

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

FILED

DEC 28 2009

BRENDA A. UMSTATTD  
CLERK CIRCUIT COURT  
COLE COUNTY, MISSOURI

BARBARA MANZARA, et. al, )  
)  
)  
) Cause No: 09AC-CC00576  
Plaintiffs )  
)  
v. ) Division II  
)  
)  
STATE OF MISSOURI, )  
)  
Defendant )

**VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER  
WITH VERIFICATION AND CERTIFICATE OF NOTICE TO DEFENDANT  
AND MEMORANDUM IN SUPPORT THEREOF**

Plaintiffs hereby respectfully request that this Court issue a temporary restraining order with notice pursuant to Chapter 526, Revised Statute of Missouri and Rule 92.02 (a), Missouri Supreme Court Rules of Civil Procedure, to enjoin defendant pending a decision on it motion for preliminary injunction, the merits of Plaintiffs' claim for injunctive and declaratory relief, from enforcing the provision of Missouri Revised Statute, Section 99.1205, known as the Distressed Land Assemblage Tax Credits.

1. In support of this verified application, Plaintiffs rely on their Amended Petition filed herein on November 2, 2009, and incorporate herein by this reference, the notice of intent to file application for a temporary restraining order attached hereto and incorporated herein labeled Exhibit A, the statements in the letter from the Solicitor

**General James R. Layton dated December, 2009 incorporated herein by reference (Exhibit B to this Motion), as well the memorandum supporting Plaintiffs' application.**

**2. On November 18, 2009 Plaintiffs filed a verified application for a preliminary injunction which is set for hearing along with Plaintiffs petition for declaratory relief and injunctive relief on January 27, 2009.**

**3. During a conference with the Court on November 23, 2009 Solicitor General James R. Layton, attorney for the defendant informed the Court that the Department of Economic Development had not received an application for land assembly tax credits on which it could act.**

**4. On December 23, 2009 Defendant's attorney informed this Court and the attorney for Plaintiffs that the Department of Economic Development has now received an application that is largely complete, and that could be complete and thus ready for Department action on or soon after Monday, December 28, 2009. (Exhibit B)**

**5. On December 23, 2009 Plaintiffs' attorney notified Defendant's attorneys, the Director Designee for the Department of Economic Development and the General Counselor for the Department of Economic Development by e-mail and facsimile that she would file an application for a temporary restraining order on December 28, 2009. A copy of said**

notice is attached hereto and incorporated herein by reference as Exhibit

A.

6. When considering whether to issue a temporary restraining order, a Court should consider “the movant’s probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction’s issuance would inflict on other interested parties and the public interest.” *State ex rel Director of Revenue v. Gabbert*, 925 S. W. 2d 838,839 (Mo. Banc 1996). Applying these factors Plaintiffs have made a sufficient showing of the need for a temporary restraining order.

7. Plaintiffs are entitled to injunctive relief to prevent the doing a legal wrong, namely, the unconstitutional issuance of tax credits under Section 99.1205, where an adequate remedy at law does not lie for an action for damages. Injunctive relief will restrain the wrongful expenditure of public funds, thereby preventing deprivation of Plaintiffs’ constitutional right under the Missouri Constitution.

8. Section 526.030, RSMo 2000, providing for injunctive relief, provides in relevant part:

The remedy by writ of injunction or prohibition shall exist in all cases... to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages. Thus, “[t]o obtain injunctive relief, a party must prove:

(1) that the party has no adequate remedy at law; and (2) that irreparable harm will result if the injunction is not granted." *City of Kansas City v. N.Y.-Kan. Bldg. Assocs., L.P.*, 96 S.W.3d 846, 855 (Mo. App. W.D.2002); see also *Dodson v. City of Wentzville*, 133 S.W.3d 528 (Mo. App.E.D. 2004).

**A. Background**

The underlying case is a Petition for Declaratory Judgment asking this Court to declare Section 99.1205 and as amended in HB 191, Section 99.1205 constitutionally void in violation of the Missouri Constitution as an illegal grant of public funds and enjoining its enforcement.

**B. Plaintiffs Have Standing To Bring This Action**

The Defendant raised standing as a defense to Plaintiffs claims. Plaintiffs Are individual taxpayers , citizens and real property owners who reside within a Missouri qualified census tract area, as designated by the United States Department of Housing and Urban Development under 26 U.S.C. Section 42, and within a distressed community as that term is defined in section 135.530, RSMo. The principle of taxpayer standing to challenge an alleged illegal expenditures made by the State has been established and re-affirmed by the Missouri Supreme Court. As echoed by the Missouri Supreme Court in *Eastern Missouri Laborers District Council, et al. v. St. Louis County* 781 S.W.2d 43, 48; ( Mo. 1989),

