**WD80556**

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**IN THE MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

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**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.**

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

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# REPLY BRIEF OF THE APPELLANTS

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## Table of Contents

## Table of Authorities

**Cases**

**Constitution of Missouri**



**Revised Statutes of Missouri**



**Missouri Supreme Court Rules**



**Rules of the Missouri Court of Appeals, Western District**



**Other Authorities**

## Reply as to Facts and Point II

### A. The Yoests' and Entities' petition alleged all facts and requested all relief necessary to state their claim to a writ of mandamus commanding the Collector to lift her ban.

Appellants the Yoests and Entities appeal from the dismissal of their mandamus petition seeking to command the Respondent Collector to lift her ban on their being bidders at Clay County tax sales. In their opening brief, they explained mandamus lies because § 140.190.2, R.S.Mo., gives them an unequivocal right to be bidders, the Collector had no power to prohibit them from being bidders and had a duty to allow them to be bidders, and the manner in which she had banned them violated their unequivocal right to due process (Brief of the Appellants ("Aplt.Br.") 10, 13-32).

In both her short statement of facts and her response to Point II, the Collector argues the Yoests and Entities never actually sought relief against being banned from the annual tax sales in their petition for writ of mandamus or stated all necessary facts to seek that relief (Brief of the Respondent ("Resp.Br.") 5-6). She argues "[t]he pleadings are inherently defective" and "do not state a cause of action" (Resp.Br. 21).

The Collector's argument is without merit. The Yoests' and Entities' petition properly stated exactly the mandamus claim at issue on appeal, alleging all facts and requesting all relief necessary to it.

First, the Collector says that Count I of the petition "recites who the parties are, but makes no claim" (Resp.Br. 5) (citing L.F. 6). While perhaps not the most artfully written, there is nothing wrong with this:

> The character of a cause of action must … be determined from the facts stated in the petition and not by the prayer or the name given the action. It is the facts stated in the petition, along with the relief sought, which … are to be looked at to determine the cause of action, rather than the form of the petition.

*Memco, Inc. v. Chronister*, 27 S.W.3d 871, 875 (Mo. App. 2000) (internal citations and quotation marks omitted). And in so determining, this Court must "give the pleadings their broadest intendment and most liberal construction, and … accord the petition 'all reasonable inferences deducible from the facts stated.'" *Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 85 (Mo. App. 2011) (citation omitted).

So, here, regardless of their heading, the first eight paragraphs stated who all the parties are, including that all the relators were Missouri residents (L.F. 6-7). The Collector later admitted these paragraphs (L.F. 75).

The Yoests and Entities then adopted them by reference in their next section, titled "Request for Writ of Mandamus" (L.F. 7). The Collector argues that next section "recites, *inter alia*, the fact that [she] emailed [the Yoests and Entities] to tell them they were banned from participating in the tax sale, that the ban was unwarranted and would cause damage, and a request 'that a preliminary order in mandamus be issued … commanding [her] to file an answer'" (Resp.Br. 5-6) (citing L.F. 9). She later argues "the mandamus relief sought in Count II was solely that [she] answer" (Resp.Br. 21).

The Collector's "*inter alia*" omits a great deal of important *alia*, including the Yoests' and Entities' allegations that:

- her ban was without prior rules, notice, or an opportunity to defend (L.F. 8, ¶15);
- this violated due process (L.F. 8, ¶¶16 and 17(a)); and
- this was without authority under Missouri law, including "RSMo [Chapter] 140, regarding tax delinquency sales and prohibited purchasers" (L.F. 8-9, ¶17(b)).

As well, the suggestions the Yoests and Entities attached to their petition under Rule 94.03, addressed *infra* at 4-8, also included an affidavit (L.F. 13, 18). "An exhibit to a pleading is a part thereof for all purposes." Rule 55.12. The affidavit alleged more facts, including that the Yoests and Entities were "not delinquent on any tax payments" (L.F. 17, ¶5(d)).

And the mandamus petition did not "solely" (Resp.Br. 21) request that the Collector file an answer. The Collector leaves out the Yoests' and Entities' actual request for a writ of mandamus: "A writ of mandamus should issue to [the Collector] commanding her to cease and lift any and all bans against Relators from participating in present and future Clay County, Missouri tax delinquency property sales" (L.F. 9, ¶18).

