

## Jones v. Mayer Revisited

57 CLEVELAND STATE L. REV. (NO. 2) (2009)

By Mira Tanna\*



Just off Lewis and Clark Boulevard, indeed, only a few miles from where Lewis and Clark began their famed expedition at the confluence of North America's great rivers, lies Paddock Woods, a subdivision in unincorporated Saint Louis County. Built in the 1960s, these 175 or so middle class homes have well kept lawns, though one can see that some of the houses are now due for a fresh coat of paint or a new roof. This is not a complete cookie cutter subdivision: the ranch homes are broken up by a two-story home on every block; each house seems to have its own character, with different colors of brick used for the facades, and quiet cul-de-sacs break up the grid. The streets sport British names: Sheffield, Coventry, Foxshire and the small square around which a number of homes face is pretentiously called Hyde Park. This park, under the control of the subdivision itself, lists as its owner "Alfred H. Mayer et al Trustees," one of the few reminders of the builder whose refusal to sell a home to Mr. Joseph Lee Jones made his name famous among civil rights advocates.

*Jones v. Mayer*, decided by the Supreme Court in 1968, was the first Supreme Court case to rule that the Civil Rights Act of 1866—which guarantees the same right of all citizens to inherit, purchase, lease, sell, hold, and convey real and personal property as is enjoyed by white citizens—applies not only to actions of the state but also to private parties.<sup>1</sup> It is easy to celebrate the *Jones v. Mayer* landmark fair housing case as an untarnished legal victory for

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<sup>1</sup> *Jones v. Mayer*, 392 U.S. 409 (1968).

fair housing, part of our nation's inexorable progress towards racial equality. But real life is not usually so clear cut, and neither is the story behind this case.

In 1961, an interracial group of activists began meeting together in University City to talk about what they could do to help open neighborhoods to blacks in the St. Louis area.<sup>2</sup> They formed an organization called the Greater St. Louis Committee for Freedom of Residence.<sup>3</sup> As one former staff person remembers, they made contact with the Home Builders Association and sought funding from them.<sup>4</sup> The Home Builders, afraid that openly supporting Freedom of Residence would create a backlash against their individual businesses, decided to provide an anonymous donation to the group.<sup>5</sup> They arranged for members of the organization to go to Forest Park (St. Louis City's largest park and site of the 1904 World's Fair) and to locate a brown paper bag under a tree which contained thousands of dollars, enough to hire their first staff person, executive secretary Ruth Porter.<sup>6</sup> In its first five years of existence, the Committee was successful in finding homes for 600 black families in 130 neighborhoods and thirty-seven municipalities throughout the St. Louis area.<sup>7</sup>

One of the largest home builders at the time was the Alfred H. Mayer Company.<sup>8</sup> Mr. Mayer had earlier co-founded a family-owned construction company called Mayer Raisher Mayer, and, then in 1961, struck out on his own.<sup>9</sup> He built a number of subdivisions, mainly in north Saint Louis County, including Paddock Forest, Paddock Meadows, Pheasant Run and Wedgewood.<sup>10</sup>

According to his family, the Alfred Mayer Company was one of the few developers that would sell homes to black people,<sup>11</sup> but he experienced problems when he did so. As soon as he sold to a black family, white families would leave or look elsewhere.<sup>12</sup> He sought and

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<sup>2</sup> Interview with Danny Kohl, Biology Professor Emeritus, Washington University, in St. Louis, Mo. (2006). Professor Kohl recalls that Ruth Porter and others met in his living room and that is how the organization began. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Telephone Interview with Hedy Epstein, Former Employee of the Greater St. Louis Freedom of Residence, (Feb. 18, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> University of Missouri – St. Louis, Western Historical Manuscripts Collection, *Summary of Records of Freedom of Residence, Greater St. Louis Committee, Records of 1962 – 1969*, available at <http://www.umsl.edu/~whmc/guides/whm0438.htm> (last visited Mar. 5, 2009).

<sup>8</sup> *Alfred H. Mayer Was Home Builder in Area*, ST. LOUIS POST-DISPATCH, May 3, 2002, at B5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Telephone Interview with Vivien Mayer, Wife of Alfred H. Mayer (Feb. 18, 2009); Telephone Interview with Jerry Mayer, Brother of Alfred H. Mayer (Feb. 18, 2009).