We are of the opinion that, where public interests are involved, and public funds are about to be dissipated for an illegal purpose, a single taxpayer may maintain

] an action for itself, and all other taxpayers in said city, to restrain the illegal acts complained of, if injunction will lie, without being required to show, at the trial, the extent of the damages which it may sustain, should the injunction be refused. *Civic League of St. Louis v. City of St. Louis*, 223 S.W. 891, 893 (Mo. 1920). This Court has held "that citizens and taxpayers of Missouri have standing to challenge the legality of expenditures made by the Missouri State Lottery Commission. This was true even though money would probably be added to, rather than taken from, the state treasury. *Tichenor v. Missouri State Lottery Commission*, 742 S.W.2d 170, 172 (Mo. banc 1988). Taxpayers were also found to have standing when they challenged the expenditure of public funds for parochial schools, although no private pecuniary injury was alleged. *Berghorn v. Reorganized School Dist. No. 8*, 364 Mo. 121, 260 S.W.2d 573, 581 (1953). The principle of taxpayer standing to challenge illegal expenditures was also articulated by this Court in *Clark v. Crown Drug Co.*, 348 Mo. 91, 152 S.W.2d 145 (1941). There the Court stated in part: In [taxpayer cases] it is not the damage suffered by each taxpayer or by all taxpayers as a class that opens the door to equity for relief, but it is *the public interests* which are involved in preventing the unlawful expenditure. *Missourians For Separation of Church and State v. Robertson*, 592 S.W.2d 825, 839 (Mo. App. 1979) (Emphasis added in *Missourians*) (quoting *Clark v. Crown Drug Co.*, 152 S.W.2d at 147).

Moreover, as the Court further indicated "the primary basis for taxpayer suits arises from the need to ensure that government officials conform to the law. *Comment, Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, Temp. L. Q., Vol. 59, p. 951, 971 (1986). It rests upon the indispensable need to keep public Corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers. S. Flanagan, *McQuillin Municipal Corporations* § 52.29, p. 74 (3rd Ed. 1984)".

The Plaintiffs herein clearly have standing to challenge the alleged illegal expenditure of public funds by seeking a declaratory judgment. Defendant's attorney Solicitor General James R. Layton reluctantly Conceded that Plaintiffs have standing at the Court conference on

November 23, 2009.

**C. Plaintiffs Will Suffer Irreparable Harm If This Temporary Restraining Order is Not Granted**

Section 99.1205 and Section 99.1205 as amended by HB 191 as indicated above violates the Missouri Constitution; (2) Section 99.1205 and Section 99.1205 as amended in HB 191 will economically impact Plaintiffs and other citizens who pay taxes to the State of Missouri by decreasing revenues of the State that are otherwise collectible from those who owe state income taxes (effectively an expenditure), thus reducing services to citizens. Monetary remedies would not compensate for this injury nor would Plaintiffs have an action at law. ( "Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct." *Glenn v. City of Grant City*, 69 S.W.3d 126, 130 (Mo. App. W.D. 2002) (quoting *Walker v. Hanke*, 992 S.W.2d 925 (Mo. App. W.D. 1999)).

**D. There is a Substantial Likelihood that Plaintiffs Will Prevail on the Merits of the Underlying Claim**

The Missouri Supreme Court has held that " grants with primarily private effect to be unconstitutional, despite the possible beneficial impact upon the economy of the locality and the state." *State ex. Rel City of Jefferson v. Smith*, 154 S.W. 2d 101 banc 1941.). The Court in *Curchin v .Missouri Industrial Development Board*, 772 S.W.2d 930,935 (Mo. Banc 1987) specifically found that the authorization of "a tax credit under

**Section 100.297 to be unconstitutional in violation of Article III, Section 38 (a) of the Missouri Constitution”.**

**E. The Issuance of A Temporary Restraining Order Is The Proper Relief at This Juncture**

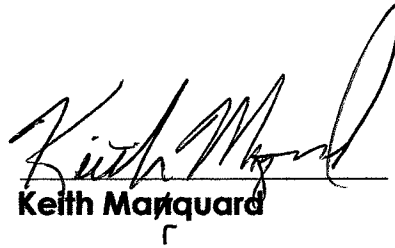
**The purpose of a temporary restraining order is to preserve the status quo until a trial on the merit and prevent immediate irreparable harm. *State ex rel. Myers Mem'l Airport Comm., Inc. v. City of Carthage*, 951 S.W.2d 347, 350 (Mo. App. S.D. 1997). A temporary restraining order is the appropriate relief in this case at this juncture and the public interest would be served by issuance of this equitable relief.**

