

WD80556

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, *ex relatione*
JOEL YOEST, DAWN YOEST, LIBERTY ASSETS LLC,
LIBERTY ASSET HOLDINGS LLC, JUPITER GROUP LLC,
CASTLE ASSOCIATES LLC, and FIVE STAR INVESTORS LLC,
Appellants,

vs.

LYDIA H. McEVOY, *Clay County Collector*,
Respondent.

On Appeal from the Circuit Court of Clay County
Honorable Louis Angles, Circuit Judge
Case No. 16CY-CV07141

BRIEF OF THE APPELLANTS

JONATHAN STERNBERG, Mo. #59533
ASHLYN BUCK LEWIS, Mo. #65501
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (Ext. 7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANTS

Preliminary Statement

The appellants make their living by purchasing properties at annual county property tax delinquency sales, principally in Clay County, and then managing and transacting in those properties.

In 2016, alleging the appellants had engaged in what she viewed as malfeasance relating to previous tax sales, which the appellants disputed, the Clay County Collector unilaterally banned the appellants from bidding at a tax sale ever again. When the appellants sought a writ of mandamus commanding her to allow them to be bidders, the trial court issued a preliminary order but then granted the Collector's motion to dismiss their petition, holding they had no right to be bidders and the Collector had unilateral discretion to ban them from bidding.

This was error. First, under the uncontested facts the trial court erred in denying a writ of mandamus. As the Collector admitted the appellants all were Missouri residents who were not delinquent on their own property taxes, § 140.190.2, R.S.Mo., gave them an unequivocal right to be bidders at the tax sales. The Collector has no express or implicit statutory power to prohibit them from doing so, and instead has a ministerial duty to allow them to be bidders. Mandamus lies to compel her to obey that duty.

If the Collector somehow does have power to ban the appellants, though, there still was no evidence to support the trial court's decision to dismiss. The Collector said she banned the appellants because of specific incidents she alleged that she termed malfeasance. The appellants denied all those allegations. Therefore, an evidentiary hearing was required.

Table of Contents

Preliminary Statement.....	i
Table of Authorities	v
Jurisdictional Statement.....	1
Statement of Facts.....	2
A. Background.....	2
B. Proceedings below	3
1. Initial proceedings	3
2. Further mandamus proceedings	6
Points Relied On	10
I. (Error in holding mandamus did not lie, as § 140.190.2, R.S.Mo., gave the appellants the right to be bidders at tax sales, and the collector had no power to ban them).....	10
II. (If the collector somehow did have power to ban the appellants from being bidders at tax sales, error in dismissing writ petition without hearing any evidence where the appellants disputed the collector’s grounds for imposing her ban).....	11
Argument.....	12
Standard of Review as to All Points	12
I. (Error in holding mandamus did not lie, as § 140.190.2, R.S.Mo., gave the appellants the right to be bidders at tax sales, and the collector had no power to ban them).....	13
Additional Standard of Review	13

A. Mandamus lies to compel a state agent to obey a ministerial duty when the relator has a right to its performance.....	15
B. As the Yoests and Entities are Missouri residents who are not delinquent on their own property taxes, § 140.190.2, R.S.Mo., gives them the unequivocal right to be bidders at the tax sales.....	16
C. The Collector has no power to “ban” other, extra-statutory categories of “persons” from being bidders at the tax sales, and instead has a ministerial duty to allow anyone to be a bidder who is not statutorily excluded from doing so.....	20
1. No express power	21
2. No implicit power	22
3. Ministerial duty	23
D. If Chapter 140 somehow gives the Collector power to “ban” other, extra-statutory categories of “persons” from being bidders at the tax sales, the way the Collector has done so as applied to the Yoests and Entities violates their right to procedural due process under Mo. Const. art. I, § 10.	28
II. (If the collector somehow did have power to ban the appellants from being bidders at tax sales, error in dismissing writ petition without hearing any evidence where the appellants disputed the collector’s grounds for imposing her ban)	33
A. The law of Missouri requires an evidentiary hearing on a mandamus petition when the pleadings raise any dispute of material fact.	34

B. The parties’ pleadings raised multiple disputes of material fact – specifically whether the Yoests and Entities had engaged in any of the wrongdoing the Collector alleged, barring the trial court from deciding the Yoests’ and Entities’ petition on the merits without an evidentiary hearing.....	36
Conclusion	40
Certificate of Compliance	41
Certificate of Service.....	41
Appendix.....	(filed separately)
Judgment (Nov. 28, 2016) (L.F. 132)	A1
Preliminary Order in Mandamus (Aug. 29, 2016) (L.F. 70).....	A2
§ 140.150, R.S.Mo.....	A3
§ 140.170, R.S.Mo.....	A4
§ 140.180, R.S.Mo.....	A6
§ 140.190, R.S.Mo.....	A7

Table of Authorities

Cases

<i>Banks v. Slay</i> , 410 S.W.3d 767 (Mo. App. 2013)	15
<i>Bateman v. Platte Cnty.</i> , 363 S.W.3d 39 (Mo. banc 2012)	29
<i>C.D.J. v. Mo. Dep't of Soc. Servs.</i> , 507 S.W.3d 605 (Mo. App. 2016).....	31-32
<i>City of Maryville ex rel. Citizens' Nat'l Bank v. Lippman</i> , 132 S.W. 47 (Mo. App. 1910)	25
<i>Colyer v. State Bd. of Registration for Healing Arts</i> , 257 S.W.3d 139 (Mo. App. 2008)	29-30
<i>Creech v. MBNA Am. Bank, N.A.</i> , 250 S.W.3d 715 (Mo. App. 2008)	20
<i>Dishon v. Rice</i> , 871 S.W.2d 126 (Mo. App. 1994)	22
<i>Div. of Cavalry Brigade v. St. Louis Cnty.</i> , 269 S.W.3d 512 (Mo. App. 2008)	23, 28
<i>Estate of Bell</i> , 292 S.W.3d 920 (Mo. App. 2009)	11, 38-39
<i>Felker v. Carpenter</i> , 340 S.W.2d 696 (Mo. banc 1960)	21
<i>Furlong Cos. v. City of Kan. City</i> , 189 S.W.3d 157 (Mo. banc 2006)	15-16, 26
<i>Giloti v. Hamm-Singer Corp.</i> , 396 S.W.2d 711 (Mo. 1965).....	19
<i>Gott v. Dir. of Revenue</i> , 5 S.W.3d 155 (Mo. banc 1999).....	20
<i>Greenbriar Hills Country Club v. Dir. of Revenue</i> , 47 S.W.3d 346 (Mo. banc 2001)	10, 18-19
<i>Jarman v. Eisenhower</i> , 744 S.W.2d 780 (Mo. banc 1988).....	16-17
<i>King-Willmann v. Webster Groves Sch. Dist.</i> , 361 S.W.3d 414 (Mo. banc 2014)	11-12, 36
<i>Kulaga v. Kulaga</i> , 149 S.W.3d 570 (Mo. App. 2004)	11, 38