<sup>12</sup> *Id.*

received commitments from the FHA to back mortgages for his developments.<sup>13</sup> However, when he created Paddock Woods, he did not get an FHA commitment.<sup>14</sup>

We may never know exactly what happened next, since Mr. Mayer passed away in 2002, and others' memories are hazy and conflicting. It may be that Mr. Mayer felt he was taking more risk with this new development and was worried about making his bottom line.<sup>15</sup> In any case, when Joseph Lee Jones and wife Barbara Jo Jones, an interracial couple who had visited a display home at Paddock Woods, expressed interest in purchasing a lot at 7417 Hyde Park for \$28,195, they were told that the company would not sell to them because of Mr. Jones' race.<sup>16</sup> Joseph Jones had a business as a bail bondsman and Barbara was a social worker—the couple could afford to purchase the home.<sup>17</sup> Perhaps Mr. Mayer offered them a home in another of his developments. In any case, they contacted Freedom of Residence, whose staff attorney Sam Liberman agreed to represent them.

Liberman, lead attorney on the case, argued that the Civil Rights Act of 1866 prohibited discrimination not only by the state, but also by private parties.<sup>18</sup> The plaintiffs also argued that the private subdivision of Paddock Woods had, in fact, been given the powers of the state by virtue of the authority it had to build and name roads, provide sewer and essential services, ensure access to schools, et cetera, and therefore was required to provide equal protection under the law.<sup>19</sup> Civil rights attorneys at the time considered the § 1982 claim to be ancillary to the plaintiff's chief argument.<sup>20</sup> According to a *New York Times* article at the time that discussed the issue:

[The Joneses'] offer [to purchase a home in Paddock Woods] was rejected.

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<sup>13</sup> Audio recording: Oral Arguments Before the Supreme Court of the United States in *Jones v. Mayer*, available at [http://www.oyez.org/cases/1960-1969/1967/1967\\_645/](http://www.oyez.org/cases/1960-1969/1967/1967_645/) (last visited Mar. 5, 2009); *Jones v. Mayer*, 255 F. Supp. 115, 127 (D.C. Mo. 1966).

<sup>14</sup> *Id.* This was significant because it established that the discrimination involved in this case was solely between private parties and not endorsed by the state.

<sup>15</sup> Mr. Mayer's wife, Vivien Mayer, seemed to think that the entire case was set up, but confided that she did not know a lot of the details and it had happened long ago. Telephone Interview with Vivian Mayer, *supra* note 11. The defendant's brother, Jerry Mayer, seemed to remember that the Joneses were interested in purchasing in a development where there was more risk to the Alfred H. Mayer Co., and that Mr. Mayer, feeling he was on shaky ground, denied them and encouraged them to buy in another development of his. Telephone Interview with Jerry Mayer, *supra* note 11.

<sup>16</sup> *Man in '68 Bias Case Slain, Brother Held*, N.Y. TIMES, May 19, 1974, at 58 [hereinafter *Man in '68*].

<sup>17</sup> Ollie Malone, Jr. Jones vs. Alfred H. Mayer: The Rest of the Story 1 (unpublished paper for Principles of Real Estate I, on file with author). Malone spoke to Sam Liberman about the case, who kept in touch with Barbara Jones for a number of years after the case was resolved. *Id.* at 2.

<sup>18</sup> *Mayer*, 255 F. Supp. at 118-19.

<sup>19</sup> *Id.* at 127-28.

<sup>20</sup> Fred P. Graham, *The Law: The Courts May Settle 'Open Housing,'* N.Y. TIMES, Oct. 8, 1967, at E7.

Congress at that time had not even begun to consider the ill-fated fair housing law that succumbed to a Senate filibuster in 1966. So the Joneses' lawyer tried a long shot: He sued the developers on the theory that existing statutes [sic] and constitutional amendments, read in the light of the latest Supreme Court decisions, already add up to an enforceable fair housing law.<sup>21</sup>

The 1866 Civil Rights Act had only been used in one other federal court case dealing with private parties, as opposed to state actors, but the verdict was favorable.<sup>22</sup> In 1903, a federal judge in Arkansas considered, in *United States v. Morris*, whether a private conspiracy by white citizens to prevent a "Negro" from leasing a farm violated § 1982, and found that it did.<sup>23</sup> The case was never appealed.<sup>24</sup>

