching dollars for state or federal grants;
(f) Marketing;
(g) Providing grants and low-interest loans to companies for job training, equipment acquisition, site development, and infrastructure. Not more than twenty-five percent of the revenue generated may be used annually for administrative purposes, including staff and facility costs. §67.1303.3 R.S.Mo.

(3) Economic Development Tax Board. Any city or county imposing the tax authorized in this section shall establish an economic development tax board. The volunteer board shall receive no compensation or operating budget. The board established by the city shall consist of at least five members, but may be increased to nine members. The members to be appointed as follows:

(a) One member of a five-member board, or two members of a nine-member board, shall be appointed by the school districts included within any economic development plan or area funded by the sales tax. Such members shall be appointed in any manner agreed upon by the affected districts;

(b) Three members of a five-member board, or five members of a nine-member board, shall be appointed by the chief elected officer of the city with the consent of the majority of the governing body of the city;

(c) One member of a five-member board, or two members of a nine-member board, shall be appointed by the governing body of the county in which the city is located. §67.1305.12 RSMo.

(4) Duties of Board. The board, subject to approval of the governing body of the city or county, shall develop economic development plans, economic development projects, or designations of an economic development area, and shall hold public hearings and provide notice of any such hearings. The board shall vote on all proposed economic development plans, economic development projects, or designations of an economic development area, and amendments thereto, within thirty days following completion of the hearing on any such plan, project, or designation, and shall make recommendations to the governing body within ninety days of the hearing concerning the adoption of or amendment to economic development plans, economic development projects, or designations of an economic development area. §67.1303.6 R.S.Mo.

(5) County Local Use Tax. The Act also authorizes St. Louis County to impose a use tax in addition to a sales tax for purposes of economic development. §144.757.2 R.S.Mo.

(6) 2005 Amendment. In 2005, via House Bill 58, a new section, Section 1305 was added to the law and made applicable to any incorporated city, town or village. §67.1305.1 R.S.Mo. An identical provision was enacted the same year in Senate Bill 210 and signed by the governor.

(7) Expansion to any City or County. The new section provides that in lieu of the sales taxes authorized under §§67.1300 and 67.1303 (the Act passed in 2004) the governing body of any city or county may impose a sales tax not to exceed one-half of one percent. §67.1305.2 R.S.Mo. The tax shall be in addition to all other sales taxes imposed by law except those imposed under the 2004 Act. §67.1305.2 R.S.Mo. Except as modified by §67.1305, all provisions of §§32.085 and 32.087 shall apply to the tax imposed. §67.1305.9 R.S.Mo. (general provisions relating to sales taxes.) "City" is defined as any incorporated city, town, or village. §67.1305.1 R.S.Mo.

(8) Election. The tax shall not be effective until submitted to the voters of the political subdivision. The ballot language shall state: "Shall blank (insert the name of the city or county) impose a sales tax at a rate of __ (insert rate of %) percent for economic development purposes?" §67.1305.3 R.S.Mo. The tax shall be collected by the Director

of Revenue less one percent for cost of collection and placed in a fund known as the "Local Option Economic Development Sales Tax Trust Fund". §67.1305.4 R.S.Mo.

(9) Use of Tax. No revenue generated by the tax shall be used for any retail development project, except for the redevelopment of downtown areas and historic districts. Not more than twenty-five percent of the revenue generated may be used annually for administrative purposes. §67.1305.10 R.S.Mo. The Act contains a detailed list of items on which the tax may be spent. §67.1305.10(2) R.S.Mo.

(10)Economic Development Tax Board. Any city or county imposing the tax shall establish an economic development tax board, consisting of five members, one member appointed by the school districts, three members appointed by the chief elected officer of the city and one member appointed by the governing body of the county. §67.1305.12 R.S.Mo. In the case of a county, the board shall consist of seven members, one member appointed by the school districts, four members appointed by the governing body of the county and two members from the cities, towns or villages within the county appointed in any manner agreed upon by the chief elected officers of such cities, towns or villages. §67.1305.12(3) R.S.Mo.

(11)Duties of Board. The board shall vote on all proposed economic development plans, projects, or designations of economic development areas and make recommendations to the governing body. §67.1305.13 R.S.Mo. The board may recommend using funds outside the boundaries of the city or county imposing the tax if the city or county receives significant economic benefit and the board establishes an agreement with the governing bodies of all cities and counties in which the plan, project or area designation is located detailing the authority and responsibilities of each governing body with regard to the plan, project, or area designation. §67.1305.14 R.S.Mo.

(12)Immunity from TIF Capture. Unless the city or county imposing the tax agrees, the tax is immune from capture by any special taxing district including a tax increment financing district, a neighborhood improvement district or a community improvement district. §67.1305.15 R.S.Mo.

§11.2 —Theatre, Cultural Arts and Entertainment District (67.2500 *et seq.* R.S.Mo.)

Certain cities may establish a Theatre, Cultural Arts, and Entertainment District to fund educational, civic, musical, theatrical, cultural, lecture series, concerts, and related activities and to fund and operate public improvements, transportation projects, and related facilities in the district. The district shall be a political subdivision. It must contain a minimum of 50 contiguous acres. A sales tax of up to ½% may be imposed. Property owners may petition for the formation of a district, which must be approved at a public election, after

approval by the governing body of the city. Certain sub-districts may opt out of the activities of the district. In the alternative, the district may be formed by petition filed with the circuit court, which shall, if it approves the petition, order an election. If no registered voters live in the district, the election may be held by the filing of a unanimous petition of all property owners.

Via SB 1155, the General Assembly enacted the Theatre, Cultural Arts and Entertainment District Act in 2004, providing that the governing body of certain cities, towns, or villages may establish a theater, cultural arts, and entertainment district in the manner provided in section 67.2500.1. R.S.Mo. to fund, promote, and provide educational, civic, musical, theatrical, cultural, concerts, lecture series, and related or similar entertainment events or activities, and to fund, promote, plan, design, construct, improve, maintain, and operate public improvements, transportation projects, and related facilities in the district.

(1) Political Subdivision. Such a district is a political subdivision of the state.

(2) Name. The name of a district shall consist of a name chosen by the original petitioners, preceding the words "theater, cultural arts, and entertainment district".

(3) Area. The district shall include a minimum of twenty-five contiguous acres.

(4) Voting. Subdistricts shall be formed for the purpose of voting upon proposals for the creation of the district or subsequent proposed subdistrict, voting upon the question of imposing a proposed sales tax of up to one half of one percent, and for representation on the board of directors, and for no other purpose.

(5) Petition By Owners. Whenever the creation of a district is desired, one or more registered voters from each subdistrict of the proposed district, or one or more property owners who collectively own one or more parcels of real estate comprising at least a majority of the land situated in the proposed subdistricts within the proposed district, may file a petition requesting the creation of a district with the governing body of the city, town, or village within which the proposed district is to be established. The petition shall contain the information set forth in the Act. §67.2505.1 R.S.Mo.

(6) Resolution By Governing Body. Upon the filing of a petition pursuant to this section, the governing body of any city, town, or village described in this section shall pass a resolution containing the following information:

- A description of the boundaries of the proposed district and each subdistrict;
- The time and place of a hearing to be held to consider establishment of the proposed district;
- The timeframe and manner for the filing of protests;
- The proposed sales tax rate to be voted upon within the subdistricts of the

proposed district;

- The proposed uses for the revenue to be generated by the new sales tax; and
- Such other matters as the governing body may deem appropriate. §67.2505.7 R.S.Mo.

(7) Election. Following a public hearing, §67.2505.8 R.S.Mo. the governing body may order an election, §67.2505.8 R.S.Mo., at which the District may be approved by a simple majority. §67.2505.10 R.S.Mo. Any subdistrict that does not approve the creation of the district and imposing the sales tax shall not be a part of the district and the sales tax shall not be imposed until after the district board of directors has submitted another proposal for the inclusion of the area into the district and such proposal and the sales tax proposal are approved by a majority of the qualified voters in the subdistrict voting thereon. Such subsequent elections shall be conducted in accordance with section 67.2520; provided, however, that the district board of directors may place the question of the inclusion of a subdistrict within a district and the question of imposing a sales tax before the voters of a proposed subdistrict, and the municipal clerk, or circuit clerk if the district is formed by the circuit court, shall conduct the election. In subsequent elections, the election judges shall certify the election results to the district board of directors.

(8) Alternative Procedure In Certain Counties. As a complete alternative to the procedure establishing a district set forth in §67.2505 R.S.Mo., a circuit court with jurisdiction over any city, town, or village that is within any county with a charter form of government and with more than two hundred fifty thousand but less than three hundred fifty thousand inhabitants, may establish a theater, cultural arts, and entertainment district in the manner provided in §67.2515 R.S.Mo. §67.2510 R.S.Mo. Whenever the creation of a theater, cultural arts, and entertainment district is desired, one or more registered voters from each subdistrict of the proposed district, or if there are no registered voters in a subdistrict, one or more property owners who collectively own one or more parcels of real estate comprising at least a majority of the land situated in the proposed subdistricts within the proposed district may file a petition with the circuit court requesting the creation of a theater, cultural arts, and entertainment district. §67.2515 R.S.Mo. After a hearing, §67.2515.2 R.S.Mo. , the court may order an election, §67.2515.5 R.S.Mo. For elections held in subdistricts , if all the owners of property in a subdistrict joined in the petition for formation of the district, such owners may cast their ballot by unanimous petition approving any measure submitted to them as subdistrict voters. Each owner shall receive one vote per acre owned. Fractional votes shall be allowed. The petition shall be submitted to the municipal clerk, or the circuit court clerk if the district is being formed by the circuit court, who shall verify the authenticity of all signatures thereon. The filing of a unanimous petition shall constitute an election in the subdistrict under this section. §67.2520.2 R.S.Mo. There are many other provisions in this rather lengthy act, such as the qualifications of board members, governance, organization, powers, officers, the issuance of notes or bonds, particulars of the sales tax, and dissolution of the district. §67.2525 R.S.Mo.

11.3 Amateur Sporting Events Tax Credits (67.3000 -67.3005 R.S.Mo.)

Via SCS/SBs 10 & 25 in 2013 the legislature created a refundable income and financial institutions tax credit which may be available for sports commissions, certain nonprofit organizations, counties, and municipalities to offset expenses incurred in attracting amateur sporting events to the state.

(1) Tax Credits.

(a) Ticket/Expense Credit. The tax credit will be equal to the lesser of five dollars for each admission ticket sold for the event or one hundred percent of eligible expenses incurred. 67.3000.4 No more than three million dollars in ticket/expense tax credits may be issued per fiscal year. 67.300.5 The tax credits are fully transferrable, provided a notarized endorsement is filed with the Department of Economic Development.

(b) Contribution Credits. The act also creates an income, financial institutions, and corporate franchise tax credit equal to fifty percent of the amount of an eligible donation made, on or after January 1, 2013, to a certified sponsor or local organizing committee for the purposes of attracting sporting events to the state. 67.3005.1 The tax credit is non-refundable, but may be carried forward two years. The tax credit is transferable. The Department of Economic Development is prohibited from issuing more than ten million dollars in Contribution tax credits each fiscal year. 67.3005.3.

(2) Application. Applicants for the ticket/expense tax credit must submit game support contracts to the Department of Economic Development for approval. 67.3000.2. No support contract can be approved unless the site selection organization was choosing between sites both in an outside the state. 67.3000.8 Certified sponsors and local organizing committees may apply to the Department of Economic Development for the tax credits. Applications for tax credits must be accompanied by payment in an amount equal to the tax credits requested. 67.3005.2.

(3) Sunset. The Department of Economic Development is prohibited from certifying game support contracts after August 28, 2019, but may certify game support contracts prior to that date for games to be held after August 28, 2019. 67.300.8 The provisions of this act shall automatically sunset six years after August 28, 2013, unless reauthorized. 67.3005.5.

§11.4 —Port Authorities (68.010 R.S.Mo)

In 1974, the legislature enacted legislation authorizing local port authorities. §68.010 R.S.Mo.

(1) Eligible Cities and Counties. Every city or county which is situated upon, or adjacent to, or which embraces within its boundaries a navigable waterway, is authorized to form a local port authority, and upon approval of the Missouri highways and transportation commission, the port authority shall be a political subdivision. In the city

of St. Louis, a port authority is deemed created by the statute. §68.010 .1 R.S.Mo. the standards for approval by the highways and transportation commission are set forth in §68.010.2 R.S.Mo. and include population, whether there is an existing port authority in the same area, feasibility of port development, river traffic, and economic impact. The application shall be approved if it is made by Kansas City or Jackson County, whether individually or as part of a group of cities or counties as long as the proposed boundary of the port authority does not overlap the boundary of an existing authority. §68.010.2 R.S.Mo. No city shall create a port authority if it is located within a county that has an approved port authority. §68.010.3 R.S.Mo.

(2) Eligible Areas to Be Included in District. The legislative body of the city or county creating a port authority or the port authority of St. Louis shall designate which areas within the city or county shall comprise one or more port districts, subject to the limitation that the area "shall be or could be reasonably connected to the business of the port." Such legislative body may from time to time change the boundaries of any port district. Any change shall be submitted for approval to the highways and transportation commission. §68.015.1 R.S.Mo.

(3) Expenditure of City or County Funds. The legislative body of any County or city authorized to create a local port authority may expend such funds of the city or county for the planning and development of a port district as are reasonable and necessary to carry out the provisions of the Port Authority Act (§§68.010 *et seq*.) §68.015.2 R.S.Mo.

(4) Purpose. It should be the purpose of the report authority to "promote the general welfare, *to promote development within the port district*, to encourage private capital investment by fostering the creation of industrial facilities and industrial parks within the port district and to endeavor to increase the volume of commerce, and to promote the establishment of a foreign trade zone within the port districts." §68.020 R.S.Mo. (italicized words were added by the legislature in 2005).

(5) Powers. A port authority shall have broad powers, which shall include, but not be limited to:

- confer with any similar body created under the laws of Missouri or any other state for the purpose of adopting a comprehensive plan for the future development and improvement of its port districts; §68.025.1(1) R.S.Mo.
- consider and adopt detailed plans for future development and improvement of its port districts; §68.025.1(2) R.S.Mo.
- establish a port improvement district; §68.025.1(3) R.S.Mo.
- carry out any of the projects enumerated in subdivision (16) of section 68.205 R.S.Mo.; §68.025.1(4) R.S.Mo.
- Within the boundaries of any port improvement district, to levy either a sales and use tax or property tax, or both, for the purposes of paying any part of the cost of the project benefiting property in a port improvement district, except that no real property tax may be levied on any real or

personal property which is assessed against railroads pursuant to chapter 151 R.S.Mo.; §68.025.1(5) R.S.Mo.

- pledge its revenues for the payment of any outstanding obligations; §68.025.1(6) R.S.Mo.
- approve the construction of all wharves, piers, bulkheads, jetties or other structures; §68.025.1(12) R.S.Mo.
- prevent or remove obstructions in harbor areas; §68.025.1(13) R.S.Mo.
- acquire, own, construct, redevelop, lease, maintain, and conduct land reclamation and resource recovery, including the removal of sand, rock, or gravel, residential developments, commercial developments, mixed-use developments, recreational facilities, industrial parks, industrial facilities, and terminals, terminal facilities, warehouses and any other type port facility; §68.025.1(15) R.S.Mo.
- acquire, own, lease, sell or otherwise dispose of interests in and to real and personal property necessary to fulfill its purposes; §68.025.1(16) R.S.Mo.
- acquire rights-of-way and property of any kind or nature within its port districts necessary for its purposes, by purchase, negotiation, or by condemnation, under the powers of eminent domain granted to cities or counties. The power of eminent domain shall not apply to property actively being used in relation to or in conjunction with river trade or commerce, unless such use is by a port authority pursuant to a lease; §68.025.1(17) R.S.Mo.
- improve navigable and non navigable areas as regulated by federal statutes; §68.025.1(21) R.S.Mo.
- engage in Public/Private Partnerships. SB 156 (2005) expanded the powers of port authorities (§68.020 R.S.Mo.). Under current law Port Authorities have the power to own and develop certain property for a period of five years in the event private operators are not interested or available. After the five-year period, the properties must be submitted to a competitive bidding process. This Act modifies this process by interjecting more flexibility for Port Authorities. SB 156 provides that Port Authorities may enter into agreements with private operators and public entities for the joint development, redevelopment and reclamation of property within the port district.

(6) Transfer of Property and Grants from State and Political Subdivisions. The state and any political subdivision may convey any property within the port district to any port authority. §63.030 R.S.Mo. The state can make grants to a state port fund to be allocated by the Department of Transportation and capital improvement matching grants of 80% to local port authorities for specific projects and these grants may be used as the local share in applying for other grants. §68.035 R.S.Mo.

(7) Bonds. Every port authority may issue revenue bonds or notes for any of its purposes. Virtually all governmental and financial institutions in the state are authorized to invest in such bonds or notes. They shall be exempt from state taxes except for death and gift taxes and taxes on transfers. Every port authority shall have the powers and be governed by the procedures now or hereafter conferred upon the Environmental Improvement Authority under chapter 260 R.S.Mo. relating to the manner of issuance of revenue bonds and notes. §68.040 R.S.Mo.

(8) Exemption from State and Local Taxes. No port authority shall be required to pay any taxes or any assessments whatsoever to the state of Missouri or to any political subdivision. §68.040.5 R.S.Mo.

(9) Board of Commissioners. Every local port authority shall be administered by a board of commissioners consisting of at least seven members provided that the number of members of one party shall not exceed the number of members of the other party by more than one. No more than three members' terms shall expire in any one year. The legislative body of the political subdivision creating the port authority shall determine the method of appointment and the qualifications, salaries, powers and duties consistent with the port authority act. §68.045 R.S.Mo.

(10) Letting of Contracts. Every port authority shall let contracts (in excess of $25,000 §68.057 R.S.Mo.) for all work to be done or equipment supplies and materials to be purchased, to be awarded to the lowest responsible bidder upon not less than 20 days notice of the letting given by publication in a newspaper of general circulation in the city or county creating the port authority. §68.055.1 R.S.Mo. But an authority may let contracts in a manner consistent with the procedures set forth in 24 CFR Section 85.36 except that if a funding source mandates specific procedures for letting contracts as a condition to receive funds, the authority may use such procedures. §68.055 R.S.Mo.

(11) Consolidation. Any combination of cities and counties eligible to form port authorities may apply to the highways and transportation commission for approval of a regional port authority as a political subdivision. Local port authorities may contract with a regional port authority for inclusion in the regional port authority and be thereby dissolved. The procedures for establishing regional port authorities are set forth in §68.060 R.S.Mo.

(12) Powers of the State Highways and Transportation Commission. The commission is granted broad powers, including, but not limited to, the power to develop a statewide plan for waterborne commerce, establish procedures and standards for application for the creation of local and regional port authorities, review boundaries of such authorities and mediate any disagreements between them, petition any governing authority for the adoption and execution of any physical improvements to improve the handling of commerce or terminal and transportation facilities on or adjacent to the navigable rivers of Missouri. §68.0650 R.S.Mo.

(13) Dissolution. Provided an authority has no outstanding obligations, the legislative body of the creating political subdivision may vote to dissolve such authority said subject to the approval of the state highways and transportation commission.. §68.070 R.S.Mo.

(14) Port Improvement District Act. In 2010, the legislature passed the **Port Authorities and the "Port Improvement District Act."** (Amends R.S.Mo. §§ 68.025, 68.035, 68.040, and 68.070 and adds nineteen new sections).

A. Allows Port Authorities to establish "port improvement districts" that may levy sales/use and real property taxes for payment of project costs benefiting the property in a port improvement district. (R.S.Mo. § 68.025.1(5)).

B. Creates the Port Improvement District Act, R.S.Mo. §§ 68.200 *et seq.*

1. Projects include:

a. Environmental cleanup;

b. Solid waste disposal;

c. Wetland preservation, creation and relocation;

d. Construction or modification of facilities for developing energy, reducing pollution or providing water facilities; property acquisition;

e. Operation, maintenance, repair, or rehabilitation of existing buildings in furtherance of history, architecture, archeology, or culture of the United States, Missouri or any political subdivisions. (R.S.Mo. § 68.205(16)).

2. To establish a district, the board must approve its formation by resolution and hold a public hearing no later than ten days prior to filing a petition in the circuit court. The petition must be signed by property owners collectively owning more than 60% per capita of real property within the boundaries of the district. R.S.Mo. § 68.210.2. In 2013, via SB 257, the Legislature defined "consent" as the written acknowledgment and approval of the creation of the district by more than 60% of the property owners and by property owners who collectively own more than 60% of the assessed value of the real property within the proposed district.

3. Property within the district must be contiguous. Property separated by public streets, easements or rights-of-way, or connected by a

single public street, easement, or right-of-way shall be considered contiguous. R.S.Mo. § 68.210.2(1).

4. Property taxes must be approved by a majority of registered voters within the district (or if there are no registered voters, property owners within the district) by mail-in ballot. R.S.Mo. § 68.235.

5. Sales/use taxes may be imposed in 1/8 of 1% increments up to a maximum of 1% and must be approved by a majority of registered voters within the district (or if there are no registered voters, property owners within the district) by mail-in ballot. R.S.Mo. § 68.245.

§12. —State and Local Governments Convention, Sports Facility, Meeting and Tourism Program (Ch. 70)

The State and Local Convention, Sports Facility, Meeting and Tourism Program is designed to promote convention and recreation activities with the purpose of attracting out-of-state attendees and users. A qualifying project shall be owned by the state or a political subdivision. Any lessee of the facility shall credit-enhance and guarantee the payment of any bonds used to fund construction. The state and any participating local government may enter into a contract or lease with any political subdivision owning or operating the project. The state's contract must be approved by the Board of Public Buildings. At least 10% of the total amount of the contracts for construction and concessions shall be awarded to socially and economically disadvantaged small business concerns. The state and participating political subdivisions shall pay rent subject to annual appropriation in an amount not to exceed the net new fiscal benefit to the entity, but the state's participation is limited to 50% to 60% of the total rent. The rent under the contract may be paid from the proceeds of any new or increased taxes that the state or any local government may impose. No such rent or fee shall constitute a debt of the state or local government. The state shall divert sales taxes resulting from the project into a separate trust fund which shall be used to pay rent. The net new public fiscal benefit is the direct or indirect result of the new economic activity from the project according to a model used by the Army Corps of Engineers or in accordance with any special procedures established pursuant to any contract.

§70.840 R.S.Mo., *et seq.* sets forth the State and Local Government Convention, Sports Facility, Meeting and Tourism Act of 1989. The Act establishes a state and local government convention, sports facility, meeting and tourism program to assist in providing funding for qualifying projects by the state and a county or city in which a

qualifying project is located, in an adjoining city or county, or any city within a county where a qualifying project is located. §70.843 R.S.Mo. As of January 1, 2008, the program had never been used, although a *de facto* version was used to finance the TWA Dome in St. Louis. The reason stems from the difficulty in convincing the legislature to make large annual appropriations for specific projects.

(1) Qualifying Project. A qualifying project includes convention centers, sports stadiums, exhibition and trade facilities, transportation facilities, cultural facilities, field houses, indoor and outdoor convention and recreational facilities and centers, playing fields, parking facilities and other suitable concessions, and all things incidental to or necessary to a complex suitable for all types of convention, recreational, transportation, cultural and meeting activities and for all types of sports and recreation, either professional or amateur, commercial or private, §70.846 R.S.Mo., and shall be designed to attract out of state attendees and users. §70.846 R.S.Mo. No complex used for parimutuel wagering shall qualify. Id. A qualifying project shall also include costs associated with the relocation of a National Hockey League team from one facility to another within the same standard metropolitan statistical area. (As of this writing, the St. Louis Blues was the only team that would have qualified.) §70.846 R.S.Mo.

(a) Ownership. A qualifying project shall be owned by the state, a county, a city, a political subdivision, a public authority or public entity or otherwise as provided by law. §70.846 R.S.Mo.

(b) Bonds. A user, tenant, lessee, or sublessee entitled to revenues from the project shall credit-enhance and guarantee the payment of any bonds issued to fund construction of the project. §70.849 R.S.Mo.

(2) Participation of State and Local Governments.

(a) Contract or Lease. The state and any participating counties and cities may participate in a qualifying project pursuant to a contract or lease with any political subdivision owning or operating the qualified project for a term not to exceed the term of any bond used to fund construction of the project or 35 years, whichever is less.

(i) Contract—Execution. The state and any participating local government shall enter into a contract executed by the chief executive or administrative officer of the state, approved by the Board of Public Buildings, and executed by the chief executive or administrative officer of the local government and approved by the adoption of a resolution or ordinance. §70.851.3 R.S.Mo.

(ii) Percentage of Contracts, Construction and Concessions to Be Awarded to Socially and Economically Disadvantaged Small Business Concerns. At least 10% of the total amount of the contracts for construction and concessions of the qualifying project shall be awarded to socially and economically disadvantaged small business concerns. §70.859.2 R.S.Mo.

(b) Rent Paid by Government. Such contract or lease shall provide that the state and any participating political subdivision shall pay rent, subject to annual appropriation, in an amount equal to the obligation of the owner in connection with the financing. The amount paid by each shall not exceed its new net public fiscal benefit as defined in §70.853 R.S.Mo. The state's share shall not exceed 50% of the obligations and

the balance shall be divided equally between the participating counties and cities provided that if a participating county's share of the benefit is less than its share of the payments, the proportionate share of the state may increase to 60%. §70.851 R.S.Mo.

(c) Shortfall of Rent. In the event the rent is insufficient to discharge the obligation of the owners in retiring the bonds, the user or tenant that credit-enhanced the bonds shall deposit the shortfall with the owner in time to discharge the obligations. §70.851 R.S.Mo.

(d) Quarterly Payments by Governments. An amount equal to one-fourth of the rent or charges payable by the state and any participating local government shall be credited from the general revenue of the state and participating local government at least quarterly to a fund established by each of them in the name of the project. §70.856.1 R.S.Mo.

(e) Separate Trust Funds Established for Participating Counties and Cities. For any project, the Department of Revenue shall establish a separate trust fund for each participating local government and shall quarterly credit to such funds from the share of the regular and special sales taxes imposed by the local governments and collected by the Department of Revenue an amount equal to one-fourth of the rent, fees or charges payable by such local governments. §70.856.2 R.S.Mo.

(f) Credit to Begin When. The credits provided above shall commence at the time provided in the agreement and the amount of such credit shall be established pursuant to such agreement. §70.856.3 R.S.Mo.

(g) Disbursements, How Made. Any rent or charges under any agreement or lease shall be subject to annual appropriation by the state or any local government. Upon receipt by the Department of Revenue of evidence that the local government has so appropriated, the Department shall make such disbursements as directed in the appropriation ordinance. Unappropriated balances remaining at the end of each fiscal year shall be credited to the general revenue of the state and participating local governments. §70.856.4 R.S.Mo.

(h) Rents, Fees or Charges May Be Paid from Taxes—Not to Constitute Debt. The rents, fees or charges under any contract or lease may be paid from the proceeds of any new or increased taxes that the state or any local government may now or hereinafter impose. §70.856.5 R.S.Mo. Any such rents, fees or charges shall not constitute a debt, liability or obligation of the state or local government within the meaning of any constitutional or statutory provision, nor obligate the state or any local government to levy any form of taxation therefor, or make any appropriation for their payment. §70.856.6 R.S.Mo.

(3) New Net Public Fiscal Benefit (NNPFB).

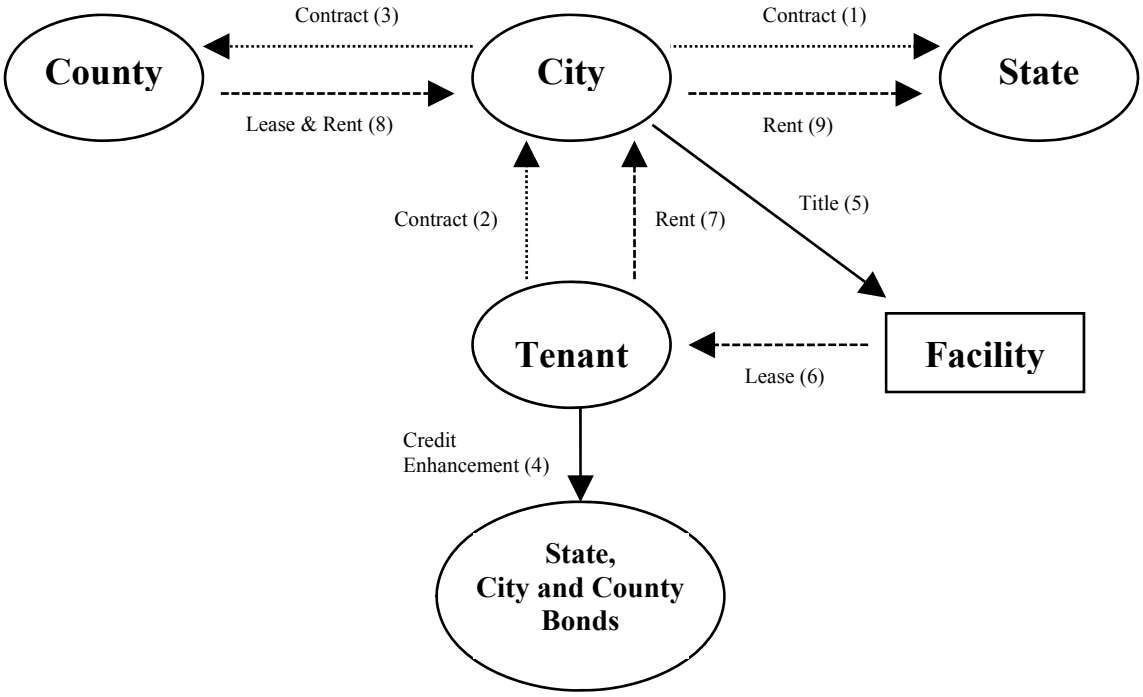
(a) How Determined. The NNPFB arising from a qualifying project shall be the net additional tax and other revenues accruing to the state and participating local governments as a direct or indirect result of the new economic activity generated by the planning, construction, operation and use of the project including the expansion of a related facility owned by any political subdivision or other public entity which is operated jointly with the project. It shall include taxes paid by employees in connection

with the project, sales taxes in connection with the construction or ticket sales and other sales related to the project, hotel, motel, restaurant and similar taxes as a result of attendance at events at such projects, and revenue from any indirect increase in economic activity and employment as a result of the construction, ownership, use, leasing and operation of the project and related facilities. §70.853.1 R.S.Mo. The determination of NNPFB shall take into account out of state resident use of the project based on the International Association of Convention and Visitors Bureau standards and Indirect Fiscal Benefit calculated on the Economic Impact Forecast System part of the Environmental Technical Information System of the United States Army Corps of Engineers. Alternatively, it may be calculated in accordance with any special procedures established pursuant to any contract referred to in §70.851 R.S.Mo. §70.853.3 R.S.Mo.

(b) By Whom. The final determination of NNPFB shall be made by the Office of Administration at the close of the fiscal year in which the planning of the project has commenced, and the close of each fiscal year thereafter. §70.853.2 R.S.Mo.

(4) Annual Audit. The state auditor shall conduct an annual audit of all transactions of the authority. §70.853.4 R.S.Mo.

(5) Illustration. See next page.


County
City
State
Contract (3)
Contract (1)
Lease & Rent (8)
Rent (9)
Contract (2)
Rent (7)
Title (5)
Tenant
Facility
Lease (6)
Credit
Enhancement (4)
State,
City and County
Bonds

§13. —Special Business Districts (Chap. 71 R.S.Mo.)

Under Missouri's special business districts law, any property owner may petition the city to form a district. A special business district may impose taxes against the owners of real property within such district to implement improvements adopted in the ordinance establishing the district such as landscaping, parking, and the general promotion of business activity within the district. An election must be held to approve the new taxes or special assessments. Residents of the district may apply to be qualified voters on the issues of taxes and assessments with the exception of business license taxes, on which only business licensees may vote. Bonds may be issued if approved by the qualified voters of the district. Taxes and special assessments may be used to retire bonds of the District.

(1) Establishment. The governing body of any city may establish a special business district which shall be a body corporate and politic and a political subdivision of the state. §71.790 R.S.Mo. A business district is formed by ordinance of the governing body which ordinance shall establish the business district and define its limits. §71.792 R.S.Mo. In a suit against a business district to enforce provisions of the Hancock Amendment, the court of appeals held that the city, not the district, was liable for plaintiff's attorneys fees. *Gilroy-Sims and Associates v. Downtown St. Louis Business Dist.*, 729 S.W.2d 504 (Mo. App. 1987). The basis of the challenge was that the tax of the District was not approved by the voters. After the suit, the issue was submitted to the qualified voters within the district. Thus, in a subsequent suit, the Court of Appeals held that Hancock challenges to the formation of the district and imposition of the tax were moot. *Gilroy-Sims & Associates v. Downtown St. Louis Business District*, 729 S.W.2d 504 (Mo. App. E.D. 1987).

(2) Survey and Investigation. Prior to the establishment of a business district, the governing body shall conduct a survey and investigation to determine the improvements needed, the approximate cost of land acquisition, the area to be included in the district, the need for special services and the costs thereof and other matters related to the establishment of the district. A written report of the survey shall be filed in the office of the city clerk and be a public record. §79.792 R.S.Mo.

(3) Procedure. To establish, enlarge, or decrease a business district, the following procedure must be followed:

(a) Petition. Upon the petition by one or more owners of real property subject to real property taxes, the governing body may adopt a resolution of intention to establish or change a special business district. The resolution shall contain:

A description of the boundaries of the proposed area;

The time and place of a hearing to be held by the governing body considering establishment of the district;

The proposed uses to which additional revenue shall be put and the initial tax rate to be levied. §71.794(1) R.S.Mo.

(b) Notice. Notice of the hearing shall be given by publication on two separate occasions in at least one newspaper of general circulation not more than 15 days nor less than ten days before the hearing and by mail to all owners of record of real property and licensed businesses located in the proposed districts. §71.794(2) R.S.Mo.

(c) Amendment of Boundaries. If a governing body decides to change the boundaries of a proposed area, the hearing shall be continued to a time at least 15 days after the decision. Notice shall be given in at least one newspaper of general circulation at least ten days prior to the time of the hearing showing the boundary amendments. §71.794(3) R.S.Mo.

(d) Adoption of Ordinance. If the governing body decides to establish the proposed district after the hearing, it shall adopt an ordinance containing:

The number, date and time of the resolution of intention pursuant to which it was adopted;

The time and place the hearing was held concerning the formation of the area;

The description of the boundaries of the district;

A statement of the property subject to the provisions of additional taxes;

The initial rate of levy to be imposed upon the property;

A statement that a special business district has been established;

The uses of any additional revenue;

In any city with a population of less than 350,000, the creation of an advisory board and the enumeration of its duties;

In any city with a population of 350,000 or more, provisions for a board of commissioners to administer the special business district consisting of seven members appointed by the mayor with the advice and consent of the governing body, five of whom shall be owners of real property within the district or their representatives and two of whom shall be renters of real property within the district or their representatives. The terms shall be staggered and the ordinance shall provide the method of appointment, qualifications and terms. §71.794(4) R.S.Mo.

(4) Powers of Governing Body. The governing body in establishing and maintaining a business district shall have all the powers necessary to carry out any and all improvements approved in the ordinance establishing the district. In addition to this general pronouncement, §71.796 R.S.Mo. goes on to list considerable specific powers of the governing body in this regard.

(5) Expenditures. The governing body is granted sole discretion in the use of revenues derived from any tax to be imposed under the special business district law, restricted only by the scope of the purposes enumerated above. §71.798 R.S.Mo. The governing body shall appoint an advisory board or commission to make recommendations on the use of the revenue and may not decrease the level of publicly funded services in the district existing prior to creation of the district or transfer the

financial burden providing the services to the district unless the services at the same time are decreased throughout the city. §71.798 R.S.Mo.

(6) Additional Powers of Cities of 350,000 or More. In cities with populations of 350,000 or more, a district shall have all the powers necessary or convenient to carry out all and any improvements adopted in the ordinances establishing the district. §71.799 R.S.Mo. This section goes on to enumerate specific powers of the district. The apparent intent of the statutory scheme is to grant to the district those powers which in smaller cities are left to the governing body of the city. The provisions, with respect to discretion in the use of revenues are repeated in §71.799 R.S.Mo. for cities of 350,000 or more, as are the provisions preventing a decrease or transfer of the burden for services. §71.799.2 R.S.Mo.

(7) Revenues.

(a) Property Tax Authorized. To pay for the construction or operation of a district or retire bonds therefor, a district may impose a tax upon the owners of real property within the district not to exceed $.85 per $100 of assessed valuation. In any city other than St. Louis, property which is subject to tax abatement under Chapter 353 R.S.Mo. or a land clearance for redevelopment authority project shall, for the purpose of special business district taxes, be assessed as if it were not subject to the abatement. §71.800 R.S.Mo.

(i) Collection. The collection of delinquent tax shall be in the same manner and form as that provided by law for all ad valorem property taxes, and the uniformity requirements applicable to property taxes shall pertain. §71.800.1 R.S.Mo.

(ii) Taxation of Urban Redevelopment Property (St. Louis). In St. Louis, if property subject to tax abatement pursuant to Chapter 353 R.S.Mo. is included in a special business district, the manner of assessment and collection of taxes shall be controlled by ordinance adopted by the governing body. §71.801 R.S.Mo.

(b) Business License Tax. The district may also impose an additional tax on business licenses not to exceed 50% of the existing business license taxes. Such tax may not be imposed over the protest of businesses which would pay a majority of the additional taxes within the district. §71.800.2 R.S.Mo.

(c) Special Assessments. Upon authorization of a majority of the voters voting thereon, any district located in Kansas City may impose special assessments of one or more of the following:

Not more than $.05 per square foot of land;

Not more than one-half of a cent per square foot of improvements; and

Not more than $12 per front foot of land abutting public streets. §71.800.3 R.S.Mo.

(d) Election. The special business district law provides that the governing body may order an election for the approval of a new tax rate ceiling for ad valorem property taxes, and business license taxes, or assessment limit for the special assessments. §71.800.5 R.S.Mo. A qualified voter is defined in the act as "persons or other entities who have filed an application pursuant to subsection 6 of this section." §71.800.4(2) R.S.Mo. Section 6 defines those persons who are eligible to apply for a

ballot. With respect to the ad valorem taxes or special assessments, the applicant shall be a resident individual of the district, or any person or entity which owns real property within the district. With respect to a tax on business licenses, the applicant shall be the licensee. §71.800.6 R.S.Mo.

(8) General Obligation Bonds. Any special business district may, upon the approval of the constitutionally required percentage of the voters of a district voting thereon, incur indebtedness and issue bonds or notes for the payment thereof. The bonds may not extend beyond 20 years and the debt, when added to the existing indebtedness of the district, shall not exceed in the aggregate 10% of the value of taxable, tangible property therein. §71.802 R.S.Mo.

§13.1 —Center City Sales Tax.

> **In addition to the sales tax authorized in §94.577, [the capital improvements sales tax] the governing body of any home rule city with more than one hundred fifty-one thousand five hundred but less than one hundred fifty-one thousand six hundred inhabitants is authorized to impose a sales tax at a rate of one-eighth, one-fourth, three-eighths, or one-half of one percent for three years, for the purpose of funding the construction, operation, and maintenance of capital improvements in the city's center city. The governing body may issue bonds secured by the sales tax. The order or ordinance shall not become effective unless the governing body of the city submits the question to the voters. §94.578. 1. R.S.Mo.**

§14. —Housing Authority (99.010-99.231 R.S.Mo.)

> **Missouri's Housing Authority Law may be used for the redevelopment of older areas of cities although the area of operation of a housing authority need not be blighted. A housing authority is established for the purpose of providing affordable, safe and sanitary dwellings to low income urban citizens. The Act may be used in any city or county and the Authority shall have the power to issue bonds, including revenue bonds which may be secured by rents or mortgages. In Kansas City all new units shall be scattered proportionately among all school districts.**

(1) Creation. The Act creates in each city and in each county a municipal corporation known as the housing authority which shall not transact business until the governing body of the city or county declares the need for the authority to function. §99.040.1 R.S.Mo. A housing authority on the other hand, has been held to be an agency separate from the city government, *St. Louis Housing Auth. v. City of St. Louis*, 239 S.W.2d 289 (Mo. banc 1951); *State ex rel. City of St. Louis v. Ryan*, 776 S.W.2d 13 (Mo. 1989), §99.040 R.S.Mo., with no restriction or prerequisite approvals by the local governing body upon its operations. Declaration by the legislature that the authority is a municipal

corporation which serves a public function, is entitled to great deference, but is not conclusive. *Laret Inv. Co. v. Dickmann*, 134 S.W.2d 65 (Mo. 1939).

(2) Purpose. The law declares that there exist insanitary and unsafe dwelling accommodations, that persons of low income are forced to reside in such accommodations, that there is a shortage of safe or sanitary dwellings at rates affordable to low income persons and that private enterprise is unable to provide a clearance of insanitary and unsafe housing in the construction and operation of affordable safe and sanitary housing. §99.030 R.S.Mo. The underlying purposes of slum clearance, public health and safety, and crime prevention are proper subjects of the police power. *Bader Realty & Inv. Co. v. St. Louis Housing Authority*, 217 S.W.2d 489 (Mo. banc 1949).

(3) Appointment of Commissioners. Upon determining that there is a need for the authority to operate, the governing body shall notify the mayor of the adoption of such finding and the mayor shall forthwith appoint five persons who shall be taxpayers and who have resided in the city for five years, as commissioners of the authority. §99.050 R.S.Mo.

(a) St. Louis. Two commissioners of the Housing Authority of the City of St. Louis are elected by the residents. §99.051.1 R.S.Mo.

(b) Kansas City. In Kansas City, the commission shall consist of seven commissioners, one from each council district and a tenant of any housing project of the authority.

(4) Powers. An authority shall constitute a municipal corporation and have all powers necessary and convenient to carry out the purposes of the Act including the power to sue and be sued; to lease any property which it may own or convey, to acquire by the exercise of the power of eminent domain any interest in real estate (§99.080.1(4) R.S.Mo.), to make contracts (§99.080.1(1) R.S.Mo.) (County council has authority to contract with housing authority. *Carson v. Oxenhandler*, 334 S.W.2d 394 (Mo. App. 1968)), to prepare, carry out, acquire, lease and operate housing projects, to provide for the construction, reconstruction, improvement, alteration or repair of any project (§99.080.1(2) R.S.Mo.), to arrange for services in connection with a housing project (§99.080.1(3) R.S.Mo.), to invest any funds held in property or securities which savings banks may legally invest in or to purchase its own bonds which shall then be canceled (§99.080.1(5) R.S.Mo.), to make studies of housing to determine where the reconstruction of new housing is necessary (§99.080(6) R.S.Mo.), to investigate any matter material for its information and in the furtherance thereof to administer oaths, issues subpoenas and commissions for the examinations of witnesses who are outside of the state and make information available to appropriate agencies for the abatement of nuisances (§99.080(7) R.S.Mo.), to contract with private owners to manage, lease or operate any rental, cooperative or condominium housing project within its area of operation and to act as management agent for any such project for a management fee (§99.080(8) R.S.Mo.), (so long as the persons occupying the housing project shall be low income persons and any profit derived by the housing authority from such management

fee shall be applied to the development or maintenance of projects for very low income or low income persons (§99.080(8) R.S.Mo.)).

(a) Delegation. An authority may delegate any and all of the powers conferred upon it to any agent including a corporation formed under the laws of the state of Missouri provided the profits of such corporation shall be used for developing or maintaining housing units occupied by very low income or low income persons. §99.080.3 R.S.Mo.

(b) Acquisition of Property. An authority shall have the right to acquire by the exercise of eminent domain any interest in real estate which it may deem necessary for its purposes. §99.080.1(4) R.S.Mo. The power shall be identical to that granted corporations under Chapter 523 R.S.Mo. §99.120 R.S.Mo. No doubt, a municipal corporation has the authority to exercise the power of eminent domain for any legitimate public purpose, although under the Dillon rule, it might be required to identify a specific grant of the power by statute if it is not a charter city or county. The provision of safe and sanitary housing would certainly qualify as a legitimate public purpose and, therefore, there would be no need to exercise the power of eminent domain under the special eminent domain provisions of the Constitution relating to redevelopment in Art. VI, §21 of the Missouri Constitution; and even if there were, that section provides for the reclamation of blighted or substandard or insanitary areas. If the housing authority restricted itself to such an area, the operation of the power of eminent domain would seem to fall within the aegis of the constitutional provision. In 1988, the definitions section of the housing authority law was amended to add a definition of the word "blighted": "Blighted shall mean any area where dwellings predominate which, by reason of dilapidation, overcrowding, lack of ventilation, light or sanitary facilities or any combination of these factors are detrimental to safety, health and morals. . . ." §99.020(3) R.S.Mo.

(c) Housing Projects Subject to Local Regulations. All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated. §99.103 R.S.Mo.; *State ex rel. Housing Authority of St. Louis County v. Wind*, 337 S.W.2d 554 (Mo. App. 1960).

(i) Violation of Property Maintenance Code in Kansas City—Personal Liability of Director or Chairman. The single family and duplex units of the authority are specifically made subject to the city property maintenance code in cities in excess of 450,000 population. The executive director of such housing authority, or if there is no director, the chairman of the authority shall be the person held responsible for such violations and shall be subject to any penalty provided by law. §99.132.2 R.S.Mo. The authority itself, however, is clothed with governmental immunity. *Tyler v. Housing Authority of Kansas City*, 781 S.W.2d 110 (Mo. App. W.D. 1989); *State ex rel. St. Louis Housing Authority v. Gaertner*, 695 S.W.2d 460 (Mo. 1985).

(5) Rentals—How Fixed. Rentals shall be fixed at the lowest possible rates consistent with providing decent safe and sanitary dwelling accommodations and not higher than rental guidelines established by HUD, and subject to this provision, in

amounts sufficient to pay the principal and interest on bonds of the authority, to meet the cost of maintaining the operation of its projects, and to create a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year. §99.090 R.S.Mo. The dwelling accommodations referred to herein shall be leased only to persons of very low income, low income or moderate income. §99.100.1 R.S.Mo.

(6) Cooperation in Joint Ventures. An authority may cooperate with another authority or with private entities in joint ventures as long as the profits from such participation are distributed as provided in §99.080.3 R.S.Mo. and if a housing project is the subject of the participation, at least 20% of the units shall be occupied by very low or low income persons. §99.110 R.S.Mo. If the authority participates with a private entity in the development or management of a project for which the property has been acquired by the power of eminent domain and results in the displacement of persons and/or businesses, it shall establish written policies and procedures for the payment of displacement and relocation benefits to such affected parties. §99.110.4 R.S.Mo.

(7) Bonds.

(a) Type. An authority shall have the power to issue bonds for any of its corporate purposes and to refund them, including but not limited to revenue bonds which may be secured by rentals, grants or mortgages on the property of the authority. *Bader Realty & Inv. Co. v. St. Louis Housing Authority*, 217 S.W.2d 489 (Mo. banc 1949).

(b) Liability. Neither the commissioners nor any person executing the bonds shall be liable personally thereon and such bonds shall not be a debt of the city, county, state or any political subdivision. §99.140 R.S.Mo.

(c) Terms and Sale. The bonds shall bear such interest rate and conversion privileges and include such other terms as the authority may provide and shall be sold for not less than par value at public sale after notice provided that the bonds may be sold to the federal government at private sale at not less than par and in the event less than all of the bonds are sold to the federal government, the balance of such bonds may be sold at private sale at not less than par at an interest cost not to exceed that paid by the federal government. §99.150 R.S.Mo.

(d) Security and Covenants. In connection with the issuance of the bonds, an authority shall have the power to pledge all of its gross rents, fees or revenues, to mortgage all or any part of its real or personal property, to covenant against pledging all or any part of its rents, fees and revenues or mortgaging its real or personal property to make covenants as to the use of bond proceeds or the rents and fees to be charged in the operation of a housing project, to covenant as to the use of its real property, to vest in a trustee or the bondholders the right to enforce the payment of the bonds or any covenants securing or relating to the bonds, and to make covenants other than and in addition to the covenants set forth in the act of like or different character, as may be necessary or convenient or desirable in order to secure its bonds, or make them more marketable. §99.160 R.S.Mo.

(e) State Auditor's Certification. An authority may submit to the state auditor any bonds to be issued after all of the proceedings for the issuance of the bonds have been taken and the auditor shall pass upon the validity of the bonds and certify on the

back of each bond that it is issued in accordance with the Constitution and laws of the State of Missouri. §99.170 R.S.Mo.

(f) Remedies of Bondholders. Any obligee of such bonds may have his remedies by mandamus, suit, action or proceeding at law or in equity to compel the authority and its officers and agents to perform the covenants contained within any contract or to enjoin any acts which may be unlawful or the violation of any of the rights of the obligee unless restricted by contract. §99.180 R.S.Mo. The authority shall have the power to confer upon any obligee the right to, upon default, take possession of any housing project or obtain the appointment of any receiver of any housing project. §99.190 R.S.Mo.

(g) Loan of Proceeds. The Authority shall have the power to loan the proceeds of its bonds and notes to provide for the purchase, construction, extension and improvement of any housing project. §99.080.1(9) R.S.Mo.

(8) Authority May Not Rent or Lease to Certain Persons. In Kansas City, the authority may not rent to any person who has been within the preceding five years convicted of a crime involving prostitution or the sale or possession of controlled substances or whose dwelling unit is known to have been the site of crimes involving prostitution or such sale or possession. §99.103 R.S.Mo.

(9) Dispersion. In response to allegations by certain portions of Kansas City, Missouri that they were carrying more than their fair share of the load of public housing, the housing authority's law was amended in 1990 to provide that all new units in Kansas City shall be scattered proportionately among all school districts located wholly or partly within the city in proportion with each district's population within the city. §99.132.4 R.S.Mo.

(10)Exemption of Property from Levy and Sale and Taxes. Other than the rights of the obligee of a bond, all real property of an authority shall be exempt from levy and sale. §99.200 R.S.Mo. The property is also exempt from ad valorem taxes. *Schmoll v. Housing Auth. of St. Louis County*, 321 S.W.2d 494 (Mo. 1959).

(a) School Taxes. The housing authority shall make payments in lieu of taxes for any single family or duplex unit to the school district in which the property is located as if it were subject to taxation. §99.132.3 R.S.Mo.

§15. —Land Clearance for Redevelopment Authority (LCRA) (§99.300-99.660)

The Land Clearance for Redevelopment Law was enacted to eradicate and redevelop blighted and insanitary areas pursuant to a redevelopment plan. It functions as a part of city government requiring government approval. The Act applies to any city or county but in any city containing less than 75,000 inhabitants, the governing body must submit the question of forming an authority to a vote of the people. An authority shall have the power to issue bonds secured by the proceeds of any land clearance project including those not financed with bond

proceeds. Prior to adoption of a plan, a governing body must declare an area to be blighted or insanitary. A plan is submitted to the planning commission which makes recommendations, and is then submitted to the governing body. A hearing is held on the plan prior to action by the governing body. An authority has the power to acquire property by eminent domain. Any rehabilitated area to which the LCRA holds title is exempt from real property taxes. In any constitutional charter city, any person may apply to the authority for a certificate that real property which he owns or leases is in an area declared to be a blighted area under the Act and provide plans showing that he is engaged in new construction or rehabilitation pursuant to an approved plan. Upon presentation of such plans, the authority shall issue a certificate of qualification for tax abatement. Within 30 days of receiving the certificate, the applicant shall notify the city or county assessor who shall issue a statement as to the current assessed value of the property. This statement shall be the maximum total assessed valuation for the next 10 years.

(1) Constitutionality. The general constitutionality of the law was upheld in *State on inf. of Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44 (Mo. 1954), and *Land Clearance for Redevelopment Auth. of St. Louis v. City of St. Louis*, 270 S.W.2d 58 (Mo. 1954).

(2) Findings and Purpose. ***The act begins*** with a finding that cities of the state contain insanitary, blighted and deteriorated areas which constitute a serious and growing menace injurious to the public health, safety, morals and welfare which substantially impairs or arrests the sound growth of communities and retards the provision of housing accommodations. It states that the elimination or prevention of the detrimental conditions in such areas by the acquisition and preparation of land for redevelopment and its sale or lease are public uses and purposes for which public money many be expended. §99.310 R.S.Mo.

(a) "But For." A finding that without the activities of LCRA, "blight would not have been removed, redevelopment would not have occurred, and the benefit to the public in jobs and tax dollars would not have come into existence" was approved by the court in *Land Clearance for Redevelopment Auth. of Kansas City v. Waris*, 790 S.W.2d 454, 455 (Mo. banc. 1990).

(3) Qualification of Area. Since the purpose of the Act is to eliminate or prevent insanitary, blighted or deteriorated areas, it stands to reason that if an area is any of these things, the provisions of the Act may be used.

(a) Definition of Blight. The definition of blight used in §99.320(3) is identical to that of Missouri's tax increment financing law:

> An area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence

> of conditions which endanger life or property by fire or 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. . . .

Under the Act, a blighted area may contain non-blighted parcels. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991).

(b) Insanitary Area. "The term 'insanitary area' is often overlooked in redevelopment law since so much of the focus has been placed upon blight." An insanitary area is defined under the Act as:

> An area in which there is a predominance of buildings and improvements which, by reason of dilapidation, deterioration, age, or obsolescence, inadequate provision for ventilation, light, air, sanitation or open spaces, high density of population and overcrowding of buildings, overcrowding of land, or the existence of conditions which endanger life or property by fire or other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime or constitutes an economic or social liability and is detrimental to the public health, safety, morals, or welfare. . . .

§99.320(9) R.S.Mo. Note that "insanitary" is one of the qualifications for the use of eminent domain in Art. VI, §21 Mo. Const.

(c) Inclusion of Vacant, Non-Blighted Land for Predominantly Residential Use. Vacant land may be developed for housing, notwithstanding the fact that it may not be blighted if it is essential to the proper clearance or redevelopment of a blighted or insanitary area. Such an undertaking shall require a determination by resolution or ordinance of the necessity of the same, that there is a shortage of decent safe and sanitary housing in the community, that such undeveloped vacant land will be developed for predominantly residential uses and that the provision of dwelling accommodations on such undeveloped land is necessary to accomplish the relocation to decent safe and sanitary housing of families displaced from blighted or insanitary areas which are to be redeveloped. §99.470 R.S.Mo.

(4) Certain Cities Eligible. The Act applies to any county or municipality except that it shall not include any municipality containing less than 75,000 inhabitants until the governing body submits the question at an election in which it is approved by the majority of qualified voters. §99.320(6) R.S.Mo.

(a) Repeal. Since the law serves state purposes as well as municipal, the residents of a municipality may not repeal its provisions by initiative or referendum. *Anderson v. Smith*, 377 S.W.2d 554 (Mo. App. W.D. 1964).

(5) Creation of Authority. The Act creates a land clearance for redevelopment authority in each community but precludes it from transacting business until the governing body approves by resolution or ordinance the exercise of the powers under the

Act. If the governing body approves the exercise of the powers of the Act, the mayor shall appoint a board of five commissioners. §99.330 R.S.Mo. Once a city establishes a Land Clearance for Redevelopment Authority, it lacks the power to dissolve it. Only the legislature has that power. *Anderson v. Smith*, 377 S.W.2d 554 (Mo. App. W.D. 1964); *Casey's Marketing Company v. Land Clearance for Redevelopment Authority of Independence, Missouri*, 101 S.W.3d 23 (Mo. App. W.D. 2003).

(a) Status. The LCRA is a part of city government. *Land Clearance for Redevelopment Auth. of Kansas City v. Waris*, 790 S.W.2d 454, 455 (Mo. banc 1990), and is therefore entitled to exemption from real estate taxes under Art. X, §6 of the Missouri Constitution and §137.100 R.S.Mo. (1986) as to rehabilitated property to which it holds legal title and leases to private owners of buildings on that property. *Id*. A redevelopment authority thus requires local governing body approval for substantive exercises of its powers. *Id*.; §99.330(1) R.S.Mo. (1986). A housing authority on the other hand, has been held to be an agency separate from the city government, *St. Louis Housing Auth. v. City of St. Louis*, 239 S.W.2d 289 (Mo. banc 1951), §99.040 R.S.Mo. with no restriction or prerequisite approvals by the local governing body upon its operations. See also, *City of Olivette v. Graeler*, 338 S.W.2d 827 (Mo. 1960) (In larger sense, the term "municipal corporation" applies to any local public corporation exercising governmental powers.).

(b) Findings Required. In order to adopt such a resolution, the governing body must find that one or more blighted or insanitary areas exist in the community and that the redevelopment of the areas is necessary in the interest of the public health, safety, morals or welfare. §99.330 R.S.Mo.

(6) Powers. An authority under the Act has a great number of powers which are declared not to be exclusive of others which may be necessary or convenient to carry out and effectuate the purposes and provisions of the Act. §99.420 R.S.Mo. However, a court will not infer powers not specifically granted. *State ex rel. R.W. Filkey, Inc. v. Scott*, 407 S.W.2d 79 (Mo. App. 1966). Among the enumerated powers are:

(a) Preparation and Execution of Plans. The power to prepare redevelopment plans and urban renewal plans for recommendation to the governing body and to undertake and carry out land clearance projects and urban renewal projects within its area of operation. §99.420(2) R.S.Mo. The "area of operation" is defined in §99.320(1) R.S.Mo. as the entire area within the municipality. A county may not have an area of operation within a city without the city's consent.

(b) Acquisition of Land—Construction; Conveyance. The authority has the power to acquire land either through purchase, lease or the power of eminent domain necessary or incidental to a land clearance project or urban renewal project under the procedure as provided in Chapter 523 R.S.Mo.; to hold, improve, clear or prepare for redevelopment or urban renewal any such property; to build new buildings or rehabilitate old ones; to sell, lease, exchange or transfer, mortgage, pledge, hypothecate or otherwise encumber such property; and to enter into contracts with redevelopers of property. §99.420(4) R.S.Mo. Property may not be acquired until the governing body has approved the redevelopment or urban renewal plan and declared the area to be a blighted or

insanitary area in need of redevelopment or rehabilitation, and a general plan for the development of the community has been declared. §§99.430.1(1)-(3) R.S.Mo.

(i) Standing to Complain. Once a redevelopment authority has taken property through eminent domain, the former owner has no standing to question through declaratory judgment whether the authority is complying with statutory requirements. *Brooks v. Land Clearance for Redevelopment Authority of St. Louis County*, 425 S.W.2d 481 (Mo. App. 1968).

(c) Borrowing Money. An authority has the power to borrow money. §99.420(8) R.S.Mo.

(d) Bonds. An authority shall have the power to issue bonds secured by the income, proceeds and revenues of the land clearance project financed with the proceeds of the bonds or any land clearance project not financed with the bond proceeds. §99.480 R.S.Mo. The Act sets forth the interest rates, §99.490.1 R.S.Mo., the sale at par, §99.490.2 R.S.Mo., the exemption from personal liability of the commissioners for the bonds, §99.500.1 R.S.Mo., that the bonds are not a debt of the political subdivision or state, §99.500.1 R.S.Mo., the exemption of the interest and income therefrom from income taxes, §99.500.2 R.S.Mo., the method of execution and conclusive presumption of validity, §99.510 R.S.Mo., various covenant powers, §99.520 R.S.Mo., and the rights of obligees upon default. §§99.530 and 99.540 R.S.Mo. An authority was held not to have the power to issue mortgage revenue bonds for housing in *State ex rel. Taylor v. Land Clearance for Redevelopment Auth. of Kansas City*, 586 S.W.2d 331 (Mo. 1979).

(7) Plans—Contents. The Act provides that the authority itself may prepare a plan or any person may submit a plan, which shall be sufficiently complete to indicate its relationship to definite local objectives as to appropriate land uses, etc. The plan shall include:

(a) Map. The boundaries of the land clearance or urban renewal project area with a map showing the existing uses and conditions of the real property therein;

(b) Land Use Plan. A land use plan showing proposed uses of the area;

(c) Statistics. Information showing the standards of population densities, land coverage and building intensities in the areas after redevelopment or urban renewal;

(d) Zoning and Streets. A statement of the proposed changes in zoning, street layouts, ordinances, etc.;

(e) Public Facilities. A statement as to the number and kind of additional public facilities or utilities which will be required; and,

(f) Schedule. A schedule of completion. §99.430(4) R.S.Mo.

(8) Procedure for Adoption of Plan.

(a) Declaration of Blight or Insanitary Area. In order to proceed with a plan, a governing body must declare by resolution or ordinance an area to be blighted or insanitary and in need of redevelopment. §99.430.1(2) R.S.Mo.

(b) Preparation and Adoption of Plan. The authority shall prepare a general plan for the development of the community. §99.430.1(3) R.S.Mo. Any other party may prepare and submit a plan to an authority. §99.430.1(4) R.S.Mo.

Plan Commission Recommendations to Authority. The authority shall submit the plan to the planning commission which shall submit its written recommendations to the authority within 30 days. §99.430.1(5) R.S.Mo.

Governing Body. The authority then may submit the redevelopment or urban renewal plan to the governing body with its recommendations and those of the planning commission accompanied by a statement of the method and estimated cost *of* acquisition and the estimated proceeds from its disposal to redevelopers; a statement of the proposed method of financing; a statement of a feasible method for relocation; and a schedule. §99.430.1(7) R.S.Mo.

Hearing and Notice. The governing body shall hold a public hearing on the plan or any substantial modification thereof, public notice of which shall *be* given by publication in a newspaper of general circulation once each week for two consecutive weeks, the last publication to be at least ten days prior to the hearing. §99.430.1(8) R.S.Mo.

Approval. The governing body may then approve *the* redevelopment or urban renewal plan. §99.430.1(9) R.S.Mo.

Modification. A plan may be modified by the authority at any time prior to the lease or sale of property in the area. After such lease or sale, the modification must be consented to by the redeveloper of the real property. Where the *modification* substantially changes the redevelopment or urban renewal plan, it must be similarly approved by the governing body. §99.430.1(10) R.S.Mo.

(9) Alternate Procedure. As an alternative to the above method, an authority may find an area to be blighted or insanitary, prepare a plan and make its recommendation to the governing body while simultaneously submitting such findings and plan to the planning commission which shall have 30 days to comment. Thereafter, the governing body may simultaneously approve the findings and approve the plan after holding the public hearing. §99.430.2 R.S.Mo.

(10) Implementation of Plan. After a plan is approved, an authority shall have the following powers and obligations:

(a) Disposition of Property. An Authority may dispose of property to a redeveloper for virtually any use, provided that the disposal or any agreement relating thereto is subject to the approval of the redevelopment plan by the governing body. Such property shall be disposed of at its fair value, notwithstanding such value may be less than the cost of acquiring and preparing the property. §99.450(1) R.S.Mo. This section requires publication of notice before consideration of any redevelopment contract proposal, but "consideration" refers to formal action on the proposal. *Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. 1961); *Pace v. Land Clearance for Redevelopment Auth. of Kansas City*, 713 S.W.2d 34 (Mo. App. W.D. 1986) (internal memo did not constitute an acceptance of proposal).

Bidding Procedure. In disposing of the property, the authority shall use such reasonable competitive bidding procedures as it shall prescribe. §99.450(2) R.S.Mo.

(b) Contracts.

Publication of RFP. Before considering any redevelopment contract proposal, an authority shall publish notice two times in a newspaper of general circulation

inviting proposals from private developers interested in undertaking the redevelopment and may then accept such redevelopment contract proposal as it deems to be in the public interest. §99.450(2) R.S.Mo.

Notice to Governing Body. Before accepting a redevelopment contract proposal, the authority shall give 30 days' notice to the governing body in writing of its intention to do so. §99.450(2) R.S.Mo.

(11) Tax Abatement.

(a) Application. In any constitutional charter city, any person may apply to the authority for a certificate that real property which he owns, rents or leases is an area declared to be a blighted area pursuant to §99.430 and provide plans showing that he is engaged in new construction or rehabilitation pursuant to an approved plan. §99.700 R.S.Mo.

(b) Certificate of Qualification Issued by Authority. Upon the presentation of such plans, the authority shall issue a certificate of qualification for tax abatement. Id

(c) Statement of Assessed Value by Assessor. Within 30 days of receiving the certificate, the applicant shall notify the city or county assessor who shall as soon as possible issue a statement as to the current assessed valuation of the then existing property covered by the plan. §99.705 R.S.Mo. The city or county assessor's statement shall be the maximum total assessed valuation of all real property included in the plans for the next ten years. §99.710 R.S.Mo.

(d) Timing of Abatement. §99.710 R.S.Mo. provides:

> The city or county assessor statement as issued under §99.705, shall be the maximum total assessed valuation of all real property included in the plans . . . for each year for a period of ten years *from the date on which the statement was issued*.

If a developer begins rehabilitation in one year and applies for the statement of assessed value in the following year, should the statement of assessed value include the value as of January 1 of the year in which the statement is requested or the assessed value of the property before the rehabilitation begins? The Supreme Court held in *20th & Main Redevelopment Partnership v. Kelley*, 774 S.W.2d 139 (Mo. banc 1989) that it is the latter. The court acknowledged that there is an ambiguity between "current assessed valuation" and the "assessed valuation of the then existing real property covered by the plans." *Id*. at 141. The Court held that §99.705 R.S.Mo.

> provides that the valuation of the property before rehabilitation begins is the applicable number which is to be used in determining tax relief. Respondents qualified for and were entitled to tax abatement as provided by §99.705 based upon the assessed valuation of $46,080 and are therefore entitled to a refund of the overpayment of the protested taxes.

Id. at 141-42. The Court noted that since the purpose of the act is to encourage private enterprise to rehabilitate property, the act should be construed liberally to effectuate that purpose. In *20th & Main*, the developer began rehabilitation in January of 1985. It did not apply for a certificate and assessor's statement until July of 1986. By January 1, 1986,

90% of the rehabilitation work had been completed and the county took the position that the January 1, 1986 value should be the frozen value for abatement purposes.

(e) Exemption Through Ownership By LCRA. If an authority owns property, it is exempt from property taxes under the Missouri Constitution, Art. X, §6. See *Land Clearance for Redevelopment Authority of Kansas City v. Waris*, 790 S.W.2d 454 (Mo. banc 1990). The court based its reasoning on the legal conclusion that a Land Clearance for Redevelopment Authority is part of city government and not a separate political subdivision.

§16. —Tax Increment Financing (99.800-99.865 R.S.Mo.)

The Real Property Tax Increment Allocation Redevelopment Act is found in §§99.880 -99.865 R.S.Mo. Tax Increment Financing ("TIF") is an economic development tool that encourages development by applying the new taxes generated by the TIF project to reimbursement of certain costs of the project or to retire bonds issued to pay those costs. A city, county or incorporated town may use TIF. The property tax increment of a new project (referred to as a payment in lieu of tax or "PILOT") may be pledged to retire bonds or to reimburse costs, but the economic activity tax increment is subject to annual appropriation because while the PILOT is not a pure tax the economic tax increments are. Specifically excluded from the capture of economic activity taxes are taxes imposed on sales or charges for sleeping rooms paid by transient guests of hotels and motels, licenses, fees, personal property taxes or special assessments other than payments in lieu of taxes, the Kansas/Missouri Bi-State Cultural Tax, the Jackson County Stadium Renovation sales tax, and the St. Louis County Transportation Tax. All other sales taxes are included in the TIF capture, even though they may have been approved by voters for a specific purpose such as law enforcement. A portion of the state sales tax may be captured in urban core projects which are approved by the Director of Economic Development.

The Act requires that the local legislative body find that the project would not proceed "but for" the use of Tax Increment Financing. The developer must sign an affidavit to that effect and provide a cost benefit study showing the impact on each taxing jurisdiction.

The Commission is composed of representatives of the local government, the school district, and other taxing jurisdictions. The Commission may have the power of eminent domain and the power to issue bonds if these powers are delegated to it by the governing body of the local government. The governing body must decide the issues of approvals of projects and plans and the designation of the

redevelopment area. These items cannot be delegated to the TIF Commission.

Tax Increment Financing may be used in one of the four following areas: (1) a blighted area; (2) a conservation area (an area which is not blighted but in which 50% or more of the structures in the area are at least 35 years of age and the area is in danger of becoming blighted because of the presence of certain factors set forth in the statute); (3) an economic development area (an area which is neither blighted nor a conservation area but is one in which the governing body finds that redevelopment will discourage businesses from moving to another state or result in increased employment or preservation or enhancement of the tax base); or (4) an enterprise zone. The test for inclusion of the state sales tax is rigorous and vests a great deal of discretion in the Director of the Department of Economic Development of the State of Missouri.

A redevelopment plan must include *inter alia* estimated project costs (which may include virtually any costs except that the construction of buildings is not an allowable (reimbursable) project cost in an economic development area), anticipated sources of funds to pay the cost, evidence of commitments to finance the costs, descriptions of any bonds to be issued, a cost benefit analysis showing the impact on affected political subdivisions, assessment information about the property, a detailed description of the factors qualifying the redevelopment area and a developer's affidavit attesting that the factors exist. In addition, the plan must include findings that

- **the area falls into one of the four qualifying categories;**
- **the area has not be subject to growth and development and would not reasonably be anticipated to be developed without the adoption of the redevelopment plan (commonly referred to as the "but for" test);**
- **the redevelopment plan conforms to the comprehensive plan of the municipality;**
- **the estimated dates of completion of the project and retirement of the bonds;**
- **a relocation plan for businesses and residents is included; and**
- **the plan will not benefit any gaming operation.**

Before approving the plan, there must be an opportunity offered for any person to submit alternative proposals to develop the area. Each commission is required to establish written procedures relating to bids and proposals for implementation of redevelopment projects.

The Tax Increment Financing Commission must hold a hearing on each project and make its recommendation to the local governing body. Notice of the hearing must be mailed to all taxing jurisdictions and published in a newspaper of general circulation. Prior to the conclusion of the hearing, changes may be made in the plan, project or area, with notice to each taxing jurisdiction at least seven days prior to termination of the hearing. Changes may be made after the hearing but prior to the adoption of a final ordinance approving the plan or projects so long as the changes do not enlarge the exterior boundaries of the redevelopment area, do not change the land use established in the plan or change the nature of the redevelopment project. Each taxing jurisdiction must be notified by mail and by publication in a newspaper of general circulation not less than 10 days prior to the adoption of the changes by ordinance. An ordinance approving the plan and projects may be introduced not sooner than 14 nor later than 90 days after the completion of the hearing. The governing body is not required to hold another hearing, but some do.

Each project within a plan must be approved within 10 years of the date of the adoption of the plan.

On December 12, 1989, the Missouri Supreme Court handed down a landmark decision in the case of *Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc.*, 781 S.W.2d 70 (Mo. banc 1989). The case is the first significant judicial interpretation of Missouri's 1982 Real Property Tax Increment Allocation Redevelopment Act (the Act), §§99.800 *et seq.* R.S.Mo., the first post-Hancock declaration that a special assessment is not a "tax" and the first approval of the use of either tax abatement or eminent domain for urban renewal in an area not blighted. In an earlier case, *State ex inf. Ashcroft, ex rel. Plaza Properties, Inc. v. City of Kansas City*, 687 S.W.2d 875 (Mo. 1985), the Court declined an opportunity to rule on many of the same issues raised in *Dunn*, primarily because it objected to the manner in which the case came up by extraordinary writ of *quo warranto*. Although the court hinted it would only rule such matters in the context of a declaratory judgment, *Plaza Properties*, *supra*, 687 S.W.2d at 876, *Dunn* came up by way of defenses to the right to take, raised by answer in a condemnation proceeding. Such issues are tried, however, in the same manner as declaratory judgments, so there is little practical difference.

(1) What is Tax Increment Financing? TIF is an economic development tool that allows a municipality to use new taxes* generated by development to reimburse certain costs with respect to that development, thereby providing incentive for the development to occur in the first place. The new taxes "captured" by TIF include property taxes and 50% of all local economic activity taxes such as sales taxes. The ad valorem taxes levied upon the preplan assessed value continues to be paid to the respective taxing districts. §99.845(1) R.S.Mo. (*Legally, payments in lieu of taxes, where real property assessments are involved.)

(2) Surrounding States. Every state that borders on Missouri has enacted tax increment financing statutes. *Arizona, City of Tucson v. Corbin*, 128 Ariz. 83, 623 P.2d 1239 (1980), and *Kentucky, Miller v. Covington Development Auth.*, 539 S.W.2d 1 (Ky. 1976), have held their statutes unconstitutional under their state constitutions. (The Arizona tax increment statute permitted the pledge of proceeds from ad valorem taxation to retire tax increment bonds.)

(3) Tax Relief.

(a) Property Taxes-Creation of Increment—PILOTs. Once improvements are made pursuant to the plan, the assessed value of property in the project will increase. Each year that the post-plan assessed value of the taxable real property within the redevelopment area exceeds the pre-plan assessed value, taxes on the increases in assessed value are abated. In place of the taxes, payments in lieu of taxes (PILOTs) measured by the increase in the assessed valuation are paid into the special allocation fund described above (§99.845(2) R.S.Mo.) for the purpose of paying redevelopment project costs and/or the debt service on any bonds issued to pay these project costs. §99.845(2) R.S.Mo. The ad valorem taxes levied upon the pre-plan assessed value continue to be paid to the respective taxing districts. §99.845(1) R.S.Mo. In *Consolidated School District No. 1 of Jackson County v. Jackson County*, 936 S.W.2d 102 (Mo. banc 1996), the Supreme Court turned aside a challenge to the capture of the Merchants and Manufacturers Inventory Replacement Tax. The school district argued that the tax was constitutionally mandated. The Court found that virtually all taxes have their source in the Constitution and therefore the Merchants and Manufacturers Tax is no different from any other tax authorized by the constitution. What the school district could not get done in litigation, the Missouri General Assembly did five months after the decision in approving Senate Bill 1 in a special legislative session in 1997, deleting the Merchants and Manufacturers Inventory Replacement Tax and State Blind Pension Fund taxes from TIF capture on plans approved after January 1, 1998. §99.845.1(3) R.S.Mo. Also excluded from capture is the blind pension fund levy. Id.

(i) Levies.

1) Does PILOT Include Debt Service Levy? §99.855.2 should be construed to mean that the size of a debt service levy shall be set by assuming it will be levied only against the initial equalized assessed value. The size of payment in lieu of taxes is determined by all levies including debt service. Other than clarifying that debt service levies apply only to initial equalized A.V., it is questionable whether any of the section is needed. PILOTS are defined in §99.805(7) and their collection is described in §99.845.2 R.S.Mo. §99.855.2 says "all levies" are included in measuring the size of PILOTs as does §99.805(7). §99.855 states that the levies will be applied to the equalized assessed value. See also §99.845. PILOTs, then, are measured by both pre-[*] and post-plan debt service levies on post-plan assessed value. Does this impair the contract rights of the general obligation bond holders? No, because they are getting what they bargained for, which is the debt levy applied to the pre-plan assessed value that was in place when the bonds were issued. Furthermore, they are not in jeopardy anyway, since the debt service levy floats to

[*] Debt service levies authorized pre-plan and still in existence post-plan.

whatever level is necessary when applied to the initial equalized assessed value to retire the bonds. Finally, there is no more reason to hold that debt levies should be exempt from capture than to hold operating levies exempt.

STATUS OF EXACTIONS RESULTING FROM THE APPLICATION OF LEVIES TO ASSESSED VALUES:

		LEVIES	
		Pre-Project	Post-Project
ASSESSED VALUES	Pre-Project	Tax	Tax
	Post-Project	PILOT	PILOT

(ii) Taxes Are Abated. It appears that taxes on the new development in the District are abated by the Act although the *Dunn* Court did not so state. Because the Court held that PILOTs are not taxes, the conclusion is inescapable. Since PILOTs are the only exaction levied against the new improvements, there are no taxes resulting from the increase in assessed value. Therefore, the regular taxes are abated. *Ste. Genevieve School Dist. R-11 v. Board of Alderman of the City of Ste. Genevieve*, 66 S.W.3d 6,11 (Mo. Banc 2002). This is plain from the language of §99.805(7) R.S.Mo. which speaks of revenues "which taxing districts would have received had a municipality not adopted tax increment allocation financing . . ." and §99.845 R.S.Mo. which divides taxes and payments in lieu of taxes and provides that taxes result from levies on the initial (pre-plan) assessed value of property in the district while only payments in lieu of taxes result from the increased (post-plan) assessed value; and from §99.855(2) R.S.Mo. which states that tax levies are extended to the new (post-plan) assessed value only "for the purpose of measuring the size of payments in lieu of taxes. . . ." After the taxes are abated, payments in lieu of taxes are made by the new development in an amount that is measured by the taxes that would have been levied if the plan had not been adopted. §§99.805(7), 99.845(2) R.S.Mo. The respective taxing jurisdictions continue to receive that portion of the taxes levied upon the redevelopment property attributable to the initial equalized assessed value of the property. §99.845(1) R.S.Mo. What happens under the Act is similar to a situation in which a city approves a redevelopment plan, for example, under Chapter 353 R.S.Mo., grants tax abatement and then imposes in the 353 redevelopment area a special assessment for sidewalks.

Thus, the PILOTs constitute the plan of tax relief adopted by the General Assembly pursuant to the tax relief clause, Article X, §7, Missouri Constitution, which allows the legislature to provide tax relief by such method and on such terms as it may prescribe.

The net effect on any given taxing jurisdiction is virtually identical whether redevelopment occurs under Chapter 353 R.S.Mo. or under the Act with these exceptions:

a) Under the Act, a taxing jurisdiction continues to receive the taxes it was receiving before the plan is implemented. §99.845(1) R.S.Mo. Under Chapter 353, for the

first ten years of a plan, the taxing jurisdictions receive only the taxes they received on the *land* (but not the improvements). §353.110(1) R.S.Mo.

b) Under the Act, as soon as the project costs are paid, the property pays full taxes. §99.850(2) R.S.Mo. Under Chapter 353 the abatement continues for 25 years. §353.110(2) R.S.Mo.

c) Under the Act, the abatement must be spent on allowable project costs, and thus stays in the project. §99.805(11) R.S.Mo. Under Chapter 353, there is no restriction on the use of the abatement.

d) Under the Act, merchant's and manufacturer's replacement taxes are not abated. §99.845.1 R.S.Mo.

(iii) PILOTs are Special Assessments, Not Taxes, and Need Not Have Voter Approval Under the Hancock Amendment. The Defendant in *Dunn* claimed that payments in lieu of taxes are taxes and that, therefore, they may not be levied because they were not approved at an election, in violation of the "Hancock" Amendment. Article X, §22(a) Missouri Constitution. The Court sanctioned the lack of voter approval, finding that payments in lieu of taxes under the Act are in the nature of special assessments collected from only the redeveloped property and spent only for redevelopment project costs. §99.845(2) R.S.Mo.

> As the Commission argues, PILOTs are special assessments levied against the property in the District for the improvements provided that property under a redevelopment plan. *See County of Fresno v. Malmstrom*, 156 Cal. Rptr. 777, 782 (1979) ('Special assessments are not general taxes but rather used to confer special benefit upon the parcels charged for the improvements.').

Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc., 781 S.W.2d 70, 77 (Mo. banc 1989).

Identity of Benefits. Defendant in *Dunn* had claimed that payments in lieu of taxes are not special assessments because the apportionment of special benefits among parcels of property within the project area did not exactly match the apportionment of payments in lieu of taxes paid by the parcels. The Court ignored this issue in its opinion and is therefore presumed to have ruled it for the commission. There was support for this ruling; the amount of special assessment was based on the increase in value which is based in part on the new improvements made possible by proceeds of the special assessments. The property in the district would enjoy special improvements such as grading, paving, curbs, sidewalks, landscaping, lighting and utility relocations resulting from the redevelopment. These improvements would be paid by special assessments (payments in lieu of taxes). There is no requirement under Missouri law that the benefit paid for by a special assessment be exactly proportional, on a parcel by parcel basis, to the payment. *Farrar v. City of St. Louis*, 80 Mo. 379, 393-95 (1883).

Source of Funds - Special Fund Doctrine. The main issue under Missouri law in determining whether an exaction is a tax or a special assessment is whether it comes from a special source or from the public at large. *Schwab v. City of St. Louis*, 274 S.W. 1058,

1062 (Mo. 1925). Clearly, the payments in lieu of taxes are not paid by the public at large; only by property in the district.

Purpose of Assessment. Assessments for special benefits and local improvements are not "taxes" under Article X of the Missouri Constitution, though they are "in a broad sense referable to the taxing power." *Schwab v. City of St. Louis*, 274 S.W. 1058, 1062 (Mo. 1925); *Farrar v. City of St. Louis*, 80 Mo. 379 (1883); *Adams v. Lindell*, 5 Mo. App. 197, *aff'd*, 72 Mo. 198 (1878). "Taxes" are "imposts levied for revenue or governmental purposes only." *Schwab*, 274 S.W. at 1062. *See also* 63 C.J.S. *Municipal Corporations* §1290 at 1025-31 (1950) (distinction between special and general taxation). Relying on abundant precedent that special assessments are not taxes, the Court then held that payments in lieu of taxes are not imposts levied for general revenue or governmental purposes and therefore not taxes. The Act directs that PILOTs be paid into a special allocation fund securing the bonds. The bonds finance special purpose improvements to the District. PILOTs are not initially available for deposit into the general fund of the taxing districts; only after meeting debt service on the bonds may any surplus be used to meet the general governmental expenditures in the special allocation fund. §99.835.1. In sum, PILOTs are not taxes.

PILOTs Are Not Taxes Because Levied for a Special Purpose. In *Pace v. City of Hannibal*, 680 S.W.2d 944, 947 (Mo. banc 1984), "payments in lieu of franchise tax" made by a municipal utility to the general revenue fund of the municipality did not require an election under Article X, §22(a), 680 S.W.2d at 948. The Court determined that these payments did not constitute "charges to the public for governmental services" and did not amount to the imposition of a "tax, license or fee in the sense of Article X, §22(a)." *Id*. Similarly in *Dunn*, the Court stated:

> In *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 875 (Mo. banc 1960), the Court defined 'taxes' as the 'proportional contributions imposed by the state upon individuals for the support of government and for all public needs. [Citations omitted.] Taxes are not payments for a special privilege or a special service rendered. [Citations omitted.] Fees or charges prescribed by law to be paid . . . for services rendered in connection with a specific purpose ordinarily are not taxes, [citations omitted], unless the object of the requirement is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures. . . .' *Craig v. City of Macon*, 543 S.W.2d 772, 774 (Mo. banc 1976).
>
> Dunn's argument is founded on the assumption that the adoption of Art. X, §22(a) changed the definition of taxes in Missouri. In support of its point, Dunn focuses on the broad definition of 'tax, license or fees', Art. X, §22(a), given that phrase in *Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982).
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> * * *

> *Leggett* teaches, and *Roberts* agrees, that an exaction demanded by the government for a special privilege or for specific purposes and not intended to be paid into the general fund to defray general public needs or governmental expenditures is not a tax.

Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc., 781 S.W.2d 70, 76-77 (Mo. banc 1989). Query whether government property is exempt from a special assessment. First, it would have to be benefited and secondly, legally authorized. See *Walker v. MODNR*, 28 S.W.3d 460 (Mo. App. E.D. 2000).

No Increase in Levy Even If PILOTs Were Taxes. Increases in revenues from property in the redevelopment project area result from increases in value, not new or increased levies. Therefore, payments in lieu of taxes do not constitute a new or increased levy of taxes under the Hancock Amendment. It is the imposition of a new *levy* or the increase in the current *levy* of an existing tax that triggers the Hancock Amendment. Article X, §22(a), Missouri Constitution. Payments in lieu of taxes do not result from an increase in any existing tax levy. The Hancock Amendment, Article X, §22(a) Mo. Const., does not prohibit increases in revenues resulting from increased assessed valuations on property.

By analogy, increases in EATs resulting from increased economic activity does not trigger a Hancock election. In *County of Jefferson v. QuikTrip Corp.*, 912 S.W.2d 487 [17-18] (Mo. banc 1995), the court made it clear that even when taxes are involved such as an economic activity tax, there is no violation of the Hancock Amendment because changing the distribution of revenue is not the levying of a new tax requiring voter approval, holding also that it did not mandate a new activity by a local government.

(iv) Uniformity.

1) Uniformity Doesn't Apply to Special Assessments or Tax Abatement. The Defendant in *Dunn* argued that payments in lieu of taxes are Article X taxes for purposes of the Hancock Amendment and Article VI taxes for purposes of municipal debt limitations, and that therefore, property within the district pays less taxes than property outside the district. Actually it pays less "taxes," due to tax abatement. As to the taxes on property in the district which are not abated (those attributable to pre-plan assessed values), they are as uniform as they ever were. The Act proclaims that tax increment financing should not be construed "as relieving property in such project areas from paying a uniform rate of taxes" under Article X, §3 of the Missouri Constitution, §99.850(3) R.S.Mo., a fact noted by the Court. *Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc.*, 781 S.W.2d 70, 75 (Mo. banc 1989).

Furthermore, the requirement that all taxes be levied and collected under general law operating uniformly throughout the state is restricted to measures seeking to raise general revenue and has no application to special assessments which are not taxes. *State ex rel. Crutcher v. Koeln*, 61 S.W.2d 750 (Mo. banc 1933); *State on inf. of Dalton v. Metropolitan St. Louis Sewer Dist.*, 275 S.W.2d 225 (Mo. 1955).

If the argument that property in a redevelopment area cannot pay less taxes than similar property outside the area were valid, it would prevent tax abatement of any kind. Yet such abatement currently exists and has been declared valid under the Land

Clearance for Redevelopment Law and the Urban Redevelopment Corporation Act. §99.300 and §353.010 R.S.Mo., respectively, and under the Planned Industrial Expansion Law: "The power to classify for tax purposes is primarily in the legislature and not in the courts. . . . It is sufficient if the court, on review, may find [the classifications] supported by 'justifiable reasoning.'" *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36, 46 (Mo. banc 1975); §§100.300, *et seq.* R.S.Mo.; *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965).

(v) No Illegal Diversion Even If PILOTs Were Taxes. In Dunn, the defendant's primary argument on appeal concerned the diversion of taxes from their intended destination; that since payments in lieu of taxes are taxes, the distribution of these "taxes" to entities other than the regular taxing authorities violates Article X, §§3 and 4(b) of the Missouri Constitution, which require taxes to be levied uniformly, *Olan Mills, Inc. v. City of Cape Girardeau*, 272 S.W.2d 244 (Mo. 1954), and property to be assessed uniformly for tax purposes.

The Court held even if PILOTs were taxes, Article X, §3 requires uniformity in the *assessment* and *levy* of taxes, not in their distribution. *Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc.*, 781 S.W.2d 70, 75 (Mo. banc 1989). *See State ex rel. Conservation Comm'n v. LePage*, 566 S.W.2d 208 (Mo. banc 1978); *Hammett v. Kansas City*, 173 S.W.2d 70 (Mo. 1943). What the General Assembly does with "taxes" after collection thereof is not governed by the uniformity requirement. *State ex rel. Spink v. Kemp*, 283 S.W.2d 502, 514 (Mo. banc 1955). The distribution of payments in lieu of taxes is beyond the intended scope of the uniformity clause, Article X, §§3 and 4(b). But the Court also found PILOTs are *not* taxes and, therefore, are not diverted. "*If PILOTs are not taxes—and we hold here that they are not*—it follows that the Act cannot require an unlawful diversion of taxes." *Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc.*, 781 S.W.2d 70, 77 n. 4 (Mo. banc 1989). And in *County of Jefferson v. QuikTrip Corp.*, 912 S.W.2d 487 [14] (Mo. banc 1995), the Supreme Court rejected the argument that the capture of sales taxes constituted an unconstitutional diversion of the taxes from their intended destination. Since the *Dunn* decision, the Supreme Court has decided *Land Clearance for Redevelopment Auth. of Kansas City v. Waris*, 790 S.W.2d 454, 456 (Mo. banc 1990), in which it stated: "Article X, §6 of the Missouri Constitution was enacted expressly to prevent the payment of taxes by one political subdivision to another using taxes collected from taxpayers for the public purposes of the paying jurisdiction." However, the "payment" involved in a TIF project is made to a developer, not to another political subdivision or to another political subdivision acting as a developer and the "taxpayer" is the occupant of the TIF plan. Furthermore, the "public purpose" for which the taxes are collected is redevelopment.

Although not relied upon by the Court, it seems clear that if the City of Kansas City were unable to undertake redevelopment under the Act, other taxing districts would be without the additional revenue claimed to be diverted. *See Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392, 288 N.W.2d 85, 95 (1980). As the Indiana Supreme Court stated in *South Bend Pub. Transp* :

> If no redevelopment projects were undertaken, in the first place, there would be no increased revenues due to increased assessment values and other taxing authorities would be completely without the additional revenue. Since the increased revenues will be the result of the redevelopment project, it is impossible to see how other overlapping taxing districts are being forced to relinquish any revenue to which they might be entitled.

South Bend Public Transp. Corp. v. City of South Bend, 428 N.E.2d 217, 224 (Ind. 1981).

In order to divert something, it must exist prior to the diversion. In *Dunn*, the increased revenues generated by improvements would not have existed without the adoption of the plan by Kansas City because the improvements which *generate* the payments in lieu of taxes would never exist. *See People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356, 403 N.E.2d 242, 244 (Ill. 1980) ("taxing districts located in redevelopment projects areas would not derive the benefits of an increased assessment base without the benefits of tax increment financing. . ."). *See also Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 288 N.W.2d 85, 95 (1980); *South Bend Public Transp. Corp. v. City of South Bend*, 428 N.E.2d 217, 224 (Ind. 1981). This was apparently the purpose of the legislature in including a "but for" test in the Act, requiring a finding that development is not likely to occur without the adoption of tax increment financing. §99.810(1) R.S.Mo.

(vi) Can Frozen Base Decline? If the actual value in the project area declines, does the amount of tax payable to the taxing jurisdictions decline or is it "frozen?" §99.845 provides that after the total equalized assessed value exceeds the total initial equalized assessed value "arising from the levies upon taxable real property in such redevelopment project area by taxing districts and tax rates determined in the manner provided in subsection 2 of §99.855 each year after the effective date of the ordinance until redevelopment project costs have been paid shall be divided as follows: (1) that portion of taxes levied . . . which is attributable to the initial equalized assessed value . . ." shall be paid to the respective taxing districts. It appears that the statute assumes the assessed value will never actually decrease. In order for the initial EAV to decrease, the entire EAV would have to decrease below the level of the initial frozen base since the frozen base or EAV is fictional once the AV of the project increases above it: it no longer represents an identifiable, tangible assessable piece of property apart from the entire project.

It is theoretically possible for the AV to drop below the EAV, but highly unlikely. It could happen if there were structures which are demolished and not replaced for some time. If that happened, the taxes being distributed to the taxing jurisdiction would not be due to the TIF plan.

(b) Economic Activity Taxes. In 1990, at the urging of school superintendents, the law was amended to provide that in addition to payments in lieu of taxes, 50% of the total additional revenue from taxes imposed by the municipality or other taxing districts generated by economic activities within the area of the redevelopment project over the amount of such taxes from the calendar year prior to the

adoption of the redevelopment project by ordinance shall be allocated to and paid by the collecting officer to the treasurer of the municipality. §99.845.2 R.S.Mo. The treasurer shall deposit such funds in a separate segregated account within the special allocation fund. These revenues are known as "economic activity taxes." Unlike payments in lieu of taxes, they are not special assessments: they are taxes.

(i) Excluded Taxes.

- *Hotels, personal property, special assessments*. Economic activity taxes do not include taxes imposed on sales or charges for sleeping rooms paid by transient guests of hotels and motels, licenses, fees, personal property taxes or special assessments other than payments in lieu of taxes. §99.845.3 R.S.Mo.
- *Emergency services*. §99.845.3 excludes sales taxes for emergency communication systems. In 1996, via HB 1237, the General Assembly adopted a new §99.847 which provided:

> Any district providing emergency services pursuant to Chapter 190 or Chapter 321, R.S.Mo., upon the provision of evidence to the governing body of the municipality that direct costs incurred by such district in providing emergency services to the redevelopment area are directly attributable to the operation of redevelopment projects as these terms are defined in §99.805, in the redevelopment area, shall be entitled to reimbursement from the special allocation fund for direct costs to the extent that such district can demonstrate that the increased tax revenues it receives from such projects in such areas are insufficient to fund such direct costs. However, such reimbursement shall not be less than twenty-five percent nor more than one hundred percent of the district's tax increment.

In 2002, via HB 1237, the language in §99.847 was pared down to reduce the burden of proof on the emergency service providers. §99.847 now simply provides that districts providing emergency services:

> shall be entitled to reimbursement from the special allocation fund in the amount of at least fifty percent nor more than one hundred percent of the district's tax increment.

In 2013, via HCS HB 128 the legislature amended section 99.845.3 R.S.Mo., excluding sales taxes of an emergency

communication system pursuant to section 650.399 from the capture of plans adopted after August 28, 2013.

In 2014, the trend continued with HB 1504, which excluded sales taxes on capital improvements related to emergency communications systems.

- *Bi-state tax*. In 1997, the legislature excluded the Kansas-Missouri Bi-State cultural tax and the St. Louis County Transportation Tax from TIF capture. §§99.845.2 and .3 R.S.Mo.
- *Jackson County Sports Complex*. In 2006, the legislature adopted HB 1688 which exempted the Jackson County stadium sales tax from TIF Capture. §99.845.3 R.S.Mo.
- *Capital Improvements – Kansas City*. In 2008, via SB 1131, the legislature excluded capital improvements sales taxes imposed under §94.577 R.S.Mo. in Kansas City, §94.577.8 and, with respect to TIF plans adopted after March 31, 2009, any 3/8ths cent sales tax imposed in Kansas City under §§94.600 – 94.655 R.S.Mo.
- *Automobiles*. Although §99.845.2 R.S.Mo. states that 50% of taxes generated by "economic activities within the area of the redevelopment project…." are captured in a TIF plan, §144.069 deems the sale of an automobile to be consummated at the address of the owner.
- *Metropolitan Park and Recreation District*. In 2013, via HCS HB 128 the legislature amended section 99.845.3 R.S.Mo., excluding from TIF capture, sales taxes for operating and maintaining a metropolitan park and recreation district.
- *Levy Increases and New Taxes*. In 2014, via HB 1504, the legislature exempted revenues resulting from levy increases and newly imposed taxes, that occur after project approval, from capture. 99.845.1.2[a].

(ii) Subject to Annual Appropriation. The reason the funds must be deposited in a separate segregated account within the special allocation fund is that, being taxes, they cannot be pledged to retire bonds since such a pledge would require a vote of the people. They can be paid out of the fund, however, on an annual appropriation basis. §99.845 R.S.Mo.

(iii) Sales Taxes. In *County of Jefferson v. QuikTrip Corp.*, 912 S.W.2d 487 (Mo. banc 1995), the Supreme Court held that a county general sales tax, law enforcement sales tax and capital improvement sales tax were captured by a lawfully enacted TIF plan. The county argued that the legislature intended to exclude sales taxes for special designated purposes from TIF capture.The Court noted that the legislature expressly excluded some taxes such as taxes on sales or charges on sleeping rooms and could have

excluded other sales taxes but did not do so. The Court also held that the act did not violate the Hancock Amendment since it does authorize the levying of a new tax or the increase of the levy of an existing tax. The Court cited *Berry v. State*, 908 S.W.2d 682, 685 (Mo. banc 1995), as authority for the proposition that changing the distribution of revenue is not the levying of a new tax requiring voter approval. In *State ex rel. Village of Bel-Ridge v. Lohman*, 966 S.W.2d 356 (Mo. App. E.D. 1998), the eastern district court of appeals decided that sales taxes levied after the effective date of the law authorizing the capture of economic activity taxes were captured by the plan in question. It would appear that this issue had already been disposed of in *QuikTrip*. Two counties in Missouri stopped making their tax increment financing allocations to tax increment financing districts in the City of Monett in 2009, jeopardizing the payment on debt for public improvements already made. In 2009 the City sued Lawrence and Barry Counties, and the Barry County Emergency Services Board ("Board") when they each failed to allocate TIF revenue as required by the TIF Plans and State law. The Counties and Board countersued, claiming that the TIF Plans and TIF Districts had been improperly formed in 1996 and 2005. The Board also contended it was not subject to the EATs allocation requirements because voters approved the Emergency Services tax after the TIF Plans were approved and the TIF Districts were created. A trial court judgment upheld the validity of two of Monett's tax increment financing plans ("TIF Plans") and the Redevelopment Districts created under the Plans ("TIF Districts"). In addition to upholding the validity of the TIF Plans and the TIF Districts, the Court ordered the Board, to allocate and pay economic activity taxes ("EATS") based upon levies the Board imposed after the TIF Plans were approved and the TIF Districts were established. (The Counties had been withholding EATS and PILOTS.) A unanimous appeals court held that laches and estoppel barred Barry County's challenges (Lawrence County had voluntarily dismissed). The Appeals Court held that because TIF bonds had been issued, public improvements had been made with bond proceeds, because the Counties participated in and benefitted from the TIF Districts, and because of the delay in bringing their claims it would be inequitable to enforce the County's claims. The Court further held that "it is well to enforce the law, 'but it is quite another matter to disrupt settled expectations years after' an alleged violation."

In response to the Board claim that its taxes were approved subsequent to the formation of the TIF Districts, the court drew on the Missouri Supreme Court decisions in *County of Jefferson v. Quiktrip Corp*. and *Village of Bel-Ridge v. Lohman, supra.* In these cases, the Supreme Court emphasized that only taxes that are expressly excluded under Section 99.845 are taxes the legislature intended to exclude from TIF allocation. Emergency services taxes are not excluded under Section 99.845 and, therefore, were subject to collection and allocation pursuant to the TIF Plans. *State ex rel. City of Monett v. Lawrence County*, 2013 WL 1952537 407 S.W.3d 635 (Mo. App. S.D. 2013)

(iv) Intra-County Moves. In 1997, the legislature redefined net new revenues for an intra-county relocation of a retail facility as excluding the revenues at the previous location. §99.805(4) R.S.Mo.

(v) County Collection Fees. In *State ex rel. City of Desloge v. St. Francois County,* 245 S.W.3d 855 (Mo.App. E.D. 2007), the court held that the county

could not charge a 4% fee for collecting captured economic activity taxes under a TIF plan. The court found no violation of the "Hancock Amendment" Missouri Constitution, Article X, Section 23, because the county failed to prove an additional burden placed on local government, in that it only showed that it took some administrative time to collect the taxes, but did not show any additional personnel were required. Only taxpayers are authorized to bring challenges to the Hancock Amendment. *Fort Zumwalt Sch. Dist. v. State,* 896 S.W.2d 918, 921 (Mo. 1995). The Hancock Amendment does not exist to protect one level of government from another. *Fort Zumwalt*, 896 S.W.2d at 921. However, here the officials also alleged that they were taxpayers. The court in its opinion, relies on an earlier Supreme Court decision, *County of Jefferson v. Quiktrip Corp.,* 912 S.W.2d 487 (Mo. 1995) in which the Missouri Supreme Court dealt with whether Section 99.845 of the TIF Act, requiring the county collector to distribute TIF funds, violated the Hancock Amendment. The *Quiktrip* Court said it did not because "[d]istributing tax revenue is part of the normal operations of any county. There is no violation of §21 based on the *de minimus* administrative activity of calculating the amount due and writing the checks to the city. In *Dep't of Revenue of Kentucky et al., v. Davis,* 128 S.Ct. 1801 (2008), the Court upheld a Kentucky law that allowed income from Kentucky local and state bonds to be deducted from state income while taxing out-of-state government bonds in the face of a challenge under the dormant commerce clause. The Court reiterated the following analysis: The dormant Commerce Clause was "driven by concern about economic protectionism," measures designed to benefit in-state economic interests at the expense of out-of-state competitors. A law that discriminated against interstate commerce was "virtually *per se* invalid," but a "market participant" exception allowed states to legitimately exercise their right to favor their own citizens. In *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 127 S.Ct. 1786 (2007) decided a year earlier the court upheld a solid waste flow control statute against a similar dormant commerce clause challenge. It now seems clear the United States Supreme Court has a much more narrow view of the dormant commerce clause and has retreated from the expansive view of the dormant clause taken by the Rehnquist Court. Referring to *that case,* the Court held *United Haulers "*provides a firm basis for reversal." As in *United Haulers*, the logic that a government function was not susceptible to standard dormant Commerce Clause scrutiny because it was likely motivated by legitimate objectives – distinct from simple economic protectionism – applied "with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects" like protecting the health, safety, and welfare of citizens, "was a quintessentially public function." Kentucky's tax exemption favored "a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests. This type of law does 'not "discriminate against interstate commerce" for purposes of the dormant Commerce Clause.'" *Id.* at 491.

(c) State Sales Taxes for Urban Core Projects. In 1997, the legislature added, via S.B. 1, language allowing the capture of 1½ cents of the net new state sales tax or 50% of the net new state income taxes for urban core projects which are approved by DED. §99.845.4 R.S.Mo. To qualify, an area must be (1) blighted, (2) located in

enterprise zones, federal empowerment zones or urban cores, (3) contain at least one building of 50 years of age or more and (4) have generally declining population or property taxes. §99.845 R.S.Mo. In addition, an historic hotel in a county of the first class without a charter form of government with a population in excess of 150,000 (Excelsior Springs) may qualify. §99.845.9 R.S.Mo. Also included is a federally approved levy district in certain counties (Platte). §99.845.11 R.S.Mo.

The application must be filed by the municipality and include inter alia; a developer's "but for" affidavit §99.845.10 R.S.Mo. The length of capture is 15 years unless extended for up to 23 years by prior approval of the Director and the Commissioner of Administration. §99.845.10(4) R.S.Mo. The application must be filed prior to the approval of the local TIF plan although this requirement can be waived by the state. §99.845.7 R.S.Mo. As of this writing, the only Urban Core TIFs that had been approved were (1) Santa Fe Trail in Independence (inactive – proposed commercial development), (2) Midtown/Center in Kansas City, (3) Elms Hotel in Excelsior Springs (using Wal-Mart revenues), (4) Convention Center in St. Louis, (5) Couple Station in St. Louis, (6) Jordan Valley Park in Springfield, (7) The Main Post Office in Kansas City (IRS Center), (8) the Bannister Mall in Kansas City, (9) The Crackerneck Golf Course in Independence, (10) Branson Landing and (11), Bannister Mall in Kansas City. In 2005 via Senate Bill 343, the state cap on all new revenues approved for disbursement was raised from $15 million to $32 million dollars. §99.845.10(3) R.S.Mo.

The election to capture either income taxes or sales taxes is made by the municipality in its application to the Department of Economic Development. §99.845.10 R.S.Mo. In addition, an historic hotel in a county of the first class without a charter form of government with a population in excess of 150,000 (Excelsior Springs) may qualify. §99.845.9 R.S.Mo. Also included is a federally approved levy district in certain counties (Platte). §99.845.11 R.S.Mo.

The plan must insure that 100% of the capturable local PILOTs and 50% of all EATs will be used so that the state is not replacing those revenues. §99.845.6 R.S.Mo. In addition, an application process is set forth in which the Director of the Department of Economic Development and the Commissioner of the Office of Administration must approve the application submitted by the municipality. §99.845.10(1) R.S.Mo. The detail for such applications is set forth in §§99.845.10(1)(a) - (g). The Director of the Department of Economic Development and the Commissioner of the Office of Administration must approve the method used for calculating the net increase in new state revenue, §99.845.10(2) R.S.Mo., and upon approval of the application, the Director and the Commissioner will issue a certificate of approval, §99.845.10(2) R.S.Mo.

(d) Reimbursement of Emergency Service Providers. Notwithstanding subsection 1 of §99.847, any district providing emergency services pursuant to Chapter 190 or Chapter 321, R.S.Mo., shall be entitled to reimbursement from the special allocation fund in the amount of not less than fifty percent nor more than one hundred percent of the district's tax increment. This section shall not apply to tax increment financing projects or districts approved prior to August 28, 2004. §99.848 R.S.Mo. (Added by HB 1155, 2004.)