<i>Mo. Bluffs Golf Joint Venture v. St. Charles Cnty. Bd. of Equalization</i> , 943 S.W.2d 752 (Mo. App. 1997)	26
<i>Modern Day Veterans Chapter No. 251 v. City of Miller</i> , 128 S.W.3d 176 (Mo. App. 2004)	26
<i>Mueller v. Mo. Hazardous Waste Mgmt. Comm’n</i> , 904 S.W.2d 552 (Mo. App. 1995)	22
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976)	12
<i>Prof’l Fire Fighters of E. Mo. v. City of Univ. City</i> , 457 S.W.3d 23 (Mo. App. 2014)	11-12, 34-36, 39
<i>Regions Bank v. Alverne Assocs.</i> , 456 S.W.3d 52 (Mo. App. 2014)	38
<i>St. Louis Cnty. v. Kienzle</i> , 844 S.W.2d 118 (Mo. App. 1992)	29-30
<i>State ex rel. Alexander & Lindsey, LLC v. Planning & Zoning Comm’n of Platte Cnty.</i> , 346 S.W.3d 411 (Mo. App. 2011)	26
<i>State ex rel. Cole v. Matthews</i> , 274 S.W.2d 286 (Mo. banc 1954)	27
<i>State ex rel. Folkers v. Welsch</i> , 124 S.W.2d 636 (Mo. App. 1939)	27
<i>State ex rel. Jones v. Cook</i> , 73 S.W. 489 (Mo. banc 1903)	27
<i>State ex rel. Lane v. Kirkpatrick</i> , 485 S.W.2d 62 (Mo. 1972)	27
<i>State ex rel. Lee v. City of Grain Valley</i> , 293 S.W.3d 104 (Mo. App. 2009)	15-16
<i>State ex rel. McCleary v. Adcock</i> , 105 S.W. 270 (Mo. banc 1907)	27
<i>State ex rel. Pickett v. Truman</i> , 64 S.W.2d 105 (Mo. banc 1933).....	20
<i>State ex rel. Stricker v. Hanson</i> , 858 S.W.2d 771 (Mo. App. 1993).....	10, 24-25
<i>State ex rel. Thomas v. Neeley</i> , 128 S.W.3d 920 (Mo. App. 2004).....	26
<i>State ex rel. Unnerstall v. Berkemeyer</i> , 298 S.W.3d 513 (Mo. banc 2009)..	13-14

<i>U.S. Dept. of Veterans Affairs v. Boresi</i> , 396 S.W.3d 356 (Mo. banc 2013).....	12
<i>United Pharmacal Co. of Mo. v. Mo. Bd. of Pharm.</i> , 208 S.W.3d 907 (Mo. banc 2006)	22
<i>Vowell v. Kander</i> , 451 S.W.3d 267 (Mo. App. 2014).....	10, 23, 25-26
<i>Walker v. Mills</i> , 109 S.W. 44 (Mo. 1908).....	10, 19
<i>Wiley v. Daly</i> , 472 S.W.3d 257 (Mo. App. 2015)	20-21
Constitution of Missouri	
Art. I, § 10.....	<i>passim</i>
Art. V, § 3	1
Art. V, § 11	1
Revised Statutes of Missouri	
Chapter 52.....	20, 30
Chapter 140 (Jones-Munger Act).....	1, 14, 28, 30-31
Chapter 536 (Administrative Procedures Act).....	30
§ 1.020.....	17
§ 140.150.....	16, 21
§ 140.170.....	21
§ 140.180.....	21
§ 140.190.....	<i>passim</i>
§ 477.070.....	1
§ 536.085.....	18
§ 536.087.....	18

Missouri Supreme Court Rules

Rule 81.01.....1
Rule 84.06..... 41
Rule 84.14..... 32

Rules of the Missouri Court of Appeals, Western District

Rule XLI 41

Other Authorities

BLACK’S LAW DICT. (8th ed. 2004)..... 18

Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Clay County dismissing the appellants' petition for writ of mandamus after entry of a preliminary order in mandamus and answer by the respondent.

For the reasons the appellants explained in the Rule 81.01(b) jurisdictional statement they attached to their notice of appeal (L.F. 177-80), which they incorporate here, this appeal involves questions of first impression requiring construction of the Jones-Munger Act, Chapter 140, R.S.Mo., which the Supreme Court has held to be a revenue law of this state, as well as the validity of the respondent's powers under those statutes as she is applying them to the appellants. So, under Mo. Const. art. V, § 3, this case falls within the Supreme Court's exclusive appellate jurisdiction. The appellants appealed directly to the Supreme Court.

On March 10, 2017, however, the Supreme Court transferred this case to this Court under Mo. Const. art. V, § 11. As this case arose in Clay County, venue lies in this Court. § 477.070, R.S.Mo.

Statement of Facts

A. Background

Appellants Joel and Dawn Yoest, husband and wife Clay County residents, are the principals of five Missouri entities: Appellants Liberty Assets, LLC, Liberty Asset Holdings, LLC, Jupiter Group, LLC, Castle Associates, LLC, and Five Star Investors, LLC (collectively “the Entities”) (L.F. 6-8, 14-15).¹

Both individually and through the Entities, the Yoests earn their living purchasing properties at county tax-delinquent property sales (“tax sales”), 95% of which are in Clay County, and then possessing and transacting in those properties (L.F. 6-8, 14-15). In Clay County, by statute those tax sales are conducted by Respondent Lydia McEvoy, Clay County Collector (“the Collector”) (L.F. 6-7, 15). The Clay County tax sale occurs each year in August; the one in 2016 was on August 22, 2016 (L.F. 10, 15). Each year, the Yoests and Entities purchased between 15-20 certificates of purchase at the tax sale, which amount to 50% of their business assets (L.F. 15).

On August 16, 2016, six days before the 2016 Clay County tax sale, the Collector e-mailed Mr. and Mrs. Yoest, citing no authority, but stating she was permanently banning the Yoests and Entities from participating in the 2016 tax sale and any future Clay County tax sales (L.F. 7-9, 13-14). She stated without specifics that the ban was the result of an “ongoing” investigation of the Yoests and Entities she was conducting (L.F. 7-9).

¹ Because the circuit court dismissed the appellants’ petition without receiving any evidence, the facts are taken solely from the parties’ pleadings.

The Collector had not previously notified the Yoests or Entities of any investigation that could result in the termination of their ability to participate in the tax sales, told them what behaviors would result in a “ban,” or given them any opportunity to represent their interests or defend themselves before she issued her “ban” (L.F. 8-9, 14). The e-mail was not designated an administrative or official order and it did not provide any process for remedy or response (L.F. 14). It did not state that any investigation was final or what burden of proof the Collector had to satisfy in that investigation (L.F. 14).

B. Proceedings below

1. Initial proceedings

The following day, the Yoests and Entities filed a verified petition for writ of mandamus and a supporting affidavit against the Collector in the Circuit Court of Clay County, seeking the Court to “command [the Collector] to cease and lift any and all bans against [the Yoests and Entities] from participating in present and future Clay County, Missouri tax” sales (L.F. 6, 9). They also requested the Court to enter a preliminary order in mandamus commanding the Collector to answer their petition (L.F. 9).

The Yoests and Entities argued that because they were not among the classes who Chapter 140, R.S.Mo., prohibited from purchasing properties at tax sales, those statutes provided them the right to participate in the tax sales (L.F. 8-9, 15-16). Specifically, this was because § 140.190.2, R.S.Mo., provides, “The person offering at said sale to pay the required sum for a tract shall be considered the purchaser of such land,” and then listed two classes

prohibited from being purchasers – people currently delinquent on their own taxes and non-Missouri residents, and the Yoests and Entities were Missouri residents who were not delinquent on any property taxes (L.F. 15-16).

The Yoests and Entities then argued that the Collector’s failure to notify them in advance of her allegations and give them an opportunity to represent their interests or defend themselves violated their right to due process under Mo. Const. art. I, § 10 (L.F. 8-9, 17). They argued that because they earned their livelihoods from purchasing properties at the tax sales, depended on the 2016 tax sale, and the tax sales occur only once a year, banning them from the 2016 tax sale was causing them irreparable harm, and they had no adequate remedy at law (L.F. 9, 17).

In the same petition and supporting affidavit, the Yoests and Entities also requested a temporary restraining order immediately enjoining the Collector from banning them from the 2016 tax sale (L.F. 10-11).

The Collector opposed the petition and temporary restraining order, though without specifically answering the relators’ petition (L.F. 19). She argued she had a duty “to refuse bids from those who have demonstrated a history of dishonesty, lack of integrity, and lack of reliability” and was “vested” with “discretion” to do so (L.F. 21). She said that when “it became clear to [her] that [the Yoests and Entities] were engaged in fraudulent, unethical, and deceitful conduct, it became necessary to ban them as bidders, in order to protect the taxpayers of the county, uphold the due process rights of taxpayers, and protect the integrity of the tax sale process” (L.F. 20).