It is well-established that "[o]n an application for a writ, a court may grant the appropriate remedy irrespective of the relator's prayer." *Smith v. Kintz*, 245 S.W.3d 257, 259 (Mo. App. 2008) (citation omitted). But here the Yoests' and Entities' petition expressly sought exactly the relief they now again argue was appropriate: a writ commanding the Collector to lift her ban. That the "wherefore" clause at the end of Count II requested the trial court order the Collector to answer does not undo the petition's express request for

the writ the Yoests and Entities sought. A cause of action "is determined … ***not*** by the prayer …." *Memco*, 27 S.W.3d at 875.

Rather, plainly, the facts stated in the petition, along with the relief sought, stated a cause of action for a writ of mandamus commanding the Collector to lift her ban because the Yoests and Entities were non-delinquent Missouri residents, the Collector had no power under Chapter 140, R.S.Mo. or otherwise to ban them from the tax sales, and even if she did the manner in which she had banned them – without notice or an opportunity to defend – violated their unequivocal right to due process.

This is exactly what the Yoests and Entities then argued in opposition to the Collector's motion to dismiss (L.F. 82-88, 93-94), in their post-judgment motion (L.F. 133, 138-44), and what they now argue in Point I.

**B. The Yoests' and Entities' suggestions accompanying their petition further explained how the facts alleged in their petition legally warranted mandamus relief.**

The Collector's cursory review of the Yoests' and Entities' petition also entirely omits their suggestions in support (Resp.Br. 5-6). While she argues they failed to state a cause of action because their petition's allegations "do not" "invoke principles of substantive law [that] may entitle the[m] to relief" (Resp.Br. 21-22), arguing that substantive law is exactly the role of the required suggestions, and the suggestions here fully met that requirement.

Throughout her brief, the Collector misunderstands key differences between a mandamus action and a regular civil case. Indeed, both her standard of review and her whole response to Point II, which cites no writ

cases (Resp.Br. 6-7, 18-22), are premised on principles applicable only in regular civil cases.

Citing decisions reviewing only dismissals for insufficient pleading and only in a medical malpractice case, *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595 (Mo. banc 1990), a Merchandising Practices Act case, *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410 (Mo. banc 2014), a breach-of-lease case, *Arnold Crossroads, LLC v. Gander Mountain Co.*, 471 S.W.3d 721 (Mo. App. 2015), and two declaratory actions, *Lynch v. Lynch*, 260 S.W.3d 834 (Mo. App. 2008), *LC Dev. Co. v. Lincoln Cnty.*, 26 S.W.3d 336 (Mo. App. 2000), the Collector argues review is *de novo* and this Court reviews only the pleadings (Resp.Br. 7, 19-20).

Like its other writ cousins, mandamus is different. "Proceedings in mandamus in a circuit court shall be as prescribed in" Rule 94. Rule 94.01. While it is true that, "In all particulars not provided for" in Rule 94, mandamus proceedings "shall be governed by and conform to the rules of civil procedure and the existing rules of general law upon the subject," *id.*, the Collector's treatment of dismissal on the merits runs afoul of mandamus particulars.

The Collector recognizes that "[t]he manner in which the trial court disposes of a writ petition determines the proper standard of review" (Resp.Br. 6) (quoting *Prof'l Fire Fighters of E. Mo. v. City of Univ. City*, 457 S.W.3d 23, 27 (Mo. App. 2014)). But she does not seem to grasp what that means. What the Court in *Prof'l Fire Fighters* – which the Yoests and Entities relied on in detail in Point II of their brief, but the Collector does not

address at all – meant by that "manner" was whether the trial court "dismisse[d] the petition following answer or motion directed to the merits of the controversy ***and in doing so determine[d] a question of fact or law***." *Id.* at 26 (quoting *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 365 n.7 (Mo. banc 2013) (Fischer, J., concurring)) (emphasis added).

So, where the trial court determined "issues of law and fact directly affecting the ultimate merits of the controversy," review is not *de novo* as in a dismissal for failure to state a claim in an ordinary civil case. *Id.* Instead, it is for whether the judgment is supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Id.* at 27 (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

Here, the judgment plainly determined disputed issues of fact and law on the merits. It ***did not*** dismiss the Yoests' and Entities' petition for failure to state a claim for which relief could be granted. Rather, it held the Yoests and Entities "failed to establish a clear, unequivocal right to be bidders" and the Collector had power "to ba[n] participation of persons or entities" from being bidders (L.F. 132). The Yoests and Entities challenge the merits of both of these holdings – that § 140.190.2 provided them an unequivocal right to be bidders at the tax sales, the Collector does not have power to ban them from the tax sales, and even if she does have that power the way she banned them violated their unequivocal right to due process.