(e) Starting Triggers for Capture of PILOTs and EATs. Capture of PILOTs and EATs, begins with the passage of an ordinance approving tax increment financing for a specific project. Section 99.805 (4) R.S.Mo. defines "Economic activity taxes" as taxes generated "within a redevelopment area over the amount of such taxes generated by economic activities within such redevelopment area in a calendar year prior to the adoption of the ordinance designating such a redevelopment area…." Section 99.805 (10) R.S.Mo. defines "Payment in lieu of taxes" as revenues from real property "which would result from levies made after the time of the adoption of tax increment allocation financing during the time the current equalized value of real property in the area selected for the redevelopment project exceeds the total initial equalized value of real property in such area…." Section 99.845.1 R.S.Mo. provides that "A municipality… At the time a redevelopment project is approved… May adopt tax increment allocation financing by passing an ordinance providing that after the total equalized assessed valuation of the taxable real property in a redevelopment project exceeds the certified total initial equalized assessed valuation of the taxable real property in the redevelopment project,… Payments in lieu of a taxes…" shall be identified and "when collected" paid to the municipal treasurer. Of course, as these payments in lieu of taxes are collected in the same manner as taxes and therefore would normally be collected based on the assessed values existing on January 1 of the year in which the ordinance is adopted and paid between the time tax bills are male and December 31 of the same year. Section 99.845.3 R.S.Mo. provides for the capture of economic activity taxes "over the amount of such taxes generated by economic activities within the area of the redevelopment project in a calendar year prior to the adoption of the redevelopment project by ordinance….". Thus, section 99.845 R.S.Mo. indicates that capture of either PILOTs or EATs may not commence until a project is approved.

Occasionally, tax increment financing is inadvertently triggered before there is an increment of real property taxes or any economic activity taxes to be captured. The following analysis by Neal Hefferren examines whether such inadvertent trigger may be nullified.

(i) State Law regarding Authority to Repeal. A municipality exercises its legislative function only through the enactment of ordinances, and the delegated authority to a municipality to legislate on a subject pre-supposes the authority both to enact and repeal ordinances, but both may be limited by the terms of the grant of the power. *McCarty v. City of Kansas City*, 671 S.W.2d 790, 793 (Mo.App. W.D. 1984). In *McCarty*, the court explained that as applied to the subject of land use regulation, the foregoing principles require the conclusion that a city derives only the legislative power which the statutes have granted. *Id*. at 793. "That power is to be exercised by the adoption and repeal of ordinances and then, subject to the limitations which the statutes impose on the grant. If there be any conflict between the statutes and the municipal ordinances, the former must prevail." *Id*.

The City's authority to adopt the Activation Ordinance is found in the Real Property Tax Increment Allocation Redevelopment Act, R.S.Mo. §§99.800 *et seq*. ("Act"), which provides that a city may:

> by ordinance introduced in the governing body of the municipality within fourteen to ninety days from the completion of the hearing required in section 99.825, approve . . . redevelopment projects, and designate redevelopment project areas pursuant to the notice and hearing requirements of sections 99.800 to 99.865. No redevelopment project shall be approved unless a redevelopment plan has been approved and a redevelopment area has been designated prior to or concurrently with the approval of such redevelopment project and the area selected for the redevelopment project shall include only those parcels of real property and improvements thereon directly and substantially benefited by the proposed redevelopment project improvements . . ..

R.S.Mo. §99.820. This section provides no limitation on a city's power to repeal an activation ordinance. Accordingly, under the reasoning of *McCarty*, because the authority of the City to enact an activation ordinance pre-supposes the City's authority to repeal an activation ordinance, and because the Act does not restrict that pre-supposed authority to repeal, the City has the power to repeal the Activation Ordinance.

(ii) TIF Act. The Act provides no express prohibition of a city's ability to repeal an activation ordinance. In fact, it would appear that a prohibition of the proposed repeal of the Activation Ordinance would thwart the redevelopment purposes of the Act. Where an activation ordinance is inadvertently triggered, no redevelopment has occurred within the Original Redevelopment Area; no blight has been remedied; no properties have been redeveloped; no public improvements have been made. If the Activation Ordinance is required to stand despite its inadvertent adoption, it will likely prevent any redevelopment within the Original Redevelopment Area for the next 18 years.

The Act does provide that after the adoption of an ordinance approving a redevelopment project, no ordinance shall be adopted changing the nature of the redevelopment project without complying with the procedures provided in §99.825 R.S.Mo. pertaining to the initial approval of a redevelopment project. Although it is questionable whether this section applies to the repeal of an erroneously adopted activation ordinance, the Section 99.825 procedures can easily be complied with to eliminate all doubt on the question.

(4) When to Use TIF. The Tax Increment Financing Statute, passed in 1982 by the Missouri General Assembly, includes a "but for" test. Under this test, a municipality must find that, but for the adoption of a tax increment financing plan, the development in question would not occur. This is the central fact issue in the debate over the use of TIF. Since 1997, the findings under the "but for" test must include an affidavit of the developer that the area qualifies, §99.810(1) R.S.Mo., and a cost-benefit analysis showing the impact on each taxing jurisdiction, §99.810(5) R.S.Mo.

(5) Tax Increment Financing Commission. When the governing body of a municipality, which is defined as a city, village, or incorporated town or any county of the state, decides to utilize tax increment financing for redevelopment, it must create a tax increment financing commission. §99.820(11) R.S.Mo. In 1997, the legislature added a

requirement that for redevelopment areas or projects approved on or after the effective date of the law (December 1997) the word "municipality" applies only to cities, villages, incorporated towns or counties established for at least one year prior to such date. §99.805(7) R.S.Mo. There is little potential harm and great potential gain in establishing a TIF commission before a project comes calling. If the city attempts to establish a TIF commission only after a controversial project has been unveiled, the commission itself becomes unfairly identified with the project so that in the community's mind they may be one and the same. In order to institutionalize the TIF commission and give it greater (at least perceived) independence, it should be established before a project is proposed. Further, if a TIF commission is established in advance, it will save time in the event a prospect is identified.

After a great deal of wrangling between the School Administrators Association and various municipalities around the state, representation for taxing districts on tax increment financing commissions was provided in the 1991 amendments to the Act. §99.820.2 (1991) provided that the commission shall consist of nine members, two appointed by the school boards whose districts are included in the redevelopment plan or redevelopment area, one appointed by the affected districts to represent all other districts levying ad valorem taxes in the area selected for a redevelopment project, and six members appointed by the chief elected officer of the municipality. In 1997 (S.B. 1 in special session), the legislature expanded city commissions to include two additional members appointed by the affected county, except commissions formed by St. Louis County and any city in St. Louis County. The St. Louis City Commission remained at nine members. §§99.820.2(1) - (4) R.S.Mo. The non-city members of a commission may serve during the public hearing or for a definite term, at the option of the city-appointed members. §99.820.2(7) R.S.Mo. Special rules apply to cities in St. Charles, St. Louis and Jefferson Counties since August 28, 2008. (HB 2058) §99-820.3 R.S.Mo. and SB 718.

(a) General Powers of Commission. §99.802(2) provides that a municipality may "make and enter into all contracts necessary or incidental to the implementation and furtherance of its redevelopment plan and project." This language is broad enough to include a contract with the developer to reimburse project costs from the PILOTs.

(b) Evidence of Financing in Plan. §99.810 provides the required contents of a redevelopment plan, and states that each Plan shall include the estimated redevelopment project costs, the anticipated sources of funds to pay the costs, evidence of commitments to finance the project costs, "the anticipated type and term of the sources of funds to pay the costs, the anticipated type and term of the obligations to be issued . . .." This section would allow the inclusion of PILOTs as a source of funds to pay project costs (on a pay-as-you-go basis), but it also implies that obligations must be issued unless it is read "obligations, if any." And the contract to reimburse the developer could be said to be an obligation. It further implies that the sources of funds to pay project costs are different from obligations, since it lists as a requirement that the plan include both "the nature and term of the sources of funds to pay costs" and "the nature and term of the obligations to be issued." But obviously, obligation proceeds can be used to pay project costs since that is their only function. It is probably just a redundancy. It could be argued that the sources of funds to pay costs as distinguished from the obligations to be issued simply means that

no project would be 100% financed through PILOTs, but rather that the developer will be paying a portion. In fact, it is difficult to conceive of a situation where a development would yield enough PILOT to pay for the entire project in 23 years, since even at full taxes with a full assessment, PILOTs total theoretically a small fraction of the property value annually for 20 years.

(c) Exceptions. §99.820.3 provides that a commission can exercise the powers enumerated in the section except approval of plans, projects and areas.

(d) Contracts with Developer. However, that is not entirely true since subsection §99.820.1(3) provides that no conveyance of property or agreement relating to the development of the property can be made without an ordinance. Since §99.820.3 was adopted later in time (1991) than §99.820.1(3) (1982), it arguably prevails in the event of a conflict.

(e) Eminent Domain. It appears that pursuant to §99.820.3 the TIFC can condemn property.

(f) Bonds. The TIF Commission has the power to issue bonds. §99.835.1 R.S.Mo.

(6) Qualification. Any "municipality" is eligible for the use of TIF. The term municipality is defined as city, village, or incorporated town or any county of Missouri. For plans or projects approved after the effective date of the 1997 amendments, such entities must have been established for at least one year prior to such date. §99.805(7) R.S.Mo. Generally speaking, TIF should be planned for use in those areas of the city where the governing body finds and believes that development will not occur without some added incentive. There are four geographic qualifiers which may be used. Such areas may include only those properties directly and substantially benefited by the project. §99.805(11) R.S.Mo.

(a) Blight. The most obvious of these areas is a blighted area. A "Blighted Area" is defined (§99.805(1)) in the same manner as the term is used in the Land Clearance for Redevelopment Law. §99.320(3) R.S.Mo. Economic under-utilization may constitute blight. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991); *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146 (Mo. banc 1987). The determination of blight is a legislative function and will not be disturbed unless it is arbitrary or induced by fraud, collusion or bad faith. *Meramec Valley R-III School District v. City of Eureka,* 281 S.W.3d 827, 835 (Mo. App. E.D. 2009); *Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279 (Mo.App. W.D. 2012). The condemnees in *City of Kansas City v. Ku et al.,* 282 S.W.3d 23 (Mo.App. W.D. 2009) contended that the determination of blight was not supported by substantial evidence and was therefore arbitrary, capricious, and induced by fraud, collusion, or bad faith. They relied on the *Centene Plaza Redevelopment Corporation v. Mint Properties* decided by the Missouri Supreme Court in 2007 that held under the definition of blight in Chapter 353 – the City had to prove both economic **and** social liability. However, the Western District held that since the City was proceeding under the TIF statute that provides a blight finding requires either economic **or** social liability, the more specific definition of blight in the TIF statute as set forth in Section

99.805(1) R.S.Mo. controls. Missouri enacted eminent-domain reform in 2006, and provided that a legislative determination that an area is blighted "shall not be arbitrary or capricious or induced by fraud, collusion, or bad faith and shall be supported by substantial evidence." Section 523.261 R.S.Mo. (Supp.2008). This new statute makes no discernible change in the standard of review that Missouri courts have employed for over fifty years. *Land Clearance for Redevelopment Authority of City of St. Louis v. Inserra*, 284 S.W.3d 641, 645 (Mo.App. E.D. 2009). See §48 herein.

(b) Conservation Area. The second geographical qualifier is a "conservation area." A Conservation Area is an improved area that is by definition not blighted. A Conservation Area is defined as *inter alia*

> 'an area . . . [which] is not yet a blighted area but is detrimental to the public health, safety, morals, or welfare and may become a blighted area because of any one or more of' several enunciated factors, including 'dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; abandonment; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light or sanitary facilities; inadequate utilities; excessive land coverage; deleterious land use or layout; depreciation of physical maintenance and lack of community planning.'

§99.805(2) R.S.Mo. "Improved" is not defined under the statute, but the definition of a Conservation Area goes on to state that 50% or more of the structures in the area must have an age of 35 years or more. Although the title of the district would indicate otherwise, there is nothing in the definition of a conservation area that prevents the demolition of the improvements. By analogy, vacant ground may qualify as a "Neighborhood Improvement District" under §67.453 R.S.Mo. *Spradlin v. City of Fulton*, 924 S.W.2d 259 (Mo. banc 1996). A "Conservation Area" is an area not yet blighted but which may become so because of the presence of certain factors set out in §99.805(3) R.S.Mo. In 1997, the legislature amended the Act to require that at least three of the factors be present. Id.

Article X, §7 of the Missouri Constitution provides in relevant part:

> For the purpose of encouraging . . . the reconstruction, redevelopment, and rehabilitation of obsolete, decadent or blighted areas, the general assembly by general law may provide for such partial relief from taxation of the lands devoted to any such purpose and of the improvements thereon by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe. . . .

The *Dunn* court held that the Act falls within the language of Article X, §7 since the Act has as its purpose the reconstruction, redevelopment and rehabilitation of an obsolete,

decadent area to prevent it from becoming blighted. "Decadence" is defined in Webster's New Collegiate Dictionary (2d ed.) as "deterioration; decline." Preventing blight has been recognized as a public purpose in Missouri. *City of Kansas City v. Kindle*, 446 S.W.2d 807, 817 (Mo. 1969) (approval of rezoning with compensation).

The *Dunn* court held that the General Assembly may grant tax relief to a Conservation Area under the tax relief clause, Article X, §7, Mo. Const. "Obsolescence" is one of the specific standards in the Act's definition of a Conservation Area (§99.805(2) R.S.Mo.) and in the tax relief clause of Article X, §7.

> The PILOTs are the General Assembly's mechanism for addressing the problems of blight, obsolescence and decay, particularly within, though not limited to, the urban setting here. The Act is consistent with the Constitution.

Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc., 781 S.W.2d 70, 76 (Mo. banc 1989). In other words, a Conservation Area qualifies as an obsolete and/or decadent area under Article X, §7.

(c) Economic Development Area. A third qualifying area is an Economic Development Area which was added in 1986. It was drafted by Roger M. Grow, Director of Planning and Development for the City of Webster Groves. Such an area is neither blighted nor a Conservation Area but is one in which the governing body finds that redevelopment will discourage businesses from moving to another state or result in increased employment or in preservation or enhancement of the tax base. §99.805(3) R.S.Mo. In *Smith v. Independence Tax Increment Financing Comm'n*, 919 S.W.2d 292 (Mo. App. W.D. 1996), the court of appeals upheld a tax increment financing plan even though the Independence TIF Commission had found that the project area was "a blighted area and/or an economic development area". Of course, these definitions are mutually exclusive. However, the City Council had corrected the problem by finding that the project site was a blighted area. The Court stated that the TIF Commission's role is merely to make recommendations as to designations of project areas.

The economic development area qualifier set forth in the act basically declares it a public purpose to develop a certain area if it will retain or attract commerce or jobs to the municipality. §99.805(3) R.S.Mo. In 1997, the legislature added the requirement that in such areas, the development "will not be solely used for development of commercial businesses which unfairly compete in the local economy." §99.805(5) R.S.Mo.

(i) Eminent Domain. Nichols, *Law of Eminent Domain*, §1.13[4], §1.14[2], believes that the power of eminent domain comes into being *eo instante* with the establishment of the government and continues as long as the government endures. §1.14[2]. The provisions found in the constitutions of the various states providing for just compensation for private property taken or damaged for public use are only a limitation upon the exercise of the right. *Southern Ill. & M. Bridge Co. v. Stone*, 73 S.W. 453, 456 (Mo. 1903); *State ex rel. State Highway Comm'n v. Gordon*, 36 S.W.2d 105, 106 (Mo. 1931); *State ex rel. Lane v. Pankey*, 221 S.W.2d 195, 196 (Mo. banc 1949). This may be

true as to the *state*, but in Missouri the right of eminent domain does not naturally inhere in counties, municipalities or public service corporations and can be exercised only upon delegation from the state. *State ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819, 820 (Mo. banc 1994) citing *State ex rel. Schwab v. Riley*, 417 S.W.2d 1, 3 (Mo. banc 1967) (without specific statutory authority city not authorized to take water company already operating under certificate of convenience).

Article VI, §21, Mo. Const. provides that eminent domain may be used to redevelop *blighted, insanitary or substandard areas*. The grounds for invoking the power of eminent domain involve the redevelopment of an area that is blighted, substandard or insanitary. Perhaps a case could be made that where an economic development district has been declared, the area is somehow "obsolete" and "substandard" because of the potential loss of jobs or a long-standing inability to attract jobs. As to eminent domain, one could argue it needs no special authorization in the constitution, being an inherent power of government. The use of eminent domain in redevelopment has largely been assumed to depend upon the language of Art. VI, §21 of the Missouri Constitution. This section restricts the use of the power to land which is blighted, substandard, or insanitary. However, the power can be granted by statute for other purposes, such as transportation.

(ii) Tax Relief. Article X, §7 Mo. Const. provides that tax relief may be granted to induce the redevelopment of obsolete, decadent and blighted areas. By its terms, it is possible that an economic development area could be none of the above. §99.805(3) R.S.Mo.

(iii) Project Costs. § 99.825.3 R.S.Mo. provides: "Tax incremental financing projects within an economic development area shall apply to and fund only the following infrastructure projects: highways, roads, streets, bridges, sewers, traffic control systems and devices, water distribution and supply systems, curbing, sidewalks and any other similar public improvements, but in no case shall it include buildings."

(d) Enterprise Zone. In 1997, the legislature added a fourth qualifier; location in an enterprise zone. §99.805(11) R.S.Mo.

(e) "But For" Test. §99.810 requires a finding that the area has not been subject to growth and development through investment by private enterprise and would not be reasonably anticipated to be developed without adoption of the redevelopment plan. Where there is evidence that growth and development were not occurring and not likely to occur, the "possibility" of development are not sufficient to defeat the "but for" finding. *JG St. Louis West, Ltd. Liability Co. v. City of Des Peres*, 41 S.W.3d 513, 520-21 (Mo. App. E.D. 2001) (differing opinion by experts, including that competitive rates of return possible without TIF, made the issue fairly debatable). But see *Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 566 (Mo.App. W.D. 2008) where the court said of the use of TIF to finance a levee that was under construction at the time the TIF ordinance was passed: "It defies reason to say that a project currently underway without the use of TIF funding cannot be reasonably anticipated to occur without the use of TIF funding."

(f) Exempted Areas.

(i) St. Charles County. No new TIF project shall be authorized in an area located in St. Charles County and which is also designated flood plain, unless the

redevelopment area actually abuts a river or a major waterway and is substantially surrounded by contiguous properties with residential, industrial, or commercial zoning classifications. §99.847.1 R.S.Mo.

(ii) Hunting Heritage Areas. In 2007, SS/SCS/SB 225 created the Hunting Heritage Protection Areas Act. Subject to all applicable state and federal laws, and any local law in effect as of August 28, 2007, the discharge of firearms for hunting, sport, and other lawful purposes shall not be prohibited in hunting heritage protection areas, which are defined as the 100-year floodplains of the Missouri and the Mississippi Rivers as designated by the Federal Emergency Management Agency.

Certain areas are exempt from the Act, which are: areas designated as "urbanized areas" according to the 2000 U.S. Census; land used by facilities that are regulated by the Federal Energy Regulatory Commission; land used for the operation of physical ports of commerce and customs ports; land within Kansas City and St. Louis City; and land located within one-half mile of an interstate highway, as such highway exists as of August 28, 2007.

No new tax increment financing (TIF) project may be authorized in a hunting heritage protection area after August 28, 2007, except for the purposes of improving existing flood or drainage protection or for constructing or operating a renewable fuel production facility, provided that no new development results from the projects. TIF projects or districts approved prior to the effective date of this act may make certain modifications.

(iii) Franklin, Jefferson, St. Louis and St. Charles Counties. HB 741, adopted in 2007, requires, beginning January 1, 2008, any municipality in the counties of Franklin, Jefferson, St. Charles, or St. Louis to establish a county tax increment financing (TIF) commission in the same manner as St. Louis County. The bill specifies the membership of the 12-member commission; it also requires, beginning January 1, 2008, any municipality in the counties of Franklin, Jefferson, St. Charles, or St. Louis to obtain permission from its county TIF commission before implementing a TIF project; and requires, beginning January 1, 2008, a two-thirds majority vote of a municipality's governing body to overturn a county TIF commission's recommendation against a proposed TIF redevelopment plan, project, or area;

(7) Processing a Plan.

(a) Filing. Theoretically, a tax increment financing plan is not "filed"; rather, it is generated by the city. It is important to keep in mind that while the plan may be, and usually is, initiated by a developer, it is the city's plan, not the developer's.

(b) Contents. A redevelopment plan may be proposed by the commission for a clearly defined redevelopment project area and a public hearing is held regarding the plan. §§99.825 and 99.830 R.S.Mo. This plan must include, inter alia, a statement of what will be redeveloped and how it will be done. §99.810 R.S.Mo. The act is very clear about the contents of the plan. The statutory requirements must be complied with or the plan may be ruled invalid. Section 99.845.1 states in pertinent part:

> A municipality, *either at the time a redevelopment project is approved or, in the event a municipality has undertaken acts establishing a*

> *redevelopment plan and redevelopment project and has designated a redevelopment area* after the passage and approval of Sections 99.800 to 99.865…which acts are in conformance with the procedures of Sections 99.800 to 99.865, may adopt tax increment allocation financing by passing an ordinance…. (Emphasis added by the *Dunn* court).

The city of Shelbina, adopted an ordinance purporting to designate a portion of the City as a redevelopment area, approving the plan, and making related findings. Ordinance No. 1095 was also adopted purporting to approve the redevelopment plan and area, a redevelopment project area, adopt a TIF within this area, and set up the City's special allocation fund. The County refused to remit the TIF revenues and the City brought a mandamus and declaratory judgment and damages action against the County. On appeal, the Eastern District stated:

> The redevelopment plan which was presented at the TIF Commission's public hearing reveals the City lacked any specific redevelopment project prior to enacting the ordinances. The redevelopment plan is replete with references to aspirational goals and conceptual frameworks that may be implemented in an effort to redevelop the City, but no specific projects are discussed, nor is an identifiable financial structure set forth.
>
> ****
>
> It is clear from the excerpts cited that the City did not have any specific redevelopment projects approved nor had undertaken acts to establish a redevelopment project as required under Section 99.845.1. Since Section 99.845.1 contemplated the adoption of a redevelopment project prior to enactment of TIF ordinances, and in light of the absence of a redevelopment project at that time, we deem Ordinances No. 1094 and No. 1095 void *ab initio*. Therefore, we need not address the County's lengthy list of other alleged deficiencies. Moreover, we need not discuss the City's second point with respect to the severability clause contained in the ordinances.

The City of Shelbina v. Shelbina County, 245 S.W.3d 249 (Mo.App. E.D. 2008).

Briefly, the plan must also include:

- A detailed description of the factors qualifying the redevelopment area. §99.810(1) R.S.Mo. A developer's affidavit must now be submitted with the redevelopment plan, attesting that the factors regarding the qualification of the area as a redevelopment area have been met. §99.810(1) R.S.Mo. This section is rather clumsily worded, stating that the finding shall include an affidavit. §99.810(1) R.S.Mo.;
- Estimated project costs. Redevelopment project costs are defined in §99.805(14) as the "sum total of all reasonable or necessary costs incurred or estimated to be incurred, and any such costs incidental to a redevelopment plan or redevelopment project, as applicable." Such costs

include but are not limited to, certain enumerated costs set forth in the definition. In 1997, the legislature amended the Act to provide that with respect to professional service costs, except those incurred by the commission, such costs shall be allowed only as an initial expense which, to be recoverable, shall be included in the cost of a redevelopment plan or project, §99.805(14)(b) R.S.Mo., and to allow as a redevelopment cost the reasonable cost incurred by the municipality, by the clerk or other official administering the redevelopment project. The charge for these costs must be determined based on a recommendation from the commission. §99.820(14) R.S.Mo.;

- Anticipated sources of funds to pay the costs;
- Evidence of commitments to finance the costs. Legislative finding of adequate evidence is entitled to substantial weight and will be overturned only if it is not fairly debatable. *Smith v. City of St. Louis*, __ S.W.3d __ (Mo. banc 2013);
- A cost benefit analysis must be part of the plan indicating the impact of the project if built or not built, the impact on every affected political subdivision, and sufficient information from the developer for the commission to evaluate whether the project is financially feasible. §99.810(5) R.S.Mo.;
- If bonds are issued, a description thereof;
- The most recent equalized assessed value of the property in the area before, and an estimate of the assessed value after, redevelopment. When a plan is approved the county assessor determines the assessed value of the property before and after the plan is implemented. §99.855(1) R.S.Mo. In 1993, the General Assembly amended §99.810 R.S.Mo. to provide that each redevelopment plan shall set forth the most recent equalized assessed valuation of only the property within the redevelopment area which is to be subjected to payments in lieu of taxes and economic activity taxes pursuant to §99.845 R.S.Mo. The amendment was adopted in response to the Kansas City Midtown Redevelopment Plan to avoid including all assessed values in the plan area, a large area where housing was to be rehabilitated;
- Findings that:
  - The area falls into one of the four categories mentioned above;
  - The area has not been subject to growth and development and would not reasonably be anticipated to be developed without the adoption of the redevelopment plan (this is the "but for" test) including a developer's affidavit to that effect. In *Reed-Custer Community Unit School Dist. v. City of Wilmington*, the Circuit Court of the Twelfth Judicial Circuit of Will County, Illinois rejected the argument that the developer had failed the "but for" test because some development had occurred in the redevelopment area. "The test doesn't require that no growth occurs. It requires 'but for' the TIF district, the subject area is substantially unmarketable or that sound,

good quality and substantial growth is impaired and would not be reasonably anticipated within the development plan." Case No. 91-CH2187, Vol. 0511, p. 067 (1992). Although Missouri courts have not ruled on the precise meaning of the "but for" test with respect to tax increment financing, the "but for" theory of causation has been recognized in other contexts. *Zumalt v. Boone County*, 921 S.W.2d 12, 15-16 (Mo. App. W.D. 1996) (but-for test applied to whether damage to foundation was caused by street creep);

- The redevelopment plan conforms to the comprehensive plan of the municipality. See City of St. Charles v. DeVault Management, 959 S.W.2d 815 (Mo. App. E.D. 1997) (struck down TIF plan as not complying with comprehensive plan); c.f. *Smith v. City of St. Louis*, __ S.W.3d __ (Mo. banc 2013) (finding of general consistency is all that is required);
- The estimated dates (not more than 23 years after adoption) of the completion of the project and retirement of the obligations (if any) incurred to finance the project, have been stated;
- A relocation plan has been developed for any necessary relocation of businesses and residents;
- An additional required finding was added that the TIF plan will not benefit any gaming establishment, provided that this prohibition shall be applicable only to a redevelopment plan adopted after the effective date of the amendment which would be in 1997. §99.810(6) R.S.Mo.

(c) Requests for Proposals. That the plan is that of the city and not the developer is never more evident than when the city advises the developer (often to the developer's great surprise) that the city will have to advertise for and examine competing proposals to develop the property under the TIF plan, which the developer has worked so hard to bring to the city's attention. Usually, this is not a problem because the developer who originated the plan will be the only one to submit a proposal. The lead time on developments is so long, most developers cannot gear up rapidly enough to submit a proposal competing with a developer who has studied the site. However, occasionally, real live competition will result, to the great benefit of the city. This occurred in the Midtown Plan in Kansas City when Wal-Mart and Kmart competed with each other for the right to be designated as the developer under the City's TIF plan. In all fairness, if the city were to select a competing developer over the developer who originated the idea, it ought to at least reimburse the original developer the cost invested in the plan up to that time in return for receiving all work product.

§99.820(3) provides that no conveyance of land or agreement relating to the development of property "shall be made without making public disclosure of the terms of the disposition and all bids and proposals made in response to the municipality's request. The procedures for obtaining such bids and proposals shall provide reasonable opportunity for any person to submit alternative proposals or bids." The Kansas City TIF Commission now follows a practice of advertising a request for proposals to develop the project and

then selecting a developer at the hearing on the plan. The request for proposals is sent before the plan is approved by the Commission. However, it seems the Commission should approve the plan before it advertises for an RFP, since the Commission may change the plan after the developer is selected which could lead to a charge of unfair procedure and a possible "disappointed bidder" suit. In 1997, the legislature required that municipalities adopt formal procedures of their own design regarding soliciting competing proposals. "Each municipality or its commission shall establish written procedures relating to bids and proposals for implementation of the redevelopment projects." §99.820.1(3) R.S.Mo.

(i) Chicken/Egg Problem.

- **Amendment After Selection**. Even if the Commission approved the plan before it sent out an RFP, the plan could still be amended by the City Council so that a developer might claim that he would have bid if the plan had been advertised as amended. However, the nature of redevelopment is such that the plan has to be susceptible to amendment after the developer is selected, since it is the developer with his practical experience that points out those portions of the plan which need amendment. Furthermore, the amendments are not likely to encompass changes in the boundaries or the real substance of the plan, but usually are only minor since the selected developer was probably involved in putting the plan together in the first place.
- **Getting Commitments To Finance Before Approvals**. Before the 1991 amendments, the Act required both evidence of financing commitments and the source of funds to be included in the plan. (§99.810). The act now requires evidence of commitments to finance and the *anticipated* source of funds. Still, it is pure fiction to believe that any developer is going to have a firm commitment to finance a project for which he has not been selected and for which all final approvals by local government have not been given. Thus, the "commitment" to finance is usually in the form of a letter from a financial institution which contains such contingencies.

(d) Notice. Notice of a hearing, which must be held by the Tax Increment Financing Commission, is set forth in the Act. Forty-five days mailed notice must be given to all affected taxing jurisdictions. There are other specific notice requirements that must be followed. Because of these notice periods, it will usually take at least 100 days to approve a plan after it is "filed." §99.830.1 R.S.Mo. has always provided that notice of the public hearing held to approve tax increment financing should be given by registered mail to all property owners within the redevelopment plan or project area. In 1993, this section was amended to restrict the notice requirement to only such property as will be subjected to the payment of payments in lieu of taxes and economic activity taxes

pursuant to §99.845 R.S.Mo. Thus, in a large plan area, not all of which will contain redevelopment projects, notice need be given only to property owners within the redevelopment project areas. The purpose of this amendment was to allow the approval of large multi-project plans in which funds will be spent outside of a project area but within the plan area (e.g., the Kansas City Midtown Plan) eliminating the necessity of notifying each property owner in the plan area, on the theory that such property owners could only benefit from the expenditures and would never be called upon to pay them. In 1997, the legislature added the requirement that hearing notices be sent to the director of DED 45 days in advance of the hearing. §99.830.4 R.S.Mo. In 2008, via SB 718, the legislature added special rules with respect to cities in St. Louis, St. Charles and Jefferson Counties. §99.820.4(3) R.S.Mo. and 99.825.1 R.S.Mo.

(e) Hearing. At the hearing before the TIFC, the plan is reviewed and the TIFC may vote to recommend it, or not, to the governing body. There is no reason why the proposals of developers to implement the plan may not be reviewed at the same hearing, and a recommendation made as to the selection of a developer.

(f) Amendments.

(i) Before the Hearing Is Closed. Prior to the conclusion of the public hearing, changes may be made in the plan, project or area, with notice to each taxing district at least seven days prior to the termination of the hearing, pursuant to the 1997 amendments. §99.825.1 R.S.Mo.

(ii) After the Hearing. Changes may be made after the public hearing but prior to the adoption of a final ordinance approving the plan or projects so long as the changes do not enlarge the exterior boundaries of the redevelopment area, do not change the land use established in the plan or change the nature of the redevelopment projects. Each taxing jurisdiction must be notified by mail and by publication in a newspaper of general circulation in the plan area not less than 10 days prior to the adoption of the changes by ordinance. §99.825.1 R.S.Mo.

(iii) After Plan is Adopted. Once a plan has been approved by ordinance, "no ordinance shall be adopted altering the exterior boundaries, affecting the general land uses established pursuant to the redevelopment plan or changing the nature of the redevelopment project without complying with the procedures provided in this section pertaining to the initial approval of a redevelopment plan or redevelopment project and designation of a redevelopment area." §99.825.1 R.S.Mo. A substantial increase in costs of a project does change its "nature". *Ste. Genevieve School District v. Board of Aldermen of the City of Ste. Genevieve*, 66 S.W.3d 6 (Mo. banc E.D. 2002).

(g) Role of Governing Body. An ordinance approving the plan and projects within the plan may be introduced within 14 to 90 days from the completion of the hearing. §99.820.1(1) R.S.Mo. While certain items may be delegated to the commission, the governing body has the final say on the approval of projects and plans and the designation of redevelopment areas.

(h) Adoption. After receiving the recommendation of the TIF commission, the governing body may decide to hold its own hearing, but such a hearing is not required under the law. The governing body may proceed to approve the plan, projects and development areas.

(i) Termination. After all project costs are paid, bonds retired, and excess monies distributed, the plan is dissolved. §§99.845 and 99.850(2) R.S.Mo. "Thereafter the rates of the taxing districts shall be extended and taxes levied, collected, and distributed in the manner applicable in the absence of the adoption of tax increment financing." §99.850.2 R.S.Mo.

(j) Limits on Period of Capture. The tax relief clock does not start until a project is approved by ordinance. §99.845. It continues for the time specified in the plan, up to 23 years or until redevelopment costs have been paid, whichever first occurs. Id. Projects must be approved within 10 years. §99.810(3). Thus, the last capture period must begin no later than 10 years after plan approval.

(i) Length of Capture Period. Most lawyers assume that taxes may be captured for a period of 23 years. This belief stems from §99.810(3) which requires a finding that "the estimated dates, which shall not be more than twenty-three years from the adoption of the ordinance approving a redevelopment project within a redevelopment area, of completion of any redevelopment project and retirement of obligations incurred to finance redevelopment project costs have been stated . . . ." Note that this section does not say that the tax relief is limited to 23 years. It merely says that there must be a finding that the project will be completed within 23 years and that obligations will be retired within 23 years. The Constitution, Article X, §7, provides that tax relief may continue for 25 years. When does the capture period begin? §99.845.1 R.S.Mo. provides that a municipality may adopt tax increment financing by passing an ordinance providing that after the total equalized assessed valuation of the taxable real property in a redevelopment project exceeds the certified total initial equalized assessed value of the taxable property in the redevelopment project, the ad valorem taxes and payment in lieu of taxes, if any, arising from the levies on taxable property shall be divided into the taxes levied upon the initial equalized assessed value and payments in lieu of taxes resulting from assessed value increases. Thus, it is the increase in assessed value that triggers the beginning of the capture period. The same is true of EATs: §99.845.3 provides that the net increase in EATs after a project has been approved shall be deposited in a separate segregated account within the special allocation fund.

(k) Steps. The following schedule is a list of the steps required in a typical tax increment financing. The time intervals are estimates based on experience and state statutory notice periods.

Date

Day 01 Begin drafting plan.

Day 60 Tax Increment Financing Commission (the "Commission") "prepares" redevelopment plan (the "Plan") as defined in §99.805(8) (a "comprehensive program" to redevelop the area) including those items specified in §99.810 R.S.Mo.:

(1) general description of program to be undertaken
(2) estimated redevelopment project costs

(3) anticipated sources of funds to pay costs - anticipated type and term
(4) evidence of the commitments to finance the project costs (in form of letter from developer who states he will commit if he is selected: must be carefully worded)
(5) anticipated type and term of sources of funds
(6) anticipated type and terms of obligations to be issued
(7) most recent equalized assessed value ("A/V") of redevelopment area ("R/A")
(8) estimate of A/V of R/A after redevelopment
(9) general land uses to apply in R/A
(10) evidence that area is a qualified area
(11) redevelopment plan conforms to the comprehensive plan
(12) estimated dates of completion (not more than 23 years from the adoption of the ordinance)
(13) Plan developed for relocation assistance.

Day 60 Commission adopts resolution inviting developers to submit proposals for acquisition and redevelopment in accordance with the Plan, giving reasonable opportunity to developers to submit alternative bids or proposals, §99.820.1(3).

Day 60 Commission mails notice of hearing to all taxing districts entitled to levy on property in the Plan area. Notice is mailed not less than forty five (45) days prior to the hearing, §99.830(3).

Day 75 Commission gives notice of public hearing by publishing such notice twice, the first time not more than thirty (30) days, and

Day 95 the second time not more than ten (10) days prior to the public hearing, in a newspaper of general circulation in the area of proposed redevelopment. The Tax Increment Financing Commission gives further notice by mail to all landowners in the R/A. This notice shall be mailed not less than ten (10) days prior to the hearing. The landowners shall be determined by the tax rolls, §99.830(1).

Day 90 Developers submit proposal to Tax Increment Financing Commission.

Day 105 Commission holds public hearing and votes within thirty (30) days following completion of the hearing. Commission votes on all proposed redevelopment plans, redevelopment projects and designations of redevelopment areas, including amendments. Within ninety (90) days of voting, Commission makes recommendations to the Governing Body, §99.820(3).

Day 120 An ordinance is introduced in the Governing Body within fourteen (14) to ninety (90) days after the hearing, §99.820(1). The ordinance shall:

a. approve the redevelopment plans and redevelopment projects;

b. designate R/A's pursuant to notice and hearing requirements of Act. No redevelopment project shall be approved unless a redevelopment plan has been approved and a redevelopment area has been designated prior to or concurrently with the approval of such redevelopment project and the area selected for the redevelopment project shall include only those parcels "substantially benefited" by "redevelopment project improvements," §99.802.1(1).

c. adopt tax increment financing by including the provisions set out in §99.845.

d. make the findings set forth in §99.810 including:

(1) R/A not likely to redevelop without redevelopment plan, §99.810(1);

(2) the Project and Plan conform to comprehensive plan;

(3) dates of completion of project and retirement of bonds;

(4) Plan for relocation assistance has been developed;

(5) the Plan area is a blighted conservation or economic development area or located in an Enterprise Zone.

e. select the developer and authorize contract.

Day 127 Governing Body holds hearing on ordinance and adopts the ordinance. No ordinance approving a redevelopment project shall be adopted later than ten (10) years from the adoption of ordinance approving redevelopment plan, §99.810(3).

Day 127 The Governing Body adopts an ordinance authorizing the issuance of the bonds specified in §99.835. Such obligations shall bear such dates, mature at such times not exceeding twenty-three (23) years from their respective dates as determined by the council.

Day 128	Developer enters into contract with Commission.
Day 128	Commission staff notifies county assessor and county clerk, §99.855.
Day 130	County Assessor immediately determines the total equalized assessed value of all taxable real property within redevelopment project. §99.855(1). County Clerk shall in every year that tax increment allocation financing is in effect ascertain in the amount of value of taxable property in redevelopment project by including certified total initial equalized assessed value in lieu of the equalized assessed value. §99.855(2).
Day 200	City acquires property if necessary (§§99.820(1.(3)) and 99.805(7)). No property for a redevelopment project shall be acquired by eminent domain later than five (5) years from adoption of ordinance. §99.810(3).
Day 215	City conveys property by ordinance to developer at price City determines is reasonably necessary to achieve objectives of plan and project. §99.820(1.(3)), which is also the price bid by developer when original proposal was submitted.
Annually	City files report and publishes statement per §99.865.1.
Year 5	City holds hearing re progress, §99.865.2. Notice of hearing is published once each week for four weeks immediately prior to the hearing in a newspaper of general circulation in the area served by Commission. Last year for property acquisition by eminent domain, §99.810.2.
Year 10	City holds hearing re progress, §99.865.2. Notice of hearing is published once each week for four weeks immediately prior to the hearing in a newspaper of general circulation in the area served by Commission. Last year for adoption of redevelopment project ordinances, §99.810.3.
Year 15	City holds hearing re progress, §99.865.2. Notice of hearing is published once each week for four weeks immediately prior to the hearing in a newspaper of general circulation in the area served by Commission.
Year 20	City holds hearing re progress, §99.865.2. Notice of hearing is published once each week for four weeks immediately prior to the hearing in a newspaper of general circulation in the area served by Commission.

(l) Projects. The Eastern District held that to be valid, a plan must include at least one project which is fully described. *Smith v. City of St. Louis*, ED 95733 (2012). However, the Supreme Court held that the issue was not properly raised by the pleadings. *Smith v. City of St. Louis*, 395 S.W.3d 20 (Mo. banc 2013), thus the opinion of the Eastern District is of no effect.

(8) Allowable Project Costs. §99.805(14) R.S.Mo. defines "Redevelopment Project costs" to include "the sum total of all reasonable or necessary costs incurred or estimated to be incurred, and any such costs incidental to a redevelopment plan or redevelopment project, applicable." and then goes on to list a wide assortment of costs. In *JG St. Louis West, Ltd. Liability Co. v. City of Des Peres*, 41 S.W.3d 513 (Mo. App. E.D. 2001) the court held that a parking structure for a mall was a reasonable and necessary expense under the Act.

(a) PILOTs as Project Cost. In §99.805(11)(j), "Payments in lieu of taxes" are included as a redevelopment project cost. How can PILOTs be a cost?

(i) Capitalization of PILOTs. If bond proceeds are used to pay taxes in the early stages of a project before it generates lease revenues, the effect would be the same as the capitalization of interest with Bond proceeds.

(ii) Type 2 PILOTs. It may be a reference to the PILOTs that are paid to taxing jurisdictions per §99.820(12). See §16(12)(b), infra. Why does the Act use payments in lieu of taxes ambiguously? §99.820(12) states that PILOTs can be paid to taxing jurisdictions by the municipality. These are no doubt a payment out of the special allocation fund while the Type 1 PILOT is paid into the fund. Payments out of the special allocation fund to taxing jurisdictions are referred to herein as "Type 2 PILOTs". This is probably just an unfortunate choice of words to describe a payment of surplus to a taxing jurisdiction. In a sense, surplus is something a taxing jurisdiction receives in lieu of taxes.

(b) Use of Payments in Lieu of Taxes to Construct Private Buildings. Nothing in the Dunn case would prohibit this since the court treats payments in lieu of taxes as special assessments and since the property assessed is benefited. In fact, §99.805(7) R.S.Mo. defines PILOTs as revenues which are to be used for a private use.
§§23 and 25 of Article VI of the Constitution of Missouri prohibit the lending of credit or granting of public money to any private individual, association or corporation. To determine whether the use of PILOTs to fund private structures violates this section we must ask:

- Whether PILOTs are public funds; and, if they are,
- Are they being granted to a private person?

(i) Are PILOTS Public Funds? If PILOTs are not classified as "public money" then there is no limitation upon their use. See *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. banc 1977); where the Supreme Court held that ". . . there is no lending of credit where revenue bonds are payable solely from the revenue derived from the project and not from taxes." Id. at 290. Clearly, taxes are public funds. We know from Dunn that PILOTs are not taxes. But are they some other kind of public fund? It would seem that special assessments are a public fund. EATs would appear to be public funds since they are taxes.

(ii) If So, Does Their Use to Build Private Building Violate Article VI? The prohibition against lending public credit or public funds is based upon the desire to ". . . prohibit the State from acting as a surety or guarantor of the collateral obligations of another party." Id. at 291. In *Menorah Medical Center v. Missouri Health & Education Facilities Authority*, 584 S.W.2d 73 (Mo. banc 1979), the Supreme Court stated that bonds do not constitute a debt or liability of the State or any political subdivision if they are . . . payable solely from the revenues and receipts generated by the sale or lease of the facilities involved and not from taxation, . . ." Id. at 78. Assuming PILOTs are public funds, are they loaned or granted for the benefit of a private person? The fact that they may benefit a private person is not sufficient.

1) Public Purpose. If the legislature declares the construction of a private building to be a public purpose, the court is not likely to disturb this determination. The question is, "what is the dominant purpose?" Even if PILOTs constitute public funds, they may be used for private buildings if the primary effect of the construction is designed to promote a public purpose. In *Curchin v. Missouri Industrial Development Board*, 722 S.W.2d 930 (Mo. banc 1987), the Supreme Court of Missouri cited with approval; *State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 102 (Mo. banc 1941), and stated that in order to determine whether there is a sufficient public purpose behind a grant of public money, Missouri utilizes the "primary effect" test. Under this test:

> [I]f 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 purposes, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose. *Curchin* at 930.

The legislative determination of whether an activity serves a public purpose will not be upset by the courts unless there is ". . . clear proof that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith." *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975). The question was not reached in Curchin. Accordingly, with the deference given by the courts to the legislative determination, if the construction of a private building is decreed to serve a public purpose by the legislature, then the court will not set the determination aside simply because public monies are involved.

(iii) Statutory Authorization. §99.805 makes any expenditures necessary to complete a plan an allowable project cost including:

(a) Cost of rehabilitation, reconstruction, or repair or remodeling of existing buildings and fixtures;

(b) Costs of construction of public works or improvements; §99.805(11) R.S.Mo.

Does the word "public" modify the word "improvements" in subsection (f)? A court could very well find that it does since Paragraph (d) specifically deals with buildings and that would have been the logical place to discuss a new building. On the other hand, one could argue that (f) deals with construction of new structures of all kinds and that would be the appropriate place to deal with the construction of a new building. §99.820.1(5), enumerating the powers of a municipality, states it may "construct any structure or building" but it does not say it may finance it with PILOTs or EATs. The court in *JG St. Louis West, Ltd. Liability Co. v. City of Des Peres*, 41 S.W.3d 513, 522-231 (Mo. App. E.D. 2001) determined that a private parking garage for a regional mall was an allowable project cost. Since the Act provides that privately-owned structures cannot be a reimbursable cost in an economic development area, the logical inference is that they can be in other qualified areas, e.g., blighted or conservation areas.

(c) Inter Project Spending. Redevelopment project costs are defined in §99.805(11) as:

> The sum total of all reasonable or necessary costs incurred or estimated to be incurred and any such costs incidental to *a redevelopment plan and redevelopment project* . . .. (Emphasis added.)

Based upon the reference to the redevelopment plan an argument can be made that redevelopment project costs are not limited to one particular project area. But §99.820.1(1) R.S.Mo. provides that "the area selected for the redevelopment project shall include only those parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvement." If there is only one special Allocation Account where all Project Area PILOTS and EATs are commingled, inter project spending is accomplished but is it legal? §99.820.1(1) deals with which property is "assessed" in the form of PILOTs,[1] but contains no restrictions on where PILOTs and EATs from that project area may be spent.

(d) Outside Boundaries of District. The definition of "redevelopment project costs" in §99.805 (14) R.S.Mo. does not restrict them to the boundaries of the Redevelopment Area and to the contrary, includes all costs which are "reasonable or necessary" and "incidental to a redevelopment plan or redevelopment project". Thus costs incurred outside of the boundaries of the Redevelopment Area which are necessary for the plan to be accomplished, such as a traffic signal, qualify.

(9) Pay-as-You-Go. The Act allows a municipality to pay redevelopment project costs on a pay-as-you-go basis without the issuance of bonds.

(a) Definition of Costs. The definitions section, in §99.805(15) defines "redevelopment project" costs as including "the sum total of all reasonable or necessary costs incurred or estimated to be incurred, and any such costs incidental to a redevelopment plan or a redevelopment project." §99.805(15)(g) specifically includes

[1] At the time this section of the statute was written, PILOTs were the only form of TIF revenue and followed a special assessment model

"financing costs" and later sections of the statute (§99.835) anticipate the use of payments in lieu of taxes to retire obligations. "Obligations" are defined in §99.805(5) R.S.Mo. as "bonds, loans, debentures, notes, special certificates, or other evidences of an indebtedness issued by a municipality to carry out a redevelopment project or refund outstanding obligations." This definition is broad enough to include an obligation to pay a redeveloper on a pay-as-you-go basis under a contract with the Commission.

(b) Pledge. §99.835[1] states that a municipality may pledge all "or any part" of the funds in the special allocation fund to the "payment of the redevelopment project costs and obligations." §99.850 states that after redevelopment project costs "including obligations" have been paid, any surplus is distributed to the county collector and §99.835.1 states that the amount not pledged shall be declared surplus.

(c) Special Allocation Fund. §99.845(2) R.S.Mo. provides that payments in lieu of taxes ("PILOTs") shall be deposited in a special allocation fund "for the purpose of paying redevelopment project costs and obligations incurred in payment thereof."

(10) Bonds. §99.835 R.S.Mo. provides that the municipality may authorize the issuance of "[o]bligations secured by the special allocation fund . . . for the redevelopment area . . . to provide for redevelopment project costs." The bonds issued pursuant to the Act, §§99.820 and 99.835 R.S.Mo. for the purpose of grading, paving, landscaping, lighting, curbs, sidewalks, utility relocations and the like, and secured by the payments in lieu of taxes resulting from increased value created in the district, do not constitute a general indebtedness of the city according to the *Dunn* court. 781 S.W.2d at 77. §99.835(1) of the Act provides for the issuance of obligations that are "secured by the special allocation fund" which is funded by payments in lieu of taxes and EATs. §§99.845 and 99.850 R.S.Mo. §99.835(3) R.S.Mo. provides that the bonds are "special obligations of the municipality payable solely from the special allocation fund." No approval of the electors is required in the Act as a condition precedent to the issuance of tax increment obligations.

(a) Election Not Required Under Debt Clause Because No Article X Taxes Are Involved.

(i) Special Assessments. In rejecting the defendant's argument, the *Dunn* Court faced the tax issue head-on and held that payments in lieu of taxes that are distributed to the special allocation fund to secure the payment of the bonds are special assessments, not "taxes," and are not proceeds representing the general revenues of the municipality. The Missouri "special funds" doctrine precludes any finding that municipal indebtedness occurs under the Act. See *State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 115 S.W.2d 816 (Mo. banc 1938); Woodmansee v. Kansas City, 144 S.W.2d 137 (Mo. banc 1940). Under the "special funds" doctrine, "if the taxpayers of the City cannot be taxed to pay the bonds, the constitutional limitation does not apply." *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36, 47 (Mo. banc 1975). EATs are taxes, but they are subject to annual appropriation.

(ii) Non-Hancock Decisions. Missouri has never required voter approval for special assessments reasoning that they are not taxes. *State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 115 S.W.2d 816, 823 (Mo. banc 1938). In that case

the Court examined a "rental charge" collected by the city from the owners of abutting property, apportioned according to assessed value. The rental charge was used to retire sewer bonds. If delinquent, it was collected "in the same manner as taxes levied" for debt service on bonds. The Court held the charge was a special assessment and that the bonds retired therewith were not debt. 115 S.W.2d at 821. In *Oswald v. City of Blue Springs*, 635 S.W.2d 332 (Mo. banc 1982), the Supreme Court held that assessments against land for maintenance of a water system need not be voter-approved. As the Court noted in *Farrar v. City of St. Louis*, 80 Mo. 379 (1890), Missouri has consistently held, under the Constitutions of 1820, 1865, and in Farrar, 1875, that special assessments are not taxes. 80 Mo. at 387. To hold otherwise would, for example, have exempted churches and hospitals from paying their share of sewer and street improvements benefiting their property. 80 Mo. at 387-91. Under the "duck" test, PILOTs might look like a tax; they are the same amount, measured in the same manner, §§99.805(7), 99.855(2) R.S.Mo., assessed by the assessor and collected by the collector. But the Court relied on *Webster Groves, id*. in holding they are not:

> The fact that the PILOTs are measured by the assessed value of the property does not change their character as special assessments.

Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc., 781 S.W.2d 70, 77 (Mo. banc 1989).

The use of existing levies to measure the size of the payments in lieu of taxes is a rule of convenience and fairness adopted by the General Assembly, because the existing structure can be used to collect the payments without establishing a new bureaucracy.

(b) The Bonds Are Not Revenue Bonds Requiring a Vote. The Defendant in Dunn argued that if payments in lieu of taxes are not taxes, they are "revenues" and the bonds which the city issued are "revenue bonds" which required voter approval under Article VI, §27 of the Missouri Constitution. First of all, it is doubtful that the bonds are revenue bonds any more than the bonds secured by special assessments in *State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 115 S.W.2d 816 (Mo. banc 1938), were. But the Court didn't decide this question. Instead, it simply held that even if the bonds could be characterized as revenue bonds for purposes of Article VI of the Constitution, §27(b) of Article VI allows such bonds to be issued by a majority vote of the governing body of the city and further allows bond proceeds to be used to purchase or improve any facility to be leased or disposed of to private persons for commercial, warehousing and industrial purposes. *State ex inf. Ashcroft ex rel. Bell v. City of Fulton*, 642 S.W.2d 617 (Mo. 1982). The bonds are probably special assessment bonds for want of a better description and since the Constitution doesn't consider them debt or prohibit them in any other way they are restricted only by the public purpose clause. The distinction between §27(b) revenue bonds and special assessment bonds is probably only important in a housing development or some other purpose which may be outside 27(b)'s "commercial, warehousing and industrial" purposes.

Many developers naively assume that the city will take care of selling these bonds. In fact, the developer usually is given the responsibility of arranging this financing. The buyer of these bonds usually will be a bank, an investment bank, or the developer.

Furthermore, only the property tax portion of the increment may be pledged in future years to retire the bonds. The other local taxes are subject to annual appropriation in paying off the bonds. It is not necessary to issue bonds in order to have a workable TIF plan. Under a pay-as-you-go type of plan, the municipality simply remits all or a portion of the captured increment (annually as it is collected) to the developer for allowable project costs until they are paid.

(c) Grant or Loan of Credit. The *Dunn* Court rejected the notion that the pledge of "Payments in Lieu of Taxes" to pay a portion of redevelopment costs is the use of public credit or a grant of public funds in violation of the credit clauses, Article VI, §§23 and 25, Missouri Constitution. Article VI, §23 provides in pertinent part that:

> No county, city, or other political corporation or subdivision of this state shall . . . lend its credit or grant public money or thing of value to or in aid of any corporation, association, or individual, except as provided in this constitution.

And Article VI, §25 provides:

> No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or Property to any private individual, association or corporation.

(i) Credit. The purpose of the constitutional prohibition against the lending of credit is to forbid the state from acting as a surety or guarantor of the debt of another. *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666, 676 (Mo. banc 1978). Under the Act, the city does not guarantee payment of the bonds and thus, prospective investors will not look to the credit of the city. The city's credit is not involved in the issuance of TIF bonds which are secured by a fund consisting of payments in lieu of taxes and EATs resulting from the construction of the improvements. §99.835.3. and §99.845 R.S.Mo. The bondholders look only to the special allocation fund for payment of the bonds.

(ii) Grant. Nor is direct aid given to any private individual, corporation or association. The constitutional provisions noted are not violated when money and property are expended or utilized primarily to accomplish a "public" purpose. *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. banc 1977); *State ex inf. Danforth ex rel. Farmers' Electric Co-op, Inc. v. State Environmental Improvement Auth.*, 518 S.W.2d 68 (Mo. banc 1975). The determination of what constitutes a public purpose is for the legislature to decide. *Jardon*, 570 S.W.2d at 674, *State ex rel. Wagner v. St. Louis County Port Auth.*, 604 S.W.2d 592, 596 (Mo. banc 1980). The fact that the plan may incidentally aid a private individual in the same manner as tax abatement under the Land Clearance for Redevelopment Authority Law, §§99.300, et. seq. R.S.Mo., or the Urban Redevelopment Corporation Act, §§353.010, *et seq*. R.S.Mo., has been held not to result in a violation of the above-cited constitutional provisions. See *State on Inf. of Dalton v. Metropolitan St. Louis Sewer Dist.*, 275 S.W.2d 225 (Mo. 1955); *Land Clearance for Redevelopment Authority of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58, 64 (Mo. banc 1954).

That private parties may incidentally benefit has been held to not deprive the redevelopment of its primary public purpose. *See Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 644-653 (Mo. banc 1965), *dismissed*, 385 U.S. 5 (1966); *State on inf. of Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44, 52 (Mo. banc 1954).

(11) Surplus.

(a) Amount Not Pledged. It appears that the municipality may control the amount which is declared surplus by the amount of pledge. §99.835.1 provides that

> any pledge of funds in the special allocation fund *may* provide for distribution to the taxing district of moneys not required for payments and securing of the obligations and such excess funds *shall* be deemed to be surplus funds. In the event a municipality only pledges a portion of the funds in the special allocation fund *for the payment of redevelopment project costs or obligations*, any such funds remaining in the special allocation fund after complying with the requirements of the pledge *shall* also be deemed surplus funds.

(b) Amount Not Used. §99.850 provides in subsection 1 that "when such redevelopment project costs, including . . . obligations . . . have been paid, all surplus funds shall be paid to the County Collector for distribution to the taxing entities."

(i) PILOTs. Surplus PILOTs must be distributed proportionally to collection of property taxes. §99.820(12)(a).

(ii) EATs. Surplus EATs must be distributed proportionally to the amount each taxing district would have received had TIF not been adopted. §99.820(12)(b).

(12) Risks.

(a) Non-Appropriation. The Act makes it abundantly clear that in the issuance of a tax increment financing bond or other obligation, the city's credit is not pledged. The bondholders look solely to the success of the project in generating new assessed value and economic activity taxes as security for their bonds, and if the project fails, that is the risk they take. If bonds are issued, the payments in lieu of taxes resulting from the increase in assessed value may be pledged for future years to pay the bonds. But that portion of the increment generated by economic activity taxes (e.g., sales taxes) is subject to annual appropriation if, as and when, collected by the city. This differentiates a TIF annual appropriation obligation from the typical annual appropriation obligation for the purchase or lease of equipment by a municipality. In the typical case where, for example, the municipality leases a computer and agrees to annually appropriate the rent payment, the city can decide not to annually appropriate for any reason but would have the moral obligation to appropriate in any event. In TIF annual appropriation not even the moral obligation is triggered until the city actually collects the economic activity taxes. If the city were to collect the increment and then fail to appropriate, no doubt the investment banking community would take notice.

(b) Payments to Taxing Jurisdictions. What if the municipality wants to induce a particular development, but runs into strong opposition from a taxing jurisdiction, perhaps a school district? Can the municipality make payments in lieu of taxes to the school district only, without making the same payment to all other taxing jurisdictions?

(i) Type II PILOTs. There actually are two types of payments in lieu of taxes (PILOTs) mentioned under the Act. The first one is the payment in lieu of property tax made by the development based on its increased assessed value. §99.805(7) R.S.Mo. The second type of PILOT is one that is made to a taxing jurisdiction in place of the taxes it would have received if the tax increment financing had not been in effect. §99.820(11) R.S.Mo. However, if such a payment is made, it must be made across the board to all affected taxing districts. In 1997, the legislature amended the Act to clarify that surplus payments in lieu of taxes shall be distributed to affected taxing districts on a basis that is proportional to the collections of taxes from real property in the redevelopment area, that surplus economic activity taxes shall be distributed on a basis that is proportional to the amount of such economic activity taxes which the taxing district would have received had tax increment financing not been adopted and that surplus revenues other than payments in lieu of taxes or economic activity taxes shall be distributed on a basis that is proportional to the total receipt of such other revenues in such account in the year prior to disbursement. §99.820(12) R.S.Mo.

(c) Payment Schedules. It has become fashionable to negotiate payment schedules that differ from that envisioned by the statute. The statute applies the maximum amount of increment available to paying project costs so that they are paid off as rapidly as possible. Taxing jurisdictions frequently negotiate payment schedules in which only a portion of the increment is applied to the payment of project costs or obligations. This is done so that the municipality, and in some cases other taxing jurisdictions, may immediately begin realizing the economic benefits of the project instead of waiting until the project costs are paid. The municipality should be warned that if this occurs, the funds not used to pay project costs are deemed surplus and must be distributed to the taxing jurisdictions on a pro rata basis. §99.835.1 R.S.Mo.

(13) Eminent Domain. The Act grants the municipality the power of eminent domain in furtherance of a plan. §99.820(3) R.S.Mo. It can, however, be delegated to the TIF commission. The power of eminent domain most often is used in assembling tracts of land so that one recalcitrant owner cannot thwart the entire plan. Eminent domain also may be used to eliminate restrictive covenants.

(a) Public Use. The condemnee in Dunn argued that the taking of "Conservation Area" property constitutes a "private use," there being no public purpose in rehabilitating Conservation Areas which, by definition, are not blighted.

(i) Conservation Area Qualifies as "Substandard." In rejecting this point the Court relied on Article VI, §21 of the Missouri Constitution, which authorizes the taking of property for "the . . . redevelopment and rehabilitation of blighted, substandard or insanitary areas" (emphasis added). A "Conservation Area," as defined in

§99.805(2), probably qualifies as either a "substandard or insanitary" area within the intent of Article VI, §21 (see definition, *supra*), but the Court fixed on "substandard."

(ii) Rehabilitation of a Conservation Area Is a Public Purpose. Redevelopment of a blighted area is unquestionably a public purpose. In holding that the redevelopment of a (substandard) Conservation Area is a public purpose under Article VI, §21 Missouri Constitution, the *Dunn* Court followed the lead of Illinois, Florida, Colorado and Minnesota. The achievement of the public purpose of urban redevelopment is "no less true when the purpose of the municipality is the prevention, rather than elimination, of blight which has not yet begun or which, though begun, has not yet reached its apex." *People ex rel. City of Canton v. Crouch*, 403 N.E.2d at 245. *See also Berman v. Parker*, 348 U.S. 26, 32-36, 75 S.Ct. 98, 99 L. Ed. 27 (Colo. 1954); *State of Florida v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 889-91 (Fla. 1980); *Tracy v. City of Boulder*, 635 P.2d 907, 909-10 (Colo. App. 1981); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 388 (Minn. 1980).

(b) City Involvement in Prohibited Commercial Venture. Defendant argued that the use of payments in lieu of taxes to retire the bonds or pay redevelopment project costs is not allowable under Missouri's "business purpose doctrine" established by the courts in *State ex rel. Kansas City v. Orear*, 277 Mo. 303, 210 S.W. 392 (Mo. banc 1919), and *Kennedy v. City of Nevada*, 222 Mo. App. 459, 281 S.W. 56 (1926), which prohibits a city from using taxes to conduct a business. This argument rested on the assumption that payments in lieu of taxes are "taxes" and failed for the same reason since the Court held that PILOTs are not taxes. See *Wolper v. City Council of City of Charleston*, 287 S.C. 209, 336 S.E.2d 871 (1985).

(c) Sunset. §99.810(3) R.S.Mo. had provided since 1990 that no property within a redevelopment project area shall be acquired by eminent domain later than five years from the adoption of the ordinance approving the redevelopment plan under which the project is authorized. In 1993, the General Assembly liberalized this section to five years from the adoption of the project. Thus, in a multi-phased plan including a number of projects, each project may have separate triggers for the five year eminent domain period. "Acquired" means obtaining title by paying the condemnation award into court. It is not sufficient to simply file the condemnation action with the five year period. *State ex. Rel. Broadway-Washington Assoc. v. Mannese*, 186 S.W.3d 272 (Mo. Banc. 2006).

(14) Delegation. The Dunn Court held that the power to disburse "payments in lieu of taxes" to pay redevelopment costs is lawfully delegated to the sponsoring municipality. Therefore, the plan does not violate the separation of powers clause, Article II, §1, Missouri Constitution, which vests the legislative power in the General Assembly.

The legislature may enact the basic purpose or rule, leaving matters of detail in administering a law to a board or executive, even though an exercise of discretion by the latter may be involved. *State ex rel. Wagner v. St. Louis County Port Auth.*, 604 S.W.2d 592, 598 (Mo. banc 1980). Missouri follows the modern tendency toward greater liberality in permitting grants of discretion. *Id*. at 598. Under this reasoning, the General Assembly made the initial policy decision permitting cities to adopt tax increment allocation financing in connection with a redevelopment project and the powers given to

the city and the Commission simply enable the execution of that policy. *Wagner*, *Id*. at 598.

The Missouri Supreme Court has held that similar standards were adequate where the legislature could not have prescribed all the details incident to establishing and executing the plan. *See Wagner*, *Id*. at 600. The powers granted to the municipality under the Act, while necessarily stated in general terms are nothing new under Missouri law and are connected with and restricted to the stated legislative goal of relieving urban blight. *Id.* at 250; *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 654 (Mo. banc 1965), *dismissed.*

§99.820(11) of the Act enumerates the permissible scope of the city's delegation of powers to the Commission. Under the list of delegated powers, the Commission merely carries out the details of the Plan. The Commission has no power to increase or decrease the amount of abatement provided by the Act.

> Mo. Const. Art. X, §2 states: 'The power to tax shall not be surrendered, suspended or contracted away, except as authorized by this constitution.' In its penultimate point, Dunn argues that the City 'has attempted to delegate to the [Commission] indirectly a power of taxation that the City itself does not possess, in violation of [Article X, §2].' In essence, *Dunn's* argument is that the City is permitted to divert tax revenues needed by other taxing authorities to its own uses. The force of the argument obviously depends on PILOTs being taxes. We conclude otherwise, *supra*. The point is denied.

Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc., 781 S.W.2d 70, 79 (Mo. banc 1989).

(15) Reporting.

(a) By TIF Commission. ***The reporting*** requirements of §99.885 were beefed up in 1997 with the addition of a requirement to report on economic activity taxes, generated by each project and all amounts disbursed to municipalities, giving the Department of Economic Development more control over the process. By the last day of February each year, each TIF Commission must report to the Director of the Department of Economic Development the name, address, phone number and primary activity of any business which relocates to a TIF district. Furthermore, copies of all hearing notices required by §99.825 must be submitted to the Director by the Commission not less than 45 days prior to the hearing. §99.825.4 R.S.Mo. In addition, the municipality must file detailed annual reports regarding its TIF activities with the Director of DED. In 2009 the legislature continued its annual assault on TIF by providing that failure of a municipality to file the report on time would prohibit that city from initiating any new TIF plan for 5 years. §99.965.8 R.S.Mo.

(b) By Director. The Director is required to report to the Speaker and President pro tempore no later than February 1 each year, summarizing all information received by the Director under §99.865 - §99.865.4. The Director shall compile and

report the same to the Governor, the Speaker of the House, and the President pro tempore of the Senate on the last day of April each year. §99.810(7) R.S.Mo.

(c) Status Hearings. §99.865(2) provides that five years after the establishment of a redevelopment plan and every five years thereafter, the governing body shall hold a public hearing on the plan. It is unclear whether this requirement applies to each individual plan or whether one hearing every five years will suffice for all the plans. It should be amended to make this clear.

(16) Fishnet Plans. Left unresolved by the *Dunn* opinion is the validity of "fishnet" plans in which the municipality declares an area (usually large) to be a tax increment financing district and outlines public infrastructure improvements that will be funded through the increment, but sets forth no plan of development which will generate higher assessed values and resulting payments in lieu of taxes or EATs. Rather, the city uses the improved infrastructure as "bait" hoping to lure new development into the tax increment financing district and throwing out a net to capture what increased revenues may result from such new development. Such plans may face difficulties under the current Act with respect to evidence of commitments to finance (§99.810 R.S.Mo.), inclusion of parcels not specifically benefited (§99.820(1) R.S.Mo.), public purpose under the tax relief clause (Article X, §7, Mo. Constitution), estimated dates of completion (§99.810[3] R.S.Mo.), and the chicken-egg problem of financing since, no increment will be generated and, thus, no infrastructure built until after new development occurs (§99.856 R.S.Mo.). This last problem can be obviated by not issuing bonds but rather, by building the infrastructure (say, with funds from a developer) and seeking reimbursement when the increment becomes available. The question is whether the "but for" test can be satisfied by generally stating development will not occur without the plan or whether the specific development must be known at the time of passage of the plan and the specific developer must say the specific development would not occur. Section 99.845.1 states in pertinent part:

> A municipality, *either at the time a redevelopment project is approved or, in the event a municipality has undertaken acts establishing a redevelopment plan and redevelopment project and has designated a redevelopment area* after the passage and approval of Sections 99.800 to 99.865…which acts are in conformance with the procedures of Sections 99.800 to 99.865, may adopt tax increment allocation financing by passing an ordinance…. (Emphasis added by court).

The city of Shelbina, adopted an ordinance purporting to designate a portion of the City as a redevelopment area, approving the plan, and making related findings. Ordinance No. 1095 was also adopted purporting to approve the redevelopment plan and area, a redevelopment project area, adopt a TIF within this area, and set up the City's special allocation fund. The County refused to remit the TIF revenues and the City brought a mandamus and declaratory judgment and damages action against the County. On appeal, the Eastern District stated:

> The redevelopment plan which was presented at the TIF Commission's public hearing reveals the City lacked any specific redevelopment project prior to enacting the ordinances. The redevelopment plan is replete with references to aspirational goals and conceptual frameworks that may be implemented in an effort to redevelop the City, but no specific projects are discussed, nor is an identifiable financial structure set forth.
> ****
> It is clear from the excerpts cited that the City did not have any specific redevelopment projects approved nor had undertaken acts to establish a redevelopment project as required under Section 99.845.1. Since Section 99.845.1 contemplated the adoption of a redevelopment project prior to enactment of TIF ordinances, and in light of the absence of a redevelopment project at that time, we deem Ordinances No. 1094 and No. 1095 void ab initio. Therefore, we need not address the County's lengthy list of other alleged deficiencies. Moreover, we need not discuss the City's second point with respect to the severability clause contained in the ordinances.

The City of Shelbina v. Shelbina County, 245 S.W.3d 249 (Mo.App. E.D. 2008).

(a) Evidence of Commitments to Finance. §99.810 R.S.Mo. requires that each Redevelopment Plan set forth evidence of commitments to finance the project costs. Typically, such commitments are in the form of a letter from the developer and/or a financial institution indicating that they will provide funds sufficient to pay for the redevelopment project. In a Fishnet TIF Plan the financing commitment is based only on the availability of estimated payments in lieu of taxes resulting from the increased value of property after redevelopment occurs. Rather than a commitment from a lender, the commitment is from the municipality and is contingent on an unspecified development occurring although no developer has been identified at the time of passage. Since by nature a Fishnet TIF Plan does not call for a specific redevelopment project, but relies on the general likelihood of development within the Project Area, there is no way of accurately determining in advance the amount of PILOTs that will be generated from the project. Consequently, there is a lack of certainty as to whether the redevelopment project will generate sufficient PILOTs to finance the proposed infrastructure. In short, a Fishnet TIF plan lacks a true commitment to finance the project other than the potential proceeds resulting from the project itself.

(b) Financing Mechanisms. A substantial problem exists in financing a Fishnet Plan. Under the Act, there are two methods to pay for project costs: (1) pay-as-you-go; or (2) bonds.

(i) Pay-As-You-Go. In a Fishnet Plan there are no funds initially available to pay for the infrastructure improvements. Thus, the infrastructure cannot be improved until *after* development occurs in the Project Area. On the other hand, under the "but for" test, the municipality must find development will not occur until *after* the infrastructure. The City of Belton, Missouri met this difficulty by issuing general obligations to finance infrastructure is built, to be reimbursed by TIF revenues in 1995.

(ii) Issuance of TIF Bonds. With no certainty that development will occur it will be difficult to market the bonds to any one other than the developer (who has not been identified).

(c) "But-For Test." §99.810(1) R.S.Mo. 1994 requires a finding by the municipality that the redevelopment area is not likely to be developed without the adoption of a redevelopment plan.The Act and the tax abatement granted pursuant thereto, are generally a means of encouraging development in areas in which development would not otherwise occur. A Fishnet Plan is premised on the likelihood of new development in the project area. Concerning large plan areas, which fishnet plans usually encompass, it might be difficult to argue that redevelopment would not otherwise occur in the project area given its size.

On the other hand, one can argue that development would not occur absent a commitment of future infrastructure improvements in the area.Thus, if the Council determines that infrastructure improvements are necessary for development to occur in the Area, the "But-For Test" could be satisfied.

(d) Limitation of Plan to Properties Benefited. §99.820(1) R.S.Mo. requires that the ordinance approving the TIF district must include only those parcels that are substantially benefited by the redevelopment project improvements. A Fishnet Plan encompassing large areas runs a greater risk of including parcels that the project does not specifically benefit. However, it can be argued that infrastructure improvements are beneficial to the city as a whole and, consequently, benefit all properties within the Project Area. But is this a "substantial" benefit?

(e) The Purpose of the Plan Must be for Elimination or Prevention of Obsolescence, Decadence or Blight. The authority for the tax relief involved in TIF rests in the Missouri Constitution, Article X, §7, which provides in relevant part:

> For the purpose of encouraging . . . reconstruction, redevelopment, and rehabilitation of *obsolete*, *decadent* or blighted areas, the general assembly by general law may provide for such partial relief from taxation of the lands devoted to any such purpose and of the improvements thereon by such method or methods, for such period or periods of time, not exceeding twenty-five (25) years in any instance, and upon such terms, conditions, and restrictions as it may prescribe . . ..

Article VI, §21 of the Missouri Constitution authorizes the taking of property for "the . . . redevelopment and rehabilitation of blighted, *substandard* or *insanitary* areas." Thus, a TIF Plan and the tax abatement and power of eminent domain granted pursuant thereto must have as their purpose the elimination of blighted, substandard or insanitary areas and encouragement of the redevelopment of blighted, obsolete or decadent areas. It is questionable whether a Fishnet Plan has as its purpose the elimination of blighted, substandard or insanitary areas, to the extent is appears to be simply a mechanism to capture revenue for a certain purpose, namely infrastructure improvement. However, the city could argue that by proposing a plan to provide infrastructure, redevelopment is encouraged, thus eliminating blight.

(f) Estimated Date of Completion of the Redevelopment Project. §99.810(3) R.S.Mo. 1994 requires the City Council to make a finding regarding the estimated dates for completion of the project. In light of the fact that a Fishnet TIF Plan has no contract with a developer the municipality would have difficulty determining when the infrastructure improvements could be completed. For example, if sufficient development in the project area does not occur within 25 years, there may be insufficient PILOTs to pay for the infrastructure improvement.

(g) Definition of "Project." In a Fishnet Plan, the "project" is the infrastructure. But §99.805(7) defines PILOTs as revenues which are to be spent for a private use. This would be a problem with most TIF plans because the revenues are usually spent on public infrastructure.

(h) Political Considerations. Fishnet Plans might draw more opposition from school and other taxing districts because of their size and the uncertainty as to their duration. For example, in 2006 the City of Lake Lotawana approved a TIF plan which included the entire city, proposed no specific revenue-generating development and identified as a reimbursable cost, the improvement of city streets.

(17) Initiative and Referendum. The voters of a city have no power to enact an ordinance which would require a public vote on all tax increment financing plans, as such an ordinance would conflict with a state statute. *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos*, 35 S.W.3d 457 (Mo.App. E.D. 2001)

(18) National Labor Relations Act. In larger cities, it is common practice to require from the selected developer of a TIF plan, affirmative action and prevailing wage agreements. At least one court has held that an ordinance imposing a labor neutrality agreement is not pre-empted by the National Labor Relations Act. In *Hotel Employees and Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Circuit 2004), after a TIF plan was approved, the city of Pittsburgh passed an ordinance requiring contractors and employers of employees hired to staff hospitality operations to be signatory to collective bargaining agreements where the city of Pittsburgh has a financial or proprietary interest. When the developer of the hotel balked at entering into a labor agreement, the city passed a resolution dissolving the TIF district. One week after the passage of the resolution, the developer signed a labor and neutrality agreement with the plaintiff union. Following the agreement, the Mayor vetoed the city council's repeal of the TIF district and the developer received funding. When the union attempted to be recognized, the developer claimed the neutrality agreement was void. Specifically, the developer argued that the ordinance was pre-empted by Section 7 of the National Labor Relations Act. The district court did not address the federal pre-emption question since the city was not a party to the litigation. The Court of Appeals held that because the ordinance was a specifically tailored response to a financial interest of the city, the ordinance was therefore exempt from pre-emption review. The court affirmed the judgment of the district court which had ruled in favor of the union, disregarding the developer's claim that the contract was entered into under economic duress.

§16.5 —Missouri Downtown Economic Stimulus Act (§99.915 *et seq*.)

In 2003 the Missouri legislature passed the Missouri Downtown Economic Stimulus Act. Any city, village, incorporated town (prior to January 1, 2001) or county may avail itself of the provisions of the Act. The first project to be approved for funding by MDFB was the KC Live downtown project in December 2004. To qualify for MODESA, the area must be a blighted area or a conservation area. It must be located in the central business district. The median income in the area must be less than $62,000 per year and 50% or more of the buildings must be at least 35 years old. The area must have suffered from declining taxes or population if the 50% test cannot be met. It cannot exceed 10% of the land area of the city nor be located within a 100 year floodplain. Development projects must be a "major initiative." Section 99.918 (14) R.S.Mo.

MODESA allows the capture of up to 50% state income taxes generated by the plan, [with certain exceptions] plus 50% of the incremental increase in the state sales tax revenue in the development area. The baseline for purposes of calculating the increment is more lenient under MODESA than under traditional TIF where an out-of-state national headquarters company is locating in the plan area.

The project must be completed and the obligations paid within 25 years under MODESA, as opposed to the normal 23 years under TIF. MODESA allows 10 years to acquire property by eminent domain after the plan is approved, as opposed to the normal five years under TIF. The county may withhold its sales tax from capture under MODESA

MODESA requires a much more detailed development plan than tax increment financing, including, *inter alia*, information about the businesses to be located in the project, the employment generated, the wages generated, information about other operations of the company elsewhere in the state, community and economic benefits resulting from the project, a list of all development subsidies that any business in the project has previously received, a list of competitors of the businesses benefiting from the development plan in the county containing the development area and each contiguous county, a market study, and a certification by the chief officer of the applicant as to the accuracy of the plan. These same items are required for Urban Core TIF.

Each municipality may create a "Downtown Economic Stimulus

Authority." A special countywide authority is required for St. Louis County, and all cities located therein. A board of commissioners with between 5 and 14 commissioners shall govern each authority. One commissioner must be a member of a local community development corporation, if one exists, and one commissioner must be an African American business owner in the municipality, if one exists. One of the initial commissioners must be appointed by the school districts located within the development area. The mayor or CEO of the municipality appoints the commissioners (except for the school districts commissioner). In addition, the other taxing districts located within the development area must appoint a nonvoting advisor. §99.924 R.S.Mo. The authority shall constitute a public body corporate and politic, exercising public and essential governmental functions. §99.933.1.

Other than these qualifications, MODESA substantially mirrors tax increment financing.

(1) Qualifying Jurisdiction. Any local government wishing to use the Act must create a Downtown Economic Stimulus Authority.

(2) Qualifying Area. A development area must be:

- *Classified as a blighted area or conservation area. MODESA uses the same definition of blight as the Tax Increment Financing Act;*
- *Located in a Central Business District which is defined as the area at or near the historic core that is locally known as the "downtown" of a municipality, with a median income of $62,000.00 or less;*
- *Generally have suffered from declining population or property taxes for the 20-year period immediately preceding the year of designation or include structures 50% or more of which have an age of 35 years or more;*
- *Contiguous except that a development area may include up to three non-contiguous area selected for development projects if each meets all of the other criteria;*
- *Not more than 10% of the entire area of the municipality; and*
- *Free of any property located within a 100-year floodplain unless it is protected by a structure certified by the Corp of Engineers. However, in 2005, via HB 431, the legislature provided that "this subdivision" shall not apply to property within the one hundred year flood plain if the buildings on the property have been or will be flood proofed in accordance with the Federal Emergency Management Agency's standards for flood proofing and the property is located in a home rule city with more than one hundred fifty-one thousand five hundred but fewer than one hundred fifty-*

> *one thousand six hundred inhabitants [Springfield]. Only those buildings certified as being flood proofed in accordance with the Federal Emergency Management Agency's standards for flood proofing by the authority shall be eligible for the state sales tax increment and the state income tax increment."§99.918(g) R.S.Mo.*

(3) Allowable Costs. MODESA allowable development project costs are far more restrictive than TIF, and include those which "are expended upon public property, buildings, or rights of way for public purposes to provide infrastructure to support a development project". The Act prohibits the use of MODESA funds for a sports facility which seats over 10,000 persons. §99.918(11) R.S.Mo.

(4) Revenues Captured. The baseline year for measuring the net new revenues to be captured by a plan is established by the date of the adoption of an ordinance approving the development project. MODESA allows the capture of up to 50% of the state income tax generated within the development project area with certain exceptions. It also allows the capture of up to ½ of the incremental increase in the state sales tax revenue in the development area. In no event shall the incremental increase include any amounts attributable to retail sales unless the Missouri Development Finance Board and the Department of Economic Development are satisfied and such entities have made a finding that a substantial portion of all but a diminimus portion of the state sales tax increment attributable to retail sales is from a new source which did not exist in the state during the baseline year. The net new revenues from real property taxes may be captured for twenty-five (25) years with certain exclusions. 50% of net new economic activity taxes may be captured for twenty-five (25) years consisting. The governing body of any county may exclude the portion of any countywide sales tax from the economic activity taxes capture. §99.918(12) R.S.Mo.

(5) Qualifying Project. A project must qualify as a major initiative that promotes tourism, cultural activities, arts, entertainment, education, research, arenas, multi-purpose facilities, libraries and the like or promotes business location or expansion. A major initiative is measured on a sliding scale by dollar amount according to the population of the jurisdiction:

Population of Municipality	Estimated Project Cost	New Jobs Created
300,000 or more	$10,000,000	At least 100
100,000 to 299,999	$5,000,000	At least 50
50,001 to 99,999	$1,000,000	At least 10
50,000 or fewer	$500,000	At least 5

§99.918(14) R.S.Mo.

(6) Composition of Commission. The Downtown Stimulus Economic Authority consists of between five and fourteen commissioners. One commissioner must be a

member of the local community development corporation and one must be an African-American business owner in the municipality. One of the initial commissioners must be appointed by the school districts located in the development area. The Mayor or CEO of the municipality appoints the commissioners except for the school district commissioner. The other taxing jurisdictions in the development area must appoint a non-voting advisor. §99.924 R.S.Mo.

(7) Disadvantaged Assistance. Projects in Kansas City, St. Louis and St. Louis County must approve a disadvantaged business enterprise program. These same jurisdictions may by ordinance establish a revolving fund for the purpose of providing funds to community development corporations to be known as the "Community Development Corporation Revolving Fund". §99.939 R.S.Mo.

(8) Plan. MODESA requires a much more detailed development plan than tax increment financing, including, *inter alia*, information about the businesses to be located in the project, the employment generated, the wages generated, information about other operations of the company elsewhere in the state, community and economic benefits resulting from the project, a list of all development subsidies that any business in the project has previously received, a list of competitors of the businesses benefiting from the development plan in the county containing the development area and each contiguous county, a market study, and a certification by the chief officer of the applicant as to the accuracy of the plan. These same items are required for Urban Core TIF. A MODESA Development Plan may be adopted only upon findings that:

- The development area is a blighted area or a conservation area.
- A but for test has been satisfied.
- The plan conforms to the City's Comprehensive Plan.
- The project must be completed and obligations paid within twenty-five (25) years from the date of the ordinance and no project may be passed more than fifteen (15) years after the plan was approved and no land may be acquired for the project by eminent domain more than ten (10) years from the plan adoption. It should be noted that the MODESA Commission has no eminent domain authority and must rely upon the City or an agency such as the Planned Industrial Expansion Authority.
- A relocating tenant plan has been prepared.
- A cost study analysis showing the economic and fiscal impact on the city and school districts affected has been prepared.
- The development plan does not include any gambling establishment.
- An economic feasibility analysis including a Proforma Financial Statement indicating the return on investment has been prepared.

§99.942(3) R.S.Mo.

(9) Powers. A municipality may authorize a MODESA Authority to exercise all of the powers of a transportation development district under Chapter 238 R.S.Mo. The

MODESA authority shall not have the power of eminent domain. Obligations may be issued by the Authority or the municipality for project costs. §99.948 R.S.Mo.

(10) Procedure. A MODESA authority must hold public hearings upon published notice prior to approving development areas, plans or projects. Prior to the conclusion of the public hearing, changes may be made in the plan if written notice is given at the public hearing. A municipality shall submit an application for state supplemental MODESA financing to the DED which will review the application and make a recommendation to the Missouri Development Finance Board. The application shall include inter alia an affidavit signed by the developer that the development area would not reasonably anticipated to be developed without MODESA. §99.951 R.S.Mo.

(11) Downtown Economic Stimulus Authority. (§§99.919 to 99.927). Each municipality may create a "Downtown Economic Stimulus Authority." A special countywide authority is required for St. Louis County, and all cities located therein. A board of commissioners with between 5 and 14 commissioners shall govern each authority. One commissioner must be a member of a local community development corporation, if one exists, and one commissioner must be an African American business owner in the municipality, if one exists. One of the initial commissioners must be appointed by the school districts located within the development area. The mayor or CEO of the municipality appoints the commissioners (except for the school districts commissioner). In addition, the other taxing districts located within the development area must appoint a nonvoting advisor. §99.924 R.S.Mo.

TIF makes no similar Commission requirements regarding community development corporations or African American business owners.

The mayor shall designate the first chair of the authority (one year term), and the mayor or CEO of the municipality shall serve as the co-chair. Commissioners shall appoint chairs thereafter. The authority shall constitute a public body corporate and politic, exercising public and essential governmental functions. §99.933.1.

The authority shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of MODESA, *excluding* the powers of eminent domain. §99.933.2(20).

However, despite this express exclusion, §99.942.3(4) states that "no property for a development project shall be acquired by eminent domain later than ten years from the adoption of the ordinance approving such development plan." One way to explain this apparent contradiction is that while a MODESA authority may not condemn ground, other bodies, *e.g.,* a municipality, may condemn ground within a development area and then transfer it to the developer. However, the municipality will need to find its authority to condemn outside of MODESA.

Under TIF, a municipality may acquire real property for use in the development project through the exercise of eminent domain powers. §99.820.

(12) Minority Business Plan. Kansas City, St. Louis, and St. Louis County must approve a disadvantaged business enterprise program to be implemented by the authority. The program shall require all businesses, vendors, and contractors working on projects

undertaken by the authority to ensure enforcement of an equal opportunity employment plan and a minority and women-owned business program that is based on population and availability that contains specific worker ethnicity goals for each such business, vendor, and contractor, in accordance with applicable state and federal laws, rules, regulations, and orders. §99.933.4.
TIF has no similar requirement.

(13) Community Development Corporation ("CDC") Revolving Fund. Kansas City, St. Louis, and St. Louis County "may by ordinance establish a fund for the purpose of providing funds to community development corporations in such city for comprehensive programs within such city to stimulate economic development, housing, and other public benefits leading to the development of economically sustainable neighborhoods or communities, such fund to be known as the 'Community Development Corporation Revolving Fund.'" §99.939.1.

Starting 1/1/04, up to 5% of the state sales tax increment portion of other net new revenues generated by development projects certified for state MODESA financing, but not being used for state MODESA financing, may be available for appropriation by the general assembly from the state supplemental downtown development fund, to the general revenue fund, for the purpose of providing grants to cities or counties. Kansas City, St. Louis, and St. Louis County may, upon application to the DED, receive a grant for deposit into the city or county CDC revolving fund for the purposes of funding a CDC revolving fund program. Any city or county otherwise eligible shall not be denied participation in the grant program due to a lack of projects certified for state MODESA financing, but such grants shall be limited to incremental revenues generated from certified projects in Kansas City, St. Louis, and St. Louis County. At no time shall the sum of the grants exceed one million five hundred thousand dollars annually. §99.939.3.

From money granted to Kansas City, St. Louis, and St. Louis County for deposit in the CDC revolving fund, the city or county, through the CDC revolving fund board, shall provide grants and forgivable loans to CDCs in such municipality for community economic development activities implemented by such corporations. The CDC board shall give special funding consideration to collaborations on community development projects between developers organized for-profit and nonprofit developers. All expenses for such projects shall be paid for out of the CDC revolving fund. §99.939.4.

For Kansas City, St. Louis, St. Louis County, and Boone County, the MODESA authority shall be required in connection with the designation of the development area, development projects, and development project areas, to work with local community development corporations, as defined in subsection 3 of §135.400 R.S.Mo., with a goal that over the term of the development plan 5% of the funds generated pursuant to §99.957 (PILOTs and EATs) will be expended in connection with such projects through the CDC revolving fund. §99.939 R.S.Mo.

TIF has no similar provisions.

(14) Transportation Development District. A municipality may authorize a MODESA authority to exercise all powers and perform all functions of a transportation development district pursuant to §§238.200 to 238.275, R.S.Mo., within a development

area. §99.948.2. The statute does not elaborate any further on this edict. Because a TDD has the power of eminent domain, and because this Section states that a municipality may authorize a MODESA authority to have all the powers of a TDD, this Section further confuses the issue as to whether a MODESA authority has the power of eminent domain. TIF has no similar TDD provision.

(15) MODESA Authority Public Hearings. A MODESA authority must hold public hearings prior to approving development areas, plans, or projects. §99.948.3 to the conclusion of the public hearing regarding a development plan, changes may be made in the development plan if written notice of such changes is available at the public hearing. §99.951.1 TIF requires 7 days prior written notice to taxing districts for such pre-ordinance changes.

Notice of the hearing must be given in two minority newspapers, if such are published in the municipality, of which one shall be published in the Spanish language. §99.951.2. TIF has no similar provision.

Notices of public hearing must include, in addition to other standard TIF items, an estimate of other net new revenues (the amount of state sales tax increment or state income tax increment or the combination of the amount of each such increment as determined under §99.945). §99.951.3

(16) Development Financing. Obligations may be issued by the authority or the municipality, but not the state, to pay or reimburse project costs. §99.954.1. State supplemental MODESA financing, however, may not be used to retire or refinance debt on a previously publicly financed redevelopment project without express approval from DED and MDFB. §99.954.7.

(a) PILOTs. For 25 years (TIF is 23 years) following approval by ordinance of development area, the ad valorem taxes on the real property and PILOTs if any shall be divided as follows:

- Taxes attributable to initial equalized assessed value paid to taxing districts in the manner provided by law in the absence of MODESA financing. §99.957.3(1). TIF has the same application.
- PILOTs attributable to the increase in the current equalized assessed valuation of real property in the development project area over and above the initial equalized assessed value of real property in such development project area shall be paid to the collecting officer of the municipality who shall deposit such PILOTs into a separate segregated account for PILOTs within a special allocation fund. §99.957.3(2). Again, this is similar to TIF.
- The following are not captured in PILOTs: the blind pension fund tax (same as TIF), the merchants' and manufacturers' inventory replacement tax (same as TIF), the desegregation sales tax (not in TIF), or the conservation taxes (not in TIF).

(b) EATs. Under MODESA, in each of the 25 calendar years following the adoption of development financing, 50% of the economic activity taxes from such

development project area shall be deposited in a separate segregated account for EATs within the special allocation fund. TIF provides for the same percentage, but only offers a 23-year capture period.

Additionally, under MODESA, the governing body of any county may exclude any portion of any county-wide sales tax of such county from the EATs of a project. TIF offers no similar exclusion to counties.

(17) State Supplemental Downtown Development Financing. A municipality "shall" submit an application to for state supplemental MODESA financing to the DED. The DED will review the application and make a recommendation regarding such to the MDFB. The application shall include, inter alia, an affidavit signed by the developer the development area would not be reasonably anticipated to be developed without the appropriation of the other net new revenues. §99.960.1(5).

State MODESA financing may include up to 50% of the state sales tax increment and state income tax increment. TIF limits State TIF up to 50% of either the state sales tax revenue increment or the state income tax revenue increment--the applicant must elect which.

Under MODESA, at no time shall the annual amount of other net new revenues (state sales tax increment and state income tax increment) approved for state supplemental MODESA financing exceed one hundred fifty million dollars. TIF limits the aggregate annual appropriation cap of State TIF funds to fifteen million dollars.

State MODESA financing is available for 15 years, or up to 25 years with approval from DED and the commissioner of the office of administration. TIF allows for 15-23 years of state supplemental TIF with approval from the DED and the commissioner of the office of administration.

A development project approved for state supplemental MODESA financing may not thereafter elect to receive TIF and continue to receive state supplemental MODESA financing.

The MDFB shall consider "parity based on population and geography of the state among the regions of the state in making determinations on applications" for state supplemental MODESA financing. §99.960.11. Accordingly, a party may be less likely to receive MODESA funding if such project is based in a part of the state which has already received ample MODESA funding. TIF has no similar parity provision.

No new applications for MODESA funding shall be approved after January 1, 2013.§99.975. TIF has no similar sunset provision.

(18) Development Plan. MODESA requires much more information in a development plan than TIF. For example, in addition to the TIF standard items (*e.g.*, estimated development project costs, anticipated sources of funds to pay such development project costs, evidence of the commitments to finance such development project costs, etc.), MODESA also requires, *inter alia*: (1) the three-digit North American Industry Classification System number or numbers characterizing the development project; (2) the total number of individuals employed in the development area, categorized by full-time, part-time, and temporary positions; (3) the total number of full-time equivalent positions in the development area; (4) the current gross wages, state

income tax withholdings, and federal income tax withholdings for individuals employed in the development area; (5) the total number of individuals employed in this state by the corporate parent of any business benefiting from public expenditures in the development area, and all subsidiaries thereof, as of December thirty-first of the prior fiscal year, categorized by full-time, part-time, and temporary positions; (6) the number of new jobs to be created by any business benefiting from public expenditures in the development area, categorized by full-time, part-time, and temporary positions; (7) the average hourly wage to be paid to all current and new employees at the project site, categorized by full-time, part-time, and temporary positions; (8) for project sites located in a metropolitan statistical area, the average hourly wage paid to nonmanagerial employees in this state for the industries involved at the project; (9) a list of other community and economic benefits to result from the project; (10) a list of all development subsidies that any business benefiting from public expenditures in the development area has previously received for the project, and the name of any other granting body from which such subsidies are sought; (11) a list of all other public investments made or to be made by this state or units of local government to support infrastructure or other needs generated by the project for which the funding pursuant to this act is being sought; (12) a statement as to whether the development project may reduce employment at any other site, within or without of the State, resulting from automation, merger, acquisition, corporate restructuring, relocation, or other business activity; (13) a list of businesses that are competing with the business benefiting from the development plan in the county containing the development area and in each contiguous county; (14) a market study for the development area; and (15) a certification by the chief officer of the applicant as to the accuracy of the development plan. §99.931.

These same items have been added to the application requirements for state supplemental TIF, but are not required for regular TIF.

A MODESA development plan may be adopted on findings that:

- The development area is a blighted area or a conservation area, and a study has been performed to confirm such.
- A "but-for test" similar to the one required under TIF has been satisfied.
- The development plan conforms to the city's comprehensive plan.
- Project must be completed and obligations paid within 25 years from ordinance (23 years under TIF), no project ordinance may be passed more then 15 years after the plan was approved (10 under TIF), and no land may be acquired for the project by eminent domain more than 10 years from plan adoption (5 years under TIF).
- A relocating tenant plan has been prepared.
- A cost-benefit analysis showing the economic and fiscal impact of the development plan on the municipality and school districts that are at least partially within the boundaries of the development area.
- The development plan does not include the initial development or redevelopment of any gambling establishment.
- An economic feasibility analysis including a pro forma financial statement indicating the return on investment that may be expected without public

assistance. §99.942.3.

(19) Summary.

	Standard TIF	**State TIF**	**MODESA**
Prohibits Funding for Sports Stadiums			x
Requirements for Development Area			
Blighted Area (or)	x		x
Conservation Area (or)	x		x
Economic Development Area (or)	x		
Enterprise Zone	x		
Blighted in Enterprise Zone, 50 yr Bldg, and Declining Taxes or Population, OR Historic Hotel (or)		x	
Blighted in Federal Empowerment Zone, 50 yr Bldg, and Declining Taxes or Population OR Historic Hotel (or)		x	
Blighted in Central Business District or Urban Core, 50 Yr Bldg, and Declining Taxes or Population, OR Historic hotel		x	
Federally approved levee district		x	
Located in Central Business District (Median Income less than $62,000, and 50% or more of Bldgs are 35 yrs old) (and)			x
Declining Taxes or Population, OR 50% or more Bldgs are 35 yrs old (and)			x
Self-Contained (3 noncontiguous exception) (and)			x
Can't exceed 10% of Municipality total area (and)			x
Not located within 100 year Flood Plain (and)			x
Development Projects Must be "Major Initiatives" §99.918(14)			x
Permissible Development Project Costs			
Privately owned structures (but not in economic development area)	x	x	x
Public property/improvements	x	x	x
Possible Baseline Years/Increment Calculations			
Calendar year prior to ordinance approving development	x	x	x
Calendar year following ordinance approving development			x
No reductions for baseline revenue for out-of-state national headquarters	x	x	

	Standard TIF	**State TIF**	**MODESA**
No reductions for baseline revenue for out-of-state companies relocating to MO			x
Miscellaneous			
Authority/Commission has power of eminent domain	x	x	
Authority/Commission has TDD powers			x
Municipality Must Establish Minority Business Plan			x
Community Development Corporation Revolving Fund			x
Development Plan Required Findings			
Blighted or Conservation Area	x	x	x
Satisfy But-For Test	x	x	x
Conforms to Comprehensive Plan	x	x	x
Project Complete and Obligations Paid Within:	23 years	23 years	25 years
No. of Years to Activate Project after Plan Approval	10 years	10 years	15 years
No. of Years to Acquire via Eminent Domain	5 years	5 years	10 years
Cost Benefit Analysis	x	x	x
No Gambling Establishment	x	x	x
Relocating Tenant Plan	x	x	x
Development Financing			
Years PILOTs Available to Fund Projects	23 years	NA	25 years
Taxes Attributable to Initial Equalized Assessed Value to Taxing Districts	x	NA	x
PILOTs equal to difference between IEAV and current EAV	x	NA	x
Blind Pension Fund Revenue Captured?	no	NA	no
Merchants' and Manufacturers' Replacement Tax Captured?	no	NA	no
Desegregation Tax Captured?	yes	NA	no
Conservation Taxes Captured?	yes	NA	no
Years EATs Available to Fund Projects	23 years	NA	25 years
EATs only available if state supplemental funding approved		NA	X
Financing available to refinance prior redevelopment debt?	Yes	Yes	w/ DED/MDFB appvl

	Standard TIF	**State TIF**	**MODESA**
May county withhold county sales tax from EATs	No	No	Yes
State Supplemental Financing			
Must Elect Either State Sales Tax Increment or State Income Tax Increment	NA	x	
May Elect Both State Sales Tax Increment and State Income Tax Increment	NA		x
Percentage of State Increment Captured	NA	up to 50%	up to 50%
Restricts use of retail sales tax revenue	NA	No	Yes
Cap on Total Annual State Sales and Income Tax Increment for Projects	NA	$15,000,000	$150,000,000
No. of Years State Financing Available to Project	NA	15-23	15-25
Prohibits Use of Program in Combination with TIF			x
Requires Approval/Recommendation of DED	NA	x	x
Requires Approval of Commissioner of MO Office of Administration	NA	x	
Requires Approval of MDFB	NA		x
Parity of population and geography considered	NA		x
Sunset Provision			
Last date funding applications may be approved	NA	NA	1/1/13

(20) Differences Between MODESA and TIF.

(a) Sports Stadium. MODESA provides that "Nothing in §§99.915 to 99.1060 shall be construed to provide any funding for the construction, maintenance, or operation of any sports stadium, arena, or related facility which has as its intended purpose use for spectator events which seats over ten thousand persons." §99.915.2. TIF makes no similar restriction.

(b) MODESA Definitions. (§99.918).

(i) Authority: The downtown economic stimulus authority created by a municipality.

(ii) Baseline year: The calendar year prior to the adoption of an ordinance approving a development project. However, if EATs or state sales tax revenues, from businesses other than any out-of-state businesses locating in the development project area, decrease in the project area in the year following the year the ordinance was approved, the baseline year may, at the option of the municipality, be the year following the year of the adoption of the ordinance. MODESA also provides for a special baseline year for projects related to repairs caused by the Spring 2003 tornados. §99.916(25) R.S.Mo.

TIF does not use the phrase "baseline year", but does calculate EATs on current revenues less revenues collected in the calendar year prior to the project-approving ordinance. §99.845.2. To calculate the supplemental state sales tax increment, TIF reduces new revenues by revenues generated in the "base year", but then fails to define the term. §§99.845.8 and 99.845.10. To calculate the state supplemental state income tax increment, TIF examines the withholdings of "new employees who fill new jobs directly created by the tax increment financing project." §99.845.8(2). Though TIF does not define new employees or new jobs, the Department of Economic Development ("DED") calculates the income tax increment by reducing the new withholdings by withholdings from the prior calendar year. TIF makes no provision for an alternate baseline year following ordinance approval, and makes no special provision for tornado relief.

(iii) Blighted area: MODESA uses the same definition as the TIF Act. §99.918 R.S.Mo.

(iv) Central business district ("CBD"): MODESA defines the CBD as "the area at or near the historic core that is locally known as the 'downtown' of a municipality that has a median household income of sixty-two thousand dollars or less, according to the last decennial census. In addition, at least fifty percent of existing buildings in this area will have been built in excess of thirty-five years prior or vacant lots that had prior structures built in excess of thirty-five years prior to the adoption of the ordinance approving the redevelopment plan. . . ." A project is not eligible for MODESA funds if it is not in a CBD. §99.918(3) R.S.Mo.

Under TIF, a project may be eligible for real property tax increment and EATs even if it is not located in a CBD. However, state supplemental TIF "shall apply only to blighted areas located in enterprise zones, . . . blighted areas located in federal empowerment zones, or to blighted areas located in central business districts or urban core areas of cities which districts or urban core areas at the time of approval of the project by ordinance, provided that the enterprise zones, federal empowerment zones or blighted areas contained one or more buildings at least fifty years old; [and] Suffered from generally declining population or property taxes over the twenty-year period immediately preceding the area's designation as a project area by ordinance . . ." §99.845.9 R.S.Mo.

(v) Development area: MODESA requires that development areas: (1) be classified as a blighted area or a conservation area, (2) are located in the central business district (see above definition), (3) generally suffer from declining population or property taxes for the twenty-year period immediately preceding the area's designation as a development area or has structures in the area fifty percent or more of which have an age of thirty-five years or more, (4) is contiguous, except that a development area may include up to three noncontiguous areas selected for development projects if each noncontiguous area meets all the development area criteria, (5) don't exceed 10% of the entire area of the municipality, and (6) don't include any property located within the one hundred year flood plain unless such property is protected by a structure that is inspected and certified by the United States Army Corps of Engineers. §99.918(7).

- Standard TIF requires redevelopment areas to be a blighted area, conservation area, economic development area (a non-blighted, non-conversation area, but one that requires

redevelopment to discourage commerce from leaving the state, prevent increased unemployment, or preserve tax base), or within an enterprise zone.

- State supplemental TIF requirements for redevelopment areas were described above. §99.845.9. State supplemental TIF is also available to areas in a federally approved levee district.

(vi) Development project: MODESA requires projects to be "Major Initiatives" as defined below. §99.918(14) R.S.Mo. TIF has no similar requirement.

(vii) Development project costs: MODESA defines project costs as costs which are expended on public property, buildings, or rights-of-way for public purposes to provide infrastructure to support a development project." §99.918(11) R.S.Mo.

TIF defines project costs as "the sum total of all reasonable or necessary costs incurred or estimated to be incurred, and any such costs incidental to a redevelopment plan or redevelopment project, as applicable," including, *inter alia*, costs of rehabilitation, reconstruction, or repair or remodeling of existing buildings and fixtures, and costs of construction of public works or improvements. Projects in economic development areas may not use TIF for buildings.

(viii) Economic activity taxes: MODESA defines EATS as "the total additional revenue from taxes which are imposed by the municipality and other taxing districts, and which are generated by economic activities within each development project area, which are not related to the relocation of any out-of-state business into the development project area, which exceed the amount of such taxes generated by economic activities within such development project area in the baseline year . . ., but excluding personal property taxes, taxes imposed on sales or charges for sleeping rooms paid by transient guests of hotels and motels, licenses, fees, or special assessments." §99.918(12) R.S.Mo.

Except for the "out-of-state business" exception, TIF has substantively the same EATs definition: "the total additional revenue from taxes which are imposed by a municipality and other taxing districts, and which are generated by economic activities within a redevelopment area over the amount of such taxes generated by economic activities within such redevelopment area in the calendar year prior to the adoption of the ordinance designating such a redevelopment area, while tax increment financing remains in effect, but excluding personal property taxes, taxes imposed on sales or charges for sleeping rooms paid by transient guests of hotels and motels, licenses, fees or special assessments. . . ." §99.805(4) R.S.Mo.

(ix) Major initiative: A MODESA project must be a "major initiative." *See* §16.5(a), *supra*.

TIF has no comparable Major Initiative requirements.

(x) Municipality: MODESA defines municipality as any city, village, incorporated town, or any county of this state established on or prior to January 1, 2001. TIF limits municipality to cities, villages, incorporated towns or counties established prior to December 23, 1996 (only applies to projects approved after December 23, 1997).