The Collector then listed six things she believed showed “[e]vidence of dishonesty, lack of ethics, and fraudulent conduct on the part of” the Yoests and Entities that she said she would “presen[t] at the hearing on the Writ of Mandamus” (L.F. 21-22). These grievances included that the Yoests or one of the Entities allegedly had: (1) not personally served someone in a quiet title action who had lost his property at a tax sale; (2) persuaded the court in that action to award the plaintiff the tax sale surplus; (3) refused to consent to delivery of the surplus to the former owner; (4) convinced an owner to sign a quitclaim deed without telling the owner of the possibility of a surplus; (5) badgered another owner into signing a quitclaim deed by threatening to call police; and (6) in that last case, prepared a form that incorrectly said an estate had no interest in the property (L.F. 21-22). She attached exhibits she said supported her contentions (L.F. 26-64). She also said the Yoests or Entities had “suspicious” transactions in which they received more than \$60,000 in surpluses she thinks should have gone to prior owners (L.F. 22).

The Collector argued mandamus did not lie because the Yoests and Entities did not show they had a right to participate in the tax sales and, in any case, had unclean hands (L.F. 22-23). She asked the court to deny a temporary order “and set the Mandamus matter for hearing within two months for a determination of whether Relators should be permanently banned from the tax sale” (L.F. 25-26).

On August 19, the trial court denied a temporary restraining order (L.F. 66). It held, “Mandamus is available only when there is an already existing legal right,” and the Yoests and Entities “have not proven they have

such a right” (L.F. 66). It did “not reach the merits of whether Relators have committed prior acts of malfeasance which undermine the integrity of the tax sale process” (L.F. 66).

The Yoests and Entities immediately moved the trial court to reconsider (L.F. 67). Ten days later, on August 29, the court issued a preliminary order in mandamus commanding the Collector to answer the petition for writ of mandamus by September 16, and the order was served on the Collector’s counsel (L.F. 70, 72; Appx. A2).

2. Further mandamus proceedings

In her answer, the Collector admitted most of the Yoests’ and Entities’ factual allegations – including that she permanently banned them from being purchasers at the annual tax sales without notice of her guidelines or the opportunity to defend themselves, but she again denied that the Yoests or Entities had a legal right to be bidders at the tax sales or that her actions violated due process (L.F. 74-76). She alleged as an affirmative defense that the Yoests and Entities could not obtain mandamus relief anyway “under the ‘unclean hands doctrine’” because of “their history of dishonesty, lack of ethics, and fraudulent conduct,” purporting to incorporate by reference her previous allegations (L.F. 74).

The Collector then also moved the trial court to dismiss the Yoests’ and Entities’ petition (L.F. 78). She argued dismissal was proper because: (1) the Yoests and Entities had not shown a sufficient right to be bidders at any tax sales; (2) the Yoests and Entities had unclean hands for the same reasons as she previously alleged; (3) she had “an obligation to uphold the law and the

Due Process rights of all the persons involved in the tax sale;” and (4) citing no authority, that she had the power to:

consider past conduct and ban individuals, and entities owned and controlled by them, from participation in the tax sale, where the past conduct includes fraud, deceit, dishonesty, forgery, coercion, unethical conduct, lack of integrity, lack of reliability or unfair business practices, impacting the legal and due process rights of others.

(L.F. 79).

The Yoests and Entities opposed the Collector’s motion (L.F. 81). They restated their argument that the relevant provisions of Chapter 140, especially § 140.190.2, gave them the unequivocal right to be bidders at the tax sales, as they were not among either of the two statutorily-prohibited classes (L.F. 82-84, 86-87). The statutes also “remove[d] from [the Collector] her self-appointed authority to deny on discretion” (L.F. 82-84, 86-87).

The Yoests and Entities also restated their argument that the Collector’s unilateral ban without notice or the opportunity to defend violated their right to due process under Mo. Const. art. I, § 10, and U.S. Const. Amend. XIV, § 1 (L.F. 84-88, 93-94). They argued that if anyone’s hands were unclean, it was the Collector, who denied them due process by summarily applying her own unwritten guidelines to deprive them of the ability to be bidders at the tax sales (L.F. 89). They denied all the Collector’s allegations of the instances why she believes they should be banned from the tax sales (L.F. 93-94).

The Yoests and Entities also moved to file an amended petition, which the Collector opposed, and called up that request for a hearing on November 17 (L.F. 97, 99, 106). The Collector then called up her motion to dismiss for hearing “concurrently with Relator’s [*sic*] Motion to Amend” (L.F. 108).

At the hearing, neither party produced witnesses or introduced evidence (Tr. 2-11). Instead, counsel merely made legal arguments and addressed one of the Collector’s allegations of purported malfeasance by the Yoests and Entities (Tr. 2-11). The court took the matter under advisement and gave the parties “ten days ... to file anything in addition” (Tr. 10).

The Collector then filed what she termed supplemental suggestions in support of her motion to dismiss (L.F. 113). She argued that the “statutes governing tax sales in Chapter 140 outline the procedures required for delinquent tax collections but in the details are subject to the discretion of the Collector” (L.F. 115). Without citing any specific section, she argued this included “[w]hether to admit a particular bidder” to the tax sale, and so the Yoests and Entities “have shown no unequivocal right to be a bidder in the tax sale” (L.F. 115). She also repeated all her allegations against the Yoests and Entities, arguing this gave them “unclean hands” obviating mandamus, and attached what she alleged to be materials related to the instance the attorneys discussed at the hearing (L.F. 115-16, 119-31).

The trial court then entered a judgment dismissing the Yoests’ and Entities’ petition (L.F. 132; Appx. A1). It held,

Relators have failed to establish a clear, unequivocal right to be bidders at the annual Clay County tax delinquency sale.

Respondent, as duly elected Clay County Collector, has a legal obligation to uphold the Due Process rights of all persons involved in and maintaining the integrity and validity of the annual tax sale process. Respondent's obligation extends to banning participation of persons and entities which, in her discretion, fail to abide by the statutes or rules necessary to protect the rights of all property owners and of all bidders.

(L.F. 132; Appx. A1).

The Yoests and Entities timely moved the Court for a new trial or to amend its judgment and issue a permanent writ of mandamus commanding the Collector to cease and lift her ban (L.F. 133). They argued that because the parties' pleadings raised disputed issues of material fact, the Court could not resolve the merits of the relators' petition without an evidentiary hearing, and there was no actual evidence in support of the judgment of dismissal (L.F. 133-37). They also argued that even if no evidence was required, they did prove their right to mandamus, as § 140.190.2 gave them an unequivocal right to be bidders at annual tax sales, the law of Missouri neither expressly nor implicitly empowered the Collector to deprive them of that right, and if Chapter 140 did work in the way that the Collector argued it would violate their right to procedural due process (L.F. 133, 138-44).

The trial court denied the Yoests' and Entities' post-judgment motion, and they timely appealed to the Supreme Court of Missouri (L.F. 173-74). The Supreme Court then transferred their appeal to this Court.

Points Relied On

- I. The trial court erred in holding mandamus did not lie because the Yoests and Entities “failed to establish a clear, unequivocal right to be bidders at the” tax sales and the Collector has power to “ba[n] participation of persons or entities which, in her discretion, fail to abide by” uncited “statutes or rules” *because* this misapplied the law, as § 140.190.2, R.S.Mo., provides that any “person offering at said sale to pay the required sum for a tract shall be considered the purchaser of such land” and limits those prohibited from being bidders to (1) non-Missouri residents or (2) people delinquent on their own property taxes, no statute expressly or implicitly empowers the Collector to “ban” other classes from being bidders, and the Collector’s argued interpretation of her powers to create unwritten rules without notice, unilaterally determine a violation, and then ban a person for that violation without possibility of review violates Mo. Const. art. I, § 10’s guarantee of procedural due process *in that* the Yoests and Entities are Missouri residents who are not delinquent on their own property taxes.