So, review of these holdings is on the merits under *Murphy v. Carron*, not of the pleadings for whether the Yoests and Entities stated a claim. And as the Yoests and Entities explained in Point II, if the Collector somehow did

have power to ban people who engaged in wrongdoing, the parties' pleadings raised disputes of material fact regarding whether the Yoests and Entities had done so, requiring an evidentiary hearing.

The Yoests' and Entities' suggestions in support of their petition further argued their right to participate, the Collector's lack of power to ban, and the Collector's violation of due process. Rule 94.03 requires suggestions, the function of which is to argue the legal basis for mandamus and ensure "all parties underst[and] the issues presented." *State ex rel. Kugler v. City of Md. Heights*, 817 S.W.2d 931, 933 (Mo. App. 1991). For, legal argument in the petition itself is gratuitous, as it only should state the operative facts. *State ex rel. Yefremnko v. Lauf*, 450 S.W.2d 462, 463-64 (Mo. App. 1970).

The Yoests and Entities' suggestions clearly argued that because they were not among the classes who Chapter 140 prohibited from purchasing properties at tax sales, they had the right to bid (L.F. 15-16). They made the same argument they now reiterate in Point I: that § 140.190.2 gave them an unequivocal right to participate in the tax sales because it provides that the person offering at the sale to pay the required sum *shall* be the purchaser, and then only lists two classes prohibited from being purchasers, of which they were not members (L.F. 15-16). They also argued that the Collector lacked power to ban them and her failure to notify them in advance of her allegations and give them an opportunity to represent their interests or defend themselves violated their unequivocal right to due process under Mo. Const. art. I, § 10 (L.F. 17), which they also make in Point I.

Plainly, the Yoests' and Entities' factual allegations in their petition (that they were Missourians not delinquent in their property taxes, but the Collector banned them from the tax sales anyway without notice or an opportunity to defend), and their request for relief in that petition (a writ of mandamus commanding the Collector to lift her ban), combined with their argument in their suggestions (that they had an unequivocal right under § 140.190.2 to attend the sales, the Collector had no power to ban them, and even if she did the manner in which she banned them violated their unequivocal right to due process), sufficiently stated their mandamus claim.

Finally, that the Collector disagreed with petition's and suggestions' allegations of fact and legal arguments does not mean that the Yoests and Entities failed to state a claim and cannot *ipso facto* command dismissal:

> Relators seeking a writ of mandamus must show the right sought to be enforced is clearly established and presently existing. However, this does not mean the writ will only issue if all facts are undisputed. If that were true, respondents in every mandamus case could prevail by filing a general denial ….

*Kugler*, 817 S.W.2d at 933 (internal citation omitted).

The Yoests' and Entities' mandamus petition alleged all facts and requested all relief necessary to state their claim to a writ commanding the Collector to lift her ban. Their suggestions accompanying their petition explained how the facts alleged in their petition legally warranted mandamus relief. The trial court resolved their petition on the merits, and their appeal of that resolution property is before this Court.

## Reply as to Point I

### A. Under § 536.150, R.S.Mo., mandamus is appropriate to review the lawfulness of the Collector's non-contested agency decision banning the Yoests and Entities from attending the tax sales, which she tacitly concedes violated the Yoests' and Entities' right to procedural due process, entitling them to a writ.

In Point I, the Yoests and Entities explained that, on the admitted facts, the trial court erred in denying a writ commanding the Collector to lift her ban against them from attending the tax sales (Aplt.Br. 10, 13-32).

This is because § 140.190.2, R.S.Mo., provides any Missourian not delinquent on its own taxes an unequivocal right to be bidders at the tax sales, and the Collector admitted the Yoests and Entities were non-delinquent Missourians (Aplt.Br. 16-20). Regardless, the Collector had no power to ban non-delinquent Missourians like the Yoests and Entities from being bidders (Aplt.Br. 20-28). And even if she did, the way she banned the Yoests and Entities – without prior rules, without notice, and without opportunity to defend or for review – violated their unequivocal right to due process under Mo. Const. art. I, § 10 (Aplt.Br. 28-32).

Nearly all the Collector's response is that mandamus is inappropriate to address these arguments. She begins by arguing that "there is a yet-unanswered question as to whether a county collector may ban someone from bidding at the tax sale, and if so, under what circumstances," which she argues is "not properly raised in mandamus" (Resp.Br. 9).