(xi) New job: MODESA defines new job as any job defined as a new job pursuant to subdivision (10) of section 100.710 R.S.Mo. A "new job" under 100.710*10) is a job in a new or expanding eligible industry not including jobs of recalled workers, replacement jobs or jobs that formerly existed in the eligible industry in the state. It is unclear if MODESA intended to include the "eligible industry" standards of 100.710 in its requirements for "new jobs." If so, a party would then need to meet the eligible industry standards to qualify for MODESA supplemental state income increment.

An eligible industry is a business located within the state of Missouri which is engaged in interstate or intrastate commerce for the purpose of manufacturing, processing or assembling products, conducting research development, or providing services in interstate commerce, office industries, or agricultural processing, but excluding retail, health or professional services. 100.710(9). Further, an eligible industry must: (a) invest a minimum of fifteen million dollars, or ten million dollars for an office industry, in an economic development project; and (b) create a minimum of one hundred new jobs for eligible employees at the economic development project or a minimum of five hundred jobs if the economic development project is an office industry. *Id*. An office industry is a regional, national or international headquarters, a telecommunications operation, a computer operation, an insurance company, or a credit card billing and processing center. 100.710(11).

TIF calculates supplemental state income tax TIF on "new employees" in "new jobs," but fails to define either term.

(xii) State sales tax revenues: MODESA excludes the same taxes as TIF from the state sales tax revenues: sales taxes that are constitutionally dedicated, taxes deposited to the school district trust fund in accordance with 144.701, sales and use taxes on motor vehicles, trailers, boats and outboard motors and future sales taxes earmarked by law.

(xiii) State income tax increment: MODESA defines this as up to 50% of the estimate of the income tax due the state for salaries or wages paid to new employees in new jobs at a business located in the development project area and created by the development project. Section 99.919 states that for projects that result in the relocation of out-of-state businesses to the development area, this increment is based on the full amount of tax revenue generated by the out-of-state business without reduction due to revenues generated in the baseline year.

TIF provides the state supplemental TIF may be available in an amount equal to up to 50% of the new state revenues estimated for the businesses within the project area over and above the amount of such taxes reported by businesses within the project area prior to the approval of the redevelopment project by ordinance 99.845.4. Under TIF, the developer must elect either state income tax increment or state sales tax increment. MODESA permits the use of both increments. The portion of new state revenues relating to income tax withholding is the state income tax withheld on behalf of new employees by the employer at the business located within the project. The state income tax withholding shall be the municipality's estimate of the amount of state income tax withheld by the employer within the redevelopment area for new employees who fill new jobs directly created by the tax increment financing project. 99.845.8. While the TIF Act

defines the increment in terms of revenue generated by "new jobs," the DED has traditionally reduced this increment by income withholding revenue in the project area in the baseline year.

A recent amendment to the TIF Act provides an exception for this baseline year reduction to income tax increment for national headquarters which relocate from out of state into a Missouri redevelopment project area, stating: "the economic activity taxes and new state tax revenues [which includes income increment] shall not be based on a calculation of the incremental increase in taxes as compared to the base year or prior calendar year for such redevelopmentproject, rather the incremental increase shall be the amount of total taxes generated from the net new jobs brought in by the national headquarters from another state. In no event shall this subsection be construed to allow a redevelopment project to receive an appropriation in excess of up to fifty percent of the new state revenues." 99.845.14.

(xiv) Payment in lieu of taxes: MODESA and TIF use essentially the same PILOTs definition.

(xv) State sales tax increment: MODESA defines this increment as

> up to one-half of the incremental increase in the state sales tax revenue in the development project area. In no event shall the incremental increase include any amounts attributable to retail sales unless the Missouri development finance board [("MDFB")] and the [DED] are satisfied . . . , and such entities have made a finding that a substantial portion of all but a de minimus portion of the sales tax increment attributable to retail sales is from new sources which did not exist in the state during the baseline year. The incremental increase for an existing facility shall be the amount by which the state sales tax revenue generated at the facility exceeds the state sales tax revenue generated at the facility in the baseline year. The incremental increase in development project areas where the baseline year is the year following the year in which the development project is approved by the municipality pursuant to subdivision (2) of §99.918, shall be the state sales tax revenue generated by out-of-state businesses relocating into a development project area. The incremental increase for a Missouri facility which relocates to a development project area shall be the amount by which the state sales tax revenue of the facility exceeds the state sales tax revenue for the facility in the calendar year prior to relocation. §99.918(24) R.S.Mo.

MODESA excludes the same taxes as TIF from the state sales tax revenues; sales taxes that are constitutionally dedicated, taxes deposited to the school district fund in accordance with §144.701, sales and use taxes on motor vehicles, trailers, boats and outboard motors and future sales taxes earmarked by law.

Again, under §99.919, MODESA provides that in the case of an out-of-state business relocating to a development area, the sales tax increment will be based on the full amount of sales tax revenue generated by the out-of-state business without reduction due to revenues generated in the baseline year.

TIF calculates the supplemental state sales tax increment in the same fashion as state supplemental income tax increment (up to 50% of new state revenues), except that the sales tax increment is the "incremental increase in the general revenue portion of state sales tax revenues . . ., excluding sales taxes that are constitutionally dedicated, taxes deposited to the school district trust fund in accordance with §144.701 R.S.Mo., sales and use taxes on motor vehicles, trailers, boats and outboard motors and future sales taxes earmarked by law. The incremental increase in the general revenue portion of state sales tax revenues for an existing or relocated facility shall be the amount that current state sales tax revenue exceeds the state sales tax revenue in the base year." §99.845.8(1).

Again, TIF provides an exception to this rule for national headquarters which relocate from out of state into a Missouri redevelopment project area, stating: "the economic activity taxes and new state tax revenues [which includes sales tax increment] shall not be based on a calculation of the incremental increase in taxes as compared to the base year or prior calendar year for such redevelopment project, rather the incremental increase shall be the amount of total taxes generated from the net new jobs brought in by the national headquarters from another state. In no event shall this subsection be construed to allow a redevelopment project to receive an appropriation in excess of up to fifty percent of the new state revenues." §99.845.14.

TIF provides no restrictions on the use of retail sales tax revenue similar to those found in MODESA.

(21) Cap. Upon its initial enactment, the State cap limited the annual amount of other net new revenues (state income tax and sales tax approved for MODESA financing) to $108,000,000.00. §99.960.4 R.S.Mo. (reduced from $150,000,000 SB 343 [2005 reg session]).

§16.6 —Rural Economic Stimulus Act (§§99.1000 – 99.1060)

Under the Rural Economic Stimulus Act, any city or county may establish a Rural Economic Stimulus Authority. The Authority performs basically the same functions as a tax increment financing commission. Upon its recommendation, a municipality may designate areas, plans, and projects. Projects are limited to renewable fuel facilities and facilities producing goods derived from agricultural commodities and products. After a project is adopted, net new property taxes or "payments in lieu of taxes" plus 50% of economic activity taxes become available for project costs. Economic activity taxes are defined in §99.1000(9) R.S.Mo. as "total additional revenue from taxes which are imposed by the municipality and other taxing districts, and which are generated by economic activities within each development project area." Although the definition does not include state sales taxes, the act creates a state supplemental rural development fund into which the state can transfer sales and income taxes. A municipality may submit an application to the Missouri Agricultural on Business Development Authority created pursuant to §348.020 for approval of

> **the disbursement of project costs from the State Supplemental Rural Development Fund. The Authority shall make a determination regarding the application and forward it to the director of Department of Economic Development. On approval, by the director, disbursements may be made from the fund for project costs. §99.1045.3 R.S.Mo.**

Adopted in 2003, this Act allows any city or county to establish a Rural Economic Stimulus Authority. §99.1006 R.S.Mo. The authority performs basically the same functions as a tax increment financing commission. It shall constitute a public body, corporate and politic. §99.1018 R.S.Mo. A municipality which has created an authority may by ordinance, designate development areas, adopt the development plans, and development projects, designate a development project area for each development project adopted and adopt development financing for each such development project area. §99.1033.1 R.S.Mo.

(1) Projects. A development project is defined as "any development project within a development area which creates a renewable fuel production facility." §99.1000(6) R.S.Mo. In 2004 via Senate Bill 1155, the legislature added a definition of development facility as "a facility producing either a good derived from an agricultural commodity or using a process to produce a good derived from an agricultural product. §99.1000(5) R.S.Mo. The April 2005 edition of the Community Compass published by DED stated that to be eligible for MORESA, "upon completion, the project must generate at least thirty new jobs and have a total cost of at least $3,000,000". No statutory authority for that statement is cited. It is true that under MODESA, a development project by definition must be a project within a development area which constitutes a major initiative. § 99.918(9) R.S.Mo. However, under MORESA, the definition of "development project" makes no similar major initiative requirement. § 99.1000(7) R.S.Mo. The MODESA definitions are clear in that they only apply to MODESA, and not MORESA. § 99.918 R.S.Mo.

It is also stated that MORESA state financial incentives supplement local funds by contributing up to 50% of the state's general revenue sales tax increment or up to 50% of the state's general revenue sales tax increment or up to 50% of the state income tax increment, or a combination of both. While that standard is true for MODESA, § 99.918(23) and (24) R.S.Mo., we find no similar limitation in MORESA. MORESA defines other net new revenues as the amount of state sales tax increment or state income tax increment or the combination of the amount of each as determined under § 99.1045. § 99.1000(17) R.S.Mo. Then, in § 99.1000(21) and (22), the state sales tax and income tax increments are defined without the 50% limitation.

(2) Division of Revenues. After a municipality has adopted a development area, a development plan, and development project, it may adopt development financing for the development project area selected for any such development project. §99.1042.1 R.S.Mo.

Thereafter, as in tax increment financing, in each of the 25[2] calendar years following the adoption of an ordinance adopting development financing the net new ad valorem taxes shall be allocated to and paid to the collecting officer of the municipality for the payment of project costs. §99.1042.3 R.S.Mo. Also, in each of the 25 years following the adoption of the ordinance, 50% of the economic activity taxes "from such development project area" shall be allocated to the treasurer or other designated financial officer of the municipality for the payment of project costs. §99.1042.4 R.S.Mo.

(3) Application Process. A municipality shall submit an application to the Missouri Agricultural and Small Business Development Authority created pursuant to §348.020 R.S.Mo. for approval of the disbursement of the project costs of one or more development projects from the fund. §99.1045.1 R.S.Mo. The aggregate base line year amount of state sales tax revenue and state income tax withheld on behalf of existing employees reported by existing businesses within the development area shall be included in any application submitted to the Authority for disbursements from the Fund. The application shall also include an estimate of the state sales tax increment and state income tax increment within the development project area after redevelopment. §99.1045(3)(4) R.S.Mo. The Authority shall make a determination regarding the application for such disbursement and forward it to the Director of the Department of Economic Development. Upon the approval by the Director, a certificate of approval shall be issued by DED containing the terms and limitations of the disbursement. §99.1045.3 R.S.Mo.

(4) Caps. At no time shall the annual amount of other net new revenues approved for disbursements from the Fund exceed the amount set forth in §99.1045.4 R.S.Mo. Development projects shall be limited to receiving such disbursements for 15 years unless specific approval for a longer term is given by the Director of DED. In no case shall the duration exceed 25 years. §99.1045.5 R.S.Mo.

(5) Funds. The Act establishes within the state treasurer's office a special fund to be known as the "State Supplemental Rural Development Fund" to be administered by the Department of Economic Development. §99.1048. The Fund shall consist of, inter alia, the first $12,000,000 of other net new revenues generated annually by the development projects. §99.1048.1 R.S.Mo. Other net new revenues is defined as "the amount of state sales tax increment or state income tax increment or the combination of the amount of each such increment as determined under §99.1045." §99.1000(15) R.S.Mo.

§16.7 —Downtown Revitalization Preservation Program (§§99.1080-99.1092 R.S.Mo.) (Dream Initiative)

In 2005, via SB 210 and HB 58, the Legislature adopted the Downtown Revitalization Preservation Program. According to MDFB and DED, only 6 – 10 citites will be selected annually under this program.

[2] Note: Normal tax increment financing is restricted to 23 years of capture.

(1) Eligible Municipality. The Act applies to any city or county having fewer than 200,000 inhabitants. §99.1082(9) R.S.Mo.

(2) Major Initiative. A qualified city or county may undertake a major initiative which is defined as "a development project within a central business district which promotes tourism, cultural activities, arts, entertainment, education, research, arenas, multi-purpose facilities, libraries, ports, mNass transit, museums, economic development, or conventions for the municipality and where the capital investment within the redevelopment project area meets the following standards:

Investment	Size of Local Government
$5,000,000	Population of 100,000-199,999
$1,000,000	Population of 50,000-99,999
$500,000	Population of 10,000-49,999
$250,000	Population of 1-9,999

§99.1082(8) R.S.Mo.

(3) Redevelopment Plan. The plan must include, *inter alia*, a study analyzing the revenues that are being displaced as a result of the project. §99.1086.1(12) and an economic feasibility study including a pro forma financial statement indicating the return on investment that may be expected without public assistance. The financial statement shall detail any assumptions made including a pro forma statement analysis that demonstrates the amount of assistance required to bring the return into a range deemed attractive to private investors. That amount shall not exceed the estimated reimbursable project costs. §99.1086.1(13) R.S.Mo.

(4) Findings. The development plan may be adopted by a municipality in reliance upon findings that a reasonable person would believe. The findings are virtually identical to those in a standard tax increment financing plan. §99.1086.2 R.S.Mo.

(5) Notice and Hearing. Prior to the adoption of the ordinance designating a redevelopment area, adopting a redevelopment plan, or approving a redevelopment project, the municipality or "authority" shall hold a public hearing noticed per §99.1088.1 R.S.Mo. The contents, publication and mailing of the notice are virtually identical to the tax increment financing act §99.1088 R.S.Mo.

(6) Application to DED. A municipality shall submit an application to the Department of Economic Development for review and determination. The Department shall forward the application to the Commissioner of the Office of Administration for approval. §99.1090.1 R.S.Mo. The contents of the application are set forth in §99.1090.1 R.S.Mo. and include, (1) an estimate that 100% of the local sales tax increment deposited to the special allocation fund will be used to pay redevelopment project costs or obligations issued to finance redevelopment project costs; (2) identification of the existing businesses located within the redevelopment project area and the redevelopment

area; (3) the aggregate baseline year amount of sales tax revenues reported by existing businesses within the redevelopment project area; (4) an estimate of the state sales tax increment within the redevelopment project area after redevelopment; (5) an affidavit signed by the developer attesting that the redevelopment area has not been subject to growth and redevelopment through investment by private enterprises or would not reasonably be anticipated to develop or continue to be developed without the implementation of one or more redevelopment projects and the adoption of local and state redevelopment financing; (6) the amounts and types of other net new revenues sought by the applicant to be dispersed from the downtown revitalization preservation fund over the term of the redevelopment plan; (7) the methodologies and underlying assumptions used in determining the estimate of the state sales tax increment; and (8) any other information reasonably requested by the Department of Economic Development.

(7) Baseline Year. Once a redevelopment plan is adopted containing the elements required by the Act, (§99.1086.1 R.S.Mo.), a baseline year is established, which is usually the year prior to the year in which the ordinance is adopted by the municipality approving a redevelopment project. §99.1082(1).

(8) Costs. Redevelopment project costs receiving disbursements from the Downtown Revitalization Preservation Fund shall be limited to receiving such disbursements for twenty-five (25) years, or when redevelopment financing for a redevelopment project is terminated by a municipality. §99.1090.5 R.S.Mo.

(9) Mutually Exclusive With Tax Increment Financing. A redevelopment project approved for downtown revitalization preservation financing shall not thereafter elect to receive tax increment financing and continue to receive downtown revitalization financing. §99.1090.8 R.S.Mo.

(10) Downtown Revitalization Preservation Fund. The Act establishes a fund within the state treasury known as the "Downtown Revitalization Preservation Fund" to be administered by the Department of Economic Development. §99.1092.1 R.S.Mo. The Department of Revenue shall annually submit the first $15,000,000.00 of other net new revenues generated by the redevelopment projects to the treasurer for deposit in the Downtown Revitalization Preservation Fund. §99.1092.2 R.S.Mo. The Department of Economic Development shall annually disperse funds from the Fund in amounts determined under the certificates of approval for projects providing that the amounts of other net new revenues generated from a redevelopment area have been verified and all of the conditions of §§99.1080 to 99.1092 are met. If the revenues appropriated from the Downtown Revitalization Preservation Fund are not sufficient to equal the amounts determined to be dispersed under such certificates of approval, the Department of Economic Development shall disperse the revenues on a pro-rata basis to all such projects and other costs approved under §99.1090. §99.1092.3 R.S.Mo. In no event shall the amounts distributed to a project exceed the lesser of the amount of the certificates of approval for projects or the actual other net new revenues generated by the projects. §99.1092.4 R.S.Mo.

§16.8 —Distressed Land Assembly Act (§99.1205 R.S.Mo.) Originally enacted in 2007, this Act allows transferable tax credits for certain land acquisition costs, including the purchase prices, environmental assessments, closing costs, brokerage fees, reasonable demolition costs and reasonable maintenance costs to maintain a parcel for a period of 5 years after the acquisition of the eligible parcel. Tax credits may be granted for up to 50% of land acquisition costs and 100% of interest costs for up to 5 years. §99.1205.1.3 R.S.Mo. HB 191 passed in 2009 increased the amount of land assemblage tax credits which can be issued annually from $10 million to $20 million. §99.1205.7 R.S.Mo. Eligible project areas consist of at least 50 acres, with at least four lots per acre, and may include parcels that do not constitute eligible parcels. Eligible project areas may consist on noncontiguous parcels. §99.1205.2 R.S.Mo. On August 2, 2011, the Supreme Court handed down *Manzara v. State*, 343 S.W.3d 656 (Mo. 2011) holding that St. Louis taxpayers lacked standing to challenge the award of, so far, $28,000,000 in tax credits under the act to developer Paul McKee. The large development also involved a $390,000,000 tax increment financing plan. The court followed federal law on taxpayer standing basing its decision on the lack of a direct expenditure of public funds. Judge Wolff would have granted standing but denied the plaintiffs' claim on the ground that there was no showing that the expenditure was not for a public purpose.

§17. —Industrial Development Projects—Bonds (100.010 *et seq*. R.S.Mo.)

Under Missouri's industrial development law, a municipality (including counties) may implement industrial development projects consisting of the purchase, construction and improvement of warehouses, distribution facilities, service facilities which provide interstate commerce, and industrial plants through the use of industrial development bonds in accordance with a plan approved by the majority of the governing body. Revenue bonds issued under the Act are retired by the rentals paid on municipally owned facilities which are leased to private enterprise. These bonds do not require an election. General obligation bonds may also be issued under the Act, but these require a municipality-wide election with a 4/7ths approval of those voting. While the property and improvements titled in the municipality are exempt from property taxes, the bonus value of the lease from the municipality to the company is taxable. Materials used to construct the project in the name of the municipality may be exempt from sales taxes. Personal property may be included. However, the exemption of sales taxes on personal property is dependent on the approval of the Department of Economic Development.

The use of Missouri's industrial development law was curtailed with the passage of the 1986 Tax Reform Act which severely restricted the use of industrial development bonds which are eligible for the exclusion of interest from federal taxable income treatment. The following are the most pertinent elements of the industrial development law. They are not intended to be a total description of the law.

(1) Qualifying Project. Article VI, §27(b) of the Missouri Constitution was approved by a vote of the people in 1978. It provides as follows:

> Any county, city or incorporated town or village in this state, by a majority vote of the governing body thereof, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any facility to be leased or otherwise disposed of pursuant to law to private persons or corporations for ***manufacturing, commercial, warehousing and industrial development purposes***, including the real estate, buildings, fixtures and machinery. The cost of operation and maintenance and the principal and interest of the bonds shall be payable solely from the revenues derived by the county, city, or incorporated town or village from the lease or other disposal of the facility.

A project for industrial development is defined by statute as the purchase, construction, extension and improvement of warehouses, research and development facilities, office industries, agricultural processing industries, service facilities which provide interstate commerce and industrial plants, including buildings, fixtures, machinery and real estate inside or outside of the limits of the municipality except that projects of a municipality having fewer than 800 inhabitants shall be located inside the municipality. §100.010 R.S.Mo. The statute originally did not allow "commercial" projects, as the Constitution does. A commercial laundry was held not to be an industrial plant in *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11 (Mo. 1968). However, "service facilities which provide interstate commerce" was added by H.B. 1656 in 1998. In the case of a charter city, the constitution could arguably be implemented by the city which can do anything which is not *prohibited* by the statute. Thus, a charter city may issue Chapter 100 bonds for commercial projects, such as office use. The Supreme Court has recognized that the public policy of the state favors an aggressive role for municipalities in industrial development. *St. Louis County v. Village of Champ*, 438 S.W.2d 205 (Mo. 1969).

(2) Plans. Any municipality desiring to avail itself of the provisions of the Industrial Development law shall prepare plans for the industrial development of the municipality. §100.040 R.S.Mo.

(a) Approval by Governing Body. The governing body must first approve the plan by a majority vote.

(b) Contents. The plan shall contain a *description of the project, the estimated cost, the source of funds, the terms upon which the facility will be leased or otherwise disposed of* and such other information necessary to meet the requirements of the law. §100.050 R.S.Mo. If the plan for the project is approved after August 28, 2003, and the plan involves the issuance of revenue bonds or the conveyance of a fee interest in property to a municipality, then the plan shall additionally include (i) a statement identifying each school district, county, or city affected by such project, (ii) *the most recent equalized assessed valuation of the real and personal property included in the*

project, and an estimate of the property's post-development equalized assessed valuation, (iii) an analysis of the costs and benefits of the project on each school district, county, or city, and (iv) the identification of any payments in lieu of taxes expected to be made by any lessee of the project, including the disposition of any such payments by the municipality. Id.

(c) Execution of Plan - Bidding. When funds have been received by the municipality for the carrying out of the project, it shall purchase, construct, extend or improve the facilities as provided by the plan (§100.160 R.S.Mo.), by contract which shall be let on competitive bidding to the lowest and best bidder. §100.170 R.S.Mo. The Supreme Court has held that this section is not applicable where the city itself does not assume the obligation or indebtedness. *Wring v. City of Jefferson*, 413 S.W.2d 292 (Mo. 1967).

(d) Notice to County and School District. A 2003 amendment to the Act provided that all plans which involve the issuance of revenue bonds or the conveyance of a fee interest in property to a municipality must, not less twenty days prior to approving the plan, provide notice of the proposed project to the county and school district. §100.059 R.S.Mo. The notice must include the §100.050 plan information, state the date the municipality will first consider approval of the plan, and invite the school districts, counties, or cities to submit comments to the governing body. Id. The comments "shall be fairly and duly considered." Id.

(e) Payments in Lieu of Taxes. Any payments in lieu of taxes expected to be made by any lessee of the project shall be applied in accordance with §100.050 as follows: the lessee may reimburse the municipality for its actual costs of issuing the bonds and administering the plan, but all amounts paid in excess of such actual costs shall be disbursed to each school district, county, or city in proportion to the current ad valorem tax levies. §100.050 R.S.Mo. In 2005, via SB210 and HB58, the Legislature adopted an amendment requiring that certain Junior College districts be added to the list of entities to receive excess PILOTs and that they be given notice along with all other affected taxing districts of the date which the governing body will consider the plan. §§100.050 and 100.059 R.S.Mo.

(3) General Obligation Bonds. Any municipality may issue its general obligation bonds in an amount not in excess of 10% of the assessed valuation of the property in the municipality to provide funds to carry out a project under §§100.010 to 100.200 R.S.Mo. which bonds shall be submitted to public vote in the manner set forth in §§95.135-95.170 and must receive the constitutionally required majority for such bonds (§100.090 R.S.Mo.) which since 1988 stands at 4/7ths of those voting on certain election days. Art. VI, §26 Mo. Const. But it should be noted that the constitutional provisions with respect to the issuance of bonds were held not to be self-executing, requiring statutory authorization in *Petition of Monroe City*, 359 S.W.2d 706 (Mo. 1962) and *State ex rel. City of Charleston v. Holman*, 355 S.W.2d 946 (Mo. 1962). The question of issuing general obligation bonds under a plan to finance a project which has been approved by the governing body shall be submitted within one year from the date of approval by the

governing body. If the proposition fails, it shall not be re-submitted to the voters without a new determination by the governing body. §100.120 R.S.Mo.

(4) Revenue Bonds. Any municipality may issue revenue bonds to provide funds to carry out a project under the Act. §100.100 R.S.Mo. Typically, the private user of the facility will pay rent to the city in an amount sufficient to retire the principal and interest on the bonds with the right to purchase the facility at the end of the term for a nominal amount, as follows:

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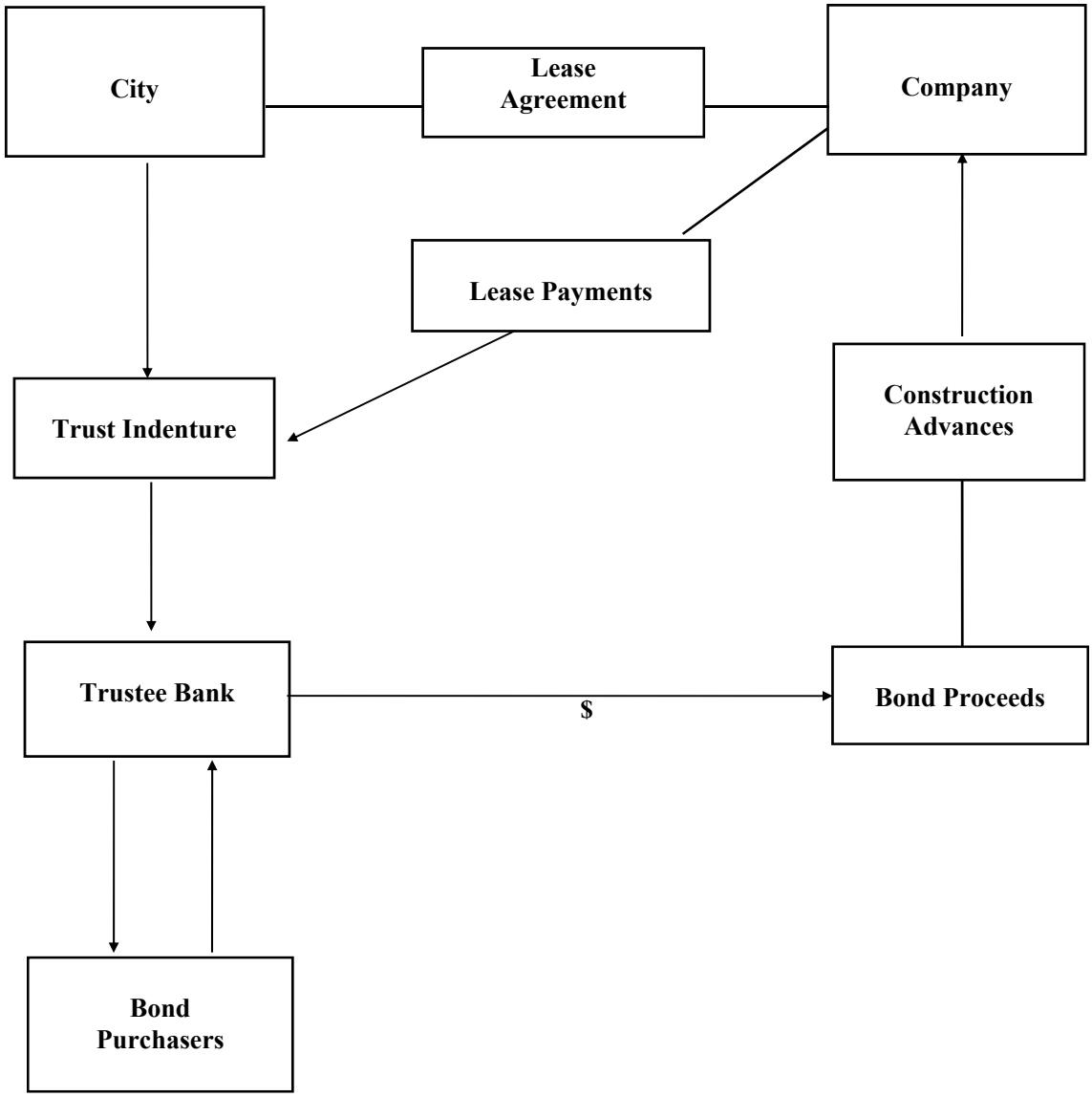
TYPICAL CHAPTER 100 STRUCTURE



(a) Terms of Bonds. The municipality may provide for the form of revenue bonds including the rate of interest which they shall bear and the number of years within which they are to be redeemed (§100.130 R.S.Mo.), create a sinking fund for the payment of principal and interest (§100.140 R.S.Mo.), such revenue bonds to be payable only from the revenues of an approved project. §100.150 R.S.Mo. The revenue bonds may be refunded. §100.155 R.S.Mo.

(b) Must Bonds be Issued in Order to Title Property in City? Could the city purchase property and lease it to a qualified business thereby removing the property from the tax rolls without issuing bonds to pay for the property? The first question is where the city would obtain the funds to purchase the property. It cannot borrow them without creating debt outside of the Chapter 100 structure, and if the business buys the property, sells it to the city for $1.00 and leases it back for a nominal amount, the lease would have a bonus value which is taxable.

(5) Powers with Respect to Project. The municipality shall have the authority to enter into virtually any agreement for the conveyance or mortgage of the project, and in the event a facility has been financed by revenue bonds, the installments of charges or rents shall be sufficient to meet the interest and sinking fund requirements on the bonds. §100.180 R.S.Mo. The municipality may sell or otherwise dispose of the project to private persons for warehousing, manufacturing or industrial development purposes upon approval by the governing body. "The terms and method of the sale or other disposal shall be established by the governing body so as to reasonably protect and promote the economic well-being and the industrial development of the community." §100.190 R.S.Mo. The sale of such property is not inconsistent with Art. 6, §23(a) of the constitution which provides for leasing or other disposition similar to leasing "pursuant to law." *State ex rel. City of El Dorado Springs v. Holman*, 363 S.W.2d 552 (Mo. 1962). It may similarly dispose of property acquired with the proceeds from the sale of revenue bonds, but in no case shall the property be sold for an amount less than that which is sufficient to retire any outstanding revenue bonds. §100.200 R.S.Mo.

(6) Exemption from Property Taxes.

(a) Constitutional and Statutory Provisions. Article X, §6 of the Missouri Constitution provides that:

> All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation . . . .

"Other political subdivisions" are defined in Article X, § 15 as those having the power to tax. §137.100 R.S.Mo. exempts from taxation for state, county or local purposes the following property:

> (1) lands and other property belonging to this state;
>
> (2) lands and other property belonging to any city, county or other political subdivision in this state. . . .

Based on the foregoing, where property is owned by a political subdivision of the state, the *ownership interest* is tax exempt. *See Land Clearance for Redevelopment Authority of Kansas City v. Waris*, 790 S.W.2d 454 (Mo. banc 1990) (the ownership interests of LCRA in the AT&T Pavilion and the Allis Plaza Hotel were held exempt from assessment and collection of taxes by Jackson County). For treatment of charitable institutions, *See Crittenton v. Reed*, 932 S.W.2d 403, 406 (Mo. 1996) (special assessment for boulevards held to be a tax and charitable institution therefore exempt from paying same).

(b) Taxability of Leasehold Interests.

(i) Bonus Value. Whether a leasehold interest is itself taxable was not addressed in *Waris*. Prior decisions of the Missouri Supreme Court, however, have held that a leasehold interest is taxable to the extent the leasehold interest has a bonus value. In *State ex rel. Benson v. Personnel Housing, Inc.*, 300 S.W.2d 506 (Mo. 1957), a private corporation leased property from the federal government to construct and rent housing for Army personnel and associated civilians. The court held that the private company's leasehold interest was valuable property, subject to taxation, since the private company would enjoy the entire worth of the building and improvements. *Id*. at 509. The court noted that this valuable property "not only may be but should be taxed." *Id*. at 510; cf. *Land Clearance for Redevelopment Corp. v. Doernhoefer*, 389 S.W.2d 780, 784 (Mo. 1965) (difference between economic and contract rental is proper method for calculating value of leasehold interest).

In *Iron County v. State Tax Commission*, 437 S.W.2d 665 (Mo. banc 1968), the City of Annapolis owned certain property which it leased to a private company for use as a manufacturing and industrial plant. The court held that it was clear that the City's ownership interest was tax exempt. *Id*. at 668. The court further held that the leasehold interest fell within the definition of real property for purposes of taxation and was, therefore, taxable as real property. *Id*. at 671. *Portions of the above bonus value research were provided by Tracy Coates of Gilmore & Bell.

- Statutory Definition of Real Property. The *Iron County* court came to this conclusion by examining how Missouri statutes defined "real property" for taxation purposes—the idea being that while the Constitution exempted the ownership interest of real property when owned by a city, ownership of the fee is only one of the sticks in the bundle of rights which constitute property. If the other interests enjoyed no Constitutional or statutory exemption, then they would under the default rule be taxable. *Iron County* determined that "real property" for purposes of taxation, was statutorily defined as "land . . . and all rights and privileges belonging or appertaining thereto . . .." R.S.Mo. §137.011(2). According to the *Iron County* court, "all rights and privileges belonging or appertaining thereto" included leasehold interests. As leasehold interests in real property enjoyed no exemptions, leasehold interests in real property were thus taxable.

When §137.011(2)was amended, and the "appertaining thereto" language deleted, the courts found a new statutory basis for determining that leasehold

> interests were a part of real property's bundle of sticks, and thus subject to taxation, in R.S.Mo. §137.115(1)'s direction to assessors to "annually assess all real property, including . . . possessory interests in real property . . .." *St. Charles County v. Curators of University of Missouri*, 25 S.W.3d 159 (Mo.banc 2000).

- No Similar Statutory Definition For Personal Property. However, the above rationale does not support taxing the leasehold interest in personal property, because the statute which defines "personal property" for taxation purposes, does not include possessory interests:

> "Tangible personal property" includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part or parcel of real property as herein defined, but does not include household goods, furniture, wearing apparel and articles of personal use and adornment, as defined by the state tax commission, owned and used by a person in his home or dwelling place.

R.S.Mo. §137.010(4). Further, R.S.Mo. §137.115, the section relied on by the courts for including a leasehold interest in real property as a property interest (via the "possessory interest" language), likewise does not include a leasehold interest in personal property: "The assessor shall annually assess all personal property at thirty-three and one-third percent of its true value in money as of January first of each calendar year." Accordingly, it is arguable that a leasehold interest in personal property is not taxable because for taxation purposes a leasehold interest is not personal property. Lastly, no Missouri cases were found examining or upholding the taxation of a leasehold interest in personal property.

(ii) Methods of Valuing Real Property Leasehold Interests: To determine how a court would value a leasehold in personal property, by analogy we examine the Missouri cases that considered the appropriate method of valuing a leasehold interest in tax-exempt real property. This is of course no guarantee that such method will be equally applied to personal property.

- *Land* Clearance *for Redevelopment Corp. v. Doernhoefer*, 389 S.W.2d 780, 784 (Mo. 1965). In *Doernhoefer*, the Missouri Supreme Court considered how to allocate a condemnation award as between a lessor and lessee of commercial real property. While *Doernhoefer* was a condemnation case, later taxation cases have cited with approval the valuation method first described therein. *See Frontier Airlines*, infra. The *Doernhoefer* court held that the proper measure of a leasehold interest was the difference between the economic rental and contract rental. This difference is known as the "bonus value," "lease savings," or "profit." To determine the total value for the leasehold interest, the trial court multiplied the annual bonus value amount by the number of years remaining in the lease term, including a ten year option period (this was included after evidence indicated that the lessee

would have exercised the option to renew), and then multiplied this amount by a discount factor to present value the sum.

- *St. Louis County v. State Tax Commission*, 406 S.W.2d 644 (Mo.1966). In *St. Louis County*, the County assessor valued for taxation purposes the leasehold interests of commercial airlines renting space in the city-owned airport. The leases had remaining terms of approximately two years, and contained no renewal clauses. The court detailed with approval the valuation method applied by the airlines' appraisal expert. The appraiser determined a fair market value by examining the leases and premises, and comparing the rents charged in similar properties (both with non-airport office and warehouse spaces in the city, and with other airports in similar cities). He then defined the value of a leasehold interest in real estate as "the present worth of the rental saving where the contractual rent to be paid is less than the fair market value of the use and occupancy of the leased premises at the time of appraisal; that is, where the fair market rental is higher than the contractual rental there is a rental saving, the value of which is determined by capitalizing the net annual rental saving over the remaining term of the lease." *St. Louis County*, 406 S.W.2d at 650. He testified that an important factor is the remaining life of the lease because it, along with restrictions and limitations on the lessee, affect the marketability of a lease. He further noted that a long term lease is relatively marketable because it has the characteristics of an annuity, and that a lease with a short remaining life "is not likely to be marketable and its market value, if any, from a practical standpoint, is less than what rental savings would show it to be worth." *Id*. at 651. Based then on his conclusion that the contractual rate was higher than the fair market value rate, he found no rental savings and no taxable value to the leasehold interest.

The court noted *that* "the formula used by the [airline appraiser] is in accord with the approved method," citing to *Doernhoefer*. *Id*. at 652. In disapproving of the assessor's valuation method, the court took the greatest offense at the fact that it "used the contract rental paid multiplied by a term longer than the remaining life of the leases to produce the assessed value." *Id.* at 653. The court noted that assessor's assumption that the airlines would renew their leases, whether this assumption was reasonable or not, was fallacious in that it assumed the depreciated cost of the leased improvements and the rents to be paid would remain the same; assumptions the court regarded as contrary to common sense.

- *Iron County v. State Tax Commission*, 437 S.W.2d 665 (Mo. banc 1968). In *Iron County*, the Ruberoid Company and City of Annapolis agreed to a Chapter 100 transaction under which the City issued $5,000,000 in bonds, the proceeds of which were used to purchase land, and construct and equip a manufacturing plant to be used by Ruberoid as lessee. The lease was for twenty years with options to renew for fifteen successive terms of five years each. The rental payments over the initial twenty-year term totaled exactly the amount of principal and interest needed to repay the bonds, plus $1,000

> in additional annual rent. Ruberoid agreed to pay any taxes assessed against the plant or its interest in the plant under the lease. Lastly, the lease provided that if the City became empowered to sell the plant, Ruberoid would have an option to purchase the plant for an amount equal to the outstanding debt on the bonds plus $1.00.

The assessor valued the leasehold interest by first estimating the value of the plant as equal to the amount of bond proceeds used to construct it (it does not appear that the assessor valued the leasehold interest in the equipment in the plant even though bond proceeds were used for such) less 3 to 4% of the proceeds, attributing this amount to costs that didn't contribute to true value, ***e.g.***, preparation of plans. The assessor then estimated the leasehold interest by subtracting from the plant value the value of the fee interest. The assessor believed the option to purchase rendered the fee interest almost worthless, and thus valued it at 10% of the bond proceeds used to construct the plant.

In contrast, Ruberoid's appraiser (the same appraiser used by the airlines in ***St. Louis County***, ***supra***) testified that the leasehold interest had no value (whether based only on the original twenty-year term or including the various options to renew) because the fair annual rent would be less than the actual annual rent—the bonus value calculation. The basis for his fair annual rent was not comparable rental properties (because there were none), but rather "a value in use or a discounted value of rental savings approach." *Iron County*, 437 S.W.2d at 672. The court did not further define these methods, but at least one Missouri court suggests that a value in use method is improper in valuing personal property for taxation. *Daly v. P.D. George Co.*, 77 S.W.3d 645, 649 (Mo.App. E.D. 2002) (Personal property must be assessed based on its true value in money, which is defined in terms of value in exchange and not value in use).

The assessor asserted that Ruberoid's methodology was improper because it gave no consideration to the option to purchase. *Id*. However, because the City did not have the legal authority at the time of assessment to sell the plant, and thus the option to purchase could not have been exercised, the court upheld the State Tax Commission's approval of Ruberoid's appraiser's bonus value method and finding of no leasehold value. Nonetheless, the court in dictum opined on the value of an option to purchase now that a city may sell such Chapter 100 property:

> This option obviously is a valuable right. The facility had been financed through issuance of tax exempt municipal revenue bonds with whatever favorable interest rate such bonds might produce. The option permits acquisition of the facility by merely retiring the bonds issued to pay the cost plus $1.00. If exercised, the only rentals not used to retire borrowed money to build the plant would be the additional rentals of $1,000 per year ($7,000 to $8,000 per year if the City also acquired a municipal waterworks system). The leasehold with such an option to purchase clearly is more valuable

> than one without. Absent the right to purchase, rental payments were rent, and nothing else, and at the end of the lease period the rental payments would have purchased merely a right of possession and use. With the option to purchase, lessee had the right to apply almost all of the rental payments to a purchase on the basis of cost to the owner (City).

Id. at 673. Unfortunately, the court did not explain *how to* value such an option to purchase.

- *Frontier Airlines, Inc. v. State Tax Commission*, 528 S.W.2d 943 (Mo. banc 1975). In *Frontier*, the St. Louis County assessor once again attempted to tax the leasehold interest of airlines leasing space at the city-owned airport (the parties to this action were substantially the same as those in *St. Louis County v. State Tax Commission*, *supra*). The court accepted the valuation method of the airlines, which was essentially the bonus value method employed in *Doernhoefer*: to determine fair market rental rate, compare to actual rental rate, and calculate bonus value if any. The court did not elaborate on the airline appraiser's method for determining fair market rental value other than to state that he "not only considered the depreciated replacement value of the buildings but compared the premises with a number of other comparable airports in the country." *Id*. at 945. The court accepted the determination that there was no bonus value in these particular leases, and hence no taxable value.
  The Court stated that:

  > [I]f the contractual rental was less than the fair market rental the leasehold would have a value. This method was illustrated by a simple example, as follows: If a store building being rented for $250 month is worth $500 the value of the interest would be the present worth of the bonus for the remaining term of the lease. On the other hand, if the lessee was paying $750 a month for a store worth $500 a month, the lease would, of course, have a negative value.

  Id. at 945. (Note that according to *Iron County*, although the State Tax Commission in *St. Louis County v. State Tax Comm'n*, 406 S.W.2d 644 (Mo. banc 1966), determined that the airlines' short-term leases were taxable, the court found substantial evidence to support a finding of zero value, but never reached the question of whether leasehold interests were taxable). 437 S.W.2d at 669.
- *Avis Rent A Car Systems, Inc. v. State Tax Comm'n of Missouri*, 716 S.W.2d 871 (Mo. App. W.D. 1986). The *Avis* case adds little to this inquiry other than the court's confirmation that the bonus value method still controls: "In *Frontier*, the court held that a lease of tax exempt property does not have a

value that can be assessed for ad valorem taxes unless the lease has a bonus value. The bonus value exists only when the contract rent actually being paid is less than the market rent for the premises." *Avis Rent A Car Systems, Inc.*, 716 S.W.2d at 875[3] (holding that concession payments could be considered part of rent). An interesting question is whether the tax savings that the private entity receives, by virtue of leasing property that is owned by the government, constitutes a bonus value. To date, this question has not been addressed by a Missouri court.

- *Nance v. State Tax Com'n of Missouri*, 18 S.W.3d 611 (Mo.App. W.D.,2000). In *Nance*, in determining the value for tax purposes of both a fee interest and a leasehold interest, the court noted that an approved method for valuing leaseholds is the "income capitalization method." *Nance*, 18 S.W.3d at 620. This method is employed to determine the fair market rental value, after which the bonus value calculation is used to determine leasehold value, and was summarized by the court as follows:

> The income capitalization approach evaluates what a willing buyer would pay to realize the income stream that could be obtained from the property when devoted to its highest and best use. Under this method, the Commission must project the net income stream that could reasonably be anticipated by an investor/purchaser, discounting future dollars to present levels in order to compensate for risk and the elapsed time required to recapture the initial investment.

The income capitalization method first determines the value of the fee simple from comparable sales, and then determines a fair market rental rate by applying a capitalization rate appropriate to the type of property to the fee value. For example, in *Nance*, comparable land sales valued the real estate fee at $300,000. The appraiser then used a 10% cap rate, typical for real estate in that area, to estimate the fair market rental rate at $30,000 annually. Applying the bonus value method, the appraiser then subtracted from the fair market rent the actual rent plus expenses, $10,700, resulting in a taxable bonus value to the lessee of $19,300. This amount is then multiplied by the remaining years in the lease term, and present valued to determine the bonus value.

[3] The issue in *Avis* was whether concession fees paid by rental car companies leasing airport space should have been considered part of their rent. Both parties agreed that if the concession fess were included as rent, then under the bonus value method there would be no bonus value. The court noted that the companies could not have leased airport space without paying the attendant concessionaire fees, which therefore should have been considered rent.

Doernhoefer held that the economic rental value of a leasehold interest is the value which a willing buyer who is not compelled to buy the lease would pay to a willing seller who is not compelled to sell. 389 S.W.2d at 784. In making this determination, a court may take into consideration

> the period of the lease yet to run, including the unexercised right of renewal, *the favorable and unfavorable factors of the leasehold estate*, the location, type and construction of the building, the business of the tenant, comparable properties in similar neighborhoods, present market conditions and future market trends, and all other material factors that would enter into the determination of the reasonable market value of the property. (emphasis supplied)

Id.

(iii) Value Added By Tax Abatement An assessor might argue that tax abatement increases the bonus value of property under a Chapter 100 lease. But in *Maryville Properties, L.P. v. Nelson*, 83 S.W.3d 608 (Mo. App. W.D. 2002) the court held that low-income housing tax credits could not be included in the valuation of property. By analogy, abatement should not add to the bonus value of a municipal lease. This would defeat the purpose of granting abatement.

(iv) Municipally-Owned Airports. In 2008, in anticipation of landing the Bombardier airplane manufacturing company from Canada, and to assist the Trammel-Crow project at the Kansas City Mid-Continent International Airport, the legislature, via SB 718 and HB 2058, added the following language to §137.115.1 R.S.Mo.which would prohibit an assessor from using the traditional method of assessing bonus value. In reading this language it is good to keep in mind that it creates an exemption for property which is not owned by a municipality, namely the leasehold interest, and in that regard may run afoul of the Missouri Constitution, Art. X, §6, which specifies a limited class of property which is exempt from taxation, including property "of the state, counties and other political subdivisions, and nonprofit cemeteries… ." It goes on to specify property which may be exempted by general law, including personal property held as inventory by merchants and manufacturers, that used for religious worship, schools, colleges, for purposes purely charitable, or for agricultural and horticultural societies, household goods, furniture, wearing apparel and articles of personal use and adornment owned and used by a person in his home or dwelling place. A leasehold interest used by a private business in a profit-making venture does not fall under any of the above categories.

> The true value in money of any possessory interest in real property in subclass (3), where such real property is on or lies within the ultimate airport boundary as shown by a federal airport layout plan, as defined by 14 CFR 151.5, of a commercial airport having a FAR Part 139 certification and owned by a political subdivision, shall be the otherwise applicable true value in money of any such possessory interest in real

property, *less the total dollar amount of costs paid by a party, other than the political subdivision, towards any new construction or improvements on such real property* completed after January 1, 2008, and which are included in the above-mentioned possessory interest, regardless of the year in which such costs were incurred or whether such costs were considered in any prior year. [emphasis supplied].

(7) Sales Tax Exemption.

Since in a chapter 100 project, both real and personal property can be titled in the municipality and since, under Article III, §39 (10) of the Missouri Constitution, the legislature is prohibited from taxing the purchase of property paid for out of the funds of any County or other political subdivision, both construction materials and furniture, fixtures and equipment may be exempted. The legislature has implemented the exemption by statute, and has provided that the exemption is not lost even if a contractor pays for the purchases, §144.062 R.S.Mo., but has attempted to limit the exemption to a political subdivision's "exempt functions and activities". §144.062 R.S.Mo. Because the Department of Revenue began taxing leases from municipalities to private entities as a "sale", or in the alternative taxing the purchase of furniture, fixtures and equipment by the municipality for a chapter 100 project on the grounds that the purchase was a purchase by a private entity, the legislature enacted §144.054.3 R.S.Mo. providing that all sales and leases by a municipality under chapter 100 are exempt if certified for exemption by the Department of Economic Development.

DOR has always taken the position that the ultimate purpose controls whether a sale is to a public entity. But in letter rulings, the department has liberalized its position. The "consumer" must be an exempt entity to qualify for a sales tax exemption. This can be accomplished by having the City purchase construction materials with Chapter 100 bond proceeds. The City can have its agent make the purchase. Chapter 349 bonds won't work because an Industrial Redevelopment Authority is not an exempt entity and Chapter 349 specifically prohibits tax abatement of property purchased with bond proceeds.

(a) Exemption of Political Subdivision. Article III, §39(10) of the Missouri Constitution provides that the general assembly shall not have the power "to impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision." §144.062 R.S.Mo. provides:

> With respect to exempt sales at retail of tangible personal property and materials for the purpose of construction, repairing, or remodeling facilities for: (1) a county, other political subdivision or instrumentality thereof exempt from taxation under subdivision (10) of §39 of Article III of the Constitution of Missouri . . . such exemptions shall be allowed for

> such purchases if the purchases are related to the entities' exempt functions and activities.

§144.062 goes on to provide that the exemption from sales tax is not lost even if a construction contractor bills or pays for such purchases or exercises control over the materials provided to the political subdivision.

Other applicable statutory provisions:

144.030. 1. There is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and from the computation of the tax levied, assessed or payable pursuant to sections 144.010 to 144.525 such retail … of tangible personal property **which the general assembly of the state of Missouri is prohibited from taxing or further taxing by the constitution of this state.**

144.054.3. In addition to all other exemptions granted under this chapter, there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and section 238.235, R.S.Mo., and the local sales tax law as defined in section 32.085, R.S.Mo., and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761, and section 238.235, R.S.Mo., and the local sales tax law as defined in section 32.085, R.S.Mo., … **all sales and leases of tangible personal property by any county, city, incorporated town, or village, provided such sale or lease is authorized under chapter 100, R.S.Mo., and such transaction is certified for sales tax exemption by the department of economic development**, …. **SB 30 (2007).**

(b) Manufacturing.

(i) Statutes. Replacement machinery and equipment used directly in manufacturing or producing a product which is intended to be sold ultimately for final use or consumption is exempt from sales tax.[4]

Additionally, equipment purchased and used to establish new or to expand existing manufacturing, if such equipment is used directly in manufacturing a product which is intended to be sold ultimately for final use or consumption is likewise exempt from sales tax.[5]

In determining whether machinery or equipment (hereinafter referred to as "equipment") is exempt under these statutes, courts examine the criteria outlined below. The equipment must satisfy each criterion to be exempt, e.g., it mut be used directly in manufacturing a product intended to be sold for final use or consumption.

(ii) Facilities Revenue Rulings. On October 8, 1996, the Director of Revenue, issued letter ruling L9293 concluding that purchases by a political subdivision's agent of materials to be used in the construction of a manufacturing facility to be owned by the political subdivision are exempt from Missouri Sales and Use Tax. Under the facts

[4] R.S.Mo. §144.030.2(4)
[5] R.S.Mo. §144.030.2(5)

presented in the letter ruling, the political subdivision will own the land, the completed building, and the tangible personal property of the manufacturing facility and will lease the property to a private manufacturer. The manufacturer will have an option to purchase the land, the building and the tangible personal property at fair market value at certain future dates.

A previous letter ruling, L9184, issued August 9, 1996, involved a situation where the city planned to issue industrial revenue bonds for a city-owned fixtures and equipment leased to the private company in a manufacturing facility *not owned by the city*. Pursuant to §144.062 R.S.Mo., the general contractor was to be provided a project exemption certificate and a copy of the city's sales tax exemption documentation to give to all direct vendors for qualifying purchases and to subcontractors for their vendor-qualifying purchases that were exempt from sales taxes. The issue presented was whether the materials and tangible personal property to be used in the plant expansion were exempt from Missouri sales and use tax when purchased by the city's agent out of the construction fund. The Department ruled that if the property being improved did not belong to the city, it could not be exempt. However, the purchases of the tangible personal property and materials to expand the plant would be exempt from sales and use tax pursuant to the new or expanded plant exemption in §144.030.2(5) which exempts "machinery and equipment, the materials and supplies solely required for the installation or construction of such machinery and equipment, purchased and used to establish new or to expand existing *manufacturing, mining or fabricating plants* in the state if such machinery and equipment is used *directly* in manufacturing, mining or fabricating a product which is intended to be sold ultimately for final use or consumption." (emphasis supplied)

(iii) Case Law. In *Floyd Charcoal Co., Inc. v. Director of Revenue*, 599 S.W.2d 173 (Mo. 1980), the Missouri Supreme Court interpreted the scope of the sales tax exemption for manufacturing equipment now set forth in R.S.Mo. §144.030(5). The court adopted an "integrated plant" theory for the determination of what is, and is not, machinery and equipment "used directly in manufacturing" a product. The court rejected a narrower theory urged by the Director of Revenue that would have limited the exemption to equipment actually working a change to raw materials. Under the theory adopted by the court, all equipment integral to the manufacturing process is exempt from sales tax. *Floyd Charcoal Co., Inc. v. Director of Revenue*, 599 S.W.2d at 178. For example, the court held that conveyor systems used to feed raw material into processing machines and equipment used to weigh and package finished product were exempt, but that stairs and walkways used to access the equipment for maintenance and repairs were not exempt. *Id*. As a practical matter, the court's rule means that building materials and equipment necessary for any building (e.g. structural materials, HVAC, electrical, plumbing, etc.) are not exempt, while materials and equipment installed to facilitate the specific manufacturing process involved are exempt. In gray areas, such as access stairs, the court indicated that equipment used only occasionally (e.g. for repairs) will not be exempt. In rejecting the access stair exemption, however, the court indicated that there was no evidence in that case that the stairs were "an integral part of the processing system and of the [sic] use . . . ." *Id*. From this language, it can be inferred that items such as

stairs or walkways necessary to use or operate manufacturing equipment would be exempt. In *Southwestern Bell Telephone Company v. Director of Revenue*, 182 S.W.3d 226 (Mo. Banc 2005), the Missouri Supreme Court held that a telephone company's verticial services equipment and transmission and distribution equipment met all three prongs of the integrated plant doctrine, i.e., [1] necessary to production, [2] physically or casually close to the end product, and [3] operates with admittedly exempt items in an integrated and synchronized system. The Court noted that the genesis of the integrated plant theory was *Niagara Mohawk Power Corp. v. Wanamaker*, 139 N.E.2d 150 (N.Y. 1956).

- ***What is "Manufacturing"?*** "Manufacturing" is the alteration or physical change of an object or material in such a way that produces an article with a use, identity, and value different from the use, identity, and value of the original.[6] Put another way, manufacturing is an activity that transforms an input into an output with a separate and distinct use, identity, or value.[7]

Below are examples of court-approved computer-related "manufacturing" activities:

- Printing of a newspaper, including first step in process where news-related information is input into a laptop computer by a reporter in the field; "organizing information through computer technology is 'manufacturing.'"[8]
- Transforming raw data through computer reorganization into securities information for institutional traders.[9]
- Use of computers to gather, store and organize securities information, and then print and package information for sale to mutual funds.[10]

- ***What is a "Product," and when is it "Sold For Final Use"?*** A "product" is an output with a market value, and can be either tangible personal property or a service.[11]

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[6] *Branson Properties USA, L.P. v. Director of Revenue*, 110 S.W.3d 824, 826 (Mo.banc 2003). Examples of court-approved "manufacturing" activities: (1) Grinding, crushing, and sorting rock into various sizes for commercial use. (2) Commercial printing. (3) Slaughtering livestock to create marketable food. (4) Treating and purifying water. (5) Converting old automobiles/appliances into steel shreds for commercial use.

[7] *Id*.

[8] *Concord Pub. House, Inc. v. Director of Revenue*, State of Mo., 916 S.W.2d 186, 190 (Mo.banc 1996).

[9] *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204 (Mo.banc 1990) (decision partially abrogated on other grounds by *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554 (Mo.banc 1997)).

[10] *DST Systems, Inc. v. Director of Revenue*, 43 S.W.3d 799, 803 (Mo.banc 2001).

[11] *International Business Machines Corp.*, 958 S.W.2d at 557 (Mo.banc 1997).

- A "sale" is the rendering, furnishing, transferring or selling for a valuable consideration any taxable tangible personal property or services.[12] Accordingly, the exemption applies only to equipment that generates sales of tangible personal property or taxable services.[13]
- Items ancillary to the main product, which themselves would not be the subject of a "sale" (*e.g.*, an instruction manual), may potentially be considered part of the product if they are included in the final package to be sold.[14] Consequently, equipment used to manufacture such ancillary items may potentially be exempt so long as the equipment satisfies the other criteria.

- ***What does "used directly" mean?*** Missouri has adopted the "integrated plant theory" to determine if equipment is "used directly" in manufacturing.[15] Under this theory, all equipment **integral** to the manufacturing process is "used directly in manufacturing," and thus exempt from sales tax.

Below are some of the questions courts ask to determine if equipment is "integral":

- Is the equipment necessary to production?[16]
- How close, physically and causally, is the equipment to the finished product?[17]
- (Note though that physical distance between equipment is not, on its own, determinative of whether equipment is integral.[18])
- Does the equipment operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system?[19]
- Does the equipment make an essential contribution to the operation?[20]
- Does the equipment contribute to the continuous flow process of the manufacturing, and if so, does

[12] *International Business Machines Corp*., 958 S.W.2d at 557.
[13] *Id*. at 558.
[14] *See DST Systems, Inc.*, 43 S.W.3d at 804 (printing and packaging of product is part of manufacturing); *Floyd Charcoal Co., Inc.*, 599 S.W.2d 173 (bagging of charcoal briquettes is part of manufacturing).
[15] *Floyd Charcoal Co., Inc.*, 599 S.W.2d 173.
[16] *Id*. at 177.
[17] *Id*.
[18] *Concord Pub. House, Inc.*, 916 S.W.2d 186.
[19] *Floyd Charcoal Co., Inc.*, 599 S.W.2d at 177.
[20] *Id*. at 178; *Concord Pub. House, Inc.*, 916 S.W.2d at 192.

the process require the equipment?[21]

- Would the product sold exist without the equipment?[22]
- Does the equipment facilitate the manufacturing process?[23]
- Is the equipment used either exclusively or substantially for the manufacture of the products?[24]

(c) Analysis of Exempt Purchases. Neither the statute nor the letter ruling appear to authorize a sales tax exemption for materials to be used in the construction of a private facility even if the construction is funded with bond proceeds. Rather, both §144.062 and the letter ruling authorize sales tax exemptions for facilities of political subdivisions where the construction materials are related to the political subdivision's exempt functions and activities. Accordingly, unless the construction would be for an exempt entity, sales tax would apply.

(d) Lease Treated as Sale. The Missouri Department of Revenue treats a lease of personal property as a sale if it is a financing lease per §144.020(8) R.S.Mo. and imposes a charge of four per cent per year on the rent paid. But if construction materials have been converted to real property, which is then leased from the government, personal property tax would not apply to the lease. In 2004, DOR began treating Chapter 100 leases of non-manufacturing personal property as taxable. In response, in 2007, the legislature amended section 144.054.3 to state, in relevant part:

> In addition to all other exemptions granted under this chapter, there is hereby specifically exempted from the provisions of sections 144.010 to 144.525 and 144.600 to 144.761, and section 238.235, R.S.Mo., and the local sales tax law as defined in section 32.085, R.S.Mo., and from the computation of the tax levied, assessed, or payable under sections 144.010 to 144.525 and 144.600 to 144.761, and section 238.235, R.S.Mo., and the local sales tax law as defined in section 32.085, R.S.Mo., … all sales and leases of tangible personal property by any county, city, incorporated town, or village, provided such sale or lease is authorized under chapter 100, R.S.Mo., and such transaction is certified for sales tax exemption by the department of economic development, ….

(e) Real v. Personal Property. The Missouri Supreme Court recently considered when personal property is sufficiently affixed to real property such that it too becomes real property. *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192 (Mo.banc 2003). The Buchholz Court enunciated the relevant test as follows:

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[21] *Floyd Charcoal Co., Inc.*, 599 S.W.2d at 178.

[22] *DST Systems, Inc.*, 43 S.W.3d at 804.

[23] WHITE, MISSOURI LAND USE LAW §5.17 (2002) interpreting *Floyd Charcoal Co., Inc.*, 599 S.W.2d 173.

[24] *DST Systems, Inc.*, 43 S.W.3d 799 (finding that computers used substantially, though not exclusively, in the manufacturing process qualified for tax exemption).

"Personal property may be so annexed to real estate that it is part of the land, a 'fixture.' This is shown by: (1) annexation to the land; (2) adaptation to the location; and (3) intent of the annexor at the time of annexation." Id. at 193 (citations omitted). Adaptation requires that the article be adapted to the use to which the realty is devoted. Id. Intent involves whether the annexor intended to make the property "a permanent accession to the land. And the intent is shown generally by one's acts and conduct and not by any secret intention." *Marsh v. Spradling*, 537 S.W.2d 402, 404 (Mo. 1976).

In cases where this real vs. personal distinction is being made for the purposes of determining whether sales tax is applicable, it is critical that these factors be considered at the time the transfer of title is made. For example, while the *Buchholz* Court found that burial containers were fixtures and thus not subject to sales tax, it also found that because when the caskets were sold, they were not in the ground and could have been moved at the purchaser's request. Accordingly, they failed the annexation and intent criteria and were thus personal property subject to sales tax. *Id.* at 195. The *Buchholz* Court contrasted this finding with an earlier Missouri Supreme Court case where the sale of *installed* kitchen cabinets was not a sales of personal property because title to the property was not transferred until the cabinets were installed, at which point they had become a fixture. *See Marsh v. Spradling*, 537 S.W.2d 402 (Mo. 1976).

The three part annexation, adaptation, intent test has also been applied to find that conveyor belt systems can be considered trade fixtures in the absence of sufficient evidence that the party installing the system intended the system to become a permanent part of the building (*Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433 (Mo. 1969)), and conversely that overhead cranes can be fixtures despite their tenuous annexation to the building so long as there is sufficient evidence that the intent to affix was present (*Oberjuerge Rubber Co. v. State Tax Com'n of Missouri*, 674 S.W.2d 186, 188 (Mo.App. E.D. 1984)). The cases cited above teach that evidence of such intent is the most important element. Some relevant inquiries include: (1) was the property's annexation to the realty permanent, or could it be adapted to use elsewhere; (2) could such removal be accomplished readily and without damage to the realty or property; (3) was the realty/building designed or built specifically to use and accommodate the property; (4) was the property an integral part or perform an important function of the realty/building; and (5) was the property necessary for the particular use to which the realty/building is devoted.

§18. —Missouri Development Finance Board Act (MDFB Act) (100.250 to 100.297 R.S.Mo.)

> **§§100.250 - 100.297 R.S.Mo. (the "Act") establish special funds and the Missouri Development Finance Board ("Board") for the purpose of funding industrial and commercial development in the state. The Board is a division of the department of economic development and consists of twelve members. The Board assists in the funding of existing essential infrastructure improvements necessary to facilitate the expansion of businesses or attraction of new businesses to Missouri. The Act establishes the Jobs Now Fund, the Development and Reserve Fund,**

the Industrial Development Guaranty Fund and Export Finance Fund into which are deposited, *inter alia*, funds appropriated by the General Assembly, the proceeds of revenue bonds issued by the state and those issued by Board. The Act also establishes the Infrastructure Development Fund for the purpose of making low interest or interest free loans to local political subdivisions and state agencies. Any request for a loan from this fund that exceeds $1 million for infrastructure facilities will not be approved unless at least two commercial lenders in Missouri have denied the loan. Loans to a small, medium sized or agricultural business may be secured by any of the funds established by the Act, but such a loan may not exceed $5 million nor have a term longer than five years. The Board may issue revenue bonds for the development of industrial, commercial or agricultural facilities.

Any taxpayer may be entitled to a state income tax credit up to the amount of 50% of any amount contributed to one of the funds. Such tax credits may be sold for no less than 75% of par value. The consideration received by the assignor of the credit shall be taxable as income, and the excess of the par value over the amount paid shall be taxable as income to the assignee. The credits can be carried forward for up to five years but must be claimed within 10 years following the tax year in which the contribution was made. If a loan secured by the Development Fund defaults, the Board shall distribute from the fund an amount not to exceed 90% of the balance to the lender. The owners of defaulted revenue bonds shall be entitled to a 100% tax credit on the unpaid principal and interest.

(1) Establishment of Funds.

(a) Industrial Development and Export Funds. §100.260 R.S.Mo. establishes four funds known as the Industrial Development and Reserve Fund, the Industrial Development Guarantee Fund the Export Finance Fund and the Jobs Now Fund into which are deposited funds appropriated by the General Assembly, the proceeds of revenue bonds issued by the state, grants, repayment of loans as provided in the MDFB Act, interest on deposits of the funds, proceeds of revenue bonds issued by the Board, funds authorized by the MDFB Act or by Chapter 620 R.S.Mo. and generally funds from any other source.

(b) Jobs Now Fund. The Jobs Now Fund will receive savings from the passage of §135.155 (cessation of state incentives for new or expanding businesses) §135.286, (cessation of state incentives from enterprise zones), §135.546 (elimination of tax credit for investing in transportation development of a distressed community), and §620.1039(7) elimination of tax credit for qualified research expenses: all of which were declared unconstitutional in *Home Builders of Greater St. Louis v. State*, 75 S.W.3d 267 (Mo. 2002)). Jobs Now Projects will consist of the purchase, construction and extension of real estate, plants, buildings structures or facilities whether in existence, used or to be used primarily as infrastructure facilities or public facilities. §100.255(10) R.S.Mo. The Commissioner of Revenue shall annually calculate the increased amount of revenue to

the state treasury due to the provisions of *Home Builders of Greater St. Louis v. State*, 75 S.W.3d 267 (Mo. 2002). §100.293, §100.277, §135.1050, §135.1055, §135.1057, §135.1060, §135.1065, §135.1070, §135.1075, §135.1078, §178.980, §178.981, §178.982, §178.983,and §178.984, R.S.Mo., shall be known and may be cited as the "Jobs Now Act". §100.293. 1 R.S.Mo.

There shall be created a "Jobs Now Recommendation Committee", comprised of representatives of the department of economic development, the department of agriculture, the department of natural resources, and the department of transportation. The committee shall establish application materials and procedures for development agencies to apply to the board for grants or low-interest or interest-free loans for the purpose of funding jobs now projects. ". §100.293.2 R.S.Mo. Applications shall be submitted simultaneously to the committee and the board. The committee shall review the applications and prepare and submit analyses and recommendations to the board for a determination as to approval or denial of grants or loans from the jobs now fund. ". §100.293.3 R.S.Mo.

In reviewing applications, the board shall give preference to redevelopment projects that protect natural resources or rehabilitate existing dilapidated or inadequate infrastructure in areas defined under §135.530, R.S.Mo. §100.293.4 R.S.Mo.

After reviewing applications and such other information as the board may require, the board may grant all or a part of a grant or loan request, provided the board determines:

- The jobs now project:
  - Will not happen without the grant or loan from the board; or
  - Will have a significant local economic impact; or
  - Demonstrates high levels of job creation;
- In the case of a low-interest or interest-free loan, the jobs now project will generate sufficient revenues or the borrower will otherwise have sufficient revenues available to enable the borrower to repay the loan to the jobs now fund, along with any interest to be charged; and
- No loan or grant may exceed two million dollars. §100.293.5 R.S.Mo.

The commissioner of administration shall annually calculate the increased amount of revenue to the state treasury due to the provisions of §135.155, §135.286, §135.546, and subsection 7 of §620.1039, R.S.Mo., as enacted or modified by this act and shall allocate up to twelve million dollars of such revenue to the jobs now fund. §100.260(5) R.S.Mo.

(c) Infrastructure Development Fund. §100.263 of the MDFB Act establishes a fourth fund, the Infrastructure Development Fund for the purpose of making low-interest or interest-free loans, loan guarantees and grants to local political subdivisions and state agencies. This fund may receive monies from the federal government or other public or private sources. Any request for a loan from this fund that exceeds $1,000,000 for infrastructure facilities will not be approved unless at least two commercial lenders in Missouri have denied the loan.

"Infrastructure facilities" was amended in 1997 by S.B. 1 to include the "acquisition of blighted real estate and the improvements thereon, demolition of existing structures and preparation of sites in anticipation of development." §100.255(9) R.S.Mo. The infrastructure development fund is mentioned in section 100.255 (8), where it is defined

as the fund mentioned in section 100.263 which states that, "An 'Infrastructure Development Fund' shall be established from which moneys shall be used to make low-interest or interest-free loans, loan guarantees, or grants to local political subdivisions and to state agencies" and that the fund shall be administered by the Board. All remaining references to the fund in the Act are operational[25].

(d) Development and Reserve Fund. The "Development and reserve fund", is defined in section 100.255 (4) R.S.Mo. as the Industrial Development and Reserve Fund established pursuant to section 100.260 R.S.Mo. Section 100.260.1 creates the Industrial Development and Reserve Fund and specifies the sources of moneys which may be deposited in the fund. The development and reserve fund shall be used to prevent a default or to defray losses in obligations secured by it. 100.287.1 R.S.Mo. Upon certification by a lender that a loan secured by the fund is in default and noncollectible, and that the property securing the loan has been liquidated, the board shall distribute from funds available in the development and reserve fund an amount not to exceed 90% of the balance of the obligation, upon which action the Board shall become segregated to the extent of such payment. 100.287.2. Obligations secured by the fund shall not constitute an indebtedness of the state or the board. 100.287.3.

(e) Guarantee Fund". The "guarantee fund" is defined in section 100.255 (7) as the industrial development guarantee fund established by section 100.260 R.S.Mo. Section 100.2 60.1 creates the Industrial guarantee fund and specifies the sources of moneys which may be deposited in the fund. The board may issue guarantees using moneys in the guarantee fund for obligations issued by the board or by development agencies upon the proper findings by the board. 100.291.1 R.S.Mo. A "development agency" is defined in section 100.255 (3) as a number of political subdivisions with an omnibus clause which includes "any other governmental, quasi -governmental or quasi-public corporation or entity created by state law or by resolution adopted by the governing body of a development agency otherwise described in paragraphs (a) through (g) of this subdivision;...." 100.255 (3) (h) R.S.Mo.

(2) Composition and Powers of the Missouri Development Finance Board.

(a) Composition. The Act creates the Board which constitutes a body corporate and politic consisting of twelve members, eight of which are appointed by the governor upon the advice and consent of the Senate. The other members are the Lieutenant Governor and the directors of the Department of Natural Resources, Agriculture and Economic Development.

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[25] They deal with the board's power to consider loans [100.270(4)] , to direct disbursements [100.270(6)] to administer and invest the fund [100.270 (7)], to receive contributions to the fund [100.270 (8)], to assess fees for loans from the fund [100.270 (18)], receive funds from the federal government for deposit into the fund [100.270 (23)]the pledging of the fund to secure bonds, notes, or loan payments [100.286.1] the requirement of a loan application to be reviewed in the first instance by a participating lender [100.2 86.3], the condition of approval of the board and receipt of an annual reserve participation fee for the securing of any loans from the fund [100.2 86.4], and the granting of tax credits for contributions to the fund [100.2 86.6].

(b) Powers. The Board shall have all of the general powers of a body corporate and politic such as the power to sue and be sued, and to contract with others. It shall have the power to administer the reserve fund, the guarantee fund, the export finance fund and the infrastructure development fund and to issue revenue bonds or notes, to make all expenditures which are incident and necessary to carry out its purposes and powers, and to take such action, enter into such agreements and exercise all other powers and functions necessary or appropriate to carry out the duties and purposes set forth in §§100.250-100.297. §100.270 R.S.Mo.

(3) Bonds and Notes. The Board may at any time issue revenue bonds for the purpose of paying the cost of any project which may include the purchase, construction or extension and improvement of real estate facilities used as a factory, assembly plant and a broad range of other uses, including a commercial or agricultural facility, as defined in §100.255(11) R.S.Mo. All terms of the bonds are set at the discretion of the Board, and they may be sold at public or private sale at such price as the Board may determine but not less than 95% of the principal amount, and at such interest rate as the Board may determine. The Board may also issue notes payable from the proceeds of the bonds to be issued or from such other sources as the Board may specify. The notes shall mature in not more than five years and otherwise have those restrictions applicable to the bonds. The state shall not be liable on any notes or bonds of the Board, and they shall not be a debt of the state. The bonds and notes and the income thereon are declared to be exempt from most state taxes, including income taxes. §100.275 R.S.Mo.

(a) Guarantees. The Board may issue guarantees using monies in the guarantee fund for bonds or notes issued by the Board or by development agencies if the owners and lessees of the projects to be financed are found to be financially responsible, sufficient income is reasonably expected to be derived from the projects to pay the bonds or notes, and the projects will benefit the economy of the state. §100.291 R.S.Mo. The MDFB Act sets forth provisions which must be included in any guarantee agreement. §100.292 R.S.Mo.

(4) Loans. A request for a loan from the development and reserve fund, the infrastructure fund, the export finance fund or the jobs now fund to fund export trade activities or carry out a project shall be in the form of an application to the Board. After reviewing the application, the Board may grant all or part of the loan request provided the Board determines that: the project will benefit the economy or infrastructure of the state, the loan will be repaid, and in the case of an infrastructure facility project, the loan will not exceed $10,000,000. All development agencies including virtually all state economic development authorities and local authorities such as port authorities, land clearance for redevelopment authorities, a county, city, incorporated town or village or other political subdivision, etc. shall have the authority to borrow funds from the Board for any project. §100.281 R.S.Mo. In 2006, the legislature added §100.282 R.S.Mo., which provides:

> The Missouri development finance board, the Missouri health and education facilities authority, the Missouri higher education loan authority, the Missouri housing development commission, and the environmental

> improvement and energy resources authority shall only approve loan requests from the state, any agency or department of the state, or any state educational institution if the borrower's means of repayment is readily ascertainable and reliable. With the exception of annual appropriation debt for state-owned property, the entities listed in this section shall not approve such requests if the means of repayment is contingent upon state funding that has not been granted, unless the project has been approved by concurrent resolution of the general assembly, or similar legislative directive or approval.

(a) Loans Secured by Funds. Any of the funds established by the Act may be used to secure bonds or notes of the Board or any loan made by the Board where the loan is made to finance any project or export trade activity, by a borrower financially responsible, is reasonably expected to provide a benefit to the economy of this state, and is otherwise secured to the satisfaction of the Board. If such loan is made to finance export trade activities it may not to exceed $5,000,000 or have a term longer than five years and must be made to a small, medium-sized, or agricultural business. §100.286 R.S.Mo.

(5) Tax Credit.

(a) Contribution Credits.

- Amount. Any taxpayer may be entitled to a 50% state income tax credit for any amount contributed to one of the funds, provided, however, the total tax credits awarded by the state in any calendar year shall not exceed the then-existing state cap. §100.286.6 R.S.Mo.
- Use. Such tax credit shall be credited against any tax otherwise due pursuant to Chapter 143, R.S.Mo., excluding withholding taxes. Id.
- Assignment. Tax credits may be sold or assigned for no less than 75% of par value. §100.286.7 R.S.Mo. Any transfer of a tax credit shall be by written agreement of which the Board shall be notified. Id. The consideration received by the assignor of the tax credit shall be taxable as income, and the excess of the par value of the tax credit over the amount paid by the assignee shall be taxable as income to the assignee. §100.286.7(2) R.S.Mo.
- Period of Use.The credits can be carried forward for up to five years but must be claimed within ten years following the tax year in which the contribution was made. §100.286.7(2) R.S.Mo. The participating taxpayer will be required to enter into a tax credit agreement.
- Cap. In 2009, as the result of $25 million in tax credits provided to the Kansas City Chiefs for renovations at the Truman sports complex and the relocation of the Chiefs' summer training camp

from Wisconsin to St. Joseph Missouri, a number of bills were introduced in the Missouri legislature to curb the ability of the Missouri development finance board to issue contribution credits. Some of the bills went as far as eliminating the credits altogether. The language that survived in House Bill 191 made the credits discretionary rather than mandatory (section 100.286.6 R.S.Mo.), and provided that the $10 million statewide annual cap could be exceeded only by mutual agreement of the Commissioner of the Office of Administration, the Director of the Department of Economic Development, and the Director of the Department of Revenue, that such action is essential to ensure the retention or attraction of investment in Missouri, and further provided that in no case could more than $25 million in credits be authorized or approved during such year. (100.286.8 R.S.Mo.)

(b) Enhancement Credits. If a loan secured by the development fund is in default, the Board shall distribute from the fund an amount not to exceed 90% of the balance remaining to be paid to the participating lender and the Board shall become subrogated to the lender's rights. §100.287 R.S.Mo. The tax credit is available to original owners of the revenue bonds or notes or subsequent owners thereof. The aggregate principal amount of revenue bonds or notes outstanding at any time with respect to which the tax credit shall be available shall not exceed the then-existing state cap. §100.286.6 R.S.Mo. The owners of defaulted revenue bonds or notes shall be entitled to a 100% tax credit on the unpaid principal and interest. §100.297 R.S.Mo. (A similar arrangement was held unconstitutional in *Curchin v. Missouri Indus. Dev. Bd.*, 722 S.W.2d 930 (Mo. banc 1987), as a violation of Art. III, §38(a) of the Missouri Constitution which prevents the General Assembly from granting public money or credit to any private person.)

(6) Conflict of Interest and Exemption from Other Laws. The Board is exempted from the provisions of a number of laws (including the Sunshine Law) to grant it more flexibility. *See* §54(3) herein. The Board shall not extend or secure a loan or grant a tax credit to, or issue bonds or enter into any other agreement with any business entity until the officers of such business entity notify the Board of all campaign contributions made within the previous two years pursuant to the requirements of Chapter 130, R.S.Mo. §100.296 R.S.Mo.

§19. —Planned Industrial Expansion Authority ("PIEA") (100.300-100.620 R.S.Mo.)

The Planned Industrial Expansion Law, §§100.300-100.620 R.S.Mo. applies to all cities which have 400,000 inhabitants or more according to the last decennial census or any city that has adopted a home rule charter. A PIEA has a broad range of powers to assist in the growth of industry, including the power to acquire land through eminent domain and convey or lease projects to private interests to prevent a recurrence of blighted, insanitary, undeveloped industrial areas or to effectuate the

other purposes of the law. An area of operation must be blighted, insanitary or an undeveloped industrial area in need of industrial development. The PIEA prepares a plan which is then approved by the governing body of the municipality. In disposing of property, an authority must receive fair market value even though such value may be less than the cost of the property to the authority. An authority must invite through public notice, proposals from private industrial developers and may accept the industrial development contract proposal that it deems to be in the public interest provided it has not less than 30 days prior thereto, notified the governing body of its intention to accept such industrial proposal.

An authority may issue bonds secured by a pledge of all rents, fees and revenues from projects and other sources.

(1) Powers. An authority is given a broad range of powers in order to carry out its responsibilities, §100.390 R.S.Mo., including the power to purchase or lease or otherwise acquire any interest in property and to construct improvements thereon of virtually any type and to convey any property and enter into contracts with developers regarding the use of such property for industrial and commercial and related purposes to prevent a recurrence of blighted, insanitary, undeveloped industrial areas or to effectuate the purposes of the law, to create covenants running with the land, to borrow money and issue bonds, and to enter into any contracts necessary to carry out the above. §100.390(4) R.S.Mo. See also *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975) (PIEA held to be a "municipality").

In carrying out a project, the authority is granted further powers under the law, including the power to convey property to the city for streets and public places, the power to grant easements, to temporarily manage real estate in the project area pending its disposition for industrial development even though not in conformity with the plan, §100.410(3) R.S.Mo., and the power of eminent domain, §100.420.1R.S.Mo.

(2) Qualification of Area. Such a plan may not be prepared until the governing body of the city has declared the area, by resolution or ordinance, to be a blighted, insanitary or undeveloped industrial area in need of industrial development. §100.400(2) R.S.Mo. Nor shall an authority recommend a plan to the governing body of the city until a general plan for the development of the city has been prepared. §100.400(3) R.S.Mo.

(3) Preparation and Approval of Plans. An authority has the power to prepare or cause to be prepared plans for industrial development, §100.390(2) R.S.Mo., which must be approved by the governing body of the city before any property can be acquired, §100.400(1) R.S.Mo.

(a) Municipality Authorized to Prepare a Master Plan. The governing body of any municipality (not defined) which is not otherwise authorized to establish a planning agency with power to prepare a master plan for the physical development of the

community, is authorized by the law and empowered to prepare such a master plan for the purposes of initiating and carrying out a project under the law. §100.600 R.S.Mo.

(b) Who May Prepare. The authority itself may prepare or cause to be prepared a plan, or any person or agency, public or private, may submit such a plan to an authority. §100.400(4) R.S.Mo.

(c) Elements. The elements of a plan are set forth in §100.400(4) R.S.Mo. and include:

- boundaries
- land use and conditions map
- land use plan
- demographic data
- proposed changes in zoning or streets
- proposed public facilities
- schedule

(d) Submission to Planning Agency. Prior to recommending a plan to the governing body for approval, an authority shall submit the plan to the planning agency of the city for review and recommendations as to its conformity with the general plan for the development of the city as a whole. The planning agency shall submit its written recommendations with respect to the proposed plan to the authority within thirty days after receipt of the plan for review. Definite standards for comparing the proposed plan to the general plan for the development of the community as a whole are set forth in §100.400(6) R.S.Mo.

(e) Recommendation to Governing Body. Upon receipt of the recommendations of the planning agency, or, if no recommendations are received within the thirty days, then without the recommendations, an authority may recommend the plan to the governing body of the city for approval. §100.400(5) R.S.Mo. The recommendations of a plan by an authority to the governing body shall be accompanied by the recommendations of the planning commission together with a statement of the proposed method and estimated cost of the acquisition and preparation for the project area and the estimated proceeds of revenues from its disposal to industrial developers, a statement of the proposed method of financing the project, a feasible method for the relocation of families displaced by the project, and a schedule of development. §100.400(7) R.S.Mo.

(f) Hearing and Approval by Governing Body. The governing body of the community may hold a public hearing on any plan or a substantial modification thereof recommended by an authority upon notice as set forth in the law. §100.400(8) R.S.Mo. Following such hearing, the governing body may approve the plan if it finds it is feasible and in conformity with the general plan for the development of the community as a whole. §100.400(9) R.S.Mo.

(g) Alternative Procedure – Simultaneous Findings & Plan Approval. As an alternative to the procedure of the city governing body declaring an area to be blighted, insanitary or undeveloped industrial area, followed by the preparation of a plan and the submission of that plan to the planning agency for review and recommendation and final recommendation by the authority to the governing body, an authority may find an area to

be blighted or insanitary or unredeveloped industrial area in need of industrial or commercial development and may simultaneously prepare a plan and recommend to the governing body of the community the approval of such findings and plan. Simultaneously with such recommendation, the authority shall submit the finding of the qualifying characteristics of the area and the plan to the planning agency for review and recommendation as to the conformity of the plan to the general plan of the development of the community as a whole. The planning agency shall submit its written recommendations to the authority and the governing body within 30 days. Upon receipt of the recommendations or the passage of 30 days, the governing body may approve the qualifying findings and the plan. §100.400.2 R.S.Mo.

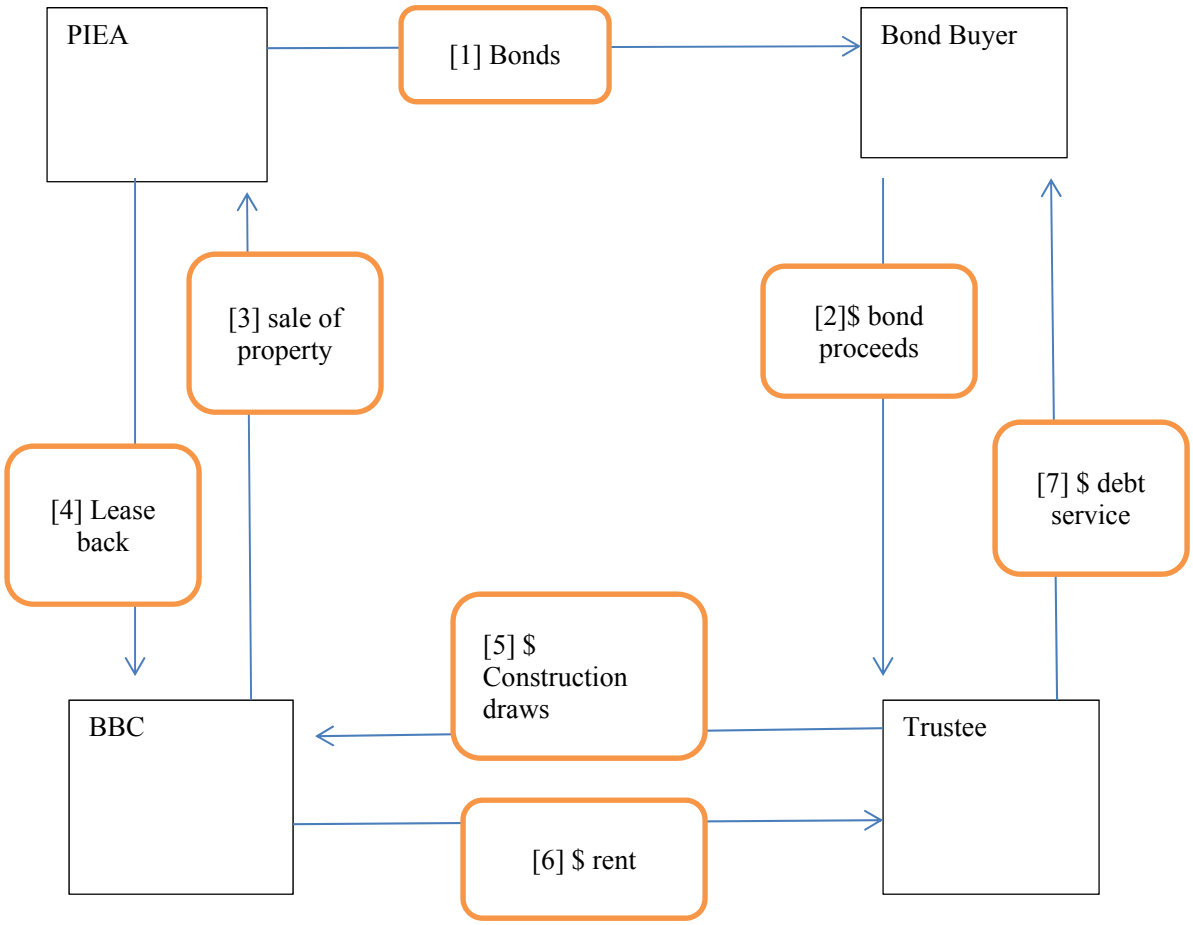
(4) Disposal of Property. An authority may dispose of any property in a project area to any developer for industrial, commercial or public use in accordance with the plan subject to the approval of the plan by the governing body. The property must be conveyed at its fair value notwithstanding that such value may be less than the cost of the property to the authority. §100.410(1) R.S.Mo. An authority shall by public notice invite proposals from private industrial developers and may accept the industrial development contract proposal that it deems to be in the public interest and in furtherance of the purposes of the law, provided, that the authority has, not less than 30 days prior thereto, notified the governing body of its intention to accept such industrial development contract proposal. §100.410(2) R.S.Mo.

(5) Bonds. An authority shall have the power to issue bonds from time to time for any of its corporate purposes or for refunding. It may issue such types of bonds as it deems necessary including revenue bonds regardless of whether the pledged revenues derive from projects financed with the bonds, and any such bonds may be additionally secured by a pledge of any loan or grant from the federal government or any other source. §100.430 R.S.Mo. The authority shall have flexibility in setting the terms of the bonds except that they may not be sold at less than 95% of par and, if in excess of $10 million, must be sold at public sale after notice. §100.440 R.S.Mo. The commissioners are exempted from liability on the bonds and the bonds are declared not to be a debt of the issuer. §100.450.1 R.S.Mo. Interest and income from the bonds shall be exempt from Missouri income taxes. §100.450.2 R.S.Mo. The bonds may be secured by a pledge of all rents, fees and revenues from projects, mortgages, negative asset pledges, a variety of bond covenants, and "any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds, or, in the absolute discretion of said authority, as will tend to make the bonds more marketable, notwithstanding that such covenants, acts, or things may not be enumerated herein." §100.470 R.S.Mo. To further secure the bonds, obligees are granted various powers pursuant to §100.480 R.S.Mo. including the right to cause a surrender of possession, to obtain the appointment of a receiver, and to require the authority to give an accounting. Id. In addition, an obligee is granted legal remedies by mandamus or a proceeding in law or equity or injunction to enforce the bond covenants. §100.490 R.S.Mo. The law authorizes any persons, political subdivisions, and any public or private officers to invest in the bonds. §100.500 R.S.Mo.

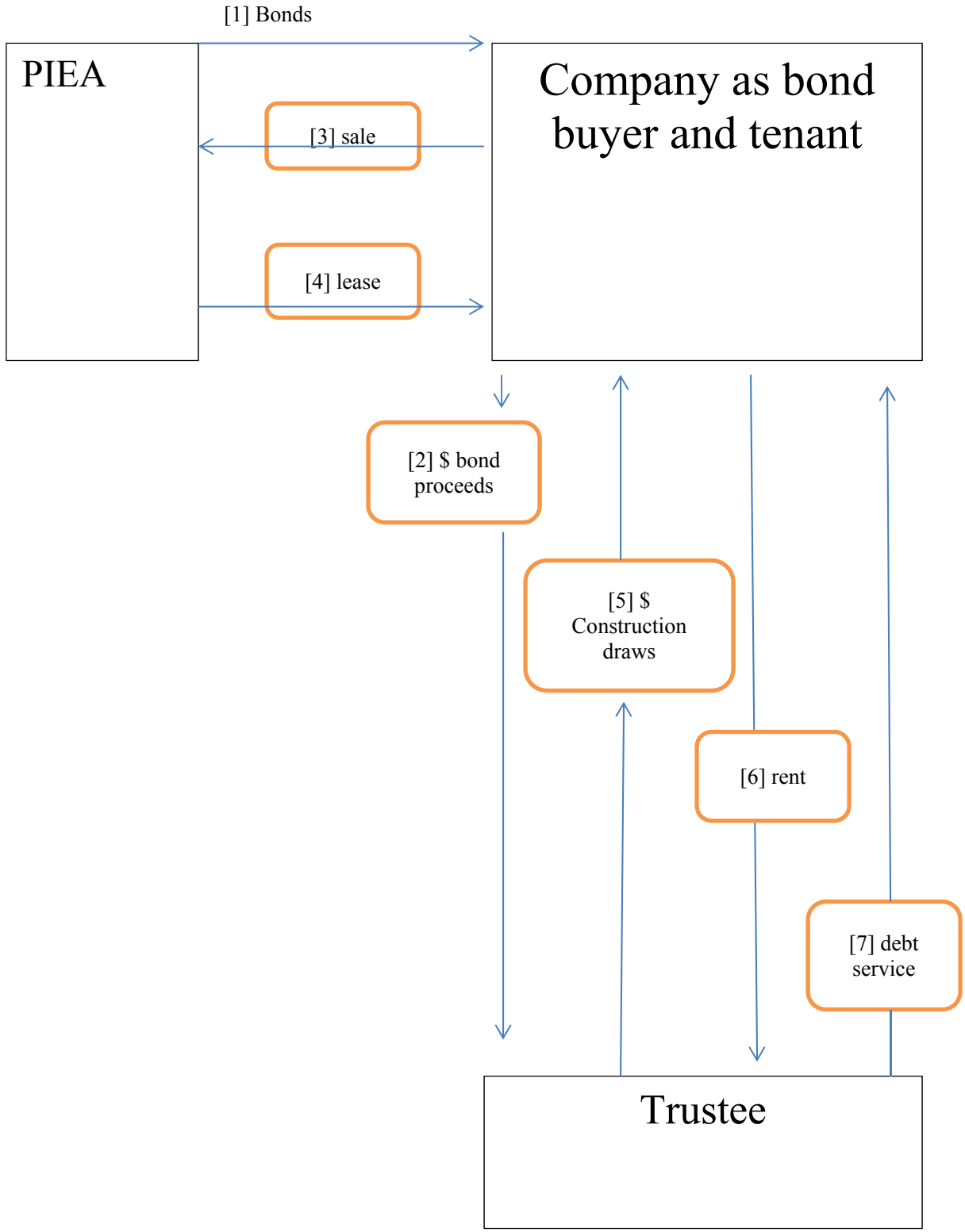
(6) Public Bodies May Assist a Project. Any "public body" (which is defined in §100.310(16) R.S.Mo. as the state or any municipality, county, township, board, commission, authority, district or any other subdivision of the state), may assist a project by conveying any of its interest in any property, constructing of any public work, planning or rezoning or making exceptions from building regulations and ordinances (if such functions are of the character which the public body is otherwise empowered to perform) administering, lending or granting funds and contracting with an authority. §100.530 R.S.Mo. A public body may convey property to an authority without appraisal, public notice, advertisement or public bidding. §100.540 R.S.Mo. A city may levy taxes or may issue and sell its bonds in order to grant funds to an authority. §100.550 R.S.Mo.

(7) Tax Abatement. §100.570 R.S.Mo. provides in toto: "The ad valorem tax exemption contained in Chapter 353 R.S.Mo. 1959, of 'The Urban Redevelopment Corporation Law' and more specifically in §§353.110 and 353.150(4) R.S.Mo., shall not be available to any urban redevelopment corporation on lands and improvements situated within a project area under this law, unless the governing body by a three-fourths vote of such body approves the ad valorem tax exemption benefit." The PIEA Act carries no self-contained tax abatement provisions. By implication, an urban redevelopment corporation may obtain tax abatement in a Land Clearance project area, but only by a three-fourths vote of the governing body. Ironically, it is then more difficult to obtain 353 tax abatement in a PIEA project area (which has already been declared blighted or insanitary) than in a different blighted area. If an authority owned property, it might be exempt from property taxes under the Missouri Constitution, Art. X, §6. See *Land Clearance for Redevelopment Authority of Kansas City v. Waris*, 790 S.W.2d 454 (Mo. banc 1990) which held that property owned by a Land Clearance Authority was exempt from taxation. The court based its reasoning on the legal conclusion that a Land Clearance for Redevelopment Authority is part of city government and not a separate political subdivision. A PIEA, on the other hand, has been held to be a "municipality." *State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis*, 517 S.W.2d 36, 48 (Mo. Banc 1975). Also, §108.170 R.S.Mo. provides that an authority "shall constitute a public body corporate and politic. . . ." but a PIEA has no taxing power. Perhaps a court would rule that since a PIEA is a "municipality", its property is exempt from taxation under Art. X, §6 which exempts the property of "political subdivisions".

Typical PIEA bond financing



Financing where buyer is also tenant



§20. —BUILD (100.700 – 100.850 R.S.Mo.)

In 1996 the Missouri General Assembly established the Missouri Business Use Incentives for Large-Scale Development Act which authorizes financial incentives through the Missouri Development Finance Board for the promotion of job creation and economic growth. Eligible industries must be involved in manufacturing, processing, research and development, or providing services in interstate commerce and must invest at least $15 million in an economic development project creating at least 100 new full-time jobs or be an office industry which has an investment of at least $10 million and creates at least 500 new jobs or, in the case of a headquarters for a tax preparation firm, 100 new jobs. Retail, health or professional services, or businesses which close or significantly reduce operations in another area of the state are not eligible. There are a number of requirements for a *project* to be eligible, including that local governments have committed incentives, and that but for the build assistance the project will not occur.

The board may issue bonds to finance projects. An assessment equal to 5% of employees' wages will be remitted by the employer to the board. (10% in the case of a distressed community) The assessment is used by the board to retire bonds. The employer recovers the assessment by means of a tax credit or refund.

(1) Eligible Industries. Eligible industries are Missouri businesses involved in manufacturing, processing, research and development, or providing services in interstate commerce, and which invest at least $15 million in an economic development project creating at least 100 new full-time jobs. Also eligible are office industries which have investments of at least $10 million and create at least 500 new jobs. §100.710(9)(a) R.S.Mo. To accommodate the move of H&R Block's World Headquarters to downtown Kansas City, the legislature provided in 2004 via SB 1155 that an office industry headquarters in Kansas City in the tax preparation business need only create 100 new jobs at the economic development project. §100.710(9)(b) R.S.Mo. An industry that meets the definition of "essential industry" may be considered an eligible industry. §100.710(9)(b) R.S.Mo. An "Essential industry", is a business that otherwise meets the definition of eligible industry except an essential industry shall: (a) Be a targeted industry; and (b) Be located in a home rule city with more than twenty-six thousand but less than twenty-seven thousand inhabitants located in any county with a charter form of government and with more than one million inhabitants. (St. Louis County) §100.710(10) R.S.Mo. In 2006 this definition was expanded to include the city of Fenton via SB 645. A "Targeted industry", is an industry or one of a cluster of industries that is identified by the department as critical to the state's economic security and growth and affirmed as such by the joint committee on economic development policy and planning established in §620.602 R.S.Mo. §100.710(15) R.S.Mo. Businesses involved in retail,

health, or professional services, or which close or significantly reduce operations in one area of the state and relocate the same operation in another area of the state, are not eligible for incentives under this act. §100.710(9)(a) R.S.Mo. Regulations define "eligible industry" as a business located in Missouri or a business which is not located in the state but which would locate there as a result of the project, which otherwise satisfies the requirements of the Act. 4 C.S.R. 80-5.010(2). In 2005, via SB 343 the legislature added development agencies as defined in §100.255(3) R.S.Mo. or a corporation, limited liability company or partnership formed on behalf of a development agency to the definition of "Eligible Industry". §100.710(9) R.S.Mo.

(2) Eligible Projects. The board, with the approval of the Department of Economic Development, may award a credit to be used for financing a particular project if all of the following conditions exist: (1) the project will create new jobs; (2) the project will strengthen the economy of the state; (3) political subdivisions affected by the project have committed local incentives to the project; (4) receiving the credit is a major factor in the project's development and not receiving the credit will likely cause the project to be discontinued or abandoned; (5) awarding the credit will produce an overall positive fiscal impact to the state. §100.760(7) R.S.Mo. Regulations define "project" as an economic development project as defined in §8(7) of the Act. 4 C.S.R. 80-5.010(6).

(3) Funding of Program. The board may borrow money or issue revenue bonds to finance the costs of eligible projects.

(a) Amount. As a project develops and hires employees, an assessment equal to five percent of employees' wages will be remitted by the employer to the board. (10% in a distressed community – see §26 herein.) Employers will recover the assessment by means of a credit against income tax liability or a refund from the treasury. §100.850 R.S.Mo. The board shall determine the amount and duration of a project and its associated assessments. Credits may not exceed the estimated assessments. Assessments may not exceed 15 years. §100.780. Monies remitted to the Missouri Development Finance Board will be used to retire debts incurred by the board and to finance future projects. Criteria to be considered by the board in determining the amount of a specific credit are outlined, but the amount of credit awarded to a particular project may not exceed the amount of the assessments resulting from that project.

(b) Clawbacks. The Act provides that should business or employment conditions cause the amount of assessments to be less than the amount projected in the agreement, then the employer shall pay to the board the difference. If this is not sufficient, then state income tax withholding collected by the employer is to be paid to the board.

(c) Financing Agreements. The Act authorizes the board to enter into financing agreements with an eligible industry. §100.740 R.S.Mo. The agreements are to include detailed project descriptions and the provision that all or part of the project costs are to be paid by the receipt of the assessments. Options for the board in the event an industry defaults on any of its obligations, including the pursuit of legal remedies, are also to be outlined in the agreements. No financing agreement may last more than fifteen years. §100.850 R.S.Mo.

(4) Rules. The Department of Economic Development, in conjunction with the board, shall promulgate rules governing the procedures and standards for approving projects. These rules must require an evaluation of the creditworthiness of eligible industries, the number of new jobs expected to be provided by the project, and the likelihood of the project's economic success. §100.730 R.S.Mo.

(5) Annual Reports. The Act requires the department to annually assess the effectiveness of this program in creating new jobs and its revenue impact on the state, and to annually report this assessment to the Governor, the Speaker of the House, and the President Pro Tem of the Senate. §100.810 R.S.Mo.

(6) Regulatory Definitions.

(a) "Average wage paid by the applicant" means the average wage paid within the county in which the project is located. The average wage will be determined by the most recent information provided by the Division of Employment Security based upon the wages paid to employees of businesses of substantially the same standard industrial classification (SIC) code as that of the applicant. In the event that the wage information is not available for a particular county or, is more than two years old, or no other employer with a comparable SIC code is located there, the Department of Economic Development may utilize average wage information from adjacent counties or counties which the department determines are comparably situated. 4 C.S.R. 80-5.010(1).

(b) "Invest" means the same as the term "new business facility investment" as defined in §135.100(7) R.S.Mo., except that for leased property, the value of real and personal property shall be determined by the present value of the projected annual lease payments throughout the term of the lease utilizing an interest rate established by the department. Investments may occur in a period commencing with a date established by the department and ending three years after the issuance of certificates. 4 C.S.R. 80-5.010(4).

(c) "New jobs" means the number of jobs created by the eligible industry during a period commencing with a date established by the department and ending three years after the issuance of certificates, and which otherwise satisfy the requirements of §8(10) of the Act. 4 C.S.R. 80-5.010(4).

(d) "Overall positive fiscal impact" and "revenue impact of the program" mean the net state economic impact which is the value of the direct and indirect new state tax revenues resulting from the project over a 15-year period (as determined by Department of Economic Development econometric models) less a projection of new state costs attributed to the project. 4 C.S.R. 80-5.010(5).

(e) "Related taxpayer" means the same as that term is defined in §135.100(9), R.S.Mo. 4 C.S.R. 80-5.010(7).

(f) "Replacement of facilities" means the same as the term "replacement business facility" as defined in §135.100(10) , R.S.Mo. 4 C.S.R. 80-5.010(8).

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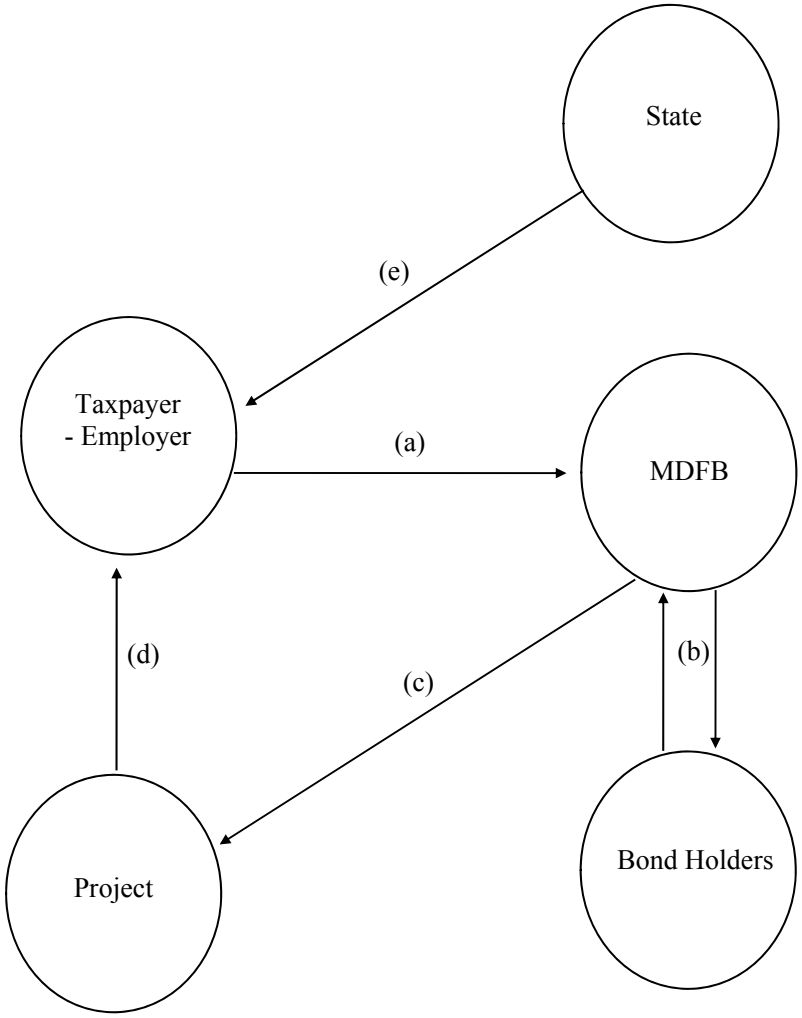
(7) Illustration.