Greenbriar Hills Country Club v. Dir. of Revenue, 47 S.W.3d 346

(Mo. banc 2001)

State ex rel. Stricker v. Hanson, 858 S.W.2d 771 (Mo. App. 1993)

Vowell v. Kander, 451 S.W.3d 267 (Mo. App. 2014)

Walker v. Mills, 109 S.W. 44 (Mo. 1908)

§ 140.190, R.S.Mo.

II. The trial court erred in granting the Collector's motion to dismiss without an evidentiary hearing *because* the trial court's judgment of dismissal lacks substantial evidence in its support, as when the pleadings in a mandamus action raise any dispute of material fact, the trial court cannot resolve the action without an evidentiary hearing, and arguments of counsel and materials attached to pleadings are not evidence *in that* taking as true the trial court's finding that the Collector had the power to ban people who, in her discretion, engaged in wrongdoing or malfeasance, the parties' pleadings raised multiple disputes of material fact regarding whether the Yoests and Entities had engaged in any supposed wrongdoing or malfeasance, and the parties anticipated presenting evidence at a hearing, but no evidence was introduced before the trial court at all.

Prof'l Fire Fighters of E. Mo. v. City of Univ. City, 457 S.W.3d 23

(Mo. App. 2014)

King-Willmann v. Webster Groves Sch. Dist., 361 S.W.3d 414

(Mo. banc 2014)

Kulaga v. Kulaga, 149 S.W.3d 570 (Mo. App. 2004)

Estate of Bell, 292 S.W.3d 920 (Mo. App. 2009)

Argument

Standard of Review as to All Points

On appeal in a mandamus action, “the manner in which the trial court disposed of the writ petition determines the proper standard of review” *Prof'l Fire Fighters of E. Mo. v. City of Univ. City*, 457 S.W.3d 23, 27 (Mo. App. 2014). Where, as here, the trial court issued a preliminary order in mandamus and then issued a judgment of dismissal that “resolved [the questions the petition posed] on the merits, and this decision ended the litigation,” review is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), just like in any judge-tried case. *Id.* at 27-28.

So, this Court “will reverse the trial court’s dismissal of [the appellants’] petition for writ of mandamus if it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.” *Id.* at 28 (citing *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 365 n.7 (Mo. banc 2013) (Fischer, J., concurring); *King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414, 415 (Mo. banc 2012)).

I. The trial court erred in holding mandamus did not lie because the Yoests and Entities “failed to establish a clear, unequivocal right to be bidders at the” tax sales and the Collector has power to “ba[n] participation of persons or entities which, in her discretion, fail to abide by” uncited “statutes or rules” *because* this misapplied the law, as § 140.190.2, R.S.Mo., provides that any “person offering at said sale to pay the required sum for a tract shall be considered the purchaser of such land” and limits those prohibited from being bidders to (1) non-Missouri residents or (2) people delinquent on their own property taxes, no statute expressly or implicitly empowers the Collector to “ban” other classes from being bidders, and the Collector’s argued interpretation of her powers to create unwritten rules without notice, unilaterally determine a violation, and then ban a person for that violation without possibility of review violates Mo. Const. art. I, § 10’s guarantee of procedural due process *in that* the Yoests and Entities are Missouri residents who are not delinquent on their own property taxes.

Additional Standard of Review

The primary rule of statutory construction “is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.” *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009) (citations omitted). “It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it

will be presumed that the legislature did not insert verbiage or superfluous language in a statute.” *Id.* (citations omitted).

* * *

Citing no authority, the trial court’s judgment holds that mandamus did not lie because the Yoests and Entities did not show a “clear, unequivocal right to be bidders at the” tax sale and the Collector has power to “ba[n] participation of persons or entities which, in her discretion, fail to abide by the statutes or rules necessary to protect the rights of all property owners and all bidders” (L.F. 132; Appx. A1).

This misapplies the law of Missouri.

First, as the Yoests and Entities repeatedly pointed out below, § 140.190.2, R.S.Mo., gives them an unequivocal right to be bidders at the tax sales because they will be offering to pay the required sum for tracts of land and they are not among the statute’s only prohibited classes of bidders: (1) non-Missouri residents and (2) people delinquent on their own property taxes. As the Collector admitted in her answer, the Yoests and Entities are Missouri residents who are not delinquent on their own taxes. Therefore, per the statute’s plain language, the Yoests and Entities have a clear, unequivocal right to be bidders at the tax sales, just like any other Missourian not delinquent on his or her own property taxes.

Second, the law of Missouri does not give the Collector, a state agent, either express or implied authority to deprive the Yoests or Entities of that right. No statute, either in Chapter 140, R.S.Mo. or elsewhere, grants her any power to create her own, extra-statutory classes of people she desires to

be prohibited from being bidders. Rather, the Collector has a ministerial duty to administer the tax sales and, per § 140.190.2, accept bids from any Missourian not delinquent on his own property taxes. Moreover, the Collector's own interpretation of her power – that she may create unwritten rules for being a bidder, unilaterally determine a violation of those rules, and disallow any review of her determination – would violate basic procedural due process guaranteed in Mo. Const. art. I, § 10.

The trial court erred in holding that mandamus does not lie. The Court should reverse the trial court's judgment and enter a permanent writ of mandamus commanding the Collector to cease and lift any and all bans against the Yoests and Entities from participating in present and future Clay County tax sales.

A. Mandamus lies to compel a state agent to obey a ministerial duty when the relator has a right to its performance.

“The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform.” *Furlong Cos. v. City of Kan. City*, 189 S.W.3d 157, 165-66 (Mo. banc 2006). Its issuance is justified “when some legal authority requires an official to perform a particular act.” *Banks v. Slay*, 410 S.W.3d 767, 769 (Mo. App. 2013).

“A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed. He must show himself possessed of a clear and legal right to the remedy.” *Furlong Cos.*, 189 S.W.3d at 166. “Whether a petitioner's right to mandamus is clearly

established and presently existing is determined by examining the statute or ordinance under which petitioner claims the right.” *State ex rel. Lee v. City of Grain Valley*, 293 S.W.3d 104, 107 (Mo. App. 2009) (internal quotes and citation omitted). Mandamus lies when the ministerial duty sought to be performed is definite and arises under conditions imposed by law. *Furlong Cos.*, 189 S.W.3d at 166.

Under the uncontested facts, mandamus lies here, and the trial court erred in holding otherwise. Section 140.190.2 gives the Yoests and Entities an unequivocal right to be bidders at the tax sales. The Collector has no authority to prohibit them from doing so, and instead has a ministerial duty to allow them to exercise that right. She admits she has refused to do so.

B. As the Yoests and Entities are Missouri residents who are not delinquent on their own property taxes, § 140.190.2, R.S.Mo., gives them the unequivocal right to be bidders at the tax sales.

Section 140.150.1, R.S.Mo., provides that tax-delinquent properties can be sold at an annual tax sale: “on the fourth Monday in August of each year,” all real property “on which taxes or special assessments are delinquent and unpaid are subject to sale to discharge the lien for the delinquent and unpaid taxes or unpaid special assessments” (Appx. A3).

Section 140.190.1 then makes it the county collector’s duty to hold that sale: “the county collector *shall* commence the sale of such lands and *shall* continue the same from day to day until each parcel assessed or belonging to each person assessed shall be sold as will pay the taxes” (Appx. A7) (emphasis added). “Shall” is mandatory language. *Jarman v. Eisenhauer*,

744 S.W.2d 780, 781 (Mo. banc 1988). So, commencing and continuing the sale is the collector's duty.

Section 140.190.2 then provides who the "purchaser" of the land is: "The person offering at said sale to pay the required sum for a tract **shall** be considered the purchaser of such land" (Emphasis added). Again, "shall" is *mandatory* language.

So, as a matter of law, under § 140.190.2 **any person** who pays the required sum at the sale *must* be considered the purchaser. And the term "person" in all statutes includes any legal entities, too, such as limited liability companies. § 1.020(12), R.S.Mo.