This is without merit. The Yoests and Entities already explained that the Collector is a state agent and her powers are governed by the law of agency, so her decision to ban them from the tax sales was an agency decision subject to all law governing agency decisions (Aplt.Br. 20-21, 28-30). She does not contest this.

Section 536.150.1, R.S.Mo., authorizes a mandamus proceeding to review the lawfulness of any agency decision not otherwise subject to the normal contested administrative review process under Chapter 536:

> When any administrative officer … shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person … and there is no other provision for judicial inquiry into or review of such decision, ***such decision may be reviewed by suit for … mandamus***, … and … the court may determine whether such decision … is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly ….

(Emphasis added).

This statute governs review of an agency's decision in a "non-contested" case. *Furlong Cos. v. City of Kan. City*, 189 S.W.3d 157, 165 (Mo. banc 2006). A "'contested case' is … 'a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing,'" whereas "a 'non-contested case'" is "a decision that is not required by law to be determined after a hearing." *Id.* (citation omitted).

In a contested case, the trial court acts under §§ 536.100 to 536.140, R.S.Mo., and reviews "the record created before the administrative body." *Id.* As "[n]on-contested cases do not require formal proceedings or hearings before the administrative body," however, "there is no record required for review." *Id.* Instead, under § 536.150, even by writ of mandamus, "the circuit court … hears evidence, determines facts, and adjudges the validity of the agency decision" and "conducts such a hearing as an original action." *Id.*

The Collector's decision to ban the Yoests and Entities here plainly is a non-contested case subject to review under § 536.150 by writ of mandamus. The Collector herself admitted that she permanently banned them from the tax sales without notice of her guidelines or the opportunity to defend themselves (L.F. 74-76). Clearly, no statute, administrative rule, or other guideline required her decision to be determined after an administrative hearing. In the words of § 536.150, the Collector "rendered a decision which is not subject to administrative review, determining the legal rights … or privileges of" the Yoests and Entities, "and there is no other provision for judicial inquiry into or review of such decision …." So, her "decision may be reviewed by suit for … mandamus …." *Id.*

Just as § 536.150 says, the question in the mandamus suit as to her decision is whether it was "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." *Furlong*, 189 S.W.3d at 167-68. If it was, the Yoests and Entities would be entitled to a writ. *See, e.g.*, *State ex rel. Donelon v. Div. of Empl. Sec.*, 971 S.W.2d 869, 873-74 (Mo. App. 1998) (whether manner in which agency entered non-

contested decision violated procedural due process is reviewable by mandamus).

The Collector concentrates her response to the Yoests' and Entities' first point on criticizing their argument that her decision was unlawful because § 140.190.2 gave them an unequivocal right to attend the tax sales and she did not have power to ban them from attending the tax sales. The Yoests and Entities address those responses *infra* at 14-19.

But this case also is about another "unequivocal right" – the Yoests' and Entities' right to due process in enduring the manner in which Collector entering her ban in the first place. They explained that, *even* if § 140.190.2 did not provide them an unequivocal right to attend the tax sales, and *even* if the Collector somehow had power to ban them from the tax sales, mandamus *still* must lie because the way she levied her ban violated their rights under Art. I, § 10, to procedural due process (Aplt.Br. 28-32).

The Collector offers no response to that at all. She does not contest that the procedural due process rights the Yoests and Entities identified – to (1) clear, express written rules giving notice in advance on what is prohibited, (2) afford one accused of violating those rules the opportunity to resolve the accusation and the appropriate penalty, and (3) allow for judicial review of her determinations – are clear and unequivocal (Aplt.Br. 28-32).

And by her own admission, she violated all these rights (L.F. 75-76). She 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). This means "the Collector accused the Yoests and Entities of violating unwritten rules that she arbitrarily determined after the fact" and "then banned them from the tax sales in perpetuity as a result" and "refused to afford them any opportunity for review" (Aplt.Br. 30).

The Collector does not contest any of this, because she cannot. Her brief does not even mention procedural due process. Her only mention of the Yoests' and Entities right to due process at all is to argue, not citing the record, that the Yoests and Entities only ever invoked "substantive due process," which she argues is not implicated here (Resp.Br. 15).