(a) Company pays an assessment equal to 5% of payroll to MDFB.
(b) MDFB issues bonds secured by assessments.
(c) Bond proceeds used to construct project.
(d) Project is leased or sold to company.
(e) State grants tax credits to company in the amount of the assessments.



(8) Annual Cap. The Act provides that in no event shall the aggregate amount of tax credits authorized by subsection 4 of this section exceed fifteen million dollars annually. In 2005, the legislature, via SB343 added the following language, "Of such amount, nine hundred fifty thousand dollars shall be reserved for an approval project for a world headquarters of a business whose primary function is tax return preparation that is located in any home rule city with more than four hundred thousand inhabitants and located in more than one county, which amount reserved shall end in the year of the final

maturity of the certificates issued for such approved project." §100.850 R.S.Mo. This amendment facilitated the move of the H & R Block headquarters downtown Kansas City. In 2009, the cap was increased to $25,000,000 via HB 191. §100.850.5 R.S.Mo.

§20.1. —Build America and Recovery Zone Bonds (108.1000 – 108.1020 R.S.Mo.)

This legislation creates three new sections for the issuance of Build America and Recovery Zone bonds. (R.S.Mo. §§108.1000, 108.1010, and 108.1020). These bonds may be combined with any other economic development program offered by the state.

(1) Types of Bonds. The American Recovery and Reinvestment Act of 2009 §1531 added Sections 54AA and 1400U-2 to the Internal Revenue Code ("IRC"). These sections create three levels of bonds that must be issued before January 1, 2011. Davis Bacon prevailing wage rates apply.

(a) Build America Bonds .

(i) Federal Tax Credit Bonds. This bond gives the holder of a bond on interest payment dates a tax credit against the tax imposed by the IRC equal to 35% of the amount of the interest payable by the issuer with respect to the interest date. ("Build America Bonds Tax Credit").

(ii) Refundable Tax Credit Bonds. This bond provides a refundable tax credit paid to state or local governmental issuers by the Treasury and the Internal Revenue Service ("IRS") in an amount equal to 35% of the total coupon interest payable to investors in the bonds. ("Build America Bonds Direct Payment").

(b) Recovery Zone Economic Development Bonds. This bond provides a refundable tax credit paid to the state or local government issuers in an amount equal to 45% of the total coupon interest payable to investors in these taxable bonds. This bond can be used with Build America Bonds to finance a single project.

(c) Recovery Zone Facility Bonds. This bond is a tax-exempt private activity bond offering lower interest rates typically associated with tax-exempt bonds. Debt service can be funded directly by the private business that owns and uses the property. Only expenditures incurred after a Recovery Zone is designated can be reimbursed.

(2) Recovery Zone. Recovery Zones are established by the political subdivision receiving the allocation and include areas designated:

(a) by the issuer as having significant poverty, unemployment, rate of home foreclosures, or general distress;

(b) by the issuer as economically distressed by reason of the closure or realignment of a military installation; or

(c) as an empowerment zone or renewal community is in effect.

(3) Purposes for Bond Issuance. The Missouri Development Finance Board ("MDFB") may issue bonds for the purpose of paying any part of the cost of financing any qualified project or for purchasing any debt related to such projects. The MDFB may

also buy, sell and broker federal tax credits issued in connection with Build America and Recovery Zone Bonds. §108.1000.2 R.S.Mo.

(4) Agencies Which May Designate Bonds as Build America and Recovery Zone Bonds. The following development agencies may designate bonds as Build America and Recovery Zone Bonds: a port authority, bi-state development agencies, a land clearance and redevelopment authority, a county, city, incorporated town or village or other political subdivision, a planned industrial expansion authority, an industrial development corporation, a tax increment financing commission or any other governmental, quasi-governmental or quasi-public corporation or entity created by state law. §§108.1000.1(4) and 100.255(3) R.S.Mo.

(5) Allocation of Recovery Zone Bonds. The Recovery Zone Bonds will be allocated to counties and large municipalities by the Department of Economic Development ("DED"). Any allocated Recovery Zone Bonds that are unissued on July 1, 2010 will be recaptured by the DED for reallocation. §108.1010.1 R.S.Mo.

(6) Award Criteria.

(a) Economic Development Bonds.

(i) Number of beneficiaries;

(ii) Environmental impact;

(iii) Local Effort;

(iv) Economic Impact;

(v) Economic distress of zone (previous job loss, average income, poverty levels);

(vi) Project readiness; and

(vii) Other compelling information that may be presented by the applicant.

(b) Facility Bonds.

(i) Number of jobs created;

(ii) Number of jobs retained;

(iii) Wages of jobs created or retained;

(iv) Economic distress of zone (previous job loss, average income, poverty levels);

(v) Project readiness;

(vi) Project competitiveness;

(vii) Amount of investment;

(viii) Economic impact;

(ix) Opportunities for spin-off jobs; and

(x) Other compelling information that may be presented by the applicant.

(7) Exemption From State Tax. These bonds are exempt from taxation by the State and its political subdivisions. §108.1020 R.S.Mo.

§21. —New or Expanded Businesses (135.100 – 135.150 R.S.Mo.)

Any taxpayer who establishes a new business facility in accordance with §§135.100, *et seq.* R.S.Mo., is allowed investment and job tax credits for a period of 10 years. A taxpayer operating an existing facility shall be allowed a tax credit of $100 for each new employee and each $100,000 of new investment. A taxpayer not operating an existing business facility shall be entitled to a credit of $75 per job and for each $100,000 of investment. These credits may not be carried forward or back but may be deferred to the third taxable year after commencement of operation. Credits may be allocated among shareholders or partners according to their ownership. The initial application for claiming tax credits must be made in the taxpayer's tax period immediately following commencement of commercial operations.

Employee-owned engineering firms, architectural firms or accounting firms establishing a new business facility qualifying as a headquarters shall be allowed certain credits provided such facility maintains an average of at least 500 new employees and an average of at least $20 million in new investment. These credits shall equal the greater of $400 for each new employee and 4% of new investment or $500 for each new employee and $500 for each $100,000 of new investment. These credits may be sold for no less than 75% of par nor more than 100% of par, and may be carried forward for up to five tax periods. Excess credits shall constitute an overpayment and qualify for a refund. Per §135.155 R.S.Mo. enacted in 2004, notwithstanding any provision of the law to the contrary, no revenue-producing enterprise shall receive the incentives set forth in §§135.100 to 135.150 for facilities commencing operations on or after January 1, 2005.

(1) Tax Credit for New or Expanded Business Facility.

(a) 10 Year Tax Credit. A taxpayer operating an existing business facility shall be allowed a credit (of $100 per new employee and $100 for each $100,000 of new investment §135.110.2(2) R.S.Mo.) each year for 10 years against income taxes excluding withholding taxes. A taxpayer not operating an existing business facility shall be entitled to a credit of $75 per job and $75 per $100,000 of investment.

Tax Credit per Job/$100,000 of Investment

	Taxpayer	
	New	Existing
New Facility	$75.00	$100.00

Existing Facility	N/A	$100.00

An insurance company which establishes a new business facility shall be allowed a credit against the tax imposed by Chapter 148 R.S.Mo. An insurance company exempt from the 30% employee requirement, may apply the credit against any retaliatory tax imposed pursuant to §375.916 R.S.Mo. §135.110.1R.S.Mo.; except that:

(i) Initial Application. The initial application for claiming tax credits must be made in the first tax period following the commencement of commercial operations. §135.110.1R.S.Mo.

1) E-Zone Designation After New Business or Expansion. If a business is entitled to tax credits prior to designation of an enterprise zone, the designation does not change the character or amount of the credit. *Additional* investments or hires by the business after designation and before completion of the 10 year period will be limited to non-enterprise zone credits unless the additional investment and employees independently qualify for enterprise zone credits. §§135.200-135.255 R.S.Mo. In no case shall the same investment or employee be eligible for non-enterprise zone credits and enterprise zone credits. §12 C.S.R. 10-2.085(16)

(ii) Minimum Number of Employees. No credits shall be allowed unless the number of new business facility employees equals or exceeds two. However, if a revenue-producing enterprise (other than a revenue-producing enterprise defined in paragraphs (a) to (g) and (i) to (l) of subdivision (11) of §135.100 establishes an office as defined in subdivision (8) of §135.100, the number must equal or exceed 25 employees. §135.110.1 R.S.Mo.

1) Calculation of number of new employees. The number of new business facility employees during any taxable year shall be the average number of individuals employed on the last business day of each month of such taxable year. The statute provides a method for prorating partial years. §135.110.4 R.S.Mo.

2) Where Previously Existing Jobs. For the purpose of computing the credit allowed for separate facilities, acquired enterprises or replacement facilities, the number of new business facility employees shall be reduced by the average number of individuals employed in the preceding year and also by any employees that were transferred to the new business facility from another Missouri facility. §135.110.4 R.S.Mo.

(iii) When Credits Exceed Liability—Refund—Perfection. Tax credits earned, which exceed the tax owed shall constitute an overpayment of taxes and be refunded to the taxpayer provided the refunds are used to purchase specified facility items (e.g., computers). The taxpayer shall perfect such refund by attesting in writing to the director that the requirements of the statute have been met. §135.110.13 R.S.Mo.

(iv) No Carry Forward/Back. Credits may not be carried forward but shall be claimed for the taxable year during which commencement of commercial operations occurs at such new business facility, and each for each of the nine succeeding taxable years. §135.110.1 R.S.Mo. Unused credits are forfeited and may not be carried back to other years. §12 C.S.R. 10-2.085(6)

(v) Deferment of Tax Credit—Election—Notice—Irrevocable. A taxpayer may elect to defer the start of the ten year period to any tax year not later than

the third taxable year after commencement of commercial operations. The election is perfected by notifying the Director of Economic Development by written statement attached to the tax credit application for the taxable year in which commencement of commercial operations occurs of the intention to make such election. The election shall be made during the taxable year immediately following the year of commencement of commercial operations. §135.120 R.S.Mo. The election by the taxpayer to defer the start of the ten year period is irrevocable. The election is binding on all shareholders or partners. §12 C.S.R. 10-2.085(9).

(vi) Multiple Ten Year Periods. No taxpayer shall be entitled to multiple ten year periods for subsequent expansions of the same facility unless a new business facility is expanded in the eighth, ninth or tenth year of the ten year period or in subsequent years following the expiration of the ten year period, at least 25 new business facility employees are attributed to such expansion and the amount of new business facility investment is at least $1 million. §135.110.1 R.S.Mo.

(b) Taxes Against Which Credit May Be Offset. (§135.110.2)

(i) Taxpayer with Existing Facility. In the case of a taxpayer operating an existing business facility, the credit shall offset the greater of:

1) Income or Premium Taxes - Some Portion. Some portion of the income tax otherwise imposed by Chapter 143 R.S.Mo. (excluding withholding tax), the tax on direct premiums under Chapter 148 R.S.Mo., and in the case of an insurance company exempt from the 30% employee requirement of §135.230, against any retaliatory tax imposed pursuant to §375.916 R.S.Mo. §135.110.2(1) R.S.Mo. or

2) Business Income Tax.

- ***Sole Missouri Facility: Up To 50%***. If the business operates no other facilities in Missouri, up to 50% of the business income tax imposed by Chapter 143 R.S.Mo. (excluding withholding taxes), the tax on direct premiums under Chapter 148 R.S.Mo., and in the case of an insurance company exempt from the 30% employee requirement, against any retaliatory tax per §375.916, R.S.Mo. §135.110.2(2) R.S.Mo. or
- ***Multiple Missouri Facilities: Up To 25%***. For an existing business operating more than one facility in Missouri, up to the greater of the portion described in §135.110.2(1) or 25% of the business's tax. §135.110.2(2) R.S.Mo.
- ***Acquired Existing Sole Operation***. For a taxpayer acquiring a new business facility, up to the greater of the portion prescribed in subdivision §135.110.2(1) R.S.Mo. or 50% of the business's tax provided the business operates no other facilities in Missouri. §135.110.2(2) R.S.Mo.
- ***Acquired Multiple Missouri Facilities***. In the case of an acquired business operating more than one facility in

Missouri, the credit allowed shall offset up to the greater of the credit allowed in §135.110.2(1) or 25% of the business's tax. §135.110.2(2) R.S.Mo.

(ii) New Taxpayer - Sole Facility. In the case of a taxpayer not operating an existing business facility, the credit allowed by §135.100.1 shall offset the greater of:

1) Income or Premium Taxes. Some portion of the income tax (excluding withholding taxes), the tax on direct premiums, or in the case of an insurance company exempt from the 30% requirement of §135.230, against any retaliatory tax imposed pursuant to §375.916 R.S.Mo. §135.110.3(1); or

2) Business Income Tax. Up to 100% of the business income tax otherwise imposed by Chapter 143 R.S.Mo. (excluding withholding tax), the tax on direct premiums, or in the case of an insurance company exempt from the 30% employee requirement of §135.230, against any retaliatory tax pursuant to §375.916 R.S.Mo. §135.110.3(2) R.S.Mo.

(iii) New Taxpayer - Multiple Missouri Facilities. The credit allowed by §135.110.1 shall offset up to the greater of the portion described in §135.110.3(1) or 25% of the business's tax.

1) Amount of Employee/Investment Credit. Such credit shall equal $75 for each new business facility employee plus $75 for each $100,000 in new business facility investment. §135.110.3(2) R.S.Mo.

(iv) Credit Applicable Only to New or Expanded Facility. The credit available to a new business facility, expanded facility or additional facility may be applied to up to 100% of the income tax liability on the taxpayer's new business facility income. This credit may only be applied against tax liability incurred on income which is attributed to a new business facility or the expanded portion of a facility which qualifies as a new business facility. §12 C.S.R. 10-2.085(8)

(c) Calculation of New Investment—Separate, Acquired or Replacement Facility. In the case of a separate, acquired or replacement facility, the amount of the taxpayer's new business facility investment shall be reduced by the average amount of investment immediately preceding the expansion, acquisition or replacement. §135.110(5) R.S.Mo.

(d) Transferred Investment. "Furthermore, the amount of the taxpayer's new business facility investment shall also be reduced by the amount of investment employed by the taxpayer or related taxpayer which was subsequently transferred to the new business facility from another Missouri facility and for which credits authorized in this section are not being earned, whether such credits are earned because of an expansion, acquisition, relocation or the establishment of a new facility." §135.110.5 R.S.Mo.

(e) Eligibility for Credit.

(i) Expansion. If a facility which does not constitute a new business facility is expanded, the expansion shall be considered a separate facility eligible for tax credits if:

1) Investment or Jobs. The taxpayer's new business facility investment (in the expansion during the tax period in which the tax credits are claimed)

exceeds $100,000 (or, if less, 100% of the investment in the original facility prior to expansion) and if the number of new business facility employees engaged or maintained in employment at the expansion facility equals or exceeds two. §135.110.6(1)

- ***Larger numbers required for office***. If the new enterprise is an office which qualifies (other than certain revenue-producing enterprises) the number of new employees must equal or exceed 25 provided that the expansion adds at least 25 (other than certain revenue-producing enterprises) employees.

2) If Expansion Constitutes New Facility. The expansion otherwise constitutes a new business facility. §135.110.6(2) R.S.Mo.

(f) Eligible Business.

(i) Revenue-Producing Enterprise. When the Credit For New Or Expanded Business Facility law was first passed in 1980, the eligible businesses consisted of any new business facility which was a facility employed by the taxpayer in the operation of a revenue-producing enterprise. A "revenue-producing enterprise" was defined as mining, manufacturing, warehousing, storage, distribution, etc. With the passage of the enterprise zone law in 1982 and with subsequent amendments, the definition of "revenue-producing enterprise' was expanded in §135.200(5) to include the selling of any product or the rendering of any service. Since then, various activities have been added by reference to standard industrial classification codes. For example, in 1996, the legislature added manufacturing activities classified as SICs 20 through 39 to allow a Harley-Davidson motorcycle manufacturing plant to qualify for enterprise zone benefits. §135.100(11). In 1997, programming, data processing and other computer-related activities were added. §135.100(11)(o). In 1998, local exchange telecommunications services were added. §135.100(11)(k) R.S.Mo. Leasing improved real property to a commercial tenant is not among the activities deemed a "revenue-producing enterprise" by the statute. *Schudy v. Cooper*, 824 S.W.2d 899 (Mo. banc 1992) (enterprise zone statute §135.225 adopts tax credits described in §§135.100 to 135.600 R.S.Mo.). Non-contiguous parcels in same city or county qualify as one facility. §135.155.3 R.S.Mo.

(ii) No NEB Credits to Public Utility. No credits shall be allowed to a public utility. §135.110(7) R.S.Mo.

(iii) Common Carriers. However, motor carriers, barge lines or railroads engaged in transporting property for hire, or any interexchange telecommunications company may qualify for new or expanded business facility credits. §135.110(7) R.S.Mo.

(g) Allocation of Credits to Shareholders and Partners. New or expanded business tax credits can be claimed by the shareholders of a corporation described in §143.471 R.S.Mo. and the partners of a partnership in proportion to their share of ownership on the last day of the taxpayer's tax period. §135.110.8(1) R.S.Mo. A partner's distributive share of a credit shall be determined by the Partnership Agreement or failing that, by IRS rules. DED regulations are very specific about the information which must be attached to the income tax returns of corporations and partnerships claiming these credits. 12 C.S.R. 10-2.085(7)

(h) Credits for Headquarters of Engineering, Architectural or Accounting Firms. Employee-owned engineering firms, architectural firms or accounting firms establishing a new business facility qualifying as a headquarters, shall be allowed certain credits under the same terms and conditions as any other new or expanded business facility provided such facility maintains an average of at least 500 new business facility employees §135.110.9(1) R.S.Mo. and an average of at least $20,000,000 in new business facility investment while the credits are being claimed. §135.110.9(2) R.S.Mo. (The Burns & McDonnell Amendment) The definitions of "employee owned" and "headquarters" are found in §135.110.10 R.S.Mo. "Headquarters" was defined in HB 191 in 2009 to mean a business must have been headquartered in Missouri for at least 50 years. §135.110.10(2) R.S.Mo.

(i) Amount. The greater of $400 for each new employee and 4% of new investment, or $500 for each new employee and $500 of each $100,000 of new investment. §135.110.11 R.S.Mo.

(ii) Apportionment. In the case of such headquarters operations, the credits may be apportioned to shareholders and partners. §135.110.12R.S.Mo.

(iii) Assignability.

1) Price. Pursuant to §135.110.14 R.S.Mo., such headquarters operations tax credits may be sold or otherwise conveyed for no less than 75% of par, in an amount not to exceed 100% of such credits.

2) Taxability. The amount received by the assignor of such tax credit shall be taxable as income.

3) Use. The taxpayer acquiring the credits may use them to offset 100% of income tax liabilities, or in the case of an insurance company exempt from the 30% employee requirement of §135.230, against any retaliatory tax imposed pursuant to §375.916 R.S.Mo.

4) Carry Forward. Unused credits in the hands of the assignee may be carried forward for up to five tax periods, provided all such credits shall be claimed within ten tax periods following the commencement of commercial operations. Excess credits shall constitute an over payment and qualify for refund. §135.110(13) R.S.Mo.

5) Perfection. The transfer shall be perfected by written notice from the assignor to the director of the Department of Economic Development within thirty days of the day of transfer. §135.110.14(2) R.S.Mo.

(2) Transfer of Business Facility. If the owner of a new business facility transfers all or part of the facility during the ten year period, the transferor must allow the transferee to claim the remaining tax credits. §135.130.1 R.S.Mo. Of course, the transferee must operate the facility and otherwise continue to qualify for the credit. 12 C.S.R. 10-2.085(11)

(a) Transferor Shall Notify Department of Intent. The transferor shall notify the director of DED of any intent to transfer the right to claim credits by written statement attached to the tax credit application for the tax year of transfer. §135.130.3 R.S.Mo. Detailed information is required by regulation to be included in the notification. 12 C.S.R. 10-2.085(12)

(b) Death of Owner. If a taxpayer dies during the ten year period and the new business facility passes to the estate of the deceased taxpayer, the distributees thereof shall be entitled to the credits in proportion to their interest. §135.130.4 R.S.Mo.

(3) Termination and Resumption of Operation of Business.

(a) Gap in Operations. If an enterprise is terminated and later resumed during the ten year period, the taxpayer may, with the consent of the Director of DED, elect to claim a credit for the balance of years remaining after deducting the number of years for which the credit was claimed prior to termination. The director shall grant the consent if the termination was for reasonable cause and the resumption will provide increased opportunities for employment and result in a substantial contribution to the economy of the state. §135.140 R.S.Mo. A revenue-producing enterprise which has been discontinued may be reactivated along with the tax credits if the director of revenue makes certain findings about whether the resumption of operations will provide increased opportunities for employment, etc. A dormant period exceeding five years shall constitute prima facie evidence of a lack of reasonable cause for termination as well as a lack of increased employment opportunities and substantial contribution to the economy upon resumption of operations. (12 C.S.R. 10-2.085(14))

(b) Notification to Director of Termination. Upon termination of an enterprise, the taxpayer shall notify the Director of Revenue in a detailed written statement attached to the income tax return for the year of termination. Failure to notify the director of the termination shall be prima facie evidence that the termination was not due to reasonable cause. (12 C.S.R. 10-2.085(13))

(4) Consolidated Tax Returns. In the case of a member of an affiliated group of corporations who qualifies and elects to file a Missouri consolidated income tax return, the use of the credit shall be limited to that member's separate income tax liability as though a separate income tax return was filed. 12 C.S.R. 10-2.085.

(5) Claims – Procedure. All procedural matters relating to filing a claim for NEB incentives, including refunds, deficiencies, interest, contents of returns, limitations and penalties shall be determined pursuant to §§143.481-143.996 R.S.Mo. 12 C.S.R. 10-2.085.

(6) Sunset. No revenue producing enterprise shall receive incentives under §§135-100-135-150 (except headquarters as defined in §135.110.10 R.S.Mo.). §135.155.1. No headquarters will receive the credits for facilities commencing or expanding operations after January 1, 2020. §135.155.1 R.S.Mo. Expansions at headquarter facilities will be considered separate business facilities and entitled to the credits if at least 25 new employees and $1 million of new investment are attributed to the expansion. §135.155.2 R.S.Mo. Headquarters buildings on multiple non-contiguous properties will be considered one facility if they are in the same county or municipality. §135.155.3 R.S.Mo.

§22. —Enterprise Zones (135.200-135.423 R.S.Mo.)

Areas that contain pervasive poverty, unemployment, and general distress may qualify for designation as an enterprise zone ("E-zone"). At least 65% of the residents living in the area must have incomes below 80% of the Missouri median income. Over 50 such zones have been created in the State of Missouri. Three areas of the state, Kansas City, Claycomo and St. Louis, are eligible for the establishment of satellite enterprise zones. As of August 28, 2004, the Department of Economic Development shall designate any area which meets all of the requirements of §135.205 R.S.Mo.

State income tax credits are provided to businesses located within the E-zone based on the number of new jobs and the amount of new investment created at the qualifying facility. There is also a possible income exemption and property tax abatement on improvements to real property.

At least one-half of the ad valorem taxes imposed on property in an E-zone shall be abated for a period of not less than 10 years for property used for assembling, fabricating, processing, manufacturing, mining, warehousing and distributing. But no such exemption shall be granted for more than 25 years beyond the date of designation of the E-zone and no exemption shall be granted until the governing authority holds a public hearing to obtain the opinions and suggestions of residents of any political subdivision affected.

The tax credits for jobs and investments, the income exemption and the training credits that are allowed to a new or expanding business not located in an E-zone shall be granted to a business in the enterprise zone on the same terms and conditions with the following modifications: $400 per new employee, $400 per each E-zone resident, $400 for each §240 employee, an investment credit of basically 2% of the total amount of investment and certain enhanced training costs. One-half of the Missouri taxable income attributed to a new business facility in an E-zone shall be exempt from Missouri income taxes. The investment credit and the income exemption are granted only if 30% of the employees are enterprise zone residents or §240 employees or some combination thereof. A §240 employee is one who was unemployed for at least three months immediately prior to being employed by the new facility or eligible to receive aid to families with dependent children or general relief.

Tax credits for a new or expanding business may not be sold regardless of whether the business is located in an E-zone. E-zone tax credits may

not be deferred. The owner of a new business facility in an E-zone may elect to forego the enhanced E-zone benefits and take the benefits allowable to a new or expanding business not located in an E-zone.

An E-zone designation may exist for 15 years and may be extended for an additional seven years. E-zone benefits may be granted for up to 10 years during the life of the E-zone.

Regular enterprise zones were discontinued in favor of enhanced zones via legislation passed in 2004. No revenue-producing enterprise shall receive the state tax exemption, state tax credits, or state tax refund set forth in the Enterprize Zone Act for facilities commencing operations on or after January 1, 2005.

(1) Objectives of Enterprise Zone Program. The E-zone program is designed to accomplish three fundamental objectives: to reduce unemployment by creating jobs, to eliminate blight through the rehabilitation of area buildings and facilities and to improve the local economy by fostering new entrepreneurship. The program is designed to exclusively serve areas with a history of pervasive poverty, unemployment and general distress. 4 C.S.R. 85-3.010.a

(2) Administration of E-Zone Program. The Division of Community and Economic Development shall administer the E-zone program in cooperation with the Department of Revenue.

(3) Definitions. §135.200 R.S.Mo. A number of terms are defined in the definitions section and probably the most significant is "Revenue Producing Enterprise" (§135.200(6)) which lists those businesses (some by SIC code) that qualify. In addition, certain other definitions have been promulgated by regulation such as "Applicant", "Blight" and "Entrepreneurship". 4 C.S.R. 85-3.010

(4) Qualification as Enterprise Zone.

(a) General. The area must be one of pervasive poverty, unemployment and general distress (§135.205(1) R.S.Mo.);

(b) Income Levels. At least 65% of the residents living in the area must have incomes below 80% of the Missouri median income (§135.205(2) R.S.Mo.);

(c) Size of Population. The resident population of the area must be at least 4,000 but not more than 59,000 at the time of designation, but if not within a standard metropolitan statistical area (SMSA) 1,000 to 20,000. If the jurisdiction does not meet the minimum population requirements, the population of the area must be at least 50% of the population of the jurisdiction provided that no enterprise zone consist of an entire county (§135.205(3) R.S.Mo.); and

(d) Unemployment Levels. The level of unemployment must exceed one and one-half times the average Missouri rate over the previous twelve months or the

percentage of area residents employed on a full-time basis must be less than 50% of the statewide percentage. §135.205(4) R.S.Mo.

(5) Designation.

(a) Hearing by Local Government. Any governing authority which desires to have an area designated as an enterprise zone shall hold a public hearing. The governing authority shall notify the Director of the hearing at least thirty days prior thereto and publish notice thereof in a newspaper of general circulation in the area at least twenty days but not more than 30 days prior to the date of the hearing. The Director or his designee shall attend the hearing. §135.210.1 R.S.Mo. The governing authority shall promptly deliver a copy of the published notice to DED. 4 C.S.R. 85-3.020(1)

(b) Post-Hearing Petition to DED – Contents. After a public hearing is held, the governing authority may file a petition with DED requesting designation of an enterprise zone. The petition shall include such matters as a description of the physical, social and economic characteristics of the area, a plan for adequate police protection, a specific and practical process for individual businesses to obtain waivers from burdensome local regulations, ordinances, and orders which serve to discourage economic development within the area, a plan to encourage investment, a plan to assist residents, an impact statement and a plan for relocation assistance. §135.210.2 R.S.Mo. In addition, required contents have been added by regulation, including such things as the zone description, the planned development of the zone, a description of intrazone compatibility, a firm public commitment, and assurances against loss of employment. 4 C.S.R. 85-3.020(2). Regulations set forth the form of petition, filing periods, limitations, acknowledgment of receipt and zone size. 4 C.S.R. 85-3.020(3).

(c) Review. The director shall review the contents of the petition and determine whether the proposed zone satisfies statutory requirements and what effect a designation may have on other proposed or existing zones. 4 C.S.R. 85-3.020(4).

(d) Designation. 4 C.S.R. 85-3.030 establishes timetables for the announcement and issuing of designation status, requirements for continued eligibility and monitoring procedure.

(6) Initial Maximum Number and Additional Areas. The law originally provided that no more than fifty areas could be designated as enterprise zones except by specific legislative enactment after August 28, 1991. If an enterprise zone designation is canceled the director may designate one area to replace it. §135.210.4 R.S.Mo. A number of additional enterprise zones have been established by specific legislation as follows:

(a) Southwest. In addition to all other zones authorized, the department shall designate a zone in any county of the third class which is south of the Missouri River and which adjoins one county of the second class and also the state of Oklahoma. §135.208.1 R.S.Mo.

(b) Certain First Class Counties. In 1998 the Legislature added E-zones for all first class counties with less than 30,000 population without a charter. §135.208.5 R.S.Mo. (Camden County)

(c) Certain Third Class Counties. Those adjacent to the Missouri River and adjoining certain second class counties (§135.208.2 R.S.Mo.), certain counties with less

than 25,000 population (§135.206 R.S.Mo.), and certain third class counties south of the Missouri River with less than 10,000 population. §135.208.3 R.S.Mo.

(d) Certain Cities. In addition to all other enterprise zones, the director is directed to designate in certain cities, such as Rolla (§135.256 R.S.Mo.), St. Louis (S.B. 1 1997) (§630.1350 R.S.Mo.) and certain third class cities of more than 8,000 population but less than 10,000 population in certain third class counties with populations between 20,000 and 22,000. (S.B. 1 1997) §135.208.4 R.S.Mo. In 1998, the Legislature added Independence bringing the total number of zones to 62. §135.208.5.

(e) End of Department's Discretion and End of State Benefits. In 2004, the legislature authorized a large number of new enterprise zones and per a new §135.262, provided that in addition to the number of enterprise zones authorized under the provisions of §§135.206 to 135.260, the department of economic development shall designate any area that meets all the requirements of §135.205 as an enterprise zone. §135.262 R.S.Mo. In the same bill [SB 1155], the legislature provided that, notwithstanding any provision of law to the contrary, no revenue-producing enterprise shall receive the state tax exemption, state tax credits, or state tax refund as provided in §§135.200 to 135.283 for facilities commencing operations on or after January 1, 2005. §135.286.1 R.S.Mo. This provision does not affect the local real property tax abatement authorized by §135.215. §135.286. 1 R.S.Mo.

(7) Report by Zones—Evaluation—Cancellation of Zones. Each E-zone or satellite zone must report to the director annually regarding the status of business activity within the zone. The director may recommend to the committee that certain designations be canceled. Approvals of enterprise zones may be withdrawn for failure to satisfy the statutory criteria. 4 C.S.R. 85-3.050. The committee shall thereupon schedule a hearing on the recommendation for not less than 60 days after it is filed. Within 60 days after the hearing the committee shall determine whether or not the designation shall be continued. If cancelled, all agreements negotiated under the benefits of such zone shall remain in effect for the originally agreed-upon designation. Similarly, an area which has petitioned for designation and met all existing statutory requirements but not been designated, may appeal to the Joint Legislative Committee. §135.210.5 R.S.Mo. Complaints of E-zone applicants are processed according to 4 C.S.R. 85-3.040.

(8) Approval of Designations by Joint Committee on Economic Development. Upon approval of an enterprise zone designation, the Director shall submit the designation to the Joint Committee for its approval. An E-zone designation shall be effective upon approval by the Joint Committee. The Director shall report annually to the Joint Committee the number and location of all e-zones designated together with the business activity within each designated zone. §135.210.3 R.S.Mo. The Director shall evaluate the zones every five years and present the evaluation to the Joint Legislative Committee on Economic Development Policy and Planning. §135.210.5 R.S.Mo.

(9) Satellite Zones. (§135.207 R.S.Mo.). These are defined as a "non-contiguous addition" to an existing state designated enterprise zone. §135.200(7) R.S.Mo.

(a) Geographical Areas. Certain geographical areas have been designated by statute as being eligible for the establishment of satellite enterprise zones. These include by generic description, Kansas City (§135.207.1(1) R.S.Mo.), Claycomo (§135.207.1(2) R.S.Mo.), and St. Louis (§135.207.1(3)R.S.Mo.).

(b) Qualifications for Satellite Zones.

(i) General. The area must be one of pervasive poverty, unemployment and general distress, or one in which jobs equaling 1% or more of the area's population have been lost, over five employers have closed, or in which a large percentage of available production capacity is idle. §135.207.2(1) R.S.Mo.

(ii) Income Levels. At least 50% of the residents living in the area must have incomes below 80% of the Missouri median. §135.207.2(2) R.S.Mo.

(iii) Population. The resident population of the existing designated enterprise zone and its satellite zone must be at least 4,000 but not more than 59,000 at the time of designation. §135.207.2(3) R.S.Mo.

(iv) Unemployment Levels. The level of unemployment must exceed one and one-half times the average rate for the state over the previous twelve months or the percentage of residents employed on a full-time basis must be less than 60% of the statewide average. §135.207.2(4) R.S.Mo.

(c) Justification for Incentives Other than Traditional Blight. It could be argued that the standards set forth above do not rise to the level of traditional blight required under the constitution for property tax relief. In *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975), the Missouri Supreme Court stated:

> Relator next argues that the tax exemptions violate Art. X, §7, quoted above, in that the act provides for the development of 'blighted, insanitary and ***undeveloped*** industrial areas.' 'Undeveloped' areas, relator contends, include far more territory than could qualify as obsolete, decadent or blighted, and development thereof cannot be equated with '***re***construction, ***re***development, or ***re***habilitation.' . . . An undeveloped area is considered such because its development has been stunted or has become defective in some way. . . . The fact of lack of development in a particular area may itself be caused by surrounding urban decay and blight. . . . Nor does the fact that land is vacant mean it cannot be considered 'blighted.' It may well be vacant because it no longer meets the economic or social needs of modern city life and progress. . . . These areas are certainly subject to 'rehabilitation.'

Id. at 46-47.

In *Tierney v. Planned Indus. Expansion Auth. of Kansas City*, 742 S.W.2d 146 (Mo. banc 1987), the court held that economic underutilization was sufficient for a finding of blight.

> The concept of urban redevelopment has gone far beyond 'slum clearance' and the concept of economic underutilization is a valid one. . . . Redevelopment of this area could promote a higher level of economic activity, increased employment, and greater services to the public.

Id. at 151. *See also Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 910 (economic underutilization sufficient to declare an area blighted). In *Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co., Inc.*, 781 S.W.2d 70 (Mo. banc 1989), the court went even further and held that an area which is not yet blighted but which is becoming blighted can qualify for tax relief under Art. X., §7. Since a conservation area under the TIF Act is, by definition, not blighted, it must necessarily be obsolete or decadent to qualify for tax relief under Art. X, §7.

(d) Courts Defer to the Legislative Findings Regarding Which Property Should Be Included in a Redevelopment Area. Even if a satellite zone were not itself blighted or decadent, it might still qualify for tax relief if part of a larger plan. The courts in Missouri have held that a blighted area may include parcels which are not themselves blighted if these parcels are necessary to provide a tract of sufficient size or accessibility to attract redevelopers. *Tierney*, 742 S.W.2d at 151; *Atkinson*, *supra*; *Allright Missouri, Inc.*, *supra*. The local legislature is justified in including property within a redevelopment area which is itself innocuous and unoffending because the legislative body must evaluate the needs of the city as a whole. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385, 389 (Mo. banc 1991). The United States Supreme Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L. Ed. 27 (Colo. 1954), held that:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Id. at 103-104.

(e) Qualifications and Benefits of Business in Satellite Zone. A qualified business located within the satellite zone shall be subject to the same eligibility criteria and can be eligible to receive the same benefits as a qualified facility in an E-zone. §135.207.3 R.S.Mo. Satellite zones are treated as having their own 15-year life by DED.

(10) Expansion of E-Zone. The governing authority may petition DED to expand the boundaries of an enterprise zone if the expansion area meets the requirements of an E-zone (as set forth in §135.207 or §135.210, whichever is applicable), the area to be expanded is contiguous to the existing zone, and the number of expansions do not exceed three. §135.230.4 R.S.Mo.

(11) Real Property Tax Exemption. (§135.215 R.S.Mo.).

(a) Qualification. Improvements to real property in an enterprise zone subsequent to the date of designation may upon approval of an authorizing resolution by the governing authority be exempt in whole or in part from real estate taxes of one or more political subdivisions provided that,

(i) Qualifying Business. The property is used for assembling, fabricating, processing, manufacturing,* mining, warehousing or distributing, low income housing** or,

(ii) 50 New Jobs. At least fifty new jobs that provide at least 35 hours of employment per week per job are created and maintained. The authorizing resolution shall specify the percent of exemption granted, its duration, and the political subdivisions to which the exemption shall apply. A copy shall be forwarded to the director of DED within 30 days. §135.215.1 R.S.Mo.

(b) Procedure: Hearing by Local Government on Exemption. No exemption shall be granted until the governing authority holds a public hearing for the purpose of obtaining the opinions and suggestions of residents of political subdivisions affected by the exemption. The governing authority shall send by certified mail a notice of the hearing to each political subdivision affected and publish notice of the hearing in a newspaper of general circulation in the area at least 20 days but not more than 30 days prior to the hearing. Such notice shall state the time, location, date and purpose of the hearing. §135.215.2 R.S.Mo.

(c) Amount: Minimum 50% Ten-Year Exemption for Certain Industrial Uses. At least one half of the ad valorem taxes imposed on property in an e-zone shall be abated for a period of not less than ten years for property used for assembling, fabricating, processing, manufacturing, mining, warehousing and distributing. §135.215.3 R.S.Mo.

(d) Duration: Exemption Terminates 25 Years After Designation. No exemption shall be granted for a period of more than 25 years following the date on which the original enterprise zone was designated. §135.215.4 R.S.Mo. However in 2004, via SB 1155, the legislature amended §135.286.2 to provide that notwithstanding §135.215.4, if an exemption is granted on property prior to the expiration of 25 years from the designation of the zone, the property may continue to receive the exemption for up to 25 years from the date the exemption was granted.

(e) Election: Abatement or TIF Capture. The governing body may elect to ignore the mandatory abatement where a tax increment financing plan is imposed so that the net new ad valorem property "taxes" may be captured as part of the plan. In that case, the assessor or other responsible official shall assess the property. §135.215.6 R.S.Mo.

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* Facility which was used for administration, new product development, quality testing and production and packaging of free sample did not qualify as a facility used for manufacturing, and thus did not qualify for abatement. *Mid-America Dairymen, Inc. v. Payne*, 990 S.W.2d 648, 653 (Mo. App. S.D. 1999).

** Commercial leasing did not constitute a revenue producing enterprise. *Schudy v. Cooper*, 824 S.W.2d 899 (Mo. 1992).

(f) Exemption Versus Abatement. The use of the word "abatement" in §135.215.4 R.S.Mo. highlights a conceptual difficulty with the granting of a tax exemption. Under the Constitution, tax exemptions are mandatory for certain commercial inventories, government property and non-profit cemeteries, and may be granted by general law for schools, property used for religious worship, property used for charitable purposes, and agricultural and horticultural societies. Whether industrial development and the creation of jobs is a foundation for tax exemption would appear to be questionable. The constitutional foundation for property tax relief for redevelopment is Art. X, §7 which states that the legislature may provide "partial relief from taxation" for redevelopment properties. Exemption of course would not constitute partial relief. There are several Missouri Supreme Court cases which, when speaking of §353 redevelopments, refer to the "tax abatement" or "tax relief" permitted by §353 as one and the same with "tax exemption" under Article 10, §7 and §138.430(2) R.S.Mo. See *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965); *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36, 46 (Mo. banc 1975). The courts appear to be taking license with the word.

(g) Cessation of Business. Effective August 28, 2004, any abatement or exemption provided for in §135.215 on an individual parcel of real property shall cease after a period of thirty days of business closure, work stoppage, major reduction in force, or a significant change in the type of business conducted at that location. "Work stoppage" shall not include strike or lockout or time necessary to retool a plant, and "major reduction in force" is defined as a seventy-five percent or greater reduction. Any owner or new owner may reapply, but cannot receive the abatement or exemption for any period of time beyond the original life of the enterprise zone. §135.215.7 R.S.Mo.

(12) Income Earned By Business In Zone, Exemption, How Computed. One half of the Missouri taxable income attributed to a new business facility in an E-zone shall be exempt from Missouri income taxes (if the taxpayer meets the "30% test" infra). §135.220 R.S.Mo.

(a) Low Income Housing. A taxpayer owning low income housing may elect to exempt from Missouri income tax, one half of the taxable income attributable thereto or may elect to claim a $50 credit against income tax (excluding withholding tax) for each bedroom. §135.220.1 R.S.Mo. Low income housing is exempt from the 30% test. §135.230.1 R.S.Mo.

(13) Allocation of Income to Shareholders and Partners. Businesses in an enterprise zone may allocate tax credits to shareholders and partners. §135.220.2 R.S.Mo.

(14) E-Zone Enhancement of Credits. If certain conditions are met, the E-zone credits, the income exemption and the training credit allowed under §135.235 shall be allowed to any taxpayer who establishes a new business facility in an enterprise zone designated pursuant to §135.230. §135.225.2 on the same terms and conditions as a non E-zone NEB, with the following modifications:

(a) New Employees. $400 per new employee. §135.225.1(1) R.S.Mo.

(b) E-Zone Resident. An additional credit of $400 for each twelve month period that a new business facility employee is a resident of an E-zone (§135.225.1(2)). §135.230.1 R.S.Mo. To qualify as an E-zone resident, the employee must have lived in the E-zone for at least one full calendar month and been employed at the new facility for at least one full calendar month. §135.230.1 R.S.Mo.

(c) Section 240 Employee. An additional credit of $400 for each 12-month period that the employee (who at the time of such employment met the criteria as set forth in §135.240 R.S.Mo.) is employed. §135.225.1(3)R.S.Mo. §240 employees must have satisfied the §240 requirements at the time they were employed and must have been employed at least one full calendar month. §135.230.1 R.S.Mo.;

(d) Investment Credit. The investment credit shall be 10% of the first $10,000 plus 5% of the next $90,000 plus 2% of all remaining qualifying investments within an enterprise zone, §135.225.1(4) R.S.Mo., provided the company meets the 30% test, §135.230(1).

(i) Limitation of Credit to Net New Facility. Where the plain words of the statute do not limit the credit to the income from the new facility, department store could apply credit to its entire taxable income and not just the income from the new store. *State ex rel. May Dept. Stores Co. v. Koupal*, 835 S.W.2d 318 (Mo. 1992). However, the legislature may close such a loophole since under the enterprise zone law, the right to receive tax credits is not a vested right. *LA-Z-Boy Chair Co. v. Department of Economic Development*, 983 S.W.2d 523 (Mo. banc 1999).

(e) Training. To the extent training costs are not paid by federal, state or local programs, the facility shall be eligible for a credit equal to 80% of the expenses in excess of $400 for §240 employees, not to exceed $400 per employee. §135.230 R.S.Mo.

(15) Apportionment and Offsets.

(a) Apportionment of Credits to Small Corporation Shareholders and Partners. In the case of a small corporation described in §143.471 R.S.Mo. or a partnership, the E-zone tax credits shall be apportioned to the shareholders or partners according to their interests. §135.225.1(5) R.S.Mo.

(b) Offsets by Financial Institutions and Certain Insurance Companies. In the case of financial institutions described pursuant to Chapter 148 R.S.Mo. the credits allowed in §§135.225(1) through (4) and the training credit allowed in §135.235 may be used to offset income taxes and in the case of certain insurance companies (TransAmerica) the credits may be used to offset any retaliation tax imposed pursuant to §375.916 R.S.Mo. §135.225.1(6) R.S.Mo.

(16) Expansion in E-Zone Treated as New Facility. If a facility within the enterprise zone is expanded or improved, the expansion or improvement shall be considered a separate facility eligible for the credits allowed in §135.225 and §135.235 and the exemption allowed in §135.220 if:

(a) Minimum Investment. The new business facility investment exceeds $100,000 (or if less than $100,000 is 25% of the investment in the original facility and the expansion or improvement otherwise constitutes a new business facility); and

(b) Minimum Employees. At least two new employees are hired and the total number of employees at the facility after the expansion or improvement is at least greater than the total number before expansion or improvement. §135.225.1(7) R.S.Mo.

(17) Minimum Number of Employees for Specific Enterprises.

(a) Office. For the purpose of §§135.200 - 135.256, an office defined in §135.100(8) when established must create and maintain at least two new employees. §135.225.1(8) R.S.Mo. (An office not in an E-zone must ramp up from ten new employees initially to 25 by the fifth year.) §135.100(8) R.S.Mo.

(b) Low Income Housing. Taxpayers operating low income housing shall not be required to create and maintain new business facility employees. §135.225.1(12) R.S.Mo.

(18) Calculation of Partial Year for E-Zone Residents and §240 Employees. In the case of enterprise zone residents or §240 employees which are employed for less than the twelve month period, the taxpayer shall receive a portion of the full credit equal to the percentage of the year the employee was employed. §135.225.1(9) R.S.Mo.

(19) No Deferment in E-Zone. The deferment of tax credits authorized in §135.120 shall not be available to taxpayers establishing a new business facility in an enterprise zone. §135.225.1(10) R.S.Mo.

(20) Election to Forfeit Enhanced Credits. Any taxpayer who establishes a new business facility in an enterprise zone may elect to forfeit the tax credits allowed in §135.235 (80% of training expense up to $400 for each enterprise zone resident or §240 employee), §135.220 (50% income exclusion), §135.225 (job and investment credits), §135.215 (property tax exemption) and the refunds available under §135.245 (where tax credit exceeds tax liability) and in lieu thereof claim the tax credits allowed in §135.110 ($75 to $100 per employee plus $75 to $100 per $100,000 of investment) and such election is irreversible. The only conceivable situation where such an election might be made is where there is little time remaining in the enterprise zone designation, where there is no tax liability, where the 30% test cannot be met, or where the taxpayer wishes to defer liability for three tax periods. §135.225.3 R.S.Mo. The following table illustrates the effect of such an election:

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TAX CREDITS FOR NEW OR EXPANDED BUSINESS FACILITY

§§135.100 - .150 R.S.Mo. Not In E-Zone			**§§135.200 - .256 R.S.Mo. E-Zone**	
10 year Credits §135.110.1			**10 year Credits §135.225**	
Annual Credits	**Existing Business Facility §135.110.2(2)**	**No Existing Business Facility §135.110.3(2)**		**Election per §135.225(3) forego tax credits (§135.235) (§135.225), exemptions (§135.215) (§135.220), and refund (§135.245) and in lieu claim credits per §135.110**
Per New Employee	$100 §135.110.2	$75 §135.110.3	$400 §135.225(1)(a)	$100 -§135.110.2 $75 - §135.110.3
Per E-Zone Resident	No	No	$400 §135.225(1)(b)	No
Per §240 Employee	No	No	$400 §135.225(1)(c)	No
Per 100/k Invest	$100 §135.110.2	$75 §135.110.3	2% §135.225(1)(d) If 30% test - 135.230.1	$100/$100,000 -§135.112 $75/$100,000 - §135.110.3
50% Exemption of Income	No	No	Yes If 30% test met §135.230.1	No

§§135.100 - .150 R.S.Mo. Not In E-Zone			**§§135.200 - .256 R.S.Mo. E-Zone**	
10 year Credits §135.110.1			**10 year Credits §135.225**	
Annual Credits	**Existing Business Facility §135.110.2(2)**	**No Existing Business Facility §135.110.3(2)**		**Election per §135.225(3) forego tax credits (§135.235) (§135.225), exemptions (§135.215) (§135.220), and refund (§135.245) and in lieu claim credits per §135.110**
Carry Forward?	No §135.110.1	No §135.110.1	No §135.110	No §135.110.1
Deferment? (3 years)	Yes §135.120	Yes §135.120	No §135.225(1)(j)	Yes §135.120 and §135.225(3)
Refund 1st 2 years?	No	No	Yes §135.245.2	No
Can Credits be Sold?	No 135.130	No 135.130	[26]	
Transferable?	Yes 135.130	Yes 135.130	Yes §135.225(1)	Yes §135.130
Offset 135.119	1 facility - 50% More than 1 facility - 25%	1 facility - 100% More than 1 facility - 25%	Yes 25% to 100% §135.119	Yes 25% to 100% §135.119

[26] Not allowed nor prohibited by statute. Statute is silent on this subject. DED takes the position that they cannot be sold.

§§135.100 - .150 R.S.Mo. Not In E-Zone			**§§135.200 - .256 R.S.Mo. E-Zone**	
10 year Credits §135.110.1			**10 year Credits §135.225**	
Annual Credits	**Existing Business Facility §135.110.2(2)**	**No Existing Business Facility §135.110.3(2)**		**Election per §135.225(3) forego tax credits (§135.235) (§135.225), exemptions (§135.215) (§135.220), and refund (§135.245) and in lieu claim credits per §135.110**
One-Time Credit per Each Special Employee Trained	No	No	80% of uncovered over $400 up to $400 for training e-zone residents or §240 employees §135.235	No
Property Tax				
Abatement	No, would violate constitution.	No	May be exempt 0 - 100% if 50 full time jobs; must be 50% exempt for 10 years for certain industrial uses §135.215	No

(21) Conditions for Incentives in E-Zone. (§135.230 R.S.Mo.).

(a) Minimum Number of Employees. A business other than low-income housing must employ or maintain at least two employees. §135.230.1R.S.Mo.

(b) 30% Test. In order to qualify for the E-zone exemption and tax credits, at least 30% of the new business facility employees shall be enterprise zone residents or §240 employees, or some combination thereof except low-income housing or certain insurance companies (TransAmerica Insurance Company). The test has been reduced to 15% for motorcycle manufacturers. The taxpayer shall certify to the Director that these requirements have been met each tax period that benefits are claimed. §135.230.1 R.S.Mo.

(i) Temporary Reduction Or Waiver For Small Business. The Director may temporarily reduce or waive this requirement for any business in an E-zone with no more than ten full-time employees and temporarily reduce it for businesses with 11 - 20 full-time employees. No reduction or waiver shall be granted for more than one tax period or be renewable. §135.230.1R.S.Mo.

(ii) Certain Large Motor Carriers Exempt From 30% Requirement. Certain motor carriers establishing a new business facility between January 1, 1993 and January 1, 1995 may qualify for the credits and exemption of the E-zone even though the new facility has not satisfied the employee criteria provided that the taxpayer employs an average of at least 200 persons, exclusive of truck drivers and maintains an average investment of at least $10,000,000 exclusive of rolling stock. §135.230.3 R.S.Mo.

(c) No E-Zone Incentives for Public Utility. E-zone incentives shall not be allowed to any "public utility". §135.230.1 R.S.Mo.

(d) Conditions Under Which Transportation and Telecommunications Businesses May Qualify For Incentives. Motor carriers, barge lines or railroads or any interexchange telecommunications company establishing a new business facility may qualify for E-zone incentives, except that trucks, truck trailers, truck semi-trailers, rail or barge vehicles or other rolling stock, track, switches, bridges, barges, tunnels, rail yards and spurs shall not constitute new business facility investment nor shall truck drivers or rail or barge vehicle operators constitute new employees. §135.230.2 R.S.Mo.

(22) Time Limits.

(a) Zone.

(i) Seven Year Extension of Designation. (§135.230.5 R.S.Mo.) Notwithstanding the fifteen year limitation on benefits in §135.230.1, any governing authority with jurisdiction over the enterprise zone, except one which already has a seven year extension, may file a petition for redesignation of the zone for seven years following the fifteenth anniversary of the zone's initial designation date, provided:

1) Time For Filing Petition. The petition is filed with the Director three years prior to the date the tax credits and exemption are required to be removed. §135.230.5(1) R.S.Mo.;

2) Coterminous Boundaries. The governing authority conforms the boundaries of the area to political boundaries established by the latest decennial census unless otherwise approved by the Director. §135.230.5(2) R.S.Mo.;

3) Qualification. The area satisfies the population and unemployment requirements of §135.205 according to the latest decennial census or other appropriate sources as approved by the Director. §135.230.5(3) R.S.Mo.;

4) Procedure. The governing authority satisfies the requirements in certain enumerated sections. §135.230.5(4) R.S.Mo.;

5) But For. The Director finds that the area is unlikely to support reasonable tax assessment or to experience reasonable economic growth without such designation. §135.230.5(5) R.S.Mo.;

6) Joint Committee Approval. The Director's recommendation that the area be designated is approved by The Joint Committee On Economic Development, Policy And Planning. §135.230.5(6) R.S.Mo.

7) Not Subject To Fifty-Zone Limit. Redesignation per §135.230.5 R.S.Mo. shall not be subject to the 50-zone limit of §135.210.4 R.S.Mo. §135.230.6 R.S.Mo.

8) Removal Not Later Than Seven Years. All such tax benefits shall be removed not later than seven years after the E-zone is designated. §135.225.2 R.S.Mo.

(b) Benefits.

(i) Ten Year Limit on Exemption and Enhanced Credits. All credits, training benefits and exemptions shall be granted for up to ten years after commencement of the business. §135.230.1 R.S.Mo.

1) No Additional Ten Year Periods For E-Zone Incentives. The allowance for additional ten year periods to certain new business facilities as prescribed in §135.110.1 R.S.Mo. shall not be available to such facilities in an enterprise zone except that

a) May Qualify for Non E-Zone Credits. Any taxpayer who has been eligible to earn enterprise zone tax benefits (for 10 tax periods, or until the expiration of the fifteen year period as prescribed in §135.230.1 or for the maximum period otherwise allowed by law), may qualify for the tax credits allowed in §135.110 if otherwise eligible, pursuant to the same terms and conditions prescribed in §§135.100-150. §135.225.1(11) R.S.Mo.

(ii) Fifteen Year Limit. All benefits except property tax abatement shall end 15 years after designation. §135.230.1 R.S.Mo.

(iii) Ten Year Guarantee Trumps Fifteen Year Limit. Any taxpayer establishing a new business facility in an E-zone (except when designated pursuant to a seven year extension per §135.230.5) who did not earn the tax credits or exemption for the full 10 years because of the 15-year limitation,

shall be eligible to earn such credits for ten tax years less the number of tax years the benefits were claimed or could have been claimed prior to the expiration of the original fifteen year period (except that such tax benefits shall not be earned for more than seven tax periods during the ensuing seven year period), provided the taxpayer continues to operate the new business facility. §135.230.6 R.S.Mo.

(iv) Twenty-Five Year Limit. No exemption shall be granted for a period more than 25 years following the date on which the original zone was designated. §135.220.4 R.S.Mo.

(v) Benefits During Extension. Any taxpayer who establishes a new business facility after the start of the ensuing seven year period, as authorized by §135.230.5 may qualify for E-zone incentives under the same terms and conditions set forth in §§135.100 - 256 R.S.Mo. §135.230.6 R.S.Mo. But all tax benefits shall be removed not later than seven years after the E-zone is redesignated. §135.225.2 R.S.Mo.

(23) Tax Credit for Excess Expense of Training Special Employees—Small Corporations and Partnerships. (§135.235 R.S.Mo.) To the extent that training expenses of a new facility in an E-zone are not covered by existing federal, state or local programs, such new business facility shall be eligible for a full tax credit equal to 80% of that portion of the expenses in excess of $400 for each trainee who is a resident of the E-zone or a Section 240 employee, provided such credit shall not exceed $400 for each employee trained. The credits may be allocated pro rata to partners and shareholders. §135.235 R.S.Mo.

(24) Special Employees. (§135.240 R.S.Mo.) The provisions of subdivision §135.225(3) (additional $400 tax credit) and §135.230 (tax credits and exemptions) shall apply to employees who were unemployed for at least three months immediately prior to being employed by the new facility or eligible for aid to families with dependent children or general relief programs. §135.240 R.S.Mo.

(25) Income Tax Refund. (§135.245 R.S.Mo.).

(a) Surplus Credits Considered Overpayment By New Facility in E-Zone. A portion of the tax credits earned by a new facility in an E-zone (except one enjoying a seven year extension), which exceeds its total income tax liability pursuant to Chapter 143 R.S.Mo., shall be considered an overpayment of tax and refundable as follows (§135.245.1 R.S.Mo.):

(i) Not Allowed for Expanded, Replacement or Acquired Facilities. The refund shall not be allowed to an expanded facility, an acquired enterprise, or a replacement facility. §135.245.1 R.S.Mo.

(ii) Limits On Time (First Two Years) and Amount. Refunds shall be available only for the first two years during which the taxpayer is eligible for credits, and the portion of credit considered an overpayment shall be limited to 50% or $50,000, whichever is less, in the first year, and 25% or $25,000, whichever is less, in the second year. §135.245.1 R.S.Mo.

(iii) Delay of Refund Until Third and Fourth Years of Operation. The overpayment of the income tax for the first year shall not be refunded to the taxpayer until the third taxable year of operation and overpayment for the second year shall not be refunded until the fourth taxable year of operation. §135.245.1 R.S.Mo.

(b) Further Limits on Refund During Seven Year Extension. The portion of tax credit considered an overpayment shall be limited to 25% or $25,000, whichever is less, in the first year of the ensuing seven year period. Such overpayment of tax shall not be refunded to the taxpayer until the third taxable year of operation. §135.245.2 R.S.Mo.

(c) Apportionment of Refunds to Shareholders and Partners. Refunds shall be apportioned pro rata to partners and shareholders. §135.245.3 R.S.Mo.

(d) Director of Revenue to Determine Amount of Refund - May Promulgate Rules for Processing. The Director of Revenue shall determine the amount of the taxpayer's refund and notify the taxpayer in writing of the amount. The Director of Revenue may promulgate rules and regulations necessary to process the E-zone credits, exemption and refund. §135.245 R.S.Mo.

(26) Rules for Zone Designation and Claiming Incentives—Certification to Director of Revenue. The Director of DED may issue rules and regulations regarding the qualifications necessary for an area to be deemed an E-zone and for the continuation of such designation. Prior to the designation of any E-zone, the director of DED shall submit to the Joint Committee on Economic Development Policy and Planning established by §620.602 R.S.Mo., rules and regulations pertaining to the designations of enterprise zones. §135.210.3 R.S.Mo. The Director shall prescribe a method for applying for the credits and exemptions and shall, if such application is approved, certify the same to the Director of Revenue. §135.250.1 R.S.Mo.

(27) Protest If Incentive Denied.

(a) Filing. Any taxpayer whose application for E-zone incentives has been denied may file with the Director of DED a protest within 60 days (150 days if the taxpayer is outside the United States) after the date of contested certification or the date of the notice denying certification. The protest shall be in writing and set forth the grounds on which it is based. §135.250.3 R.S.Mo.

(b) Director Shall Rule on Protest. If a protest is filed, the Director of DED shall consider it and make a determination thereon. The Director of DED shall notify the taxpayer in writing of such determination within thirty days following the date on which the written protest was received. Such notice shall be mailed to the taxpayer by certified or registered mail and set forth briefly the Director's finding of fact and basis of decision. §135.250.4 R.S.Mo.

(c) Appeal of Director's Ruling to Administrative Hearing Commission. The decision of the Director on the taxpayer's protest is final upon the expiration of 30 days from the date notice is mailed to the taxpayer unless

within this period the taxpayer seeks review by the Administrative Hearing Commission. §135.250.5 R.S.Mo.

(28) Federal Zones. (§135.247 R.S.Mo.).

(a) Federal Empowerment Zones and Enterprise Community Shall Be E-Zones. Any area designated by HUD as a federal empowerment zone or the Department of Agriculture as an enterprise community shall immediately upon such federal designation become and remain a state enterprise zone until the expiration of such federal designation. §135.247.1 R.S.Mo.

(b) E-Zone Credits Exemption and Refund Available to New Business Facility Within Federal Zone. The real property tax exemption provided in §135.215 R.S.Mo. shall be available to any taxpayer who makes improvements to real property in an empowerment zone or enterprise community after the area is federally designated. §135.247.2 R.S.Mo.

(29) Retail, Hotels and Recreational Facilities Eligible. (§135.247.3 R.S.Mo.) Retail businesses (SIC 52-59), hotels and motels (SIC 7011), and recreational facilities (SIC 7999) shall be eligible for all E-zone benefits if:

(a) Retail Located in Federal Zone. In the case of a retail business, such business is located within a state designated enterprise zone located wholly or partially within a federal empowerment zone or enterprise community; or

(b) Retail In Satellite Zone. Such business is located within a satellite enterprise zone established pursuant to §135.207.1(1) or (3); and

(c) Hotel in Jackson County Federal Or Satellite Zone or Excelsior Springs E-Zone. In the case of a hotel or motel, such businesses located in a first class county with a population of at least 500,000 but less than 700,000 or an E-zone which is located in a city of the third class which is partially located within a county of the first class with a population of 150,000 adjacent to a county of the first class with a population of at least 500,000 but less than 700,000 (Excelsior Springs); and

(d) Recreational Facility in St. Louis Satellite Zone: But For. In the case of a recreational facility, the business is located within an area designated a satellite enterprise zone by the Director after January 1, 1992 and before January 1, 1999, in any city not within the county provided the Director approved the eligibility of such facility. When making such determination the Director shall consider the number and quality of new jobs to be created, the amount of payroll and investment to be generated, the extent to which tax concessions are needed to induce the development, whether the area is unlikely to support reasonable tax assessment or experience reasonable economic growth without such designation, and the overall economic benefits to be realized from the proposed project.

(i) Benefits Not Available for Gaming. Recreational facilities shall not include any gambling boat or docking facility for such boat. §135.247.4 R.S.Mo.

(30) Displaced Enterprise Zone Resident Assistance. (§135.255 R.S.Mo.) E-zone residents displaced as a result of condemnation under Chapter 353 R.S.Mo. from a dwelling owned and occupied as a principal residence for not less than one year prior to the initiation of negotiations for acquisition, shall be paid moving expenses, dislocation expenses, replacement costs, financing costs and loss of government subsidies. §135.255 R.S.Mo.

§23. —Low Income Housing Tax Credits (135.350 *et seq*. R.S.Mo.)

Under §135.350 *et seq.*, taxpayers are allowed a credit for a portion of their investments in qualified low-income housing. A qualified low-income housing project has restricted rents and satisfies one of the following tests the taxpayer elects: Either that 20% or more of the units are rent-restricted and occupied by individuals whose income is 50% or less of area median gross income or that 40% or more of the units are rent-restricted and occupied by individuals whose income is 60% or less of the area median gross income. The Missouri Housing Development Commission determines the amount of tax credit available to each low-income project in the state and issues an eligibility statement. The amount of the credit is based on the cost of the project and the number of qualified low-income units created. In no event is the credit greater than the amount necessary to ensure the feasibility of a project or greater than the federal low-income housing tax credit. The taxpayer must submit the eligibility statement at the time of filing a Missouri state income tax return. The credit may be allocated within a partnership.

(1) Definitions.

(a) Commission. The Missouri Housing Development Commission. §135.350.1 R.S.Mo.

(b) Director. Director of the Department of Revenue. §135.350.2 R.S.Mo.

(c) Eligibility Statement. A statement issued by the Commission certifying that a project qualifies for low income housing tax credits and specifying the amount of credits allowed. §135.350.3 R.S.Mo.

(d) Federal Low Income Housing Tax Credit. The federal tax credit as provided in Section 42 of the 1986 Internal Revenue Code, as amended. §135.350.4 R.S.Mo.

(e) Low Income Project. A housing project with rents that do not exceed 30% of median income for (i) at least 40% of its units which are reserved for persons or families having incomes of 60% or less of the median income or at least 20% of the units reserved for persons or (ii) families having incomes of 50% or less of the median income. §135.350.5 R.S.Mo.

(f) Median Income. The median income determined by the Federal Department of Housing and Urban Development Guidelines adjusted for family size. §135.350.6 R.S.Mo.

(g) Qualified Missouri Project. A qualified low income building as that term is defined in Section 42 of the 1986 Internal Revenue Code as amended. §135.350.7 R.S.Mo.

(h) Taxpayer. A person, firm or corporation subject to the state income tax imposed by Chapter 143 R.S.Mo. (except withholding imposed by §§143.191 - 143.265 R.S.Mo.), a corporation subject to the annual corporation franchise tax imposed by Chapter 147 R.S.Mo., an insurance company paying an annual premium tax in this state, any other financial institution paying taxes to the State of Missouri or any political subdivision of this state under the provisions of Chapter 148 R.S.Mo., or an express company which pays an annual tax on its gross receipts in this state. §135.350.8 R.S.Mo.

(2) Eligible Taxpayer. A taxpayer owning an interest in a qualified Missouri project shall be allowed a state tax credit, whether or not allowed a federal tax credit, to be termed the Missouri Low Income Housing Tax Credit, if the Commission issues an eligibility statement for that project. §135.352.1 R.S.Mo.

(a) Criteria for Eligibility Statement—Low Income Housing. By Regulation 4 C.S.R. 170-6.010, the Department of Revenue has promulgated criteria for eligibility for low income housing tax credits. The credit is contingent upon a taxpayer receiving federal low income housing tax credits (in practice, this may mean the project must receive federal tax credits). The Commission is charged with allowing no more tax credits, both federal and state, than are necessary to make the proposed housing development viable. The amount of Missouri tax credit allowed will be calculated at the sole discretion of the Commission not to exceed 20% of the taxpayer's Federal Low Income Housing Tax Credit for a federal tax period. The Director of the Department of Revenue or the Commission may require the filing of additional documentation necessary to determine the accuracy of a tax preference claim. 4 C.S.R. 170-6.010.

(3) Calculation of Credit. The credit shall be in such amount as the Commission shall determine is necessary to insure the feasibility of the project up to an amount equal to the Federal Low Income Housing Tax Credit, and such amount shall be subtracted from the amount of state tax otherwise due for the same tax period. §135.352.2 R.S.Mo.

(4) Taxes Offset. The Missouri Low Income Housing Tax Credit shall be taken against the taxes named and in the order specified pursuant to §132.115 R.S.Mo. §135.352.3 R.S.Mo.

(5) Refund; Carry Forward/Back. The credit authorized by §135.352 shall not be refundable. Any amount of credit that exceeds the tax due may be carried back for three years or forward for five years. §135.352.4 R.S.Mo.

(6) Allocation. Low income housing tax credits may be allocated to parties who are eligible pursuant to §135.352.1 R.S.Mo. The owner of the project shall certify to the Director the amount of credit allocated to each taxpayer, and shall provide to the Director appropriate information so that the low income housing tax credit can be properly allocated. §135.352.5 R.S.Mo.

(7) Statement of Proportion of Tax Credit to Be Recapture. In the event that the recapture of Missouri Low Income Housing Tax Credits is required, any statement submitted to the Director regarding the allocation for recapture shall include the identity of each taxpayer subject to the recapture and the amount of credit previously allocated. §135.352.6 R.S.Mo.

(8) Rules and Regulations. The Director of the Department of Revenue may promulgate rules and regulations to administer the granting of Missouri Low Income Housing Tax Credits. §135.352.7 R.S.Mo.

(9) Filing. The owner of a qualified project shall submit to the Department of Revenue an eligibility statement at the time of filing a return. Credits shall be denied until the statement is filed. §135.355.1 R.S.Mo.

(10) State Recapture to Match Federal. In the event of federal recapture only during the first ten years after a project is placed in service, state credits shall also be recaptured for the same period in the same proportional amount as the federal recapture. §135.355.2 R.S.Mo.

(11) Capital Gain Exclusion, When. The taxpayer may exclude from income tax a portion of the federal capital gain that results from the sale of a low income project (subsidized by HUD) to a non-profit or governmental organization which agrees to preserve or increase the low income occupancy of the project. For projects with at least 40% of units reserved for persons or families having an income of 60% or less of the median income, the exclusion shall equal 25% of the capital gain. §135.357 R.S.Mo.

(12) Additional Documentation. The Director of Revenue or the Missouri Housing Development Commission may require the filing of additional documentation necessary to determine the accuracy of a tax preference claimed under the provisions of the Act. §135.359 R.S.Mo.

(13) State-Wide Cap. In 2009, via HB 191, the legislature imposed a cap which limited the total amount of tax credits that may be authorized for low-income housing to taxpayers owning an interest in a qualified Missouri project to $6 million for projects financed through tax-exempt bonds. §135.352.3 R.S.Mo.

§24. —Certain Investment Tax Credits

(1) Capital Tax Credit Program (Tax Credit for Investments in Missouri Small Businesses) (§135.400 et seq. R.S.Mo.).

The Capital Tax Credit Program, §§135.400 *et seq.*, grants a 40% (60% in distressed community) transferable state income tax credit for qualified investments in independently-owned small businesses. The investment may be made either through an unsecured loan or the purchase of equity or unsecured debt securities. The maximum credit per investor is $100,000. The business must use the investment funds for capital improvements, plant, equipment, research and development or working capital. The approved business must be headquartered in Missouri and have less than 100 employees, at least 80% of whom must be employed in Missouri.

(a) Definitions. As used in §§135.400 to 135.430, the following terms mean:

(i) "Certificate." The tax credit certificate issued by the Department of Economic Development (DED) in accordance with the Act. §135.400.1 R.S.Mo.

(ii) "Community Bank." Either a bank community development corporation or development bank, which receives investments from commercial financial institutions regulated by the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, or the Missouri Division of Finance. Community Banks, in addition to their other privileges, shall be allowed to make loans or equity investments in businesses or in real estate if such transactions have associated public benefits. §135.400.1 R.S.Mo.

(iii) "Community Development Corporation." A not-for-profit corporation the board of directors of which is composed of business, civic, and community leaders, which organization's primary purpose is to encourage and promote the industrial, economic, entrepreneurial, commercial, and civic development or redevelopment of a community or area, including the provision of housing and economic development projects that benefit low income individuals and communities. §135.400.3 R.S.Mo.

(iv) "Department." The Missouri Department of Economic Development. §135.400.4 R.S.Mo.

(v) "Director." The Director of the Department of Economic Development (DED), or a person acting under the supervision of the Director. §135.400.5 R.S.Mo.

(vi) "Investment." A transaction in which a Missouri small business or a Community Bank receives a monetary benefit from an investor under the provisions of §§135.403 to 135.414. §135.400.6 R.S.Mo.

(vii) "Investor." An individual, partnership, financial institution, trust, or corporation meeting the eligibility requirements of §§135.403 to 135.414. In the case of partnerships and nontaxable trusts, the individual partners or beneficiaries shall be treated as the Investors. §135.400.7 R.S.Mo.

(viii) "Missouri Small Business." An independently owned and operated business as defined by Federal Rules and Regulations, headquartered in Missouri, employing at least 80% of its employees in Missouri and having no more than 100 employees. Such business must be engaged in manufacturing, processing or assembling products, conducting research and development, or providing services in interstate commerce, and must not be engaged in retail, real estate, insurance, or professional services. "Missouri small business" shall include cooperative marketing associations organized pursuant to Chapter 274 R.S.Mo., and such associations shall not be required to comply with the terms of §135.414 R.S.Mo. §135.400.8 R.S.Mo.

(ix) "Primary Employment." Work which pays at least the minimum wage and which is not seasonal or part time. §135.400.9 R.S.Mo.

(x) "Principal Owners." One or more persons who own an aggregate of 50% or more of a Missouri Small Business and are involved full-time in the operation of the business. §135.400.10 R.S.Mo.

(xi) "Project." Any commercial or industrial business or other economic development activity undertaken in a target area, designed to reduce conditions of blight, unemployment, or widespread reliance on public assistance and which creates permanent, primary employment opportunities. §135.400.11 R.S.Mo.

(xii) "State Tax Liability." Generally, any tax liability under Chapters 143, 147, 148, and 153 R.S.Mo. exclusive of withholding tax. §135.400.12 R.S.Mo.

(xiii) "Target Area." An area or neighborhood where the rate of poverty is certified by the Departments of Economic Development and Social Services to be twice the national rate and for which a revitalization plan has been submitted pursuant to §208.335 R.S.Mo. §135.400.13 R.S.Mo.

(b) Community Development Fund. The act creates a revolving fund in the State Treasury to be administered by DED known as the "Community Development Fund" consisting of all funds from any source. The Fund may be used for programs and activities implemented by community development corporations to stimulate economic development in neighborhoods or communities.

(c) Tax Credits for Qualified Investment in Missouri Small Businesses.

(i) Amount of Credit. An investor making a qualified investment in a Missouri small business shall be entitled to a tax credit of 40% of the amount invested (60% if made in a distressed community as defined in §135.530R.S.Mo.). An investor who makes a qualified investment in a

community bank or community development corporation shall be entitled to a credit of 50% if directly invested into a targeted area. §135.403.1 R.S.Mo.

(ii) Caps.

1) State Cap. The total amount of tax credits issued pursuant to the Small Business Investment Act shall not exceed the state cap found in §135.403.2 R.S.Mo. Six million dollars in tax credits shall be available as a result of investment in community banks or community development corporations. §135.403.2 R.S.Mo.

2) Project Cap. No more than 20% of the tax credits available for each year for investments in community banks or community development corporations for direct investment into a target area shall be certified for any one project. §135.403.1 R.S.Mo. Aggregate investments eligible for tax credits in any one Missouri small business shall not exceed $1,000,000, nor be less than $5,000. §135.403.2 R.S.Mo.

3) Total Tax Credit - Minimum/Maximum - Not to Limit Other Investments. The total amount of tax credit evidenced by certificates issued to any one taxpayer shall be not less than $1,500 nor more than an aggregate of $100,000 in any one business, except that this provision shall not be interpreted to limit other investment. These limits shall not apply to investments in community banks or community development corporations or investments in distressed communities. §135.405 R.S.Mo.

(iii) Certificates - Use of Credits. The tax credit shall be evidenced by a certificate in accordance with the provisions of §§135.400 - 135.430 and may be used to satisfy the state tax liability of the owner due in the next tax year following the tax year in which the qualified investment is made, or in any of the ten tax years thereafter (in the case of a distressed community there is also a three-year carryback). The investor must present a tax credit certificate to the Department of Revenue. §135.403.1 R.S.Mo. The tax credits will be granted in the same order as established by §132.115.1 R.S.Mo. §135.403.1 R.S.Mo.

(iv) Transferability. Such tax credits are transferable. §135.403.1 R.S.Mo.

(d) Qualified Investment Requirements.

(i) Type of Investment. A qualified investment in a Missouri small business may be made either through an unsecured loan or the purchase of equity or unsecured debt securities of such business.

(ii) Ownership. Investors in a small business under the Act, however, must collectively own less than 50% of a business after their investments are made.

(iii) Use of Investment. Qualified investments in a small business must be spent for capital improvements, plant, equipment, research and development, or working capital for the business or such business activity as may be approved by the Department. §135.408 R.S.Mo.

(iv) Investment to Remain in Business for Five Years. The qualified investment made in a Missouri small business must remain in that

business for five years. Early withdrawal shall result in a revocation of the tax credit and repayment of any amounts of the credit already used. §135.411 R.S.Mo.

(v) Portion of Investment Required to be Spent in Missouri. All investments in Missouri small businesses for which tax credits are claimed under the Act shall satisfy the conditions of being registered securities or specifically exempt from registration by law or regulations under Chapter 409 R.S.Mo. that require a certain percentage of the investment to be used in Missouri. §135.416 R.S.Mo.

(e) Eligibility. Annual revenues of the business receiving the investment must not exceed $2,000,000 and the business must be the full-time, professional activity of the principal owners, exempt full-time researchers or faculty members at universities. The following persons or entities shall not be eligible for a tax credit under the Act:

- The principal owner;
- The spouse of the principal owner;
- Any person related to the principal owner or his/her spouse within the third degree of consanguinity or affinity; or
- Any corporation, partnership, trust, or other entity which is controlled by any of the above persons, where 50% or more of the equity interest in such entity is owned, directly or indirectly, by any of the persons specified above. §135.414 R.S.Mo.

(2) Rebuilding Communities and Neighborhood Preservation Act (§135.475 et seq.).

In 1999, the General Assembly passed, via Senate Bill 20, the Rebuilding Communities and Neighborhood Preservation Act. Under the Act, a taxpayer who incurs certain costs for new housing or rehabilitation of existing housing may receive a tax credit which varies depending upon the geographical area in which the home is located. In the more distressed areas, the 15% tax credit is capped at $40,000, and in the less distressed areas, $25,000. The rehabilitation tax credit shall be 25% of allowable costs with a cap from $5,000 to $10,000. A substantial rehabilitation of a qualifying residence shall receive a tax credit of 35% of the cost with a cap of between $10,000 and $70,000 in any 10-year period. The tax credit is available only for housing which is or will be owner occupied. The tax credits may be carried forward and back three years and are fully assignable.

(a) Tax Credit for New Housing. Under the Act, any taxpayer who incurs eligible costs for a new residence located in a distressed community or

within a census block group in which the median household income is less than 70% of the median for the metropolitan statistical area or nonmetropolitan area shall receive a tax credit equal to 15% of such cost, not to exceed $40,000 per new residence in any 10-year period. §135.481.1 R.S.Mo. Any taxpayer who incurs eligible costs for a new residence located in a census block in which the median household income is less than 90% but greater than or equal to 70% of the median household income for the metropolitan statistical area or nonmetropolitan area shall receive a tax credit equal to 15% of such cost, not to exceed $25,000 per new residence in any 10-year period. §135.481.2 R.S.Mo.

(b) Rehabilitation Tax Credit. A taxpayer who is performing rehabilitation, but not substantial rehabilitation, of an eligible residence or a qualifying residence shall receive a tax credit equal to 25% of such cost, not to exceed $25,000 in any 10-year period. The minimum eligible cost for rehabilitation of an eligible residence shall be $10,000. The minimum eligible cost for rehabilitation of a qualifying residence shall be $5,000. §135.481.3 R.S.Mo. Any taxpayer who incurs eligible costs for substantial rehabilitation of a qualifying residence shall receive a tax credit equal to 35% of such cost against his or her tax liability. The minimum eligible cost for substantial rehabilitation of a qualifying residence shall be $10,000. The tax credit shall not exceed $70,000 in any 10-year period. §135.481.4 R.S.Mo.

(c) Definitions.

(i) "Eligible costs for a new residence" is defined as expenses incurred for property acquisition, development, site preparation other than demolition, surveys, architectural and engineering services and construction and all other necessary and incidental expenses incurred for constructing a new market rate residence which is or will be owner occupied, which is not replacing a national register listing or local historic structure; except that, costs paid for by the taxpayer with grants or forgivable loans, other than tax credits, provided pursuant to state or federal government programs are ineligible. §135.478(4) R.S.Mo.

(ii) "Eligible residence" is defined as a single-family residence, 40 years of age or older, located in Missouri and not within a distressed community and which is occupied or intended to be occupied long-term by the owner or offered for sale at market rate for owner occupancy and which is either located within a United States census block group which has a median household income of less 90% but more than 70% of the median household income from the metropolitan statistical area or respective nonmetropolitan area. §135.478(6) R.S.Mo.

(iii) "Qualifying residence" is a single-family residence, 40 years of age or older, located in Missouri and which is occupied or intended to be occupied long-term by the owner or offered for sale at market rate for owner occupancy and which is located in a metropolitan statistical area or nonmetropolitan statistical area within a United States block group which has a median household income of less than 70% of the median household income for the metropolitan statistical area or nonmetropolitan area, respectively, or which is

located within a distressed community. A qualifying residence shall include a condominium or residence within a multiple-residential structure or a structure containing multiple single-family residences which is located within a distressed community. §135.478(10) R.S.Mo.

(iv) "Substantial rehabilitation" refers to one in which the costs of the rehabilitation exceed 50% of either the purchase price or the cost basis of the structure immediately prior to rehabilitation, provided that the structure is at least 50 years old. §135.478(11) R.S.Mo.

(d) Use of Credits. The tax credits may be carried back for three years or forward for five years and may be assigned, transferred, sold or otherwise conveyed. §135.484.2 R.S.Mo.

(e) Application. Application for the tax credit shall be made to the Department of Economic Development. A taxpayer other than an owner-occupant who receives a certificate of tax credit shall within 30 days of the date of the sale of a residence, furnish to the director, satisfactory proof that such residence was sold at market rate for owner occupancy. §135.487.1 R.S.Mo.

§25. —Missouri Certified Capital Company Law (135.500 R.S.Mo.)

Under the 1996 Missouri Certified Capital Company Law, the Department of Economic Development initiates the formation of private venture capital firms ("certified capital companies") for the purpose of investing in qualified Missouri businesses. A certified capital company may invest in an eligible business, which is in need of venture capital and cannot obtain conventional financing. The eligible businesses must derive their revenue primarily from manufacturing, processing or assembling of products; conducting research and development or service businesses, which can demonstrate that more than 33% of its revenue would originate outside the state of Missouri. The certified capital companies must meet certain statutory requirements to make equity investments in eligible Missouri businesses. Eligible businesses must have less than 200 employees, 80% of which are employed in Missouri. Insurance companies which invest in certified capital companies receive a 100% tax credit. Investments may be made through unsecured debt, equity or a hybrid security. The law primarily serves as an inducement to insurance companies to invest in the qualified businesses.

(1) Qualification as a Certified Capital Company. A Missouri certified capital company ("CCC") is any partnership, corporation, trust or limited liability company, whether organized on a profit or not-for-profit basis, that is located, headquartered and registered to conduct business in Missouri, that has its primary business activity the investment of cash in qualified Missouri businesses, and

which is certified by the Department as meeting the criteria of the Act. §135.500.2(5) R.S.Mo.

(a) Funding Within One Year of Certification. A CCC shall have a funding period of one year from the date of receiving certification from the Director. All investments in the CCC shall be made within that year. §135.505 R.S.Mo.

(b) Application. Profit or nonprofit companies may submit an application to be designated as a CCC. To be so certified, the company must have liquid assets of at least $500,000. No insurance company shall be a managing general partner of or control the direction of investments of a CCC. Within 75 days of an application, the Department shall either issue the certification or refuse the certification and communicate in detail the applicant the grounds for the refusal. §135.508 R.S.Mo.

(c) Investment Schedule. To continue to be certified, a CCC shall make qualified investments according to the following schedule:

(i) Within two years after the date of designation, at least 25% of its certified capital;

(ii) Within three years after the date of designation, at least 40% of its certified capital;

(iii) Within four years after the date of designation, at least 50% of its total certified capital.

(2) Qualified Missouri Business. A qualified Missouri business is defined as an independently owned and operated business which is headquartered and located in Missouri and which is in need of venture capital and cannot obtain conventional financing. Such businesses shall have no more than 200 employees, 80% of which are employed in Missouri. Such business shall be involved in commerce for the purpose of manufacturing, processing or assembling products, conducting research and development, or providing services in interstate commerce, but excluding retail, real estate, real estate development, insurance and professional services provided by accountants, lawyers or physicians. If such business has been in existence for three years or less, its gross sales during its most recent complete fiscal year shall not have exceeded $4 million. If such business has been in existence for longer than three years, its gross sales during its most recent complete fiscal year shall not have exceeded $3 million. The amount a CCC may invest in one Missouri business depends on various factors, however the maximum amount is 15% of the CCC's certified capital. Funding decisions are made by each CCC based on their evaluation of the return on investment relative to the risk. CCC funds may be used for equity investments, unsecured loans or hybrid investments in eligible businesses. Typically, venture capitalists require a projected 25-40% annual ROI, depending on the risk.

(a) Follow-On Investments. Any business which is classified as a qualified Missouri business at the time of the first investment in such business by a CCC shall for a period of seven years from the date of such first investment,

remain classified as a qualified Missouri business and may receive follow-on investments from any CCC and such follow-on investments shall be qualified investments even though such business may not meet the other qualifications of the definition of a qualified Missouri business at the time of such follow-on investments. §135.500.2(13) R.S.Mo.

(3) Premium Tax Credits. Any insurance company that makes an investment of cash in a CCC shall, in the year of the investment, earn a vested credit against state premium tax liability equal to 100% of the investment. §135.503.1 R.S.Mo. An investor shall be entitled to take up to 10% of the vested credit in any taxable year of the investor. §135.503 R.S.Mo. Any time after August 28, 1999, the Director of Economic Development (the "Director"), with the approval of the Commissioner of Administration, may reduce the percentage from 100% on a prospective basis. §135.503.1 R.S.Mo. The credit may not exceed the state premium tax liability of the investor for any taxable year. §135.503.2 R.S.Mo. All such credits may be carried forward indefinitely until they are used. §135.503.2 R.S.Mo.

(a) Transfer. The tax credit established pursuant to the Act may be sold or transferred in accordance with regulations adopted by the Department. Any such sale or transfer shall not affect the time schedule for taking the tax credit as provided by the Act. In approving the sale or transfer of the tax credit, the Department may require the transferor or the transferee or both to execute guarantees or post bonds with respect to any potential recapture. §135.529.1 R.S.Mo.

(b) Limits. The amount of certified capital for which earned invested credits are allowed statewide shall not exceed an amount which would entitle all CCC investors to take aggregate credits of the cap in §135.503.5; and for any year thereafter an amount determined by the Director but not to exceed the state cap with the approval of the Commissioner of Administration. If the limits have been exceeded for any given year, certified capital shall be allowed and allocated in the immediately succeeding calendar year in the order of priority based upon the date of filing information reporting the name of each investor and the amount of investment. §135.503.4 R.S.Mo. In 1998 (H.B. 1656), a new §5 was added which increased the maximum aggregate amount upon a determination of the director of DED in certain situations. §135.503.5 R.S.Mo. "Distressed Community" is defined in §135.530 R.S.Mo.

(4) Investments.

(a) Form of Investment. Capital in a qualified Missouri business may be in the form of debt or equity or a hybrid security of any nature and description whatsoever which are acquired by a CCC as result of transfer of cash to a business. However, it may not be in the form of a secured debt instrument. §135.500.2(3) R.S.Mo.

(b) Prohibited Investments. A CCC may not make an investment in an affiliate of the certified capital company. §135.516.1(3) R.S.Mo. No qualified

investment may be made which uses more than 15% of the total certified capital of the CCC. §135.516.3 R.S.Mo.

(c) Use. The funds invested in the business must be used for new capital improvements; research and development; and certain working capital expenses. All such funds must be used in Missouri.

(d) Amount. Effective January 1, 1999, eligible businesses also include those located in "distressed communities" as defined by §135.530 R.S.Mo. Supp. 1998. The annual revenue of the business located in a "distressed community" must be less than $5 million.

(5) Notice of Intent to Invest. A CCC, at least 15 working days prior to making the qualified investment, shall certify to the department that the company in which it proposes to invest is a qualified Missouri business and shall state the amount it intends to invest and the name of the business in which it intends to invest. The Department shall notify the CCC if it agrees that the business is a qualified Missouri business within the 15 days or the business shall be deemed a qualified Missouri business. §135.516.1(4) R.S.Mo.

(6) Distributions.

(a) Qualified Distributions. A CCC may make qualified distributions at any time.

(b) Other Distributions. In order to make distributions other than qualified distributions, the CCC must have placed an amount cumulatively equal to 100% of its certified capital in qualified investments. Cumulative distributions, other than qualified distributions, in excess of the certified capital company's original certified capital and any additional capital contributions shall be subject to audit by a nationally recognized CPA firm. The audit shall determine whether such distributions, which when combined with all tax credits utilized by investors, have resulted in an annual internal rate of return of 15%. Twenty-five percent of the distributions made, other than qualified distributions, in excess of the 15% annual internal rate of return shall be payable to the Development Reserve Fund of the Missouri Development Finance Board.

(c) Distributions to Debt Holders. Distributions or payments to debt holders of a CCC may be made without restriction with respect to debt owed to them by a CCC. A debt holder that is also an investor or equity holder may receive distributions with respect to such debt without restrictions. §135.516.2 R.S.Mo.

(7) Closed Records. Documents and other material submitted by CCCs or by businesses for purposes of the continuance of certification may be deemed "closed records" pursuant to the provisions of the Sunshine Law. §135.516.4 R.S.Mo.

(8) Reporting Requirements. Each CCC must report to the Department the name of each investor, the amount of the investor's investment, the tax credits

computed and the date on which the certified capital was received. §135.516.5(1) R.S.Mo. On a quarterly basis, the CCC shall report the amount of the CCC's certified capital at the end of the quarter and all qualified investments that it has made. §135.516.5(2) R.S.Mo. Each CCC shall provide annual audited financial statements to the Department. §135.516.4 R.S.Mo.

(9) Annual Review. The Department shall conduct an annual review of each CCC to determine if it is abiding by the requirements of certification. §135.520.1 R.S.Mo.

(10) Violation/Decertification. The Department may revoke the certification of a CCC if any material representation to the Department proves to have been falsely made or if the application materially violates any requirement established by the Department. §135.523 R.S.Mo. Any material violations of the Act shall be grounds for decertification.

(a) Procedure. If the Department determines that a company is not in compliance with any requirements for continuing its certification, it shall, by written notice, inform the officers of the company and the board of directors, managers, trustees or general partners that they may be decertified in 120 days unless they correct the deficiencies. §135.520.2 R.S.Mo. If the deficiencies are not cured, the Department may send a notice of decertification to the company.

(b) Effect. Decertification shall cause the recapture of all premium taxes previously claimed and the forfeiture of all future credits to be claimed.

(c) Fully Invested MCCC. However, once a certified capital company has invested 100% of its certified capital in qualified Missouri businesses, all future premium tax credits to be claimed by investors with respect to such company shall be nonforfeitable. If such company has met all of the requirements of the Act, it shall no longer be subject to regulation by the Department except with respect to the payment of distributions to the Missouri Development Finance Board. §135.520.3 R.S.Mo.

(11) Eligible Areas: State wide and "rebuilding communities" areas.

(12) Application Procedure. A CCC investor is required to file Missouri Form 135-5, parts A and B and return the completed form to DED for approval and certification.

(13) Approval Method. DED will issue a tax credit certificate authorizing the applicant to claim the tax credits.

(14) Awarded Certified Capital Companies.

Advantage Capital Missouri Partners
Pierre Laclede Center
7733 Forsyth Blvd.
St. Louis, MO 63105
(314) 725-0800 : Rounds 1, 2 and 3

BOME Investors/Gateway Associates
8000 Maryland Avenue, Suite 1190
St. Louis, MO 63105
(314) 721-5707 : Rounds 1 and 2

BOME Investors/Kansas City Equity Partners
233 West 47th Street
Kansas City, MO 64112
(816) 960-1771 : Round 3

CAPCO Holdings, L.C.
300 West 11th Street
Kansas City, MO 64105
(816) 391-2040 : Round 3

CFB Emerging Business Funds
11 South Meramec, Suite 1430
St. Louis, MO 63105
(314) 746-7427 : Round 2

Stifel CAPCO, Inc.
500 North Broadway
Suite 1400
St. Louis, MO 63102
(314) 342-2118 : Rounds 1, 2 and 3

§26. —Rebuilding Distressed Communities (135.530-135.545 R.S.Mo.)

The Distressed Communities Act allows a qualified business entity which expands within a distressed community or moves its operation into a distressed community or commences operations in a distressed community to receive a 40% investment credit against income taxes. The maximum amount of credits available per taxpayer cannot exceed $125,000 for each of the three years after the commencement of business. The business must employ more than 75% of its employees at its facility in the distressed community. Distressed communities must have a median household income under 70% of the median income for the general area in which they are located.

Employees of eligible facilities in distressed communities may receive a tax credit against their individual income tax.

(1) Eligible Areas and Operations.

(a) Operations. Qualified businesses include manufacturing, biomedical, medical devices, scientific research, animal research, computer software design or development, computer programming, telecommunications or professional firms. §135.535.1 R.S.Mo. Via SB 343 (2005) internet, web hosting, and other information technology, wireless, wired or other telecommunications form were added.

(b) Areas. For the purposes of §§100.010, 100.710 and 100.850, R.S.Mo., §§135.110, 135.200, 135.258, 135.313, 135.403, 135.405, 135.503, 135.530 and 135.545, §215.030, R.S.Mo., §§348.300 and 348.302, R.S.Mo., and §§620.1400 to 620.1460, R.S.Mo., "distressed community" means either a Missouri municipality within a metropolitan statistical area which has a median household income of under seventy percent of the median household income for the metropolitan statistical area, according to the last decennial census, or a United States census block group or contiguous group of block groups within a metropolitan statistical area which has a population of at least two thousand five hundred, and each block group having a median household income of under seventy percent of the median household income for the metropolitan area in Missouri, according to the last decennial census. In addition the definition shall include municipalities not in a metropolitan statistical area, with a median household income of under seventy percent of the median household income for the nonmetropolitan areas in Missouri according to the last decennial census or a census block group or contiguous group of block groups which has a population of at least two thousand five hundred, each block group having a median household income of under seventy percent of the median household income for the nonmetropolitan areas of Missouri, according to the last decennial census. *In metropolitan statistical areas, the definition shall include areas that were designated as either a federal empowerment zone; or a federal enhanced enterprise community; or a state enterprise zone that was originally designated before January 1, 1986, but shall not include expansions of such state enterprise zones done after March 16, 1988.* §. 135.530. R.S.Mo. [italicized portion added via SB 1155 in 2004].

(2) Tax Credits.

(a) Employees' Credits. Employees of such facilities shall also be eligible to receive a tax credit against individual income tax for each of the three years that the facility receives the tax credit. §135.535.2 R.S.Mo.

(b) Employers' Credits. A tax credit may be taken in the amount of 40% of the amount of funds expended for computer equipment and its maintenance, medical laboratories and equipment, research laboratory equipment, manufacturing equipment, fiber-optic equipment, high speed telecommunications, wiring or software development expense up to a maximum of $75,000 in tax

credits for such equipment or expense per year per entity and for each of the three years after commencement of operations in the distressed community. A business entity which has no more than 100 employees and which is already located in the distressed community which expends funds for such equipment in an amount exceeding its average of the prior two years, shall be eligible to receive a 25% tax credit up to a maximum of $75,000 for such additional equipment and expense. §135.535.3 R.S.Mo. A taxpayer shall also receive a 50% tax credit for a qualified investment in transportation facilities until January 2005. §135.545 R.S.Mo. An existing qualified business located within a distressed community that doubles the number of employees in the distressed community in a tax year shall be eligible for the tax credits in §135.535.1 and §135.535.3 R.S.Mo. §135.535.5 R.S.Mo.

(c) Transferability. Tax credits may be transferred, sold or assigned by notarized endorsement which names the transferee. §135.535.4 R.S.Mo.

(d) Carry Back/Forward.

(i) Transportation Credits. The taxpayer may carry forward any unused tax credit for up to 10 years and may carry it back for the previous three years. Any unused portion of the tax credit shall be available for use in the future by those entities until fully claimed. §135.545 R.S.Mo.

(ii) High Tech Credits. Employer's tax credits may be used to satisfy the state tax liability in the tax year the credit is certified and that was due during the previous three years, and in any of the five tax years thereafter. §315.535.3 R.S.Mo.

(e) Duplication of Credits. No taxpayer shall earn the tax credits allowed under this Act and the tax credits under the new or expanding business law or enterprise zone law for the same business for the same tax period. §135.535.7 R.S.Mo.

(f) Transportation Investment Credits. A taxpayer shall be allowed a credit equal to 50% of a qualified investment in transportation development for aviation, mass transportation, including parking facilities for users of mass transportation, railroads, ports, including parking facilities and limited access roads within ports, waterborne transportation, bicycle and pedestrian paths, or rolling stock located in the distressed community as defined in §135.530,and which are part of a development plan approved by the appropriate local agency. §135.545 R.S.Mo.

(3) Collective Bargaining Agreements. An employer relocating into a distressed community and having employees covered by a collective bargaining agreement at the facility from which it is relocating shall not be eligible for the tax credits nor will its employees, if the relocation violates or terminates a collective bargaining agreement unless the affected bargaining unit concurs with the move. §135.535.8 R.S.Mo.

§26.1 —Tax Credit Accountability Act of 2004 (135.800-135.830 R.S.Mo.).

(1) Must Include Estimated Number of Jobs. All tax credit applications must now include the number of estimated jobs to be created as a result of the tax credits separated by construction, part-time permanent and full-time permanent. §135.802.1(5) R.S.Mo.

(2) Must Report Actual Number of Jobs. Tax credit recipients must annually report the actual number of jobs created as a result of the tax credits for a period of 3 years following the issuance of the credits. §135.805.1(5) R.S.Mo.

(3) Tax Credit Information Availability. The DED must make all tax credit reporting information available on its website and the Missouri Accountability Portal. §135.805.15 R.S.Mo.

§26.2 —Rural Empowerment Zones (135.900-135.910 R.S.Mo.)

§§135.900-135.910 allow two REZs in any area of pervasive poverty in the state located in a 3rd class county without a township government with a population between 800 and 9025. They expire August 28, 2014. All taxable income of a new business facility in an REZ shall be exempt if the business creates new full-time jobs at various levels depending on the site of the business and whether it is new or expanding.

§26.3 —Enhanced Enterprise Zones (135.950-135.970 R.S.Mo.)

In 2004 the legislature authorized the creation of enhanced enterprise zones in areas of high unemployment and low incomes in certain small to medium size cities and counties. The governing body of the city or county may establish an enhanced enterprise zone board which shall include members appointed by the school district affected, and other taxing jurisdictions, with five members appointed by the chief elected official of the city or county. After holding a public hearing, the governing authority may file a petition with DED requesting designation. If approved, the designation shall expire in 25 years. Improvements to real property in an EEZ may, upon approval by the governing authority, be exempt, in whole or in part, from assessment of ad valorem taxes of one or more political subdivisions. At least one-half of the value of such improvements shall be exempt for at least 10 years. In addition, a new business facility may be allowed, upon approval by DED, a credit against state income tax each year for up to 10 years based upon a formula set forth in the act. An expanding facility may also be eligible for the credits. The credits may not be

carried forward but may be transferred and the unused portion is refundable.

(1) Qualifying Area. §§135.950-973 R.S.Mo. allow the creation of EEZ's in areas of high unemployment and low incomes, not exceeding 100,000 nor less than 500 if in an MSA, and if not, not exceeding 40,000 nor less than 500. If the population of the governing body authority does not meet the minimum population, the population must be at least 50% of the population of the jurisdiction, but may not consist of the total area of a county. §135.953.1(3). However, areas which do not meet the above criteria may be designated EEZ's if disaster relief has been requested by the governor, if the area is blighted and sustained severe damage [§135.953.2] or in a county of declining population if it meets certain requirements. [§135.953.3] In addition to the above, an area must demonstrate the potential to create sustainable jobs in a targeted industry or an impact on local industry cluster development. [§135.953.4]

(2) Board. The governing authority of a county or city may establish an EEZ board, which shall include members appointed by the school district affected and other taxing jurisdictions, with the remaining five members appointed by the chief elected official of the county or city. §135.957.

(3) Hearing. Before establishing the zone, the governing authority shall hold a public hearing, after which it may file a petition with DED requesting designation, which must include the items set forth in §135.960.2 R.S.Mo.

(4) Effective Date and Term. An EEZ shall be effective upon approval by DED and shall expire in 25 years. §135.960.3. For example, the three Kansas City zones [Zone 1 – Northland; Zone 2 – Midtown to Richards-Gebaur; Zone 3 – Midtown to East KCMO] were approved by DED on August 19, 2005, and will thus expire August 19, 2030.

(5) Local Property Tax Abatement. Improvements to "real property" in an EEZ may, upon approval by the governing authority after a public hearing, be exempt, in whole or in part, from assessment of ad valorem taxes of one or more affected political subdivisions for up to 25 years. §135.963.5. At least one half of the value of such improvements shall be exempt for at least 10 years §135.963. Kansas City requires an application and 'council action' to obtain the abatement pursuant to ordinances 051411 [Zone1], 051412 [Zone 2] and 051413 [Zone 3].

(6) Investment and Job Tax Credits. A taxpayer establishing a new business facility with at least two employees and one hundred thousand dollars of investment may, upon approval by DED be allowed a credit against state income tax each year for up to 10 years in an amount which is the lesser of:

- Projected state economic benefit as determined by DED
- A sum based on the number of new employees, the number of new

employees who are residents of an EEZ, the number of employees who are paid above average wages and two percent of investment. §135.967.1-4 R.S.Mo.

(a) Cap. For 2005 and 2006, the credits shall be subject to a state-wide cap of four million dollars annually. Afterwards, it shall increase to seven million dollars. §135.967.5. In 2008 via SB 718 and HB 2058, it was increased to twenty four million dollars.

(7) Expansion. If an existing facility is expanded, it may be eligible for the credits if investment exceeds one hundred thousand dollars and the number of new employees exceeds two and the total number of employees at the facility after the expansion is at least two greater than the total before the expansion. §135.970.9 The statute sets forth a method of calculating the number of employees, [§135.967.7] and discounting pre-existing investment. 135.967.9.

(8) Use of Credits. Credits may not be carried forward but shall be claimed for the taxable year during which commencement of commercial operations occurs and for each nine succeeding years. §135.970.11. They may be transferred for not less than 75% of par value. §135.967.12. The director of revenue shall issue a refund for the unused portion of the credit. §135.967.13.

(9) Eligible Businesses. The ordinances (see §(5) above) designate by NAICS Sector Name the types of businesses eligible for state and local incentives. Ineligible busnesses include retail, gambling, food and drink establishments and adult –oriented businesses. 135.950(9)(b) R.S.Mo. In 2008, in anticipation of landing Bombardier Aviation, the legislature adopted HB 2393, which included a definition for "mega projects" with special benefits for airplane manufacturers and assemblers. However, any such project would have had to be approved before December 31, 2008, per the provisions of the bill.

After January 1, 2007, all enterprise zones designated before January 1, 2006, shall be eligible to receive the tax benefits under §§135.950 to 135.970, R.S.Mo. §135 973**.**

§27. —Community College Missouri Works New Jobs Training Program (620.800 to 620.809 R.S.Mo.)

The Missouri Works New Jobs Training Program uses withholding taxes of employees to fund training programs for eligible businesses which create jobs in Missouri. A qualified company must offer health insurance to all full time Missouri employees and pay at least fifty percent of such insurance premiums, and certain industries are excluded, including retail, food service, and education. Local community colleges may initially finance training through the sale of certificates.

Training is funded on a pay-as-you-go basis or certificates are repaid from tax withholding equal to 2½% of gross wages for the first 100 new jobs, and 1½% for the remaining new jobs. Projects may continue for 8 years.

(1) Job Training Fund Established. The "Missouri Works Community College New Jobs Training Fund" is established within the state treasury and administered by the Department of Economic Development ("DED"). The Department of Revenue shall credit to the fund all New Jobs Credits from withholding. Monies in the fund shall be disbursed to DED pursuant to regular appropriations by the general assembly. DED in turn shall disburse such funds to community college districts for the payment of training project costs. §620.809.1 R.S.Mo.

(2) Agreement; Community College District; Qualified Company Terms. Financial assistance is provided by DED through the training program to qualified companies that create new jobs. A community college district with the approval of DED may enter into an agreement to establish a training project and provide training project services to a qualified company. §620.809.4 R.S.Mo. A "qualified company" is defined as an entity or headquarters of such entity registered to do business in Missouri that is the owner or operator of a project facility, offers health insurance to all full-time employees at all facilities located in the state and pays at least 50% of such insurance premiums. Certain designated industries are excluded. §620.800(16) R.S.Mo. A "training project" is the project established through the Missouri Works training program for the creation of jobs by providing education and training of workers. A "New Job" is defined as the number of full-time employees located at the project facility that exceeds the project facility base employment less any decrease in the number of full-time employees at related facilities below the related facility base employment. No job created prior to the date of the notice of intent shall be deemed a new job. A qualified company must submit a notice of intent to DED stating its intent to request benefits under the new jobs training program. §620.800(11) R.S.Mo. "Project facility base employment" is the greater of the number of full-time employees located at the project facility on the date of the notice of intent, or for the twelve month period prior to the date of the notice of intent, the average number of full-time employees located at the project facility. §620.800(15) R.S.Mo. "Training Project Services" include job training, skill assessment services and all expenses related thereto, including facilities, equipment, materials and supplies. §620.800(26) R.S.Mo.

(a) Application. DED has 14 days from receipt of an application to approve or disapprove training projects. If no response is received within 14 days the projects are deemed approved. §620.809.4 R.S.Mo.

(3) Agreement; Contents. If an agreement is entered into, the district and the employer shall notify the Department of Revenue within 15 calendar days.