In § 140.190.2, the General Assembly then identified **two – and only two – categories** of people who are prohibited from being purchasers: (1) a "person or designated agent who is currently delinquent on any tax payments on any property, other than a delinquency on the property being offered for sale, and who does not sign an affidavit stating such at the time of sale;" and (2) "any person not a resident of the state of Missouri or a foreign corporation or entity all deemed nonresidents." *Id.*

So, under § 140.190.2, (a) any person who pays the required sum **must** be considered the purchaser, **only unless** that person is (b) currently delinquent on any tax payments on another property or (c) not a Missouri resident. The General Assembly set forth no further legal restrictions on who may be a "purchaser" at the tax sale.

If the General Assembly had wanted to add in more categories of prohibited people, it could have. It did not. So, *expressio unius est exclusio*

alterius: “to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S LAW DICT. 602 (8th ed. 2004). If only nonresidents or delinquent payers are excluded from the sale, *ipso facto* all other “persons” offering the requisite amount of money “shall” – i.e., have the right to – be purchasers.

The Supreme Court’s decision in *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001), provides a good example. A statute, § 536.087, R.S.Mo., provided that any party who prevailed in an agency proceeding against the State “shall be awarded” reasonable attorney fees and costs. *Id.* at 351. Another statute, § 536.085, R.S.Mo., “provide[d] an enumerated list of agency proceedings that are excluded from [§ 536.087’s] coverage, and tax cases are not expressly mentioned.” *Id.* at 352.

A country club prevailed against the Director of Revenue in a sales tax dispute, but the Administrative Hearings Commission denied its § 536.087 application for attorney fees and expenses, reasoning that nothing in the statutes specifically related to sales tax disputes allowed for them. *Id.* at 349-50. The Supreme Court reversed. Regardless of the tax-dispute statutes, § 536.087 provided a general right to attorney fees, tax cases were not among those excluded from this right in § 536.085, and so “under the familiar maxim of statutory construction *expressio unius est exclusio alterius*, the legislature must have intentionally omitted tax cases from the excluded proceedings.” *Id.* at 352. The country club had a right to attorney fees and expenses. *Id.*

The same is true here. Section 140.190.2 provides a general right to pay the amount of money required to satisfy a tax deficiency, upon which the

payer “shall” be the purchaser. It then provides a list of only two classes that are excluded from being purchasers, non-Missouri residents and those delinquent on their own taxes, and “people excluded within the Collector’s discretion” “are not expressly mentioned.” *Greenbriar*, 47 S.W.3d at 352.

So, “the legislature must have intentionally omitted” a class of discretionarily-prohibited people “from the excluded” classes. *Id.* Any Missourian who is not delinquent on his or her own taxes therefore has the right to be a bidder at the tax sale. *Id.*; see also *Giloti v. Hamm-Singer Corp.*, 396 S.W.2d 711, 713 (Mo. 1965) (statute that made it unlawful only for wholesaler to discriminate between retailers in price, discounts for time payment, or discounts for quantity did not also expressly prohibit wholesaler from refusing to sell its products to any particular retailer, and so had to be construed as allowing this).

Indeed, though it predates the Jones-Munger Act that promulgated § 140.190.2 in the 1930s the only decision in the history of Missouri regarding who has the right to bid at a tax sale held that anyone has that “right” who is not prohibited by statute from doing so. See *Walker v. Mills*, 109 S.W. 44, 45 (Mo. 1908). There, the Supreme Court held that an attorney for the collector himself had the “right” to be a purchaser at a tax sale because, while perhaps unseemly, he was not statutorily barred from doing so. *Id.* In fact, the Court held that even the collector herself would have the “right” to be a bidder. *Id.*

Here, the Yoests and Entities pleaded that they are residents of Missouri and are not delinquent on any disqualifying property taxes (L.F. 6-7, 17). **The Collector admitted this in her answer** (L.F. 75). The

Collector is bound by that admission: “[a]llegations in a petition which are admitted in an answer ... constitute judicial admissions, for which production of evidence on the issue is not required and the fact is conceded for the purpose of the litigation that the certain proposition is true.” *Creech v. MBNA Am. Bank, N.A.*, 250 S.W.3d 715, 717 (Mo. App. 2008).

So, under § 140.190.2, the undisputed facts here **do** prove that the Yoests and Entities are entitled to be purchasers at the annual Clay County delinquency tax sale. The trial court’s holding otherwise misdeclared and misapplied the law.

C. The Collector has no power to “ban” other, extra-statutory categories of “persons” from being bidders at the tax sales, and instead has a ministerial duty to allow anyone to be a bidder who is not statutorily excluded from doing so.

In Missouri, the office of county collector is created by statute. *See* Chapter 52, R.S.Mo. This means that a county collector is a state agent, and her powers are governed by the law of agency. *State ex rel. Pickett v. Truman*, 64 S.W.2d 105, 108 (Mo. banc 1933) (county collector is “agency of the state in collecting the taxes”). An agency of the state “has only those powers expressly conferred or reasonably implied by statute.” *Gott v. Dir. of Revenue*, 5 S.W.3d 155, 158 (Mo. banc 1999).

So, the Collector only has such powers as the General Assembly expressly has given her by statute, or which reasonably can be implied from the express language of those statutes. *Wiley v. Daly*, 472 S.W.3d 257, 266 (Mo. App. 2015) (collector had no authority to act as circuit clerk’s collection

agent where statute did not expressly or implicitly give her that authority); *Felker v. Carpenter*, 340 S.W.2d 696, 701 (Mo. banc 1960) (collector had no authority to pay himself 1% of utility taxes where utility tax statute did not expressly give him that authority and it could not reasonably be implied from railroad tax statutes, which did not expressly apply to utility taxes).

Here, the Collector has no express or implicit power to “ban” the Yoests or Entities from being bidders at the tax sales. Instead, the law of Missouri is that she has a ministerial duty to allow them to bid. Mandamus lies to command her to obey that duty.

1. No express power

The General Assembly plainly has not given the Collector **express** power to ban **anyone** from the annual tax sale, nor did the Collector claim so below. No statute expressly provides her with such a power. Rather, her only express powers listed with respect to the time up through the sale are:

- She must send notices of delinquent taxes and impending sales to the property owners, § 140.150.2 (Appx. A3);
- She must publish the delinquency list, § 140.170, R.S.Mo. (Appx. A4);
- She may use certain prescribed abbreviations in notices, records, deeds, and other instruments, § 140.180, R.S.Mo. (Appx. A6);
- She must “commence” the tax sale and “continue” it “from day to day until each parcel assessed or belonging to each person assessed shall be sold as will pay the taxes, interest and charges thereon,” § 140.190.1 (Appx. A7); and

- She must accept and preserve consents to jurisdiction from nonresidents, § 140.190.2-.3 (Appx. A7).

Plainly, the Collector has no **express** authority to ban anyone from the tax sales.

2. No implicit power

Nor do the statutes give the Collector any **implicit** authority to ban anyone from the annual delinquent tax sale.

An implicit power must be firmly grounded in an express power, as an agent “does not have the power to broaden the scope of its statutory authority.” *United Pharmacal Co. of Mo. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 912 (Mo. banc 2006). And a power cannot be inferred “from [a] statute simply because that power would facilitate the accomplishment of an end deemed beneficial” by the agent. *Dishon v. Rice*, 871 S.W.2d 126, 128 (Mo. App. 1994). Rather, “Implication of a power is properly found **only** if the power **necessarily follows from the language of the statute.**” *Mueller v. Mo. Hazardous Waste Mgmt. Comm’n*, 904 S.W.2d 552, 557 (Mo. App. 1995) (emphasis added).

Simply authorizing the Collector to “commence” and “continue” the sale in § 140.190.1 does not authorize her to determine who may or may not be a purchaser at that sale. If the General Assembly had desired her to have power to make that determination, it could have empowered her to do so. It did not. Instead it reserved that power for itself, providing **expressly** that any “person offering at said sale to pay the required sum for a tract **shall** be considered the purchaser,” unless that person is a nonresident or is

delinquent on his own property taxes. § 140.190.2. *See Vowell v. Kander*, 451 S.W.3d 267, 275-76 (Mo. App. 2014) (statutes requiring Secretary of State to administer elections did not implicitly empower him to investigate and judge candidate’s qualifications for primary ballot).