The Yoests and Entities never have invoked "substantive due process." While their petition and suggestions discussed several bases why the Collector's decision was unconstitutional or otherwise unlawful, one was that the way she entered her decision – without prior rules, without notifying them in advance of her allegations, and without giving them an opportunity to represent their interests or defend themselves, all of which the Collector admitted (L.F. 74-76) – violated due process (L.F. 8-9, 17).

This invoked the Yoests' and Entities' right to *procedural* due process, not *substantive* (Aplt.Br. 29, n.2). Even if they had no unequivocal right to attend the tax sales, and even if the Collector somehow had power to ban them from attending, her decision accusing them of violating unwritten rules she arbitrarily determined after the fact and taking away their *privilege* of attending the sales, § 536.150, with no opportunity for response or review, still violated Art. I, § 10, and was unconstitutional (Aplt.Br. 28-32). Mandamus still lies. *Donelon*, 971 S.W.2d at 873-74.

### B. Section 140.190.2, R.S.Mo., provides the Yoests and Entities, who the Collector admitted are Missourians who were not delinquent on their own property taxes, a clear and unequivocal right to offer to purchase at the tax sales.

In their opening brief, the Yoests and Entities explained that § 140.190.2 provided them an unequivocal right to offer to purchase at the tax sales, as it states a general right of any person offering at the sale the required sum to be the purchaser, and then states only two classes prohibited from being purchasers: non-Missourians and people delinquent on their own taxes (Aplt.Br. 16-20). Because, as the Collector admitted below, the Yoests and Entities are Missourians who are not delinquent on their own taxes, if they offer the required sum at the sale to be the purchaser, § 140.190.2 provides they "shall be considered the purchaser" – that is, the Collector *must* consider them the purchaser (Aplt.Br. 16-20).

The Collector argues § 140.190.2 does not provide such a right. She argues it only could if it expressly stated, "Any person not delinquent on land taxes and signing an affidavit attesting to the same, who is a Missouri resident, shall have an absolute right to bid at the sale and have his or her bid accepted, should it be made for the required sum" (Resp.Br. 13). She says that because there is no such "explicit" or "specific language allowing any person or class of persons to bid," this is "hardly the stuff of mandamus" and the Yoests and Entities have committed a "logical fallacy" (Resp.Br. 10, 14).

The Collector's argument that only a statute expressly granting "an absolute right to X" can provide a right to X sufficient to support mandamus

is without merit. Mandamus always has allowed for statutory interpretation: "Whether a petitioner's right to mandamus is clearly established and presently existing is determined by examining the statute … 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).

Here, § 140.190.2's statement that any "person offering at said sale to pay the required sum for a tract shall be considered the purchaser," combined with its prohibition on non-Missourians and tax-delinquent people from being purchasers, necessarily does and must mean that any non-delinquent Missourian offering at the sale to pay the required sum must be considered the purchaser (Aplt.Br. 17-19). If the legislature had desired to create more prohibited classes – e.g., people the Collector discretionarily banned – it could have (Aplt.Br. 19). As it did not, § 140.190.2 provides the Yoests and Entities, who the Collector admits are non-delinquent Missourians, a right to offer at the sale to pay the required sum and, if sufficient, be considered the purchaser.

As authority for her contrary proposition that a statute must expressly grant "an absolute right to X," the Collector cites the Yoests' cited decisions, arguing they are "distinguishable" in this way (Resp.Br. 16). "For example," she says, "in *State ex rel. Stricker v. Hanson*, 858 S.W.2d 771, 778 (Mo. App. 1993), mandamus was appropriate to remedy the acceptance of a bid when, '*A statute provided for the manner and form of bidding, which the Office was required to follow*,' and here "no statute provides for the manner and form of

evaluating prospective bidders" (Resp.Br. 16) (quoting Aplt.Br. 24) (emphasis in the original).

*Stricker* is directly contrary to the Collector's argument. The statute at issue there, § 34.040, R.S.Mo., ***did not*** say "any person shall have an absolute right to bid on state public works contracts." Like § 140.190.2, it, too, merely provides that state contracts are to be awarded by bid, does not state who may bid, and provides for the manner in which the State must advertise the process, requiring only that it let the contract "to the lowest and best bidder." § 34.040.1-.3.

In *Stricker*, the problem was that the Office of Administration treated prospective bidders differently. 858 S.W.2d at 775-76. Despite any express statute allowing the petitioner to bid, § 34.040 nonetheless gave him the unequivocal right to the same bidding process as the rest of the public: "a fair opportunity to compete in a field where no favoritism is shown or may be shown to other contestants." *Id.* at 778 (citation omitted). Despite the lack of language in the statute stating "any person shall have an absolute right to bid on state public works contracts," this still was a clear and unequivocal right, and mandamus still lay. *Stricker* vitiates the Collector's argument.