§620.809.4 R.S.Mo. An agreement may include, but is not limited to, payment of training project costs, which shall not be deferred for a period longer than eight years, costs of on-the-job training including wages of participating employees not to exceed the average of 50% of the total wages paid by the qualified company to each participant during the period of training and which may continue for up to six months from the date training begins, and a provision which fixes the minimum amount of New Jobs Credit from withholding which shall be paid for training project costs. Any payment required to be made by a qualified company is a lien on the qualified company's business property until paid. §§620.809.4(5) R.S.Mo. Projects may continue for up to 8 years. §620.809.4(2) R.S.Mo.

(4) Job Training Program Costs. If an agreement provides that all or part of program costs are to be met by receipt of New Jobs Credits from withholding, such New Jobs Credits shall be determined and paid as follows:

(a) Determination of Amount of Qualified Company Credit. New Jobs Credits from withholding shall be based upon the wages paid to the employees in the new jobs. §620.809.6(1) R.S.Mo. A portion of the withholding tax made by qualified companies per §143.191 to 143.265 R.S.Mo., shall be designated as the New Jobs Credit from withholding. Such portion shall be an amount equal to 2 1/2% of the gross wages paid by the qualified company for each of the first 100 jobs included in the project and 1 1/2% of the gross wages paid by the qualified company for each of the remaining jobs in the project. If business or employment conditions cause the amount of the New Jobs Credit from withholding to be less than the amount projected in the agreement, then other withholding taxes paid by the qualified company shall be credited to the Missouri Works Community College New Jobs Training Fund by the amount of such difference. §620.809.6(2) R.S.Mo. The qualified company claims the training credit by completing a DOR form and attaching it to his/her Employers Report of Income Taxes Withheld. 4 CSR 195-3.010(20)(A).

(b) Appropriation and Disbursement of Funds to Community College. The General Assembly then appropriates funds from the Missouri Works Community College New Jobs Training Fund which are disbursed by the Division of Workforce Development of DED to the Community College District for deposit in the subaccount established for the applicable qualified company. §620.809.6(2) R.S.Mo.

(c) Termination of Credits. When all of the training program costs, including the principal of, premium, if any, and interest on the certificates have been paid, the new jobs credits shall cease. §620.809.6(2) R.S.Mo.

(5) Employee to Receive Credit for Amount Withheld. An employee participating in a project will receive full credit for the amount designated as a New Jobs Credit from withholding and withheld as provided in §143.221 R.S.Mo. §620.809.6(6) R.S.Mo.

(6) Certificates, Issue of. To provide funds for the payment of training project costs, a community college district may borrow money and issue and sell certificates payable from future receipts of payments authorized by the agreement including disbursements from the Missouri works community college new jobs training fund to the special fund established by the district for each project. §620.809.7 R.S.Mo. However, DED encourages applicants to fund training program costs on a pay-as-you-go basis rather than through the issuance of certificates.

(a) Pledge of Revenues to Pay Certificates. Receipt of payments authorized by the agreement, including disbursements from the Missouri works community college new jobs training fund may be pledged by the district for the payment of principal and interest on certificates issued by the district to finance the project. §620.809.7 R.S.Mo.

(b) Limits. The total amount of outstanding certificates sold by all community college districts shall not exceed the total amount authorized under law as of January 1, 2013, unless an increased amount is authorized by the Missouri Works Job Training Joint Legislative Oversight Committee. §620.809.7 R.S.Mo.

(c) Terms. Certificates may be sold at public or private sale at par, premium, or discount of not less than 95% of par and bear interest at the rates determined by the board of trustees. §620.809.7 R.S.Mo. If certificates are issued, they are generally purchased by the qualified company.

(d) Notice of Intent to Issue. Before certificates are issued, the board of trustees shall publish once a notice of its intention to issue the certificates. §620.809.9 R.S.Mo.

(e) Statute of Limitations. An action shall not be brought which questions the legality of the certificates from and after 15 days from the publication of the Notice of Intention to Issue. §620.809.9 R.S.Mo.

(f) Certificates Not Debt. Certificates shall not be deemed an indebtedness of the state, of the community college district or of any other political subdivision and are payable only from the sources provided in §620.809.4(1) R.S.Mo. which are pledged in the agreement. §620.809.11 R.S.Mo.

(g) Sunset. The new program authorized under Section 620.800 to 620.809 shall automatically sunset July 1, 2019, unless reauthorized by act of the general assembly. If the program is reauthorized, it will automatically sunset twelve years after the effective date of the reauthorization of such sections. §620.809.12 R.S.Mo.

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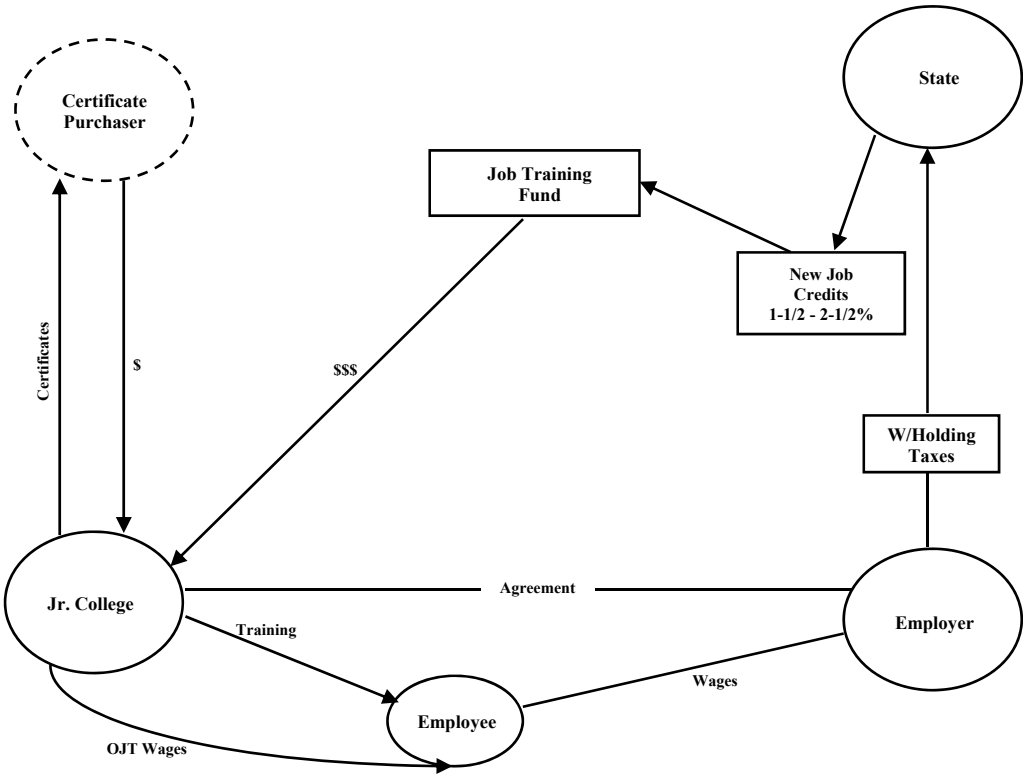
(7) Diagram.



§27.1 — Missouri Works Community College Job Retention Training Program (620.800-620.809 R.S.Mo.)

The Missouri Works Community College Job Retention Training Act authorizes agreements between qualified companies and community college districts whereby the college administers and disburses funds for training program costs. The qualified company must have maintained at least 100 employees per year for the calendar year preceding the year of application, and retained at that site the level of employment that existed in the taxable year immediately preceding the application and make a new capital investment of more than five times the award. Furthermore, the employer must have made substantial investment in new technology requiring the upgrading of workers skills or be located in a border county and represent a potential risk of relocation or be determined to represent a substantial risk of relocation by the Director of DED. The

> **agreement may cover a wide variety of training costs including on-the-job training. The withholding taxes paid by the qualified companies fund the program. The community college may issue certificates payable ultimately from retained jobs credit from withholding. A portion of the total payments made by the qualified company for withholding taxes shall be designated as a retained jobs credit and credited to the Missouri Works community college retained job training fund, until approved program costs have been paid. These funds shall be appropriated by the General Assembly from the Missouri Works Community College Job Retention Training Fund and disbursed for the project into a special fund created by the community college.**

§§620.800-620.809 R.S.Mo. adopted in 2013, authorize agreements between qualifying employers and community college districts for eight years, [§178.760(1)] whereby the training project costs may be funded. The business must be a qualified company which must have [1] maintained at least 100 employees per year at the project facility in Missouri for the calendar year preceding the year in which application is made and [2] retained at that project facility the same number of employees that existed in the taxable year immediately preceding the year in which the application is made, and [3] made or agreed to make a "new capital investment" of greater than five times the amount of any award under the training program at the project facility over a period of two consecutive calendar years, and [a] have made substantial investment in new technology requiring the upgrading of employee skills; or [b] be located in a border county and represent a potential risk of relocation from the state; or [c] be determined to represent a substantial risk of relocation from the state by the director of DED. §620.809.5 R.S.Mo. A "new capital investment" means costs incurred by the qualified company at the project facility *after acceptance* by the qualified company of the proposal for benefits from the department or the approval of the notice of intent, whichever occurs first, for real or personal property, that may include the value of finance or capital leases for real or personal property for the term of such lease at the project facility executed *after acceptance* by the qualified company of the proposal for benefits from the department or approval of the notice of intent. [Emphasis added] §620.800(10) R.S.Mo.

(1) Agreement. The Agreement may provide, but is not limited to:

(a) Payment of training project costs, which may be paid from one or a combination of the following sources:

(i) Funds appropriated by the general assembly from the Missouri works community college job retention training program fund and disbursed by DED in respect of retained jobs credit from withholding for purposes consistent with §620.800 to 620.809 R.S.Mo.; or

(ii) Tuition, student fees, or special charges fixed by the board of trustees to defray training project costs in whole or in part;

(b) Payment of training project costs shall not be deferred longer than eight years;

(c) Costs of on-the-job training for employees shall include wages or salaries of participating employees. Payments for on-the-job training shall not exceed the average of 50% of the total wages paid by the qualified company to each participant during the period of training. Payment for on-the-job training may continue for up to six months from the date training begins;

(d) A provision which fixes the minimum amount of retained jobs credit, or tuition and fee payments which shall be paid for training project costs;

(e) Any payment required to be made by a qualified company is a lien upon the qualified company's business property until paid and has equal priority with ordinary taxes and shall not be divested by a judicial sale. §620.809.4(5) R.S.Mo.

(2) Funding. If an agreement provides that all or part of training program costs are to be met by receipt of retained jobs credit from withholding, such retained jobs credit from withholding shall be determined and paid as follows:

(a) Retained jobs credit shall be based upon the wages paid to the employees in the retained jobs;

(b) A portion of the total payments made by the qualified company under §143.191 to 143.265 R.S.Mo., shall be designated as the retained jobs credit from withholding. Such portion shall be an amount equal to 2½ % of the gross wages paid by the qualified company for each of the first 100 jobs included in the project and 1½ % of the gross wages paid by the qualified company for each of the remaining jobs included in the project. If business or employment conditions cause the amount of the retained jobs credit from withholding to be less than the amount projected in the agreement for any time period, then other withholding tax paid by the qualified company under §143.191 to 143.265 R.S.Mo., shall be credited to the Missouri works community college retained job training fund by the amount of such difference. The qualified company shall remit the amount of the retained jobs credit to the department of revenue in the manner prescribed in §143.191 to 143.265 R.S.Mo. When all program costs have been paid, the employer credits shall cease;

(c) The community college district participating in a project shall establish a special fund for and in the name of the training project. All funds appropriated by the general assembly from the Missouri works community college job training retention program fund and disbursed by DED for the project and other amounts received by the district for training project costs as required by the agreement shall be deposited in the special fund. Amounts held in the special fund may be used and disbursed by the district only to pay training project costs;

(d) Any disbursement under §§620.800 to 620.809 and deposited to the special fund for a training project may be irrevocably pledged by a community

college district for the payment of the principal, premium, and interest on the certificate issued by a community college district to finance or refinance, in whole or in part, the training project. §620.809.6(4) R.S.Mo.

(3) Borrowing. To provide funds for the present payment of the training project costs of retained jobs training programs, a community college district may borrow money and issue and sell certificates payable from a sufficient portion of the future receipts of payments authorized by the agreement including disbursements from the Missouri works community college job retention training fund to the special fund established by the district for each project. The total amount of outstanding certificates sold by all community college districts shall not exceed the total amount authorized under law as of January 1, 2013, unless an increased amount is authorized in writing by a majority of members of the Missouri job training joint legislative oversight committee. The receipts shall be pledged to the payment of principal of and interest on the certificates. Certificates may be sold at public sale or at private sale at par, premium, or discount at not less than 95% of the par value thereof, at the discretion of the board of trustees, and may bear interest at such rate or rates as the board of trustees shall determine, notwithstanding the provisions of §108.170 R.S.Mo., to the contrary. Certificates shall not be deemed an indebtedness of the state, of the community college district or of any other political subdivision and are payable only from the sources provided in §620.809.4(1) R.S.Mo. which are pledged in the agreement. §620.809.11 R.S.Mo. However, DED encourages applicants to fund training program costs on a pay-as-you-go basis rather than through the issuance of certificates.

(4) Accounting. There is established within the state treasury a special fund, to be known as the "Missouri Works Community College Job Retention Training Fund." §620.809.2 R.S.Mo. The retained jobs credit from withholding shall be accounted as separate from the normal withholding tax paid to the department of revenue by the qualified company. Reimbursements made by all qualified companies to the Missouri works community college job retention training fund shall be no less than all allocations made by DED to all community college districts for all job retention projects. The qualified company shall remit the amount of the retained credit to the department of revenue in the same manner as provided in §§143.191 to 143.265 R.S.Mo. §620.809.3 R.S.Mo.

(5) Sunset. The new program authorized under Section 620.800 to 620.809 shall automatically sunset July 1, 2019, unless reauthorized by act of the general assembly. If the program is reauthorized, it will automatically sunset twelve years after the effective date of the reauthorization of such sections. §620.809.12.

§28. —Transportation Development Districts (238.200-238.275 R.S.Mo.)

The Transportation Development District Act provides methods of funding transportation infrastructure by the formation of a District to issue bonds, and impose special assessments, property taxes or sales taxes within the District. A petition to form the district may be filed with the Circuit Court by a local government, all of the property owners in the District or a certain number of registered voters. The court must determine, *inter alia*, if the District is unduly burdensome on any property owner. If not, the Court will order an election regarding the formation of the district. At the election, either registered voters, or if none, property owners, vote on the formation of the district. After the District is formed, a board of directors is elected, either by property owners with one vote per acre or by voters residing in the District. All funding methods instituted by the District must also be approved by either the property owners or a majority of those registered voters voting. A district may annex or deannex property if all of the owners of the property to be annexed and all of the owners of the property in the existing district agree.

(1) Creation.

(a) Petition for Formation. The petition must be filed in Circuit Court and shall contain, inter alia, a general description of each project to be undertaken and a proposal for initial funding of the District. §238.207.4 R.S.Mo. The petition must name as respondents the Missouri Highway and Transportation Commission (the "Commission") and the affected Local Transportation Authority (usually a city). If the petition is filed by voters or a Local Transportation Authority, public notice of the filing of the petition shall be published in one or more newspapers of general circulation for four consecutive weeks, in a form set forth in the Act. §238.212 R.S.Mo. If the petition is filed by a governing body on behalf of two or more local transportation authorities, the petition must include a request that the question of formation be submitted to qualified voters within the limits of the district, as well as a statement that the district will not be an undue burden on any property owner in the district and is not unjust or unreasonable. §238.207.5(3). The petition toform a transportation development district must contain the elements enumerated in the statute, including the estimated project costs and the anticipated revenues to be collected from the project (§238.207.4(5) R.S.Mo.) and details of budgeted expenditures. (§238.207.4(12) R.S.Mo.)

(i) Voters' or Owners' Petition. Fifty registered voters from each county partially or totally within a proposed district may file a petition requesting the creation of a district. §238.207.1 R.S.Mo. If no persons eligible to vote live in the district, the record owners of all property may file the petition. 238.202.2(2)(b) R.S.Mo. After amending the definition of "qualified voters" in

2007, in 2008, via SB 930 & 947, the legislature amended the definition again in §238.202.2 R.S.Mo.as follows:

> 2. For the purposes of sections 11(c), 16 and 22 of article X of the Constitution of Missouri, section 137.073, R.S.Mo., and as used in sections 238.200 to 238.275, the following terms shall have the meanings given:
>
> ***
>
> (2) "Qualified electors", "qualified voters" or "voters":
>
> (a) Within a proposed or established district, except for a district proposed under subsection 1 of section 238.207, any persons residing therein who have registered to vote pursuant to chapter 115, R.S.Mo.; or
>
> (b) Within a district proposed or established under subsection 1 of section 238.207 which has no persons residing therein who have registered to vote pursuant to chapter 115, R.S.Mo., the owners of record of all real property located in the district, who shall receive one vote per acre, provided that if a registered voter subsequent to the creation of the district becomes a resident within the district and obtains ownership of property within the district, such registered voter must elect whether to vote as an owner of real property or as a registered voter, which election once made cannot thereafter be changed;
>
> (3) "Registered voters", persons qualified and registered to vote pursuant to chapter 115, R.S.Mo.

(ii) Local Transportation Authority's Petition. In the alternative, the governing body of any local transportation authority within any such county may file such petition. §238.207.2 R.S.Mo. A local transportation authority is defined as any local government, county highway commission, special road district, interstate compact agency, or any local public authority or political subdivision having any jurisdiction over transportation infrastructure. §238.202.1(4) R.S.Mo.

(iii) Joint Local Transportation Authorities' Petition. As an alternative to the formation methods above, if two or more local transportation authorities call for a joint district, then the governing body of one of the authorities may file a petition requesting formation of such district.

(iv) Contiguous District Area. Generally, district areas must be contiguous, provided that property separated only by public streets, easements or right-of-way are considered contiguous. §238.207.3 R.S.Mo. However, district which are formed by petition of all the district landowners need not be contiguous if: (1) the only district funding method will be a sales tax, (2) the court finds that all the district property will be benefited by the district project, and (3) each parcel within the district is within five miles of every other district parcel. §238.207.3(2) R.S.Mo. Districts formed by the joint local transportation authority method shall be considered contiguous if the district is separated only by public streets, easements, or right-of-way or connected by a single public street, easement, or right-of-way. §238.207.5(2).

(b) Hearing and Objections. Within 30 days after the petition is filed, the circuit clerk shall serve a copy of the petition on the respondents named therein. They shall have 30 days after receipt of service to file an answer agreeing with or opposing the creation of the district. §238.210.1 R.S.Mo. In addition, any resident or taxpayer may join as either a petitioner or respondent, within the district. §238.210.1 R.S.Mo. The court shall hear the case without a jury and determine whether the petition is defective, or the district is illegal or unconstitutional, or constitutes an undue burden on any owner of property or is unjust and unreasonable. If the petition is valid or if no objections are timely filed, the court may certify the question of the creation of the district, project development and proposed funding for voter approval (if filed by registered voters or a governing body) or may enter judgment declaring the district formed (if filed by all owners). §238.210.2 R.S.Mo. If the petition was filed by the owners of the property in the District, the court must order at least one public hearing. §238.212.2 R.S.Mo. Via SB 930 and SB 947, in 2008 the legislature amended §238.210.3 to provide that the circuit court shall have continuing jurisdiction to enter such orders as may be required for the administration of the district.

(c) Election. If the court certifies the petition the clerk shall cause an election to appear on the ballot at the next regularly scheduled general primary or special election day in the form set forth in the Act. The question may be approved by a majority of those voting. §238.215 R.S.Mo. If the petition was filed by a governing body on behalf of two or more local transportation authorities, and if the question failed to pass (less than a majority approved), then the governing body must file a new petition with the court before another election can be held. §238.215.5. If the petition was filed otherwise, then a failed question may be resubmitted for voter approval after two years. §238.215.4.

(i) Who Can Vote – Corporations. In the case of *Day v. Robinwood West Community Improvement District*, 693 F.Supp.2d 996, 2010 WL 584027 (E.D.Mo. 2010) plaintiff claimed that to the extent not resident property owners were allowed to vote on electing directors, and imposing taxes, the statute violated the equal protection clause of the 14th amendment. In granting partial summary judgment, the federal district court ruled that Defendant

unconstitutionally applied R.S.Mo. § 67.1401.2(14)(c) to permit District landowners to cast multiple votes in the election of members of the District's Board of Directors, and that § 67.1401.2(14)(c) is facially unconstitutional, insofar as it causes persons voting as registered voters to be subject to certain requirements not imposed on persons voting as nonresident landowners. Instead of completely invalidating the statute, however, the Court enjoined any application of § 67.1401.2(14)(c) permitting voting in CID elections by persons who do not meet the age requirement in R.S.Mo. § 115.133.1 and by persons who are disqualified from registering to vote under R.S.Mo. § 115.133.2 (criminal status). The court also ruled that only persons and not legal entities could vote in any CID elections. In footnote 10 of the opinion, the court stated:

> FN10. Somewhat curiously, the scope provision of the Comprehensive Election Act of 1977, of which § 115.137 is a part, provides that the Act does not apply to public elections in Missouri "for which ownership of real property is required by law for voting." Mo.Rev.Stat. § 115.005. Although one might read this provision as negating § 115.137.2, the Court concludes that given that § 115.137 is titled as an exception-"Registered voters may vote in all elections-exception"-this provision instead reinforces § 115.005, to the extent that it specifically points out a circumstance in which the Act's general requirements for registered voters do not apply.

(ii) Owners in Districts Formed by Local Transportation Authorities. Under the law as it existed prior to 2011, where a majority of the owners in a proposed district were in agreement, but there were no residents, even one owner could thwart the holding of an election. And in a proposed district to be formed by two or more local transportation authorities under Section 238.207.5, no election could be held if there were no residents because there were no qualified voters to vote in such election under the definition of qualified voter in Section 238.202. This problem was corrected for districts formed under 238.207.5 by the legislature in 2011 via the adoption of HB 506 by defining 'voter' in such a situation to include property owners.

(iii) Standing to Complain. In the case of *In Re: The Creation of the Clarkson Kehrs Mill Transportation Development District, Behymer v. City of Ballwin*, 308 S.W.3d 748 (Mo.App. E.D. 2010), nearby residents moved to intervene in the action filed to form a transportation development district related to the construction of a Schnucks supermarket on the grounds that as taxpayers they would spend money in the district. This was held insufficient as a reason to allow intervention.

(2) Directors.

(a) Election by Voters in District. After the district has been declared organized, if any persons eligible to be registered voters reside within the District,

the court shall upon the petition of any interested person order an election to elect a board of directors of the district consisting of not less than five nor more than 15 persons. §238.220.1 R.S.Mo. Per SB 22 in 2007, "Qualified voters" now includes owners of real property within a transportation development district who shall receive one vote per acre provided that any registered voter who also owns property must elect whether to vote as an owner or a registered voter. This will clarify the situation where a transportation development district has been established and registered voters have moved in to reside in the district after the district was formed. However, this language may complicate elections for those districts that were formed by registered voters or which were formed by municipalities and contained registered voters at the time they were formed. According to a March, 2006 report by the state auditor, as of December 31, 2004 there were 69 transportation development districts established in Missouri. Of these, 66 (or 96%) were initiated by a petition filed by property owners. Three were established by cities (Independence, Brentwood, and Troy). None were established by registered voters. §238.202.2(2) R.S.Mo. Via SB 22 (2007), for the purpose of determining board membership, the owner or owners of real property within the district and their legally authorized representatives shall be deemed to be residents of the district; for business organizations owning real property within the district, the individuals legally authorized to represent the business organizations in regard to the district shall be deemed to be a resident of the district. §238.220.2(1) R.S.Mo.

(b) Election by Owners. After the District is formed, if no persons eligible to be registered voters reside within the District, the circuit court shall within 30 days, upon giving published notice, call a meeting to elect a board. §238.220.2. At that meeting, each owner shall have one vote per acre.

(c) Joint Local Transportation Districts. If the district was formed at the request of four or more local transportation authorities, the board shall consist of the presiding officer of each authority. If formed by two or three authorities, then the board shall consist of the presiding officer of each authority and one person designated by the governing body of each authority. §238.220.3 R.S.Mo.

(d) MoDOT Advisor Appointees. The Missouri Highway and Transportation Commission shall appoint one or more advisors to the board who shall have no vote but shall have the authority to participate and access to all records. §238.220.4 R.S.Mo.

(e) Municipal Advisor Appointees. If the proposed project is not intended to be merged into the state highway and transportation system, the local transportation authority that will assume maintenance of the project shall appoint one or more advisors to the board of directors, such advisors to have the same rights as advisors appointed by the commission. §238.220.5 R.S.Mo.

(f) County Advisor Appointees. Any county which is located within a district which is not a local transportation authority may appoint one or more advisors to the board who shall have the same rights afforded an advisor appointed by the Commission. §238.220.6 R.S.Mo.

(g) Application of Sunshine Law to Directors Meetings. In 2010 the Missouri Gen. assembly via SB 851 adopted section 67.2725 R.S.Mo. which requires that for any public meeting where a vote of the governing body is required to implement a tax increase, or with respect to a retail development project, when the governing body votes to utilize the power of eminent domain, create a transportation development district or a community improvement district, or approve a redevelopment plan that pledges public funds as financing for the project or plan, the governing body of any county, city, town, or village, or any entity created by such county, city, town, or village, shall give notice conforming with the sunshine law at least four days before such entity may vote on such issues exclusive of weekends and holidays when the facility is closed, provided that this section shall not apply to any votes or discussion related to proposed ordinances which require a minimum of two separate readings on different days. No vote shall occur in thought after a public meeting at which parties in interest and citizens shall have an opportunity to be heard. Any legal action challenging the notice requirements shall be filed within 30 days of the subject meeting.

The legislation is somewhat confusing in that (1) of vote of the governing body of the political subdivision is already always required to implement a tax increase, if by "implement" the statute includes placing the increase on the ballot; (2) governing bodies of political subdivisions do not "create" transportation development districts, which are created by a unanimous vote of the owners of the property within the proposed district or by a majority vote of the registered voters residing within the proposed district; (3) the word "facility" is not defined, but probably refers to city hall or the county courthouse; (4) the term "governing body" does not appear to apply to the governing body of a TDD or a CID since it specifically refers in two places to the governing body of a county, city, town or village, and furthermore the governing body of a TDD or a CID cannot vote to create itself since the governing body does not exist before the district is created.

For transportation development districts, the statute would apply when the board of the district votes to submit the question of the imposition of a tax to the qualified voters of the district, or votes to condemn property.

(3) Projects. Proposed projects shall be submitted to the commission for its approval. §238.225.1 R.S.Mo. If the proposed project is not intended to be merged into the state highway and transportation system, the district shall also submit the proposed project to a local transportation authority that will become the owner of the project for its prior approval. §238.225.2 R.S.Mo. In such a case, the commission may decline to consider the project. In that event, agreements and approvals concerning the project shall be between the district and the relevant local transportation authority. §238.225.3 R.S.Mo.

(4) Funding. The District may levy a property tax in an amount not to exceed the annual rate of 10¢ per $100 of assessed valuation (§238.232.1) or sales tax (§238.235.1) in increments of one-eighth of one percent up to one percent in addition to any county transportation sales tax or county capital improvements

sales tax already imposed in the district. §238.235.1(7) R.S.Mo. The District may also levy tolls (§238.237.1) or special assessments for those project improvements which benefit properties within the district. §238.230.1 R.S.Mo. The District may borrow money. §238.240. Such revenue may be transferred to the commission for use in funding a project. §238.227.3 R.S.Mo. If the proposed project is not intended to be merged into the state highway and transportation system, such revenues may be transferred to the relevant local transportation authority for use in funding the project or debt service. §238.227.4 R.S.Mo. The Missouri Highways and Transportation Commission has taken the position through its general counsel in the past that a district may not impose a sales tax until an intergovernmental agreement is executed between the Commission and the district. The problem with this position has been that such agreements require detailed construction drawings to be attached as an exhibit. These drawings often cost hundreds of thousands of dollars. Most developers are not willing to invest these sums not knowing whether the Commission will approve the project. Thus, the legislature has provided that the Commission may preliminarily approve the project subject to the district providing plans and specifications for the project and that after such preliminary approval the district may impose and collect such taxes and assessments as may be included in the commission's preliminary approval. Section 238.225.1 R.S.Mo. (SB 22, 2007)

(a) Owner-Formed District. By a unanimous vote, the owners may approve a special assessment. §238.230.1 or a tax. §238.216.1(3) R.S.Mo. On 2006, via SB 931, the legislature clarified that in all elections in an owner-formed district, the owners receive one vote per acre. §238.416.4 R.S.Mo.

(b) Government or Voter-Formed District. The board may submit or resubmit a proposed funding method to the district voters for approval. §238.227.2 R.S.Mo. The form of ballot is set forth in the Act for each funding method.

(i) Special Assessments. If approved by a majority of those voting, the district may make one or more special assessments. §238.230.1 R.S.Mo. In 2007, via SB 22, the legislature clarified that a district may establish different classes or subclasses of real property within the district for purposes of levying differing rates of special assessments. The levy rate for special assessments may vary for each class or subclass of real property based on the level of benefit derived by each class or subclass from projects funded by the district. §238.230.5 R.S.Mo. Of course, under Missouri's constitution, all special assessments must be proportional to the benefit they confer on the property assessed.

(ii) Property Tax. If approved by at least four-sevenths of those voting, the district may impose a property tax of 10¢ per $110 of assessed value. §238.232 R.S.Mo.

(iii) Sales Tax. Any transportation development district may by resolution impose or increase the levy of an existing transportation development district sales tax on all retail sales made in such transportation district for

purposes designated by the district in its ballot of submission to its voters. §238.235.1 R.S.Mo. The proposition may be passed by a simple majority of those voting thereon. §238.235.1(2) R.S.Mo. The sales tax may be amended or repealed by election, §238.235.6(2) R.S.Mo., but not if such action will impair the district's ability to repay its obligations. §238.235.6(1) R.S.Mo. The tax is imposed on sales subject to taxation pursuant to §§144.010 to 144.525 R.S.Mo., but excluding vehicles, trailers, boats and other items. §§238.235.1(1) and (7) R.S.Mo. Brackets may be used to avoid fractions of pennies. §238.235.1(5) R.S.Mo. Revenues shall be deposited in a special trust fund. §238.235.1(6) and §238.235.5 R.S.Mo. The tax shall be imposed in the manner provided in §§144.010 to 144.525 R.S.Mo. and the rules of the director of revenue issued pursuant thereto. §238.235.2 R.S.Mo. Until 2009, the tax was collected either by the district or the city in which it was located. But in that year, the legislature commanded that the Director of Revenue shall administer, operate, collect and enforce the tax. §238.235.3 R.S.Mo. and §238.235.5 R.S.Mo. Situs of sale rules are contained in §238.235.4(6) R.S.Mo. In each transportation development district in which a sales tax has been imposed or increased under §238.235 R.S.Mo., every retailer shall prominently display the rate of the sales tax imposed or increased at the cash register area. §238.280. (SB 22, 2007). In 2013, via SSHB 253, the legislature exempted the retail sale of fuels and motor vehicles, planes, boats, and modular homes from a TDD sales tax. Section 238.235 R.S.Mo.

(iv) Toll Roads. If approved by a majority of those voting on the question in the district, the district may charge and collect tolls or fees for the use of a project. §238.237.1 R.S.Mo. The form of ballot is set forth in the Act. §238.237.2 R.S.Mo. While a district may relocate an existing state highway, subject to approval by the commission, or an existing local public street subject to approve by the local transportation authority, it shall not incorporate an existing free public street, road or highway into a district project that will be subject to tolls. §238.237.3 R.S.Mo.

(c) Districts Consisting of One or More Entire Municipalities. In 1998, via Senate Bill 861, the legislature repealed §238.240 and adopted two new sections, §238.236 and §238.240, which apply to transportation districts consisting of all or one or more entire counties, all of one or more entire cities, or all of one or more entire counties and one or more entire cities which are totally outside the boundaries of those counties. Any such district is authorized by resolution to impose or increase the levy of an existing transportation district sales tax which must be approved by the qualified voters of the district. The sales tax may be imposed at a rate of one-eighth of one percent, one-fourth of one percent, three-eighths of one percent, one-half of one percent or one percent on the receipts from the sale at retail of all tangible personal property or taxable services. §238.236 R.S.Mo. Whenever the board of directors of any transportation development district in which a sales tax has been imposed pursuant to §238.236, receives a petition signed by 10% of the qualified voters of the district calling for

an election to repeal the sales tax, the board of directors shall, if the repeal will not impair the district's ability to repay liabilities, submit to the voters of the district a proposal to repeal the sales tax. The tax may be repealed by a majority vote of the votes cast. §238.236.12(2) R.S.Mo. The district shall not mortgage, pledge or give a deed of trust on any real property or interest which it obtained by eminent domain or which it acquired from the State of Missouri or any agency or political subdivision thereof without the written consent of the state, agency or political subdivision from which it obtained the property. §238.240.4 R.S.Mo.

(5) Debt. The district may contract and incur liabilities appropriate to accomplish its purposes and may borrow money and issue bonds, notes and other obligations. It may secure these obligations by mortgage, pledge or deed of trust of any or all of its property and income. However, it shall not mortgage, pledge or give a deed of trust on any real property or interest which it has obtained by eminent domain, or acquired from the State of Missouri or any agency or political subdivision thereof. §238.240 R.S.Mo.

(a) Revenue Bonds. A district may issue revenue bonds payable from its revenues. The bonds shall be subject to such terms as determined by the district but may not exceed 40 years, and may be sold at public or private sale. §238.242.1 R.S.Mo. Such bonds may be refunded. §238.242.2 R.S.Mo.

(6) Acquisition of Property. The district may, subject to commission or local transportation authority approval, purchase or receive contributions of land, limit and control access of adjacent properties, and sell and convey excess right-of-way for fair market value. §238.245 R.S.Mo. A district may also condemn lands for a project in the name of the State of Missouri, upon prior approval by the commission, and by ordinance of the local governing body. §238.242.1 R.S.Mo. Displaced persons shall be entitled to payments and procedures under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended. §238.247.5 R.S.Mo.

(7) Project Control. Project improvements shall not be under the control and jurisdiction of a local transportation authority while the district retains control and jurisdiction. §238.270 R.S.Mo. Within six months after the development and initial maintenance costs of a completed project have been paid, the district shall, pursuant to contract, transfer ownership and control of the project to the commission or a local transportation authority which shall be responsible for all future maintenance costs. §238.275.1 R.S.Mo. In 2007, via SB 22, the legislature provided that such transfer may be made sooner with the consent of the recipient. §238.275.1 R.S.Mo. At such time as the district has completed a project and transferred ownership, or determined that it is unable to complete the project, it shall submit for a vote in an election held throughout the district the question of whether the district should be abolished. §238.275.2 R.S.Mo. However, it may not propose the question for its own abolition while there are outstanding claims or causes of action pending against the district, while its liabilities exceed its assets,

or while it is insolvent or in receivership or under the jurisdiction of the bankruptcy court. §238.275.3 R.S.Mo.

(8) Addition of Adjacent Property. In 2004, the General Assembly passed House Bill 1107 which provides *in toto*:

> The owners of property adjacent to a transportation district formed under the Missouri transportation development district act may petition the court by unanimous petition to add their property to the district. If the property owners within the transportation development district unanimously approve of the addition of property, the adjacent properties in the petition shall be added to the district. Any property added under this section shall be subject to all projects, taxes, and special assessments in effect as of the date of the court order adding the property to the district. The owners of the added property shall be allowed to vote at the next election scheduled for the district to fill vacancies on the board and on any other question submitted to them by the board under this chapter. The owners of property added under this section shall have one vote per acre in the same manner as provided in subdivision (2) of subsection 2 of §238.220.

(9) Deannexation. The owners of all the property located in a transportation development district may by unanimous petition filed with the board of directors of the district, remove any property from the district, so long as such removal will not materially affect any obligations of the district. §238.208.2 R.S.Mo. (SB 22, 2007).

(10) Reports. A District must file an annual report with the State Auditor per §105.145 R.S.Mo. and 15 C.S.R. 40-3.030. Report must be on form prescribed by State Auditor unless an audited financial statement is filed in lieu of the report. The report must be filed 4 months after the end of the fiscal year; 6 months if an audited financial statement is filed.TDDs that fail to timely submit annual reports to the state auditor are subject to a fine not to exceed $500 per day. §105.145 R.S.Mo. (HB 191, 2009). In 2014, via HB 1261, the legislature authorized the Department of Revenue to collect the fines.

§28.1 —Regional Economic Development District Law (251.600-251.630 R.S.Mo.)

HB 741, adopted in 2007established the Regional Economic Development District Law which;

(1) Establishment of District. Allows two or more governing bodies to establish a regional economic development district to develop programs encouraging economic development within the district. The governing bodies

must enact identical ordinances or mutually agree to the district's establishment. The ordinances or mutual agreements must specify the qualifications, terms, membership, and powers of the district's board;

(2) Sales Taxes. Allows the district to impose, upon voter approval, a sales tax of 0.125%, 0.25%, 0.375%, or 0.5% within the district to be used for the benefit of the district;

(3) Trust Fund. Creates the Regional Economic Development District Sales Tax Trust Fund for the deposit of all revenue levied from the district's sales tax;

(4) Dedication of Revenue. Prohibits the revenue from the district's sales tax from being included in calculations of money available to other special taxing districts that may also be a part of the regional economic development district. Other special taxing districts include TIF districts, neighborhood improvement districts, and community improvement districts. Revenue from the regional economic development district's sales tax can only be used for its purposes and cannot be diverted to any other special taxing district unless approved by the district's board;

(5) Annual Reports. Requires the board to make a report available to the public at least annually on the use of its funds;

(6) TIF. Allows the board to adopt incremental tax financing for the purposes of the district; however, this cannot be used for any retail projects. Allows the district to collect 50% of the economic activity tax revenue received from sales within the district for 25 years;

(7) Division of PILOTs and EATs. Specifies the manner in which ad valorem taxes and payments in lieu of taxes will be divided among affected taxing districts;

(8) Plan. Specifies the requirements of a regional economic development plan;

(9) Findings. Requires that certain findings be made by the board before adopting a regional economic development plan, including a determination that the development area has not been subject to growth and development through private investment and that this cannot be reasonably expected to occur without the implementation of regional economic development projects and the adoption of incremental tax financing;

(10)Exclusion of Gambling. Prohibits the initial development or redevelopment of gambling establishments;

(11)Bonds. Allows the district to issue bonds to pay for the costs associated with the regional economic development projects.

§29. —Historic Preservation Tax Credits (253.545-253.559 R.S.Mo.) (S.B. 1, 1997) (S.B. 827, 1998)

> **The state historic preservation tax credit program provides financial incentives for the redevelopment of historic structures in Missouri. It rewards private investment by providing state income tax credits in the amount of 25% of eligible costs and expenses of the rehabilitation of an approved historic structure. The rehabilitation costs must exceed 50% of the total basis in the property and the rehabilitation must meet the standards of the state historic preservation officer. The investor must receive a certificate of eligible credits from the Department of Economic Development and attach the certificate to all Missouri income tax returns on which the credit is claimed. A federal credit in the amount of 20% is also available. An investor may claim both the federal historic rehabilitation credit and the state historic rehabilitation credit for the same project.**

(1) Definitions.

(a) "Certified Historic Structure:" "a property located in Missouri and listed individually on the National Register of Historic Places."

(b) "Eligible Property:" "property located in Missouri and offered or used for residential or business purposes".

(c) "Structure in a Certified Historic District:" "a structure located in Missouri which is certified by the Department of Natural Resources as contributing to the historic significance of a certified historic district listed on the National Register of Historic Places or a local district that has been certified by the United States Department of the Interior." §253.545 R.S.Mo.

(2) Tax Credits. Since January 1, 1998, any person or entity incurring costs for the rehabilitation of eligible property which is a certified historic structure or structure in a certified historic district shall be entitled to a state income tax credit of 25% of the total cost of the rehabilitation, provided the rehabilitation costs exceed 50% of the total basis in the property and the rehabilitation meets standards consistent with the standards of the Secretary of the United States Department of the Interior for the rehabilitation as determined by the State Historic Preservation Officer of the Missouri Department of Natural Resources. §253.550 R.S.Mo.

(a) Historic Tax Credit Reform Act of 2009. Concern over the amount of historic tax credits issued and their impact on the state budget prompted the general assembly to enact restrictions in 2009 via HB 191, revising

R.S.Mo. §§253.545, 253.550, and 253.559. These sections were enacted with an emergency clause.

- ***State Cap.*** Between January 1, 2010 and June 30, 2010, the DED may not approve applications for tax credits which exceed $75 million in the aggregate. Beginning July 1, 2010, the DED may not approve applications for tax credits which exceed $140 million in the aggregate in a fiscal year. This limitation does not apply to applications for projects that receive less than $250,000 in tax credits. §253.550.2 R.S.Mo.
- ***Owner-Occupied Properties.*** Beginning on January 1, 2010, tax credits are limited to $250,000 for non-income producing single family, owner occupied residential property. §253.550.3 R.S.Mo.
- ***Order of Processing***. Tax credit applications will be processed in order and given priority based on the date of the postmark. If tax credits are exhausted, the applications will be kept on file and considered in the same order for any credits that become available due to rescission. §253.559.1 R.S.Mo.
- ***Contents of Application.*** Applications must include: proof of ownership or control, floor plans of existing structure and proposed alterations, estimated cost of rehabilitation, anticipated costs of the total project, the actual basis of the property, the anticipated labor costs, the estimated project start date, the estimated project completion date, and proof that the property is eligible. §253.559.2 R.S.Mo.
- ***Commencement of Rehabilitation***. Rehabilitation must commence within two years of the date of the issuance of the letter from the DED granting approval for the credits. §253.559.6 R.S.Mo.
- ***Date of Issuance***. Tax credit certificates will be issued in the final year that the cost of rehabilitation is incurred or within the 12 month period immediately following the conclusion of the rehabilitation. §253.559.8 R.S.Mo.

(3) Use of Tax Credits.

(a) Carry Forward/Back. If the tax credits exceed the total tax liability for the year in which the property is placed in service, the excess amount may be carried back for three years and forward for 10 years or until it is fully used, whichever occurs first. Not-for-profit entities shall be ineligible for the tax credits. §253.557.1 R.S.Mo.

(b) Assignability. Taxpayers eligible for such credits may transfer, sell or assign credits. The assignor shall perfect the transfer by notifying DED in

writing within 30 calendar days following the effective date of the transfer and shall provide any information required by DED relative thereto. §253.557.1 R.S.Mo.

(c) Allocation. Credits created to a partnership or a limited liability company shall be passed through to the partners or members pro rata or pursuant to an agreement among the partners or members. §253.557.1R.S.Mo.

(d) Off-Set. The assignee of the tax credits may use acquired credits to offset up to 100% of its tax liability. §253.557.2 R.S.Mo.

(4) How Claimed. To claim the historic tax credits, the taxpayer shall apply to DED which, in consultation with DNR shall determine the amount of eligible rehabilitation costs and expenses and whether the rehabilitation meets the standards of the Department of the Interior as determined by the State Historic Preservation Officer. These certificates of eligible credits shall be issued by DED. The taxpayer shall attach the certificate to all Missouri income tax returns on which the credit is claimed. §253.559.1 R.S.Mo.

(5) Federal Credits.

Incentives are available for buildings that are National Historic Landmarks, that are listed in the National Register, and that contribute to National Register Historic Districts and certain local historic districts. Jointly managed by the National Park Service (NPS) and the Internal Revenue Service in partnership with State Historic Preservation Offices, the Historic Preservation Tax Incentives program rewards private investment in rehabilitating historic buildings by providing a 20% tax credit for rehabilitating historic buildings that then become income-producing. Owners who begin rehabilitation work prior to getting approval from the NPS do so at their own risk.

Because the rehabilitation tax credit is available to the entity who holds title to the property, the tax credit, by itself, cannot be bought or sold. However, a building owner, who incurs the cost of rehabilitating an historic structure, can pass the rehabilitation tax credit to its lessees. The credits are subject to certain recapture rules if the building is sold or ceases to be business use property. If the credit, or a portion of tax credit, cannot be used, the excess can be carried back one year and forward for 20 years.

If a building is not listed in the National Register, is not located in a Registered Historic District, or is located in a Registered Historic District but has been determined to be a non-contributing structure by the Department of the Interior, then a 10% rehabilitation tax credit may be utilized provided the building, inter alia, was placed in service before 1936, is used for non-residential rental purposes, and has not been physically moved after 1936.

The rehabilitation project must not damage, destroy, or cover those exterior or interior materials or features that define the building's historic character. The project must be consistent with the historic character of the property and it must meet ALL ten Secretary of the Interior's "Standards for Rehabilitation." Further,

the project must meet the "substantial rehabilitation test," meaning that the cost of rehabilitation must exceed the pre-rehabilitation value of the building.

The Historic Preservation Certification application is a 2- or 3-part process, depending on whether the building is individually listed in the National Register of Historic Places. Each part requires approval or "certification" by the National Park Service. The application is always submitted in duplicate to the State Historic Preservation Officer (SHPO), which retains one copy and forwards the other to the National Park Service. Part 1 is the Evaluation of Significance of the property. Part 2 is the Description of Rehabilitation Work. Part 3 is the Request for Certification of Completed Work done after the rehabilitation work is completed.

§29.5 Missouri Science and Innovation Reinvestment Act. "MOSIRA" (Sections 348.250 to 348.275, R.S.Mo.) Under MOSIRA, the powers and duties of the Missouri Technology Corporation are expanded to allow the corporation to assume all monies and assets of the Missouri Seed Capital Investment Board and to establish a proof of concept finance program, an angel investment finance program, and a venture capital co-investment fund. The act provides application, approval, and reporting requirements for programs established by the Missouri Technology Corporation. In addition to the exceptions to open records and meetings requirements provided under the Sunshine Act, the act authorizes the Missouri Technology Corporation to close certain meetings and records held by the corporation. The act replaces the Missouri Technology Fund with the Missouri Science and Innovation Reinvestment Fund, which will receive annual appropriations made by the General Assembly, based upon recommendations made by the directors of the Departments of Economic Development and Revenue, and contributions made by private entities, the federal government, and local governments. The act requires that any contract entered into between the corporation and any not-for-profit organization must provide at least a one hundred percent match of funding received from the corporation. It also:

- Adds to the list of purposes of the Missouri Technology Corporation and provides for its perpetual existence;
- Specifies that the corporation will be exempt from certain property, income, and sales and use taxes;
- Adds additional provisions for closing certain meetings and records of the corporation board and committees of the board under the Open Meetings and Records Law, commonly known as the Sunshine Law;
- Renames the Missouri Technology Investment Fund as the Missouri Science and Innovation Reinvestment Fund.

MOSIRA was part of DED's omnibus economic development bill which failed in the regular 2011 session, but passed in a special session that year. (SB 7) However, it included a clause making its effectiveness contingent upon passage of

a separate measure with respect to state incentives, which did not pass. On Dec 1, 2011, Missouri Right to Life filed suit alleging the law allows the possibility of using state funds for human embryonic stem cell research. Specifically, the plaintiffs claim making the effectiveness contingent upon an external event constitutes an unlawful delegation of legislative power.

§30. —Tax Credit for Contributions to Innovation Centers (348.300-348.318 R.S.Mo.)

> **In 1998, the legislature approved transferable tax credits of 50% of cash contributions made to a qualified fund which contracts with innovative centers or the corporation for science and technology. The contract must stipulate that 10% of all earnings are transferred to the Missouri Business Modernization and Technology Corporation. A qualified fund is one which invests seed capital, start-up capital or follow-up capital in a commercial activity in a Missouri distressed community. The investment must be used for research, development, or prototype fabrication. Tax credits may be carried forward for 10 years.**

(1) Definitions.

(a) Commercial Activity Located in Missouri. "Any research, development, prototype fabrication, and subsequent precommercialization activity, or any activity related thereto, conducted in Missouri for the purpose of producing a service or a product or process for manufacture, assembly or sale or developing a service based on such a product or process by any person, corporation, partnership, joint venture, unincorporated association, trust or other organization doing business in Missouri. Subsequent to January 1, 1999, a commercial activity located in Missouri shall mean only such activity that is located within a distressed community, as defined in §135.530 R.S.Mo." §348.300(1) R.S.Mo.

(b) Follow-up Capital. "Capital provided to a commercial activity located in Missouri in which a qualified fund has previously invested seed capital or start-up capital and which does not exceed ten times the amount of such seed and start-up capital." §348.300(2) R.S.Mo.

(c) Qualified Contribution. "Cash contribution to a qualified fund." §348.300(3) R.S.Mo.

(d) Qualified Economic Development Organization. "Any corporation organized under the provisions of Chapter 355 R.S.Mo., which has as of January 1, 1991, obtained a contract with the department of economic development to operate an innovation center to promote, assist and coordinate the research and development of new services, products or processes in the state of Missouri; and the Missouri Business Modernization and Technology Corporation

organized pursuant to the provisions of §§348.251 to 348.266." §348.300(4) R.S.Mo.

(e) Qualified Fund. "Any corporation, partnership, joint venture, unincorporated association, trust or other organization which is established under the laws of Missouri after December 31, 1985, which meets all of the following requirements established by this subdivision. The fund shall have as its sole purpose and business the making of investments. The fund shall enter into a contract with one or more qualified economic development organizations which shall entitle the qualified economic development organizations to receive not less than ten percent of all distributions of equity and dividends or other earnings of the fund. Such contracts shall require the qualified fund to transfer to the Missouri Business Modernization and Technology Corporation organized pursuant to the provisions of §§348.251 to 348.266, this interest and make corresponding distributions thereto in the event the qualified economic development organization holding such interest is dissolved or ceases to do business for a period of one year or more." §348.300(5) R.S.Mo.

(f) Qualified Investment. "Any investment of seed capital, start-up capital, or follow-up capital in any commercial activity located in Missouri." §348.300(6) R.S.Mo. After January 1, 1999, such commercial activities shall include only those located in a distressed community as defined in §135.530 R.S.Mo. §348.300.1 R.S.Mo.

(g) Person. "Any individual, corporation, partnership or other entity." §348.300(7) R.S.Mo.

(h) Seed Capital. "Capital provided to a commercial activity located in Missouri for research, development and precommercialization activities to prove a concept for a new product or process or service, and for activities related thereto." §348.300(8) R.S.Mo.

(i) Start-up Capital. "Capital provided to a commercial activity located in Missouri for use in preproduction product development or service development or initial marketing thereof and for activities related thereto." §348.300(9) R.S.Mo.

(j) State Tax Liability. "Any state tax liability incurred by a taxpayer under the provisions of Chapters 143, 147 and 148 R.S.Mo., exclusive of the provisions relating to the withholding of tax as provided for in §§143.191 to 143.265 R.S.Mo., and related provisions." §348.300(10) R.S.Mo.

(k) Uninvested Capital. "The amount of any distribution, other than of earnings, by a qualified fund made within five years of the issuance of a certificate of tax credit as provided by §§348.300 to 348.318; or the portion of all qualified contributions to a qualified fund which are not invested as qualified investments within five years of the issuance of a certificate of tax credit as provided by §§348.300 to 348.318 to the extent that the amount not so invested exceeds twenty percent of all such qualified contributions." §348.300(11) R.S.Mo.

(2) Tax Credit. Any person who makes a qualified contribution to a qualified fund shall be entitled to receive a tax credit equal to 50% of the amount of the qualified contribution. §348.302.1 R.S.Mo.

(a) Use. The credit may be carried forward for 10 years. §348.302.1 R.S.Mo.

(b) Transfer. All tax credits authorized may be transferred, sold or assigned. §348.302.2 R.S.Mo.

(c) Administration. The credits are issued by the director of DED. §348.308.1 R.S.Mo.

(d) How Claimed. A tax credit certificate will be issued in accordance with §§348.300 - 348.318 R.S.Mo.

(e) Use of Credits. The tax credit must be presented to the Department of Revenue for payment of such state tax liability. §348.302.1 R.S.Mo. A taxpayer may use the certificate as if it were cash to pay taxes. The Director of DED shall issue a new certificate for any unused balance. §348.310 R.S.Mo.

(f) Limitation. The aggregate of all tax credits authorized under the provisions of §§348.300 - 348.318 shall not exceed the state cap. §348.302.2 R.S.Mo. The total amount of credit evidenced by certificates of tax credit issued to taxpayers at the request of any one qualified economic development organization shall not exceed $10 million until after January 1, 1996. §348.304 R.S.Mo. No person shall receive certificates in excess of $1 million. §348.306 R.S.Mo.

(3) Tax on Qualified Funds. In addition to other taxes, a tax on each qualified fund equal to 15% of the amount of its uninvested capital as of the end of the tax year of the qualified fund is imposed by §348.314 R.S.Mo.

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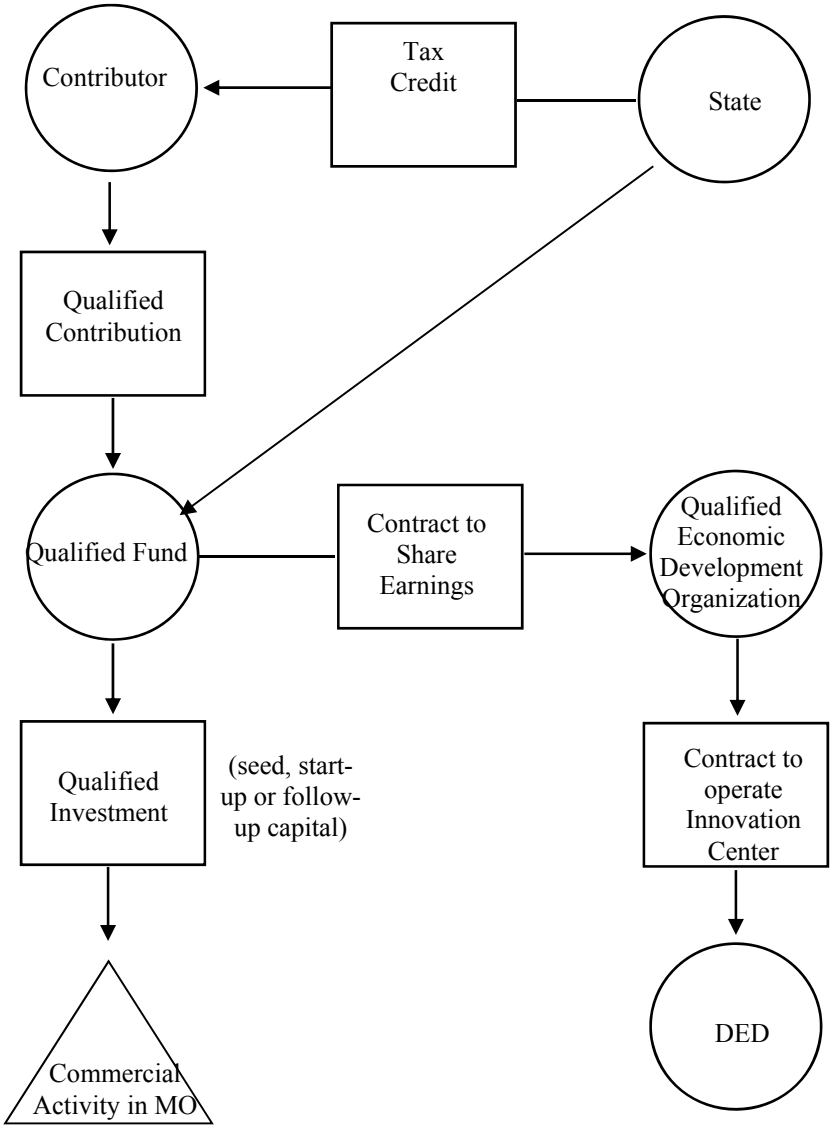
(4) Illustration.



§31. —Technology Assistance (348.253 *et seq*. R.S.Mo.)

The Missouri Technology Corporation has been established to further the commercialization of technology. The primary activity of the corporation is contracting with innovation centers within the state. These centers provide assistance to new technology-based business ventures.

(1) Missouri Technology Corporation.

(a) Contracts with Not-For-Profit Organizations. §§348.253, 348.256 and 348.261 R.S.Mo. establish the Missouri Technology Corporation. The Corporation may contract with not-for-profit corporations in order to establish a research alliance which will advance technology development and shall have the authority to contract directly with centers for advanced technology as established by §348.272 R.S.Mo. and other not-for-profit entities. §348.253.1 R.S.Mo. Any contract between the corporation and any not-for-profit organization shall require the not-for-profit organization to provide at least 100% match for any funding received from the corporation through the technology investment fund established in §348.264 R.S.Mo. §348.253.2 R.S.Mo.

(b) Establishment, Members, Qualification. The Act sets forth the matters which must be included in the Articles of Incorporation and Bylaws of the Missouri Technology Corporation. Its stated goal is to strengthen the economy of the state through the development of science and technology and to promote the modernization of Missouri businesses through the use of technology. §348.256(1) R.S.Mo. The Board of Directors shall be composed of 15 persons consisting of 11 persons appointed by the Governor, the Director of DED, the President of the University of Missouri, a member of the Senate and a member of the House. §348.256(2) R.S.Mo.

(c) Powers. The powers of the corporation are largely those of identification of problems and opportunities, and assisting in the furtherance of technology, advising universities, coordinating programs and providing a financial assistance through contracts, grants and loans to programs of scientific and technological research and development. The corporation has the power to contract with innovation centers as established in §348.271 R.S.Mo., Small Business Development Corporations as established in §§620.1000-620.1007 R.S.Mo., Centers for Advanced Technology as established in §348.272 R.S.Mo. and other entities or organizations for the provision of technology application, commercialization and development services and to make direct seed capital or venture capital investments in Missouri business investment funds or businesses which demonstrate the promise of growth and job creation. §348.261 R.S.Mo.

(2) Technology Investment Fund. §348.264 R.S.Mo. establishes in the state treasury a special fund to be known as the "Missouri Technology Investment Fund" which shall consist of all monies which may be appropriated by the general

assembly and monies from any other source. The fund shall be utilized to finance projects which would previously have been funded through the higher education applied projects fund. §348.264 R.S.Mo. Debts incurred by the corporation do not constitute a debt of the state. §348.266 R.S.Mo.

(3) Centers for Advanced Technology. This Act authorizes the Missouri Technology Corporation to contract with Missouri not-for-profit corporations for the operation of innovation centers. The primary emphasis of the centers shall be in the areas of technology commercialization, finance and business modernization. These centers shall provide assistance to individuals in business organizations during the early stages of the development of new technology-based business ventures. §348.271.1 R.S.Mo. The innovation centers shall counsel and assist new technology-based business ventures in finding a suitable site in Missouri upon their graduation from the program. Each center shall annually report its activities to the DED and the Missouri Technology Corporation. §348.271.2 R.S.Mo.

§32. —Industrial Development Corporations (Authorities) (349.010 *et seq*. R.S.Mo.)

> **Industrial Development Corporations may be organized solely for the purpose of promoting commercial and industrial development. Approval must be obtained from the governing body of the jurisdiction in which the corporation will operate. Once organized, the board of directors is appointed by the chief elected official of the jurisdiction, consisting of not less than 5 duly qualified electors of and taxpayers in the jurisdiction. The corporation is authorized to issue revenue bonds for the purpose of paying any cost of a project. Such corporations are prohibited from operating any manufacturing, industrial or commercial activity. All projects initiated by the corporation are subject to property taxes.**

(1) Definitions.

(a) County and Municipality. Any county or city in the state. §349.010(4) R.S.Mo.

(b) Project. Facilities used for factory, assembly, manufacturing, processing, fabricating, distribution, warehouse, public facility, waterborne vessel, office, hospital, nursing or retirement, physical fitness, recreational, residence (operated by not-for-profit corporations), commercial, agricultural, and pollution control purposes, including any required fixtures, equipment and machinery. Excluded are gas, water, telephone, cable television and public utilities facilities. §349.010(4) R.S.Mo.

(2) Jurisdiction. Projects of a municipal authority must be located wholly within the incorporated limits of the municipality except that such projects may be located outside the corporate limits within the county in which the municipality is located with the permission of the governing body of the county. Projects of a county authority must be located within an unincorporated area except when approved by the governing body of the municipality. §349.010(4) R.S.Mo.

(3) Property Not Exempt from Taxation. An Industrial Development Authority ("IDA") lacks the power to tax and therefore is not a "political subdivision" under Article 10, §6 of the Missouri Constitution which provides that properties owned by political subdivisions are exempt from taxation. *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666 (Mo. banc 1978). Projects of a corporation shall be subject to all real and tangible personal property taxes and assessments except hospitals which are exempt from taxation under Article X, §6(1), Missouri Constitution, or other projects which are exempted or relieved from such taxes pursuant to any constitutional or statutory provision. §349.090 R.S.Mo.

(4) Power of Governing Body to Encourage Industrial and Commercial Development. The governing body shall have the power to spend its funds to promote commercial and industrial development, and to engage in any activities alone or in conjunction and by contract with any not-for-profit organization to achieve such development. §349.012 R.S.Mo.

(5) Operation of Projects Not Authorized. No IDA shall be authorized to operate any manufacturing, industrial or commercial enterprise or conduct an agricultural operation. §349.020 R.S.Mo.

(6) Formation.

(a) Application. Whenever any number of natural persons, not less than three, each of whom shall be a duly qualified elector of and taxpayer in the county where a city forming an IDA is located or in the county in which a county IDA is being formed, shall file with the governing body thereof an application seeking permission to apply for the incorporation of an Industrial Development Corporation ("IDC") the governing body shall proceed to consider such application. The governing body may authorize thereafter the formation and shall approve the form of the Articles of Incorporation proposed to be used. §349.025 R.S.Mo.

(b) Articles of Incorporation. §349.030 R.S.Mo provides for the contents of the articles, including the identity of the applicants, the name of the corporation which shall be "the Industrial Development Authority of the _____ of _____," a recital that permission has been granted by the appropriate governing body, the location of the principal office of the corporation, the purpose for which the corporation is organized, the number of directors, the duration, and any other matter which the applicants may choose to insert therein

which shall not be inconsistent with Chapter 349 or with the laws of the State of Missouri. §349.030 R.S.Mo.

(c) Articles/Where Filed/Secretary of State to Issue Certificate. When executed and acknowledged, the articles of incorporation shall be filed with the secretary of state who shall examine them and, if they are in order, shall approve them and issue a certificate of incorporation. Thereupon, the applicants shall constitute a public corporation. §349.035 R.S.Mo. Any amendment of the articles of incorporation must be filed with the governing body of the sponsoring county or municipality which must approve them before they are filed with the secretary of state. §349.040 R.S.Mo.

(7) Board of Directors. The board may consist of any number of directors, not less than five, all of whom shall be duly qualified electors of and taxpayers in the county or municipality. They shall serve without compensation except for expenses. They shall be resident taxpayers for one year immediately prior to their appointment. However for a corporation formed by a municipality located wholly within a county of the third or fourth class, they may be taxpayers and voters of the county. (HB 351, 2003) No director shall be an officer or employee of the county or municipality. All directors shall be appointed by the chief executive officer of the sponsoring county or municipality with the advice and consent of a majority of the governing body, and in all counties other than St. Louis City and first class counties under a charter form of government they shall be appointed by the county commission so that they shall hold office for staggered terms. §349.045 R.S.Mo. Taxpayers suing for ultra vires act against shareholders were held to lack standing in *Champ v. Poelker*, 755 S.W.2d 383 (Mo. App. E.D. 1988).

(8) Powers of Corporation. An industrial development corporation has many powers listed in §349.050 including, to make and execute leases and contracts, to acquire, improve, maintain and equip projects, to give an option to purchase a project, to lease, to sell or mortgage property, to loan the proceeds of bonds for the purchase, construction and extension and improvement of projects, to issue bonds and temporary notes, to sell at private sale any of its property or projects to any private entity or to any public body on such terms as it deems advisable and to take a note in payment provided that any such sale shall require payments adequate to pay the principal on the interest and premiums, if any, on the bonds issued to finance the project. It shall not be necessary for a corporation to acquire title to any project. §349.050 R.S.Mo.

(9) General and Business Corporation Law Applicable. The General and Business Corporation Law of Missouri, Chapter 351 R.S.Mo., shall be applicable to industrial development corporations but any provision of Chapter 349 shall take precedence where there is a conflict. §349.052 R.S.Mo.

(10) Revenue Bonds. Industrial development was recognized as an essential public and governmental purpose for which bonds may issue in State ex rel. Jardon v. Industrial Development Authority of Jasper County, 570 S.W.2d 666 (Mo. 1978) (bonds did not violate limitation on use of credit or constitute a grant of public funds).

(a) Terms. A corporation may at any time issue revenue bonds for the purpose of paying any part of the cost of any project. The bonds shall be payable out of the property and revenues of the corporation and may have a security interest therein. They shall bear such date, mature at such times, but not in excess of forty years, shall be in such denomination, bear interest at such rate, be in such form, be issued in such manner, be payable in such place or places, and be subject to such redemption as the authorizing resolution of the corporation shall specify. They may be sold either at public or private sale at such price or prices that the corporation shall determine but not less than 95% of the principal amount thereof at an interest rate not in excess of the maximum rate, if any, applicable to general and business corporations. §349.055 R.S.Mo.

(b) No Voter Approval. Since industrial development authorities are separate and distinct from the state or political subdivisions of the state, they may issue industrial revenue bonds without voter approval without violating Article VI, §27 of the Constitution. *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666 (Mo. 1978). It should be noted that the Constitution has been amended since Jardon to allow local governments to issue industrial revenue bonds without a vote. Article VI, §27(b) provides that any county, city or incorporated town or village, by a majority vote of the governing body, may issue revenue bonds for manufacturing, commercial, warehousing and industrial development purposes, to be retired solely from the revenues derived from the lease or other disposal of the facility and specifically provides that the projects may be leased or otherwise disposed of pursuant to law to private persons or corporations.

(c) Bonds Tax Exempt. Bonds and notes of the corporation are declared to be issued for an essential public and governmental purpose and to be public instrumentalities, and interest thereon and income therefrom shall be exempt from taxation except for death and gift taxes on transfers. §349.090 R.S.Mo. The main benefit of such bonds is the lower borrowing rate. The rules changed in 1986 with the Federal Tax Reform Act.

(11) Notes.

(a) Issuance, Provisions, Sale. Pending the issuance of bonds, the corporation may issue notes payable from the proceeds of such bonds or from such other sources as the corporation may specify. Such notes shall mature in not more than five years. The other details with respect to such notes shall be determined by the corporation as in the case of bonds. §349.060 R.S.Mo.

(b) Renewal Notes, Issued, When. The corporation from time to time may issue renewal notes or refund any bonds by the issuance of refunding bonds,

whether the bonds to be refunded have or have not matured, and to issue bonds partially to refund bonds then outstanding and partially for any other purpose. Renewal notes or refunding bonds may be sold at public or private sale and the proceeds applied to the purchase, redemption, or payment of the notes or bonds to be refunded. §349.065 R.S.Mo.

(12) Other Provisions Relating to Securities.

(a) Resolutions Authorizing Issuance. Any resolution authorizing any bonds or notes may contain such provisions as the corporation determines necessary including, but not limited to, granting of security interests in property and revenues of the corporation, governing the use and disposition of the property, fixing rents, fees or other charges and pledging the same to pay the cost of operation, maintenance and repair of any project and the principal and interest on notes or bonds, establishing reasonable reserves and limiting the issuance of additional notes or bonds. §349.070 R.S.Mo.

(b) Trust Agreements. A resolution of the corporation authorizing the issuance of any notes or bonds may provide that they will be secured by a trust agreement between the corporation and a corporate trustee, vesting in such trustee such powers as the corporation may determine. Any such trust agreement may pledge or grant a security interest in the property and revenues of the corporation to secure payments of any notes or bonds. The agreement may contain provisions for protecting the rights of note or bond holders, including covenants relating to the acquisition, construction of project and the maintenance, repair and operation thereof, the rental and other charges to be imposed for the use of any project and the custody and application of all monies relating thereto. All expenses incurred in carrying out the provisions of such trust agreement may be considered a part of the cost of the operation of the project. §349.075 R.S.Mo. The granting of these powers to a private trustee does not constitute an unlawful delegation of governmental power. *State ex rel. Jardon v. Industrial Development Authority of Jasper County*, 570 S.W.2d 666 (Mo. 1978).

(c) Individuals Not Liable on Notes or Bonds. Neither the directors of any corporation nor the person executing the bonds or notes shall be liable personally on the bonds or notes by reason of the issuance thereof.

(d) Obligations Shall Not Constitute Debt. Such bonds or notes shall not be a debt of the county, the municipality or the state, nor shall they be payable out of any funds or properties other than those acquired for the purposes of Chapter 349, nor shall they apply toward any constitutional or statutory debt limit. §349.080 R.S.Mo. No county or municipality shall be permitted to expend any public monies for the payment of an IDA's bonds, notes or other creditors. Any and all indebtedness shall be paid exclusively from the revenues of the corporation. §349.095 R.S.Mo. Taxpayers lack standing to challenge an IDA's campaign contributions to promote passage of a sales tax since no government revenues are involved. Champ v. Poelker, 755 S.W.2d 383 (Mo. App. E.D. 1988).

(e) Notes and Bonds are Approved Investments for Fiduciaries. The notes and bonds of the corporation are securities in which all Missouri public officers and bodies and all insurance companies, banks, savings and loans, etc. may properly and legally invest. §349.085 R.S.Mo.

(13) Dissolution of Corporation. Upon termination or dissolution, all rights and properties of the corporation shall be passed to and vested in the county or municipality of incorporation subject to the rights of bondholders and other creditors. §349.095 R.S.Mo.

(14) No Impairment of Other Powers of Political Subdivisions. Nothing in the act shall impair or affect the power or jurisdiction of the municipality, county, township, or school district in which the corporation is located, and such corporation shall conform to applicable regulations of any governmental authority having jurisdiction therein. §349.100 R.S.Mo.

(15) Annual Reports. No later than January 31 of each year, the issuing authority shall file a report with DED on the amount and purpose of the bonds issued, the beneficiary firms, the new jobs to be generated by proposed projects, and the total estimated cost of projects. §349.105 R.S.Mo.

§33. —Urban Redevelopment Corporations—Ch. 353

Chapter 353 of the Revised Missouri Statutes authorizes cities and St. Louis County[*] to establish Urban Redevelopment Corporations which shall be private, for-profit entities, to redevelop areas designated as blighted. In accordance with the statutes, cities may grant up to 25 years of real property tax abatement to achieve redevelopment of a designated area, 10 years at 100% tax abatement, the remaining 15 years taxed on the basis of 50% of the value of the property. All affected political subdivisions must be given a written statement of the impact of the proposed tax abatement and a public hearing must be held before a city can approve the redevelopment plan of the corporation. A blighted area is one that a city determines has become an economic and social liability because of age, obsolescence, inadequate or outmoded design or physical deterioration and that such conditions are conducive to ill health, crime or inability to generate reasonable taxes. The corporation may be required to make payments in lieu of taxes pursuant to a contract with the city.

[*] (County added in 2000 via HB 1238)

The most widely used economic redevelopment tool in Missouri prior to the advent of Tax Increment Financing, was the Urban Redevelopment Corporations Law, Ch. 353 R.S.Mo. (the "Act"), which was passed during World War II, actually prior to Art. VI, §21, and Art. X, §7, Missouri Constitution. The Act was passed, in part, in response to a perceived shortage of housing occasioned by the War. It offers two main tools for the redevelopment of blighted areas: the power of eminent domain, making it possible to assemble large tracts of property for redevelopment, and tax abatement for a specified period of up to 25 years. In return, the Act imposes certain responsibilities upon the redeveloper: first, in order to receive the tax abatement, the project must continue to be operated according to the approved plan, and secondly, the profits emanating from the redevelopment must not exceed 8% per annum. The following is a general description of the operative provisions of the Act. For specific application, the practitioner must consult the actual text of the particular statutory provision involved.

(1) Applicability. The law applies to any city within this state and any county of the first classification with a charter form of government and a population of at least nine hundred thousand inhabitants [St. Louis County] or any county with a charter form of government and with more than six hundred thousand but less than seven hundred thousand inhabitants [Jackson County].* §353.020(3) R.S.Mo.

(2) Necessity of Blight. In order to approve a development plan, the legislative authority of the city must determine that the area to be developed pursuant to the plan is blighted. §353.020(2) R.S.Mo. A blighted area is defined in the Act as

> That portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration, have [sic] become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes. . . .

§353.020(2) R.S.Mo. The most common issues involved in redevelopment projects are whether the property is blighted and whether the tax abatement is necessary. To date, no court has held that the legislative discretion of a city has been abused in declaring property blighted under Chapter 353 R.S.Mo. Thus, questioning a finding of blight does not appear to be a very fruitful avenue of attack for those opposed to a project.

(3) Organization of Corporation. The first step in utilizing Chapter 353 is the formation of an urban redevelopment corporation which is accomplished by

drafting Articles of incorporation which comply with §353.030 and filing those Articles with the Secretary of State as with any business corporation.

(4) Procedure for Approval of Plan. Once an urban redevelopment corporation has been formed, an application is then made to the city pursuant to whatever rules it may have adopted by ordinance. A public hearing must be held by the governing authority of the city for the stimulation of comment by those to be affected by any plan or project after which, the governing body must make a determination that the area included in the plan is blighted. §353.060 R.S.Mo.

(5) Contents of Plan. The Act has no specific section dealing with the contents of a redevelopment plan, and does not define it.

(a) Tax Impact Statement. Since the Act requires a Tax Impact Statement to be sent to all affected political subdivisions, it is a good idea to include it in the development plan. §353.110.3 R.S.Mo.

(6) Tax Abatement.

(a) First Ten Years. Once a project has been approved, and the redevelopment corporation has taken title to real property, that real property shall not be subject to assessment or payment of general ad valorem taxes for a period of not in excess of ten years after the date upon which the corporation became owner of such property, except on the basis of the assessed value of the land exclusive of improvements as was determined by the appropriate county assessor for taxes during the calendar year preceding the calendar year in which the corporation acquired title to the property. §353.010.1 R.S.Mo. In other words, if in 1990 the real estate was assessed at $100 and the improvements at $50, and in 1991 an urban redevelopment corporation takes title to the property, the taxes shall be based on the 1990 assessment of the land, or $100, for the next ten years. The Jackson County Assessor's office has interpreted the language which is found in §353.110.1 R.S.Mo., specifically, the word "after", to mean abatement begins the year after the year the redevelopment corporation takes title creating a potential "spike" year in the assessed value. Thus, under the county's interpretation, the abatement in the above example would not begin until 1992, and any improvements constructed on the property which were present on the tax lien date, January 1, 1991, would be assessed at full value for 1991 even though they would not thereafter be included in the assessment. However, the decision in *20th & Main Redevelopment Partnership v. Kelley*, 774 S.W.2d 139 (Mo. banc 1989), seemed to cast doubt on the assessor's interpretation. The Western District in *BHA Group Holdings, Inc. v. Pendergast*, 173 S.W.3d 373, 380, 381 (Mo. App. W.D. 2005) held that abatement begins on January 1 of the year of transfer. The court relied on *20th & Main*, *supra*, and *State ex rel. Smith v. Springfield*, 375 S.W.2d 84 (Mo. banc 1964). The *Springield* court held that property which becomes owned by a political subdivision is exempt from all property taxes, including those which may have accrued at the time the property is acquired. *Springfield* relied on *State ex rel. City of St. Louis v. Baumann*, 153 S.W.2d 31

(Mo. 1941) (holding land becomes immune from taxation the instant it is acquired, the rationale being that, political subdivision being an agency of the state, the state would simply be taxing itself. Court noted that city would hold title in its own name for its own benefit and not a fiduciary for a private party. Id. @ 35).

(b) Subsequent 15-Year Period. In the second phase of tax abatement, after the first period of up to ten years of total abatement on improvements, a new 15-year period begins during which taxes are measured on the basis of 50% of the value of the real property including any improvements. In other words, the land and buildings are assessed at 50% of normal value, resulting in an assessed value of one half of the normal assessed value. §353.110.2 R.S.Mo. After the total 25-year period, the property shall be subject to full assessment. §353.110.2 R.S.Mo. Chapter 353 does not have a "but for" test like that found in the tax increment financing law; however, most legislative bodies impose a de facto "but for" analysis and most everyone would agree that tax abatement should not be granted to a project that is going to proceed anyway. In the real estate boom of the 1980's, Kansas City, under the leadership of its Director of City Development, John Laney, began fine-tuning tax abatement: the city began granting less than full abatement and requiring developers to make payments in lieu of taxes. The amount of abatement was that needed to incent the development and tended to be inversely proportional to the amount of blight. The issue often becomes a question not of "can" developers proceed without abatement, but rather "will" they.

(c) Payments In Lieu Of Taxes. Payments in lieu of taxes ("PILOTs") may be imposed by the city. They shall be made to the county collector by December 31st of each year. The governing body of the city shall furnish the collector with a copy of the contract by which the PILOTs are imposed. The collector shall allocate the PILOTs to the taxing jurisdictions pro rata as to tax collections. §353.110.4 R.S.Mo.

(d) Notice and Hearing Regarding Abatement. In the mid-1980s, there was a nationwide reaction to overbuilding of real estate due to an overheated economy fueled in part by federal tax benefits to investors in real estate. This reaction ultimately resulted in the 1986 tax reform act which was devastating to the real estate industry, not to mention savings and loan companies, insurance companies and banks. Part of the reaction against overbuilding spilled over into a reaction against the use of Chapter 353 for the construction of a number of office and other projects. Thus, in 1986, the General Assembly added provisions to Chapter 353 which required extensive notice and hearings in order to qualify for tax abatement. Pursuant to these provisions, the governing body of the city must furnish each political subdivision affected by a project a written statement of the impact on ad valorem taxes resulting from any tax abatement granted under Chapter 353 and written notice of a hearing to be held regarding the abatement. The notice shall include an estimate of the ad valorem tax revenues of each political subdivision based on the estimated assessed value of the real property

involved as such real property would exist before and after it is redeveloped. §353.110.3 R.S.Mo.

(e) Abandonment of Abatement. The tax abatement may be abandoned by the property owner after the completion of the redevelopment project or any portion, thus freeing the property from the conditions, restrictions or provisions of Chapter 353 or any ordinance adopted pursuant thereto. §353.110.2 R.S.Mo. Such an abandonment might occur where the project is infeasible as planned and has been only partially completed, or where the tax abatement is less than the profits exceeding the profit restriction.

(7) Acquisition of Property. An urban redevelopment corporation operating pursuant to a redevelopment agreement executed on or before December 31, 2006 may acquire any interest in real property by virtually any means including the power of eminent domain under such conditions as determined and only when so empowered by the legislative authority of the city, provided that no property of any city, county or the state or any political subdivision may be acquired without its consent. §353.130 R.S.Mo. The power of eminent domain was upheld in *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974). Any city has the power to acquire property by eminent domain, to clear the property so acquired, construct infrastructure and sell the property for use in accordance with the provisions of Chapter 353. §353.170 R.S.Mo.

(a) Sunset. The 1986 amendments also added a sunset provision requiring that an ordinance be adopted providing for the expiration of development rights in the event of failure of the urban redevelopment corporation to acquire ownership of the property within the area of the development plan. The ordinance shall provide for a duration of time within which the property must be acquired and may allow for acquisition of property under the plan in phases. §353.110.3(3) R.S.Mo. This section was enacted in response to a perceived number of redevelopment projects which, after receiving approval, did not go forward, arguably creating a "free" option on the part of the developer while depressing the values of the properties in the proposed project area.

(b) Abandoned Condemnation. See §49(9).

(8) Transfer of Property by Corporation. Any urban redevelopment corporation may sell or otherwise dispose of any or all of the real property acquired by it for the purposes of a redevelopment project. In the event of such disposition, if the purchaser of the property shall continue to use, operate and maintain the property in accordance with the plan, the legislative authority of any city may grant the partial tax relief provided by the Act. But if the property is used for a purpose different than that described in the plan, or if the purchaser does not desire to continue under the redevelopment plan, or if the legislative authority shall refuse to grant continuing tax relief, the property shall be assessed for ad valorem taxes upon the true full value of the property and may be owned and operated free of the conditions and restrictions of Chapter 353. §353.150.4

R.S.Mo. Pursuant to this section, most redevelopment corporations become conduits for the transfer of title of the property and usually only hold title for a brief period of time. Any length of time is sufficient to start the abatement mentioned. Furthermore, the sale of the property to another entity appears to insulate that property from defaults in other portions of the redevelopment project under the language of §353.150.4 R.S.Mo.

(9) Steps in the 353 Process. The following is an outline of the steps which must be followed in the 353 process. It is not intended to be exhaustive, but rather illustrative. The first step begins with day 60 assuming it takes approximately 60 days to prepare a plan. Most of the time of plan preparation is needed to obtain exhibits such as a blight study, site plans, surveys and letters of commitment from financial institutions. The time periods are optimistic. They are based upon the implementing ordinance of Kansas City, Missouri and that ordinance is cited. As mentioned earlier, Chapter 353 is self-executing, and an implementing ordinance is not needed. If there is no such ordinance, plan approval could occur more quickly.

Day

60 Written notice given to all owners and occupiers of land and taxing entities within 353 plan areas that plan is going to be filed. Notice to taxing authorities must show economic impact of plan if approved. §74-7(a); §74-8; COKC.

61 Filing of application and plan with City Clerk together with appropriate fee, blight study, certificates of notice and certificates of good faith re: purchase/condemnation of property of applicant, and certificate that corporation will pay prevailing wages. §74-5, §74-6, §74-9; 74-11 (a) and (b) COKC.

62 City Clerk immediately forwards application and plan to City Plan Commission (CPC), to Director of City Development and to City Attorney. §74-5(a) COKC.

75 City Development Department begins independent blight study. §74-6(c) COKC.

105 Redevelopment Coordinating Committee reviews application and plans and makes recommendation to City Plan Commission. §74-5(a) COKC.

110 Publication of notice of City Plan Commission hearing at least 10 days before hearing. Section 74-7(b) COKC. If zoning change involved, must publish 15 days before hearing. §89.050 R.S.Mo.

Day

110 Applicant gives written notice of CPC hearing to owners and occupiers and taxing entities and certifies notice to CPC. §74-7(a); 74-8 COKC.

120 CPC hearing and review of blight studies. §74-6(d)(e); §74-7(b) COKC.

130 CPC recommendation to City Council and proposed ordinance filed with City Clerk. §74-13; §74-14 COKC.

133 Ordinance goes to Council for first reading and analysis of blight studies. §74-20 COKC.

133 Ordinance assigned to Council Committee. §74-20(a) COKC.

136 Notice of City Council Committee hearing given by applicant to owners and occupiers of land and taxing entities. §74-7(a); §74-8(a) COKC. This notice should satisfy the requirements of §353.110.3(1) R.S.Mo. which leaves the timing of the notice to local ordinance.

136 Certificates of notice filed with City Development Department and Director of Finance. §74-7(a);

§74-8(a) COKC.

147 City Council Committee hearing. §74-20 COKC. This hearing should satisfy the requirement of §353.060 R.S.Mo. that the "governing authority shall hold a public hearing for the stimulation of comment by those to be affected by any such grant [of rights or powers to a redevelopment corporation]" and the requirement of §353.110.3(2) R.S.Mo. that the governing authority hold a public hearing regarding tax abatement at which all affected political subdivisions shall have a right to be heard.

148 City Council Committee report to full Council. §74-20 COKC.

155 Second and third readings of ordinance.

155 Council approves ordinance and plan and makes findings and declaration. §74-20 COKC.

155 Council issues Certificate of Public Convenience and Necessity. §74-22 COKC.

Day

165 If requesting city to purchase property under powers of eminent domain, developer, within 10 days of ordinance approval, deposits with city the funds with which to purchase property. §74-24(a) COKC. (Note: under the amendments adopted by the legislature in 2006, Urban Redevelopment Corporiations no longer have the power of eminent doman. §523.262 R.S.Mo.)

165 Notice of relocation benefits sent to owners and occupiers of land. §74-12(h) COKC.

165 Certificates of notice filed with City Development Department and Director of Finance. §74-12(i) COKC.

175 Payment to displaced owners and occupants at least 90 days prior to displacement. §74-12(b)(1)COKC.

175 Ninety-day notice of referral programs for handicapped displaced owners and occupiers with a minimum of three suitable referral sites. If not handicapped 60 days' notice is required. §74-12(b)(3) COKC.

175 Certificate of notice filed with City Development Department and Director of Finance. §74-12(i) COKC.

175 Ninety-day notice to vacate given to owners and occupiers of land. §74-12 COKC.

175 Certificate of notice filed with City Development Department and Director of Finance. §74-12(i) COKC.

265 Property acquired. (If eminent domain is required in order to acquire property, this schedule is still possible, but not probable.)

265 Development of project.

Post Development

City Plan Commission checks compliance with plan. §74-13(b)(1) COKC.

Annual Reports filed with Director of Finance and Director of City Development. §74-11(c) COKC.

Request for certificate of compliance after each stage of project. §74-17(d) COKC.

Certificate of compliance issued. §74-17(d) COKC.

Three-year sunset provision from date in plan to acquire all property. §74-15 COKC.

Years 1-10 ad valorem tax based on frozen assessed value of land in year prior to application. §§74-30 COKC; §353.010.1 R.S.Mo.

Years 11-25 ad valorem tax based upon 50% of current assessed value of land and improvements. §74-30 COKC; §353.010.2 R.S.Mo.

(10) Profit Restriction. The articles of incorporation must contain a provision that income debentures, if any, issued by the corporation, shall not pay interest in excess of nine percent per annum, provided that this restriction shall not apply to other debt of the corporation. The articles must also contain a declaration that the net earnings "derived from any redevelopment project" shall be limited to 8% per annum of the cost of the redevelopment project, including the cost of land. §353.030(11) R.S.Mo.

(a) Upheld. An urban redevelopment corporation cannot pay in excess of the statutory limit on obligations. *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526 (Mo. banc 1969) (recognizing that the 8% profit restriction may make redevelopment corporations an unattractive investment).

(b) Allowable Deductions. Net earnings are calculated after the deduction of a wide spectrum of costs.

(i) Annual Deduction to Amortize. §353.030(11) R.S.Mo. states that a deduction can be taken annually of an amount sufficient to amortize the cost of the project prior to computing net earnings, and also provides the amortization period shall not be more than 60 years from the date of completion of the project.

- *Amortization Payments.* The phrase "amortization payments" is found in §353.030(11). Since there is no reported case on this precise question in Missouri, one can only surmise what the legislature meant when it passed the Act in 1945. The most logical interpretation is that "amortization payments" refers to any payment made to reduce debt owing for a loan, the proceeds of which were used to finance the acquisition and construction of the property in question.
- *Amortization Beyond Abatement Period*. Since the 8% limitation applies only to the tax abatement period of 25 years, why would any developer take a longer period? Their financing may be longer than 25 years. Further, they might not be concerned with the effect of the amortization on the abatement. In some cases a redevelopment corporation is needed for its power of eminent domain rather than tax abatement.

- *Amortization Period for Each Phase of a Multi-Phased Project*. §353.110 R.S.Mo. makes it clear that the tax abatement begins on the date the redevelopment corporation becomes the owner of the property. If a redevelopment corporation acquires different properties at different times, it is clear under §353.110 R.S.Mo. that the abatement period begins and ends at different times for each property. §353.030(11)(c) R.S.Mo. provides that an annual amount sufficient to amortize the cost of the entire project is deductible in computing net earnings under the 8% profit restriction and that the "excess of such surplus earnings remaining *at the termination of the tax relief* granted pursuant to §353.110 R.S.Mo. shall be tendered by the corporation to the city." It thus appears that the legislature intended the computation of net earnings to be coterminous with the period of abatement. Given that the abatement period and the net earnings restriction begin and end at the same time, it would not make sense for the amortization period to begin at a different time since amortization is relevant only to the question of computing net earnings. §36.11(d) of Kansas City's Urban Redevelopment Ordinance (the Ordinance) allows a certificate of completion to be issued on each phase so that a default in one phase will not affect other phases.
- *Land Costs Included in Amortization*. §353.030(11)(c) R.S.Mo. provides that "an annual amount sufficient to amortize the cost *of the entire project* at the end of the period . . ." is allowed to be deducted in computing net earnings.

(ii) Interest as an Operating Cost. §353.030(11)(a) R.S.Mo. states that all costs and expenses of maintenance and operation may be deducted in computing net earnings. Does "reasonable costs and expenses of maintenance and operation" include interest payments, and if so is the corporation allowed to impute an amount for cost of capital? As to interest payments on debt, the proceeds of which were used to finance acquisition, construction, improvement or maintenance of the project, such interest payments are deductible under §353.030(11)(c) with respect to the 8% project restriction. *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 531 (Mo. banc 1969). If no debt was incurred to finance the project, an amount should be allowed to be imputed for the cost of capital. Note that the Act doesn't require the amount to be actually used in the repayment of debt. Furthermore, it is difficult to believe that the legislature intended that developers who pay cash should be penalized or bear a heavier burden than developers who finance through debt.

(iii) Acceleration of Amortization with Surplus. §353.030(11)(c) provides that surplus earnings may be used to accelerate the amortization payments. If there is debt against the project and that debt is paid off earlier than the amortization schedule requires, such early payment is deductible in computing net earnings for the purpose of determining whether the 8% net earning limitation has been exceeded.

(iv) Effect of Past Losses in the Construction of a Project. Referring to losses in the form of negative cash flow from the operation of a project where revenues do not equal operating costs and actual or imputed debt service, there is an absence of revenue to count toward the 8% net earnings, thus lowering the earnings on the project. §353.030(11)(c) provides that surplus earnings in any year may be held and used to offset any deficiency which may occur in future years or which may have occurred in prior years. In other words, §353.030(11)(c) acts as a loss carry-forward/carry-back provision.

(v) Reasonable Costs of In-House Services? The Act is silent on this issue. However, if the Developer performs services such as management, which would be an ordinary business expense of owning and maintaining the property that would otherwise have to be paid to a third party, it should be deductible in computing net earnings. In the case of *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965), the Missouri Supreme Court held that the "cost and expense of operation" of a hotel, paid to the Hilton Corporation under a management agreement, was deductible in computing net earnings, even though Hilton was a joint venture lessee from the redevelopment corporation. 397 S.W.2d at 650, 652.

(vi) Subsequent Acquisition Price as a Deduction. If successor title holders are subject to the earnings limitation, in determining the 8% per annum return, does one use the developer's total cost or the new title holder's cost of investment? Neither the Act nor case law offers much guidance in answering this question. However, if gain on sale is not part of income for computation of net earnings, it would be inconsistent to allow a purchaser to count purchase price as an expense to be deducted in the computation of net earnings. The Act does not identify the cost of acquisition to a subsequent purchaser as an allowable expense item reducing the amount of net earnings. §353.030(11) R.S.Mo. refers to the 8% limitation as calculated against the "cost to said corporation of the redevelopment project including the cost of the land." The amortization provisions also refer to amortizations beginning as of the date of "completion of the project." §353.030(11)(c) R.S.Mo. Thus, a developer should use the corporation's total cost of acquisition and/or construction and may add any later costs of maintenance or improvements. The usual practice is for a developer to build the project and then convey it to the redevelopment corporation at the time a certificate of occupancy is issued in order to obtain the maximum benefit of the abatement. (See discussion on one-year gap under "Tax Abatement", *supra*.) Thus, "total cost" usually refers to a purchase price paid by the redevelopment corporation.

(vii) Cumulative Deficiencies Apply. If the developer's cost is used, does a successor title holder get the benefit of the developer's rate of return deficiencies which may have occurred in prior years? Yes. Likewise, he would suffer the burden of the amounts by which the earnings exceeded the 8% net earnings limitations in prior years. However, this is a circumstance against which any purchaser can guard themselves by a thorough examination of the income and expense history of the project. A subsequent purchaser can opt out if after examining the accumulated net earnings, he determines that the potential for surplus net earnings is greater than the prospective tax abatement. If he does opt out, the city might contend that the abatement period has ended, and look to the seller for excess earnings even though the 25-year statutory period has not yet run. Note that §353.030(11)(c) provides that "surplus earnings remaining at the termination of the tax relief granted pursuant to §353.110 shall be turned over by the corporation to the city." §353.110 of Act provides that "the abatement will continue for 25 years or . . . so long as the real property is . . . used in accordance with an authorized development plan." Further, the Act in §353.150.4 terminates abatement if the new owner elects not to continue under the plan.

(viii) Deductibility of Depreciation and Loan Amortization Payments. As to the computation to arrive at net earnings, are both depreciation expenses and loan amortization payments, if any, deductible in determining surplus earnings? Loan amortization payments are deductible according to a 1991 opinion of the Missouri Attorney General, Mo Opinion No. 19-91, 1991 WL 574264 (Mo. A.G.) but depreciation is not. To allow deductions for both depreciation and amortization would amount to deducting the cost of the project twice to reach net earnings.

(c) Items Includable As Gross Profit.

(i) Capital Gain On Sale. A question that persistently arises is whether capital gain on the sale of the project is counted as part of "gross earnings" under §353.030(11) R.S.Mo. It is difficult to tell from reading the section, and there is no case authority on the point, but the better view is that such capital gain is not part of gross earnings. The city attorneys of Kansas City and St. Louis have taken the position that it is not, and in no instance of which this author is aware, has a city attempted to recapture excess profits on the basis of the sale price of a project. However, Mo Opinion No. 19-91, 1991 WL 574264 (Mo. A.G.) the Attorney General has taken a contrary view.

(ii) Profit From Operations of Business other than Redevelopment. It seems clear from the language of §353.030(11) that the profit restriction applies only to the project involved. This becomes relevant where the project has been transferred from a redevelopment corporation to another entity. It is unlikely that the legislature intended that the profit restriction would then attach to all other operations of the acquiring entity. By analogy, the provisions of the Act that allow a life insurance company to operate as an urban redevelopment corporation, limit the net earnings derived "exclusively from the ownership or operation of any redevelopment project". §353.040 R.S.Mo.

(d) Who Is Liable For Payment of Excess Profits. The net earnings are calculated annually, with loss carry-forward and carry-back and no limitation on the number of years of carry within the 25-year abatement period.

(i) Purchaser From the Redevelopment Corporation. The Redevelopment Corporation typically transfers title to the property to some third party. §353.150.4 R.S.Mo. requires any buyer who seeks tax abatement to "use, operate and maintain" the property in accordance with the plan. Arguably, if the 8% limitation in the Act could be avoided by the simple expedient of transferring title out of the redevelopment corporation, the statutory scheme (a "trade" of abatement for a limit against "high" profits), would be meaningless. An argument can be made that the earnings limitations does not apply to the words "use operate and maintain". In support of this argument, Article VI, §21 of the Missouri Constitution, the underpinning for the Act, would allow transfer of redevelopment property to private persons, free of any restrictions. *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 649 (Mo. banc 1965), dismissed, 385 U.S. 5 (1966). But the Act requires the surrender of tax abatement in exchange for a release from the conditions. §353.150.4 R.S.Mo. and the city could certainly require the income limitation to apply to purchasers in its redevelopment agreement until the legislature adopted HB 2058 in 2008, amending §353.150 R.S.Mo. as follows:

> 4….Nothing in this chapter, any development plan, or any contract shall impose a limitation on earnings as a condition to the granting of partial tax relief provided in section 353.110 to a purchaser described in this subsection that is not an urban redevelopment corporation or life insurance company operating as an urban redevelopment corporation.
>
> 5. Any limitation on earnings imposed on any purchaser that is not an urban redevelopment corporation or life insurance company operating as an urban redevelopment corporation under any existing or future redevelopment plan or any existing or future contract shall be void.

(ii) Subsequent Purchasers. Do the owner's obligations under the earnings limitation cease when the property is sold? If at the time of sale, the earnings limitation has not been exceeded, the seller's obligations under the plan cease. Theoretically, it is impossible to know whether there is a surplus until the abatement period is terminated so the City at that time must elect to either hold only the last owner liable or make demand on all owners who exceeded the limitation during the period. Either way requires a separate accounting for each owner. Once that is done, it would be very difficult to seek renumeration from an owner who did not exceed the 8% limit during his ownership.

(11) Financing Plan. The Act requires a determination that sufficient funds will be immediately available to prosecute the plan, but this does not rise to the level of a firm loan commitment. *State ex rel. DeVanssay v. McGuire*, 622 S.W.2d 323 (Mo. App. 1981); *Allright of Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320 (Mo. 1976). Determination that the method of financing is sufficient is legislative. *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965).

(a) Evidence of Held Sufficient. Evidence held sufficient to support council determination that sufficient funds immediately available. *Allright of Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320 (Mo. 1976).

(b) Held Insufficient. Evidence not sufficient to establish ability of developer to proceed. *Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284 (Mo. App. 1979).

§34. —Development Finance Corporations (371.010 *et seq*. R.S.Mo.)

Development finance corporations ("DFCs") are authorized to assist and encourage the development and advancement of the business prosperity and economic welfare of the state, to assist and encourage the location of new industries in the state, and to provide for maximum opportunities for employment, and to these ends to secure a source of credit not otherwise available. Membership in the corporation is limited to financial institutions such as national and state banks, trust companies, or any other entity engaged in lending or investing funds. Organized for the sole purpose of providing an alternative source of credit, the corporation is prohibited from lending money when credit is readily available elsewhere. A DFC is formed by filing articles with the Director of Finance and the State Banking Board and receiving their approval to proceed. The Director of Finance oversees the operation of these corporations. All income received by the corporation is exempt from state income tax, but the exemption does not apply to dividends or other income received by the stockholders of the corporation.

(1) Formation.

(a) Filing of Articles. Any three or more qualified natural persons, Missouri residents, may file with the Director of Finance articles of incorporation to form a development finance corporation. §371.020 R.S.Mo. The contents of the articles of incorporation are spelled out in §371.080 R.S.Mo. The name must include the words "Missouri Development Finance Corporation." The number of directors shall be not less than 15. §371.080 R.S.Mo. The Director of Finance shall, as soon as practicable after the receipt of the proposed articles, ascertain the character and fitness of the applicants and shall issue his certificate approving the

articles of incorporation if he is satisfied concerning residency, standing of the incorporators in the communities, and compliance with §371.080. He may then authorize the applicants to proceed. §371.030 R.S.Mo. When the applicants have completed the organization of the corporation, they shall file with the Director of Finance a certificate or organization certifying basic information about the corporation. §371.050R.S.Mo.

(b) Approval. Immediately upon the filing of the certificate of organization, the Director of Finance shall submit it to the State Banking Board with the articles of incorporation and, as soon as practicable thereafter, the State Banking Board shall direct the Director of Finance to issue to the applicants a certificate of incorporation if the Board determines that there is public necessity and convenience, there are at least 10 stockholders, that not less than 250 shares of no par value stock issued at $100 per share have been subscribed and fully paid for, and that the bylaws are in conformity with the articles of incorporation and not in conflict with any law of Missouri. §371.060.1 R.S.Mo. Upon the issuance of the certificate of incorporation the corporate existence of the development finance corporation begins. A copy of the articles of incorporation endorsed by the Director of Finance shall be recorded in the county in which the principal office is located. §371.070 R.S.Mo.

(2) Members of Corporation to be Financial Institutions. The members of the corporation shall consist of such financial institutions as make application for membership which becomes effective upon the acceptance of the application by the board of directors. §371.120.1 R.S.Mo. A financial institution consists of any entity engaged in lending or investing funds. §371.120.2 R.S.Mo.

(a) Corporations or Banks May Own Stocks or Securities of Company, Securities Exempt. Notwithstanding any provision of law or provision in their respective charters, all domestic corporations organized for the purpose of carrying on business in Missouri are authorized to acquire or otherwise deal with any debt instruments or shares of any development finance corporation without the approval of any regulatory agency of Missouri. §371.250(1) R.S.Mo. All banking organizations are authorized to become members of and to make loans to the corporation but a banking organization which does not become a member shall not acquire any shares of the capital stock of such corporation. §371.250(2)(3) R.S.Mo.

(3) Loans by Members, Limits. Each member shall lend funds to the corporation pursuant to the commitment of the member as and when called upon by the corporation, but the total amount on loan by any member at any one time shall not exceed:

- for national and state banks and trust companies, 2% of capital and surplus;

- for federal and state savings & loan associations, not in excess of limits fixed and prescribed by regulations established by the Division of Finance;
- for stock insurance companies, 2% of capital and surplus;
- for surety and casualty companies, 2% of capital and surplus;
- for mutual insurance companies, 2% of guaranty fund or of surplus, whichever is applicable;
- for all other financial institutions, such limits as may be approved by the board of directors of the corporation.

§371.120.3 R.S.Mo.

Section §371.120 also governs the commitments, withdrawals by members, evidence of indebtedness, investing in a development finance corporation as a proper investment for members the amounts which a corporation is authorized to borrow and differing rates of interest under separate contracts. §§371.120.4 – 371.120.10 R.S.Mo.

(4) Powers of Corporation. A development finance corporation shall have the power, among other things, to lend money to and guarantee the debt of any person, firm, corporation or association §371.130(5) R.S.Mo., and shall have all powers, limitations and privileges of general business corporations under Chapter 351 R.S.Mo. except as set forth in Chapter 371 of the statutes. §371.140 R.S.Mo.

(5) Accumulation of Earned Surplus. The corporation shall set apart as an earned surplus 75% of its net earnings each year until such earned surplus equals the total of the paid-in capital and paid-in surplus then outstanding, and shall maintain it at that level. Earned surplus not required to be accumulated shall be available for the payment of such dividends as the board of directors shall deem expedient. §371.150 R.S.Mo.

(6) Limit on Obligations. At no time shall the total obligations of the corporation exceed ten times the amount of paid-in capital and surplus, not including therein the earned surplus. This limitation shall not apply with respect to that portion of the corporation's obligations which are secured by the United States. §371.160 R.S.Mo.

(7) Deposits and Loans of Funds, Regulation. The corporation shall not deposit any of its funds in any banking institution unless such institution has been designated as a depository by a vote of a majority of the directors, exclusive of any director who is an officer or director of the depository so designated. The corporation shall not receive money on deposit. No loans shall be made directly or indirectly to any officer of the corporation or to any firm of which such officer is a member or officer. §371.170 R.S.Mo.

(8) Limitation on Lending Powers; Lender of Last Resort. A development finance corporation shall not lend money when credit is readily available elsewhere. §371.180 R.S.Mo.

(9) Stockholders Not to Have Preemptive Rights. The stockholders of a development finance corporation shall have no preemptive or preferential right to purchase any unissued capital stock or any new issue of stock or to purchase or subscribe for any bonds or any other obligations whether or not convertible to stock of any class of the corporation. §371.200 R.S.Mo.

(10) Interest Paid Exempt from Intangible and Income Taxes. Interest on bonds, notes or other obligations of a development finance corporation issued under and in accordance with the provisions of this chapter is exempt from all intangible taxes imposed by this state and all state income taxes. §371.210 R.S.Mo. All income received by a development finance corporation is exempt from the taxes imposed on income by Missouri. But this exemption does not apply to income received by stockholders of the development finance corporation in the form of dividends or otherwise. §371.220 R.S.Mo.

(11) Compromise, Arrangement or Plan of Reorganization; How Adopted; Effect. Whenever a compromise or plan of reorganization is proposed between the corporation and its creditors, the Circuit Court of Cole County may order a meeting of such creditors, members or shareholders as may be effected. §371.230 R.S.Mo. If at this meeting, the compromise or arrangement for reorganization is agreed to by two-thirds of the creditors and a majority of the shareholders, the compromise shall be binding on all the creditors, shareholders, members and the corporation. §371.230.2 R.S.Mo.

(12) Dissolution. Any development finance corporation, after the payment of all of its bonds and other obligations, or after the deposit in trust with the respective trustees designated in any deeds of trust; a sum of money sufficient for the purpose, may dissolve by the vote of a majority of the stockholders. §371.240.1 R.S.Mo. When the Director of Finance has endorsed the approval of the State Banking Board on the certificate of dissolution, the corporation is deemed dissolved. §371.240.2 R.S.Mo. Any assets remaining after all liabilities and obligations have been satisfied shall be distributed pro rata to the stockholders of the corporation. §371.240.4 R.S.Mo.

§35. —Brownfields - Abandoned Property (447.700 *et seq*. R.S.Mo.) (S.B. 827 1998)

Persons who rehabilitate abandoned or underutilized commercial or industrial property for industry, commerce, distribution or research can obtain from the Department of Economic Development, loans, grants, tax credits and property

and income tax exemptions. The property must be owned by a governmental entity or private been vacant for no less than three years. The improvements must create a minimum number of new jobs or preserve existing jobs in the state. The Director must find that the eligible project would not go forward but for the receipt of assistance in accordance with the Act. The Act confers certain immunity from liability upon lenders, government agencies, prospective purchasers and owners of projects.