This is not to say the Collector has *no* implicit authority vis-à-vis the tax sales. She is expressly empowered to “commence” and “continue” them. § 140.190.1. So, this necessarily implicitly empowers her to control minutiae such as what time they start on the fourth Monday in August, where they occur, in what order the properties are offered for sale, etc. *Vowell*, 451 S.W.3d at 275-76. But that is all. *Id.*

The Collector has no power to ban anyone from the tax sales.

3. Ministerial duty

Rather, the law of Missouri is and must be that when a person is *not* statutorily precluded from being a bidder, the Collector has an implicit ministerial duty to *allow* that person to be a bidder, not an implicit power to bar that person in her discretion.

In this context, “A ministerial act is one that a public official is required to perform upon a given state of facts, in a prescribed manner, in obedience with the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.” *Div. of Cavalry Brigade v. St. Louis Cnty.*, 269 S.W.3d 512, 518 (Mo. App. 2008). And when she fails in that ministerial duty, mandamus lies to require her to obey it. *Supra* at 15-16.

This is true whenever the law provides for a public bidding process. The agent tasked with receiving the bids must allow everyone to bid who the law allows to bid. And when the agent refuses, mandamus lies to command her to allow the party to bid, regardless of whether that bid ultimately is accepted.

This Court's decision in *State ex rel. Stricker v. Hanson*, 858 S.W.2d 771, 778 (Mo. App. 1993), provides an excellent example. The Department of Conservation decided to lease helicopter services, and informed the Office of Administration ("the Office"), who prepared an invitation to bid, which the Office disseminated among nine qualified bidders. *Id.* at 772.

A statute provided for the manner and form of bidding, which the Office was required to follow. *Id.* at 775-76. The Office, however, went outside the bidding process and awarded the contract to a company whose bid did not conform to the invitation, who was allowed to amend its bid after the closing of bidding, and who was allowed to negotiate its bid after the closing of bidding. *Id.* at 775. Another bidder who was not afforded this same extra process sought a writ of mandamus voiding the contract and requiring the Office to adhere to the statute, but after issuing a preliminary order in mandamus the trial court granted summary judgment to the Office. *Id.*

This Court reversed and ordered the trial court to issue a writ. *Id.* at 778. It held,

The initial bid of [the awardee] ... should have been rejected.

[The Office's] acceptance of [it] after the bid opening violates both Missouri statutes ... and contradicts the notion that competitive

bidding procedures for public contracts should ensure “that all who may wish to bid shall have a fair opportunity to compete in a field where no favoritism is shown or may be shown to other contestants.”

Id. (quoting *City of Maryville ex rel. Citizens’ Nat’l Bank v. Lippman*, 132 S.W. 47, 48 (Mo. App. 1910)).

The same is true here. Section 140.190.2 gives the Yoests and Entities the right to be bidders at the tax sales. *Supra* at 16-20. The Collector has no power to deny them that right. *Supra* at 20-23. Her refusal to allow them to be bidders “contradicts” that same “notion.” *Stricker*, 858 S.W.2d at 778. Instead, she had a ministerial duty to allow the Yoests and Entities to be bidders just like anyone else qualified to be so, and mandamus lies to compel her to obey that duty. *Id.* She cannot show favoritism toward other bidders who she prefers or prejudice against those who she does not prefer, for whatever personal reason. *Id.*

This is the longstanding and uniform law of Missouri. When a citizen is legally minimally qualified to enter some public process, the agent in charge of facilitating the process must let the citizen enter, and mandamus lies when the agent refuses. *See, e.g.:*

- *Vowell*, 451 S.W.3d at 275-76 (where person did everything statute required her to do to be primary election candidate, Secretary of State had duty to certify her as so regardless of “his investigation of and determinations regarding her voter registration history;” statutes did not give Secretary of State power “to judge a candidate’s qualifications,”

reversing denial of declaratory relief and approving of mandamus to this end, too);

- *State ex rel. Alexander & Lindsey, LLC v. Planning & Zoning Comm'n of Platte Cnty.*, 346 S.W.3d 411, 417 (Mo. App. 2011) (where proposed preliminary plat met county's regulations, county commission had duty to allow it, reversing denial of mandamus);
- *Furlong Cos.*, 189 S.W.3d at 164-65 (same re: city, rather than county);
- *State ex rel. Thomas v. Neeley*, 128 S.W.3d 920, 927 (Mo. App. 2004) (where person did everything ordinances and statutes required him to do to be municipal candidate, city clerk had duty to place candidate's name on ballot and had no power to "make a discretionary decision not to certify the name of that candidate," affirming writ of mandamus);
- *Modern Day Veterans Chapter No. 251 v. City of Miller*, 128 S.W.3d 176, 178-79 (Mo. App. 2004) (where statute exempted nonprofit veterans' organization from requirement that vote be held to obtain liquor license, and veterans' organization otherwise qualified for liquor license, city had duty to allow it a liquor license and had no power to do otherwise, affirming writ of mandamus);
- *Mo. Bluffs Golf Joint Venture v. St. Charles Cnty. Bd. of Equalization*, 943 S.W.2d 752, 756 (Mo. App. 1997) (where statute exempted golf courses located on university property from paying property tax, county board of equalization had duty to exempt such a golf course and had no power to do otherwise, affirming writ of mandamus);

- *State ex rel. Lane v. Kirkpatrick*, 485 S.W.2d 62, 64-65 (Mo. 1972) (where person did everything statute required her to do to reserve corporate name, Secretary of State had duty to reserve that corporate name for her, regardless of having promised it to someone else who did not follow the statutes, and had no power to do otherwise, affirming writ of mandamus);
- *State ex rel. Cole v. Matthews*, 274 S.W.2d 286, 292 (Mo. banc 1954) (where statutes authorized election board to award voting machine contract after bidding process and require county to purchase the winning bidder's machines, county supervisor had duty to purchase winning bidder's machines and had no power to award contract to other party outside bidding process, granting writ of mandamus);
- *State ex rel. Folkers v. Welsch*, 124 S.W.2d 636, 639-40 (Mo. App. 1939) (where person did all statutes and municipal code required him to do to obtain building permit, city's building commissioner had duty to issue that permit and no discretion to refuse, affirming writ of mandamus);
- *State ex rel. McCleary v. Adcock*, 105 S.W. 270, 271-72 (Mo. banc 1907) (same re: board of health and medical licenses, granting writ of mandamus); and
- *State ex rel. Jones v. Cook*, 73 S.W. 489, 493-94 (Mo. banc 1903) (same re: Secretary of State and banking certificate).

Just as in all these cases, the Collector's acceptance of bids from qualified bidders at the tax sales – any Missourian who is not delinquent on his own property taxes – is a ministerial duty. It is something the Collector

“is required to perform upon [that] state of facts, in a prescribed manner, in obedience with the mandate of” § 140.190.2, “without regard to [her] own judgment or opinion concerning the propriety of the act to be performed.” *Div. of Cavalry Brigade*, 269 S.W.3d at 518.

The Yoests and Entities are qualified bidders at the tax sales under § 149.190.2. *Supra* at 16-20. The Collector has no power to prohibit them from being bidders. *Supra* at 20-23. Instead, she simply has a ministerial duty to hear their bids in the due course of the tax sales. Her attempt to prohibit the Yoests and Entities from bidding violates her ministerial duty. Mandamus lies to correct her behavior.

D. If Chapter 140 somehow gives the Collector power to “ban” other, extra-statutory categories of “persons” from being bidders at the tax sales, the way the Collector has done so as applied to the Yoests and Entities violates their right to procedural due process under Mo. Const. art. I, § 10.

The trial court held that the Collector has some implicit authority – presumably in the statutes governing the tax sales, the Jones-Munger Act, Chapter 140 – to “ba[n] participation of persons or entities which, in her discretion, fail to abide by the statutes or rules necessary to protect the rights of all property owners and all bidders” correct (L.F. 132; Appx. A1).