And the Collector's attempt to distinguish the other decisions the Yoests and Entities cited (Resp.Br. 16-17) (Aplt.Br. 25-27) suffers from the same problem. In none did a statute state "any person shall have the right to do X." Nonetheless, in each one, where the citizen was legally minimally qualified to enter some public process, the agent charged with facilitating

that process had a duty to let the citizen enter, and mandamus lay when the agent refused (Aplt.Br. 25-27).

Section 140.190.2 works the same way. So long as a person is a Missouri resident and is not delinquent on his own taxes, it gives that person the right to offer the required sum and be considered the purchaser. The Yoests and Entities are Missouri residents who are not delinquent on their own taxes, and so have that clear and unequivocal right. The Collector therefore must allow them to offer the required sum and, if successful, be considered the purchaser.

### C. The Collector's decision to ban the Yoests and Entities from the tax sales was unlawful because she has no power to do so.

In their opening brief, the Yoests and Entities also explained that the Collector's decision to ban them from attending the tax sales was unlawful because an agent only has those powers expressly or implicitly provided by statute, and no statute expressly or implicitly empowered the Collector to ban them (Aplt.Br. 20-28).

In response, the Collector points to no statute expressly giving her that authority or from which it necessarily follows that she has that authority. Instead, she harps that "[t]he trial court specifically found that [she] had discretion" (Resp.Br. 15) (citing L.F. 132). Indeed – and that holding is exactly what the Yoests and Entities are challenging. In a long paragraph citing no authority, she describes what she calls "discretion upon discretion upon yet more discretion" given to her in the tax-sale process ("Resp.Br. 17-18).

Conspicuously omitted from that discussion is any showing of how the Collector has discretion to ban people from the sales. This is because she does not. As to that, § 140.190.2 is specific: upon receiving an offer for the required sum, that person "shall be considered" the purchaser. But who "shall" do that "considering"? Obviously the Collector, the person who "shall commence … and shall continue" the sale, § 140.190.1, and "shall" issue the "certificate of purchase". § 140.250.2, R.S.Mo. The Collector has no discretion to ban persons from the tax sales. The trial court erred in holding otherwise.'

Finally, citing *KAT Excavation, Inc. v. City of Belton*, 996 S.W.2d 649, 652 (Mo. App. 1999), the Collector seeks to analogize this case to a "public works contract," in which "there is no right of the lowest bidder to get the contract" and "the public official has discretion regarding which bid to accept" and "may consider the honesty and integrity of the bidder and the bidder's previous conduct" (Resp.Br. 14). But she leaves out that in the public works contract context, all these principles are expressly statutory: the municipal one at issue in *KAT*, § 88.700, like § 34.040.3, which governs the State, requires that those contracts be awarded to the "lowest ***and best*** bidder." (Emphasis added). That express statutory language is what empowers the bid-receiving official or body with discretion. *Id.*

Here, though, when it comes to bidding, § 140.250.1 expressly directs that the "county collector shall ... sell [the property] **to the highest bidder**," with no qualification that it also be the "best" bidder. So, unlike the public-works contract context, the Collector ***has no discretion*** to determine which

bid to accept or consider what she subjectively thinks of the bidder. Instead, she is expressly directed by statute to accept the highest bid, period.

Also, in the public works context, what the Collector did – banning the Yoests and Entities from bidding – is called "debarment." *Asamoah-Boadu v. State*, 328 S.W.3d 790, 792-93 (Mo. App. 2010). It is a process governed by express regulations in 1 CSR § 40-1.060, promulgated under rulemaking authority in § 34.050, R.S.Mo., and combines explicit existing rules, notice, opportunity for a hearing, administrative review, and an opportunity to cure.

The Collector's actions bear no relation to the clear and certain due process for debarring entities from public-works contract bidding. Her decision to ban the Yoests and Entities from the tax sales was unlawful: it was entirely without authority, was contrary to the statutes governing her role in the tax sales, and cannot stand. Mandamus lies to command her to lift it.

## 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,

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## 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 5,111 words.

/s/Jonathan Sternberg
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## Certificate of Service

I certify that, on August 3, 2017, I filed a true and accurate Adobe PDF copy of this reply brief of the appellants via the Court's electronic filing system, which notified the following of that filing:

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