All parties who remember this suit seem to agree that Mr. Mayer welcomed this lawsuit. According to his wife Vivien Mayer, "The story that I heard from my husband was that they did it deliberately to try and force the other builders to sell to blacks in other communities."<sup>25</sup> Jerry Mayer recalls that his brother saw this as a test case so that he wouldn't be the only builder selling to blacks.<sup>26</sup> Unlike many fair housing cases, the defendant did nothing to dispute the facts of this case: that Mr. Jones had been denied because of his race.<sup>27</sup> And a former Freedom of Residence staff person recalls that when the organization sent out an appeal for funds, they received a check for \$100 from none other than Alfred H. Mayer, along with a note stating "I hope I will lose this case."<sup>28</sup>

But Mayer won. He won in the Eastern District of Missouri.<sup>29</sup> He won in the Eighth Circuit Court of Appeals.<sup>30</sup> Both held that the Civil Rights Act of 1866 only applied to state

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<sup>21</sup> *Id.*

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*; U.S. v. Morris, 125 F. 322, 331 (1903).

<sup>24</sup> Upon Shepardizing this case in LexisNexis, there is no indication that this case was ever appealed, or any further subsequent history.

<sup>25</sup> Telephone Interview with Vivian Mayer, *supra* note 11.

<sup>26</sup> Telephone Interview with Jerry Mayer, *supra* note 11.

<sup>27</sup> Sam Liberman, Former Defense Attorney for Alfred H. Mayer, Comments Made in First Plenary Regarding America's Housing and Immigration Challenges at the Washington University Law School Symposium: Access to Equal Justice (Apr. 17, 2008), *available at* <http://law.wustl.edu/clinicaled/index.asp?id=6537> (video recording) (last visited Mar. 5, 2009).

<sup>28</sup> Telephone Interview with Hedy Epstein, Former Employee of the Greater St. Louis Freedom of Residence, (Feb. 18, 2009).

<sup>29</sup> *Mayer*, 255 F. Supp. at 130.

<sup>30</sup> *Jones v. Mayer*, 379 F.2d 33, 45-46 (8th Cir. 1967).

action, not to private parties.<sup>31</sup> And then, on April 1st and 2nd of 1968, the case was heard before the Supreme Court.<sup>32</sup> Just nine months earlier, Thurgood Marshall had been appointed as the first African American justice on the Court.<sup>33</sup> In February, the Kerner Commission had released its report on the causes of riots in our cities and called for the passage of a Fair Housing Act.<sup>34</sup> Senators Walter Mondale and Edward Brooke led the effort to pass the Act in the Senate, and on March 4, 1968, managed to break through a Senate filibuster to pass the bill.<sup>35</sup> But it languished in the House.<sup>36</sup> In debates on the measure, references were made to the fair housing case that the Supreme Court had agreed to hear and there was speculation about whether a Fair Housing Act would be needed if the Court were to overturn the Eighth Circuit decision in *Jones v. Mayer*.<sup>37</sup> Likewise, in oral arguments on *Jones v. Mayer* there was also discussion about how relevant this case would be should a Fair Housing Act pass.<sup>38</sup>

Then, just two days after oral arguments were heard, shots rang out in Memphis. Dr. Martin Luther King, Jr. had been killed.<sup>39</sup> Riots erupted.<sup>40</sup> The National Guard troops encircled the Capitol as the House decided to reverse course and pass the Fair Housing Act.<sup>41</sup> President Johnson signed it into law just one week after King's assassination.<sup>42</sup> Finally, on June 17th, the Court delivered its sweeping opinion in the case of *Jones v. Alfred H. Mayer Co.*, reversing the Eighth Circuit, and holding that the Civil Rights Act, passed a century earlier, outlawed all public and private discrimination in the sale and rental of property based on race.<sup>43</sup>

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<sup>31</sup> *Mayer*, 255 F. Supp. at 130; *Mayer*, 379 F.2d at 44-45.

<sup>32</sup> *Mayer*, 392 U.S. at 409.

<sup>33</sup> Fred P. Graham, *Senate Confirms Marshall As the First Negro Justice: 10 Southerners Oppose High Court Nominee in 69-to-11 Vote*, N.Y. TIMES, Aug. 31, 1967, at 1.