As explained *supra*, this is untrue. The Collector has no such power. But if she somehow does have statutory power to impose a “ban,” then especially in the manner she has sought to exercise it here, her application of it to the Yoests and Entities violate the guarantee of due process in Mo.

Const. art. I, § 10.² And a court may not read or apply a statute “in a manner that leads to an unconstitutional result.” *Bateman v. Platte Cnty.*, 363 S.W.3d 39, 44 (Mo. banc 2012). Mandamus still would lie.

The Collector openly admitted in her answer that she had no stated rules for what constitutes “fraudulent and abusive conduct” that would result in a ban from the tax sales, and that when she imposes a ban on someone, that person has “no remedy at law” (L.F. 75-76). But “Due Process requires that laws provide notice to the ordinary person of what is prohibited,” and if not, the prohibition is unenforceable. *St. Louis Cnty. v. Kienzle*, 844 S.W.2d 118, 122 (Mo. App. 1992).

This requirement applies to agency rules and determinations just as it does to statutes and ordinances. *Colyer v. State Bd. of Registration for Healing Arts*, 257 S.W.3d 139, 144-45 (Mo. App. 2008). Further, if an agency accuses a party of having violated one of its rules and seeks to deprive that part of a liberty as a result, it must afford that party the opportunity to be heard to contest the accusation, including judicial review. *Id.* (“Procedural due process requires the opportunity to be heard at a meaningful time and in a meaningful manner”).

² Below, the Collector suggested the Yoests could not identify any “substantive due process” component affected by her decision (L.F. 113-14). This is without merit. The issue here – being banned from a public sale by a government agent without any preexisting rules or recourse for relief – is one of *procedural* due process, not substantive.

So, even if the Collector somehow had the implicit power to create new categories of people to be banned from the tax sales (and she plainly does not, *supra* at 20-23), Due Process would require that, to ban someone, she would have to:

- promulgate clear, express written rules³ giving notice *in advance* on what is prohibited, *Kienzle*, 844 S.W.2d at 122;
- afford one accused of violating those rules the opportunity for a hearing to resolve the accusation and the appropriate penalty, if any, *Colyer*, 257 S.W.3d at 144-45; and
- allow for judicial review of her determinations. *Id.*

By her own admission (L.F. 75-76), the Collector here has done none of that. Instead, she is applying whatever power she says Chapter 140 gives her to the Yoests and Entities dictatorially.

That is, the Collector accused the Yoests and Entities of violating unwritten rules that she arbitrarily determined after the fact. She then banned them from the tax sales in perpetuity as a result. She refused to afford them any opportunity for review. Below, though the Collector initially foresaw an evidentiary hearing (L.F. 21-22) and then requested one (L.F. 25-

³ The fact that no statute in either Chapters 52 or 140, the only chapters governing the office of county collector, empowers a county collector to be a rule-making body or subjects her to the administrative notice-and-comment rulemaking procedures of Chapter 536, R.S.Mo., itself shows it cannot be implied from statute that she has the power to create her own unilateral categories of people who should be banned from the tax sales.

26), she ultimately argued in response to the Yoests' and Entities' post-judgment motion that not even an evidentiary hearing was required (L.F. 147-48). The trial court evidently thought her actions were permissible, holding that she had 100% discretion to determine who was allowed and disallowed from being bidders at the tax sales (L.F. 132; Appx. A1).

The Collector's view of her purported powers is inimical to the rule of law in the United States and Missouri. She believes she is lawmaker, prosecutor, judge, jury, and executioner all rolled into one, with apparently no appellate court in the mix. But our system does not, has never, and cannot allow for a government functionary to self-empower with impunity in the manner the Collector has here. The guarantee of procedural due process in Mo. Const. art. I, §10, forecloses it, and this Court should put a stop to her behavior.

If the Collector does have power to ban individuals from the tax sales, then to comport with procedural due process her exercise of that power must involve: (1) promulgating express rules in advance that themselves comport with Chapter 140 and are subject to challenge in court or other review; (2) affording those accused of violating those rules an opportunity to defend themselves; and (3) allowing for judicial review of her final determinations.

So, regardless of whether the Collector has power to ban otherwise-qualified people from the tax sales (and she does not, *supra* at 20-23), her conduct here is and must be void as a matter of law. Simply put, as the Collector's "argued interpretation of" her powers "conflicts with" procedural due process and "does not necessarily follow from any ... statutory language,"

the law of Missouri is that she “does not have the implied authority to determine that” a person other than a nonresident or a delinquent taxpayer should be banned from the annual Clay County tax sale. *C.D.J. v. Mo. Dep't of Soc. Servs.*, 507 S.W.3d 605, 614 (Mo. App. 2016).

The trial court’s holding otherwise was error. The Yoests and Entities are Missouri residents who were not delinquent on their own property taxes. Section 140.190.2 therefore gave them the unequivocal right to be bidders at the annual Clay County tax sale. The Collector banned the Yoests from the sale anyway. She lacked power to do so. Mandamus lies to order the Collector to respect the Yoests’ and Entities’ right to be bidders at the tax sales.

Rule 84.14 allows this Court to “give such judgment as the court ought to give” and commands that “[u]nless justice otherwise requires, the court shall dispose finally of the case.” So, the Court should issue a permanent writ of mandamus commanding the Collector to cease and lift any and all bans against the Yoests and Entities from participating in present and future Clay County tax delinquency property sales.

II. The trial court erred in granting the Collector’s motion to dismiss without an evidentiary hearing *because* the trial court’s judgment of dismissal lacks substantial evidence in its support, as when the pleadings in a mandamus action raise any dispute of material fact, the trial court cannot resolve the action without an evidentiary hearing, and arguments of counsel and materials attached to pleadings are not evidence *in that* taking as true the trial court’s finding that the Collector had the power to ban people who, in her discretion, engaged in wrongdoing or malfeasance, the parties’ pleadings raised multiple disputes of material fact regarding whether the Yoests and Entities had engaged in any supposed wrongdoing or malfeasance, and the parties anticipated presenting evidence at a hearing, but no evidence was introduced before the trial court at all.⁴

* * *

The trial court’s judgment grants the Collector’s motion to dismiss the Yoests’ and Entities’ petition for writ of mandamus (L.F. 132; Appx. A1). Citing no authority, it holds the Collector had power to ban “persons or

⁴ This is an alternative to Point I, *supra*. Point I explains that under the undisputed facts mandamus lay as a matter of law and asks this Court to enter that writ. This point explains that, even if the Collector somehow had power to ban people who engaged in misconduct from bidding at the tax sales, the Court still should reverse and remand for a trial, because the Yoests and Entities disputed that they had engaged in any misconduct, and no evidence was before the trial court.

entities” from participating in the annual Clay County tax-delinquent property sale who “fail to abide by the statutes or rules necessary to protect the rights of all property owners and of all bidders,” and so had power to impose a ban on the Yoests and Entities (L.F. 132; Appx. A1).

As the Yoests and Entities explained in Point I, *supra*, the trial court erred in holding that the Collector had this power. But even if the Collector somehow did have power to ban them, the Yoests and Entities disputed that they failed to abide by any statutes or rules of the tax sale, and requested the Court to hold the Collector to her burden of proving that they had (L.F. 8-9, 15-16, 84-89, 93-94).

As there was no evidentiary hearing, however, the law of Missouri is that no evidence was produced and the trial court’s judgment is not supported by *any* evidence, let alone substantial evidence. *Prof’l Fire Fighters of E. Mo. v. City of Univ. City*, 457 S.W.3d 23, 28-29 (Mo. App. 2014).

The trial court’s failure to hold an evidentiary hearing is reversible error. *Id.* This Court should reverse its judgment and remand this case for trial.

A. The law of Missouri requires an evidentiary hearing on a mandamus petition when the pleadings raise any dispute of material fact.