(1) Definitions.

(a) Abandoned Property. "Abandoned property" is defined as real property previously used for, or which has the potential to be used for, commercial or industrial purposes, which reverted to the ownership of the state, a county or municipal government, or an agency thereof, through donation, purchase, tax delinquency, foreclosure, default or settlement, including conveyance by deed in lieu of foreclosure or private property if endorsed by the city or county (if not in a city), and which has been vacant for a period of not less than three years prior to the time an application is made to DED. §447.700(1) R.S.Mo. See also, §§447.620 – 447.640 R.S.Mo. regarding temporary possession of abandoned property. *Urban Renewal of K.C. v. Bank of New York*, 289 S.W.3d 631, 635 (Mo. App. W.D. 2009) (non-profit organization whose purpose was "neighborhood preservation" qualified under the temporary possession statute). Under the Lost and Unclaimed Property Act, Sections 447.620 -447.640, R.S.Mo., a "nuisance" is defined as

> any property which because of its physical condition or use is a public nuisance or any property which constitutes a blight on the surrounding area or any property which is in violation of the applicable housing code such that it constitutes a substantial threat to the life, health, or safety of the public. For purposes of sections 447.620 to 447.640, any declaration of a public nuisance by a municipality pursuant to an ordinance adopted pursuant to sections 67.400 to 67.450, R.S.Mo., shall constitute prima facie evidence that the property is a nuisance;

Section 447.620[4] R.S.Mo. An "Organization" is defined in Section 447.620[6] R.S.Mo. as

> any Missouri not-for-profit organization validly organized pursuant to law and whose purpose includes the provision or enhancement of housing opportunities in its community and which has been incorporated for at least six months;

In *Urban Renewal of K.C. v. Bank of New York,* 289 S.W.3d 631 (Mo.App.

WD 2009) a not-for-profit took over possession of an abandoned house for the purposes of rehabilitation. Reciting the law, the court stated:

> Section 447.622 allows any organization, as defined in section 447.620(5), to petition the court to have property declared abandoned pursuant to sections 447.620 and 447.640 and to gain temporary possession of the property if certain statutory requirements are met at the time of the petition's filing. § 447.632. Those requirements include: "(1) The property has been continuously unoccupied by persons legally entitled to possession for at least six months prior to the filing of the petition; (2) The taxes are delinquent on the property; (3) The property is a nuisance; and (4) The organization intends to rehabilitate the property." § 447.622. After a hearing under section 447.630, the trial court shall grant the petition if (1) the statutory conditions of section 447.622, as alleged in the petition, existed at the time the verified petition was filed, (2) the organization's rehabilitation plan is feasible, and (3) the owner has failed to demonstrate that the organization should not be allowed to rehabilitate. § 447.632.

The Court held that the bank was required to pay the expenses of the not-for-profit, finding that:

> (1) as a matter of first impression, the nonprofit established that the property had been continuously unoccupied for six months, even though bank only had possession for 11 days;
> (2) the nonprofit met the definition of an "organization," as set forth in the temporary possession statute;
> (3) award of expenses was not rendered unreasonable because nonprofit did not submit matching receipts; and
> (4) the award of expenses could include contractor's fees but not management fees.

(b) Allowable Cost. Generally "allowable cost" is defined in the Act as the cost of project facilities including land, relocation, reconstructing, constructing, equipping or furnishing, site preparation, infrastructure, voluntary remediation and any other expenses as may be necessary or incidental to the establishment or development of an eligible project and reimbursement of monies advanced or applied by any governmental agency or other person for allowable cost. §447.700(2) R.S.Mo. In 2001 via HB 133, the definition was expanded to include the demolition and reconstruction of any building or structure which is not the object of remediation as defined in §260.565 R.S.Mo., but which is located on the site of an abandoned or underutilized property approved for financial assistance under §§447.702 to 447.708 provided any such demolition is contained in a redevelopment plan approved by the director of the department of economic

development and the local government having jurisdiction over the project. However, the total of state funding, credits or exemptions shall not exceed the benefit to the state. §447.701.1 R.S.Mo.

(c) Eligible Project. Eligibility will be determined by consideration of the entire project, including that:

(i) Type. The property has been abandoned for three years or underutilized (as defined in §447.700(11)) or any property immediately adjacent to such property. §447.700(4) R.S.Mo.

(ii) Use. The property will be reused for industry, commerce, distribution or research. §447.700(4) R.S.Mo.

(iii) Jobs and Economic Development. The reuse of the property will create new jobs or preserve existing jobs, attract new businesses to the state, prevent existing businesses from leaving the state and improve the economic welfare of the state. §447.700(4) R.S.Mo.

(iv) Voluntary Remediation. The remediation is voluntary and conducted pursuant to §260.565 to §260.575 R.S.Mo. §447.700(4) R.S.Mo.

(v) Written Agreement. The obligations of the prospective private party owner/operator and the governmental agency are defined in a written agreement. §447.700(4) R.S.Mo.

(d) Full-Time Basis. Full-time basis means the employee works an average of at least 35 hours per week. §§447.706.1(3) - 447.708.1(8) R.S.Mo.

(e) New Job. "New job" means the employee was not employed by the taxpayer or a related person in the preceding 12 months. §447.708.1(8) R.S.Mo.

(f) Project Facilities. "Project facilities" means buildings, structures and other improvements and equipment and other property or fixtures excluding small tools, supplies and inventory, and any one, part or combination of the above, comprising all or part of, or serving or being incidental to, public capital improvements. §447.700(9) R.S.Mo.

(g) Related Taxpayer. "Related taxpayer" has the same meaning as in §135.100(9) R.S.Mo. §447.708.1(8) R.S.Mo.

(h) Voluntary Remediation. "Voluntary remediation" is defined as an action to remediate hazardous substances and hazardous waste pursuant to §§260.565 to 260.575 R.S.Mo. §447.700(12) R.S.Mo.

(i) Underutilized. "Underutilized" real property of which less than thirty-five percent of the commercially usable space of the property and improvements thereon, are used for their most commercially profitable and economically productive use; or property that was used by the state of Missouri as a correctional center for a period of at least one hundred years and which requires environmental remediation before redevelopment can occur, if approval from the general assembly has been given for any improvements to, or remediation, lease or sale of, said property. §447.700 R.S.Mo.

(2) Loan from Property Reuse Fund. The Director of the Department of Economic Development ("DED"), with the approval of the Directors of the

Department of Natural Resources ("DNR") and the Department of Revenue ("DOR"), may lend monies in the Property Reuse Fund for the purpose of paying allowable costs of an eligible project which is economically sound, provided that the cost of remediation may exceed the fair market value of the property prior to redevelopment, the Director determines that the borrower is unable to obtain conventional financing upon comparable terms and the loan is the least amount necessary to cause the project to occur. §§447.702.1(1) and (2) R.S.Mo.

(a) Project Cap. The loan shall not exceed $1,000,000. §447.702.1(3) R.S.Mo.

(b) New Jobs. When completed, the project facility must be projected to create not less than 10 new jobs or retain a business which supplies not less than 25 existing jobs or a combination thereof providing not less than an average of 35 hours of employment per week per job. §447.702.1(4) R.S.Mo.

(c) But For Test. The Director must determine that the eligible project could not be achieved in the local area in which it is to be located if the portion of the project to be financed by the loan, instead were to be financed by a loan guarantee under §§447.704 - 447.702.1(5) R.S.Mo.

(d) Security. The Director must determine that the loan is adequately securitized. §447.702.1(6) R.S.Mo.

(e) Powers of Director. The Director has very broad powers with respect to loans from the Property Reuse Fund. For example, his determinations of eligibility are conclusive (§447.702.2 R.S.Mo.) and the terms of the loan are subject to his total discretion. The monies used in making such loans are disbursed upon his written order. (§447.702.3 R.S.Mo.) The Director may take all actions necessary or appropriate to collect or otherwise deal with any loan and may fix service charges payable at such times and places and in such amounts and manner as he may prescribe. §§447.702.4 and .5 R.S.Mo.

(3) Loan Guarantees. The Director, with the approval of the Directors of DNR and DOR, may guarantee loans issued by private financial institutions for the purpose of paying allowable costs of an eligible project. In order to make such guarantee, the Director must make findings similar to those which must be made for a direct loan, with the exception that instead of finding that the borrower is unable to finance through conventional methods, the Director must find that the private lender is unwilling to make the loan without the guarantee and the guarantee is the minimum necessary to cause the loan to be made. The Director has powers with respect to the loan guarantee similar to those he has with respect to the direct loan. §§447.704.1, .2 and .3 R.S.Mo. Interest rates on such guaranteed loans shall not exceed three percentage points above the prime interest rate and the loan may not exceed 20 years. §447.704.3 R.S.Mo.

(a) Immunity. The private lender shall be immune from any liability arising out of the performance of the project. If the lender has foreclosed and held the abandoned property for at least two years, the Director shall use the guarantee monies from the Property Reuse Fund to pay the lender the unpaid amount of the

defaulted loan and title to the property shall revert to the original governmental owner. §447.704.6 R.S.Mo.

(4) Grants. The Director of DED, with the approval of the Directors of DNR and DOR, may issue a grant to a government agency for public capital improvements if the Director makes findings similar to those required for a loan or loan guarantee with the additional requirement that the project is a cooperative venture between a municipal or county government and a prospective private purchaser. §447.706.1 R.S.Mo. The grant shall be made to a municipal or county government or agency thereof. §447.706.4 R.S.Mo. The grant shall not exceed $1,000,000. §447.706.1(5) R.S.Mo. In 2001, the legislature created the Contiguous Property Redevelopment Fund with a sunset in 2006. The fund will be administered by the Department of Economic Development. The governing body of St. Louis, Kansas City and certain counties may apply to DED for a grant from the fund to assist in acquiring multiple contiguous properties and engaging in the initial redevelopment of such properties for future use as private enterprise. §447.721R.S.Mo.

(5) E-Zone Benefits. With notice to the Directors of DNR and DOR, the Director of DED may grant the credits and exemptions available under the new or expanding business law and the enterprise zone law (even if the project is not in an enterprise zone). §447.708.1 R.S.Mo. However, the tax credits shall be $400 per employee per year with an additional $400 per year for each employee exceeding the minimum employment threshold of 10 and 25 jobs for new and existing businesses, respectively, an additional $400 per year for each person who is a person difficult to employ as defined by §135.240 R.S.Mo., and investment tax credits at the same amount and levels as provided in subdivision (4) of §135.225 R.S.Mo. (Enterprise Zone Act). §447.708.1(4) R.S.Mo. Nothing in §447.708.1 requires the applicant to meet a certain percentage of E-Zone residents or difficult-to-employ persons in its work force.

(a) Eligibility. To receive the enterprise zone property tax exemption, income tax exemption or refund and the new or expanded business/enterprise zone tax credits:

(i) Jobs. The eligible project must create at least 10 new jobs or retain businesses which supply at least 25 existing jobs; and

(ii) Local Government Contribution. The local government must abate at least 50% of property taxes for 10 to 25 years. §447.708.1 R.S.Mo.

(b) Limits. The Director shall determine the number of years the taxpayer may claim the state tax credits and the state income exemption, not to exceed 10 consecutive tax years. The Director's determination shall be made annually, and be based on the economic benefits attributed to the eligible project, except that the minimum number of tax periods for which the taxpayer may claim the state tax credits and state income exemption shall be four. Incentives offered by local governing authorities may be provided for a period not to exceed 15 years. §447.708.1(7) R.S.Mo.

(c) Miscellaneous. The Act contains rules dealing with projects which replace a similar facility that closed elsewhere in Missouri (§447.708.1(9) R.S.Mo.) and the method of determining the number of new jobs created and maintained and the value of new qualified investment and defines new qualified investment (§§447.708.1(11) and (12) R.S.Mo.).

(d) Role of Local Government. The prospective purchaser must obtain the approval of the municipal or county government where the eligible project is located for the granting of tax credits and exemptions. §447.708.2 R.S.Mo.

(6) Tax Credit for Remediation Costs. The Director, with the approval of the Directors of DNR and DOR, may, in addition to the tax credits allowed above, grant in the least amount necessary a remediation tax credit to the purchaser and the operator of an eligible project facility, whether such facility is owned by a governmental agency or by a private party, for the full cost of materials, supplies, equipment, labor, professional engineering, consulting and architectural fees, permitting fees and expenses, demolition and asbestos abatement and direct utility charges for performing the voluntary remediation activities for the pre-existing hazardous substance contamination and releases, including the cost of performing operation and maintenance of the remediation equipment at the property beyond the year in which the systems and equipment are built and installed at the eligible project and the cost of voluntary remediation activities over a period not in excess of four tax years following the tax year in which the system and equipment were first put into use at the eligible project, provided the remediation activities are the subject of a plan submitted to and approved by the Director of DNR pursuant to §§260.565 - 260.575 R.S.Mo. The demolition need not be directly part of the remediation, provided it is on the property where the remediation is occurring and is part of an approved redevelopment plan. §447.708.3 R.S.Mo. It shall not include any costs associated with ongoing operational environmental compliance of the facility or remediation costs arising out of spills, leaks, or other releases arising out of the ongoing business operations of the facility. §447.708.3 R.S.Mo. In 2001 via HB 133, the tax credit was expanded to include, upon the approval of the directors of the Department of Economic Development and the Department of Natural Resources, 100% of the cost of demolition that is not a part of the voluntary remediation activities, provided any such demolition is either on the property where the voluntary remediation activities are occurring or on any adjacent property, and that the demolition is part of a redevelopment plan approved by the director of the department of economic development and the local government having jurisdiction over the project. §447.708.3(1) R.S.Mo.

(a) Extension of Credits. The Director may, with the approval of the Director of DNR, extend the tax credits for remediation in increments of three year periods, not to exceed five consecutive three year periods. §447.708.3 R.S.Mo.

(b) Election. The remediation tax credit may be taken in the same tax year in which the credits are received or over a period not exceed 20 years. §447.708.3 R.S.Mo.

(c) When Received. No more than 75% of earned remediation tax credits may be issued when the remediation costs are paid and the remainder when DNR issues a letter of completion or covenant not to sue. §447.708.3 R.S.Mo. When the Department issues a partial letter of completion, a pro-rated amount of credits may be released. §447.708.3(5) R.S.Mo. The remediation costs must all occur within a four year period to be fully eligible for reimbursement through tax credits. §447.708.3R.S.Mo.

(d) Allocation of Credits. If the facility owner and operator are two separate persons, the operator who directly creates the jobs shall be eligible to qualify for the credits and exemptions described. §447.708.10 R.S.Mo. Tax benefits earned by a corporation or partnership shall be allocated to the shareholders and partners according to their interests. §447.708.11R.S.Mo.

(e) Mutually Exclusive Credits. No taxpayer may earn tax credits, exemptions or refunds under §§447.708.1(2), (3) or (4) and the same benefits under the new or expanding business or enterprise zone laws for the same facility for the same tax period. §447.708.5 R.S.Mo.

(f) Limits. The total amount of the tax credits allowed in §447.708 may not exceed the limits set forth in §447.708.6 R.S.Mo. The tax credits may reimburse up to 100% of clean-up costs. §447.708.3 R.S.Mo.

(g) Application For. The taxpayer claiming the tax benefits under §447.708 must file all applications, forms and schedules prescribed by the Director during the taxpayer's tax period immediately after the tax period in which the eligible project was first put into use or forfeit the right to claim the benefits. §447.708.8 R.S.Mo.

(h) Unused Credits. Unused business facility and enterprise zone tax credits shall not be carried forward but shall be initially claimed for the tax period during which the eligible project was first capable of being used and during any applicable subsequent tax periods. §447.708.7 R.S.Mo.

(i) Assignability. The recipient of remediation tax credits ("assignor") may assign, sell or transfer, in whole or in part, the remediation tax credit to any other person who performed voluntary remediation activities at the project or to a third party. To perfect the transfer, the assignor shall provide written notice to the Director of the intent to transfer including certain information. The number of tax periods during which the assignee may subsequently claim the credits shall not exceed 20 tax periods less previously claimed credits before the transfer occurred. §447.708.9 R.S.Mo. Special rules apply where an operator and assignor has been certified to claim credits and sell or otherwise transfer title of the project to another assignee who continues the same or substantially similar operations at the project. §447.708.10 R.S.Mo.

(j) Amount. The amount of tax credits approved is based on the "least amount necessary to cause the project to occur," §447.708.3 R.S.Mo. The entity

receiving the credits must demonstrate that the projected return on equity investment is below a market rate for comparable projects without the tax credits, and the Brownfield incentives will provide only up to a market rate. §447.708.3 R.S.Mo.

(k) New Jobs. The redevelopment must be projected to create at least 10 new jobs or 25 retained jobs, or a combination thereof, as determined by DED. §447.708.1 R.S.Mo.

(7) Termination, Suspension or Revocation of Incentives. The Director of DED may terminate, suspend or revoke the tax credits and exemptions if the eligible project facility fails to continue to meet the conditions set forth in §447.708. The facility owner or operator may appeal the decision in accordance with the procedures outlined in subsections 4 - 6 of §135.250 R.S.Mo. The Director of DED shall notify the Directors of DNR and DOR of any termination, suspension or revocation. §447.708.4 R.S.Mo. If the owner sells the property within five years after receipt of any benefits, the owner shall repay a pro rata portion of the benefits upon achieving a 25% internal rate of return. §447.701.2 R.S.Mo.

(8) Property Reuse Revolving Fund. The Act establishes a Property Reuse Revolving Fund, intended to provide $10 million annually in uncommitted funds for direct loans, loan guarantees and grants and shall consist of funds from all sources including appropriations by the General Assembly and loan repayments. §447.710 R.S.Mo.

(9) Immunity from Liability. A government agency (including any officer or employee thereof) and the prospective purchaser of a project are immune from liability in a tort action resulting from or arising out of an eligible project, including harm inflicted in the performance of any voluntary remediation associated therewith. §447.712.2 R.S.Mo.

(a) Immunity to Government and its Agencies. This immunity shall extend to acts and omissions of the governmental agency and its officers and employees necessary or essential to the exercise of the powers and duties described in §§447.700 - 447.718, to discretionary acts under those sections and shall apply to include any actions or failures to act of project contractors, subcontractors, suppliers or materialmen in connection with voluntary remediation. §447.712.2 R.S.Mo. Immunity shall not apply to acts or failures to act by a governmental agency or its officers and employees which were manifestly outside of the scope of employment duties or responsibilities or committed maliciously, in bad faith or in a wanton and reckless manner. §447.712.3 R.S.Mo.

(b) Immunity to Government For Ownership. No state, county or municipal government or any agency, officer or employer thereof shall be liable in tort or under the state's environmental laws for the ownership of real or personal property acquired by foreclosure upon or acceptance of a deed in lieu of

foreclosure pursuant to a defaulted loan under §447.702 or repurchase and reversion of the property to the original governmental agency owner under §447.704.6 provided the agency did not directly cause or contribute to the cause of the new contamination. Such state, county or municipal governments or agencies thereof shall receive the creditor protections afforded financial institutions under §§427.011 - 427.041 R.S.Mo. §447.712.4 R.S.Mo.

(c) Purchaser Immunity. For any eligible project, the purchaser of the abandoned property shall be released from further liability to the extent described below based on the voluntary remediation work actually performed. §447.714.1 R.S.Mo. For any eligible project, DNR shall either:

(i) Where No Remedial Action is Necessary. Issue a letter requiring no further action from a purchaser who has performed a Phase I and Phase II environmental site assessment which demonstrate that no remedial action is necessary. §447.714.2(1) R.S.Mo.;

(ii) Where Remediation Has Been Completed and Alternative Methods May Be Used. Issue a "no further action" letter from a purchaser who has performed voluntary remediation, where the purchaser certifies that the goals of the voluntary remediation plan have been attained, but does not reduce all hazardous substances to levels below the regulatory action levels due to use of:

- alternative clean-up goals,
- risk reduction solutions,
- institutional controls, including, but not limited, use restrictions contained in the deed, or
- other alternative actions.

DNR shall not issue a no further action letter unless the voluntary remediation activities significantly restore the environment, in whole or in part, so as to minimize the harmful effects from a release of hazardous substances to acceptable risk levels. §447.714.2(2) R.S.Mo.;

(iii) Where Remediation Is Totally Successful. Provide a covenant not to sue to a purchaser who has performed voluntary remediation where the purchaser certifies to DNR that the remediation goals have been attained and has treated all hazardous substances of concern to levels below then-existing regulatory action levels §447.714.2(3) R.S.Mo. To receive a covenant not to sue from DNR, the corrective action plan must be submitted for public comment and a public hearing must be held by DNR after not less than 30 days' notice to determine the effectiveness of the remedy for the intended use of the eligible project. The public hearing shall be held in the community where the eligible project is located §447.714.2(4) R.S.Mo.

Upon successful completion of a voluntary remediation action, the purchaser shall be immune from liability in a civil action brought by any third party, except for the failure to remediate hazardous substances in accordance with the voluntary remediation action site plan, statutes and regulations or the failure to operate the facility in compliance with applicable federal, state and local environmental statutes, regulations and ordinances. §447.714.3 R.S.Mo.

DNR shall not release the purchaser from liability arising from conditions not identified, contaminations or violations caused by the purchaser or hazardous substances contamination or conditions unknown at the time of performance of the eligible project. §447.714.4 R.S.Mo.

(10) Penalties for Breaches and Violations. Any person who agrees to purchase abandoned property as part of a qualified project and subsequently breaches the agreement may be responsible for immediate repayment of Property Reuse Fund monies with a 10% penalty on the amount granted or loaned, and such person shall not be eligible to receive the tax benefits described in Chapter 447. §447.716.1 R.S.Mo. These penalties also apply to purchasers who fail to properly perform voluntary remediation activities to the satisfaction and approval of DNR. §447.716.2 R.S.Mo. Any person who obtains for a qualified project a loan guarantee and who violates the provisions of the Act may have the guarantee withdrawn, and shall not be eligible to receive the tax benefits nor the liability releases and immunities. §447.716.3 R.S.Mo.

In the event of changes of business conditions of the purchaser or prospective purchaser which make completion of the eligible project economically unsound or infeasible, the purchaser or prospective purchaser may elect to terminate their obligations upon 90 days' written notice to the affected governmental agency and DED. The Director of DED may require repayment of the loan balance together with the interest which would have been received over the remaining term of the loan. Such purchaser or prospective purchaser may not receive tax benefits but in the discretion of the Director of DNR, may receive a release for the voluntary remediation work actually performed. The Director of DED, with the approval of the Director of DNR, shall determine the sanctions and penalties to be imposed for breach or violation. §447.716.4 R.S.Mo.

§36. —Federal Brownfields Economic Redevelopment Initiative

The Taxpayer Relief Act of 1997, 26 U.S.C. §198, authorizes a tax deduction for cleanup costs as well as allowing grants for remediation expenses. The Environmental Protection Agency, in accordance with the Act, has made Kansas City a Brownfields National Assessment Demonstration Pilot Site and a Showcase Community, enabling the Kansas City Brownfields Initiative to grant federal funds for site assessment costs. 26 U.S.C. §198(c)(2)(A). The federal Brownfields incentives are detailed below using Kansas City as an example.

(1) Deduction for Environmental Cleanup Costs. Under the Brownfields Tax Incentive, environmental cleanup costs for properties in targeted areas are fully deductible in the year in which they are incurred. 26 U.S.C. §198(a). In general, expenses in connection with response to actual or threatened releases of hazardous substances are eligible. 26 U.S.C. §198(c)(1)(A)(iii). These expenses may include site assessment, cleanup costs, operations and maintenance costs, and Voluntary Cleanup Program oversight fees. 26 U.S.C. §198(b). The incentive

sunsets after three years, thereby covering eligible costs incurred or paid from the date of enactment until January 1, 2001. 26 U.S.C. §198(h).

(2) Environmental Assessment Grants. The Kansas City Brownfields Initiative can provide EPA Brownfields Pilot and Showcase grant funds for 100% of Phase I assessment costs up to $2500 and 50% of Phase II assessment costs up to $20,000. If an applicant receives the grant, the assessment report and data must be disclosed to EPA. In addition the City will typically impose public bidding and federal contract requirements and require that environmental services be contracted through the City. In order to obtain maximum funding, the City requires applications for grants to be filed before the owner has initiated site assessment. There is no specific authority, but authorizing legislation is at 42 U.S.C. §§9604(d), 9604(e).

(3) Procedures to Receive Federal Incentives. The owner must provide a written request to the Kansas City Brownfields Initiative describing: (1) the subject property and the proposed project; (2) the type of environmental assessment services needed; (3) the amount of financial assistance needed; and (4) a statement acknowledging the conditions of the Kansas City Brownfields Initiative. Upon the owner's written request, the Kansas City Brownfields Initiative Steering Committee will consider the project and decide whether to authorize the requested assistance. In order to claim the deduction for remediation expenses, a taxpayer need only attach a certificate showing entry into the Voluntary Cleanup Program to their federal tax return. Funding for this program expired in October 2000.

§37. —Job Development and Training (620.806 R.S.Mo.)

> **If funds are available and if requested by the governor, the General Assembly is vested with the power to make a one-time appropriation of $5 million to the New Jobs Fund. Approval of an amendment to Article III of the Missouri Constitution by Missouri voters must occur prior to appropriation of monies into the fund. Missouri voters have not yet granted their approval of the necessary amendment. Therefore, the fund remains dormant for the time being. Once approved, monies in the fund will be available for direct financial investment in early-stage Missouri businesses with the potential for growth and job creation.**

(1) Missouri Job Development Fund (§620.478 R.S.Mo.). The Missouri Job Development Fund, formerly established in the state treasury by Section 620.478 R.S.Mo., is now known as the "Missouri Works Job Development Fund." The fund consists of appropriations from the general assembly and gifts,

contributions or grants from federal, private or other sources. Appropriations shall be for the purpose of vocation training or retraining. §620.806.1 R.S.Mo.

DED may provide financial assistance through the training program to qualified companies that create new jobs which result in the need for training, or that make new capital investment relating directly to the retention of jobs in an amount at least five times greater than the amount of any financial assistance. Financial assistance may also be provided to a consortium of qualified companies organized to provide common training to the consortium members' employees. Funds in the Missouri works job development fund shall be appropriated by the general assembly to DED and administered by a local educational agency certified by DED for such purpose. Except for state-sponsored preemployment training, no qualified company shall receive more than fifty percent of its training program costs from the Missouri works job development fund. No funds shall be awarded or reimbursed to any qualified company for the training, retraining, or upgrading of skills of potential employees with the purpose of replacing or supplanting employees engaged in an authorized work stoppage. Training project costs, except the purchase of training equipment and training facilities, are eligible for reimbursement with funds from the Missouri works job development fund upon approval by DED. Notwithstanding any provision of law to the contrary, no qualified company within a service industry shall be eligible for assistance unless such qualified company provides services in interstate commerce, which shall mean that the qualified company derives a majority of its annual revenues from out of the state. §620.806.2 R.S.Mo.

DED may provide assistance, through appropriations made from the Missouri works job development fund, to business and technology centers, which may be established by Missouri community colleges, or state-owned postsecondary technical colleges, to provide business and training services for growth industries as determined by current labor market information. §620.806.3 R.S.Mo.

(2) New Jobs Fund (§620.1030 R.S.Mo.). A revolving fund has been created in the state treasury to be known as the "New Jobs Fund" to be administered by DED. §620.1030.1 R.S.Mo. The General Assembly may appropriate to the new jobs fund, a one-time appropriation of five million dollars. The fund is to be used to make direct financial investments in early stage Missouri businesses that show promise of significant growth and job creation. Investments from the fund may be in the form of either debt or equity in a business. The fund's investments shall be matched by investments of venture capital firms, banks or other sources of financing. The state investment from the fund may not exceed 40% of the total investment in the business. §620.1030.2 R.S.Mo. Any monies remaining in the new jobs fund at the end of the fiscal year shall not lapse to the general revenue fund, but shall remain in the new jobs fund. §620.1030.3 R.S.Mo. The provisions of the law were dependent upon a proposal submitted by the 87th General Assembly (1993 and 1994) to change the provisions of Article III of the

Constitution by adding a section to allow the use of state funds to make direct financial investments in certain Missouri businesses if submitted to the voters of Missouri and approved by a majority thereof. §620.1030.4 R.S.Mo. As of this writing, no such constitutional amendment has been approved.

(3) Missouri Works Community College New Jobs Training Fund. See §27 herein.

(4) Missouri Works Community College Job Retention Training Program Fund. See §27.1 herein.

§38. —New Enterprise Creation and Capital Access (620.641-620.650 R.S.Mo.)

(1) New Enterprise Creation (§620.641).

> **In 1999, the Missouri General Assembly, through Senate Bill 518, passed the Missouri New Enterprise Creation Act. The Act creates a Missouri Seed Capital Investment Board. Under the Act, any person who makes a qualified contribution to a qualified fund shall receive a 100% tax credit against Missouri income taxes. The credits may be carried forward for 10 years and may be assigned, transferred or sold. A qualified contribution is one made to pursuant to the terms of a contract between a qualified fund and a qualified economic development organization. A qualified fund is one approved by the Missouri Technology Corporation or by the Board. The qualified fund will then use its resources to make investments of seed capital, start-up capital or follow-up capital in a qualified business which is independently owned and operated, headquartered and located in Missouri, and involved in manufacturing, processing, or assembling products, conducting research and development, or providing services in inter-state commerce.**

(a) Missouri Seed Capital Investment Board. The Act creates the Board to be composed of thirteen persons. Each qualified economic development organization, not to exceed four, shall be represented by one member. Eight members are appointed by the Governor. Of these, one shall represent a major public research university located within Missouri, one shall represent a major private research university located within Missouri and the remaining six shall have backgrounds in technology, banking, labor or small business development. §620.641 R.S.Mo.

(b) Seed Capital and Commercialization Strategy. The Seed Capital and Commercialization Strategy shall be jointly developed by the boards of directors of all the qualified economic development organizations and approved

by the Seed Capital Investment Board. The Board shall not approve any qualified fund unless the fund is described in the Missouri Seed Capital and Commercialization Strategy. The Strategy shall include a proposal for the establishment and operation of between one and four qualified funds in Missouri. §620.644 R.S.Mo.

(c) Contracts Between Qualified and Qualified Funds for Distribution of Earnings to Organizations. The Board or Corporation may authorize each qualified economic development organization to enter into contractual agreements with any qualified fund allowing such fund to offer tax credits to those persons making qualified contributions to the fund. §620.647.1 R.S.Mo. Each qualified fund shall enter into a contract with one or more qualified economic development organizations which shall entitle all qualified economic development organizations in existence at that time to receive and share equally all distributions of equity and dividends or other earnings of the fund that are generated as a result of any equity interest secured as a result of actions taken to comply with the Act. §620.647.2 R.S.Mo.

(d) Use of Dividends and Earnings. All distributions of dividends, earnings, equity or the like paid to a qualified economic development organization by any qualified fund shall be used solely for reinvestment in qualified funds in order to provide on-going seed capital, start-up capital and follow-up capital for Missouri businesses. §620.647.3 R.S.Mo.

(e) Tax Credits. Any person who makes a qualified contribution to a qualified fund shall receive a 100% tax credit against Missouri Income Tax. §620.650.2 R.S.Mo. The credits may be carried forward for ten years and may be assigned, transferred or sold. §620.650.3 R.S.Mo.

(f) Definitions.

(i) Corporation. The Missouri Technology Corporation as established pursuant to §348.251 R.S.Mo. §620.638(3) R.S.Mo.

(ii) Qualified Business. Any independently owned and operated business which is headquartered and located in Missouri and which is involved in or intends to be involved in commerce for the purpose of manufacturing, processing or assembling products, conducting research and development, or providing services in interstate commerce. Such a business shall maintain its headquarters in Missouri for a period of at least three years from the date of receipt of a qualified investment or be subject to penalties pursuant to §620.017 R.S.Mo. §620.638(9) R.S.Mo.

(iii) Qualified Contribution. Cash contributions to a qualified fund pursuant to the terms of a contractual agreement made between the fund and a qualified economic development organization authorized by the Board to enter into such contracts. §620.638(10) R.S.Mo.

(iv) Qualified Economic Development Organization. Any corporation organized pursuant to the provisions of Chapter 355 R.S.Mo., that, as of January 1, 1991, had obtained a contract with the department to operate an innovation center to promote, assist and coordinate the research and development

of new services, products or processes in this state. §620.638(11) R.S.Mo. At the time of passage, there were four such organizations operating in St. Louis, Rolla, Kansas City and Jefferson City.

(v) Qualified Fund. A fund established by any corporation, partnership, joint venture, unincorporated association, trust or any other organization established pursuant to the laws of Missouri, and approved by the Board or the Corporation. §620.638(12) R.S.Mo. The sole purpose of each qualified fund is to make investments. One hundred percent of investments made from qualified contributions shall be qualified investments. §620.650.1 R.S.Mo.

(vi) Qualified Investment. Any investment of seed capital, start-up capital or follow-up capital in a qualified business that does not cause more than 10% of all the qualified contributions to a qualified fund to be invested in a single qualified business. §620.638(13) R.S.Mo.

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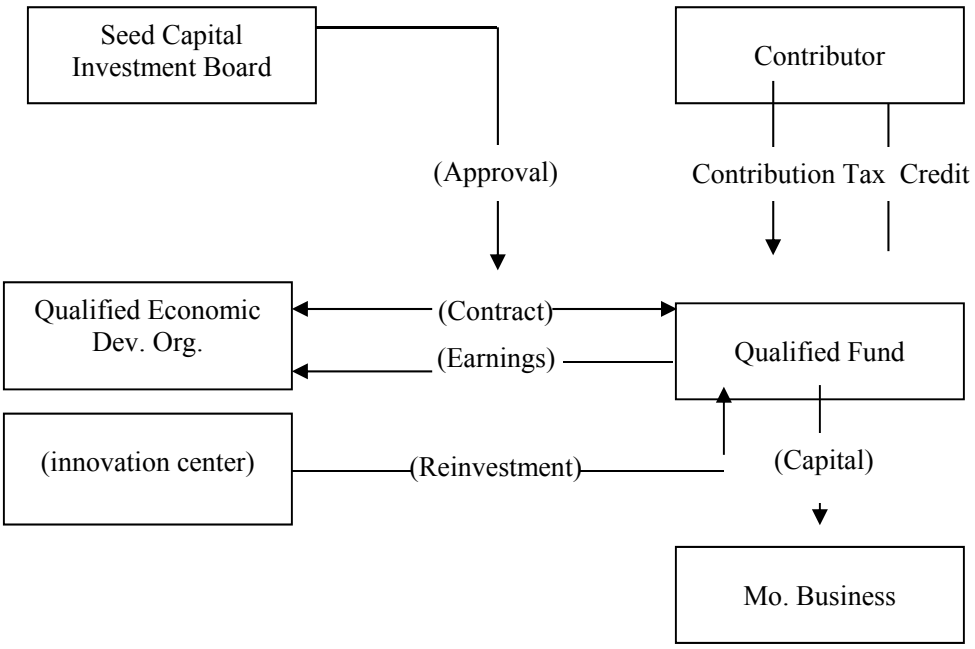
(g) Chart.



§38.1. —R & D Tax Credit for Qualified Research Expense (620.1039 R.S.Mo.)

> **As an incentive to Missouri businesses to increase their research efforts, any business may claim tax credits for up to 62% of qualified research expenses. Any research of a technical nature qualifies if it is intended to advance the business or improve the quality or performance of a marketed product.**

A taxpayer shall be allowed a tax credit, if approved by the Director of DED, against the tax otherwise due, other than withholding taxes, in an amount equal to 60% of the excess of the taxpayer's qualified research expenses expended within Missouri during the taxable year over the average of the taxpayer's qualified research expenses in Missouri in the immediately preceding three taxable years. Such R&D expenses shall be limited to expenses which equal 200% of the taxpayer's average qualified research expenses during the three immediately preceding taxable years. Certification by the director of DED shall be required as proof that the taxpayer made qualified research expenses during the taxable year. §620.1039.2 R.S.Mo. Where the amount of the credit exceeds the tax liability, the difference may be carried forward only for the succeeding five taxable years or until the full credit has been claimed, whichever first occurs. The application for claiming tax credits shall be made in the taxpayer's tax period immediately

following the tax period for which the credits are being claimed. §620.1039.3 R.S.Mo. Up to 40% of the amount of Certificates of tax credit issued but not used for years 1996-2001 may be transferred or sold with the consent of the director of DED. The funds from such sale, etc., must be used for research at Missouri University. §620.1039.4 R.S.Mo. Special rules were enacted in 1998 for automobile manufacturers, §620.1039.4.1, film production, §620.1039.4.2, and grape and wine production. §620.1039.4.3 R.S.Mo. In 2004 the legislature eliminated all tax credits under this section (SB1155). The Qualified Research Expenses Credit was repealed in 2004 via SB 1155. §620.1038.7.

§39 —Capital Access and Pilot Microenterprise Loan Programs (620.1045-620.1063 R.S.Mo.)

When a financial institution makes a loan to a qualified small business under the program, the borrower and the lender shall deposit a small amount into a loss reserve account, which amount is matched by the Department of Economic Development. Losses suffered by participating lenders may be reimbursed from the loss reserve account.

(1) Eligibility. The Missouri Capital Access Program Fund is created in the state treasury by §620.1055 R.S.Mo. Any bank, trust company, savings bank, credit union or savings and loan association with an office in Missouri may participate in the program. §620.1048(3) R.S.Mo. Under the program, the financial institution makes loans to small businesses. A "small business" is defined as an independently owned and operated business as defined in federal law, which is headquartered in and which employs at least 80% of its employees in Missouri, except that no such business shall have more than 100 employees nor more than $5,000,000 in annual revenues and must be involved in manufacturing, processing or assembling products, conducting research and development or providing services, but shall not include retail, real estate, insurance or professional services. §620.1048(6) R.S.Mo.

(2) Loss Reserve Account. A participating financial institution shall set aside an amount into a program loss reserve account, the amount to be agreed upon by it and the borrower, but not less than one half of one percent nor more than 3 1/2 percent of the principal of the loan. The borrower shall deposit into the program loss reserve account an amount equal to the amount set aside by the financial institution. §620.1051.1 R.S.Mo. The Department of Economic Development shall then transfer to the financial institution from the Missouri Capital Access Program, an amount equal to the amount deposited by the institution and the borrower into the program loss reserve account, except that for the first $2,000,000 in loans made by the financial institution, the Department shall transfer to the institution an amount equal to 150% of the combined total amount deposited by the institution and the borrower in the program loss reserve

account. §620.1051.2 R.S.Mo. A financial institution which suffers a loss on any loan made pursuant to the program, may recover its losses from the program loss reserve account. §620.1051.3 R.S.Mo. All amounts set aside by the financial institution, collected from the borrower and contributed by the Department shall be deposited by the institution into a program loss reserve account established at a location in Missouri where the institution operates. §620.1053 R.S.Mo. The program loss reserve account shall be maintained by the institution but shall be owned by and under the control of the Department. At the end of each quarter, any accumulated interest on any program loss account shall be sent to the Department for deposit in the Missouri Capital Access Program Fund. §620.1053 R.S.Mo.

(3) Use of Funds. Any loan made pursuant to the program shall be used predominantly for business activities within the State of Missouri.

(4) Limitations. No program loan, when aggregated with other program loans made by the same financial institution to the same borrower, shall exceed $500,000. No program loan shall be used to refinance prior non-program debt nor shall any program loan be made for passive real estate purposes. §620.1058 R.S.Mo.

§40. —The Missouri Individual Training Account Program Act (§§620.1400-620.1460 R.S.Mo.)

> **Under the Missouri Individual Training Account Program Act, eligible Missouri companies in distressed communities are reimbursed by tax credits for upgrading the occupational skills of their workers in the amount of 50% of actual training costs. The employee's salary cannot exceed 200% of the federal poverty level during the preceding year. In addition, the trained employee must be promoted to a position requiring more skills and paying a higher compensation upon completion of the training.**

(1) Definitions. The Act defines "individual training account" as "an account funded by the tax credits provided for in §19 of this Act for the provision of employee upgrade training to employees through their participation in classroom training provided by educational institutions." §620.1420 R.S.Mo.

(2) Purpose. Under the Act, an individual training account program is established within DED. Job training and retraining activities conducted under the Act shall be directed to employee advancement where jobs are linked to training before the training commences and shall emphasize upgrade training where current or potential employers, by means of educational programs, provide existing employees with training for higher skilled positions. §620.1410 R.S.Mo.

(3) Participation. A Missouri employer who desires to participate in the Individual Training Account Program shall provide DED with notice of intent to participate setting forth the names and occupations of employees whom the employer had selected to be trained, the name of the local educational institution that will provide the training, and a brief description of the training. §620.1430 R.S.Mo. The employer shall have complete discretion in the selection of the local educational institution and shall be responsible for the payment of the costs of classroom training. §620.1430 R.S.Mo.

(4) Tax Credits. The employer may be reimbursed for the training costs by tax credits, which may be claimed for courses provided in no more than two calendar years for each employee. For each year, the maximum amount of credit per employee which can be certified by the Department of Economic Development shall be the lesser of 50% of the cost of classroom training or $1,500. §620.1440 R.S.Mo. Tax credits may be carried forward for a period not to exceed five years and may be sold or transferred. §620.1440 R.S.Mo. No claim for the credits can be made by an employer without documentation that an employee has successfully completed the training and has been employed in the new full-time position for at least three months. The position must be an upgrade in salary and responsibilities. The salary increases shall be in addition to normal cost of living increases provided for in authorized labor management contracts. §620.1440 R.S.Mo.

§40.1 —Missouri Works Program (620.2000 to 620.2020 R.S.Mo.)[27]

In 2013 via HB 184 the legislature adopted the Missouri Works Program (Sections 620.2000 to 620.2020 R.S.Mo.) to streamline programs to incent companies creating and retaining jobs. Existing programs, including the Quality Jobs Program (620.1875 to 20.1890 R.S.Mo.) are phased out.

(a) New Jobs. **The program allows a qualified company to retain a portion of withholding taxes on wages paid to employees in newly created jobs for up to six years. Employers must offer health insurance for all full-time employees of all facilities located in the state and pay at least 50 percent of health insurance premiums. The new jobs must pay at or above the county average wage. 620.2010.6 R.S.Mo.**

(b) Retained Jobs. **Under the job retention program, a qualified company may receive tax credits in an amount up to 100% of the withholding tax generated by full time**

[27] Source = Missouri Department of Economic Development.

jobs for a period of 10 years (1) if the average wage of the retained jobs equals or exceeds 90% of the county average wage, (2) the company retains at least 50 jobs for a period of 10 years and (3) makes a new capital investment of one half the total benefits within three years of the approval.

(1) Eligible Businesses. A business registered to do business in Missouri that is the owner or operator of a project facility, which certifies that it offers health insurance to all full-time employees of all facilities located in this state, and certifies that it pays at least fifty percent of such insurance premiums is eligible for the program. Gambling establishments, consumer based retail trade, food and drinking places, public utilities, companies delinquent in the payment of any nonprotested taxes, for retained jobs a company that has filed bankruptcy, educational services, religious organizations, public administration, ethanol distillation or production, biodiesel production, or health care and social services are not eligible. 620.2005(23) R.S.Mo.

(2) Retention of Withholding Tax for New Jobs.

(a) Automatic Benefits. **(Withholding tax from new jobs for 5 or 6 years)** A qualified company may, for a period of five years from the date the new jobs are created, or six years from the date the new jobs are created if the qualified company is an existing Missouri business, retain an amount equal to the withholding tax as calculated by the Department using a schedule based on average wages, from the new jobs that would otherwise be withheld and remitted by the qualified company under the provisions of sections 143.191 to 143.265 if:

(i) Urban. The qualified company creates 10 or more new jobs, and the average wage of the new payroll equals or exceeds 90% of the county average wage §620.2010.1(v) R.S.Mo.;

(ii) Rural. The qualified company creates 2 or more new jobs at a project facility located in a rural area, the average wage of the new payroll equals or exceeds 90% of the county average wage, and the qualified company commits to making at least $100,000 of new capital investment at the project facility within two years. §620.2010.1(2) R.S.Mo. (a rural county is one that has a population less than 75,000 or that does not contain a city with a population greater than 50,000 according to the most recent federal decennial census §620.2005(28) R.S.Mo.): or

(iii) Enhanced Enterprise Zone. The qualified company creates 2 or more new jobs at a project facility located within an Enhanced Enterprise Zone under sections 135.950 to 135.963, the average wage of the new payroll equals or exceeds 80% of the county average wage, and the qualified company commits to making at least $100,000 in new capital investment at the project facility within two years of approval. 620.2010.1(3) R.S.Mo.

(b) Discretionary Benefits (Tax Credits). ***(6% of new payroll for 5 or 6 years)*** In addition, the department may award a qualified company that satisfies subsection (1) of 620.2010.1 R.S.Mo., tax credits, issued each year for a period of five years from the date the new jobs are created, or for a period of six years from the date the new jobs are created if the qualified company is an existing Missouri business, up to six percent of new payroll; provided total benefits do not exceed nine percent of new payroll in any calendar year. In determining the amount of tax credits to award to a qualified company under this subsection, the department shall consider (i) the significance of the qualified company's need for program benefits, (ii) the amount of projected net fiscal benefit to the state of the project and the period in which the state would realize such net fiscal benefit; (iii) the overall size and quality of the proposed project, including the number of new jobs, new capital investment, proposed wages, growth potential of the qualified company, the potential multiplier effect of the project, and similar factors, (iv) the financial stability and creditworthiness of the qualified company; (v) the level of economic distress in the area, (vi) an evaluation of the competitiveness of alternative locations for the project facility, as applicable, and (vii) the percent of local incentives committed. 620.2010.2 R.S.Mo. ("Discretionary Factors".)

(c) Mega Works. ***(6-7% for 5 or 6 years refundable)*** In lieu of the benefits available as described under (a) and (b) above (620.2010.1 and 620.2010.2), a qualified company may, for a period of five years from the date the new jobs are created, or for a period of six years from the date the new jobs are created if the qualified company is an existing Missouri business, retain an amount equal to the withholding tax as calculated by the Department using a schedule based on average wages, from the new jobs that would otherwise be withheld and remitted by the qualified company under the provisions of sections 143.191 to 143.265 equal to:

(i) 6% for 5 years. Six percent of new payroll for a period of five years from the date the required number of new jobs were created if the qualified company creates 100 or more new jobs and the average wage of the new payroll equals or exceeds 120% of the county average wage of the county in which the project facility is located (§620.2010.4(1)); or

(ii) 7% for 5 years. Seven percent of new payroll for a period of five years from the date the required number of jobs were created if the qualified company creates 100 or more new jobs and the average wage of the new payroll equals or exceeds 140% of the county average wage of the county in which the project facility is located (§620.2010.4(2)).

The department shall issue a refundable tax credit for any difference between the amount of benefit allowed and the amount of withholding tax retained by the company, in the event the withholding tax is not sufficient to provide the entire amount of benefit due to the qualified company under this subsection. 620.2010.4(2) R.S.Mo.

(d) Discretionary Benefits for Mega Works. ***(Additional tax credits for 5-6 years for Mega Projects -3% of new payroll)*** In addition to the benefits available as described in (d) above (620.2010.4 R.S.Mo) the department may award a qualified company that satisfies the provisions of 620.2010.4 R.S.Mo. (Mega Works) *additional tax credits*, issued each year for a period of five years from the date the new jobs are created, or for a period of six years from the date the new jobs are created if the qualified company is an existing Missouri business, in an amount equal to or less than three percent of new payroll; provided total benefits do not exceed nine percent of new payroll in any calendar year. In determining the amount of tax credits to award to a qualified company under this subsection, the department shall consider Discretionary Factors provided under 620.2010.2 R.S.Mo., 620.2010.5 R.S.Mo.

(e) Written Agreement. Upon approval of a notice of intent to receive tax credits under 620.2010.2 R.S.Mo. and 620.2010.5 R.S.Mo., the Department and the qualified company shall enter into a written agreement specifying, at a minimum, (i) the committed number of new jobs, new payroll, and new capital investment for each year during the project period; (ii) the date or time period during which the tax credits shall be issued, which may be immediately or over a period not to exceed two years from the date of approval of the notice of intent; (iii) clawback provisions, as may be required by the department; and (iv) any other provisions the department may require. 620.2010.3 R.S.Mo.

(f) Construction Start or Public Announcement Prohibited. No benefits shall be available under this section for any qualified company that has performed significant, project-specific site work at the project facility, purchased machinery or equipment related to the project, or has publicly announced its intention to make new capital investment at the project facility prior to receipt of a proposal for benefits under this section or approval of its notice of intent, whichever occurs first. 620.2010.6 R.S.Mo.

(g) Tax Credit Calculation. For tax credits under section 620.2010, the Department shall allocate the annual tax credits based on the date of approval, reserving such tax credits based on the Department's best estimate of new jobs and new payroll and other applicable factors. However, the annual additions to tax credits shall be subject to annual verification of actual payroll by the Department.

(4) Retention of Jobs.

(a) Risk of Relocation. In connection with the retention of jobs and the making of new capital investment in this state, a qualified company may be eligible to receive the benefits described in this section if the department determines that there is a significant probability that the qualified company would relocate to another state in the absence of the Missouri Works Program benefits. §620.2015.1 R.S.Mo.

(b) Retention of Withholding Tax for 10 Years. A qualified company meeting the requirements of this section may be authorized to retain an amount not to exceed 100% of the withholding tax from full-time jobs that would

otherwise be withheld and remitted by the qualified company under the provisions of sections 143.191 to 143.265 for a period of ten years. Written agreements will contain detailed performance requirements and repayment penalties in event of nonperformance. §620.2015.

(c) Eligibility Criteria-Retention of 50 Jobs, Capital Investment and Wages. In order to be eligible to receive benefits under this section, the qualified company shall meet each of the following conditions:

> (i) The qualified company shall agree to retain, for a period of ten years from the date of approval of the notice of intent, at least 50 retained jobs; and
>
> (ii) The qualified company shall agree to make a new capital investment at the project facility within three years of the approval in an amount equal to one-half the total benefits, available under this section, which are offered to the qualified company by the department; and
>
> (iii) The average wage of the retained jobs equals or exceeds 90% of the county average wage.

620.2015.3 R.S.Mo. In awarding benefits under this section, the department shall consider the factors set forth in 620.2010.2, set forth in 2(b) above. 620.2015.4 R.S.Mo.

(d) State-Wide Cap. In no event shall the total amount of benefits available to all qualified companies under this section exceed $6,000,000 in any fiscal year. 620.2015.1 R.S.Mo.

(5) Participation procedures.

(a) Notice of Intent. A company that intends to seek benefits shall submit to the department a notice of intent. The Department shall respond to such notice of intent within 30 days with an approval or rejection, provided the Department may withhold approval or provide a contingent approval until it is satisfied that proper documentation of eligibility has been provided. Failure to respond on behalf of the Department shall result in the notice of intent being deemed approved. §620.2020.1 R.S.Mo.

(b) Request for Benefits. The Department shall respond to a written request of a company for benefits under the Missouri Works program within 5 business days of receipt of such request. Such response shall contain either a proposal of benefits or a written response refusing such a proposal and stating the reasons for such refusal. §620.2020.1 R.S.Mo.

(c) Written Agreement-Clawbacks. Upon approval of a notice of intent to request benefits, the department and the qualified company shall enter into a written agreement covering the applicable project period, specifying at a

minimum: (i) the committed number of retained jobs, payroll, and new capital investment for each year during the project period, (ii) clawback provisions, as may be required by the department, and (iii) any other provisions the department may require. 620.2015.5 R.S.Mo.

(d) Beginning of Withholding Retention and Tax Credits. Upon approval by the Department, the company may begin the retention of the withholding taxes when it reaches the required number of jobs in the average wage meets or exceeds the applicable percentage of County average wage. Tax credits, if any, may be issued when the Department determines that the qualified company has exceeded the applicable percentage of County average wage and the required number of jobs. §620.2020.4 R.S.Mo.

(6) Subsequent New Jobs. A qualified company receiving approval may receive additional benefits for subsequent new jobs at the same facility after the full initial project if the applicable minimum job requirements are met.

(a) New Notice of Intent.

- No Limit. There shall be no limit on the number of projects a Qualified company may participate in under the program. The Company may elect to file a notice of intent to begin a new project concurrent with an existing project, if (1) the applicable minimum job requirements are achieved, (2) the company provides the Department with the required annual reporting, and (3) is in compliance with this program and any other state programs in which the company is participating or has previously participated.
- Bright Line Separation. *However, the Company shall not receive any further program benefits under the original approval for any new jobs created after the date of the new notice of intent and any jobs created before the new notice of intent shall not be included as new jobs for purposes of the benefit calculation for the new approval*.
- New Determination. When the company has filed and received approval of a notice of intent and subsequently filed another notice of intent, the Department shall apply the definition of project facility under §620.2005 (18) R.S.Mo. to the new notice of intent as well as all previously approved notices of intent and shall determine the application of the definitions of new job, new payroll, project facility-based employment, and project facility based payroll accordingly. §620.2020.1 R.S.Mo.

(b) Minimum Job Requirements. A qualified company may retain authorized amounts from the withholding tax for the duration of the project once the applicable minimum job requirements have been met. No benefits shall be provided until the company meets the applicable minimum new job requirements.

In the event the Company does not meet the minimum job requirements, it may submit a new notice of intent or the department may provide a new approval for a new project. §620.2020.8 R.S.Mo.

(7) Other State Programs.

(a) Withholding Credited to Other Programs. Notwithstanding any provision of law to the contrary, the benefits available to the qualified company under any other state programs for which the company is eligible and which utilize withholding tax from the new or retained jobs of the company shall first be credited to the other state program before the withholding under the Missouri Works Program will begin to accrue. §620.2020.2 R.S.Mo.

(b) Training.

(i) Withholding. If any qualified company also participates in a job training program utilizing withholding tax, the company shall retain no withholding tax under the Missouri Works Program, but the department shall issue a refundable tax credit for the full amount of benefit allowed under the Missouri Works Program.

(ii) Tax Credits. The calendar year annual maximum amount of tax credits which may be issued to a qualifying company that also participates in a job training program shall be increased by an amount equivalent to the withholding tax retained by that company under a jobs training program. 620.2020.3 R.S.Mo.

(c) Same Jobs. Notwithstanding any provision of law to the contrary, no qualified company that is awarded benefits under this program shall simultaneously receive benefits under the programs referenced in this subsection at the same capital investment while receiving benefits under the provisions of section 620.1910 for the same jobs. 620.2020.13 R.S. Mo.

(8) Penalty for Default.

(a) Failure to Maintain Jobs and Wages. If the qualified company's average wage is reported in any annual report as below the applicable percentage of the county average wage, the qualified company has not maintained the employee insurance as required, or if the number of jobs is below the number required, the qualified company shall not receive tax credits or retain the withholding tax for the balance of the project period. §620.2020.3.

(b) Failure to Reach Minimums. Any authorization of tax credits shall expire if, within two years from the date of commencement of operations, or approval if applicable, the qualified company has failed to meet the applicable minimum job requirements. 620.2020.8 R.S. Mo.

(c) Prohibited Hiring. Any taxpayer who is awarded benefits under the Missouri Works Program who knowingly hires individuals who are not allowed to work legally in the United States shall immediately forfeit such benefits and shall repay the state an amount equal to any state tax credits already redeemed and any withholding taxes already retained. 620.2020.6 R.S.Mo.

(9) State-Wide Tax Credit Caps. The maximum amount of tax credits that may be authorized under the Missouri Works Program for any fiscal year shall be limited as follows, less the amount of any tax credits previously obligated for that fiscal year under any of the tax credit programs referenced in 620.2020.13 (see (12) below):

(i) For the fiscal year beginning on July 1, 2013, but ending on or before June 30, 2014, no more than one hundred six million dollars in tax credits may be authorized;

(ii) For the fiscal year beginning on July 1, 2014, but ending on or before June 30, 2015, no more than one hundred eleven million dollars in tax credits may be authorized; and

(iii) For any fiscal year beginning on or after July 1, 2015, no more than one hundred sixteen million dollars in tax credits may be authorized for each fiscal year. 620.2020.7 R.S.Mo.

(10) Annual Reporting. The Department may withhold the approval of any benefits under this program until it is satisfied that proper documentation has been provided, and shall reduce the benefits to reflect any reduction in full-time employees or payroll. §620.2020.4 R.S.Mo. The annual issuance of tax credits for new jobs under 620.2010 is subject to annual verification of actual payroll by the department. Failure to timely file the annual report required under this section results in the forfeiture of tax credits attributable to the year for which the reporting was required and a recapture of withholding taxes retained by the qualified company during such year. 620.2020.3 R.S.Mo.

(11) Attributes of Tax Credits.

(a) No Carry-Forward. Tax credits provided under this program may be claimed against taxes otherwise imposed by chapters 143 and 148, and may not be carried forward, but shall be claimed within one year of the close of the taxable year for which they were issued.

(b) Assignable. Tax credits provided under this program may be transferred, sold, or assigned. 620.2020.9 R.S.Mo.

(c) Refundable. The director of revenue shall issue a refund to the qualified company to the extent that the amount of tax credits allowed under the Missouri Works Program exceeds the amount of the qualified company's tax liability under chapter 143 or 148. 620.2020.11 R.S.Mo.

(12) Phase Out of Existing Programs. Notwithstanding any provision of law to the contrary, beginning August 28, 2013, no new benefits shall be authorized for any project that had not received from the department a proposal or approval prior to August 28, 2013, under the development tax credit program created under sections 32.100 to 32.125, the rebuilding communities tax credit program created under section 135.535, the enhanced enterprise zone tax credit program created under sections 135.950 to 135.973, and the Missouri quality jobs program created

under sections 620.1875 to 620.1890. If a project proposal or approval was received prior to August 28, 2013 the administering agency can authorize related benefits.

The provisions of this subsection shall not be construed to limit the ability of any governing authority to provide any local abatement or designate a new zone under the enhanced enterprise zone program created by sections 135.950 to 135.963. 620.2020(13) R.S.Mo.

(13) Records. Any qualified company approved for benefits under this program shall provide to the department upon request, any and all information and records reasonably required to monitor compliance. The Missouri Works program shall be considered a business recruitment tax credit under §135.800 .2 (4) R.S.Mo. and any company approved for benefits shall be subject to the provisions of §§135.800 – 135.830 R.S.Mo. (The Tax Credit Accountability Act). §620.202 0.5 R.S.Mo.

(14) Verification of Good Standing. Prior to the issuance of tax credits or the retention of withholding, the Department shall verify to the Department of revenue and any other state department that the tax credit applicant does not owe any delinquent income or other taxes or fees or assessments, and through the Department of Insurance, financial institutions in professional registration that the applicant does not owe any delinquent insurance taxes or other fees. Such delinquency shall not affect the approval, except that any tax credits issued shall be first applied to the delinquency and any amount issued shall be reduced thereby. The taxpayer should be granted 30 days to satisfy the deficiency if it is found delinquent after June 15 but before July 1 in any year. §620.202 0.10 R.S.Mo.

(15) Net Fiscal Benefit. It is repeatedly stated throughout the Act that the amount of benefits awarded to a qualified company under this act shall not exceed the projected net fiscal benefit and or the least amount necessary to obtain the qualified company's commitment to retain the necessary number of jobs and make the required new capital investment. 620.2015.2 R.S.Mo. See, for example, discretionary benefits under §620.2010.2 and 620.2010.5 (Mega Works).

(16) Employee Is Credited With Withholding Taxes. In all cases under the Act in which the employer retains the withholding tax of the employees, an employee of a qualified company shall receive full credit for the amount of tax withheld as provided in §143.211 R.S.Mo. §620.2020.12 R.S.Mo.

(17) Sunset. Under section 23.253 of the Missouri sunset act: (i) the provisions of the Missouri Works Program authorized under sections 620.2000 to 620.2020 shall automatically sunset six years after August 28, 2013, unless reauthorized by an act of the general assembly; and (ii) if such program is reauthorized, the Missouri Works Program shall automatically sunset twelve years

after the effective date of this reauthorization of sections 620.2000 to 620.2020; and (iii) Sections 620.2000 to 620.2020 shall terminate on September first of the calendar year immediately following the calendar year in which the program authorized under sections 620.2000 to 620.2020 is sunset. §620.2020.17 R.S. Mo.

§40.2 —Manufacturing Jobs Act (620.1910 R.S.Mo.) (Ford Motor Plant – Liberty, MO)

(1) Notice of Intent. Any Qualified Manufacturing Company [28] or a Qualified Supplier that wishes to participate in the Manufacturing Jobs Act shall file a notice of intent on the form developed by the Department of Economic Development which form shall state the company's intent to create new jobs or retain current jobs and make additional capital investment. The notice shall specify the minimum number of such newer retained jobs and the minimum amount of such capital investment. The department Shall respond within 30 days to such notice of intent with either an approval or rejection. Failure to respond on behalf of the department shall result in the notice of intent being deemed an approval for the purposes of this section. §620.1910.3 R.S.Mo.

(2) Retention of Withholding Tax.

(a) Qualified Manufacturing Company. A Qualified Manufacturing Company that manufactures a *new product* may, upon the department's approval of a notice of intent and execution of an agreement that meets the requirements of subsection 9 of this section, but no earlier than January 1, 2012, retain *100%* of the withholding tax from full-time jobs at the facility for a period of 10 years. A Qualified Manufacturing Company that modifies or expands the manufacture of an *existing product* may, upon the departments of approval of the notice of intent and the execution of an agreement that meets the requirements of subsection 9 of this section, but no earlier than January 1, 2012, retain *50%* of the withholding tax from full-time jobs at the facility for a period of seven years the company shall be eligible for participation in the Missouri quality jobs program for any new jobs for which it does not retain withholding tax under this section. §620.1910.4 R.S.Mo.

(b) Qualified Supplier. A qualified supplier may upon approval of the notice of intent by the Department retain *all* withholding tax from new jobs for a period of *three years* from the date of approval of the notice of intent or for a

[28] A qualified manufacturing company is defined in section 620.1910 .2 (11) as a business with an NAICS code 033611 that: (A) manufactures goods at a facility in Missouri; (B) in the case of the manufacture of a new product, commits to make a capital investment of at least $75,000 per retained jobs with no more than two years of the date of the qualified manufacturing company begins to retain withholding tax under this section, or in the case of the modification or expansion of the manufacture of an existing product, commits to make a capital investment of at least $150,000 per retained jobs within no more than two years from the date the qualified manufacturing company begins to retain withholding tax under this section.

period of *five years* if the supplier pays wages for the new jobs equal to or greater than 120% of counties average wage these benefits are mutually exclusive with certain benefits under chapter 100 (Business Use Incentives for Large-Scale Developments) and chapter 135. R.S.Mo. §620.1910.5 R.S.Mo.

(3) Company and Statewide Caps. The maximum amount of withholding tax that may be retained by anyone qualified manufacturing company shall not exceed $10 million per calendar year. The statewide cap is $15 million per calendar year. §620.1910.6 R.S.Mo.

(4) Mutual Exclusion with Other Benefits. Benefits under the Act are mutually exclusive with benefits under the Business Use Incentives for Large Scale Developments Act (§§ 100.700 – 100.850) , the New or Expanded Business Act (§§ 135.100 – 135.150) the Enterprise Zone Act (§§135 200 – 135 286), the Rebuilding Distressed Communities Act (§135.535), the Rural Empowerment Zone Act (§§ 35.900 – 135.906 or the New Jobs Training Program §§178.892 – 178.896). The benefits available to the qualified manufacturing company under any other state programs which utilize withholding tax shall be first credited to the other state programs. Although any qualified manufacturing company or supplier that is awarded benefits under the Manufacturing Jobs Act is exempted from the enrollment requirements under the Illegal Immigrants Act (§285.525 et. seq.), If they knowingly hire individuals who are not allowed to work legally in the United States, they shall immediately forfeit all benefits and repay the state an amount equal to any withholding taxes already retained.

(5) Program Agreement. Within six months of completion of a notice of intent, the qualified manufacturing company shall enter into an agreement with the department, which shall include:

(a) Qualified Manufacturing Company Default – Shortfall in the Amount of Capital Investment. If the amount of capital investment is not made within the two-year. The company shall cease retaining any withholding tax and shall forfeit all rights to retain the tax for the remainder of the withholding.. In addition, the qualified manufacturing company shall repay any amounts already retained +5% interest per annum. If the shortfall is due to economic conditions beyond the control of the company, the director may suspend rather than terminate the privilege to retain withholding tax for up to three years. Any such suspension shall extend the withholding. By the same amount of time. No more than one suspension shall be granted. (§620.1910.9(1).

(b) Discontinuance of New Project. If the company discontinues the manufacturing of the new product and does not replace it with the subsequent or additional new product at any time during the withholding, the company shall immediately cease retaining any withholding tax and forfeit all rights to retain for the remainder of the withholding. (§620.1910 .9(1).

(6) Sunset. The Act shall sunset October 12, 2016. (620.1910 .11 (1)).

§41. —Community Development Block Grants

Community Development Block Grants provide funds to cities or counties for development of public infrastructure necessary to support the location of new industrial facilities, the expansion of existing facilities, or to prevent the relocation or closing of a facility. Funding for the CDBG program is mainly provided by the U.S. Department of Housing and Urban Development which requires that 51% of the employees hired for the project be low-and-moderate income at the time of hiring. Approval of the CDBG program is subject to a public hearing application and completion of an environmental review by the applicable city or county.

(1) Generally. The authority for funding CDBG programs is found in the following sources:

(a) Federal statute (Housing and Community Development Act of 1974);
(b) HUD regulations;
(c) HUD memorandums regarding the federal regulations;
(d) Consolidated plan, and
(e) Six individual program guidelines.

The CDBG program , which is administered federally by the United States Department of Housing and Urban Development (HUD) and locally by the Department of Economic Development (DED), was designed to deal broadly with the problems of urban decline. Implemented by the Housing and Community Development Act of 1974 ("Act"), Pub. L. No. 93-383, 88 Stat. 633, August 22, 1974 (codified as amended in scattered sections of 42 U.S.C.), the CDBG program eliminated categorical grant programs and gave local governments discretion in the use of funds directed toward urban development. 42 U.S.C. §5301(d) (1994). The Act contains a list of 24 activities for which CDBG funds may be expended, five of which are specifically geared toward economic development. 42 U.S.C. §5305(a) (1994).

(2) Local Administration and Responsibility. After the federal authorization, the DED must act under a series of HUD regulations and memoranda. The DED is responsible each year for drafting a consolidated plan and six individual program guidelines detailing local distribution and use of funds. Prior to receipt of funds, recipients must produce a statement of objectives and projected use of funds for each grant year and a planning document called the "consolidated plan".

(3) Low and Moderate Income Participation. At least 51% of the new jobs to be created with the aid of CDBG funds must be filled by persons considered "low to moderate income".

(a) Duration of Requirement. The CFRs do not appear to require for how long such LMI persons must be employed. The Participation Agreement requires that the Company certify that it will employ a certain number of "Full-Time, Year-Round Employees at this location for a period of at least five (5) years from the date of DED's conditional approval of the Application," but does not tie this requirement to the 51% LMI requirement. In practice, the City's grant administrator reported that the 51% LMI requirement should be maintained at least until a project has been closed (i.e., when infrastructure funded with CDBG funds has been completed and when the minimum number of jobs has been created (e.g., for $900,000 project, and $10,000 in funds per job, at least 90 jobs must be created)). The administrator then explained that projects are not monitored after closing, making it unlikely that DED would seek to verify that the LMI percentage was maintained after closing. Accordingly, so long as the minimum number of jobs was maintained for this 5 year period, and the LMI percentage maintained through CDBG Project closing, the LMI requirements would appear to be satisfied.

(b) Definition. "Low- and moderate-income person" means a member of a family having an income equal to or less than the Section 8 low-income limit established by HUD. Unrelated individuals will be considered as one-person families for this purpose. 24 CFR 570.3. "Family" includes, but is not limited to, the following, regardless of actual or perceived sexual orientation, gender identity, or marital status: (1) A single person, who may be an elderly person, displaced person, disabled person, near-elderly person, or any other single person; or (2) A group of persons residing together, and such group includes, but is not limited to: (i) A family with or without children (a child who is temporarily away from the home because of placement in foster care is considered a member of the family); (ii) An elderly family; (iii) A near-elderly family; (iv) A disabled family; (v) A displaced family; and (vi) The remaining member of a tenant family. Id. referencing above definition in 24 CFR 5.403.

> "Income," means, for the purpose of determining whether a family or household is low- and moderate-income, grantees may select any of the three definitions listed below for each activity, except that integrally related activities of the same type and qualifying under the same paragraph of § 570.208(a) shall use the same definition of income. The three definitions are as follows:
>
> (1)(i) "Annual income" as defined under the Section 8 Housing Assistance Payments program at 24 CFR 813.106 (except that if the CDBG assistance being provided is homeowner rehabilitation under § 570.202, the value of the homeowner's primary residence may be excluded from any calculation of Net Family Assets); or

> (ii) Annual Income as reported under the Census long-form for the most recent available decennial Census. This definition includes: (A) Wages, salaries, tips, commissions, etc.; (B) Self-employment income from own nonfarm business, including proprietorships and partnerships; (C) Farm self-employment income; (D) Interest, dividends, net rental income, or income from estates or trusts; (E) Social Security or railroad retirement; (F) Supplemental Security Income, Aid to Families with Dependent Children, or other public assistance or public welfare programs; (G) Retirement, survivor, or disability pensions; and (H) Any other sources of income received regularly, including Veterans' (VA) payments, unemployment compensation, and alimony; or (iii) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 for individual Federal annual income tax purposes.

Further, a grantee shall estimate the annual income of a family or household by projecting the prevailing rate of income of each person at the time assistance is provided for the individual, family, or household (as applicable). Estimated annual income shall include income from all family or household members, as applicable. Income or asset enhancement derived from the CDBG-assisted activity shall not be considered in calculating estimated annual income. 24 CFR 570.3.

Typically the grant administrator in combination with DED will establish the requisite income levels to meet the above definition. [see doc 385447].

(4) CDBG Funds Used for Infrastructure in Connection with Industrial Development.

(a) Federal Statute. Authorization for infrastructure grants is found in Title I, Housing and Community Development Act of 1974 (42 U.S.C. §5301 *et seq*.). Under the Act, the grant must benefit at least "51% persons from low to moderate income (LMI) categories." 42 U.S.C. §5305(C)(1)(c).

(b) Federal Regulations. 24 C.F.R. §570.483 "State Administration of CDBG Nonentitlement Funds" provides:

> §570.483(b) Activities - Low and Moderate Income Persons: An activity will be considered to address the objective of benefiting low and moderate income persons if it meets one of the criteria in paragraph (b) of this section, unless there is substantial evidence to the contrary. In assessing any such evidence, the full range of directive facts of the assisted activity will be considered. The activities, when taken as a whole, must not benefit moderate income persons to the exclusion of low income persons.

* * *

§570.483(b)(4) - Job Creation or Retention Activities:

(i) An activity designated to create permanent jobs where at least 51% of the jobs, computed on a full-time equivalent basis, involve the employment of low and moderate persons. For an activity that creates jobs, the unit of general local government must document that at least 51% of the jobs will be held by, or will be made available to low and moderate income persons.

* * *

(iii) Jobs will be considered to be available to low and moderate income persons for these purposes only if:

(A) Special skills that can only be acquired with substantial training or work experience or education beyond high school are not a prerequisite to fill such jobs, or the business agrees to hire unqualified persons and provide training; and

(B) A unit of general local government and the assisted business take actions to ensure that low and moderate income persons receive first consideration for filling such jobs.

(iv) For purposes of determining whether a job is held by or made available to a low- or moderate-income person, the person may be presumed to be a low- or moderate-income person if:

(A) He/she resides within a census tract (or block numbering area) that [meets certain criteria].

(c) Duration. There are no federal or state regulations controlling how long the low to moderate income hiring requirement remains in place, but, in practice, the employer must sign an agreement with DED providing that the number of jobs promised will exist for a period of five years after funding.

(d) State Statute. §100.270(23) R.S.Mo. provides that the Missouri Development Finance Board may receive federal funds for deposit into the Infrastructure Development Fund for repair, replacement or further development of the infrastructure of the state and its political subdivisions. This program assists local governments in the development of public infrastructure that is essential for industries to locate new facilities, expand existing facilities, or prevent the relocation or closing of a facility where the local government has exhausted its available resources.

(e) State Regulations. The Department of Economic Development claims to have reasonable latitude to interpret the LMI requirement. They could be requested to interpret the requirements to the extent that a "best faith attempt"

would be sufficient. They could provide assurance that should the local government be judged in violation of the requirements, DED would provide a mechanism to replace the CDBG Funds with other funds and hold the Company harmless. The following are policies adopted by DED.

(5) Geographic Restrictions. The grant or loan must be made in cooperation with a city or county sponsor in a "non-entitlement" area where the project will be located. A "non-entitlement" area is any city or county in Missouri other than large urban areas such as St. Louis City or County, Kansas City, Independence, St. Charles, Lee's Summit, Joplin, Columbia, Springfield, or St. Joseph.

(6) Funding Limits. The maximum grant per project is the lower of $500,000, 40% of the industry's capital investment, or $10,000 per job (depending on the area and type of project).

(7) Use of Funds. Grant funds may be used for public streets, water or sewer lines, engineering, and other public facilities necessary to support the project.

(8) Funding Procedure.

(a) Pre-Approval Actions. The company cannot make a public announcement of the project prior to DED's contingent approval of an application submitted by a city or county. Also, neither the company, the developer, nor the local government may begin any construction related to the project before DED's approval and the completion of the environmental review (approximately 45 days). An environmental review must be conducted by a city or county sponsor, and may be started at any time, even prior to submission of an application.

(b) Notice and Hearing. A sponsor (city/county) inserts a public hearing notice in a local newspaper. At least five days later, a public hearing is held by the sponsor. The sponsor must also complete the environmental review, and have a FONSI/RFF notice published in the newspaper.

(c) Application. The sponsor (city/county) submits application documents to DED. If DED approves the grant request, a letter will be sent to the sponsor and company.

(d) Grant Agreement and Flow of Funds. A Grant Agreement is executed between DED and the city/county sponsor. Grant proceeds are typically disbursed after all other funds. Proceeds would be provided upon the submission of invoices for approved items, or other approved documentation. Such documents must be dated after the date of DED's approval of the loan. Typical turn-around time from the submission of invoices to the receipt of proceeds is 10 days.

(e) Participation Agreement. A participation agreement is executed between the company creating the jobs and DED. (See Appendix F.)

(9) Restrictions.

(a) "But For." The company must prove that but for the Industrial Infrastructure grant, the project could not occur. A project would not be eligible if it begins prior to DED's approval of the grant.

(b) Local Effort. The local government applicant must provide such resources (cash, in-kind as it has) available.

(c) Multiple Beneficiaries. More than one business must potentially benefit from the facilities to be funded.

(d) Benefit to For-Profit Industrial Parks. Industrial parks owned by a for-profit developer are not a priority, except in rare cases. In any case, if a for-profit property owner may realize a benefit from the public improvements, certain restrictions may be imposed.

(e) Public Ownership. A public entity must own the facilities to be funded

(10) Timing. DED will provide a decision on funding within about two to three weeks after the submission of a completed application. There is no deadline for applications to be submitted.

(11) Priority Companies. Manufacturing, processing, and assembly which produce wages above the average for the area, provide health benefits, and have high value-added processes receive the highest priority. In areas of high economic distress DED has more discretion on the types of businesses which are prioritized. No intra-state relocation projects, except where the alternative is that the business would move out of the state, are eligible.

§42. —Federal Programs

When traditional funding resources such as bank loans and owner equity have been maximized, Missouri acts as a conduit for several alternative financing sources to promote economic development. Each specific loan program contains certain eligibility requirements and restrictions. All require a public hearing and trigger federal and state prevailing wage rates.

(1) Loan Guarantee Program.

(a) Purpose. The purpose of the Loan Guarantee Program (Public Law 93-383, Title I of the Housing and Community Development Act of 1974; as amended, 24 CSR Part 570) is to provide "gap" financing for new or expanding businesses that cannot access complete funding for a project. "Gap" financing means other sources of financing (including bank loans and owner equity) have been maximized, and a shortfall exists in financing. DED will guarantee 50% to 90% of the principal balance (after liquidation of assets) of a loan made by a financial institution. The Loan Gurantee Program is similar to the SBA 7(a) program, which must be exhausted prior to the use of this program.

(b) Funding Limits. The maximum funding available is based on the lower of: $400,000 per project, or $20,000 per new full-time permanent job created or retained. Approval is based on the good character of the owners, sufficient cash flow, adequate management, and reasonable collateral.

(c) Use of Funds. The purchase of real estate, new machinery and equipment or working capital are eligible. Lines of credit are not eligible. Manufacturing, processing, and assembly companies are prioritized.

(d) Funding Procedure.

(i) Information to Sponsor. The company provides financial and project information to the applicant (city or county).

(ii) Notices and Hearing. A public hearing notice is placed in a local newspaper. At least five days later, a public hearing is held by the sponsor. The sponsor must complete the environmental review, and have a FONSI/RFF notice published in the newspaper.

(iii) Application. The application is submitted to DED. If it meets all eligibility criteria, DED will issue a letter specifying contingencies prior to final approval. This process takes approximately two to three weeks from the submission of a completed application.

(iv) Flow of Funds. Loan funds are disbursed by the bank after the submission of invoices (paid or unpaid) which are dated after the later of the loan approval or environmental review.

(e) Restrictions.

(i) Beginning of Project. The company's project cannot begin and funds cannot be spent prior to the completion of (a) the environmental review and (b) the approval of the project by DED. The environmental review is conducted by the applicant (city or county) and may be started at any time, even prior to the submission of an application. Once the application is approved, the loan agreement and guarantee are executed, and the environmental review process has been completed, the project may begin.

(ii) Wage Rates. If loan proceeds are used for the financing of building construction or the installation of machinery, federal and state prevailing wage rates must be paid to the employees of contractors.

(iii) Exhaustion of Other Sources. The company must demonstrate that other public programs have been maximized (as well as bank financing and active owner equity resources). The public programs that can be utilized are the SBA 7a, LowDoc and 504 loans, FmHA guaranteed or direct loans, or EDA regional revolving loans. The Action Fund loan would take subordinate lien positions to those programs in most cases.

(f) Terms of Loan. The term of the loan is a maximum of three to five years for permanent working capital; five to ten years for machinery and equipment; and seven to fifteen years for real estate. The interest rate is determined by the bank, but cannot exceed prime plus 2%. The debt/worth ratio should not exceed 4/1. Any available collateral should be secured, including personal guarantees for closely-held companies, and/or corporate guarantees, as

applicable. Personal guarantees are required for owners of more than 20% of the company. Equity injection for start-up projects is at least 20% to 30%. Any administrative, legal, or closing costs must be paid by the business.

(2) Action Fund Loan Program for New or Expanding Manufacturing, Processing and Assembly Businesses.

(a) Purpose. The purpose of this program (Public Law 93-383, Title I of the Housing and Community Development Act of 1974; as amended, 24 CSR Part 570) is the creation of new, higher quality jobs by providing a last resort gap loan to new or expanding manufacturing, processing, and/or assembly businesses. Payments may be deferred for up to two to three years for faster growing companies if cash flow is inadequate. The projected growth, economic impact of the company, risk of failure, and quality of management are critical factors for approval.

(b) Funding Limits. An Action Fund Loan is limited to the LOWER of: $400,000 per project; 30% of the total project cost; or $20,000 per new full-time year-round job.

(c) Use of Funds. The purchase of new machinery and equipment or working capital are eligible. Refinancing, payout of stockholders, buyouts, or lines of credit are not eligible.

(d) Funding Procedure.

(i) Application by Company. The company submits an application to the Department of Economic Development. DED will review the application, and recommend the appropriate funding sources.

(ii) Notices and Hearing. If DED determines that an Action Fund loan is appropriate, a sponsor (city/county) would insert a public hearing notice in a local newspaper. At least five days later, a public hearing is held by the sponsor. The sponsor would complete the environmental review, and have a FONSI/RFF notice published in the newspaper.

(iii) Application by Sponsor. The sponsor (city/county) submits application documents to DED. If DED approves the loan request, a letter will be sent to the sponsor and company.

(iv) Loan Agreement and Flow of Funds. A Loan Agreement is executed between the company, DED and the city/county sponsor. Action Fund loan proceeds are typically disbursed after all other funds. Proceeds would be provided upon the submission of invoices for approved items, or other approved documentation. Such documents must be dated after the date of DED's approval of the loan. Typical turn-around time from the submission of the request for funds to the receipt of proceeds is ten days.

(e) Restrictions.

(i) "But For." The company must prove that but for the Action Fund loan, the project could not occur. The project would not be eligible if it begins prior to DED's approval of the loan, or if other project funds were distributed to the borrower prior to DED's approval of the loan. An environmental

review must be conducted by a city or county sponsor, and may be started at any time, even prior to submission of an application.

(ii) Exhaustion of Other Sources. DED must determine that the borrower has exhausted other funding sources. The company must demonstrate that other public programs have been maximized (as well as bank financing and active owner equity resources). The public programs that can be utilized are the SBA 7a, LowDoc and 504 loans; FmHA guaranteed or direct loans; or EDA regional revolving loans. The Action Fund loan would take subordinate lien positions to those programs in most cases.

(f) Terms of Loan.

(i) Interest Rate. Generally at the current prime rate.

(ii) Term. One to ten years, depending on the type of collateral.

(iii) Collateral. Depends on the predictability of the cash flow.

(iv) Equity Participation. May be required, depending on the level of risk.

(g) Timing. DED will provide a decision on funding within about two to three weeks after the submission of a completed application.

(h) Priority Companies. For-profit manufacturing, processing, and assembly companies with wages above the county average (for manufacturing employees), medical benefits, and a high value-added process receive the highest priority. In areas of high economic distress these priorities may change.

(3) Interim Financing Loan Program. to Provide Cash Flow Relief for New Fixed Assets or Working Capital at a Negotiated Rate for a Term of 18 Months.

(a) Purpose. The purpose of the Interim Financing Loan Program (Public Law 93-383, Title I of the Housing and Community Development Act of 1974; as amended, 24 CSR Part 570) is to provide cash flow relief to cause a project to occur.

(b) Amount. The approval of funding is based on the least amount possible to cause the project to occur and the availability of limited funds. DED should be contacted prior to proposing this program to a business.

(c) Use of Funds. The purchase of new fixed assets or permanent working capital are eligible. Manufacturing, processing, and assembly companies receive the highest priority.

(d) Funding Procedure.

(i) Application by Company. The company provides financial and project information to the applicant (city or county). An application is completed, a public hearing is scheduled, and the environmental review notice is published.

(ii) Notice and Hearing. A public hearing notice is placed in a local newspaper. At least five days later a public hearing is held by the applicant.

(iii) Application to DED. The application is submitted to DED. If it meets all eligibility criteria, DED will issue a letter specifying contingencies prior to final approval.

(iv) Flow of Funds. Loan funds are disbursed by the bank after the submission of invoices (paid or unpaid) which are dated after the latter of the loan approval date or environmental review completion.

(e) Restrictions.

(i) Wage Rates. If loan proceeds are used for the financing of building construction or the installation of machinery, federal and state prevailing wage rates must be paid to the employees of contractors.

(ii) Conditions for Beginning Project. The company's project cannot begin or funds cannot have been spent prior to (a) the completion of the environmental review, (b) execution of the Loan Agreement and (c) approval of the project by DED. The environmental review is conducted by the applicant (city or county) and may be started at any time, even prior to submission of an application.

(f) Terms of Loan. The term of the loan is typically 18 months. The interest rate is negotiated by DED, and the principal and interest is deferred until the end of the term.

(g) Timing. DED will provide a decision on funding within three weeks of the submission of an application.

(4) Speculative Building Loan Program.

(a) Purpose. The purpose of the Speculative Building Loan Program (Public Law 93-383, Title I of the Housing and Community Development Act of 1974; as amended, 24 CSR Part 570) is to induce non-profit organizations ("NFPs") to build speculative industrial buildings.

(b) Amount. The maximum funding available is $1 million per project. Approval is based on the availability of funding. Distressed areas are given priority consideration.

(c) Use of Funds. Eligible uses of funds include the purchase of an existing building and improvements, the construction of a new building purchase of land or development of on-site infrastructure.

(d) Funding Procedure.

(i) Application by NFP. An application is completed, a public hearing is scheduled, and the environmental review notice is published.

(ii) Notice and Hearing. A public hearing notice is placed in a local newspaper, and at least five days later a public hearing is held by the applicant.

(iii) Application to DED. The application is submitted to DED.

(iv) Flow of Funds. The DED which provides a grant to a city or county, who will then loan the funds to a non-profit corporation for a maximum term of 30 months. Loan funds are disbursed by DED after the submission of

invoices (paid or unpaid) which are dated after the date of the grant agreement. Typical turn-around time is ten days.

(v) Contingency Letter. If the application meets all eligibility criteria, DED will issue a letter specifying contingencies prior to final approval.

(e) Restrictions. This program is funded from Community Development Block Grant (CDBG) funds, which carries certain requirements:

(i) Conditions for Beginning. The project cannot begin or funds cannot have been spent prior to the completion of (a) the environmental review and (b) the execution of a loan agreement with the NFP, and (c) a grant agreement with the city.

(ii) Wage Rates. Loan proceeds that are used for the funding of building construction or the installation of machinery trigger the use of federal and state wage rates on the employees of contractors.

(iii) Availability of Other Industrial Buildings. If there are other available industrial buildings in the market area, the program is not applicable.

(f) Terms of Loan. The term of the loan is a maximum of 30 months, deferred to the end of the term. The interest rate is 2% of the amount borrowed. The loan is callable at the option of DED after the first 12 months if DED requires the funds to fulfill the obligations of other grantees. (This will likely not occur.) An irrevocable letter of credit from a bank acceptable to DED is required to secure the loan. [Source: Missouri Department of Economic Development.]

(5) U.S. Department of Commerce Infrastructure Grants to State and Local Governments.

Title: Grants for Public Works and Economic Development Facilities (the "Grants")

Agency: Economic Development Administration (EDA), Department of Commerce. Catalog of Federal Domestic Assistance (CFDA) 11.300

The controlling legal authority for the Grant is the Public Works and Economic Development Act of 1965, as amended; Sec. 201, 42 U.S.C., 3141, *et seq*., including those comprehensive amendments made by the Economic Development Administration Reauthorization Act of 2004 (PWEDA).

The Grant is regulated by 13 CFR Chapter III, through the Interim Final Rule published August 11, 2005 (70 FR 47002, effective October 1, 2005) and the Second Interim Final Rule published December 15, 2005 (70 FR 74193, effective immediately upon publication). The EDA was to publish a Final Rule sometime in 2006 to incorporate all comments received during the public comment period (8/11/2005-11/14/2005).

(a) Eligibility Requirements. Eligible applications for the Grants are limited to States, cities, counties or other political subdivisions of a State (including special purpose unit of a State or local government engaged in economic or infrastructure development activities) or a consortium of such political subdivisions, an institution of higher education or a consortium of

institutions of higher education, an Economic Development District organization, a private or public nonprofit organization or association (including faith-based non-profit organizations) acting in cooperation with officials of a political subdivision or State, or an Indian Tribe or a consortium of Indian tribes. (42 U.S.C. 3122 and 13 CFR §300.3)

Individuals, companies, corporations and associations organized for profit are not eligible for the Grants.

(b) Purpose. The purpose of the Grants are to economically support the construction or rehabilitation of essential public infrastructure and facilities necessary to generate or retain private sector jobs and investments, attract private sector capital, and promote regional competitiveness, including investments that expand and upgrade infrastructure to attract new industry, support technology-led development, redevelop brownfield sites, provide eco-industrial development and support heritage preservation development investments such as those promoted by the Preserve America initiative (Executive Order 13287).

EDA's priority is to provide economic assistance to those organizations whose main goal is to benefit areas or regions experiencing or which are threatened with substantial economic distress. "Distress" includes (but is not limited to) high unemployment, low income levels, large concentrations of low-income families, declines in per capital income, loss of population because of lack of employment opportunities, large numbers of business failures, sudden major layoffs or plant closures, trade impacts, military base closures, natural or other major disasters, depletion of natural resources, or reduced tax bases.

(c) Criteria. Successful applicants for Grants must demonstrate to the EDA, through the use of the most recent Federal data available (including data from the Bureau of Economic Analysis, the Bureau of Labor Statistics, the Census Bureau, the Bureau of Indian Affairs, or any other Federal source deemed acceptable) or, if no Federal data is available, the most recent data available through the State government, the nature and level of economic distress in the region where the proposed project is located. One or more of the following criteria must be met in order for a proposal to be considered for Grants:

- An unemployment rate that is at least one (1) percent greater than the national average unemployment rate during the most recent 24-month period;
- A *per capita* income that is eighty (80) percent or less of the national average *per capital* income for the most recent period for which data is available; or
- A "special need" as determined by EDA. Such "special needs" include substantial outmigration or population loss; underemployment (employment of workers at less than full-time or at less skilled tasks than their training), military base closure, natural disasters or emergencies, closure or restructuring of industrial firms, negative effects of changing trade patterns, or other circumstances set forth in an Federal Funding Opportunity (FFO).

(d) Funding Availability. Funding for the Grants has been appropriated under the FY 2006 Science, State, Justice, Commerce and Related Agencies Appropriations Act (Pub. L. No. 109-108, 119 Stat. 2290 (2005)). The total amount of funds appropriated for FY 2006 for the entire block of five grants administered by the EDA is $250,741,104. The amount of funding earmarked for the Grants is $158,088,957. The average funding level in FY 2005 was between $70,000-$4,000,000.

The amount of the Grant may not exceed fifty (50) percent of the total cost of the project. However, some projects may receive up to an additional thirty (30) percent funding of the total project cost based on the needs of the region in which the project is taking place (as determined by EDA). Other applicants, including Indian Tribes, certain States, political subdivisions and non-profit organizations and applicants for training, research and technical assistance are eligible to receive up to one hundred (100) percent of project funding. In the case of States, political subdivisions and non-profit organizations who apply for 100 percent funding, the Secretary of Commerce may determine that said entity has exhausted its effective borrowing capacity and increase the Federal share of the percentage to 100 percent.

Those entities who do not qualify for 100 percent of Federal funds may provide in-kind contributions (space, equipment, assumptions of debt, and services) in lieu of cash contributions. The EDA evaluates all in-kind contributions on an individual basis. All in-kind contributions must be eligible project costs and meet applicable Federal cost principles and uniform administrative requirements. Eligible project costs may include administrative and legal expenses, land, structures, rights-of-way, appraisals, relocation expenses and payments, architectural and engineering fees, project inspection fees, site work, demolition and removal, construction, and equipment. 2 C.F.R. §225, "Cost Principles for State, Local and Indian Tribal Governments" addresses in detail those project costs deemed to be eligible for reimbursement with EDA grants.

(e) Application Process. For Missouri, the EDA Regional Office is located in Denver, Colorado at 1244 Speer Boulevard, Room 670, ZIP 80204, telephone (303) 844-4715/fax (303) 844-3968. The Regional Director is Robert Olson, ROlson@eda.doc.gov. The Missouri Regional EDA Representative is Paul Hildebrandt, 101 Park De Ville Drive, Suite C, Columbia, MO 65203-1726, telephone (573) 445-1700, e-mail phildebrandt@eda.doc.gov.

(i) Pre-Application. The first step in the application process is for the applying entity to complete a Form ED-900P "Pre-application for Federal Assistance". This form must be completed in its entirety and submitted to the Missouri Regional EDA Representative or EDA Regional Office**.**

The EDA uses the Form ED-900P to evaluate proposals for investment assistance. The Form ED-900P consists of a face page "Application for Federal Assistance", followed by Part I of the Application, which is a multi-page section requesting a pre-application narrative (no more than four pages in length) to include information concerning identification of the region in which the project

will take place, scope of work for proposed investment, the economic development needs of the surrounding areas, the anticipated impact of the investment, the funding priorities, the applicant's ability to implement the project, the proposed time schedule, the beneficiaries of the project, civil rights declaration, project budget, sources of non-EDA project funding, ownership of projects, and environmental considerations for construction projects. Part II of the Application provides information for satisfaction of regional eligibility requirements under 13 CFR §301.3(a)(1). Part II of the Application provides information concerning the maximum allowable EDA investment rates for the project. There are many references to information contained in the Federal Funding Opportunity announcement for the Grants.

For Public Works grants, EDA reviews the project eligibility at the time the application for investment assistance is received in the appropriate regional office. EDA bases its decisions on eligibility using the most recent American Community Survey (ACS) published by the Census Bureau to determine project region, or uses the most recent federal data from other sources if an ACS is not available. The project must be eligible on the date EDA receives the application.

EDA applications for funding are subject to the requirements of Executive Order 12372, "Intergovernmental Review of Federal Programs". While state participation in the Review is voluntary, Missouri has elected to participate and copies of all application materials will either be sent directly to or will be forwarded to the Missouri review officer, Sara VenderFeltz, Federal Assistance Clearinghouse, Office of Administration, Commissioner's Office, Capitol Building, Room 125, Jefferson City, MO 65102, telephone (573) 751-0337/fax (573) 751-1212, email sara.vanderfeltz@oa.mo.gov.

Applicants must submit one (1) original and two (2) copies of a pre-application proposal to the appropriate EDA regional office. Facsimile transmissions of pre-application proposals are not accepted, nor is the EDA set up to receive electronic transmission of pre-application forms.

(ii) Proposal Review. The pre-application proposal is circulated by an assigned project officer within the regional office to which the proposal was submitted for comments and initial consideration. Once the necessary input and information is received, the pre-application proposal is considered by the regional Investment Review Committee (IRC) on two levels: (1) for whether the project meets the program-specific award and application requirements that the project will:

- Improve the opportunities for successful establishment or expansion of industrial or commercial plants or facilities in the region;
- Assist in the creation of additional long-term employment opportunities in the region; or
- Will primarily benefit the long-term unemployed and members of low-income families in the region (13 C.F.R. §305.2)

and (2) to rate the whether the project proposal satisfies one or more of the following criteria:

- Is market-based and results-driven;
- Has strong organizational leadership;
- Advances productivity, innovation and entrepreneurship;
- Anticipates economic chances and diversifies the regional economy; and/or
- Demonstrates a high degree of local commitment, including high levels of local government or non-profit matching funds, clear and unified local (elected) leadership, and strong cooperation between business, regional partners, and federal, state and local governments. (13 C.F.R. §301.8).

The IRC will recommend to the Regional Director whether or not a formal application should be invited. Documentation concerning the IRC's consideration of a project is available in the Investment Proposal Summary and Evaluation Form and meeting minutes.

If an applicant is selected to submit a formal application, the regional office will forward the application materials to the applicant and will provide guidance to the applicant in completing the form. The applicant will have thirty (30) days to submit the completed formal application to the regional office.

(iii) Formal Application and Construction Investments Requirements. Successful pre-applicants for investment assistance will be required to complete Form ED-900A "EDA Application for Investment Assistance" and "EDA Construction Investments Requirements" as the next step in the application process. Both the "Application" and "Construction Investments Requirements" forms are several pages in length and the "Application" requires the attachment of several exhibits in order to be deemed complete. Receiving an invitation to complete a formal application is not a guarantee that the project will receive Grants.

(f) Post-Award Reporting. There is considerable post-award reporting that is required of successful grant applicants. Information concerning post-award reporting is available, in-depth, upon request. [This section provided by Cynthia Palmer]

(6) Historically Under-Utilitzed Business Zones. Pursuant to the Small Business Reauthorization Act of 1997, 15 USCA Section 631 *et seq*., congress created the HUBZone program. Pursuant to the Act, a qualified HUBZone small business concern receives preferential treatment in the award of federal contracts. Specifically, 15 USCA Section 657a(b)(3)(A) provides that "Subject to Subparagraph (B), in any case in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher

than the price offered by the otherwise lowest, responsive, and responsible offeror." Pursuant to information provided by the HUBZone website www.sba.gov/hubzone, to qualify for the program a business must:

- Be a small business by SBA standards;
- Be located within a "historically underutilized business zone" which includes lands on federally recognized Indian reservations;
- Be owned and controlled by one or more U.S. citizens, a Community Development Corporation or an Indian tribe; and
- Hire at least 35% of its employees from residents of a HUBZone.

(7) New Market Tax Credits. Begun in 2000 as part of the Federal Community Renewal Tax Relief Act, New Market Credits are used to spur private investment in low-income urban and rural communities. In 2007, the legislature, via HB 1, adopted §135.680 R.S.Mo. to provide a state tax credit to accompany the federal credit. In 2008, the legislature added a procedure to provide revenue rulings with respect to the credits. §135.682 R.S.Mo. In 2009 via HB 191, the legislature increased the statewide cap on these credits from $15,000,000 to $25,000,000 per year and extended the program through 2012. §135.680.2 R.S.Mo. Here is a brief explanation of the Federal Act and credit excerpted from www.aicpa.org/pubs/jofa/aug2001/ftta.htm.

The Community Renewal Tax Relief Act provides tax incentives for businesses to locate and hire residents in urban and rural areas that have not experienced recent economic expansion. The Act establishes a new markets credit (part of the general business credit) for investment in the stock of community development entities (CDEs). CDEs are domestic corporations or partnerships the primary mission of which is serving or providing capital for low-income communities or persons, that maintain accountability to residents (who are represented on governing and advisory boards) and that are certified by the Treasury. Taxpayers and businesses that invest in economically challenged communities will be able to take a credit for "qualified equity investments." To earn the credit, an investor must make capital or equity investments in (or loans to) qualified businesses located in low-income communities and may also provide financial counseling to both the businesses and the residents. The new markets credit may be taken directly by a passive investor as well as an active business.

Calculation and requirements for the credits are found in 26 U.S.C.A. §45D.

The Revenue Ruling below gives some perspective of the operation of the Credit.

Rev. Rul. 2003-20, 2003-7 I.R.B. 465, 2003-1 C.B. 465, 2003 WL 152074 (IRS RRU)

IRS RRU
Revenue Ruling

NEW MARKETS TAX CREDIT

Released: January 23, 2003

SERSBUGS;ELVIS;12:11/12/04/2006;EA
Section 45D.--New Markets Tax Credit, *26 CFR 1.45D-1T: New markets tax credit.*

New markets tax credit. This ruling holds that, for purposes of determining the new markets tax credit under the facts of the ruling, the amount of the qualified equity investment made by a limited liability company (LLC) classified as a partnership includes cash from a nonrecourse loan to the LLC that the LLC invests as equity in a qualified community development entity.

ISSUE

For purposes of determining the new markets tax credit allowable under § 45D of the Internal Revenue Code, does the amount of the qualified equity investment made by a limited liability company (LLC) classified as a partnership include cash from a nonrecourse loan to the LLC that the LLC invests as equity in a qualified community development entity?

FACTS

In Year 1, *CDE*, a qualified community development entity under § 45D(c), receives a new markets tax credit allocation of $2,000x from the Secretary of the Treasury. In Year 2, *X*, a widely-held C corporation, contributes $792x for a 99-percent member interest in *LLC*, a limited liability company that is classified as a partnership for federal tax purposes. *Y*, a widely-held C corporation, contributes $8x for a 1-percent managing member interest in *LLC*. *LLC* borrows $1,200x from *Bank*, an unrelated third party. *LLC* contributes $2,000x for an equity interest in *CDE*, which is a limited liability company classified as a partnership for federal tax purposes. *CDE* designates *LLC*'s equity investment in *CDE* as a qualified equity investment under § 45D(b)(1)(C).

The $1,200x loan from *Bank* is a nonrecourse liability that is characterized as indebtedness of *LLC* for federal tax purposes. The loan is secured only by *LLC*'s interest in *CDE*. The loan is not secured by any assets of *CDE*. The full amount of the loan is repayable at the end of Year 9. The loan is not convertible into an equity interest in *LLC*.

On April 1 of Year 2, *CDE* lends the $2,000x to a qualified active low-income community business, as defined in § 45D(d)(2)(A). This $2,000x loan is repayable in full at the end of Year 9. Interest payments received by *CDE* from the qualified active low-income community business are distributed to *LLC*. *X* and *Y* retain their membership interests in *LLC*, and *LLC* retains its $2,000x equity investment in *CDE*, until the end of Year 9. The entire $2,000x loan by *CDE* remains outstanding, and the borrower continues to qualify as a qualified active low-income community business, until the end of Year 9.

LLC claims its qualified equity investment in *CDE* is $2,000x on each credit allowance date and allocates the new markets tax credit with respect to this amount to *X* and *Y* in accordance with § 704(b).

LAW

Section 45D(a)(1) provides that for purposes of § 38, in the case of a taxpayer who holds a qualified equity investment on a credit allowance date (as defined in § 45D(a)(3)) of the investment which occurs during the taxable year, the new markets tax credit determined under § 45D for the taxable year is an amount equal to the applicable percentage (as defined in § 45D(a)(2)) of the amount paid to the qualified community development entity for the investment at its original issue. Section 7701(a)(14) defines the term "taxpayer" to mean any person subject to any internal revenue tax. Section 7701(a)(1) provides that the term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

Section 45D(b)(1) defines the term "qualified equity investment" as *any equity investment in a qualified community development entity* if (A) the investment is acquired by the taxpayer at its original issue (directly or through an underwriter) solely in exchange for cash, (B) substantially all of the cash is used by the qualified community development entity to make qualified low-income community investments, and (C) the investment is designated for purposes of § 45D by the qualified community development entity.

Section 45D(b)(2) provides that the maximum amount of equity investments issued by a qualified community development entity which may be designated under § 45D(b)(1)(C) by the entity shall not exceed the portion of the limitation amount allocated under § 45D(f) to the entity.

Section 45D(b)(6) defines the term "equity investment" as (A) any stock (other than nonqualified preferred stock as defined in § 351(g)(2)) in an entity that is a corporation, and (B) any capital interest in an entity that is a partnership.

Section 45D(c)(1) defines the term "qualified community development entity" as any domestic corporation or partnership if (A) the primary mission of the entity

is serving, or providing investment capital for, low-income communities or low-income persons, (B) the entity maintains accountability to residents of low-income communities through their representation on any governing board of the entity or on any advisory board to the entity, and (C) the entity is certified by the Secretary for purposes of § 45D as being a qualified community development entity.

Section 45D(d)(1) defines the term "qualified low-income community investment" as *(A) any capital or equity investment in, or loan to*, any qualified active low-income community business, (B) the purchase from another qualified community development entity of any loan made by the entity which is a qualified low-income community investment, (C) financial counseling and other services specified in regulations prescribed by the Secretary to businesses located in, and residents of, low-income communities, and (D) any equity investment in, or loan to, any qualified community development entity. Section 45D(d)(2)(A) defines the term "qualified active low-income community business" as any corporation or partnership that satisfies the requirements of § 45D(d)(2)(A)(i) through (v).

ANALYSIS

Section 45D(b)(1)(A) requires that a qualified equity investment be acquired by the taxpayer solely in exchange for cash. Section 45D does not prohibit a taxpayer (including any taxpayer who is a person as defined under § 7701(a)(1)) from using cash derived from a borrowing, including nonrecourse borrowing, to make a qualified equity investment in a qualified community development entity. The facts of this revenue ruling state that the loan from *Bank* is characterized as indebtedness of *LLC* for federal tax purposes. The loan proceeds and the contributions by *X* and *Y* to *LLC* are used by *LLC* to make an equity investment of $2,000x in *CDE*. The requirements of § 45D(b)(1)(A) are satisfied because *LLC* acquires its investment in *CDE* at its original issue solely in exchange for cash. The requirements of § 45D(b)(1)(B) are satisfied because *CDE* uses the entire equity investment of $2,000x to make a qualified low-income community investment. The requirements of § 45D(b)(1)(C) are satisfied because *CDE* designates the equity investment of $2,000x for purposes of § 45D. Accordingly, *LLC* is treated as having made a qualified equity investment of $2,000x in *CDE* when *LLC* acquires its equity interest in *CDE*. *LLC* may claim a new markets tax credit on each credit allowance date in an amount determined under § 45D that is equal to the applicable percentage of the $2,000x qualified equity investment in *CDE*. *LLC may allocate to X and Y the amount of the new markets tax credit that LLC claims with respect to the $2,000x qualified equity investment*. This allocation must be made in accordance with § 704(b) (which provides rules regarding a partnership's allocation of income, gain, loss, deduction, or credit (or item thereof) among the partners).