**As indicated in Exhibit B, the Department of Economic Development(DED) has an application pending for distressed land assemblage tax credits. At any moment a certificate for these tax credit certificate can be issued. The exact time that the application will be approved and issuance of tax credit certificate is not known to the Plaintiffs because the application is a closed record until the application is approved and the tax credit certificate is actually issued. Plaintiffs have challenged the validity of the distressed areas land assemblage tax credit (DALATC) before the credits are issued, sought injunctive relief before approval or, as a practical matter, the courts will be reluctant to invalidate the tax credits. The validity of the DALATC should be determined before issuance. Moreover, once an application for DALATC is approved the applicant can sale the tax credits to others and additional controversies**

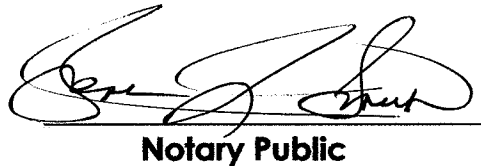


and have read the foregoing Verified Application for Temporary Restraining Ordered in said document are true to the best of their knowledge, information and belief.

  
Barbara Manzara

  
Keith Marquard

Signed and sworn to before me this 28<sup>th</sup> day of December, 2009

  
Notary Public

My Commission Expires:



**CERTIFICATE OF SERVICE**

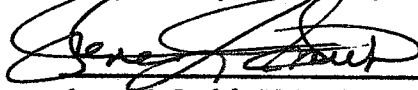
On this 28<sup>th</sup> day of December, 2009, a copy of the foregoing Application for Restraining Order and Memorandum in Support Thereof was hand delivered to the office of Solicitor General James R. Layton, Attorney for Defendant at the Missouri Attorney General's Office, Jefferson City, Missouri 65102.

  
Irene J. Smith



**Jefferson City, Missouri make application to the Honorable Judge of Circuit Court Division II for a temporary restraining order to enjoin the State of Missouri, including , but limited to its employees and agents of the Department of Economic Development from issuing certificates for distressed land assemblage tax credits authorized under Section 99.1205 RSMo until the Court has determined the constitutionality of Section 99.1205 and until such further order be made in the premises of Plaintiffs' Petition for Declaratory Judgment.**

**Respectfully Submitted,**



**Irene J. Smith #28199**

**Attorney for Plaintiffs**

**5425 Arlington**

**St. Louis, Missouri 63120-2520**

**Telephone: (314) 374-4261 or 381-2430**

**Facsimile: (314) 381-7840**

**Email: fallenjustice@ aol.com**

**CERTIFICATE OF SERVICE**

**A copy of the foregoing Notice was emailed and faxed respectively to James R. Layton, Attorney for Defendant at [James.Layton@ago.mo.gov](mailto:James.Layton@ago.mo.gov) and (573) 751-0774. Maureen C. Beekely, Attorney for Defendant at [Maureen.Beekley@ago.mo.gov](mailto:Maureen.Beekley@ago.mo.gov) and (314) 340-7029; David Kerr, Director Designee of the Department of Economic Development at [ecodev@ded.mo.gov](mailto:ecodev@ded.mo.gov) and (573) 526-7700 and Karen A. Winn, General Counselor of the Department of Economic Development at [ecodev@ded.mo.gov](mailto:ecodev@ded.mo.gov) and (573) 526-7700 on this 23rd day of December, 2009.**



**Irene J. Smith**

**Exhibit B**



**ATTORNEY GENERAL OF MISSOURI**

**JEFFERSON CITY  
65102**

**CHRIS KOSTER  
ATTORNEY GENERAL**

**P.O. Box 899  
(573) 751-3321**

**December 23, 2009**

**The Honorable Richard Callahan  
Circuit Judge, Division II  
Cole County Courthouse  
Jefferson City, MO 65101  
(573) 634-7676 (facsimile)**

**Ms. Irene J. Smith  
5425 Arlington  
St. Louis, MO 63120  
(314) 381-7840 (facsimile)**

*By e-mail and facsimile*

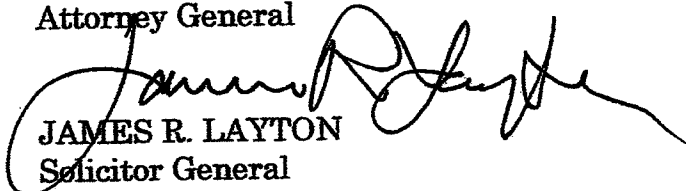
**RE: *Barbara Manzara, et al. v. State of Missouri*; 09AC-CC00576**

**Dear Judge Callahan and Ms. Smith:**

As you know, in this case the plaintiffs challenge the constitutionality of § 99.1205, the "Distressed Areas Land Assemblage Tax Credit Act." During our conference on November 23, 2009, I informed the Court that the Department of Economic Development had not received an application on which it could act. The Department has now received an application that is largely complete, and that could be complete and thus ready for Department action on or soon after Monday, December 28, 2009.

**Respectfully submitted**

**CHRIS KOSTER  
Attorney General**

  
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