When a party seeks a writ of mandamus arguing that an official has not complied with a legal obligation, and the “resolution of the petition ... require[s] the trial court to address” any issues of fact “directly affecting the ultimate merits of the controversy,” the Court’s resolution of the petition on

the merits will be reversed “if it is not supported by substantial evidence.” *Id.* at 27-28. Dismissing a mandamus petition after a preliminary order has been issued is just such a resolution, and **must** be supported by substantial evidence. *Id.*

So, if this process involves resolving any material dispute of fact, the law of Missouri is that an evidentiary hearing **is required**, and the failure to hold one is **reversible error**. *Id.* A “trial court’s ruling on a writ petition made without an evidentiary record is not supported by sufficient competent evidence in the record if material issues of fact are raised by the pleadings.” *Id.* at 28.

This is exactly what happened in *Prof'l Fire Fighters*. There, a union sought a writ of mandamus, arguing that a city unlawfully had prevented it from engaging in constitutionally-guaranteed collective bargaining and asking the Court to require the city to allow that process. *Id.* at 25, 27. After the trial court issued a preliminary order in mandamus, the city moved to dismiss the petition. *Id.* at 25. “The trial court heard oral argument ... and dismissed the [u]nion’s petition for writ of mandamus without holding an evidentiary hearing,” resolving on the merits that the city had not violated the union’s rights under any collective bargaining laws. *Id.* at 25.

This Court’s Eastern District reversed and remanded for an evidentiary hearing. *Id.* at 27-29. “The resolution of the petition ... required the trial court to address multiple issues of ... fact directly affecting the ultimate merits of the controversy” *Id.* at 27. So, the judgment dismissing the petition had to be “supported by substantial evidence” *Id.* at 28. This

required an evidentiary hearing. *Id.* That the parties’ pleadings “had thousands of pages of documents attached to” them meant nothing. *Id.* Because “the trial court did not hold an evidentiary hearing, ... none of the documents ... were admitted to the record.” *Id.*

The trial court could not “rule on the petition for writ of mandamus ... based only on the pleadings ... and the parties’ oral argument.” *Id.* An evidentiary hearing had to be held. *Id.*; *cf. King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414, 416 (Mo. banc 2014) (reversing judgment granting permanent writ of mandamus based on pleadings and oral argument, but without any evidentiary hearing, and which resolved factual disputes, as not supported by substantial evidence).

The same is true here.

B. The parties’ pleadings raised multiple disputes of material fact – specifically whether the Yoests and Entities had engaged in any of the wrongdoing the Collector alleged, barring the trial court from deciding the Yoests’ and Entities’ petition on the merits without an evidentiary hearing.

Profl Fire Fighters is directly on point. The trial court’s judgment dismissing the Yoests’ and Entities’ petition here must be reversed for the same reason as the judgment dismissing the union’s petition there.

The parties’ pleadings raised multiple disputed issues of material fact. Nonetheless, the trial court resolved them on the merits *without* the production of any evidence at a hearing. As in *Profl Fire Fighters*, this was reversible error.

The Yoests and Entities sought a writ of mandamus commanding the Collector to “cease and lift any and all bans against [them] from participating in present and future” tax sales (L.F. 9). They explained that:

- § 140.190.2, R.S.Mo., gives anyone the right to offer to buy a tract for sale at the tax sale, unless he either is not a Missouri resident or is delinquent in his own property taxes (L.F. 15-16);
- despite the fact they were Missouri residents and were not prohibitively delinquent on any property taxes, the Collector had banned them from being bidders at the tax sales (L.F. 8-9, 15-17); and
- as the law did not empower the Collector unilaterally to impose such a ban, the Collector’s actions were contrary to law and they had a right to be bidders at any present and future Clay County tax sales (L.F. 8-9, 15-17).

In both her answer and her motion to dismiss, the Collector then alleged that she did have the power to ban the Yoests and Entities from being bidders at the tax sales because the Yoests and Entities had a “history of dishonesty, lack of ethics, and fraudulent conduct” (L.F. 74, 79). ***She said she would prove this at an evidentiary hearing***, listing six specific incidents of their alleged misconduct (L.F. 74, 79, *incorporating* L.F. 21-22).

But the Yoests and Entities denied all the Collector’s allegations of so-called “wrongdoing” and disputed that the Collector had given them notice of any guidelines or rules for what would constitute prohibitable “wrongdoing” before imposing her ban on them (L.F. 91, 93-94). They objected that the

Collector “has not presented even a preponderance” of evidence in support of her allegations against them (L.F. 94).

Assuming for the sake of argument that the collector had the power to ban people from participating in the tax sales who she believed had engaged in wrongdoing, whether the Yoests and Entities had or had not engaged in the actions the Collector alleged to support her ban on them from being bidders at the annual tax sale plainly was a disputed question of material fact. Indeed, it was multiple questions of fact – one question per alleged action.

Despite these clear material factual disputes, the trial court granted the Collector’s motion to dismiss and denied the Yoests’ and Entities’ mandamus petition on the merits *without any evidentiary hearing* (L.F. 132; Appx. A1). Indeed, it held the Collector could ban the Yoests from the annual tax sale for engaging in alleged actions *that the Yoests disputed even happened in the first place*.

There plainly was no evidentiary hearing to resolve that dispute of fact. Parties’ pleadings and their attachments were not evidence: “[e]xhibits attached to motions ... are not evidence and are not self-proving.” *Kulaga v. Kulaga*, 149 S.W.3d 570, 573 n.6 (Mo. App. 2004). Even those attachments are sworn, notarized affidavits, they are not evidence. *Regions Bank v. Alverne Assocs.*, 456 S.W.3d 52, 57 (Mo. App. 2014). And attorneys’ oral arguments are not evidence. *Estate of Bell*, 292 S.W.3d 920, 926-27 (Mo. App. 2009).

Here, though, that was all there was before the Court: pleadings, attachments, and oral argument (L.F. 6-64, 74-96, 113-31; Tr. 2-11). No party introduced any evidence at the November 2016 argument hearing (Tr. 2-11). There was no sworn testimony, no opportunity for cross-examination, no admission of any exhibits, and no stipulations (Tr. 2-11). **Consequently, there was no evidence at all.** *Prof'l Fire Fighters*, 457 S.W.3d at 28-29. And no evidence cannot be substantial evidence. *Bell*, 292 S.W.3d at 923-24, 926-28.

So, just as in *Prof'l Fire Fighters*, the trial court reversibly erred when it “resolved and dismissed the writ petition without admitting any evidence, despite the existence of a multitude of unresolved issues of material fact raised by the pleadings. In fact, the court decided the entirety of the merits of the case without any evidence before it. Under such circumstances,” it cannot be said that the trial court’s “ruling is supported by substantial evidence.” *Prof'l Fire Fighters*, 457 S.W.3d at 28.

If the Court does not issue a writ of mandamus, it still should reverse the trial court’s judgment and remand this case for trial.

Conclusion

This Court should reverse the trial court's judgment and issue a permanent writ of mandamus commanding the Collector to cease and lift any and all bans against the Yoests and Entities from participating in present and future Clay County tax delinquency property sales. Alternatively, the Court should reverse the trial court's judgment and remand this case for trial.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533

Ashlyn Buck Lewis, Mo. #65501

2323 Grand Boulevard, Suite 1100

Kansas City, Missouri 64108

Telephone: (816) 292-7000 (Ext. 7020)

Facsimile: (816) 292-7050

jonathan@sternberg-law.com

COUNSEL FOR APPELLANTS

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook, 13-point font, which is not smaller than Times New Roman, 13-point font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court’s Rule XLI, as this brief contains 10,262 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that, on April 27, 2017, I filed a true and accurate Adobe PDF copy of this brief of the appellants and its appendix via the Court’s electronic filing system, which notified the following of that filing:

Ms. Patricia L. Hughes	Counsel for Respondent
17 West Kansas	
Liberty, Missouri, 64068	
Telephone: (816) 792-5700	
Facsimile: (816) 781-1953	
thughes@claycountymo.gov	

/s/Jonathan Sternberg
Attorney