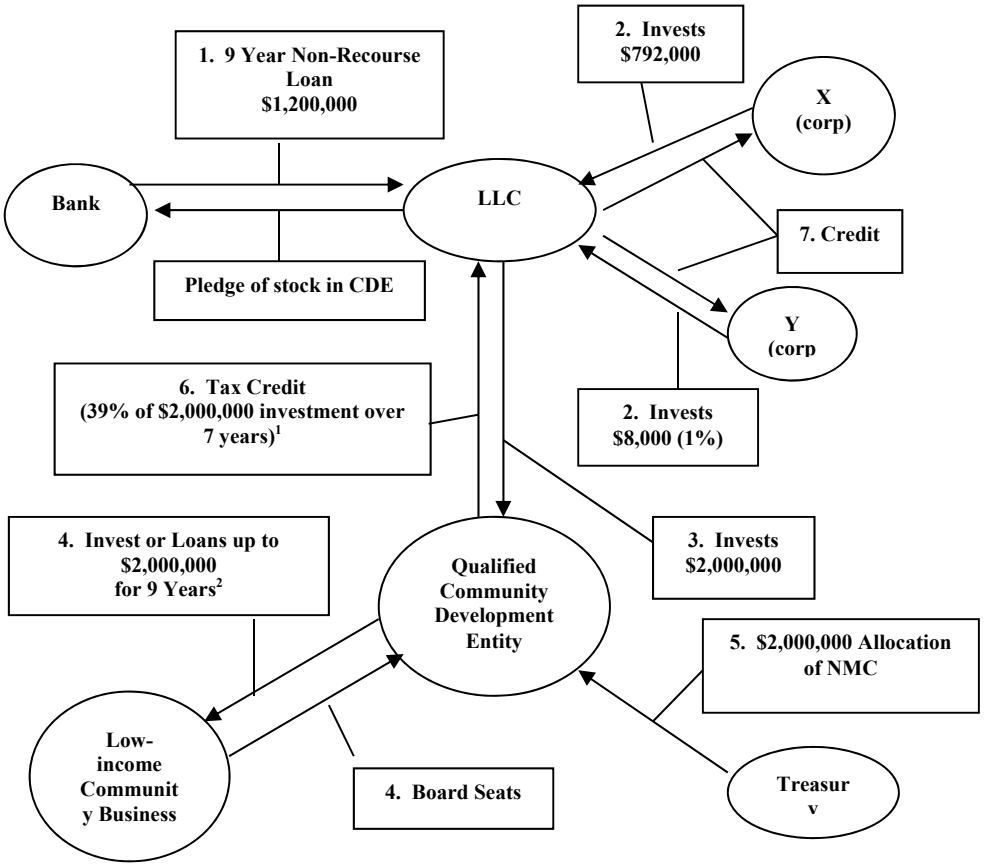
HOLDING

Under the facts of this revenue ruling, for purposes of determining the new markets tax credit allowable under § 45D, the amount of the qualified equity investment made by an LLC classified as a partnership includes cash from a nonrecourse loan to the LLC that the LLC invests as equity in a qualified community development entity.

DRAFTING INFORMATION

The principal author of this revenue ruling is Michael J. Goldman of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Mr. Goldman at (202) 622-3080. For information regarding issues under § 45D, contact Gregory N. Doran of the Office of Associate Chief Counsel (Passthroughs and Special Industries) at (202) 622-3040. These are not toll-free calls. Rev. Rul. 2003-20, 2003-7 I.R.B. 465, 2003-1 C.B. 465, 2003 WL 152074 (IRS RRU).

New Market Credits



Notes:

1. LLC may also receive a return of all or part of its investment, as well as cash flow generated by the interest on a loan to Low-income Community Business from Qualified Community Development Entity ("QCDE"). The agreement between LLC and QCDE will specify this arrangement.

2. The Internal Revenue Code specifies that the QCDE must invest (either as equity or loan) a "substantial portion" of the $2MM investment made by LLC. Regulations provide that "substantially all" means at least 85%. The QCDE retains a portion of the investment to fund its operations and profits. It may also receive a portion of any loan/equity repayment or interest income.

(8) Employment of Unauthorized Aliens Prohibited. In 2008, the legislature via HB 1549 adopted §285.530 R.S.Mo., effective January 1, 2009, which provides:

> 1. No business entity or employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the state of Missouri.
>
> 2. As a condition for the award of any contract or grant in excess of five thousand dollars by the state or by any political subdivision of the state to a business entity, or for any business entity receiving a state-administered or subsidized tax credit, tax abatement, or loan from the state, the business entity shall, by sworn affidavit and provision of documentation, affirm its enrollment and participation in a federal work authorization program with respect to the employees working in connection with the contracted services. Every such business entity shall also sign an affidavit affirming that it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services.
>
> 3. All public employers shall enroll and actively participate in a federal work authorization program.
>
> 4. An employer may enroll and participate in a federal work authorization program and shall verify the employment eligibility of every employee in the employer's hire whose employment commences after the employer enrolls in a federal work authorization program. The employer shall retain a copy of the dated verification report received from the federal government. Any business entity that participates in such program shall have an affirmative defense that such business entity has not violated subsection 1 of this section.
>
> 5. A general contractor or subcontractor of any tier shall not be liable under sections 285.525 to 285.550 when such general contractor or subcontractor contracts with its direct subcontractor who violates subsection 1 of this section, if the contract binding the contractor and subcontractor affirmatively states that the direct subcontractor is not knowingly in violation of subsection 1 of this section and shall not henceforth be in such violation and the contractor or subcontractor receives a sworn affidavit under the penalty of perjury attesting to the fact that the direct subcontractor's employees are lawfully present in the United States.

In addition, the legislature in 2008 added section 135.815.2 R.S.Mo., which provides:

> 2. Any applicant of a tax credit program contained in the definition of the term "all tax credit programs" who purposely and directly employs unauthorized aliens shall forfeit any tax credits issued to such applicant which have not been redeemed, and shall repay the amount of any tax credits redeemed by such applicant during the period of time such unauthorized alien was employed by the applicant. As used in this subsection, the term "unauthorized alien" shall mean an alien who does not have the legal right or authorization under federal law to work in the United States, as defined under Section 8 U.S.C. 1324a(h)(3).

However, the case of *Lozano v. City of Hazelton, PA,* 496 F.Supp. 477 (M.D. PA 2007) holds that federal law preempts a local ordinance requiring enrollment. A few provisions that are found in the Act (and held to be pre-empted) are discussed in *Lozano*. First, the *Lozano* ordinance required mandatory enrollment in a federal work authorization program that is pre-empted by the voluntary enrollment requirement found in 8 U.S.C.A. 1324a. Second, the *Lozano* ordinance did not provide any appeal rights for employees, in conflict with federal law (like HB1549). It wasn't discussed in *Lozano*, but HB1549 also has additional penalties in conflict with federal law (business license suspension and debarment).

§43. —Tax Reimbursement Agreements

> **Tax reimbursement agreements are an alternative funding tool available to local governments needing assistance with providing infrastructure necessary to serve a project. A tax reimbursement agreement shifts risk of payment for the infrastructure to the developer. The agreement typically provides that the developer build publicly owned infrastructure that would normally be the responsibility of the local government and be reimbursed from net new taxes generated by the development, if, as and when collected.**

Frequently, a city is faced with the loss of potential retail development because it lacks the infrastructure to accommodate the development, and has no funds with which to build the infrastructure. Also, with each new development, local governments usually demand that developers finance surrounding infrastructure to accommodate the "burden" caused by the new activity. Developers seldom have time or leverage to debate the merits of these demands. The fairness of the demands are often in question, since the infrastructure called for usually serves a far broader spectrum of the public than just the development. Therefore, at least a portion of this burden should be borne by that public so that "rough proportionality" is achieved. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 2319, 129 L. Ed. 2d 304 (1994). A public/private partnership can provide a fair allocation of the burden of financing these types of improvements

with a simple sales tax reimbursement agreement. Since any "pledge" of taxes would be a debt requiring an election for its approval, notes issued are moral obligations only, and the buyer (lender) takes the risk of non-appropriation. For this reason, the developer will usually have to guarantee the obligations or buy them. Should traditional tax increment financing not be appropriate, for reasons such as the property not qualifying, a Public-Private Partnership Development Agreement ("P^3K") which accomplishes similar results through agreements between the developer, the contractor, a lender familiar with these types of projects and the municipality involved, might be pursued.

(1) General Description. Under a P^3K, a city's (but no other jurisdiction's) incremental increase in property tax revenue and economic activity tax revenue is utilized to fund reimbursable project costs ("RPC") generally consisting of publicly-owned infrastructure such as streets. Under this method, the incremental increase in the city's property taxes and as much as 100% of the city's incremental increase in sales taxes and utility taxes, depending upon municipal charter limitations, are dedicated towards the payment of RPCs.

(2) TIF Compared to P^3K.

(a) Advantages of P^3K. Utilizing a P^3K:

- Eliminates the requirement that a determination of blight or other qualifying condition be made.
- Avoids the technical requirements of tax increment financing statute.
- Requires no input from other taxing jurisdictions.

(b) Disadvantages of P^3K.

- Since only the municipality's tax revenue is utilized, the revenue stream available to pay project costs will be reduced.

(3) Contracts. Under a P^3K, the following contracts will be required:

(a) Contract Between the Developer and the Municipality. The developer will enter into a contract with the municipality which details exactly what infrastructure will be built, when it will be built and what specific improvements are to be funded. These improvements will be stated as an inducement to the developer to proceed. But the developer will reserve the right to cancel the project up until the time it pulls a building permit. The only penalty to the developer, if it decides not to proceed after pulling a building permit, is to satisfy any payment due the contractor for work done up to that time.

(b) Contract Between the Municipality and the Lender. The municipality will enter into a contract with a lender/underwriter which would loan the city the funds with which to pay the contractor. The lender would need to be aware that the contractual obligation committing the city to repay the loan will be subject to an annual appropriation.

(c) Contract Between the Municipality and the Contractor to Construct the Infrastructure. Where state and local law allow, the developer or its contractor would be the contracting party in order to maintain control of the construction schedule. This contact may have to be bid. If so, the developer's contractor should be able to offer the lowest bid, since it will be already on site.

(4) Miscellaneous. Under either a TIF or P^3K, the following considerations may apply:

(a) Public Bids. The use of city sales tax and property tax may require that all contracts for improvements be subject to a public bid. See "Public Bidding Requirements" herein.

(b) Prevailing Wage. The use of city sales tax and property tax may require that all contracts for infrastructure be subject to payment of "prevailing wages" (union scale) by the contractor. See section on "Prevailing Wages" herein.

(5) Typical Transaction Chronology.

(a) Developer makes an initial determination to develop in City A.

(b) City A meets with Developer or its representative to discuss the development and City A informs Developer that off-site improvements need to be constructed in conjunction with the new store.

(c) Developer's P^3K Team and City A negotiate the exact amount of the off-site improvements which will be funded through P^3K funds.

(d) If a P^3K is proposed, City A and Developer enter into a P^3K agreement which is approved by City A by ordinance.

(e) During the course of negotiating with City A, Developer's P^3K Team will find a financing source which will reimburse the Developer after the public improvements have been built if Developer provides the construction financing or provide a loan to the City to pay for the infrastructure so that Developer is never obligated to advance funds.

(f) Construction begins.

(g) Simultaneously with the construction of the new development, either Developer's contractor or another contractor constructs the public improvements with Developer serving as the construction lender if City A does not have funds available.

(h) Developer obtains a certificate of occupancy.

(i) The P^3K lender closes on its contract with the City and takes Developer out of its construction loan, if any, for the off-site improvements.

(j) City A's incremental increase in property taxes and sales taxes are used to service the debt on the P^3K obligation.

§44. Legal Issues Common To Various Incentives

§45. —Public Bidding Requirements

Construction of public infrastructure or facilities is subject to specific bidding requirements under Missouri law. In general, whenever taxes are used to fund a project, public bidding mandates that contracts be let to the lowest and best bid. In addition to price, the ability to perform, timely performance, character, reputation, and quality of prior performance are considered by the contracting governing body. Building requirements vary by type of project and jurisdiction. In addition to state and federal law and regulations, local charters and ordinances must be consulted for specific bidding requirements. Generally, a disappointed bidder has no standing to challenge a letting, because bidding laws are enacted to protect the public, not bidders.

(1) Governmental Entities.

(a) State and Certain Cities in General. There is no common law requirement that contracts for the construction of public works be let to the lowest and best bidder. The public entity must follow those statutes applicable to it, as well as its own bid instructions. 52 J. Mo. B. 94, 94 (1996) citing *State ex rel. Stricker v. Hanson,* 858 S.W.2d 771 (Mo.App. W.D. 1993), and *Klotz v. Savannah R-III Sch. Dist.,* 747 S.W.2d 708 (Mo.App. W.D. 1988). ("The bidding procedures and requirements are governed by different state statutes applicable to specific governmental entities" *citing e.g.*, R.S.Mo. §8.250 (cities of 500,000 or more); R.S.Mo. §50.660 (counties); R.S.Mo. §88.940 (cities with 75,000 to 80,000 inhabitants); R.S.Mo. §249.340 (county sewer districts); R.S.Mo. §182.270 (public library buildings and cities of more than 10,000); R.S.Mo. §177.086 (school districts); R.S.Mo. §248.110 (sanitary districts) and R.S.Mo. §253.080 (Department of Natural Resources)). However, on large projects, local governments will usually use a construction manager. See section 45 (19), *infra.*. §88.250 R.S.Mo. requires public bidding where taxes are used for the construction of any building or improvement the total cost of which exceeds $25,000. §88.250 by its express terms, applies only to the state and cities containing at least 500,000 inhabitants. §88.940 requires all constitutional charter cities with a population between 75,000 - 80,000 to bid for all city improvements, including public buildings.

(i) State Highways. All contracts for the construction of state highways shall be advertised and let to the lowest responsible bidder. The Highway Commission can reject any and all bids and construct the highway itself. (§227.100) The Highway Commission shall advertise for signs, signals and guideboards along state highways and let to the lowest responsible bidder. The Commission may reject any and all bids. (§229.220)

(b) Political Subdivisions in General. §71.290 R.S.Mo. authorizes political subdivisions to pay for public improvements out of general revenues or by special assessments. §71.290 further provides in relevant part that:

> The ***proceedings*** in each instance providing for the construction of such improvements from their initiation to the awarding of the contract to the successful bidder . . . ***shall be the same*** as that now provided by the charter and law governing such city, town, village, county or district where the entire cost of such improvement is to be paid for in special tax bills or special assessments against property. . . . In letting contracts pursuant to this section ***the awarding authority shall require*** bidders to separately state the amount bid on that portion of such improvement for which payment is to be made by special tax bills or benefit assessments. Where any portion of the labor and materials on any such improvements shall be furnished in kind by the state or the United States government . . . ***bids shall be required only*** for the balance of the labor and materials and ***the contract shall be awarded to the lowest and best bidder*** or lowest responsible bidder on the balance of said labor and materials. (Emphasis supplied.)

(c) Counties (§50.660). With certain exceptions, all contracts and purchases involving county expenditures shall be let to the lowest and best bidder after due opportunity for competition, including advertisement. The county may reject any and all bids.

- ***County Buildings Generally.*** The construction of county buildings shall be advertised and let to the person who agrees to do the work on the lowest and best terms not exceeding the amount set aside for such building. If after two advertisements, no bids are received below the amount set aside, the county may let the construction of the building by a private contract. (§49.420).
- ***County Hospitals.*** County hospital buildings shall be advertised and let according to the law applicable to other county public buildings. (§205.250).
- ***County Health Center.*** All buildings constructed as part of the county health center shall be advertised and let according to the law applicable to other county public buildings. (§205.080)
- ***Personal Services.*** Contracts exceeding $25,000 with Jackson County or the Jackson County Sports Complex Authority must be bid. §64.940.3 R.S.Mo.

(d) Drainage Districts - Cities Over 300,000 and Adjoining Counties. Drainage districts which lie partially within a city having a population of 300,000

or more shall advertise and let contracts for channels, drains or sewers in excess of $500 to the lowest responsible bidder. The district can reject any and all bids. (§248.110).

(e) River Basin Water Conservancy Districts. Contracts by water conservancy districts in excess of $5,000 shall be advertised and may be awarded to the lowest and best bidder. (§257.250).

(f) Where Special Assessments Used (Chapter 88). Chapter 88 R.S.Mo. governs public improvements and special assessments to be used for payment thereof. §88.824 requires the city to make an estimate of costs for the construction of public improvements, including sewers, before entering into a contract for the work. §88.826 provides that whenever the city shall advertise for bids for the construction of sidewalks or street improvements and no bids are received, the city may construct the sidewalks or make street improvements at its own expense and levy special assessments on the abutting property owners. This section does not mandate competitive bidding and, by its terms, applies only to sidewalks and streets.

(g) Libraries. The construction of a free public library building shall be let to the lowest and best responsible bidder. The library board may reject any and all bids. (§182.270).

(h) Missouri - St. Louis Metropolitan Airport Authority. All purchases, rentals or leases of goods, supplies, insurance, services, bonds, wares, commodities or other items, tangible or intangible, by or for the airport authority shall be advertised and let to the lowest and best bidders. The authority may reject the bids and readvertise for new bids. (§305.525).

(i) Fire Protection Districts. Construction or purchase contracts for work or materials for fire protection districts, including the construction of any public improvement or facility such as water supply distribution and fire alarm systems shall be advertised for bid where the cost is $5,000 or more.

(j) Neighborhood Improvement District.

- ***Legislation.*** §§67.453 through 67.475 R.S.Mo., Missouri's Neighborhood Improvement District Act (the "Act"), authorizes the funding of certain improvements by special assessments. §67.453(5) defines "improvement" as follows:

  > Any one or more public facilities or improvements which confer a benefit on property within a definable area and may include or consist of a reimprovement of a prior improvement.

  This section further provides a non-exclusive list of specific improvements which includes streets, sewer systems, street lights, parks, landscaping, service connections from sewer, water, gas and other utility mains, conduits or pipes, and any

other public facilities or improvements deemed necessary by the City.

- ***City Charter.*** In a charter city, the charter should be consulted on the issue of bidding. The issue under the Kansas City Charter appears to be whether the City is responsible for making the improvement. If the City is responsible, then the Charter requires competitive bidding. For example, Section 242 of the City Charter for Kansas City, Missouri provides that:

> All City improvements of whatever kind or character made or to be constructed at the expense of the City, including all work to be paid for by special assessments or in special tax bills or other evidences of special assessments, except as in this Charter provided otherwise, shall be let by contract to the lowest and best bidder. . . .

- ***Responsibility for Making Improvements.*** §67.455 R.S.Mo. appears to make the City responsible for making improvements, although an argument to the contrary can be made. That section provides, in pertinent part, as follows:

> As a complete alternative to all other methods provided by law or charter, the governing body of any city or county may make, or cause to be made, improvements which confer a benefit upon property within a neighborhood improvement district pursuant to §§67.453 to 67.475. . . . Such city or county shall assess special assessments on the property deemed by the governing body to be benefited by each such improvement pursuant to §67.457. The city or county shall use the monies collected from such special assessments to reimburse the city or county for all amounts paid or to be paid by it as principal of and interest on its general obligation bonds issued for such improvements.

In addition, §67.463.1 requires the City to conduct a hearing on the proposed improvement after which the City "shall order that the improvement be made". §67.463.2 requires a city to compute the final cost of the improvements and to apportion the costs among the benefited property. Based upon the foregoing, a city appears to be responsible for making improvements within a Neighborhood Improvement District.

As noted above, however, §67.455 states that the Act is a complete alternative to all other methods provided by charter. Thus, one could argue that because the Act does not require competitive bidding and is independent of and an alternative to a city charter, competitive bidding is not required within a Neighborhood Improvement District. Furthermore, §67.455 authorizes a city to make "or cause to be made" the improvements. One could further argue, therefore, that a city is responsible simply for establishing the Neighborhood Improvement District and granting authority and responsibility for construction of improvements to another entity. Thus, an improvement would not be made directly by or at the expense of a city.

(k) Land Clearance for Redevelopment Authority. In disposing of property, an LCRA may use such reasonable competitive bidding procedures as it shall prescribe. §99.450(2) R.S.Mo.

(l) Sewer Districts.

- ***Sewer Districts in St. Louis County.*** Sewer improvements shall be advertised and let to the lowest and best bidder. (§249.330;§249.340).
- ***Sewer Districts in Other Counties*** Sewer improvements shall be advertised and let to the lowest and best bidder. (§249.510).
- ***Common Sewer Districts.*** Trunk sewers and sewer treatment plants that cost more than $500 shall be advertised and let to the lowest possible bidder. District can reject any and all bids. (§204.350).

(2) Project Being Let.

(a) Waterworks - Certain Cities. Waterworks in third and fourth-class cities and special charter cities with populations between 3,000 and 150,000 shall be advertised and let to the lowest and best bidder. (§91.170).

(b) Roads.

- ***County Road Districts.*** Road district improvements shall be advertised and let to the lowest and best bidder. (§233.270; §233.405).
- ***County Roads.*** Whenever county public roads shall be constructed or repaired by contract, the county commission, township board or district commissioner shall cause the improvement to be advertised and let to the lowest responsible bidder and may reject any and all bids. (§229.050).
- ***Township Road Districts, Contract System.*** Road districts in counties which have adopted township organization shall

advertise and let contracts for road improvements to the lowest and best bidder. (§231.250).

(c) Sidewalks.

- ***Fourth-Class Cities***. Contracts for construction of sidewalks shall be advertised and let to the lowest and best bidder. (§88.700).
- ***Unincorporated Towns and Villages in First-Class Counties***. Contracts for the laying of sidewalks, curbs, gutters, combinations of curb and gutter and roadways along any street, avenue, road or highway shall be advertised and let to the lowest and best bidder. (§231.360).

(3) Industrial Development Bonds. Under the constitution, Art. VI, §27, local governments may issue revenue or general obligation bonds to build industrial/commercial facilities which may then be leased to private enterprise. The constitutional provision has been implemented by Ch. 100 R.S.Mo. (the "Act"). The Act, §100 R.S.Mo., contains a provision requiring such facilities to be built in accordance with bidding procedures which would require awarding to the lowest and best bid. However, *Wring v. City of Jefferson*, 413 S.W.2d 292 (Mo. 1967), held that where the city is not directly involved as the developer (e.g., where private enterprise builds the facility as the agent of the city), §100 R.S.Mo. is inapplicable. See discussion, §17, *supra.*

(4) Challenges to Successful Bid.

(a) Standing.

(i) Unsuccessful Bidder. In *State ex rel. Mid-Missouri Limestone, Inc. v. County of Callaway*, 962 S.W.2d 438 (Mo. App. W.D. 1998), unsuccessful bidders on a contract for the sale of rock and gravel sought a preliminary writ of mandamus and damages for the county's alleged failure to solicit sealed bids for a contract with the lowest and best bidder. The court held that in order for the relators to have standing to maintain their cause of action they must allege a special pecuniary interest in the matter, citing *Metcalf & Eddy Services, Inc. v. City of St. Charles*, 701 S.W.2d 497, 499 (Mo. App. 1985); citing *State ex rel. Johnson v. Sevier*, 98 S.W.2d 677, 679 (Mo. banc 1936). *Mid-Missouri Limestone*, 962 S.W.2d at 441. The court further held that the appellants were not deprived of anything to which they were legally entitled and therefore could not state a cause of action. *Id*. at 441, citing *La Mar Constr. Co. v. Holt County, R-II School Dist.*, 542 S.W.2d 568, 570 (Mo. App. 1976). See also, *Experimental Holdings, Inc. v. Farris,* 503 F.3d 514 (6th Cir. 2007) (Holding disappointed bidder on county real estate lease contract did not have property interest that was protected by procedural due process under Kentucky procurement statutes governing public contracts for the lease of real property; and Eleventh Amendment barred bidder's pendent state law claims against county officials in their official capacity.) The court in *State ex rel. Johnson v. Sevier*

advanced two reasons why an unsuccessful bidder lacks a legal right to the relief requested:

> Because the advertisement was not an offer of a contract, but an offer to receive proposals for a contract, and
>
> Because the statute requiring that contracts be let to the lowest and best bidder was designed for the benefit and protection of the public and not the bidders.

State ex rel. Johnson v. Sevier, 98 S.W.2d 677 at 679. Public Communication Services, Inc. ("PCS") filed suit in the Circuit Court of Cole County to challenge the lawfulness of the State's award of a contract to Securus Technologies, Inc., to provide telephone services to inmates in Missouri prisons PCS alleged that the award to Securus was unlawful because the State failed to solicit competitive bids with respect to certain optional services Securus offered to provide, at an additional cost. PCS also contends that, in selecting Securus as the lowest and best bidder for the offender telephone services contract, the State acted arbitrarily and capriciously by failing to consider Securus' proposed per-transaction fee for prepaid accounts. Following a bench trial, the circuit court rejected PCS‟ claims, and entered judgment for the State and for Securus. PCS appealed.

Missouri cases have held that a disappointed bidder competing for a government contract does not have a special pecuniary interest in the award of the contract to it, and therefore generally lacks standing to challenge the award of the contract to another bidder. Despite the general rule Missouri does recognize that members of the public have standing to challenge a contract award where the contracting authority solicits and evaluates bids unlawfully or capriciously because the public official has a duty to the public to honestly and fairly exercise his or her discretion to award the contract to the lowest and best bidder. Applying this standard PSC as an unsuccessful bidder has standing to challenge a contract award under Missouri law "if the bidding procedure did not permit all bidders to compete on equal terms."

In awarding the contract the DOC "accepted in its entirety" the bid of Securus. While this phrase might seem ambiguous suggesting that the DOC was accepting the optional services when construed in light of the RFP it meant only those services that were required by the FRP, not optional services, even though the DOC was very interested in obtaining optional services from Serurus. To award the contract based on acceptance of optional services would mean that the bidders would be competing on an unequal basis. If an individual proposal varies from the standard specifications, the proposal must be rejected if the variance is material, meaning that "it gives a bidder a substantial advantage or benefit not enjoyed by other bidders. The record made it clear that the Division of Purchasing was the agency controlling the bidding process and that its pre-award representations made it clear that optional services were not accepted.

While the Western district shared PCS concern with the trial courts stated rationale for rejecting PCS‟ prepaid account fee claim it deferred to the trial court findings on this issue because the court was entitled to "affirm the judgment of the trial court on any ground supported by the record." *Public Communication Services, Inc. et al., v. Simmons et al.,* 409 S.W.3d 359.

The court *Sevier* distinguished *Metropolitan Express Services, Inc. v. City of Kansas City, Mo.*, 23 F.3d 1367, 1371 (8th Cir. 1994), on the basis that the plaintiffs in *Metropolitan* did not even submit a bid and that the court in *Metropolitan* noted that the bids were not solicited on an equal basis for all bidders and concluded that an unsuccessful bidder has standing to challenge the contract that was not *fairly* bid. In *Sevier*, the appellants had an opportunity to bid. *See also Emergency Providers, Inc. v. Metropolitan Ambulance Services Trust*, 2006 WL 742295, *13 (W.D. Mo. 2006)(denying the City's motion for summary judgment on the basis that "Plaintiff has identified evidence that tends to show that its proposal was never evaluated under this [fairly bid] standard" because "Plaintiff has alleged that the City waived response times, funded MAST's takeover, and changed its ordinances to allow MAST to continue operating the system.").

(5) Services.

(a) Architects, Engineers and Surveyors. In selecting architects, engineers and surveyors, the state and political subdivisions shall list three highly qualified firms based on statements of qualifications and performance data, and shall select the firm considered best qualified and negotiate a contract. If unable to negotiate a contract with the most qualified, the government shall move to the next firm until a contract is agreed to. §8.291.1 R.S.Mo.

(b) Local Preference Laws. Cities will occasionally attempt to impose local preference rules with respect to a project owned or incentivized by the city. These laws have the potential to violate the lowest and best bid laws of the state, certainly when hiring a construction manager or general contractor. §8.679 R.S.Mo.

(c) Construction Manager. A pure construction manager ("CM") may be selected by negotiation after publication of an RFP. §8.679 R.S.Mo. A CM "at risk", e.g., one who provides a guaranteed maximum price, must be selected by competitive bid. §8.685 R.S.Mo.

(6) Sports Authority. 64.940.3 R.S.Mo. All purchases greater than $25,000 by the Jackson County Sports Complex Authority must be competitively bid.

(7) Insurance. Section 376.696 R.S.Mo. provides as follows:

> Any other law to the contrary notwithstanding, no contract shall be entered into by the governing body of any political subdivision to purchase any insurance policy or policies unless the contract is submitted to competitive bidding at least every six years and the

contract is awarded to the lowest or best bidder. The renewal of any insurance policy during any period between submissions of the contract to competitive bidding shall not constitute a separate and distinct contract for the time covered by the renewal but shall be treated only as an extension of an existing contract.

§46. —Prevailing Wages

All development projects financed with public funds and constructed on behalf of a public body are subject to Missouri's prevailing wage requirements. Contractors and subcontractors on the project must comply with such requirements. The prevailing wage under Missouri law is determined by actual wages paid on commercial projects or highway projects, but developers equate it with union scale. Federal prevailing wages are regulated under the Davis-Bacon Act which covers federal construction contracts. Employees, contracting public bodies, and the state have the right to enforce payment of the prevailing wage.

(1) State. In the course of many redevelopment projects, the question arises whether the project is subject to Missouri's prevailing wage law, §§290.210 to 290.340 R.S.Mo. the ("Act").

(a) Policy. §290.220 R.S.Mo. states that it is the policy of the State of Missouri that wages no less than the prevailing wage be paid for work of a similar character in the locality in which the work is performed to all workers employed by or on behalf of a public body engaged in public work that is not merely maintenance work. The "locality" in which work is performed is the county where the physical work is performed. *City of Kennett v. Labor and Indus. Relations Commission*, 610 S.W.2d 623 (Mo. 1981). This policy also covers the prevailing wage for legal holiday and overtime work. §290.230 R.S.Mo. The prevailing wage cannot be less than the federal minimum wage. §290.263 R.S.Mo.

(b) Determination of Prevailing Wage. The Missouri Department of Labor and Industrial Relations (the "Department") Division of Labor Standards (the "Division") determines the prevailing wage by examining the wages paid for public works on commercial, heavy or highway projects in the previous year. It may or may not be equal to union scale. The Department publishes a list of prevailing wages for different types of work annually known as the Annual Wage Order of each county. For further information contact the Division of Labor Standards, 800-475-2130 or 573-751-3403. The term "work of a similar character" is also liberally construed. "Similar", in the context of the prevailing wage statute, means any work that could reasonably be found to be similar. *City of Kennett v. Labor and Indus. Relations Commission*, 610 S.W.2d 623 (Mo. 1981) (heavy construction).

(c) Test for Application of Prevailing Wage Law. A two-part test is used to determine the applicability of the law: Whether the construction is a "public work" and whether the workmen engaged in the construction are "employed by or on behalf of a public body." §290.220 R.S.Mo.; *State ex rel. Ashcroft v. City of Sedalia*, 629 S.W.2d 578 (Mo. App. 1981).

(i) The Project Must Be a Public Work (for Public Purpose or Paid by Public Funds). A "public work" is defined in §290.210(7) R.S.Mo. as "all fixed works constructed for public use or benefit or paid for wholly or in part out of **public funds**.

Public Purpose. Ashcroft focused on the "public benefit" language in the Act, which the court found was synonymous with public purpose, and found the project was a public work. *Id*. at 583.

Public Funds. "'Public funds' means funds belonging to the state or any county or political subdivision of the state, more especially taxes, customs, moneys, etc. raised by operation of some general law and appropriated by the government to the discharge of its obligations, or for some public governmental purpose." *State ex rel. St. Louis Police Relief Ass'n v. Igoe*, 107 S.W.2d 929 (Mo. 1937).

Utilities. A public work also includes any work done directly by any public utility company when performed by it pursuant to the order of the public service commission or other public authority whether or not it be done under public supervision or direction or paid for wholly or in part out of public funds when let to contract by said utility. It does not include any work done for or by any drainage or levy district. §290.210(7).

(ii) And Employee Must Be Employed by or on Behalf of a Public Body. A "public body" is defined in §290.210(6) R.S.Mo. as "the State of Missouri or any officer, official, authority, board or commission of the state, or any other political subdivision thereof, or any institution supported in whole or in part by public funds." *Ashcroft*, *supra*, held that the workmen in question were not employed on behalf of a "public body" because the contracts were let by the private lessee. The court relied on *Wring v. City of Jefferson*, 413 S.W.2d 292 (Mo. 1967) (Act did not apply where city not required to be a party to contract nor let competitive bids) and *City of Joplin v. Industrial Comm'n of Mo.*, 329 S.W.2d 687 (Mo. 1959) (Act does not apply to work done by municipal employees). But see, *State ex inf. Webster, ex rel. Missouri Dept. of Labor and Indus. Relations, Div. of Labor Standards v. City of Camdenton*, 779 S.W.2d 312, 317 (Mo. App. 1989), which held that workmen employed by private developer to build a fire/police station were employed on behalf of the city. The case rested on the fact that the building would be occupied by the city. In *Division of Labor Standards v. Friends of the Zoo of Springfield*, 38 S.W.3d 421 (Mo. banc 2001) the Supreme Court abrogated the "ultimate beneficiary" test which had been set forth in *Camdenton* and *Henry County Water Co. v. McLucas*, 21 S.W.3d 179 (Mo. App. 2001). The test holds that if the ultimate beneficiary is a public body, the work is being performed "on behalf of" the public body. The Supreme Court said the test is

basically redundant and not needed. 38 S.W.3d @ 423. The Supreme Court held that there was a genuine issue of material fact as to whether the city was engaged in a public work because of the involvement of the zoo director, a city employee, in the Friends of the Zoo in building a reptile house. The court said that if it could be proven that the city was engaged in a public work, the Friends of the Zoo were acting on behalf of the city, citing with approval the *Camdenton* case, *supra*. The Attorney General has taken the position that a public street which is built according to city standards pursuant to a city approved plan is built "on behalf of" the city. (Letter of November 03, 2003 regarding North Stark Avenue.) This would apply the prevailing wage law to virtually every street that is built by a developer.

(iii) And Be New Construction. The prevailing wage requirement applies only to new construction on a public work. Construction is defined at §290.210(1) R.S.Mo. to include reconstruction, improvement, enlargement, alteration, painting and decorating or major repair. This broad definition has been construed liberally by the Attorney General to include the installation of central air conditioning. Op. Att'y Gen. No. 32, Marshall 10-20-70. The hauling of materials and equipment to and from the site is covered. §290.230 R.S.Mo. The requirement does not include maintenance work which is defined as the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not changed or increased by the repair. §290.210(4) R.S.Mo. The removal of asbestos from pipe fittings was determined to be maintenance and not construction. *State Dept. of Labor and Indus. Relations, Div. of Labor Standards v. Board of Public Utilities of City of Springfield*, 910 S.W.2d 737 (Mo. App. S.D. 1995). Painting and welding a municipal water storage tank was held to be construction in *Utility Services Co., Inc. v. The Department of Labor and Industrial Relations*, 331 S.W.3d 654 (Mo. 2011).

(d) Job Site. Employees who work at a location other than the primary job site of a public work may be covered, if as in the case of a temporary batch plant, their primary mission is completion of the public work 8 CSR 30-3.020; *Long v. Interstate Ready-Mix, L.L.C.*, 83 S.W.3d 571, 578 (Mo.App. W.D. 2002).

(e) Requirements of Contractors. Each contractor and any subcontractor is required to:

- post the list of prevailing wages to be paid during the term of the construction, §290.265 R.S.Mo.;
- keep detailed and accurate records indicating the names and occupations of every person working on the public work, together with a record of the number of hours worked by each workman and the actual wages paid, §290.290 R.S.Mo.;
- keep payroll records which are subject to inspection by a member of the Department at any reasonable time, *Id*.;
- file with the contracting public body when the public work is completed and before final payment has been made, evidence

that the contractor has fully complied with the prevailing wage statute, *Id*.; and

- on any project over $250,000 display the contractor's name or logo with the city and state of their business on all motor vehicles used in connection with the public work. *Id*. If this is not possible the contractor or subcontractor may place a stationary sign at the entrance to the construction project. *Id*.

No contract for construction may be awarded until the prevailing wage for the locality and types of work have been determined. §290.325 R.S.Mo. The determination must be made a part of the specifications and contract for the public works.

(f) Enforcement and Penalty. Any worker paid less than the prevailing wage may file a complaint and shall have the right to double the difference between the amount paid and the prevailing wage and reasonable attorneys fees as determined by the court. §290.300 R.S.Mo. In addition, the Department, after investigation on complaint or upon its own initiative, shall file with the Secretary of State a list of the contractors and subcontractors who have been convicted of violations of the prevailing wage statute. §290.330 R.S.Mo. Any contractor or subcontractor named will be prohibited, directly or indirectly, from contracting with any public body for construction of any public work for one year from the date of the first conviction, or for three years from the date of each subsequent conviction. *Id*. See also *Layne, Inc. v. Moody*, 956 S.W.2d 325, 328 (Mo. App. W.D. 1997) (agreement between DNR and contractor for clean-up was not an enforceable contract, and therefore, not a contract for public work).

(g) Chapter 100 Municipal Leases. In *International Brotherhood of Electrical Workers v. City of Sedalia*, 629 S.W.2d 578 (Mo.App. W.D. 1981) the court held that an industrial development project financed with industrial revenue bonds, assuming it constituted a "public work", did not involve "workmen employed by or on behalf of" a public body engaged in public works and thus was not subject to the state prevailing wage law.

(2) Federal Law - Davis-Bacon Act. The Davis-Bacon Act, 40 U.S.C. §§276a - 276a-5 applies to all government contracts with or funded by a federal agency for the construction, alteration or repair of public buildings or public works in excess of $2,000. In general, it requires that laborers and mechanics employed directly at the site of work be compensated at not less than the prevailing wage as determined by the Secretary of Labor, including fringe benefits. 40 U.S.C. §276a. The Secretary of Labor enforces the act pursuant to rules promulgated by the Department of Labor found in 29 C.F.R. A, §5. §5.2(h) of the regulations provides:

> The term ***contract*** means any prime contract which is subject wholly or in part to the labor standards provision of any of the acts listed in §5.1 and any subcontract of any tier thereunder, let under the prime contract. A state or local government is not regarded as a

> contractor under statutes providing loans, grants, or other federal assistance in situations where construction is performed by its own employees. However, under statutes providing payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, state and local recipients of federal aid must pay these employees according to the Davis-Bacon labor standards.

Section 5.2(k)(1) provides:

> The term ***public building*** or ***public work*** includes building or work, the construction, prosecution, completion or repair of which, as defined above, ***is carried on directly by authority of or with funds of a federal agency*** to serve the interest of the general public regardless of whether title thereof is in a federal agency. (l) The term ***site of the work*** is defined as follows: (1) the ***site of the work*** is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l) of this section, or (2) other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the ***site***. (emphasis supplied)

The act applies to federally assisted projects. §5.5 of the regulations provides:

> (a) The agency head shall cause or require the contracting officer to insert in full in any contract in excess of $2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating of a public building or public work, or building or work financed in whole or in part from federal funds or in accordance with guarantees of a federal agency or financed from funds obtained by pledge of any contract of a federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated) and which is subject to the labor standards provisions of any of the acts listed in §5.1 the following clauses. . . .:

§47. —Federal Constitutionality of Incentives

In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994), the court stated that it had never squarely confronted the constitutionality of subsidies.The court has had occasion to examine the validity of state incentives under the Commerce Clause, Art. I, §8, Para. 3, which states that the Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;". The clause is

regarded as self-executing: even in the absence of federal implementing legislation, states are prohibited from discriminating against interstate commerce. For example, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) held unconstitutional a statute which granted nonprofit institutions a property tax exemption if operated for the benefit of the state residents. But *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) [while striking down an Ohio statute providing tax credit for ethanol producers from Ohio or from states which granted reciprocal tax credit, exemption, or refund for Ohio-produced ethanol] confirmed that direct subsidization of domestic industry does not ordinarily violate the Commerce Clause.

The Court upheld a Kentucky law that allowed income from Kentucky local and state bonds to be deducted from state income while taxing out-of-state government bonds in the face of a challenge under the dormant commerce clause. *Dep't of Revenue of Kentucky et al., v. Davis*, 128 S.Ct. 1801 (2008). The Court reiterated the following analysis: The dormant Commerce Clause was "driven by concern about economic protectionism," measures designed to benefit in-state economic interests at the expense of out-of-state competitors. A law that discriminated against interstate commerce was "virtually *per se* invalid," but a "market participant" exception allowed States to legitimately exercise their right to favor their own citizens. In *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 127 S.Ct. 1786. Pp. 7–10 (2007) decided a year earlier the court upheld a flow control statute for solid waste against a similar dormant commerce clause challenge. It now seems clear the United States Supreme Court has a much more narrow view of the dormant commerce clause and has retreated from the expansive view of the dormant clause taken by the Rehnquist Court. Referring to *that case,* the Court held *United Haulers "*provides a firm basis for reversal." As in *United Haulers*, the logic that a government function was not susceptible to standard dormant Commerce Clause scrutiny because it was likely motivated by legitimate objectives – distinct from simple economic protectionism – applied "with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects" like protecting the health, safety, and welfare of citizens, "was a quintessentially public function." Kentucky's tax exemption favored "a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests. This type of law does 'not "discriminate against interstate commerce" for purposes of the dormant Commerce Clause.' "
See http://www.supremecourtus.gov/opinions/07pdf/06-666.pdf

§48. —Blight

Implementation of several economic development programs in Missouri is contingent on the governing authority's declaration of blight. Definitions of blight are found in the various programs such as Tax Increment Financing (§99.805(1) R.S.Mo.), Land Clearance for Redevelopment (§99.320(3) R.S.Mo.), the Urban Redevelopment Corporation law (§353.020(2) R.S.Mo.), and the Planned Industrial Expansion Authority law (§100.310 R.S.Mo.). Governing authorities have a great deal of discretion regarding a declaration of blight. Absent arbitrariness, collusion, bad faith or fraud, a blight determination will not be questioned by a court. Although economic underutilization is not mentioned in the PIEA or urban redevelopment laws, the Supreme Court and at least one Court of Appeals have indicated it might be a basis for blight under those statutes.

(1) Declaration Is Legislative. The existence of blight is a legislative determination. *Allright of Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320 (Mo. 1976); *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146 (Mo. banc 1987); *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991) (held a finding of blight was not compelled by the evidence, but where the evidence didn't compel a decision that blight did not exist, the board of aldermen could reasonably conclude area was blighted). The Court will not interfere with the council's discretion as to what constitutes blight in the absence of fraud, collusion, bad faith or clear arbitrariness. *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974); *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991); *State ex inf. Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44 (Mo. 1954); *JG St. Louis West, Ltd. Liability Co. v. City of Des Peres*, 41 S.W.3d 513, 517-19, (Mo. App. E.D. 2001) (substantial evidence in record to support finding that shopping center was blighted.). Until the Eastern District, and then, on transfer, the Supreme Court handed down its decision in *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431(Mo. banc 2007), no Missouri appellate court had ever reversed a finding of blight by a local government. In *Centene*, the court found that the property in question could not meet the statutory definition of blight under Missouri's Urban Redevelopment law, because the evidence in the record did not support a finding that the property was a social liability under Chapter 353 R.S.Mo. At about the same time, the New Jersey Supreme Court held that a municipality's interpretation of the state's Local Redevelopment and Housing Law, which required a finding of blight in order to use condemnation, was so broad that it would include most of the property in the state. The city had designated the property as "in need of redevelopment." *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, No. A-51-2006 (N.J. 2007).

(2) Test Is Whether Existence of Blight Is Fairly Debatable. *State ex inf. Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44 (Mo. 1954); *Schweig v. Maryland Plaza Redevelopment Corp.*, 676 S.W.2d 249 (Mo. App. 1984); *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991); *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36, 45 (Mo. banc 1975) (legislative finding of blight will be accepted as conclusive evidence of public purpose absent clear proof that finding is arbitrary, or individual by fraud, collusion or bad faith). However, in the aftermath of the *Kelo* decision, the Missouri legislature adopted HP 1944 in 2006, which provides in relevant part:

> §523.261. Solely with regard to condemnation actions pursuant to the authority granted by §21, Article VI, Constitution of Missouri and laws enacted pursuant thereto, any legislative determination that an area is blighted, substandard, or unsanitary shall not be arbitrary or capricious or induced by fraud, collusion, or bad faith *and shall be supported by substantial evidence*. A condemning authority or the affected property owner may seek a determination as to whether these standards have been met by a court of competent jurisdiction in any condemnation action filed to acquire the owner's property or in an action seeking a declaratory judgment. Upon the filing of such a declaratory judgment or when such a defense is raised in a condemnation proceeding, the circuit court shall give the case preference in the order of hearing to all other cases, except elections cases, to the extent necessary to conclude the case within thirty days of having been filed. Either party may thereafter file an interlocutory appeal of the circuit court's order upholding or rejecting the legislative body's determination. Any subsequent or interlocutory appeal to a higher court on the appeal of the legislative determination shall be given preference and concluded in an expedited manner similar to the manner set forth herein for a hearing in circuit court. An interlocutory appeal shall not stay proceedings in the court unless the court of appeals so orders. (emphasis supplied)

The problem with the measure is that it allows the declaration of blight to retain its legislative character, while prescribing a review that is limited by the doctrine of the separation of powers to administrative findings, and thus is probably unconstitutional. The Missouri constitutional provision on separation of powers (Article II, §1), prohibits review of a legislative act by certiorari or other review on the record. Legislatures don't have to have evidence to pass laws. In *Bowman v. Greene County Comm'n*, 732 S.W.2d 223 (Mo. App. S.D. 1987), the court stated as follows:

> By its terms, the §[49.230 R.S.Mo.] is applicable to all decisions, orders and findings of the county commission. Nonetheless, to observe the separation of powers of government it is logical to confine the scope of that section to administrative decisions coming within the scope of Chapter 536. This result is implied in the language of the amended section.

Id. at 225."Review by certiorari is limited to decisions, that is, judicial acts of agencies, not the exercise of legislative power." *Salameh v. County of Franklin,* 767 S.W.2d 66, 68 (Mo. App. E.D. 1989); *Loomstein v. St. Louis County*, 609 S.W.2d 443 (Mo. App. 1980); *State ex rel. Croy v. City of Raytown,* 289 S.W.2d 153, 156 (Mo. App. 1956); *Allen v. Coffel,* 488 S.W.2d 671 (Mo. App. 1972); *Gambino v. Carpenter,* 851 S.W.2d 96, 97 (Mo. App. 1993); White, *The Law of Refusal to Rezone in Missouri—The Need For a Practical Injunctive Remedy*, 58 UMKC L. Rev. 1, 65 (Winter, 1989). Not even the original decision to zone is reviewable by certiorari. *State ex rel. Croy v. City of Raytown,* 289 S.W.2d 153, 156 (Mo. App. 1956). In *Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556 (Mo.App. W.D. 2008) property owner sued to invalidate city's TIF plan. Trial court granted summary judgment for the city. Held: the trial court erred in using the "fairly debatable" test that is normally used to determine the reasonableness of an ordinance, when ruling on summary judgment. To do so, shifts the burden form the city to show there is no material issue of fact. The court stated the matter thusly:

> Regardless of the underlying rationale, application of the "fairly debatable" test is rather straight-forward in practice: in order to prevail on any claim that legislative action is unreasonable, arbitrary, or capricious, it must be shown that the reasonableness of that action is not even fairly debatable. *Hankinson,* 312 S.W.2d at 8._ The assertion of such a claim ultimately leads to one of two factual findings: either the complained of action is *unreasonable* or the reasonableness thereof is *fairly debatable.*

Great Rivers Habitat Alliance @ 562. The court overlooked a third possibility: that the ordinance is reasonable beyond debate. In the interest of full disclosure, it should be noted that the author argued Great Rivers before the court on behalf of the City of St. Peters.

The court also examined the definition of blight in the TIF statute. Section 99.805(1) R.S.Mo. provides:

> (1) "Blighted area", 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;

In addressing this definition, the court stated:

> Fortunately, the phrase "by reason of a predominance of" modifies the entire list of factors, and provides a reasonable reading of the definition that does not suffer this infirmity. We, therefore, read the definition to explain that if any of the first five factors predominate, our analysis of the first half of this definition is complete, and the necessary conditions are met. If, however, various factors are present without "predominating" in the area, the question must be answered whether those factors, when combined, predominate to such an extent that the resulting circumstances, described in the second half of the definition, are present.
>
> Turning to the second half of the definition, we learn that a predominance of factors listed in the first half of the definition will result in blight if it:
>
> (1) retards the provision of housing accommodations or
>
> (2) constitutes an economic or social liability or
>
> (3) [constitutes] a menace to the public health, safety, morals, or welfare [.]
>
> *Id.* (numbering added). Like the factors in the first half of the definition, these resulting circumstances are joined by the conjunction "or." Thus, if a predominance of factors listed in the first half of the definition leads to any resulting circumstance listed in the second half of the definition, an area may properly be declared to be a "blighted area." Finally, and of particular importance to the instant case, the entire definition is modified by its final dependent clause: "in its present condition and use." *Id.* In other words, the "area" in question (the proposed TIF district) "in its present condition and use," must meet this definition.

Great Rivers Habitat Alliance @ 560-561. After the 2008 decision by the Western District the case was remanded to the circuit court where there was a full trial on the merits. The city again prevailed and the plaintiffs again appealed to the Western District. The posture of the case in the second appeal was totally different since the issue of summary judgment was no longer in the case. In the

second appeal, the Court of Appeals reaffirmed that the standard for review of a legislative determination of blight is the fairly debatable test, and is limited to whether the decision is arbitrary, induced by fraud, collusion or bad faith or whether the board exceeded its powers. *Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279 (Mo.App. W.D. 2012). (In the interest of full disclosure, it should be noted that the author argued both cases before the Western District).

(3) Conditions in Area.

(a) Economic Underutilization. Held to be a proper basis for eminent domain in *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146, 151 (Mo. banc 1987); cited in dictum as a basis for declaring an area blighted in *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991), where the court stated: ". . . [W]e note that after the trial, the court met with the parties in chambers to explain the reasons for its rulings. During the discussion, the court stated 'economic underutilization is not a basis to declare something blighted.' Though this was not one of the trial court's conclusions of law, we will briefly address this remark. In 1987, our Supreme Court stated: 'The concept of urban redevelopment has gone far beyond "slum clearance," and the concept of economic underutilization is a valid one.' *Tierney v. Planned Indus. Expansion Auth*., [citation omitted]. Thus, the trial court's remark is unfounded." *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991). However in 2006, the Missouri legislature adopted HB 1944 prohibiting the use of eminent domain "for solely economic development purposes." §523.271 R.S.Mo. The law does not prevent eminent domain to eliminate blight. *Tierney* was a PIEA case. The PIEA definition of blight is identical to that in the TIF Act: "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." §100.310(2) (PIEA); §99.805(1) (TIF). *Crestwood Commons* was a 353 case. In §353.020(2) of the 353 Act, "Blighted area" is defined as "that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes."

(b) Well Maintained Property. That an individual property is well maintained will not prevent a declaration of blight. *Schweig v. City of St. Louis*, 569 S.W.2d 215 (Mo. App. 1978). *Kelo v. City of New London*, Conn., 545 U.S. 469, 125 S.Ct. 2655, (2005), 2005WL1469529 examined the use of eminent domain by a private entity, the New London Development Corporation, to revitalize an area declared 'distressed' by the state. The plaintiffs' properties were not blighted, but were condemned to assemble the larger property. The Fifth

Amendment to the Constitution provides that private property shall not be taken for public use, without just compensation. The court held 5 to 4 that a public purpose is a public use and that further, economic development is a valid public purpose. Lack of blight of the specific properties at issue did not tempt the court to second guess the legislative plan for the redevelopment of the larger area.

(c) Size. Single parcel may be declared blighted. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991); *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991).

(d) Vacant Land. May be declared blighted. *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975). In *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974), the Supreme Court approved a declaration of blight on ground that was 49% vacant, 4% parking, and where 82% of the improved portion was not deteriorated. Streets and parking lots may be blighted. *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146 (Mo. banc 1986). However, in 2006, the Missouri legislature adopted HB 1944 which prohibits declaring farm land as blighted for eminent domain purposes. §523.283.4 R.S.Mo.

(e) Farm Land. In *Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279, 295 (Mo.App. W.D. 2012) Plaintiffs argued that farm land could not be declared blighted under the TIF Act or the constitutional provisions allowing tax abatement because it was not previously developed. The court rejected this argument, finding that substantial development had occurred in the construction of farm levees and roads.

(4) Area Included. Blight need not exist on every single parcel. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991); *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36, 47-48 (Mo. banc 1975); *Schweig v. City of St. Louis*, 569 S.W.2d 215 (Mo. App. 1978). In *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974), the Supreme Court approved a declaration of blight on ground that was 49% vacant, 4% parking, and where 82% of the improved portion was not deteriorated. A blighted area may include parcels not blighted if inclusion is necessary to assemble a tract of sufficient size to attract developers. *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146 (Mo. banc 1978). Existing area may be expanded to include non-blighted parcels. *Id*. Streets and parking lots may contribute to blight. *Id*.; see also *Schweig*, *supra*; *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991). *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct. 2655, (2005), 2005WL1469529 examined the use of eminent domain by a private entity, the New London Development Corporation, to revitalize an area declared 'distressed' by the state. The plaintiffs' properties were not blighted, but were condemned to assemble the larger property. The Fifth Amendment to the Constitution provides that private property shall not be taken for public use , without just compensation. Inherent in

the clause, is the requirement that a taking must be for a public use. The court held 5 to 4 that a public purpose is a public use and that further, economic development is a valid public purpose. Lack of blight of the specific properties at issue did not tempt the court to second guess the legislative plan for the redevelopment of the larger area. In 2006, via HB 1944, the Missouri legislature enacted §523.274.1. R.S.Mo., which provides: "Where 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 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." *Allright Properties, Inc. v. Tax Increment Financing Commission of Kansas City*, 240 S.W.3d 777 (Mo.App. W.D. 2007) held that while the condemning authority is required to "consider" individually each parcel, it is not obligated to find each parcel to be blighted, and that "preponderance" means that the total square footage of blighted property is greater than the square footage of the area not blighted. The court also held that the statute does not prevent the condemning authority from using a blight study that is older than five years, but is prohibited from commencing a condemnation action later than five years from the date of the ordinance finding blight.

(5) Declaration of Blight Not a Taking. The announcement of a project may cause a property owner to seek a declaration that his property has been taken. The Missouri Supreme Court has held, however, that a declaration of blight does not work a taking of property. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991). The decline in value between the declaration of blight and the actual condemnation is not compensable. *State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner*, 626 S.W.2d 373 (Mo. 1982). There is nothing new in this; it is commonplace for property owners in the path of a proposed highway to complain that the announcement of the plan works a taking of their property because they are then unable to sell it. However, the general rule has always been that a land owner may not recover for loss of value caused by an impending condemnation. *Land Clearance for Redevelopment Auth. of City of St. Louis v. Morrison*, 457 S.W.2d 185 (Mo. banc 1970); *Gould v. Land Clearance for Redevelopment Auth. of Kansas City*, 610 S.W.2d 360 (Mo. App. 1980); *Gardner v. City of Cape Girardeau*, 880 S.W.2d 652, 654 (Mo. App. E.D. 1994). Petition to have area declared blighted does not create a cause of action for lowering property values. *Cigas v. Kansas City Life Ins. Co.*, 586 S.W.2d 750 (Mo. App. W.D. 1979).

§49. —Eminent Domain

The Missouri Constitution allows the use of eminent domain to take private property for redevelopment purposes. Article VI, §21. Missouri allows eminent domain to be exercised by utilities,

railroads, redevelopment corporations and tax increment financing commissions. Eminent domain is allowed in conjunction with curing blight even though the property is vacant and even though the owner is capable of redeveloping it. Restrictions on the power were adopted via HB 1944 in 2006. One political subdivision may acquire the property of another if such acquisition does not totally destroy or materially impair the existing use. Charter cities and cities of more than 500,000 population have certain extra-territorial condemnation powers.

(1) Delegation of Eminent Domain Power to Private Entity Allowed. *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965) held that the power of eminent domain could be delegated to a private redevelopment corporation. And *Stewart v. Williams Communications*, 85 S.W.3d 29 (Mo. App. W.D. 2002) held that a private company, in this case a utility, was not a public governmental body and could not therefore be compelled to surrender records under the Sunshine Law, §610.010(4). However, in 2006, the legislature adopted §523.262.1 R.S.Mo., which provides: "Except as set forth in subsection 2 of this section, the power of eminent domain shall only be vested in governmental bodies or agencies whose governing body is elected or whose governing body is appointed by elected officials or in an urban redevelopment corporation operating pursuant to a redevelopment agreement with the municipality for a particular redevelopment area, which agreement was executed prior to or on December 31, 2006." One would have thought the issue of whether all cities in Missouri can condemn property in furtherance of a TIF plan has been settled, but it was raised in *City of Arnold v. Tourkakis*, 249 S.W.3d 202 (Mo. banc 2008) . Although the circuit court of Jefferson County granted Owner's motion to dismiss on the grounds that Article VI, Section 21 of the Missouri Constitution limited the power to blight and acquire such property to home rule cities, the Missouri Supreme Court held that Article VI, Section 21 allows the General Assembly to pass laws for non-charter cities to blight land and acquire the blighted property. The phrase "laws may be enacted" in Article VI, Section 21 that indicates that the General Assembly has the authority to pass laws to allow non charter cities to eliminate blighted areas. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 206 (Mo. banc 2008).

(2) Acquisition of Vacant Land Allowed. Eminent domain may be used to acquire vacant land for redevelopment purposes. *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974).

(3) Use to Prevent Blight by Acquiring Non-Blighted Parcels Allowed. *Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Construction Co.*, Inc., 781 S.W.2d 70 (Mo. banc 1989). *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct. 2655, (2005), 2005WL1469529 examined the use of eminent domain by a private entity, the New London Development Corporation to

revitalize an area declared 'distressed' by the state. The plaintiffs' properties were not blighted, but were condemned to assemble the larger property. The Fifth Amendment to the Constitution provides that private property shall not be taken for public use, without just compensation. Inherent in the clause, is the requirement that a taking must be for a public use. The court held 5 to 4 that a public purpose is a public use and that further, economic development is a valid public purpose. Lack of blight of the specific properties at issue did not tempt the court to second guess the legislative plan for the redevelopment of the larger area.

(4) Determination of Public Purpose Will Not Be Disturbed Absent Fraud, Etc. A legislative determination of public purpose is conclusive and will not be disturbed except upon proof of fraud, collusion or bad faith. *Land Clearance for Redevelopment Authority of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58 (Mo. banc 1954). "Thus, we will accept the board of aldermen's decision to take 66 Drive-In property as conclusive evidence that the contemplated use is public unless we find that the board's determination was arbitrary or it was induced by fraud, collusion or bad faith. . . . Here, we cannot substitute our opinion for that of the board, even if its action could reasonably be characterized as doubtful or debatable." *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991). In *Aaron v. Target*, 357 F.3d 768 (8th Cir. 2004), the 8th Circuit reversed the granting of a preliminary injunction by the district court against the use of eminent domain by the Land Clearance for Redevelopment Authority of the City of St. Louis. Target had a long-term lease on the store it occupied, but wanted to build a new one. The owners agreed, but demanded more rent. The city approved a redevelopment plan to demolish the store and convey the property to Target by passage of an ordinance on December 21, 2002. The Redevelopment Authority made an offer to purchase, which remained open until April 10, 2003. On April 4, 2003, the owners filed suit in Federal Court to enjoin the procedure as an unconstitutional taking. In holding that Younger abstention should apply, the 8th Circuit ruled that there were sufficient state proceedings under way when the Federal Court action was filed, noting that condemnation proceedings were initiated by the passage of the redevelopment ordinance. The court observed that litigation was sure to follow if the owners did not respond affirmatively to the offer and that the suit was filed by the owners on the last day on which they could be sure no action would be started in state court. Thus, a race to the courthouse was not allowed to determine whether there were sufficient state proceedings for Younger purposes. The court pointed out that Missouri law allows constitutional challenges to be raised in a state court condemnation proceeding. "There is an extensive body of Missouri appellate cases deciding whether a taking is for a private purpose. Federal abstention in this case would permit Missouri's condemnation procedures to run their course. Eminent domain is an appropriate tool to help neighborhoods remain economically viable, attract industry, and encourage future growth." Id. at 778. The opinion rejected the bad faith exception to abstention in spite of evidence that

Target told the city it couldn't reach agreement on price and might abandon the site even though no discussions had taken place between the parties, that Target authored the blight study, and that Target presented a redevelopment plan to the city without the owners' knowledge. (Emphasis supplied.)

(5) Private Use.

(a) Blighted Land May Be Condemned and Sold for Redevelopment. *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146 (Mo. banc 1987). A taking for redevelopment which ultimately transfers title to a private individual is not a taking for a private purpose under Article I, §§2, 10, 26, 28. *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965). See *Kelo, Supra*.

(6) Fact That Property Could Be Developed by Owner Will Not Prevent Taking. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991) cited *Schweig v. Maryland Plaza Redevelopment Corp.*, 676 S.W.2d 249, 254 (Mo. App. 1984), for the proposition that "where a statute authorizes the taking of a fee, a court may not invalidate such taking on the ground that only a lesser interest was required to accomplish the purpose the legislature had in view. We also held that this is a legislative and not a judicial question. Id.").

(7) Property Interest Which May Be Acquired – Easement Over Railroad Property. May an urban redevelopment corporation condemn an easement across railroad property? The answer appears to be that it can. §353.130 R.S.Mo. provides that the power of eminent domain applies to any property except that owned by a city, county, state or other political subdivision. §353.130.2 provides that an urban redevelopment corporation shall have "the right to acquire by the exercise of the power of eminent domain any real property in fee simple or other estate which is necessary to accomplish the purpose of this chapter, under such conditions and only when so empowered by the legislative authority of the cities affected by this chapter." §353.130.3 provides that an urban redevelopment corporation may exercise the power of eminent domain "in the manner provided for corporations in Chapter 523 R.S.Mo.; . . . property already devoted to a public use may be acquired in like manner, provided that no real property belonging to any city, county or the state or any political subdivision thereof may be acquired without its consent." In *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383 (Mo. banc 1987), a county was allowed to condemn the property of a fire protection district in order to widen a road. The court stated the rule as follows:

> The general rule is that public property held by a political subdivision cannot be acquired by another political subdivision if the proposed use will totally destroy or materially impair or interfere with the former use. The logical corollary of this rule is

> that if the proposed use does not totally destroy or materially impair or interfere with the existing use, the public property can be acquired by another political subdivision to further serve a public purpose without express authority by the legislature.

Id. at 385. *Kansas City v. Ashley*, 406 S.W.2d 584 (Mo. 1966), is an example of a case where the condemnation would totally destroy the function: the area the city wanted to condemn extended along the railroad right-of-way with no provision made for the railroad to use the street for railroad purposes. But *Kansas City v. Ashley* did hold that a municipal corporation could extend streets *across* railroad right-of-way, *Id*., as long as the condemnation does not preclude the railroad from using its tracks. *Id*. at 589. The same rationale holds true for a telephone company condemning a right to place poles and string lines on railroad right-of-way which the court described as "an easement within an easement." In *American Tel. & Tel. Co. of Missouri v. St. Louis I.M. & S. Ry. Co.*, 101 S.W. 576 (Mo. 1907), the court held that the telephone company's use of the railroad right-of-way in such a manner did not interfere with the public use in defendant's easement.

(8) Extraterritorial Powers. §82.240 R.S.Mo. (1993) states as follows:

> It shall be lawful for any city to make provision in its charter . . . to acquire and hold . . . by the exercise of the power of eminent domain by condemnation proceedings, lands for public use, either within the corporate boundaries of such city or outside such corporate boundaries, and within the territorial limits of the county in which such city may be situated, . . . for any public purpose, and to provide for managing, controlling, and policing the same.

§82.970 gives certain cities the power to condemn property outside the city, even if the property to be condemned is not within a county in which the city is located.

> Every city now having or which may hereafter have a population of 500,000 or more inhabitants shall have the authority and is hereby empowered to condemn for public use property, real or personal, or any easement or use therein, without such city.

In *City of Cape Girardeau v. Jett*, 851 S.W.2d 114 (Mo. App. E.D. 1993), the sole issue on appeal was "whether the City has authority to condemn land outside its territorial municipal boundaries." *Id*. Cape Girardeau is a constitutional charter city. *Id*. The charter of Cape Girardeau gave the city all powers which the General Assembly of the State of Missouri has authority to confer upon any city. Because the city gave itself such broad powers in the charter, the Court of Appeals held that Cape Girardeau could condemn property outside its boundaries.

Another case which is helpful in the analysis of this issue is *State ex rel. White v. Eiffert*, 774 S.W.2d 152 (Mo. App. 1989). In *Eiffert*, the City of Springfield

filed a petition in condemnation in the Circuit Court of Christian County, averring that it is a constitutional charter city, and requesting condemnation of property in Christian County. One of the issues in the case was whether Springfield was located in Christian County. The majority of Springfield is in Greene County. The court found that the city had appropriately annexed some property in Christian County.

The property owners in Christian County argued that the Circuit Court of Christian County did not have jurisdiction over this matter because the City of Springfield had no authority to condemn property located outside the limits of the County in which it is located. The Court of Appeals noted that Springfield's Charter allowed the city to condemn without regard to the political subdivisions in which the land to be condemned is located. Moreover, §82.240 R.S.Mo. allows constitutional charter cities to condemn outside their corporate boundaries but within the territorial limits of a county in which the city is located. The *Eiffert* court stated:

> §82.240 clearly permits a constitutional charter city to exercise the power of eminent domain *in any county which is within the city's corporate boundaries*. If the parcel sought to be condemned had been validly annexed to the city, then the condemnation which is the subject of this action is not objectionable as being in violation of §82.240.

Id. at 155 (emphasis added). Because the city had properly annexed property in Christian County, the Court of Appeals held that Springfield had the power to condemn lands in Christian County. *See also*, MacDonnell, Missouri Attorney General Opinion, No. 65-90. June 25, 1990 (discussing *Eiffert* case).

§71.680 R.S.Mo. allows fourth class cities to acquire by purchase or otherwise, within or without the corporate limits of such cities, property for refuse disposal facilities. In *State of Missouri ex rel. City of Gower v. Gee*, 573 S.W.2d 107 (MO. App. 1978), the City of Gower, a fourth class municipality in Clinton County, attempted to condemn property in Buchanan County, a second class county, for construction of a sewage treatment facility. The court held that a fourth class municipality had legislative authority to construct a sewage facility on land within five miles outside of its municipal corporate boundaries.

§99.010 R.S.Mo. grants municipalities the power to condemn property within one mile of their boundaries for park purposes. In *City of Kirkwood v. City of Sunset Hills*, 589 S.W.2d 31 (Mo. App. 1979), the City of Kirkwood, a third class city, sought to condemn property in the City of Sunset Hills for the purpose of building a city swimming pool. Although the case involved powers of a third class city, the court held that §90.010 R.S.Mo. grants any city the right to acquire property for the purpose of establishing a park.

(9) Abandonment. In 2006, the Missouri legislature adopted HB 1944 in a major overhaul of eminent domain law. §523.259 as adopted in that bill provides as follows:

If any condemning authority abandons a condemnation, each owner of interests sought to be condemned shall be entitled to recover:

(1) Their reasonable attorneys' fees, expert expenses and costs; and

(2) The lesser of:

(a) The owner's actual damages accruing as a direct and proximate result of the pendency of the condemnation if proven by the owner; or

(b) The damages required to be paid to an owner in the event of an abandonment under the terms of the applicable redevelopment plan or agreement.

In the event that the applicable redevelopment plan or agreement is silent as to damages required to be paid to an owner in the event of an abandonment, a court shall order the condemning authority to pay the owner's actual reasonable attorneys' fees and expenses, and shall award damages accruing as a direct and proximate result of the pendency of the condemnation if proven by the landowner.

Under pre-1966 case law, where a condemnor begins the condemnation and then abandons it, the condemnor may be liable for costs, expenses and actual damages to the condemnee. A private condemnor, such as an urban redevelopment corporation may be liable even if not acting in bad faith. *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32 (Mo. banc 1999) (Corporate veil pierced, and shareholders held liable.) Where the county filed a condemnation action under a TIF plan and appealed the commissioners' award without paying it into court and then claimed that the court lost subject matter jurisdiction because of the five-year limitation on condemnation in §99.810.1(3) R.S.Mo., the Court of Appeals held that the county's motion to dismiss should be treated as an abandonment of the condemnation and that the Constitution, Art. V §14, and the condemnation statute, §523.0450 R.S.Mo., conferred jurisdiction on the court to award interest on the condemnation award. *St. Louis County v. Berck*, 322 S.W.3d 610 (Mo.App. E.D. 2010).

(10) Ordinance Granting Power Must Be Strictly Followed. Failure by a developer to give notice as provided in the ordinance granting power of eminent domain, precluded the use of the power. *City Center Redevelopment Corporation v. Foxland, Inc.*, 180 S.W.3d 13 (Mo. App. E.D. 2005).

(11) Eminent Domain Reform Legislation.

In 2006, the Missouri Legislature adopted HB 1944 in the aftermath of the United States Supreme Court decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct. 2655 (U.S. Conn., 2005), 2005WL1469529. The bill restricts the power of eminent domain in various economic development programs such as Housing Authorities, Planned Industrial Expansion

Authorities, and Urban Redevelopment Corporations, but most of its provisions deal with amendments to Missouri's main eminent domain law codified in Chapter 523 R.S.Mo.

Of particular interest are the following sections:

(a) Economic Development. No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes. §523.271.1 R.S.Mo. For the purposes of this section, "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 §99.805 R.S.Mo. §523.271.2 R.S.Mo. The Missouri Supreme Court held that this section makes it difficult if not impossible for a port authority to use the power of eminent domain. *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472 (Mo. banc 2013). However, if any other purpose could be found, outside of the four statutory factors in the definition of economic development, a taking would survive judicial scrutiny.

(b) Blight. Where 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 definition of blight. §523.274.1 R.S.Mo. 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. Id.

(c) Statute of limitations. 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 §99.805 R.S.Mo. §523.274.2 R.S.Mo. However, such determination may be renewed for successive five-year periods by the legislative body. Id.

(d) Basis for Taking. Specifies that private property may only be taken through the use of eminent domain after determining blight of the property or the taking is for a public use and not without just compensation. §523.039 R.S.Mo., §523.271 R.S.Mo.

(e) Valuation. Defines "fair market value," "heritage value," "farmland" and "homestead taking". §523.001 R.S.Mo. Requires that for all condemnations filed after December 31, 2006, just compensation for condemned property will be determined by fair market value, homestead taking which is fair market value multiplied by 125%, or heritage taking which is fair market value multiplied by 150%. §523.039 R.S.Mo. Requires after the filing of the commissioners' report, the circuit judge presiding over the condemnation will

determine whether a homestead taking has occurred and whether heritage value is to be paid to the property owner. §523.061 R.S.Mo. Heritage value upheld in St. Louis Co. v. Riverland Estates, 408 SW3d 116 (Mo. banc 2013).

(f) Farmland. Specifies that farmland will not be determined to be blighted. §523.286 R.S.Mo.

(g) Relocation Payments. Specifies that all displaced residential individuals eligible for assistance will receive a $1,000 fixed moving expense payment or the actual reasonable costs of relocation not including the cost of replacement property. 523.205. All displaced businesses eligible for relocation assistance can choose to receive a $3,000 fixed moving expense or the actual costs of moving and up to $10,000 for reestablishment expenses. Id.

(h) Preliminary Negotiations.

- ***Notice***. Specifies that at least 60 days prior to initiating negotiations to acquire a property interest, the condemning authority must give a written notice to the owner of record identifying the interest in real property to be acquired, the purpose for which the property is being condemned, and a statement of the property owner's rights including the right to seek legal counsel, to make a counteroffer and engage in negotiations, to obtain the landowner's own appraisal, to contest the condemnation proceeding, and to have just compensation determined preliminarily by court-appointed condemnation commissioners and, ultimately, a jury. §523.250 R.S.Mo. The jury will consider the same factors as those used for determining just compensation when blighted property or property for a public use is taken. §523.055 R.S.Mo.
- ***Written Offer***. Specifies that a written offer must be presented to the property owners of record at least 30 days before filing a condemnation petition. §523.253 R.S.Mo. Contract to purchase property was a valid offer under section 523.253 R.S.Mo. even though it contained a liquidated damages clause that allowed the city to terminate the agreement. *City of Richmond Heights v. Waite*, 280 S.W.3d 770 (Mo.App. E.D. 2009).
- ***Court Determination***. Requires that before a condemning authority may proceed with a condemnation, there must be a court determination that proper and timely notice was given to all property owners, an initial offer no lower than the appraisal amount was given, and that the landowner was given an opportunity to obtain his or her own appraisal from a state-licensed or state-certified appraiser of his or her choice. §523.256 R.S.Mo. If the court finds good faith negotiations have not taken place, the court must dismiss

the condemnation petition and order the condemning authority to reimburse the owner for his or her actual reasonable attorney fees and costs. *Id*. In *PIEA v Ivanhoe,* 316 S.W.3d 418, 2010 WL 1656817 (Mo.App. W.D. 2010), the trial court ruled that the Authority had not met its statutory obligation to negotiate in good faith because the offers were not made using generally accepted appraisal procedures and that the offer made by the Authority, based on the appraisal, was not a good-faith offer. Some of the practices questioned by the court were using foreclosures as comparables, drastically reducing certain comparables without an adequate explanation and refusing to consider the sale by Brown-Caldwell to Ivanhoe as a comparable since the evidence showed it was an "at arm's length" transaction.

- ***Landowner's Alternative Location.*** Specifies that within 30 days of the initial notice by the condemning authority, a landowner may propose an alternative location on his or her property which must be considered by the condemning authority. §523.265 R.S.Mo.

(i) Abandonment. Requires the court to order payment of the landowner's legal fees and expenses and award damages accruing as a direct and proximate result of the pendency of the condemnation if the condemning authority abandons condemnation prior to the final judgment of the court. §523.259 R.S.Mo. Specifies that any easements acquired after December 31, 2006, and abandoned in whole for a period in excess of 10 years may be vacated by a court of competent jurisdiction and upon the property owner paying monetary consideration equal to the original consideration paid by the easement holder. §527.188 R.S.Mo. The holder of the easement must be a party to the action and may be allowed to maintain the easement upon a showing, in good faith, that the holder plans to make future use of the easement. *Id*.

(j) Utility Companies. Specifies that property interests acquired through eminent domain by private utility companies, public utilities, rural electric cooperatives, municipally owned utilities, or common carriers are fixed and determined by the particular use for which the property was acquired. §523.283 R.S.Mo. Any expanded use of the property will require additional eminent domain proceedings to acquire the additional rights. *Id*.

(k) Ombudsman. Establishes an Office of Ombudsman in the Office of Public Counsel within the Department of Economic Development to assist citizens seeking information regarding the condemnation process and procedures. §523.277 R.S.Mo.

(l) Blanket Easements. Specifies that blanket easements will be void as against public policy and will be unenforceable. §523.282 R.S.Mo.

(m) Taxes on Condemnee's Gain. Allows any financial gain to the

property owner arising from a condemnation action to be deducted from the taxpayer's federal adjusted gross income when calculating his or her Missouri adjusted gross income. §143.121R.S.Mo.

(12) Timetable.

Action	**Projected Day**	**Timing**	**Summary of Statutory Requirements**
Notice to Owners		At least 60 days prior to petition filing	523.250: At least 60 days prior to petition filing, notice of proposed condemnation must be sent to property owners (at address in county assessor records) by certified or registered mail. Notice must include, inter alia, property identification, purpose of condemnation, and statement of owner's rights. Owner may waive rights to this notice by written waiver.
Written Offer to Owners		At least 30 days prior to petition filing	523.253 and 523.256: At least 30 days prior to petition filing, written offer must be sent to property owners (at address in county assessor records) by certified or registered mail. Offer must be held open for 30 days unless waived. At time of offer, must also provide appraisal or explanation of offer amount. Offer may not be less than the appraisal.
Owner's Propose Alternative Condemnation Area		Within 30 days of receipt of 1st notice	523.265: Within 30 days of receipt of first notice to owner, owner may propose alternative condemnation site which must be considered by the condemning authority. There is no right to make alternative proposal where condemnation is of entire parcel.

Action	Projected Day	Timing	Summary of Statutory Requirements
Authority's Written Response to Alternative		Prior to petition filing	523.265: Authority's response (method not specified) must state that authority has considered all proposed alternative locations, and briefly state why proposals were accepted or rejected. Response should (but is not required to) occur prior to petition filing.
File Petition	Day 1	At least 60 days after 1st notice, and at least 30 days after offer	523.010, 523.020 defines parties to be named.
Summons Issued to Defendants	Day 2	Upon petition filing	523.030: Upon filing petition a summons shall be issued giving owner at least 10 days notice of the hearing date.
Notice of Hearing Published	NA	For 3 weeks prior to hearing	523.030: If address of owners is unknown, or owners live out-of-state, notice of the hearing date shall be published once a week for three weeks prior to the hearing. In present case, this notice would not apply.
Defendants File Answer		None	Condemnee is not required to answer, but if they plan to challenge right to condemn, they may do so in an answer before the court's first hearing.

Action	Projected Day	Timing	Summary of Statutory Requirements
Court Hearing Determining Good Faith Negotiations, Issuing Order of Condemnation, and Appointing Commissioners	Day 15-45	After notice of hearing has been given	523.040, 523.256: After due notice of the pendency of the petition has been given, court appoints 3 disinterested commissioners. Before court can enter order of condemnation it must find that the condemning authority engaged in good faith negotiations as defined in 523.256. If these negotiations are not evidenced, court must dismiss action without prejudice and order the authority to pay the condemnee's costs and attorney fees.
Notice to Petition Parties of Property Viewing	Day 25 to 55	At least 10 days prior to property viewing	523.040: Commissioners must notify all parties named in petition no less than 10 days prior to Commissioners' required viewing of property of parties' right to accompany Commissioners and to present information to the Commissioners.
Commissioners' Property Viewing	Day35 to 65	At least 10 days after viewing notice	523.040: Commissioners must view property prior to issuing report of assessment of damages.
Commissioners' Hearing	Day 25 to 75	None	Commissioner's consider evidence of value either before or after viewing property.
Commissioners' Damages Report Issued	Day 45 to 90	Within 45 days of appointment	523.001, 523.039, 523.040: Commissioners must issue their report of assessment of damages within 45 days of their appointment (subject to extension for good cause shown), and after a determination of the property's fair market value, heritage value and homestead taking value.

Action	Projected Day	Timing	Summary of Statutory Requirements
Commissioner's Report Recorded	Day 45 to 95	After report issued	523.040: Court clerk shall deliver copy of report to county recorder.
Notice of Commissioner's Report to Owners	Day 45 to 95	After report filed	523.050: Upon filing of Commissioner's report, court clerk shall notify party whose property is affected.
Court's Determination of Value	Day 50 to 100	After report filed, prior to payment	523.061: After filing of Commissioner's report, judge shall determine whether homestead taking occurred and whether heritage value is payable, and increase the Commissioner's award accordingly. While timing is not express, this determination clearly must occur prior to payment of award.
Payment of Award	Day 55 to 130	After report filed	523.040, 523.045: Following recording of Commissioners' report, company shall pay to the court clerk the damage award. No time requirements, though if payment is not made to court within 30 days after report court may impose interest. Title passes at this point.
Notice of Payment to Owners	Day 60 to 135	Within 5 days of payment	523.055: Court clerk shall notify owners or those in possession of payment of the award within 5 days of payment.
Written Exceptions Filed	Day 75 to 125	Within 30 days of notice of report	523.050: Either party may file written exceptions to the Commissioner's report within 30 days after service of notice of the report. If written exceptions are filed, the court shall review the report.

Action	Projected Day	Timing	Summary of Statutory Requirements
Court Considers Written Exceptions	Day 90 to 140	After written exceptions filed	523.061: If court considers exceptions, it will also consider homestead taking and heritage value at this time. No timing is provided in the statute.
Owners Deliver Possession	Day 70 to 235	Within 10 to 100 days from notice of payment award	523.055: Owner and those in possession must give authority possession within 10 days after receipt of notice of payment of the award. However, upon motion of the owner or occupant this period may be extended up to 90 days. Owners displaced from their principal residence have up to 100 days from the date of the damage award.

§50. —Relocation Assistance

(1) State Relocation Assistance.

(a) Relocation Assistance Required – When. Any public agency, meaning the State or any political subdivisions or branch, bureau or department thereof, any public school district, and any quasi public corporation which is authorized to acquire real property and which acquires any such property either partly or wholly with aid or reimbursement from federal funds (§523.200(2)), which is required as a condition of the receipt of federal funds to give relocation assistance to any displaced person is authorized and directed to give similar relocation assistance to displaced persons when the property involved is being acquired for the same public purpose through the same procedures and is being purchased solely through expenditure of state or local funds. §523.205.1 R.S.Mo.

(i) Displaced Person - No Relocation Costs If Not Displaced. Missouri's statutory definition of a "displaced person." under Section 523.200(1) includes: "any person that moves from the real property or moves his personal property from the real property permanently and voluntarily as a direct result of the acquisition, rehabilitation or demolition of or the written notice of intent to acquire such real property, in whole or in part, for a public purpose;" In *Dale v. Rahn*, 330 S.W.3d 107 (Mo.App. S.D. 2010), Plaintff sought relocation costs to move his scrag mill and his son's sawmill to another location as a result of a highway taking. He did not move his residence or anything else from the land taken. The Southern District held that he was not a "displaced person".

(b) Cities to Adopt Relocation Rules. Any Political subdivision, governmental entity, or corporation created under Chapter 353 R.S.Mo., initiating condemnation proceedings which involves the displacement of persons not subject to the Federal Uniform Relocation Act (42 USC §§4601-4655) shall establish by ordinance or rule a relocation policy which shall include the provisions of the State Relocation Assistance Act §§523.205.2 – 523.205.15 R.S.Mo. or provisions equivalent to the Federal Uniform Relocation Act. §523.205.2 R.S.Mo.

(c) Urban Redevelopment Corporations. Every Urban Redevelopment Corporation acquiring property within a redevelopment area shall submit a relocation plan as part of the redevelopment plan. §523.205.4 R.S.Mo. An Urban Redevelopment Corporation which fails to comply with the Act shall not be eligible for tax abatement. §523.205.12 R.S.Mo.

(d) Relocation Plan, Contents. Unless property acquisition under Chapters 99, 100 or 353 is subject to federal relocation standards, the relocation plan shall include:

(i) Payments. Payments to all eligible displaced persons who occupied the property for not less than 90 days prior to the initiation and negotiations;

(ii) Special Needs. A program for identifying special needs of displaced persons with specific considerations given to income, age, size of family, nature of business, availability of suitable replacement facilities and vacancy rates of affordable facilities;

(iii) Referrals. A program for referrals for displaced persons with provisions for a minimum of three decent, safe and sanitary housing referrals for residential persons or suitable referral sites for displaced businesses, a minimum of 90 days notice of referral sites for handicapped displaced persons and 60 days notice of referral sites for all other displaced persons prior to the date such displaced persons are required to vacate the premise, and arrangements for transportation to inspect referral sites (§523.205.5(3));

(iv) Notice to Vacate. §525.205.5 R.S.Mo. A relocation plan not subject to federal relocation standards shall contain:

A program for providing proper and timely notice to all displaced persons, including a general description of their potential rights and benefits if they are displaced, their eligibility for relocation assistance, and the nature of that assistance. The notices required for compliance with this section are as follows:

> A general information notice that shall be issued at the approval and selection of a designated redeveloper and shall inform residential and nonresidential owners and occupants of a potential project, including the potential acquisition of the property;
>
> A notice of relocation eligibility that shall be issued as soon as feasible after the execution of the redevelopment agreement and shall inform residential and nonresidential occupants within the project area who will be displaced of their relocation assistance and nature of that assistance,

including ninety days advance notice of the date the occupants must vacate;

(e) Initiation of Negotiations. The initiation of negotiations means the delivery of the initial written offer of just compensation by the acquiring entity to the owner of the real property, to purchase such real property for the project, or the notice to the person that he would be displaced by rehabilitation or demolition. §523.205.3(4) R.S.Mo.

(f) Payments.

(i) Residential. All displaced residential persons eligible for payments shall be paid either $1000.00 or the actual reasonable cost for relocation. §. 523.205.6 R.S.Mo.

(ii) Businesses. All displaced businesses eligible for payments shall be paid either $3000.00 or the actual cost of moving. §523.205.7 R.S.Mo.

(iii) Claims. A claim for relocation payment shall be filed with the displacing agency within six months after:

- the date of displacement for tenants or
- the date of displacement or the final payment for the acquisition of the property, which ever is later for owners. §523.205.8.

(iv) Advance Payments. If a displaced person can demonstrate the need for an advance payment the displacing agency or developer shall issue the payment within 30 days following the receipt of sufficient documentation. §523.205.8 R.S.Mo.

(g) Waiver. Any displaced person, who is also the owner of the premises may waive relocation payments as part of the negotiation for the acquisition of the interest. Such waiver shall be in writing, shall disclose that the person had knowledge of the provisions of this section and his entitlement to payment and shall be filed with the acquiring public agency but shall not waive the notices required by law. §523.205.9 R.S.Mo.

(h) Notice of Entitlement. All persons eligible for relocation benefits shall be notified in writing thereof, such notice to be given concurrently with the notice of referral sites as required in the Act. §523.205.10 R.S.Mo.

(i) Reports. Any Urban Redevelopment Corporation or its assigns, which have been provided any assistance with land acquisitions under the operations Chapters 99, 100 or 353 or 523 shall be required to make a report to the local governing body or appropriate public agency which shall include, but not be limited to, the addresses of all occupied residential buildings and structures within the redevelopment area and the names and addresses of persons displaced by the redeveloper and specific relocation benefits provided to each person as well a sample notice provided to each person. §523.205.11 R.S.Mo. The local governing body or public agency shall determine the adequacy of the proposal and may require additional elements to be provided. §523.205.13 R.S.Mo.

(j) Eligibility. Relocation assistance shall not be provided to any person who purposely resides or locates its business in a redevelopment area for the purpose of obtaining relocation benefits. §523.205.14 R.S.Mo.

(k) Date of Operation. The provisions of §§523.200 and 523.205 shall apply to land acquisitions under the operation of Chapters 99, 100, or 353 filed for approval, approved or amended on or after August 31, 1991.

(2) Under the Federal Uniform Act. Many economic development programs result in the displacement of people and entities from their homes and businesses. Relocation assistance is available to displaced persons under the Federal Uniform Relocation Assistance and Real Property Acquisitions Policy Act and the federal regulations adopted to implement the acts. The Acts ensure that where federal funds are involved, all displaced people and businesses are compensated for the costs of relocation or offered a lump sum payment to cover such costs.

(a) Moving Expense.

(i) Displaced Persons. A "displaced person" is defined as any person who moves from real property as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a project undertaken with Federal financial assistance. 42 U.S.C.A. §4601 The federal regulations promulgated under the Act provide a more involved definition, providing in relevant part that a displaced person means any person who moves from the real property "as a direct result of a written notice of intent to acquire, the initiation of negotiations for, or the acquisition of, such real property in whole or in part for a project, or as a direct result of rehabilitation or demolition for a project." 49 CFR §24.2. The Act then defines those who do not meet this criteria, and are thus not eligible for relocation expenses, as a person who moves before the initiation of negotiations, unless the Agency determines that the person was displaced as a direct result of the program or project. 49 CFR §24.2. "Initiation of ***negotiations"*** means the delivery of the initial written offer of just compensation by the Agency to the owner to purchase the real property for the project. 49 CFR §24.2. However, if the Agency issues a notice of its intent to acquire the real property, and a person moves after that notice, but before delivery to the initial written purchase offer, the "initiation of ***negotiations"*** means the actual move of the person from the property. *Id*. Additionally, the Act provides that one is not a displaced person, and thus not entitled to relocation benefits if they are "a person who is not required to relocate permanently as a direct result of a project. Such determination shall be made by the Agency in accordance with any guidelines established by the Federal agency funding the project." 49 CFR §24.2. Where a condemnee quit paying rent and was evicted, she had no claim for relocation benefits after being advised that she needed to stay in the property until it was acquired. *Burton v. Cleveland, Ohio Empowerment Zone*, 102 Fed. Appx. 461 (6th Cir. 2004).

- ***Actual Moving Expenses***. Any displaced person is entitled to payment of actual moving and related expenses including:
  - ♦ Transportation of the displaced person and personal property;

- ♦ Packing, crating, unpacking and uncrating of the personal property;
- ♦ Disconnecting, dismantling, removing, reassembling, and reinstalling relocated household appliances, and other personal property;
- ♦ Storage of the personal property;
- ♦ Insurance for the replacement value of the property in connection with the move and necessary storage; and
- ♦ Other moving-related expenses. 49 C.F.R. §24.301.

- ***Or Fixed Payment.*** In lieu of actual moving expenses, a displaced person is entitled to a fixed payment based on the number of rooms of the dwelling which the displaced person is forced to vacate.

(ii) Displaced Business.

- ***Actual Moving Expenses***. Any displaced business is entitled to actual moving and related expenses including the same related expenses set forth above as well as the following:
  - ♦ Any license, permit or certification required of the displaced business at the replacement location;
  - ♦ Relettering signs and replacing stationery;
  - ♦ Actual direct loss of tangible personal property incurred as a result of moving or discontinuing the business;
  - ♦ The cost of searching for replacement location (not to exceed $1,000); and
  - ♦ Other related expenses. 49 C.F.R. §24.303.
  - ♦ In addition, a small business may be eligible to receive a payment (not to exceed $10,000) for expenses actually incurred in relocating and reestablishing such business. 49 C.F.R. §24.304.
- ***Fixed Payment***. In lieu of actual expenses, a displaced business may opt to choose a fixed payment which will equal the average net earnings of the business, but not less than $1,000 nor more than $20,000. 49 C.F.R. §24.306.

(b) Replacement Housing.

(i) Homeowner Occupants. A displaced person who has actually owned and occupied the dwelling for not less than 180 days immediately prior to the initiation of purchase negotiations is entitled to a payment not to exceed $22,500. The formula for determining the actual payment is based on the value of a "comparable" new dwelling minus the value of the dwelling from which the person was vacated. In addition, the homeowners are entitled to increased mortgage interest costs and incidental moving expenses.

(ii) Ninety-Day Tenant. A tenant who has occupied a dwelling for at least ninety days is entitled to a payment not to exceed $5,250. The formula for determining the specific payment is as follows:

> The monthly rent of a comparable dwelling or the monthly rent of the dwelling a displaced person actually moves into, whichever is less, minus the monthly rent of the dwelling from which the person was forced to vacate. The difference is then multiplied by forty-two to arrive at the payment due. 49 C.F.R. §24.402.

§51. —Tax Abatement

> **Tax abatement is frequently granted as an economic incentive tool. Article X, §7 of the Missouri Constitution specifically authorizes the granting of relief from property taxes for any period not to exceed 25 years. However, the Missouri courts have held that where property becomes reblighted, a governing authority may authorize up to 25 years of additional tax relief. Relief from non-property taxes is not limited by the Missouri Constitution other than the uniformity clause and the prohibition against gifts to private interests. Therefore, the Missouri legislature controls non-property tax abatement. A county assessor has no jurisdiction to terminate tax relief validly granted by a city.**

(1) Is Constitutional Under Article X, §§6, 7. *Land Clearance for Redevelopment Authority of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58 (Mo. banc 1954).

(2) Exceeding 25 Years. A city has the authority under Chapter 99 R.S.Mo. to declare blighted a property which has previously completed 25 years of tax abatement under Chapter 353 R.S.Mo. and to grant an additional period of tax relief. *Board of Education of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1994); *State ex rel. Washington Ave. Redevelopment Corp. v. City of St. Louis*, 906 S.W.2d 808, 811 (Mo. App. E.D. 1995) (property which had been redeveloped under Urban Redevelopment Corporation Law could be subsequently be redeveloped under Land Clearance for Redevelopment Authority).

(3) Challenge by Assessor. Can a redeveloper obtain an injunction preventing the county assessor from sending out notice of assessment increases based on allegations that the redeveloper is no longer entitled to tax relief under §353.110 R.S.Mo.?

(a) Remedies.

(i) Board of Equalization. An injunction is not available to the redeveloper. In this case, there is a clear administrative and statutory process which avails itself to the redeveloper. §138.430(2) R.S.Mo. states that:

> Every owner of real property or tangible personal property and every merchant and manufacturer shall have the right to appeal to the circuit court of the county in which the collector maintains his office, from the decision of the local board of equalization not later than thirty days after the final decision of the board of equalization concerning all questions and disputes involving the ***exclusion*** or ***exemption*** of such property from assessment or from the tax rolls pursuant to the Constitution of the United States or the constitution or laws of this state, or of the taxable situs of such property. The appeal shall be as a trial de novo in the manner prescribed for non-jury civil proceedings. (Emphasis added.)

Article X, §7 of the Missouri Constitution provides:

> For the purpose of encouraging . . . the reconstruction, redevelopment and rehabilitation of obsolete, decadent or blighted areas, the general assembly, by general law, may provide for such partial ***relief from taxation*** of the lands devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions and restrictions as it may prescribe. (Emphasis added.) See also §353.110 R.S.Mo.

While there are no cases explicitly stating that relief from taxation under §353.110 is subject to appeal to the circuit court under §138.430(2), there is no distinction between "tax relief" or "abatement" and "exemption" or "exclusion" for purposes of appeal under §138.430(2). Therefore, there is an adequate remedy at law through an appeal to the board of equalization. Upon rejection the appellant may proceed directly to circuit court prior to paying the taxes under protest.

(b) Assessor's Authority. The more interesting question is the authority of the county assessor to issue the assessment notices. Under Chapters 99 and 353 R.S.Mo., only the city council has the power to grant tax relief. The city does this by ordinance. It follows that only the city council can repeal the tax relief. The city council must do this by ordinance if the repeal is to be effective. The context in which the repeal of the tax relief has arisen in Missouri cases is where a redevelopment corporation has assigned some or all of its rights. In *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965), the Missouri Supreme Court faced the question of whether or not the past city council decision to grant tax relief was binding upon future city councils

when it came to a purchaser of the redevelopment rights. In that case, the court decided "a future city council is not completely tethered by the ordinance; if it determines that the land is not being used by the purchaser in accordance with development plan, the land shall be assessed at its full true value." *Annbar* at 653. (Emphasis added.) In another context the court was faced with the decision as to whether or not a bridge toll could be repealed unilaterally when it had been enacted by ordinance, the court found that "the power to repeal the ordinances providing for a free bridge was but an incident to the power to enact them." *City of St. Louis v. Cavanaugh*, 207 S.W.2d 449, 454, 455 (Mo. 1947).

In light of the foregoing it appears that until the city council acts to repeal the ordinance granting the tax abatement any notice of increased assessment is void.

(4) Non-Property Taxes. The exemptions and abatements of property taxes are specifically set forth in the constitution, and the constitution provides that there shall be no others. This is not the case with other taxes which are authorized under the constitution's general power of taxation granted to the state by the constitution and then delegated to local governments by statute. Since the abatement or exemption from non-property taxes is not limited by the constitution, it is entirely within the province of the state legislature to decide which activities shall be exempt therefrom. Thus, §144.030.3(4) R.S.Mo. provides that machinery and equipment "purchased and used . . . to expand existing . . . mining plants in the state . . ." are exempt from sales and use taxes. These exemptions are construed strictly against the taxpayer but a court may examine the purpose of the exemption as it did in *State ex rel. Ozark Lead Co. v. Goldberg*, 610 S.W.2d 954 (Mo. 1981) at 957. "One object of the exemption is to stimulate the economy by encouraging the production of products which are subject to the sales tax. An equally important object of such exemption is the furtherance of industrial development in the state, regardless of whether the products involved might become subject to the Missouri sales tax. *Floyd Charcoal Co., Inc. v. Director of Revenue*, 599 S.W.2d 173, 177 (Mo. 1980)."

(5) Treatment Of Abatement Under School Foundation Formula. The basic school district entitlement formula is set forth in R.S.Mo.,§163.031.1. The formula is designed to provide statewide equity among school districts. This is accomplished by considering the number of students, the operating levy for school purposes only, and tracking districts according to equalized assessed valuation per pupil [the " guaranteed tax base"] to assist in the calculation of the district entitlement. In short, the formula is extremely complicated and based heavily upon equalized assessed valuation of property within a respective district.

Once the calculation is completed, there is a list of deductions that occur prior to distribution of the funds. The district entitlement is reduced by 100% of the amount received the previous year for school purposes from intangible taxes, fines, forfeitures, escheats, payment in lieu of taxes and receipts from state assessed railroad and utility taxes. There are also other standard contributions that are deducted; for instance, federal grant programs.

Therefore, depending upon the type of economic development incentive used, a school district could actually experience a loss on the equalized assessed valuation side of the formula as well as a deduct for PILOTS. For example:

1. Tax Abatement (353) Impact: If the equalized assessed valuation for the property within a school district contains property that is subject to tax abatement, the school entitlement is reduced by an amount of projected revenue that the district will not actually receive during the abatement period.

2. TIF Impact: (1) The incremental tax revenue from the new equalized assessed valuation is placed in a special allocation fund and thereby not received by the districts, although the increased equalized assessed valuation and projected revenue therefrom may be deducted from the district entitlement. AND (2) the PILOT, if any, paid to the district is subtracted from the district entitlement.

3. Chapter 100 Industrial Development Project: The property is not subject to ad valorem taxes and therefore not included in the calculation of the equalized assessed valuation. The district receives no revenue from the project as along as it is owned by the municipality. Any PILOTS paid are deducted from the district's statutory school entitlement.

This impact may be obviated by making a charitable contribution [instead of a payment in lieu of tax] to the disctrict in question. Whether the IRS will allow the deduction is another question.

§52. —Intergovernmental Agreements

> **Local governments may contract or cooperate with other governmental bodies for the planning or development of any public improvements or facilities.**
>
> **Article VI, §16 of the Missouri Constitution provides as follows:**
>
> **Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law.**

This section has been implemented by Ch. 70 R.S.Mo. In particular, *see* §70.220 R.S.Mo. In 2004, Via SB 951, the legislature deleted the requirement that intergovernmental agreements be recorded . §70.300 R.S.Mo.

(1) Statute of Frauds. Political subdivisions such as TDDs must contract in writing for goods and services. R.S.Mo. §432.070 provides in relevant part:

> No county, city, town, village, school township, school district or

> other municipal corporation shall make any contract, unless . . . such contract . . . shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing. . . .

(emphasis added). As this Section does not define "municipal corporation," it is not immediately apparent whether a political subdivision such as a Transportation Development District, qualifies as a municipal corporation subject to this written agreement requirement. However, the following other entities have been characterized by Missouri appellate courts as "municipal corporations" subject to R.S.Mo. §432.070:

- Public water supply district is a municipal corporation for the purposes of applying statute governing execution of contracts by local governmental entities. *Public Water Supply Dist. No. 16 v. City of Buckner*, 44 S.W.3d 860 (App. W.D. 2001).

- Sewer district is a "municipal corporation" under state law and is therefore subject to the statute of frauds applicable to public entities. Duckett Creek Sewer Dist. of St. Charles County v. Golden Triangle Development Corp., 32 S.W.3d 178 (App. E.D. 2000).

- Fire protection district was, in broad sense, "municipal corporation," and was thus prohibited from entering into oral contract. McCarthy v. Community Fire Protection Dist. of St. Louis County, 876 S.W.2d 700 (App. E.D. 1994).

The only one of these cases to explain the characteristics of a municipal corporation was *McCarthy v. Community Fire Protection Dist. of St. Louis County*, which held that a fire district was such because it "is designed for the performance of an essential public service." *Id*. at 484. *McCarthy* cites to the Missouri Supreme Court's *Laret Inv. Co. v. Dickmann*, 134 S.W.2d 65 (Mo.1939) decision for this proposition.

In *Laret*, the Court considered whether the Housing Authority of the City of St. Louis was exempt from taxation pursuant to the Missouri Constitution, Art. X, Sec. 6, which provided at the time of the decision that "The property, real and personal, of the State, counties and other municipal corporations . . . shall be exempt from taxation." The *Laret* Court explained that:

> The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed for the performance of an essential public service.

This court has adopted the broader definition. In its strict and primary sense the term 'municipal corporation' applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts.

The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. The General Assembly, in the Act under consideration, declared the Housing Authority to be a municipal corporation, defined its purposes, declared them to be governmental functions, and declared the existence of an urgent necessity for its services.
***

Appellant says that in determining whether the declared purposes of the Housing Authority are public functions we must be guided by a consideration of 'whether the activity to be undertaken is, according to history and the common acceptance of mankind, one for public action or private enterprise, and whether the public generally, or only a limited group, is benefited thereby.' To this we do not agree. To be guided solely by whether a given activity had, at some previous time, been recognized as a public purpose would make the law static. Such a standard would compel us to retain in the law, as appropriate for public expenditure, activities which have ceased to be of public concern; and would prevent us from adopting new public functions regardless of how essential to the public welfare they may have become by reason of changed conditions. Nor can we be governed alone by the fact that only a portion of the public will be directly benefited, or benefited in a greater degree than the public generally.

Id. at 68-70 (internal citations and quotation marks omitted). Then recognizing the validity of the Housing Act, the Act's valid public purpose and the governmental functions of the Authority in implementing the Housing Act, the *Laret* Court held the Authority to be a municipal corporation., exempt from taxation pursuant to the State Constitution.

Just as tax exemption is made for the benefit of the municipal corporation, R.S.Mo. §432.070 is enforced only for the benefit of the governmental entity. *Public Water Supply Dist. No. 16 v. City of Buckner*, 44 S.W.3d at 864 (the purpose of the statute is to protect the governmental entity upon which another seeks to impose or enforce some claimed contractual obligation or agreement); *Orf Construction v. Black Jack Fire Protection Dist*., 239 S.W.3d 685 (Mo. App. E.D. 2007). Secondly, the *Laret* Court noted that the state's courts had accepted the broader interpretation of "municipal corporation," which includes public, or quasi public, corporations designed for the performance of an essential public service, or formed for the purpose of performing some governmental function, including, for example, counties, school districts, townships under township organization, special road districts and drainage districts—many of the same bodies expressly subject to R.S.Mo. §432.070. Lastly, the Constitutional tax exemption provision examined in *Laret* which previously applied to "municipal corporations," has been amended to apply this exemption to "the state, counties and other political subdivisions . . .." MO Const. Art. 10, §6. The courts have defined "political subdivision" in the Art. X context as "townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax." MO Const. Art. X §15. As a TDD has the power under the Act to tax property and retail sales within a district, it would thus qualify as an Art. X political subdivision, and under the *Laret* Court's analysis, a municipal corporation.

The lower courts have followed the *Laret* Court's holding that the term "municipal corporation" should be applied broadly. For example, in *Duckett Creek Sewer Dist. of St. Charles County v. Golden Triangle Development Corp.*, 32 S.W.3d 178, 181 (Mo. App. E.D.,2000), in finding that a sewer district was a municipal corporation subject to R.S.Mo. §432.070, and thus refusing to enforce a developer's oral agreement with the sewer district, the court described the Section as "the statute of frauds dealing with Missouri public entities" and its scope as requiring "all contracts with a Missouri public body to be in writing." While there may be some question as to whether a TDD is a "municipal corporation," there can be little or no question that a TDD is at least a "public entity."

The law can produce harsh results for those doing business with cities and counties, preventing a theory of *quantum meriut* for work done or goods delivered. However, in *Investors Title Co. v. Hammonds*, 217 S.W.3d 288 (Mo. banc 2007) the court allowed a title company to recover under a theory of money had and received.