<sup>34</sup> Senator Edward M. Kennedy, *Fair Housing: The Battle Goes On*, 4 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH 20, 20 (No.3 1999), available at <http://www.huduser.org/Periodicals/CITYSCPE/VOL4NUM3/kennedy.pdf> (last visited Mar. 5, 2009).

<sup>35</sup> *Id.* at 19-20.

<sup>36</sup> *See id.* at 20.

<sup>37</sup> *See generally* Graham, *supra* note 20 (“If the Court should hand down the sweeping decision the Jones appeal asks, the effect would be to eliminate the need for new fair housing legislation.”).

<sup>38</sup> Oral Argument, *supra* note 13.

<sup>39</sup> Kennedy, *supra* note 34.

<sup>40</sup> *Id.*

<sup>41</sup> Brian Patrick Larkin, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1624 (2007).

<sup>42</sup> Kennedy, *supra* note 34.

<sup>43</sup> *Mayer*, 392 U.S. at 413.

But what kind of justice was this? Reading the opinion and the concurrence, one gets the feeling of utter failure rather than victory. Justice Douglas' concurrence is a litany of discrimination, subjugation and oppression that black people have suffered in the United States since Congress passed the Civil Rights Act of 1866 to remove the "badges" or "customs" of slavery.<sup>44</sup> The majority opinion, which quotes at length the legislative history of the Civil Rights Act of 1866, makes clear that Illinois Senator Trumbull, the prime sponsor of the bill, saw it as a way to "break down *all* discrimination between black men and white men."<sup>45</sup> Trumbull, an unsung hero for civil rights, kept pressing for a law which would guarantee those rights flowing from the Thirteenth Amendment.<sup>46</sup> He is quoted in the opinion as saying:

And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, *to buy and sell when they please*, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights . . .*<sup>47</sup>

Just weeks after the ratification of the 13th Amendment, Trumbull did introduce the Act.<sup>48</sup> Congress was able to pass the statute over President Andrew Johnson's veto, and reenacted it two years later after the passage of the 14th Amendment.<sup>49</sup> And although it had been interpreted to prevent state-sponsored discrimination in property rights (*Hurd v. Hodge*<sup>50</sup>), it went virtually unused for a century. In its opinion, the Court felt the need to emphasize that, as Attorney General Ramsey Clark had argued: "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today."<sup>51</sup>

Would *Jones v. Mayer* have been decided this way if Dr. Martin Luther King, Jr. had not been assassinated? Early on, civil rights organizations were not optimistic about its chances. Attorney Sam Liberman remembers how Freedom of Residence went to the NAACP,

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<sup>44</sup> *Id.* at 444-49.

<sup>45</sup> *Id.* at 432. Interestingly, Senator Trumbull lived in Belleville, Illinois, just across the river from St. Louis. GPO ACCESS.ORG, BIOGRAPHICAL DIRECTORY 2064, available at <http://www.gpoaccess.gov/serialset/cdocuments/hd108-222/t.pdf> (last visited Mar. 5, 2009).

<sup>46</sup> *Mayer*, 392 U.S. at 430-32, 440.

<sup>47</sup> *Id.* at 430 (emphasis added).

<sup>48</sup> *Id.* at 431.

<sup>49</sup> *Id.* at 439.

<sup>50</sup> *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948).

<sup>51</sup> *Mayer*, 392 U.S. at 437.

American Jewish Committee and other national organizations after the Joneses came to them, looking for help, and “nobody thought it was a winner” so they didn’t want to get involved.<sup>52</sup> It wasn’t until the Supreme Court accepted the petition for writ of certiorari that national organizations started to weigh in, and a large number of amicus briefs were filed in the case.<sup>53</sup> Other groups were guardedly optimistic. In a 1967 letter to the editor in *The New York Times*, George R. Metcalf, president of the National Committee Against Discrimination in Housing, wrote: “For when *Jones vs. Mayer* is appealed to [the Warren Court] and decision of the Eighth Circuit Court is conceivably reversed, the nation won’t have to wait ‘for a reluctant Congress’ to act.”<sup>54</sup> The timing of this case, indeed, seems critical to its outcome.