§53. —Federal Income Tax Treatment of Missouri Economic Development Programs

State tax credits are available under various Missouri programs. Because use of these tax credits will effectively decrease the amount of Missouri state tax paid, thereby decreasing the size of a company's federal tax deduction for state taxes, federal tax liability should increase as a result of using the state tax credits. If the tax credits are sold, such sale should generate income, thereby increasing federal tax liability. To the extent a taxpayer is required to make a contribution to a nonprofit corporation or political subdivision to obtain the tax credits and receive an investment in its project, it should be able to deduct such contributions as trade or business expenses. Such deductions should decrease its federal income tax liability.

(1) Infrastructure Tax Credit Program and Development Tax Credit Program. The Infrastructure Tax Credit Program and the Development Tax Credit Program contemplate contributions to either a public entity or a nonprofit corporation. In return for such contributions, a company may receive Missouri state tax credits equal to 50 percent of the contribution. Ch. 32 R.S.Mo. and §100.286 R.S.Mo.

Under the Infrastructure Tax Credit Program, a contribution is made to the Missouri Development Finance Board, which then grants the funds to a public entity or political subdivision to fund "approved program improvements." Improvements eligible for the program are water, sewer, gas, and electric systems, streets, bridges, rail spurs, storm water drainage, and other essential public purpose infrastructure facilities owned by and used by the public.

Under the Development Tax Credit Program, a contribution is made to a 501(c)(3), (4) or (6) nonprofit corporation. The nonprofit corporation purchases assets which are leased to the contributor.

(a) Deductibility of Amounts Contributed under the Incentive Programs. Only contributions to organizations described in I.R.C. §170(c) (generally, 501(c)(3) organizations and political subdivisions) are deductible as charitable contributions. A corporation generally cannot deduct charitable contributions in excess of ten percent of its taxable income (computed without regard to charitable contributions, net operating losses, capital loss carrybacks, and certain special deductions) each year. Excess charitable contributions can be carried forward five years.

Contributions to 501(c)(4) and 501(c)(6) organizations are not considered charitable contributions, but may qualify as deductible trade or business expenses if the donation bears a direct relationship to the taxpayer's business and is made with the expectation of commensurate financial return. Treas. Reg. §1.162-15(b). Similarly, a payment to a charitable organization by a taxpayer may be a trade or business expense, rather than a charitable contribution, when the payment bears a

direct relationship to the taxpayer's trade or business and is made with the expectation of commensurate financial return. Treas. Reg. §1.170A-1(c)(5). *See also*, Rev. Rul. 73-113, 1973-1 C.B. 65 (voluntary payment made by a taxpayer to a city fund was a trade or business expense because the benefits of the fund would ultimately accrue to the taxpayer in the form of increased business). Trade or business expenses are deductible in full in the year incurred.

The amounts paid under the Infrastructure Tax Credit Program and the Development Tax Credit Program to nonprofit or public entities should be treated as trade or business expenses, not charitable contributions, even if the recipient is a 501(c)(3) organization or a political subdivision. Such amounts bear a direct relationship to the contributor's business and are made with the expectation that the funds will be spent on its site and that it will receive tax credits in return.

There is a risk that the IRS will argue that the taxpayer should capitalize the contribution and amortize or depreciate it over the useful life of the infrastructure for which the contribution is used. However, because the contributor will not own the infrastructure built with its contribution and because use of the infrastructure must be nonexclusive in order to qualify for the program, it is unlikely the IRS would succeed in asserting this argument unless the contributor will be the exclusive user of the facility.

(b) Inclusion of Tax Credits as Income. In *Snyder v. C.I.R.*, T.C. Memo 1988-320, 1988 WL 76295 (1988), the IRS argued that state tax credits provided to a horseracing facility owner in consideration of certain capital improvements made by the owner to the facility should have been included in the owner's income in the year the tax credits were approved. The owner argued that the credits should be included as income as they are claimed, rather than including the total amount of amount of credits as income in the year the credits were approved. The Tax Court agreed with the IRS, finding that as an accrual basis taxpayer, the owner had a fixed right to receive the credits in the year the credits were approved and the approval year was the proper year of inclusion. The Sixth Circuit vacated and remanded the decision holding Snyder v. C.I.R., 894 F.2d 1337 (6th Cir. 1990), credits should be included in income in the year claimed.

In contrast, the IRS granted a private letter ruling in 1988 which found that state tax credits awarded as investment incentives were not income, but instead reduced the amount of state taxes that could be claimed as a deduction for federal income tax purposes. PLR 8829061 (April 22, 1988).

The net tax effect of the *Snyder* decision and the private letter ruling are the same. Under the *Snyder* decision, a taxpayer would include the credits as income, then deduct the full amount of state taxes (before application of the credits) from income.

If the tax credits are sold, the proceeds from the sale of the credits should be treated as income to a taxpayer in the year they are sold.

(2) BUILD Missouri Bonds Program. Under this program, the Missouri Department of Economic Development ("DED") issues industrial revenue bonds

to provide financing for the construction of a private facility. The taxpayer will pay DED an amount equal to the debt service for the bonds and will receive a state tax credit equal to the amount paid. §100.710R.S.Mo.

The payment of the debt service should be a deductible expense (except to the extent the payment is considered to be repaying principal on the loans). The use of the state tax credit will increase federal income tax liability, due to a reduction in the deduction for state income taxes paid. The amount of the tax credit received under the Build Missouri Bonds Program is equal to the amount of the debt service paid. If the taxpayer receives a refund, income tax treatment is less clear. Corporate taxpayers may be able to exclude such refunds as non-shareholder contributions to capital under Section 118 of the Internal Revenue Code; the treatment of non-corporate taxpayers is less clear, and refund payments may be treated as taxable income. If reimbursement payments are excluded from income, the taxpayer's basis in the facility must be reduced by an equivalent amount..

(3) CDBG Industrial Infrastructure. The CDBG Industrial Infrastructure Program provides grants to cities and counties to develop public infrastructure needed for a particular project. In order to be eligible for the funding, the infrastructure must be owned by a public entity and likely be used by more than one citizen.

This funding should have no federal income tax consequences for the taxpayer. The taxpayer does not need to contribute to this program in order to have the infrastructure built. Further, no tax credits are awarded as a result of the program. The taxpayer will not own the infrastructure funded by this program, and therefore should not be deemed to have income from its construction.

(4) Utility Relocations.

(a) Federal Tax Treatment. Developers are often required to relocate utilities, especially in redevelopment projects. If the utility is a for-profit company, payments to the utility for this purpose, also known as contributions in aid of construction (CIAC), may be taxable as income to the utility. The utility may attempt to require the developer to pay the tax. §824 of the Tax Reform Act of 1986 changed the way regulated public utilities treated contributions in aid of construction after December 31, 1986. §118(b) of the Internal Revenue Code of 1986 expressly provides that contributions in aid of construction and other contributions made by a customer or potential customer are not contributions to capital and thus are not excluded from gross income under §118. Therefore, such amounts (CIACs) are required to be included in gross income under §61 of the Internal Revenue Code. The legislative history to that section of the 1986 Tax Reform Act indicates that Congress viewed the receipt by utilities of CIACs as a prepayment for the provision of future utility service. I.R.S. Notice 87-82 provides an excellent discussion of the legislative intent surrounding the Code's treatment of CIACs as income to the utility company.

Notice 87-82 also indicates that there is a public use exception to CIACs treatment as income. If the transfer of property (payment of relocation costs) is

not made in connection with the provision of utility services (i.e., where it is clearly shown that the benefit to the public as a whole was a primary motivating factor in the relocation of the utility line), then that payment will not be treated as income to the utility company.

The Internal Revenue Code also treats the relocation costs paid by a public entity as a CIAC if the public entity is paying it as a prerequisite to the provision of utility services to a public facility.

(5) Payments in Lieu of Taxes.

(a) Characterized as a Contribution to School Districts. As a general matter, no payment by a business is deductible unless the deduction is governed by a statutory provision (§63(a), Internal Revenue Code of 1986 ("Code")). §170 of the Code provides for deduction of charitable contributions, subject to numerous limitations based on income and other factors. That Section does not define the term "contribution or gift." Numerous cases and rulings over the years have examined the issue, however, and the principal standard for determining whether a corporate payment to a charitable or government organization may be deducted as a charitable contribution was established in the Singer case. *Singer Co. v. U.S.*, 449 F.2d 413 (Ct. Cl. 1971). The Court of Claims in that case held that if the benefits received, or expected to be received, by a corporate donor are greater than those that inure to the general public as a result of a payment or contribution, then the contribution is not **deductible under §170. In a series of rulings, the IRS has expanded this concept, and has ruled that deductions under §170 are not allowed where payments bear a direct relationship to the taxpayer's business, and are made with an expectation of a financial return to the payor.** See, e.g., Rev. Rul. 72-314, 1972-1 C.B. 44. The *Singer* case and the IRS rulings cited continue to be the standard in this area. If payments in lieu of taxes are made to a School District and are intended to secure the benefits of property tax abatement to the company, the charitable contribution deduction may not be allowable.

While payments to a political subdivision may be generally, and accurately, referred to as payments in lieu of taxes ("PILOTs"), if they are not governed by a statute, they do not meet established IRS guidelines for the deduction of PILOTs as taxes under §164 of the Code. **To be deductible as property taxes, payments in lieu of taxes must be required by a state statute, be used for public or governmental purposes, be calculated through a rate based on valuation and be imposed with respect to ownership interests in property.** See PLR 8919002. This principle underlies a series of rulings by the IRS with respect to PILOTs, and is consistent with the general definition of a tax set forth in Rev. Rul. 57-345, 1957-2 C.B. 132, and Rev. Rul. 70-622, 1970-2 C.B. 41. Because the Chapter 100 process (unlike TIF) does not provide a statutory basis or requirement for PILOTs, the deduction as a tax under Chapter 100 is questionable.

Expenses that are not assignable to a specifically defined category by the Code may be deductible under §162 of the Code as ordinary and necessary business expenses. Under §162, the taxpayer is allowed to deduct ordinary and

necessary expenses paid or incurred during the taxable year in carrying on any trade or business. However, an expense that is otherwise deductible under §162 may be limited by another Code section; capitalization of the amounts paid may be required under §263.

§263 provides that amounts paid for buildings, or to improve, restore or increase the value of any property must be charged to capital account, and not currently deducted. Case law and IRS rulings have extended this basic rule to require capitalization of any expenditure that creates or acquires a separate and distinct asset (see, e.g., *Comr. v. Lincoln Savings and Loan Ass'n*, 403 U.S. 345 (1971); Treas. Reg. 1.263(a)-2(a)), and more recently to require capitalization of expenditures that provide a significant long-term benefit to the taxpayer, apart from any distinct asset (*INDOPCO, Inc. v. Comr.*, 92-1 USTC Para. 50,113 (S.Ct. 1992)). Because payments under Chapter 100 R.S.Mo. to a political subdivision will be made pursuant to a lease between a Taxpayer and the City, providing for the acquisition of property financed by the Chapter 100 bonds, the most straightforward treatment of the payments would be to include the amounts in the basis of the property acquired, and depreciate these amounts over the useful life of the property. However, under the theory adopted in the *INDOPCO* case, a strong argument could be made that the payments are related to the benefit of tax abatement, and could therefore be deducted ratably over the term of the abatement.

(b) IRS Treatment of PILOTs With Respect to Tax–Exempt Bonds. Effective February 19, 2007, the IRS amended its regulations with respect to the private security or payment test in determining the tax-exempt status of certain bonds, as follows:

> Par. 2. Section 1.141-4(e)(5) is revised to read as follows:
>
> §1.141-4 Private Security or Payment Test.
>
> * * * * *
>
> (e) * * *
>
> (5) Payments in lieu of taxes—
>
> (i) In general.
>
> A tax equivalency payment or other payment in lieu of a tax (PILOT) is treated as a generally applicable tax if—
>
> (A) The payment is commensurate with and not greater than the amounts imposed by a statute for a generally applicable tax in each year; and

(B) The payment is designated for a public purpose and is not a special charge (as described in paragraph (e)(3) of this section).

(ii) Commensurate standard.

For purposes of this paragraph (e)(5), a payment is "commensurate" with generally applicable taxes only if the amount of such payment represents a fixed percentage of, or reflects a fixed adjustment to, the amount of generally applicable taxes that otherwise would apply to the property in each year if the property were subject to tax. For example, a payment is commensurate with generally applicable taxes if it is equal to the amount of generally applicable taxes in each year, less a fixed dollar amount or a fixed adjustment determined by reference to characteristics of the property, such as size or employment. A payment does not fail to be a fixed percentage or adjustment as a result of a single change in the level of the percentage or adjustment following completion of development of the subject property. The payment must be based on the current assessed value of the property for property tax purposes for each year in which the PILOTs are paid and that assessed value must be determined in the same manner and with the same frequency as property subject to generally applicable taxes. A payment is not commensurate if it is based in any way on debt service on an issue or is otherwise set at a fixed dollar amount that cannot vary with the assessed value of the property determined in the manner described in this paragraph (e)(5)(ii).

(6) Taxability Of Benefits In General. To avoid treatment of economic incentive as taxable income, it is best to structure the ownership of the developmer as a corporation and treat the incentive as a contribution to capital if possible, and not as an operating subsidy. See §118, Internal Revenue Code.

§54. —Miscellaneous

(1) Receivership For Nuisance Property.

(a) General. §§441.500 – 441.643 R.S.Mo. allows for the appointment of a receiver to abate a nuisance (§441.510.1 R.S.Mo.) which is defined as "a violation of provisions of the housing code applying to the maintenance of the buildings or dwellings which the code official in the exercise of reasonable discretion believes constitutes a threat to the public health, safety or welfare;" §441.500(13) R.S.Mo.

(b) Parties. An amendment in 2001 via House Bill 133 allows a local housing corporation or neighborhood association to petition for the receivership. §441.510.1 R.S.Mo. Defendants in the action shall be the last owner of record of the dwelling as of the date of filing petition and the last holder of record of any

mortgage, deed of trust, or other lien of record against the building as of the date of filing the petition. §441.520.2 R.S.Mo. For purposes of this section, a local housing corporation shall mean only those local housing corporations established prior to August 28, 2001. §441.590 R.S.Mo.

(c) Notice. At least 60 days prior to the filing of an application for appointment of a receiver, the petitioning party which may include a county, municipality, local housing corporation or neighborhood association shall give written notice by regular mail to all interested parties of its intent to file the application and information §441.510.2 R.S.Mo. Notice of the application shall be served on all interested parties. §441.510.4 R.S.Mo. The plaintiff shall file for record with the recorder of deeds a notice of the pendency of the suit pursuant to §527.260 R.S.Mo. and from the time of filing, such notice shall be constructive notice to persons thereafter acquiring an interest in the building. §441.550 R.S.Mo.

(d) Cure. If, following the application for the appointment of a receiver, one or more of the interest parties elects to correct the conditions on the property that party shall be required to post security in an amount determined by the court to ensure timely performance of the work. §441.510.5 R.S.Mo.

(e) Receiver. In the event that no interested party elects to act, the court shall make a determination that the property is an unsafe or unsanitary condition and appoint a receiver to complete the abatement. §441.520.2 R.S.Mo.

(i) Eligible Candidates For Receiver. The court may appoint the code enforcement agency, the mortgagee, or other lienor of record, a local housing corporation established to promote housing development and conservation in the area or if no local housing corporation exists for such areas then the local neighborhood association, a licensed attorney or real estate broker or any other qualified person as a receiver, provided that all lien holders of record shall be given the right of first refusal to serve as receiver.

(ii) Priority Status of Candidates. In the event that all lien holders refuse to serve, the local housing corporation established to promote housing development and conservation in the area if any, shall be given the right of first refusal to serve as receiver for any residential property consisting of four units or less; provided that, if no local housing corporation exists for such area then the local neighborhood association shall be given the right of first refusal; or where the building is vacant, the court may appoint the code enforcement agency or any of the other persons listed above as a receiver to remove all housing code violations which constitute a nuisance as found by the court, except that all lien holders of record shall be given the right of first refusal to serve as receiver in the order of which their liens appear of record. In the event of the refusal of all lien holders to serve or in the absence of any lien holders, the local housing corporation that is established to promote development and conservation in the area in which the property is located, if any, shall be given the right of first refusal to serve as receiver for residential property consisting of four units or less, provided that if no local housing corporation exists for the area then the local

neighborhood association shall be given such right of first refusal. §441.590 R.S.Mo.

(f) Duties of Receiver. The receiver shall with all reasonable speed remove all of the housing code violations which constitute a nuisance as found by the court and make other improvements consistent with safe and habitable conditions over the remaining useful life of the property. §441.590.5 R.S.Mo.

(g) Jurisdiction and Service. Any owner whether or not a citizen or resident of this state who in person or through an agent owns, uses, or is possessed of any real estate situated in Missouri thereby subjects himself or itself to the jurisdiction of the courts of this state as to any of the cause of action arising pursuant to the provisions of §§441.500 – 441.643. Personal service of process shall be made in accordance with the rules of civil procedure; provided that, if such service cannot be with due diligence made, service of process may be made by personally serving process upon the defendant outside this state or by service in accordance with the rules of civil procedure as in all cases effecting a res within the jurisdiction of the court. §441.520.4(1) R.S.Mo. If a landlord of residential property is not a resident of this state or is a corporation, the landlord shall designate an agent upon whom service of process may be made in this state. If no designation is made, process may served upon the secretary of state, provided that the process or service upon him on her is not effective until the petitioner mails a copy of the process and pleading by certified mail to the defendant or respondent at the address stated on the assessor's records for the subject property. An affidavit of compliance with this section shall be filed with the clerk of the court. §441. 520.4(2) R.S.Mo.

(h) Source of Funds.

(i) Borrowings. The receiver may borrow money against and encumber the property as security for amounts necessary to carry out his responsibilities and the court may authorize the receiver to issue receivers certificates as security against such borrowings which shall be authorized investments for banks and savings and loan associations and shall constitute a first lien upon the property and its income and shall be superior to any claims of the receiver and to all prior or subsequent liens except taxes and assessments. §441.590.6R.S.Mo. In addition, the receiver may pledge the rentals from property and borrow and encumber the property on the strength of the rental income. §441.590.7 R.S.Mo.

(ii) Lien. Any receiver shall have a lien for the expenses necessary to carry out the courts order upon the rents receivable from the premises and this lien shall have priority over all other liens or encumbrances of record upon the rents except taxes and assessment, receivers certificates and mortgages recorded prior to October 13, 1969. §441.590.8 R.S.Mo.

(iii) Use of Rent. The receiver may, on order of the court, take possession of the property, collect all rents and profits accruing from the property and pay costs of management including insurance premiums and general and special real estate taxes or assessments. §441.590.4 R.S.Mo. The court may

authorize the receiver to draw upon the rents deposited in court to pay for the costs of necessary repairs upon the presentation of invoices for the work or materials purchased (Section 441.590.1 R.S.Mo.). The court may allow receiver reasonable and necessary expenses payable from rent monies. §441.590.2 R.S.Mo.

(i) Bond. No receiver appointed shall serve without bond, the amount in form of the bond to be approved by the court and the cost paid from the monies so deposited. §441.590.3 R.S.Mo.

(2) Application of Missouri Open Records Law to Economic Development Documents. Missouri's Sunshine Law, R.S.Mo. §610.010 *et seq*., provides a non-exhaustive list of types of records which are deemed "closed records," and accordingly not subject to public review. R.S.Mo. §610.021. However, this list does not include anything which would protect most economic development type documents from review.

(a) Chapter 610 Exceptions. The most relevant type in the Sunshine Law exclusions is detailed in R.S.Mo. §610.021(2), which provides that to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to

> leasing, purchase or sale of real estate by a public governmental body where public knowledge of the transaction might adversely affect the legal consideration therefor. However, any minutes, vote or public record approving a contract relating to the leasing, purchase or sale of real estate by a public governmental body shall be made public within seventy-two hours after execution of the lease, purchase or sale of the real estate.

This exclusion may have relevance in a Chapter 100 transaction where the municipality would purchase property and lease it back to the developer under the financing structure. However, it should be noted that the Missouri courts have strictly interpreted this section, and found it inapplicable in the case where a city closed a meeting to generally discuss a transaction under which a developer purchased ground and ultimately leased it to the city.

> While the discussions at the closed meetings may have 'related to' the city's leasing of the golf course in the broadest sense, these discussions did not qualify for closure because they did not 'directly relate to the specific reason announced to justify the closed meeting.' There are no exceptions in section 610.021 for discussing a real estate transaction between a private developer and a landowner, for discussing the developer's plans for the real estate, or for discussing the financing through municipal bonds of a development on real estate not yet purchased. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 260 (Mo.banc 1998). Accordingly, if a developer seeks protection from the open records law for economic

development documents, they must do so under separate statutory authority.

(b) Economic Development. Such separate authority is found in several different places, and has application to several different types of economic development transactions. Relating to documents submitted to the Department of Economic Development, R.S.Mo. §620.014 provides that

> records and documents submitted to the department of economic development, to the Missouri economic development, export and infrastructure board, or to a regional planning commission formed pursuant to Chapter 251, R.S.Mo., relating to financial investments in a business, or sales projections or other business plan information which may endanger the competitiveness of a business, or records and documents submitted to the department of economic development, or to a regional planning commission formed pursuant to Chapter 251, R.S.Mo., relating to tax credits except for the amount and recipient of any tax credits that are awarded may be deemed a 'closed record' as such term is defined in §610.010, R.S.Mo.

§620.014 was amended in 2009 via HB 191 to provide that records pertaining to a business prospect with which DED, the Missouri Economic Development, Export and Infrastructure Board or a Regional Planning Commission is currently negotiating may remain closed.

Records and documents relating to tax credits submitted as part of the application for all tax credits to any Missouri department, board, or commission authorized to issue or authorize or recommend the authorization of tax credits shall be deemed closed records until such time as the information submitted does not concern a pending application, and except as limited by other provision of law concerning closed records. For the purposes of this subsection, a "pending application" shall mean any application for credits that has not yet been authorized. In the case of partial authorization of credits, the completed authorization of a single credit shall be sufficient to constitute full authorization to the extent that the authorized credit or credits relate to the same application as the credits that have not yet been authorized. Upon a request for opening of records and documents relating to all tax credit programs, as defined in §135.800, R.S.Mo., submitted in accordance with the provisions of Chapter 610, except as limited by the provision of §610.255.1 R.S.Mo., the agency that is the recipient of the open records request shall make information available consistent with the provisions of Chapter 610. Where a single record or document contains both open and closed records, the agency shall make a redacted version of such record or document available in order to protect the information that would otherwise make the record or document a closed record. Staff time required for such redaction shall constitute an activity for which a fee can be collected pursuant to §610.026. §610.255. R.S.Mo.

Relating to documents submitted to the state treasurer, R.S.Mo. §30.600 provides that

> records and documents submitted to the state treasurer relating to financial investments in a business, sales figures or projections or other business results or business plan information, the disclosure of which may have a negative impact on the competitiveness of the business, shall be deemed a 'closed record' as such term is defined in §§610.010 to 610.030, R.S.Mo.

Relating to documents submitted to the Missouri agricultural and small business development authority, R.S.Mo. §348.181 provides that

> records and documents submitted by program applicants and lenders to the Missouri agricultural and small business development authority relating to financial investments in a business, or sales projections or processes or other business plan information which if released or otherwise made public may endanger the competitiveness of a business, or records and documents submitted to the authority relating to financial assistance that is awarded by the authority, except for the amount and recipient of any loan or grant from a program administered by the authority shall be deemed a closed record as such term is defined in §610.010 R.S.Mo. . . ..

(c) Tax Returns. With certain exceptions, information contained in Missouri tax returns is generally is considered confidential, and should avoid public scrutiny. §32.057 R.S.Mo. Though this section prohibits the department of revenue from disclosing any information relative to any return filed with the department, the prohibition also runs to "any person who lawfully or unlawfully inspects any report or return filed with the department of revenue." Id. Though there is no case law interpreting this section, presumably this prohibition would bind any Missouri agency reviewing a party's filed tax return as part of an economic incentive application review.

(d) Kansas. Kansas offers statutory protection of records delivered to economic development officials as part of the negotiating process. K.S.A. §45-221(a) provides in relevant part that "Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

> (20) Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.
>
> ***

> (25) Records which represent and constitute the work product of an attorney. And
>
> ***
>
> (30) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.
>
> (31) Public records pertaining to prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the state. This exception shall not include those records pertaining to application of agencies for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

In addition, the HPIP statute expressly provides that materials provided to KDOCH to determine HPIP certification are not subject to the Kansas Open Records Act:

> "The secretary of commerce and housing is hereby authorized to obtain any and all information necessary to determine such [HPIP] eligibility. Information obtained under this section shall not be subject to disclosure pursuant to K.S.A. §42-215 *et seq*., and amendments thereto, but shall upon request be made available to the legislative post audit division."

K.S.A. §74-50, 131.

(3) Missouri Certified Sites. The Missouri Department of Economic Development sponsors the Missouri Certified Sites Program. The purpose of the Missouri Certified Sites program is to provide consistent standards regarding the availability and development potential of commercial or industrial development sites. Criteria have been established based on both the requirements of industry and the data documenting availability. Site pre-qualification through this process provides a standardized tool by which both development professionals and business prospects can review prospective sites for compatibility with their development needs. The certification of a site is performed through a comprehensive review of items including the availability of utilities, site access, environmental concerns, land use conformance, and potential site development costs. Having a site "certified" reduces the risk associated with development of particular sites by providing up front and consistent information. To this end, the certification process works to assemble current and accurate information into a single, useable package and format it such that potential buyers can have this

information readily available for review immediately upon showing interest in a site. Since this information has been reviewed by an established Review Team of professionals for completeness, the potential buyer will achieve an increased level of detailed information to aid their decision-making.

Application materials for the Missouri Certified Sites Program as well as a Resource Guide that includes instructions on how to find required information, samples and attachments, can be found below. Questions about the Missouri Certified Sites Program can be directed to Hal Van Slyck at (573) 526-0748 or harold.vanslyck@ded.mo.gov.

Missouri Certified Sites standards have been developed through partnerships with Missouri Economic Development Council, Ameren UE, Empire Electric, KCP&L, Missouri Electric Cooperatives and the Missouri Department of Natural Resources. [Courtesy of DED].

The first sites to be certified were:

Union Corporate Center, Union
Callaway Energy Centre, Fulton
Ewing Industrial Park, Columbia
Partnership Industrial Center West, Site 12, Springfield
Innovation Business Park, Kearney
CenterPoint Intermodal Center – Phase I, Kansas City
Moberly Area Industrial Park, Moberly
Sutter Industrial Site, Columbia
Heidmann Industrial Park Tracts A & B, Washington

§55. —Liability for Costs.

(1) Government Not Liable Where It Exercises Governmental Powers Such As In Redevelopment. In *Union Elec. Co. v. Land Clearance for Redevelopment Auth. of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977), the St. Louis LCRA required a utility to relocate from a vacated street at its own expense. The utility sued for reimbursement. The court held that since the vacation was part of a redevelopment of a blighted area, the city was acting in a governmental rather than a proprietary capacity and was therefore not required to reimburse. *Id*. at 33.

(2) Utility's Property Interest. .

(a) No Property Interest Created By Telecommunications Act. In *Southwestern Bell Tel., LP v. City of Houston*, 529 F.3d 257 (5th Cir. 2008), the City of Houston adopted an ordinance requiring owners of facilities located in rights-of-way to bear the cost of relocating their equipment to accommodate public works projects. AT&T sought to recover these costs from the City in a Section 1983 lawsuit, claiming that the ordinance violated the Federal Telecommunications Act of 1996 (FTA), primarily §§253(a), and preemption and other claims. The Fifth Circuit held no private right existed under FTA §253 that

could be enforced under Section 1983. The ordinance was "competitively neutral and nondiscriminatory," and fell within the safe harbor provision of §253(c).

(b) Dedicated Easement In Plat Does Create Property Interest. St. Charles County (County) allowed plats to be recorded with dedicated utility easements in the public road right of way. The County subsequently requested Laclede Gas Company (Laclede) to relocate its gas lines. The Supreme Court held that the easement is a compensable property right. Thus the County was required to bear the cost of the relocation. *St. Charles County v. Laclede Gas Company*, 356 S.W.3d 137 (Mo. banc 2011).

Union Electric can be distinguished from a later case, *Home Builders*, in which the Missouri Court of Appeals held that the developer was responsible for the costs of the relocation of utilities. See *Home Builders Association of Greater St. Louis v. St. Louis County Water Company*, 784 S.W.2d 287 (Mo. App. E.D. 1989). *Home Builders* demonstrates the exception to the general rule outlined in *Union Electric*. *Home Builders* involved private developers that chose an area for a residential development. The municipality placed conditions on the development (similar to zoning restrictions), and the developer chose to pursue the project anyway. Thus, the need for utility relocation was caused by the developers. As a result, the court held that the private developer was accountable for the utility relocation costs.

(3) Attempted Special Rules. The Missouri Supreme Court has gone to great lengths to protect municipalities from being forced to bear the cost of relocation of utility lines from public streets and has held special laws that grant additional property rights to utility providers unconstitutional. In *Planned Industrial Expansion Authority of St. Louis v. Southwestern Bell Telephone Company*, 612 S.W.2d 772 (Mo. 1981), the Court held unconstitutional a statute intended to shift the cost of relocating telephone lines from the utility to local government. In RSMo. 392.080 (1974), the Legislature added an amendment that shifted the cost responsibility for utility relocation to the municipality by converting the type of use granted to the utility company from permissive to permanent. The practical effect was that, no matter the level of use originally granted to a telephone company in a public street or alley, it would not be affected by the vacation of such a road or alley. The Court held the amendment unconstitutional, stating at p. 776:

> The City has the important and indispensable duty to govern the use of its streets, and alleys, in such a manner as to serve the welfare of the public. Exercise of such control and responsibility of necessity must include the right and duty to vacate or abandon certain streets and alleys when the public would be better served by a different use thereof. . . . . If the statute were to stand, each and every time the City decided that lands encumbered by the "real property public easement" could be used better for the public welfare, the implementation thereof could be frustrated entirely by

> the potential expense of relocating conduits, cables and other equipment, . . .

(4) Common Law – Utilities Must Bear the Cost of Relocation. The Missouri Supreme Court emphasized the deference given to the Missouri Legislature in *Riverside-Quindaro Bend Levee Dist. v. Mo. Am. Water Co.*, 110 S.W.3d 378 (Mo. 2003). The court's decision reinforced the holding in *Union Electric* by noting that the Missouri Legislature specifically stated that "urban renewal projects" serve a public purpose. In Riverside-Quindaro, the project was condemnation of land to build a levee and no Missouri statute specifies a levee as a public purpose project. So, the common law is applied. The water company relied on the highway relocation statutes (RSMo 227.240 et seq.) to argue that the government was responsible for the relocation costs. However, the Missouri Supreme Court notes that "[n]othing in the any of these statutes prohibits utility companies from having to relocate their equipment in a condemnation proceeding." Id. at 386. The court then determined that the Water company was not entitled to compensation because it only held a license interest in the condemned property.

The U.S. Supreme Court provided further reinforcement of the application of the common law principles in *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Virginia*, 464 U.S. 30 (1983), in which the privately owned telephone company sought reimbursement of the costs of relocation necessitated by the urban renewal projects pursued by the NRHA. In an innovative argument, the phone company claimed it was a displaced person under the Federal Relocation Assistance Act and thus required compensation. The Court emphasized the common law rule that the utilities must bear the costs of relocation from a public right-of-way.

The Court held that the Relocation Act does not change the common law, but that an express statutory provision could carve out an exception to the common law on this issue. The Missouri legislature, in 2014, via SB 649, adpted the following language;

> Currently, no political subdivision shall require any public utility granted right-of-way access prior to August 28, 2001, to enter into an agreement or obtain a permit for general access to remain in the right of way. This act removes this date and allows any public utility that has been granted right-of-way access to remain in the right-of-way without entering into an agreement or obtaining a permit for general access.

Does this legislation change the burden of the cost of relocation? Stay tuned.

APPENDIX A
REDEVELOPMENT ISSUES
CHRONOLOGICAL TABLE OF CASES

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

a. *Public Purpose*. Is accomplished even if land is conveyed to private ownership.

b. *Eminent Domain*. Whether use is public is conclusively proven by legislative declaration unless arbitrary or induced by fraud, collusion or bad faith.

c. *Blight— Area Included*. May include sound structures and vacant land.

2. *Land Clearance for Redevelopment Authority of City of St. Louis v. City of St. Louis*, 270 S.W.2d 58 (Mo. banc 1954).

a. *Public Purpose—Lesislative*. Legislative determination conclusive except where fraud, collusion or bad faith.

b. *Loan to Private Person* of city funds not violation of Article VI, §§23, 25.

c. *Tax Exemption*. Not a violation of Constitution, Article X, §§6, 7.

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

a. *Eminent Domain—By Private Party*. Grant of eminent domain to private person approved.

b. *Eminent Domain—Public Use*. Exercise of eminent domain by private person not a taking for private use, Article I, §§2, 10, 26, 28.

c. *Financing—Adequacy*. Courts will defer to legislative finding by council that method of financing is sufficient.

4. *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526 (Mo. banc 1969).

a. *Profit Restrictions*. Approved.

5. *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974).

a. *Blight—Area Included*. Blight need not be present in total area (49% open, 4% parking, only 28% deteriorated).

b. *Blight—Legislative*. Court cannot interfere with council's discretion as to blight.

c. *Eminent Domain—Public Purpose*. Allowable to acquire vacant land by eminent domain.

6. *State ex rel Atkinson v. Planned Industrial Expansion Authority of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975).

a. *Planned Industrial Expansion Authority law validated*.

b. *Blight—Area Included* – vacant land may be considered blighted.

c. *Private Benefits*. If primary purpose of act is public, that private individuals may benefit does not deprive the act of its public character.

d. *Tax Abatement*. PIEA Tax Abatement does not unconstitutionally discriminate against competing industries.

e. *Undeveloped Areas*. That the statute granted abatement and eminent domain powers with respect to such areas did not violate the constitution simply because the word "undeveloped" does not appear in Article 10, §7 of the constitution. The definition of "undeveloped" in the statute makes it clear that these are distressed areas.

f. *Impairment of Contract*. Power of eminent domain does not impair the contract between a landlord and tenant since such contracts must yield to the power of eminent domain, and no rights are violated if just compensation is paid.

g. *Special Funds Doctrine*. If taxpayers of the city cannot be taxed to pay bonds, constitutional prohibition against certain indebtedness is not applicable. Where obligation is paid solely from revenues of the project, it is not a debt of the city.

7. *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320 (Mo. 1976).

a. Blight—Legislative. Determination of the existence of blight is legislative.

b. Financing—Adequacy. Evidence of financial commitment sufficient to support council determination that sufficient funds immediately available.

8. *Schweig v. City of St. Louis*, 569 S.W.2d 215 (Mo. App. 1978).

a. Neighbors Have Standing to Object to Project.

b. Blight. Subject to fairly debatable test.

c. Blight—Discretion. Allegation that property not blighted because well-maintained did not state cause of action.

d. Blight—Area Included. Not all property need be blighted.

9. *Cigas v. Kansas City Life Insurance Co.*, 576 S.W.2d 528 (Mo. 1979). Directed verdict did not implicate federal or state constitutions and therefore Supreme Court did not have jurisdiction of appeal.

10. *Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284 (Mo. App. 1979).

a. Financing Statement Inadequate.

11. *State ex rel. DeVanssay v. McGuire*, 622 S.W.2d 323 (Mo. App. 1981).

a. Financing. Means plan, not commitment.

12. *Schweig v. Maryland Plaza Redevelopment Corp.*, 676 S.W.2d 249 (Mo. App. 1984).

a. Public Purpose—Rehabilitation of acquired buildings is a public purpose.

b. Private Benefits—Profit to developer did not deprive redevelopment of its public purpose.

c. Eminent Domain—Court will not second guess granting of eminent domain.

d. Financing—Detailed plan of financing not required.

e. Redevelopment Agreement—That redevelopment agreement was contingent on financing did not render it void.

13. *State ex inf. Ashcroft, ex rel. Plaza Properties, Inc. v. City of Kansas City*, 687 S.W.2d 875 (Mo. 1985) (Court declined to rule the merits of a challenge to the Tax Increment Financing statute via a *quo warranto* proceeding, advising the parties to proceed by declaratory judgment instead.)

14. *Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986). Plaintiff aggrieved by grant of eminent domain to redevelopment corporation could sue under Civil Rights Act, 42 U.S.C.A. §1983, regardless of adequacy of state remedies.

15. *State ex rel. Terrell v. Nicholls*, 719 S.W.2d 862 (Mo. App. 1986).

a. Eminent Domain. Grant of not valid where developer failed to notify property owners of execution of development agreement.

16. *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146 (Mo. banc 1987).

a. *Eminent Domain—Use on Blighted Properties*. If blight, land may be *condemned* and sold for development.

b. *Blight Legislative*.

c. *Blight—Area Included*.

(1) *Inclusion of Non-Blighted Parcels*. Area may include parcels not blighted, *if* inclusion is necessary to assimilate tract of size to attract developers.

(2) *Expansion*. Existing area may be expanded to include non-blighted parcels.

(3) *Streets and Parking Lots* may contribute to blight.

d. *Economic Underutilization* is proper basis for condemnation.

e. *Amendment* of plan by developer acceptable where ultimately adopted by PIEA.

17. *Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co., Inc.*, 781 S.W.2d 70 (Mo. banc 1989).

a. *Eminent Domain* may be exercised without blight.

b. *Property Tax Abatement* may be awarded without blight.

c. *Special Assessments* are not taxes.

d. *No prohibited commercial venture* resulted from use of TIF.

e. *Debt* - TIF Bonds are not debt.

f. *Election* not required to issue bonds.

(1) Hancock Article X, §22(a)

(2) Debt clause

g. *Diversion* - No unlawful diversion of taxes.

h. *No grant or loan of credit*, Art. VI, §§23, 25.

i. *Uniformity*

(1) Property in District does not pay taxes.

(2) Uniformity does not apply to special assessments or tax abatement.

j. *Delegation* - (§99.805(11)) No unlawful delegation.

k. *Bonds.* The bonds are not revenue bonds requiring a vote.

18. *Land Clearance for Redevelopment Authority of Kansas City v. Waris*, 790 S.W.2d 454 (Mo. Banc 1990).

a. *Tax Abatement.* Unlike a housing authority, which is a separate entity, LCRA is part of City Government and entitled to exemption on property it owns and leases to private persons. Case involved the Allis Plaza hotel and the AT&T Town Pavilion in downtown Kansas City.

19. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991).

a. *Blight*

(1) *Declaration Not a Taking*.

(2) *Area Included*. May include properties not blighted.

20. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991).

a. *Blight—Fairly Debatable Test*. Finding of blight will be upheld if fairly debatable, even though evidence did not *compel* a decision that property is blighted.

b. *Single Parcel Blight* is permissible.

c. *Economic Underutilization*. Trial court in chamber stated that economic underutilization is not a basis to declare something blighted. The court cited the *Tierney* case, quoting the phrase: "The concept of urban redevelopment has gone far beyond slum clearance, and the concept of economic underutilization is a valid one." Thus, the court held the trial court's remark was unfounded.

d. *Blight—LegislativeDetermination*. A legislative finding of blight and a decision to take by eminent domain will be accepted as conclusive evidence that the contemplated use is public, unless it appears that the finding was arbitrary or induced by fraud, collusion or bad faith. No bad faith found where city favored one redevelopment plan over another.

e. *Owner's Ability to Rehabilitate*. The fact that the blighted property could be redeveloped by its owner did not invalidate the redevelopment plan.

f. *Blight—Equal Protection/Special Law.* That all other properties were taken out of the redevelopment plan except one did not constitute a denial of equal protection. Article III, §40(30) Mo. Const. (which states that the general assembly shall not pass any local or special law where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be determined without regard to any legislative assertion on the subject), not violated by redevelopment ordinance declaring an area blighted. "It is unrealistic that the framers of our constitution intended that a board of aldermen would have to enact a redevelopment ordinance for the whole city in order to redevelop a single parcel."

21. *Pettis County R-XII School Dist. v. County of Pettis* filed in Pettis Co. Cir. Ct. Cir. 1992 on grounds.

a. Violation of procedural requirements.

b. Economic development area unconstitutional. Court granted summary judgment - not appealed.

22. *County of Jefferson v. Quick Trip, City of Herculaneum, et al.*, 912 S.W.2d 487 (Mo. banc 1995).

a. *No diversion of sales taxes*.

b. *No new activity mandated by state with no source of revenue*.

23. *Smith v. Independence Tax Increment Financing Comm'n*, 919 S.W.2d 292 (Mo. App. W.D. 1996). Council properly designated area as blighted even though Commission mistakenly designated it as both blighted and a conservation area.

24. *Consolidated School District No. 1 of Jackson County v. Jackson County*, 936 S.W.2d 102 (Mo. banc 1996). M & M Replacement Tax held capturable by TIF.

25. *City of St. Charles v. DeVault Management*, 959 S.W.2d 815 (Mo. App. E.D. 1997).

a. *Comprehensive Plan* - Struck down ordinance adopting TIF plan on ground that it did not conform to comprehensive plan of City.

26. *JG St. Louis West LLC v. City of Des Peres*, 41 S.W.3d 513 (Mo.App. E.D. 2001) Challenge to TIF plan for rehabilitation of Chesterfield Mall.

a. *Blight*. Legislative determination of blight will not be disturbed unless arbitrary, or induced by fraud, collusion, or bad faith.

b. *Redevelopment Project Costs*. Parking structure was a reasonable and necessary cost.

27. *Ste. Genevieve School District v. Board of Aldermen of the City of Ste. Genevieve*, 66 S.W.3d 6 (Mo. banc 2002). Challenge to amendment of TIF plan without reconvening TIF commission.

a. *Project Amendment*. Where projects rearranged to increase cost of some items, while not increasing the cost of the overall plan, the change constituted a change in the 'nature' of the project per §99.825 R.S.Mo. Thus, plaintiff stated a cause of action

28. *Aaron v. Target*, 357 F.3d 768 (8th Cir. 2004) The 8th Circuit reversed the granting of a preliminary injunction by the district court against the use of eminent domain by the Land Clearance for Redevelopment Authority of the City of St. Louis. Target had a long-term lease on the store it occupied, but wanted to build a new one. The owners agreed, but demanded more rent. The city approved a redevelopment plan to demolish the store and convey the property to Target by passage of an ordinance on December 21, 2002.

a. *Eminent Domain*. "There is an extensive body of Missouri appellate cases deciding whether a taking is for a private purpose…. Federal abstention in this case would permit Missouri's condemnation procedures to run their course. Eminent domain is an appropriate tool to help neighborhoods remain economically viable, attract industry, and encourage future growth." Id. at 778.

b. *Bad Faith*. The opinion rejected the bad faith exception to abstention in spite of evidence that Target told the city it couldn't reach agreement on price and might abandon the site even though no discussions had taken place

between the parties, that Target authored the blight study, and that Target presented a redevelopment plan to the city without the owners' knowledge.

29. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct., 2655 (2005), 2005WL1469529 examined the use of eminent domain by a private entity, the New London Development Corporation to revitalize an area declared 'distressed' by the state. The plaintiffs' properties were not blighted, but were condemned to assemble the larger property. The Fifth Amendment to the Constitution provides that private property shall not be taken for public use , without just compensation. Inherent in the clause, is the requirement that a taking must be for a public use. The court held 5 to 4 that a public purpose is a public use and that further, economic development is a valid public purpose. Lack of blight of the specific properties at issue did not tempt the court to second guess the legislative plan for the redevelopment of the larger area.

30. *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. banc 2007). Until the Supreme Court of Missouri handed down its opinion in *Centene*, no Missouri appellate court had overturned a legislative determination of blight by a local government. The case involved an attempted condemnation under Chapter 353, R.S.Mo.

a. *Standard of Review*. The standard of review used by the *Centene* court was whether there was substantial evidence to support the legislative decision. The court cited a single case for this proposition, *Binger v. City of Independence*, 588 S.W.2d 481, 486 (Mo. banc 1979). *Binger* was an annexation case in which the court upheld the reasonableness of the city's legislative determination to annex an area into the city limits. The court dealt with the difference between a standard of review that requires the prevailing party at the trial court to demonstrate on appeal that the trial court's decision was supported by a preponderance of the evidence and the standard of review that is applied to legislative acts of local governments: simply that the reasonableness of the act be supported by substantial evidence. Under this standard, even if there is substantial evidence to the contrary, in which case the reasonableness is said to be fairly debatable, the court must uphold the legislative act. In rejecting the argument that the city had the burden of proving reasonableness by a preponderance of the evidence, the court stated:

> This argument is predicated on the assumption that in suits to determine the reasonableness and necessity of legislative action to annex, the burden of proof, referred to in *§ 71.015* and in previous annexation cases, has reference to a burden of persuasion that the preponderance of the evidence establishes reasonableness and necessity or the absence thereof. Actually, that is not what the term burden of proof means in these cases. This necessarily is true

> because the outcome of these cases does not depend on whether a city establishes by a preponderance of the evidence that annexation is reasonable and necessary or that citizens establish by a preponderance of the evidence that such annexation is unreasonable and unnecessary. There is not in these cases a burden of persuasion by a preponderance of evidence. Instead, the test is whether the evidence shows that the question of reasonableness and necessity of the annexation was fairly debatable. If it does, the legislative decision must stand. Therefore, when the suits to test reasonableness and necessity (both the Sawyers Act and the [**13] pre-Sawyers Act cases) speak of the burden of proof, they necessarily refer to a burden of proceeding with the evidence. The earlier cases have not analyzed the term burden of proof and have not articulated the fact that it really means the burden of proceeding with the evidence, but, as pointed out above, this necessarily is so and it henceforth should be so interpreted. [*486] The ultimate test, regardless of which party brings the suit and has the burden of proceeding with the evidence, is whether the reasonableness and necessity of proposed annexation was fairly debatable.
>
> *Binger*, 588 S.W.2d at 485-486.

The *Centene* court noted in footnote 2:

> After Centene filed actions for condemnation of the properties, the legislature enacted *section 523.261, R.S.Mo. Supp. 2006*. The statute states that with regard to condemnation actions, "any legislative determination that an area is blighted, substandard, or unsanitary shall not be arbitrary or capricious or induced by fraud, collusion, or bad faith and shall be supported by substantial evidence." Prior to *section 523.261*, the standard of review of the legislative determination was that it must not be arbitrary or induced [**5] by fraud, collusion or bad faith. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, 812 S.W.2d 903, 910 (Mo. App. 1991)*. If the action of the legislative body was "reasonably doubtful or even fairly debatable," the court could not substitute its judgment for that of the legislative body. It is not necessary to determine if *section 523.261* applies retroactively because Clayton's determination of blight failed to meet either standard.
>
> 225 S.W.3d @ 433.

b. *Blight*. Using this standard, the *Centene* court delved into the question of whether there was "sufficient" evidence of whether the redevelopment area had become a social liability under the definition of blight found in the Urban Redevelopment Corporation Act, §353.020 R.S.Mo. The court examined the evidence of how many police and fire calls were made in the redevelopment area over a five-year period. The statutory definition required findings that the area is both an economic liability and a social liability. The court held that evidence of economic liability cannot support a finding of social liability, since both are required. The opinion drew a dissent from Judge White who argued that the phrase "economic and social liability" found in the definition, "demonstrates the legislature's recognition of the causal connection between economics and social welfare. The decline in the former inevitably undermines the latter…." 225 S.W.3d @ 439.

31. *Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556 (Mo.App. W.D. 2008)[29]. Challenge to TIF plan ruled in favor of city on summary judgment by Cole County Circuit Court. Reversed and remanded by the Western District.

a. *Standard of Review*. Where a case comes up on summary judgment, the court will apply the standard rules concerning whether there are genuine issues of material fact. The Western District held it was error for the circuit court to apply the "fairly debatable" test to this analysis. By doing so, the Circuit Court unfairly shifted the burden to the plaintiffs: on summary judgment, for the city to prevail it must show there is no genuine issue of material fact, and it is not sufficient for the city to show that the fact issues are fairly debatable. The fairly debatable test is a test of reasonableness of a legislative act, not a test of whether a factual dispute exists. In other words, the court seemed to say that in order for the issue of the reasonableness of a legislative determination of blight to be fairly debatable, there must be substantial evidence of the blighting factors. In this case, at least, the evidence of flooding and an inadequate road system did not rise to that level through the affidavits and documents presented to the trial court. The court did not believe there was sufficient evidence as to the degree and frequency of flooding, nor did the evidence show that the road system was inadequate for the present use of the property, farming.

b. *Blight*. The court parsed the definition of blight in the Act and read it to say that any of the five factors alone or in combination must create the resulting circumstances in the second half of the definition, meaning they must retard the provision of housing accommodations or constitute an economic or social liability or constitute a menace to the public health, safety, morals, or welfare.. The court found the entire definition is modified by its final dependent clause: "in its

[29] By way of full disclosure, the author argued this case before the Western District.

present condition and use." Since the property in its present condition and use was mainly farmland, there was a genuine factual dispute about whether the poor road system was adequate, even though it admittedly may not be adequate for future development. This reading of the definition is the most revolutionary part of the opinion. In the worst slum in the world, any of the five factors in the first part of the blight definition might be adequate for the area in its present condition and use, but inadequate for redevelopment.

c. *But for*. The city's legislative finding that but for the adoption of the TIF plan the area could not reasonably be anticipated to develop was unreasonable to the extent it relied on evidence of flooding because prior to the approval of the TIF plan the city had passed a bond issue and was building a new levee at the time the case was tried.

32. *Meramec Valley R – III School District v. City of Eureka Missouri*, 281 S.W.3d 827 (Mo. App. ED 2009). Less than a year after *Great Rivers* was decided, the Eastern District handed down *Meramec Valley,* which, like *Great Rivers*, was an appeal from summary judgment in favor of the city in a case where the city's legislative finding of blight under the TIF Act was challenged.

a. *Blight.* The school district contended that the trial court erred in granting summary judgment because genuine issues of material fact existed relating to whether a portion of the redevelopment area consisted of property that would qualify as a greenfield. The court however found that the city presented ample evidence establishing that the predominance of blighting factors had resulted in economic liability. 281 S.W.3d at 836. Furthermore, the anti-greenfield language was amended into the TIF statute in §99.843 R.S.Mo. and became effective on November 28, 2007. The TIF project at issue in Merrimack was authorized in 2005. As to the present condition and use language in the blight definition of the statute, the court stated:

> The number of findings in the CBB study and in the Redevelopment Plan as to the inadequacy of the street layout and the improper or obsolete nature of the plats/subdivisions in the Redevelopment Area *in terms of their present use* are considerable, and the occasional references to their inadequacy in terms of planned uses of the property do not minimize the present use findings, but are mere surplusage.
>
> 281 S.W.3d at 837.

b. *But for*. The school district argued that it was not necessary to include the entire 938 acres in the redevelopment area in order for it to be economically feasible. The court rejected this argument saying that it could not

examine the redevelopment area piecemeal but rather was constrained to examine it as a whole.

c. *Standard of review*. The court adopted the traditional deferential standard of review for a legislative determination which is limited to whether it was "arbitrary or induced by fraud, collusion or bad faith or whether the Board exceeded its powers….If a Board's decision is reasonably doubtful or fairly debatable, we will not substitute our opinion for that of the Board." 281 S.W.3d at 839. The school district invited the court to use the reasoning from *Great Rivers* and abandon the fairly debatable test since the case came up for review on summary judgment. The court declined the invitation and distinguished *Great Rivers* on the grounds that St. Peters was found by the Western district to have placed insufficient evidence in the record to create a fairly debatable issue, whereas the city of Eureka presented ample evidence establishing that the predominance of blighting factors in the redevelopment area resulted in an economic liability through voluminous factual findings. 281 S.W.3d at 836.

APPENDIX B
CATEGORIES ECONOMIC DEVELOPMENT INCENTIVES

I. PROPERTY TAX EXEMPTION OR ABATEMENT	
A. Blighted Areas	Chapter 100 Bonds. City owns property and leases to industrial user.
	Enterprise Zones. §§135.200-135.255 R.S.Mo. Same abatement as Ch. 353, except that at least 50% of the ad valorem taxes must be abated for at least the first 10 years if the business is a manufacturing company. *See specifically* §135.215 R.S.Mo. This law is being phased out as zones around the state expire.
	Land Clearance for Redevelopment Authority. §§99.300-99.660.Ten years of full abatement on new improvements to substandard properties. Bonds can also be issued for land clearance in certain instances §99.480 R.S.Mo.

	Planned Industrial Expansion. §§100.300-100.620 R.S.Mo. Authorizes any city >75,000 having a home rule charter form of government to create an agency for the purpose of redeveloping economically distressed areas. Agency can exercise eminent domain and issue bonds.
	Tax Increment Financing ("TIF"). §§99.800 *et seq.* R.S.Mo. Real property tax and economic activity tax reimbursement equal to approved project costs.
	Urban Redevelopment Corporation. Under Chapter 353 R.S.Mo., the City Council may declare an area blighted and approve a redevelopment plan. The City may grant real property tax abatement on net new taxes, 100% for 10 years and 50% for 15 years. A TIF can be overlain on a 353 plan and the abatement contributed to MDFB for tax credits.
B. Non-Blighted Areas	Chapter 100 Bonds. *Supra*.
	TIF. Abatement available if business can qualify as a "conservation area" or an "economic development area." §§99.805(2)-(3) R.S.Mo. *et seq.*
II. INCOME AND SALES TAX EXEMPTIONS	Income Tax – Enterprise Zones. §135.220 R.S.Mo. 50% of Missouri taxable income attributed to a new business facility in an enterprise zone will be exempt from Missouri income taxation. These exemptions are available for 10 years, and must satisfy the 30% requirement (which is that 30% of the new employees must be residents of the zone or be "difficult to employ" as defined in Chapter 135 R.S.Mo.) §135.230 R.S.Mo. This law is being phased out as zones around the state expire.

	Sales Tax Exemption - Public Ownership. If facility is in public ownership at time of construction, may exempt purchases of construction materials; however, this may be off-set by higher costs resulting from public bidding requirements. §144.062 R.S.Mo. DOR has always taken position that ultimate purpose controls. But in letter ruling, department has liberalized. Must have "consumer" be an exempt entity by having City purchase with bond proceeds. Can have agent purchase. Chapter 349 bonds won't work because IRA not exempt entity.

III. STATE INCOME TAX CREDITS	Capital Investment Credits. §135.400 R.S.Mo. The Capital Tax Credit Program, §§135.400 *et seq.*, grants a 40% (60% in distressed community) transferable state income tax credit for qualified investments in independently-owned small businesses. The investment may be made either through an unsecured loan or the purchase of equity or unsecured debt securities. The maximum credit per investor is $100,000. The business must use the investment funds for capital improvements, plant, equipment, research and development or working capital. The approved business must be headquartered in Missouri and have less than 100 employees, at least 80% of whom must be employed in Missouri.
	Development Tax Credit Program (1)Source of Funds - 50% Tax Credit for contribution to Not For Profit Corporation ("NPC") for project approved by DED. NPC purchases assets which are leased to a qualified business. §§32.110 - 32.115(a). (2)Qualification - NPC must be a 501C3, 4, or 6 authorized to operate in Missouri and headquartered in geographic area of project. Recipient business can't serve on NPC's Board. *Churches, government or schools are ineligible.* Area must be blighted, distressed, E-Z, TIF or 353. §32.105(9) R.S.Mo. Source of Funds □ If rent is 50% of market, project gains $.50 from Fed. and Donor from each $1.00 of donation. (Donor $.28; Federal $.22) □ If rent is fair market value, project gains nothing and NFP gains $.50 □ If rent is 0, project gains $1.00 from: State - 50% Fed - 22% Donor – 28%

	Distressed Communities. §135.530 *et seq.* R.S.Mo. The Distressed Communities Act allows a qualified business entity which expands within a distressed community or moves its operation into a distressed community or commences operations in a distressed community to receive a 40% investment credit against income taxes. The maximum amount of credits available per taxpayer cannot exceed $125,000 for each of the three years after the commencement of business. The business must employ more than 75% of its employees at its facility in the distressed community. Distressed communities must have a median household income under 70% of the median income for the general area in which they are located. Employees of eligible facilities in distressed communities may receive a tax credit against their individual income tax.

	Enhanced Enterprise Zone. §135.950 – 135.970 R.S.Mo. In 2004 the legislature authorized the creation of enhanced enterprise zones in areas of high unemployment and low incomes in certain small to medium size cities and counties. The governing body of the city or county may establish an enhanced enterprise zone board which shall include members appointed by the school district affected, and other taxing jurisdictions, with five members appointed by the chief elected official of the city or county. After holding a public hearing, the governing authority may file a petition with DED requesting designation. If approved, the designation shall expire in 25 years. Improvements to real property in an EEZ may, upon approval by the governing authority, be exempt, in whole or in part, from assessment of ad valorem taxes of one or more political subdivisions. At least one-half of the value of such improvements shall be exempt for at least 10 years. In addition, a new business facility may be allowed, upon approval by DED, a credit against state income tax each year for up to 10 years based upon a formula set forth in the act. An expanding facility may also be eligible for the credits. The credits may not be carried forward but may be transferred and the unused portion is refundable.
	Enterprise Zone – new employee credit. §§135.225 (1)-(3) R.S.Mo. Credit of $400 against state income tax can be earned for each new job created. Additional credits of $400 earned for employees who live in an E-Zone. Another $400 of credit is granted for hiring certain disadvantaged workers. These credits will extend each year for 10 years. This law is being phased out as zones around the state expire.
	Enterprise Zone – new investment credit. §135.225(4) R.S.Mo. 10% credit for first $10,000 of investment, 5% credit for next $90,000, and 2% for the remaining investment. This law is being phased out as zones around the state expire.

	Enterprise Zone – employee training credit. §135.235 R.S.Mo. Up to $400 credit training expenses. This law is being phased out as zones around the state expire.
	Historic Preservation. §253.545 R.S.Mo. The state historic preservation tax credit program provides financial incentives for the redevelopment of historic structures in Missouri. It rewards private investment by providing state income tax credits in the amount of 25% of eligible costs and expenses of the rehabilitation of an approved historic structure. The rehabilitation costs must exceed 50% of the total basis in the property and the rehabilitation must meet the standards of the state historic preservation officer. The investor must receive a certificate of eligible credits from the Department of Economic Development and attach the certificate to all Missouri income tax returns on which the credit is claimed. A federal credit in the amount of 20% is also available. An investor may claim both the federal historic rehabilitation credit and the state historic rehabilitation credit for the same project.
	Innovation Centers. §348.300 R.S.Mo. In 1998, the legislature approved transferable tax credits of 50% of cash contributions made to a qualified fund which contracts with innovative centers or the corporation for science and technology. The contract must stipulate that 10% of all earnings are transferred to the Missouri Business Modernization and Technology Corporation. A qualified fund is one which invests seed capital, start-up capital or follow-up capital in a commercial activity in a Missouri distressed community. The investment must be used for research, development, or prototype fabrication. Tax credits may be carried forward for 10 years.

	Low Income Housing. §135.350 R.S.Mo. Under §135.350 *et seq.*, taxpayers are allowed a credit for a portion of their investments in qualified low-income housing. A qualified low-income housing project has restricted rents and satisfies one of the following tests the taxpayer elects: Either that 20% or more of the units are rent-restricted and occupied by individuals whose income is 50% or less of area median gross income or that 40% or more of the units are rent-restricted and occupied by individuals whose income is 60% or less of the area median gross income. The Missouri Housing Development Commission determines the amount of tax credit available to each low-income project in the state and issues an eligibility statement. The amount of the credit is based on the cost of the project and the number of qualified low-income units created. In no event is the credit greater than the amount necessary to ensure the feasibility of a project or greater than the federal low-income housing tax credit. The taxpayer must submit the eligibility statement at the time of filing a Missouri state income tax return. The credit may be allocated within a partnership.
	MDFB Infrastructure Tax Credit Program. Grant to local government for public infrastructure. Contributors to MDFB get 50% tax credits. A substantial user of the facility might not be entitled to a federal deduction. §100.263 R.S.Mo.
	Missouri Business Use Incentives for Large Scale Development Act ("BUILD"). §§100.710 *et seq.* R.S.Mo., 5% of employees wages paid by employer to MDFB to be used as security for bonds issued for project costs. Limited to those industries that create 100 new jobs in manufacturing, processing, R&D, or "service in interstate commerce." Employer reimbursed via tax credits.

	Neighborhood Assistance Act. §§32.100 - 32.125 R.S.Mo. 50% tax credits against income, franchise, or financial institution taxes are authorized for contributions to qualified programs.
	New or Expanded Business Facility. §135.100 R.S.Mo. Credit depends on number and type of employees, and number of new business facility investments. These credits are deducted every year for 10 years.
	Quality Jobs Program. §620.1881 R.S.Mo. In 2005 the legislature, via SB 343 adopted the Quality Jobs Program which allows certain businesses to retain a portion of new employees' withholding tax for the retention and creation of jobs. The Act is divided into four separate programs, each with separate qualification requirements: The Small and Expanding Business Program, the Technology Business Program, the High Impact Projects Program, and the Job Retention Program. §620.1881 R.S.Mo.
	Research & Development Tax Credit. §620.1039 R.S.Mo. Tax credit may be claimed against state income tax liability for qualified research expenses in an amount equal to 6 1/2% of the excess amount of the last three years of R & D expenses.
	Seed Capital Tax Credit of 30% of the amount of the investment. §§348.300 to 348.318 R.S.Mo. Investment in Missouri Small Business: Total tax credit minimum is $50,000 and the maximum tax credit is $500,000.

IV. LOANS	CDBG Interim Financing. Deferred payment loan as low as 1% (HUD). Can not be used for non-entitlement areas. (1)Conditions – If HUD funds, 51% of employees on construction of entire project must be low to moderate income ("LMI"). Return on equity and assets must be below industry median. (2)Length - 18 months
	Linked Deposit Program. §§30.750-30.767 R.S.Mo. Low interest (3% below 1-year T-Bill rate) deposits by State with lender to induce working capital or operating loans for manufacturing and related jobs.
	Missouri First for Small Business. §§30.750 *et seq*. R.S.Mo. Similar to Mo-Bucks, with the exception that maximum loan amounts are $50,000 and eligible businesses must employ fewer than 25 persons.
V. BONDS	BUILD. §100.710 R.S.Mo. authorizes the Missouri Development Finance Board to borrow money or issue revenue bonds to finance costs of eligible projects. Eligible projects then pay to the Board an assessment of up to 5% of gross employee wages which is used to retire debt.
	Industrial Revenue Bonds (1)Constitution: Art. VI, §27(b) - County or City without election may issue revenue bonds for any facility to be leased or sold to private persons for "manufacturing, commercial, warehousing and industrial development purposes." (2)Statutes: §349.055 R.S.Mo. - Industrial Development Corporation may issue revenue bonds for commercial facility.

	Municipally Owned Facilities. §§100.010 *et seq*. R.S.Mo. Local or state authorities can issue tax-exempt bonds for assembly plants, processing plants, manufacturing companies, industrial plants, and factories. §§100.265 *et seq*. R.S.Mo.
	Neighborhood Improvement District Bonds. Retired by special assessments on real estate backed by general obligation of local government. §§67.453-674.475 *et seq.* R.S.Mo.
VI. GRANTS	BUILD Development Finance Corporations. §371.010 R.S.Mo. Allowed to lend money to, and to guarantee, or to otherwise financially assist any corporation developing property located within the state.
	CDBG Industrial Infrastructure. §100.263 R.S.Mo. Grant to local government for public infrastructure. (Counties >200,000 population). Must employ 51% low to moderate income persons.
	Missouri Development Finance Board. (See §18)

VII. JOB TRAINING	Community College Job Training Program. §§178.892 *et seq*. R.S.Mo. Agreement between employer and junior college district may provide payment of training (including OJT) from withholding of state income taxes and other sources. If project is under $500,000, then agreement can extend 10 years, but if over $500,000, then up to 8 years.
	New or Expanding Industry Training Program. §§620.470 *et seq.* R.S.Mo. New or expanding industry training program designed for the training, retraining or upgrading of the skills of potential employees. Reimbursement or funding from Mo. Job Development Fund available for initiating and implementing programs.
	Tax Credits for New or Expanding Business. §135.235 R.S.Mo. To the extent that training expenses of §240 employees are not covered by existing federal, state or local programs, the new or expanded business shall be eligible for state income tax credits equal to 80% of the cost which exceeds $400, not to exceed $400 per employee.
VIII. SPECIAL ASSESSMENTS	Neighborhood Improvement Districts. §§32.100-32125 R.S.Mo. Authorizes cities and counties in Missouri to establish districts for purpose of improving infrastructure. The local government may issue temporary notes and bonds retired by special assessments on real estate and backed by a limited general obligation of the government.
	Special Business Districts. §§71.790-71.808 R.S.Mo. Any city can establish a special business district to redevelop a designated area of the city. Costs for improvement may be defrayed by special property tax levy, no greater than 850 per $100 of assessed value, levied on real property within the area.

	Transportation Development District. §§238.202 *et seq.* R.S.Mo. May levy $.10/$100 A.V. (§238.232.1), sales tax (1% unlimited number of years) (§238.235.1), tolls (§238.237.1) and special assessments (§238.230.1.) May borrow money. §238.240. Roads. Ch. 88 R.S.Mo. Community Improvement Districts. (See §11)
IX. EQUITY INFUSION	New Jobs Fund. §620.1030 R.S.Mo. Direct financial investments are available for Missouri businesses that show promise of significant job creation and growth.

APPENDIX C
INCENTIVE PROGRAM QUALIFIERS

Program [Benefits] (Statute)	**Geographic Restriction**	**Eligible Use**	**Eligible Entity**	**Eligible Cost**	**Prevailing Wage** (New Construction on a Public Work)
Industrial Development Bonds [Sales, Real and Personal Property Tax Abatement] (Ch. 100 R.S.Mo.)	No Restriction	Manufacturing, Warehousing, Commercial, and Development (Constitution)	Municipality	All Property Titled in City	N
New or Expanded Business [Investment and Job State Tax Credits] (Ch. 135 R.S.Mo.)	No Restriction	Any Project Which Produces 2+ Jobs	New or Expanded Business	Investment	N
NID [GO Credit] (Ch. 67 R.S.Mo.)	No Restriction	Any Project	N/A	Publicly-Owned Infrastructure	Y
Transportation Development District Property or Sales Tax, Special Assessment, Bonds (Ch. 238 R.S.Mo.)	No Restriction	N/A	N/A	Infrastructure	Y
TIF [Rebate of PILOTs and EATs] (§§99-800 *et seq*.)	Area needs to quality as blighted or a conservation district.	Any Use	Selected Developer	Preferably Infrastructure	N
BUILD [Tax Credits Based on Withholding] (§100-710 *et seq*.)	None	MO Manufacturing, Processing, R&D, or Providing Services in Interstate Commerce, Investing > $15 M and Creating > 100 New Full-Time Jobs	N/A	All	N
CDBG [Grant for Infrastructure] (§100.263 R.S.Mo.)	Non-Entitlement Areas Blighted	Any Use Creating LMI Jobs	Municipality	Infrastructure	Y
Urban Redevelopment [Real Property Tax Abatement] (Ch. 353 R.S.Mo.)	Blighted	No Restrictions	Redevelopment Corporation	N/A	Y

Program [Benefits] (Statute)	**Geographic Restriction**	**Eligible Use**	**Eligible Entity**	**Eligible Cost**	**Prevailing Wage** (New Construction on a Public Work)
E-Zone [Tax Credits, Income Tax Exemption, Property Tax Abatement] (Ch. 135 R.S.Mo.)	Depressed Area Criteria per §135.200 *et seq*.	Revenue Producing Enterprises as Defined in Ch. 135 R.S.Mo.	N/A	N/A	N
LCRA [10-Year Real Property Tax Abatement] (Ch. 99 R.S.Mo.)	Blighted	Any Use	Any Business	N/A	Y
NNFB [Capture of New Taxes] (Ch. 70 R.S.Mo.)	No Restriction	Arena, Recreational Facility	Municipality	All	Y
Planned Industrial Expansion Authority Real Property Tax Abatement Condemnation	Blighted	Any	Any Business	N/A	Not by Statute

APPENDIX D
SAMPLE TAX CREDIT AGREEMENT
MISSOURI DEVELOPMENT FINANCE BOARD

THIS TAX CREDIT AGREEMENT dated as of the ___ day of _____, 1996 (the "Agreement") by and between the **MISSOURI DEVELOPMENT FINANCE BOARD**, a body corporate and politic of the State of Missouri (the "Board"), and **THE PORT AUTHORITY OF KANSAS CITY**, **MISSOURI**, a political subdivision organized and existing under Chapter 68 of the Revised Statutes of the State of Missouri (the "Public Entity");

WITNESSETH:

WHEREAS, §100.286.6 of the Revised Statutes of Missouri (the "Tax Credit Statute") provides that any taxpayer shall be entitled to a tax credit against any tax otherwise due under the provisions of Chapter 143, R.S.Mo., excluding withholding tax imposed by §§143.191 to 143.261, R.S.Mo., Chapter 147, R.S.Mo., or Chapter 148, R.S.Mo., in the amount of fifty percent of any amount contributed in money or property by the taxpayer to the development and reserve fund, the infrastructure development fund or the export finance fund during the taxpayer's tax year, provided, however, the total tax credits awarded in any calendar year beginning after January 1, 1994, shall not be the greater of ten million dollars or five percent of the average growth in general revenue receipts in the preceding three fiscal years; and

WHEREAS, the City of Kansas City, Missouri (the "City") and the Public Entity have requested that the Board accept contributions from donors and make the proceeds of such contributions available to the Public Entity for the purpose of paying a portion of the cost of financing the project described on Exhibit A hereto, (the "Project") all as more fully described in the Application (as defined herein); and

WHEREAS, at meetings of the Board held on May 21, 1996 and July 16, 1996, representatives of the Department of Economic Development and the City made written and oral presentations to the Board concerning the Project and the Application; and

WHEREAS, the Project will significantly benefit the City of Kansas City, Missouri and the State of Missouri by: (i) the creation of temporary and permanent jobs; (ii) stimulating additional development in the area near the Project; (iii) increasing local and state tax revenues; and (iv) creating and stimulating additional tourism opportunities for persons visiting the Kansas City, Missouri area and the State of Missouri; and

WHEREAS, pursuant to a motion of the Board adopted at its meeting held May 21, 1996 and July 16, 1996, the Board approved the Application subject to certain limitations and considerations more fully described herein and directed the Executive Director to work with the Public Entity in the preparation of this Agreement for the purpose of setting forth the terms and conditions upon which contributions will be accepted by the Board and how the proceeds of such moneys will be applied; and

WHEREAS, the Board and the Public Entity desire to enter into this Agreement for the purpose of setting forth the terms and conditions pursuant to which the Board will accept contributions, and deposit such contributions into the infrastructure development fund for the purposes set forth herein, all subject to the terms of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein set forth, the Board and the Public Entity a hereby covenant and agree as follows:

ARTICLE I

DEFINITIONS

In addition to the terms defined in the Recitals to this Agreement and elsewhere herein, as used in this Agreement the following terms shall have the following meanings:

"Application" means the request for assistance submitted on _____ __, 1996, to the Board by the City, as revised by the letters dated _____, 1996, and July 10, 1996 (all as attached hereto as Exhibit B, collectively, the "Application"). For the purposes of this Agreement the parties acknowledge that the Project shall consist only of the Project as described on Exhibit A hereto.

"Contribution" means any contribution received by the Board pursuant to and in accordance with this Agreement.

"Disbursement Request" means the Disbursement Request referred to in Section 4.3 hereof and the form of which is attached hereto as Exhibit C.

"Donor" means any Missouri taxpayer making a contribution to the Board.

"Local Jurisdiction" means the City of Kansas City, Missouri.

"Maximum Contributions" shall have the meaning set forth in Section 3.1 hereof.

"Maximum Tax Credits" shall have the meaning set forth in Section 3.1 hereof.

"Project" means the costs described in the Application, including acquisition of the project site, site clearing, site preparation and site improvements of the real estate described in Exhibit A, hereto and any additions, improvements or equipment related thereto, approved by the Board.

"Project Budget" means the aggregate Project Budget described on Exhibit D hereto, and any amendments and additions thereto made in accordance with Section 5.8(a) of this Agreement.

"Project Costs" means all reasonable or necessary costs and expenses for the Project approved for payment by the Public Entity.

"Tax Credits" means tax credits issued by the Board in accordance with the Tax Credit Statute and this Agreement in consideration of Contributions.

"Tax Credit Statute" shall have the meaning set forth in the Recitals.

ARTICLE II

FINDINGS AND DETERMINATIONS; REPRESENTATIONS AND WARRANTIES

Section 2.1. Board's Determination of Project Benefit. The Board hereby finds and determines as follows:

(a) The Project will significantly benefit Kansas City, Missouri and the State of Missouri by: (i) the creation of temporary and permanent jobs; (ii) stimulating additional development in the area near the Project; (iii) increasing local and state tax revenues; and (iv) creating and stimulating additional tourism opportunities for persons visiting the Kansas City, Missouri area and the State of Missouri;

(b) The benefits to be derived by the State of Missouri are expected to exceed the benefits provided by the Board by this Agreement; and

(c) The Board's participation is a material precondition to the completion of the Project, and the Project would not proceed without the assistance provided by the Board.

Section 2.2. Public Entity's Determination of Project Benefit and Representations and Warranties. The Public Entity hereby finds and determines as follows:

(a) The Project will significantly benefit Kansas City, Missouri and the State of Missouri by:(i) the creation of temporary and permanent jobs; (ii) stimulating additional development in the area near the Project; (iii) increasing local and state tax revenues; and (iv) creating and stimulating additional tourism opportunities for persons visiting the Kansas City, Missouri area and the State of Missouri;

(b) The benefits to be derived by the State of Missouri are expected to exceed the benefits provided by the Board by this Agreement;

(c) The Project would not proceed without the assistance provided by the Board.;

(d) The Public Entity (1) is a political subdivision organized and existing under the laws of the State, and (2) has lawfully executed and delivered this Agreement acting by and through its Chairman or Vice Chairman; and

(e) The execution and delivery of this Agreement by the Public Entity will not result in a breach of any of the terms of, or constitute a default under, any indenture, mortgage, deed of trust, lease or other agreement or instrument to which the Public Entity

is a party or by which it or any of its property is bound or its bylaws or any of the constitutional or statutory rules or regulations applicable to the Public Entity or its property.

ARTICLE III

CONTRIBUTIONS AND TAX CREDITS

Section 3.1. Agreement to Accept Contributions and Issue Tax Credits. Subject to the requirements set forth herein, the Board hereby agrees to accept Contributions from Donors in a maximum aggregate amount of $1,475,000 ("Maximum Contributions"), resulting in the potential issuance of Tax Credits in the maximum amount of $737,500 (the "Maximum Tax Credits") and to deposit such Contributions into the Board's infrastructure development fund, and to issue such Donors' Tax Credits in an amount not to exceed the lesser of (i) 50% of the amount of such Contribution, or (ii) the then current maximum amount authorized under the Tax Credit Statute. The amount of each Contribution shall be determined as provided in the Tax Credit Statute and as provided herein.

Any portion of such Maximum Tax Credits which are not issued by December 1, 1996 shall be forfeited effective midnight on December 1, 1996. This paragraph shall not restrict the owner of any Tax Credit from utilizing the benefits of the carryforward provisions contained in the Tax Credit Statute.

Section 3.2. Submission of Form 100. The Board shall process each Contribution which is accompanied by a properly completed Form 100 and any other documents required by Missouri law. Any Contribution which is received for which the Board does not have a properly completed Form 100 and any other documents required by Missouri law shall be held by the Board until such documents are provided or, at the option of the Board, returned to the Donor with a written notation stating why such Contribution is being returned. A copy of each returned donation shall also be sent to the Public Entity. The Board reserves the right to require any additional information which the Board determines to be necessary to comply with the Board's statutes, as they may be amended from time to time, including but not limited to the "Certificate of Reportable Contributions" from any Donor (which is a business entity).

Section 3.3. Minimum Donation. The Board shall not accept any donation in an amount less than $10,000.00. Any donation which is received for less than such minimum amount shall be returned to the Donor with a written notation stating that donations must be made in the minimum amount of $10,000.00. A copy of each returned donation shall also be sent to the Public Entity.

Section 3.4. Processing Donations. The Board shall promptly process all completed donations. The Board expects that once a properly completed Form 100 and all other required documents are received by the Board, together with the Contribution, the Board will issue or cause to be issued the Tax Credits within 30 calendar days.

Section 3.5. Determination of Amount of Contribution. The amount (or value) of each Contribution shall be determined by the Board as follows:

Cash. The amount (or value) of cash Contributions shall be the face amount of such Contribution.

Marketable Securities. The amount (or value) of marketable securities shall be the proceeds received by the Board from the liquidation of such marketable securities in accordance with the Donor's instructions approved and accepted by the Board, less the Board's costs of selling such securities.

Unmarketable Securities and Other Property. No contributions of unmarketable securities or other property shall be permitted under this Agreement.

All such determinations by the Board shall, absent manifest error, be conclusive and binding upon the Donors and the Public Entity. The Board reserves the right to reject any Contribution.

Section 3.6. Public Entity Notice of Estimated Usable Tax Credits. On or before November 1,1996, the Public Entity shall notify the Board in writing of that portion of the Maximum Tax Credits the Public Entity intends to utilize (the "Estimated Usable Tax Credits") prior to December 1, 1996. In the event such amount is less than the Maximum Tax Credits for such year, the Board shall be entitled to use the difference between the Maximum Tax Credits and the Estimated Usable Tax Credits for any other project of the Board. The Public Entity understands and agrees that the maximum amount of tax credits the Board may issue in each calendar year is limited by the Tax Credit Statute. The Public Entity agrees to fully cooperate with the Board's efforts to use any tax credits provided hereunder which are not expected to be used by the Public Entity.

Section 3.7. Donations in Excess of Maximum Contributions. The Board and the Public Entity agree that in the event the Board receives Contributions in excess of the Maximum Contribution set forth in Section 3.1 hereof, the Board shall return such donation to the Donor thereof with a statement that Tax Credits are no longer available for such donations.

ARTICLE IV

APPLICATION OF CONTRIBUTIONS

Section 4.1. Board's Application of Contributions. All Contributions received by the Board shall be deposited in the same manner as other amounts received by the Board and the amount of such Contributions shall be maintained by the Board on its books and records (the "Board Project Account"). All moneys on deposit in the Board Project Account shall be invested by the Board in accordance with its investment guidelines. All interest earnings on such amounts shall accrue to the Board and shall not be credited to the Board Project Account.

Section 4.2. Disbursements from the Board Project Account. The. Board shall disburse amounts from the Board Project Account upon receipt of fully executed disbursement requests in the form attached hereto as Exhibit C (each a "Disbursement Request"). The Board shall be entitled to rely upon each Disbursement Request in disbursing amounts from the Board Project Account and it shall have no duty to conduct any investigation into the authenticity of the signatures on such Disbursement Request or the accuracy of the information set forth therein.

Section 4.3. Procedures for Disbursements. The Board and the Public Entity hereby agree to the following procedures in connection with disbursements from the Board Project Account:

(a) All Disbursement Requests shall be submitted to the Board as provided in Section 4.4 hereof. All payments from the Board Project Account shall be made payable to the Public Entity for further disbursement pursuant to the Disbursement Request.

(b) In no event shall the Public Entity submit more than one Disbursement Request to the Board each month.

Section 4.4. Processing of Disbursement Requests. Within ten (10) business days after the
submission of a fully completed Disbursement Request to the Board, the Executive Director shall process such request for payment or immediately notify the Public Entity of any information needed to process such Disbursement Request.

Section 4.5. Deduction of Board Fees and Expenses. Concurrently upon the receipt of each Contribution the Board shall deduct an administrative fee in an amount equal to 1% of the amount of all Contributions and its actual out-of-pocket expenses (including the fees and expenses of the Board's counsel) incurred by the Board in the execution and administration of this Agreement and shall furnish the Public Entity a detailed description of such deductions at least quarterly. Such fees shall be in addition to any interest earned on moneys invested in the Board Project Account. Concurrently with the execution of this Agreement the Public Entity shall pay the legal fees and expenses of Gilmore & Bell, P.C. in an agreed upon amount of $3,500. Such payment shall cover all legal fees and legal expenses of the Board relating to the Board's approval of the Application and the execution of this Agreement.

Section 4.6. Return of Contributions. In the event the Public Entity shall notify the Board that the Project has been abandoned for any reason, or upon an event of default under Section 6.1 hereof, then all Contributions held by the Board pursuant to Section 4.1 hereof or held by the Public Entity pursuant to Section 4.2 hereof shall be applied as follows: (i) first, to reimburse the State for the cost of Tax Credits issued hereunder and actually used by the Donor with respect to such Contributions, (ii) second, if requested by a Donor in writing, returned to the Donor after deducting any amount due to the State under (i) above, and (iii) third, used to pay for infrastructure projects the Board and the Public Entity mutually determine are beneficial to the Local Jurisdiction and the State of Missouri. The Board agrees that it will provide a written notice to each Donor who would be entitled to any Contribution return. In determining the cost to the State of such Tax

Credits the Board shall assess interest on such Tax Credits in an amount equal to *The Bond Buyer's* 20 Bond Index published in *The Bond Buyer* on the day such calculation is made. Notwithstanding any other provision of this Agreement, Contributions which are expended by the Public Entity in accordance with this Agreement shall not be subject to return nor shall such credits be subject to recapture. If following completion of the Project there are any amounts remaining in the Board Project Account, such amounts shall be disbursed in accordance with Section 4.6 hereof.

ARTICLE V

RECORDS AND REPORTS

Section 5.1. Access to Records. The Board and the Public Entity and the duly authorized agents of the Board and the Public Entity shall be permitted, at all reasonable times upon reasonable notice under the circumstances, to examine the books and records of the Public Entity with respect to the Project and the Contributions.

Section 5.2. Information to be Provided by the Public Entity. The Public Entity shall cause to be furnished to the Board such information as the Board may reasonably request concerning the Public Entity, the Project and the Contributions.

Section 5.3. Indemnification.

(a) The Public Entity releases the Board from, and agrees that the Board shall not be liable for, and indemnifies the Board against any liabilities, losses, damages (including attorneys' fees), causes of action, suits, claims, costs and expenses, demands and judgments of any nature imposed upon or asserted against the Board (except to the extent that any of the foregoing arises as a result of the gross negligence or willful misconduct of the Board, or any of their officials, commissioners, directors, officers, attorneys, accountants, employees or agents) on account of: (i) any loss or damage to property or injury to or death of or loss by any person that may be occasioned by any cause whatsoever pertaining to acquiring, constructing, equipping and operating the Project; (ii) any breach or default on the part of the Public Entity in the performance of any covenant or agreement of the Public Entity under this Agreement or any related document, or arising from any act or failure to act by the Public Entity, or any of its agents, contractors, servants, employees or licensees; (iii) violation of any law, ordinance or regulation affecting the ownership, occupancy or use of the Project; (iv) any loss suffered by any Donor as a result of the inability of the Donor to use any Tax Credit issued by the Board, other than as a result of the failure of the Board to issue such Tax Credit upon receipt by the Board of the necessary information, and (v) any loss resulting from any environmental violation at the Project, and (vi) any claim or action or proceeding with respect to the matters set forth in subsections (i), (ii), (iii), (iv) and (v) above brought thereon.

(b) In case any action or proceeding is brought against the Board in respect of which indemnity may be sought hereunder, the Board shall promptly give notice of that action or proceeding to the Public Entity, and the Public Entity upon receipt of that notice shall have the obligation and the right to assume the defense of the action or proceeding;

provided, that failure of a party to give that notice shall not relieve the Public Entity from any of its obligations under this Section unless that failure prejudices the defense of the action or proceeding by the Public Entity. The Board shall have the right to employ separate counsel with respect to any such claim or in any such action and to participate in the defense thereof, but the fees and expenses of such counsel shall be at the expense of the Board unless the employment of such counsel has been specifically authorized, in writing, by the Public Entity or the Board reasonably concludes that there is a conflict of interest that would prevent counsel for the Public Entity from adequately representing both the Public Entity and the Board. The Public Entity shall not be liable for any settlement without its consent.

(c) The indemnification set forth above is intended to and shall include the indemnification of all affected officials, directors, officers, attorneys, accountants, financial advisors and employees of the Board. That indemnification is intended to and shall be enforceable by the Board to the fullest extent permitted by law.

Section 5.4. Further Assurances and Corrective Instruments. The Board and the Public Entity from time to time will execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Project and for carrying out the intention or facilitating the performance of this Agreement.

Section 5.5. Litigation Notice. The Public Entity shall give the Board prompt written notice of any action, suit or proceeding by it or against it at law or in equity, or before any governmental instrumentality or agency relating to the Project or the Contributions.

ARTICLE VI

MISCELLANEOUS PROVISIONS

Section 6.1. Default. In the event the Public Entity shall fail to perform any material covenant, condition or other provision of this Agreement and such failure shall continue for 30 days after written notice thereof by the Board, the Board shall be entitled to retain all Contributions in the Board Project Account, if any; provided, however, if such failure is correctable but is such that it cannot be corrected within such 30 day period, such failure shall not constitute a failure within the meaning of this Section 6.1 if the Public Entity are diligently pursuing such corrective action and such failure is corrected within 120 days. Amounts retained by the Board pursuant to this Section shall be applied in accordance with Section 4.6 hereof.

Section 6.2. Notices. Any notice, request, complaint, demand or other communication required or desired to be given or filed under this Indenture shall be in writing and shall be deemed duly given or filed if the same shall be delivered by courier or overnight delivery service or duly mailed by first-class mail, postage prepaid, addressed as follows:

(a) To the Board:

Missouri Development Finance Board
Governor Office Building
200 Madison Street, Suite 1000
P.O. Box 567
Jefferson City, Missouri 65102
Attn: Executive Director
Telephone No. (573) 751-8479
Telecopy No. (573) 526-4418

(b) To the Public Entity:

The Port Authority of Kansas City, Missouri
1100 Walnut, Suite 1700
Kansas City, Missouri 64106
Telephone No. (816) 221-0636
Telecopy No. (816) 221-0189

The Board and the Public Entity may from time to time designate, by notice given hereunder to the others of such patties, such other address to which subsequent notices, certificates or other communications shall be sent.

Section 6.3. Severability. If any provision of this Agreement shall be held or deemed to be invalid, inoperative or unenforceable as applied in any particular case in any jurisdiction or jurisdictions or in all jurisdictions, or in all cases because it conflicts with any other provision or provisions hereof or any constitution or statute or rule of public policy, or for any other reason, such circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance, or of rendering any other provision or provisions herein contained invalid, inoperative or unenforceable to any extent whatsoever.

Section 6.4. Execution in Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 6.5. Governing Law. This Agreement shall be governed exclusively by and be construed in accordance with the applicable laws of the State of Missouri.

Section 6.6. Supremacy of Agreement. This Agreement constitutes the only written agreement among the parties relating to the Project and the Contribution, and in the event of any conflict between any other oral or other written information, the terms of this Agreement shall supersede such conflicting information and shall control.

IN WITNESS WHEREOF, each of the patties hereto has caused this Agreement to be signed in its respective name and behalf and its official seal to be hereunto affixed and attested by its duly authorized officers, all as of the date first above written.

MISSOURI DEVELOPMENT FINANCE BOARD

By: _____
Title: Executive Director

THE PORT AUTHORITY OF KANSAS CITY, MISSOURI

By: _____
Title: Chairman

(EXHIBIT A)

DESCRIPTION OF THE PROJECT

[TO BE PROVIDED BY THE PUBLIC ENTITY]

(EXHIBIT B)

APPLICATION TO THE BOARD AND SUPPLEMENTS THERETO

(EXHIBIT C)

FORM OF DISBURSEMENT REQUEST

Disbursement Request No.

To: Missouri Development Finance Board
Governor Office Building
200 Madison Street, Suite 1000
P.O. Box 567
Jefferson City, Missouri 65102
Attn: Finance Director
Telecopy No. (573) 526-4418

Re: The Port Authority of Kansas City, Missouri - Disbursement Request from the Board Project Account

You are hereby requested pursuant to Section 4.3 of the Tax Credit Agreement dated as of the _____ day of _____, 1996 (the "Agreement"), to issue a check to The Port Authority of Kansas City, Missouri (the "Public Entity") to reimburse it for checks issued to the following named payee to provide for the payment or reimbursement of the following Project Costs (as defined in the Agreement):

Payee/Address/Tax ID No.	Amount of Project Costs	Description

The undersigned hereby states and certifies that:

1. Each item listed above is a proper Project Cost (as defined in the Agreement). Attached hereto are invoices, statements, bills or other documents evidencing the fact that such payment is due.

2. These Project Costs have been incurred and are presently due and payable or have been paid by the Public Entity in connection with the Project.

3. No item listed above has previously been included in any other Disbursement Request submitted under the provisions of the Agreement.

4. All necessary permits and approvals required for the portion of the work on the Project for which this withdrawal is to be made have been issued and are in full force and effect.

Dated this ___ day of_____ 20___.

THE PORT AUTHORITY OF KANSAS CITY, MISSOURI

By: _____
Authorized Representative

(EXHIBIT D)

PROJECT BUDGET

APPENDIX E
SAMPLE PARTICIPATION AGREEMENT FOR CDBG – ASSISTED PROJECT
(to be completed by company)

COMPANY NAME:_____ APPLICANT
(City/County):_____

In consideration of the benefits to be derived by the company from the CDBG-assisted project as proposed in the application, the above named company (hereafter "Company") hereby certifies and agrees to the following:

1. **Definitions**

a. Applicant – The city or county that submitted an application to DED for funding under the CDBG Industrial infrastructure program.

b. Application – The documents, forms, certifications, engineering reports, company financial statements, and other information submitted by the Applicant to DED regarding the Project.

c. Availability to Low and Moderate Income Persons – Jobs will be considered to be available for these purposes only if: (a) Special skils that can only be acquired with substantial training or work experience or education beyond high school are not a prerequisite to fill such jobs, or the business agrees to hire unqualified persons and provide training; and (b) The unit of general local government and the assisted business take actions to ensure that low and moderate income persons receive first consideration for filling such jobs.

d. CDBG – Community Development Block Grant program, administered by DED. Funding is provided by HUD to the DED, who then grants CDBG funds to cities or counties.

e. Capital Expenditures – The funds expended by the Company (or lessor) for new real and personal property improvements related to the project, or the book value of personal properth relocated by the company from another state for the project.

f. Company – The company specified at the heading of this agreement, which will be involved in the Project specified in the Application.

g. Current Employees or Current Employment – The number of Full-time, Permanent Employees of the Company at this location at the time this agreement is signed by the Company.

h. DED – Missouri Department of Economic Development, an agency of the State of Missouri.

i. Financial Statements – Current and/or projected balance sheets, profit and loss, cash flow and other financial information about the Company at thislocation. Such projections must be consistent with those submitted to lenders, stockholders, partners, or other parties having an interest in the Company.

j. Full-Time, Year-Round Employee – An employee of the Company at this location who works a minimum of 1,800 hours per year for the Company and receives medical benefits.

k. Grant Agreement – An Agreement between the Applicant and DED defining the conditions of this project.

l. Grantee – The Applicant for this project which was approved for CDBG funding under this program.

m. HUD – The U.S. Department of Housing and Urban Development, federal sponsor of the CDBG program.

n. Job Cretion or Retention Activities – An activity designed to create permanent jobs where at least 51 percent of the jobs, computed on a full time equivalent basis, involve the employment of low and moderate income persons. For an activity that creates jobs, the unit of general local government must document that at least 51 percent of the jobs will be held by, or will be made available to low and moderate income person.

o. New Jobs – The number of new Full-time, Year-Round Employees of the Company at this location who will be added after DED's conditional approval of the Application due to the Project within two years of the date of Ded's conditional approval of the Application. The number of "New Jobs" is the addition at the Project location over Current Employment, and net of decreased employment at other locations of the Company or related companies in the State of Missouri.

p. Project – The construction, reconstruction, purchase, and/or installation of buildings, machinery, equipment, utilities, streets, furniture, and otherreal estate or personal property improvements to be located at the site indicated in the Application, whether owned or leased by the Company or Applicant, as detailed in the application.

q. Retained Jobs – The number of current Full-time, Year-Round Employees of the Company who would have been terminated if the Project had not been undertaken. In the event less than 100% of the employees of the entire facility would be terminated, the specific employees who would be retained have been named, and a direct relationship has been established between their proposed termination and the Project.

r. Unforeseen Economic Events – The Company's actual sales volume at this location was significantly less than was projected by the company prior to the Commencement of the Project due to factors beyond the Company's control.

2. **Accuracy** – The Company has reviewed the entire contents of the Application including all attachments, except for information that pertains to other companies that may be included, and hereby certifies that all information that relates to the Company is true and accurate, and can be verified upon request by proper officials of DED or the Applicant.

3. **Access to Records** – The Company agrees to provide reasonable access to company records by proper officials of DED, the Applicant, and HUD in order to verify information submitted in this Application and requirements set forth in this Agreement. "Reasonable access" shall be considered access at the Company's normal business hours with at least three days notice by DED, HUD, or the Applicant.

4. **Job Creation Activities** – The Company agrees to create permanent jobs where at least 51 percent of the jobs, computed on a full time equivalent basis, will be available to low and moderateincome persons. For an activity that creates jobs, the unit of general local government must document that at least 51 percent of the jobs will be held by, or will be made available to low and moderate income persons.

   Jobs will be considered available to low and moderate income person for these purposes only if:

   (A) Special skills that can only be acquired with substantial training or work experience or education beyond high school are not a prerequisite to fill such jobs, or the business agrees to hire unqualified persons and provide training; and

   (B) The unit of general local government and the assisted business take actions to ensure that low and moderate income persons receive first consideration for filling such jobs.

5. **New Job Creation Projections (If Applicable)** – The Company will create, at a minimum, _____ New Jobs in addition to the Current Employment of _____. The Company will maintain, at a minimum, _____ Full-Time, Year Round Employees at this location for a period of at least five years from the date of DED's conditional approval of the Application.

6. **Proposed Capital Expenditures** – The Company certifies that the proposed Capital Expenditures for the Company's Project, as identified in the Application, has not yet begun, and will not begin until DED has conditionally approved the Application.

The Company also certifies that it will expend, at a minimum, $_____ in Capital Expenditures for the Project, and provide paid invoices and other allowable documentation dated after DED's conditional approval of the Application substantiating said expenditures to the Grantee and DED.

7. **EEO/Civil Rights** – The Company agrees to comply with Equal Employment Opportunity and civil rights laws and provedures as applicable to the CDBG program, which, among other requirements, requires non-discrimination in employment.

8. **Penalties** – The penalties for non-compliance with this Agreement are as follows:

a. New Job Creation – For every New Job less than the number stated in item 5 of this Agreement within two years after the date of DED's conditional approval and sustained for five years after the date of DED's conditional approval, the Company agrees to provide as penalties to DED, within 60 days written notice by DED, an amount equal to $10,000 plus 10% interest compounded annually accrued from the date CDBG funds were first received by the Grantee, plus any expenses associated with the collection of funds from the Company due to this penalty. For every Full-Time, Year-Round Employee less than the number stated in item 5 that is not maintained for a period of five years from the date of conditional approval, the Company will be subject to the same penalties as mentioned above.

b. LMI Benefit – In the event the Company fails to comply with the Job Creation or Retention Activities requirements, as indicated in item 4 or Availability to Low to Moderate Income Persons requiremengs, as indicated in item 5 of this Agreement, the Company agrees to provide as penalties to DED, within sixty (60) days written notice by DED, an amount equal to 100% of the CDBG funds provided by DED for the Project, plus 10% interest compounded annually accrued from the date CDBG funds were first received by the Grantee, plus any expenses associated with the collection of funds from the Company due to this penalty.

c. Other Requirements – in the event the Company fails to comply with other provisions of this Agreement (not including items 9a, b, and c), the company agrees to provide as penalties to DED, within sixty (60) days written notice by DED, an amount equal to 100% of the CDBG funds provided by DED for the project, plus 10% interest accrued from the time CDBG funds from the Company due to this penalty, or a lesser amount, as determined by DED based on the severity of the non-compliance.

d. Reduction of Penalties – DED, at its sole discretion, may reduce or waive the penalties specified in Sections 9a or 9b of this Agreement in the event the Company experienced Unforseen Economic Events, as defined in Section 1(p) herein. This information must reflect the activity only at the facility referred to in

the Application, and not include other sites, subsidiaries, or parent company. In the event the company elects not to submit the current and projected financial information in the Application, DED is not obligated to determine if a reduction in penalties would be warranted.

_____ The Company elected to submit financial information as described in this section.

_____ The Company elected not to submit financial information, and hereby acknowledges that the possible waiver of penalties by DED as described herein may not be possible.

9. **Certification** – The Company also certifies that but for the proposed CDBG assistance described in the Application, the Company's Project will not be done at the proposed site, and the New or Retained Jobs would not occur.

10. **Proper Authorization** – The Company, and the officers or representatives who sign below on the Company's behalf, has entered into this Agreement with the full knowledge and autnorization of the Company under proper procedures prescribed by articles of incorporation, partnership agreements, or other applicable documents. The persons involved in the authorization of this Agreement hereby certify that they are aware that intentional misrepresentation of fact is a Class A misdemeanor, and may also cause penalties (as herein described) to be enforced.

APPROVED ON BEHALF OF THE COMPANY:

_____
Name (signed) Date

On this ____ day of _____, 20____, before me _____, a Notary Public, personally appeared _____, known to me to be the person who executed this Agreement.

_____
Notary Public

My commission expires_____

ATTACHMENT: A Corporate Resolution authorizing approval of this Agreement, and authorizing the person above to sign on behalf of the Corporation.

APPENDIX F
MISSOURI ENTERPRISE ZONES INCOME TAX BENEFIT EXPIRATION DATES (AS OF FEBRUARY 1, 2004)

	Name of Missouri Enterprise Zone	Expiration Date
1	ST. LOUIS MIDTOWN ENTERPRISE ZONE	8/30/98 & 8/30/05
2	MACON / MACON COUNTY / CALLAO / BEVIER ENTERPRISE ZONE	8/30/98 & 8/30/05
3	WASHINGTON COUNTY / ST FRANCOIS COUNTY / POTOSI / PARK HILLS	8/30/98 & 8/30/05
4	WAYNE COUNTY / GREENVILLE / PIEDMONT ENTERPRISE ZONE	1/4/99 & 1/4/06
5	BROOKFIELD ENTERPRISE ZONE	2/8/99 & 2/8/06
6	TRENTON ENTERPRISE ZONE	2/28/99 & 2/28/06
7	SPRINGFIELD ENTERPRISE ZONE	5/10/99 & 5/10/06
8	PEMISCOT COUNTY / CARUTHERSVILLE / STEELE / HAYTI / COOTER	5/30/99 & 5/30/06
9	PERRYVILLE ENTERPRISE ZONE	5/30/99 & 5/30/06
10	WELLSTON ENTERPRISE ZONE	5/30/99 & 5/30/06
11	DENT COUNTY / TEXAS COUNTY / SALEM / LICKING / HOUSTON	7/11/99 & 7/11/06
12	SEDALIA ENTERPRISE ZONE	7/17/99 & 7/17/06
13	KENNETT ENTERPRISE ZONE	9/19/99 & 9/19/06
14	CHILLICOTHE ENTERPRISE ZONE	9/19/99 & 9/19/06
15	CABOOL ENTERPRISE ZONE	1/3/00 & 1/3/07
16	JOPLIN AREA / WEBB CITY ENTERPRISE ZONE	3/19/00 & 3/19/07
17	KANSAS CITY ENTERPRISE ZONE	4/24/00 & 4/24/07
18	ST JOSEPH / BUCHANAN COUNTY ENTERPRISE ZONE	4/24/00 & 4/24/07
19	HANNIBAL ENTERPRISE ZONE	4/24/00 & 4/24/07
20	SIKESTON ENTERPRISE ZONE	4/24/00 & 4/24/07
21	HOWELL COUNTY / WEST PLAINS / WILLOW SPRINGS	4/24/00 &

	Name of Missouri Enterprise Zone	**Expiration Date**
		4/24/07
22	DUNKLIN CO / STODDARD CO / MALDEN / BERNIE / CAMPBELL / DEXTER	4/24/00 & 4/24/07
23	CUBA / STEELVILLE / CRAWFORD COUNTY ENTERPRISE ZONE	4/24/00 & 4/24/07
24	PIKE COUNTY ENTERPRISE ZONE **(EXPIRED)**	**4/24/00**
25	KIRKSVILLE ENTERPRISE ZONE	3/9/01 & 3/9/08
26	CARROLLTON ENTERPRISE ZONE	3/9/01 & 3/9/08
27	EXCELSIOR SPRINGS ENTERPRISE ZONE	3/9/01 & 3/9/08
28	NEVADA / VERNON COUNTY ENTERPRISE ZONE	3/9/01 & 3/9/08
29	POPLAR BLUFF / BUTLER COUNTY ENTERPRISE ZONE	6/22/01& 6/22/08
30	MILAN / SULLIVAN COUNTY ENTERPRISE ZONE	9/14/01 & 9/14/08
31	CAPE GIRARDEAU / CAPE GIRARDEAU COUNTY ENTERPRISE ZONE	12/3/01 & 12/3/08
32	BUTLER ENTERPRISE ZONE	12/3/01 & 12/3/08
33	NEW MADRID ENTERPRISE ZONE	3/17/02 & 3/17/09
34	NEOSHO ENTERPRISE ZONE	10/31/05
35	SHANNON COUNTY ENTERPRISE ZONE	1/1/06
36	ST LOUIS SATELLITE ENTERPRISE ZONE	1/21/06
37	CLAYCOMO SATELLITE ENTERPRISE ZONE	1/21/06
38	CALIFORNIA ENTERPRISE ZONE	3/6/06
39	ROLLA ENTERPRISE ZONE	4/4/06
40	KANSAS CITY SATELLITE ENTERPRISE ZONE #1 (KCI)	7/31/06
41	RIPLEY COUNTY ENTERPRISE ZONE	1/20/07
42	MILLER COUNTY ENTERPRISE ZONE	1/20/07
43	MARSHALL ENTERPRISE ZONE	1/20/07
44	MADISON CO / IRON CO / FREDERICKTOWN / IRONTON / PILOT KNOB	1/20/07
45	WINDSOR / HENRY COUNTY / PETTIS COUNTY	1/20/07
46	KANSAS CITY SATELLITE ZONE #2 (Richard Gebaur)	1/20/07
47	DALLAS COUNTY / BUFFALO ENTERPRISE ZONE	6/15/07
48	LEWIS COUNTY ENTERPRISE ZONE	6/15/07
49	MISSISSIPPI COUNTY ENTERPRISE ZONE	6/15/07
50	MORGAN COUNTY ENTERPRISE ZONE	6/15/07
51	MARCELINE ENTERPRISE ZONE	4/14/08
52	PUTNAM COUNTY ENTERPRISE ZONE **(TERMINATED)**	**5/16/00**
53	CARTHAGE ENTERPRISE ZONE	4/14/08
54	VANDALIA ENTERPRISE ZONE	8/4/08

	Name of Missouri Enterprise Zone	**Expiration Date**
55	GASCONADE VALLEY ENTERPRISE ZONE	8/4/08
56	MEXICO ENTERPRISE ZONE	10/26/08
57	DAVIESS / GENTRY / HARRISON COUNTIES ENTERPRISE ZONE	10/26/08
58	AURORA ENTERPRISE ZONE	2/21/10
59	KANSAS CITY FEDERAL ENTERPRISE COMMUNITY	12/20/09
60	ST. LOUIS / WELLSTON FEDERAL ENTERPRISE COMMUNITY	12/20/09
61	EAST PRAIRIE FEDERAL ENTERPRISE COMMUNITY	12/20/09
62	CLINTON ENTERPRISE ZONE	1/5/13
63	INDEPENDENCE ENTERPRISE ZONE	6/29/14
64	AVA ENTERPRISE ZONE	3/14/15
65	INDEPENDENCE SATELLITE ENTERPRISE ZONE	8/20/15
66	MOBERLY ENTERPRISE ZONE	1/9/16
67	LAMAR ENTERPRISE ZONE	5/10/16
68	CAMDEN COUNTY ENTERPRISE ZONE	1/14/17
69	FAYETTE ENTERPRISE ZONE	7/31/17
70	NORTH ST. LOUIS COUNTY ENTERPRISE ZONE	9/10/18
71	WRIGHT COUNTY ENTERPRISE ZONE	9/14/18

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