On a personal level, too, the Jones’ victory was hollow. After three years of litigation, they finally had been vindicated. Yet the family never did buy a home in Paddock Woods.<sup>55</sup> On October 28, 1968, the parties reached an out of court settlement in the case in which the Joneses agreed “that the actions of the Alfred H. Mayer Co. were not motivated by racial prejudice.”<sup>56</sup> The Alfred H. Mayer Company agreed to pay all legal costs and also agreed to pay the couple \$2000 to settle the claims.<sup>57</sup> The marriage between Joseph and Barbara Jones did not last. Although they maintained an amicable relationship, they divorced and Barbara moved out of state with their daughter.<sup>58</sup> After the case was resolved, Mr. Jones’ bail bondsman business was the subject of investigation into drugs and illegal activity.<sup>59</sup> Mr. Jones’ name was eventually cleared.<sup>60</sup> Then, tragically, in 1974, at the age of 43, Joseph Lee Jones was stabbed to death by his brother, 24-year-old J.D. Jones, in his home in Florissant, Missouri, not far from Paddock Woods.<sup>61</sup>

As for the Mayer Company, Vivien Mayer, remembering that her husband wanted to take this on as a test case, said: “Al basically took the fall for the deal and it damaged his reputation.”<sup>62</sup> Not long after the suit ended, Mr. Mayer moved his family to Houston.<sup>63</sup>

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<sup>52</sup> Liberman, *supra* note 27.

<sup>53</sup> *Id.*

<sup>54</sup> George R. Metcalfe, Letter to the Editor, N.Y. TIMES, Aug. 3, 1967.

<sup>55</sup> *Man in '68, supra* note 16.

<sup>56</sup> *Couple Reaches Settlement in Landmark Housing Case*, N.Y. TIMES, Oct. 29, 1968, at 52 [hereinafter *Couple Reaches Settlement*]. It is worthwhile to note that the couple argued in the court they had damages of \$50 from the act of discrimination. Transcript of Oral Argument, *Mayer*, 392 U.S. 409 (No. 645).

<sup>57</sup> *Couple Reaches Settlement, supra* note 56.

<sup>58</sup> *Man in '68, supra* note 16.

<sup>59</sup> *Id.*

<sup>60</sup> Malone, *supra* note 17, at 1.

<sup>61</sup> *Man in '68, supra* note 16.

<sup>62</sup> Telephone Interview with Vivian Mayer, *supra* note 11.

<sup>63</sup> *Id.*

When asked whether it was because of this case, his wife said: “I don’t think that that was the total reason. There were better opportunities in Houston for home building.”<sup>64</sup> Alfred H. Mayer passed away from complications of Parkinson’s disease in 2002.<sup>65</sup> Interestingly, Mr. Mayer’s brother, Jerry Mayer, wrote a play about his experiences with integrating another suburban area in St. Louis County.<sup>66</sup> In 1963, Jerry and his wife sold their house in Olivette to the first African American family to live in that area, over the protests of their neighbors.<sup>67</sup> This historical drama (“Black and Blustein”) ends happily—the African American family moved in, the neighbors calmed down and got to know each other, and the neighborhood diversified in a stable manner and remains so to this day.

Concerning Paddock Woods, the outcome, thus far, is mixed. It is a neighborhood where, for decades, middle class blacks and whites have lived together and gotten along with each other. Homeowners I spoke with talked about the racial change in the subdivision. One white woman, who said she had lived there for thirty years or so, said that the area is mostly black, and it is a quiet and nice neighborhood. The 2000 census figures confirm that the majority of the subdivision is black, though it maintains a significant white population.<sup>68</sup> An African American man that had lived there since the 1980s said that the neighborhood had been changing and becoming “more black.”<sup>69</sup> When I asked why this was happening he said that he wasn’t sure, that he had heard some people say that real estate agents were steering blacks here and whites away, but that he hadn’t had any direct experience with that, and that it could also be that as more and more blacks moved out of St. Louis City, that some would come here because they had a friend or a relative living here.<sup>70</sup> In fact, the Metropolitan St. Louis Equal Housing Opportunity Council sued a large real estate company in 1998 for steering practices in North St. Louis County, in the same general area as Paddock Woods.<sup>71</sup> None of the residents I spoke with had ever heard of the *Jones v. Mayer* case.

Although this subdivision perhaps didn’t experience the instant white flight of which Alfred Mayer had complained about, it seems there has been a gradual turning over. When white families were ready to downsize or moved out of the area, they left and were replaced by black families. New white families weren’t attracted to this area, especially white families with children, or were steered towards other areas. The neighboring elementary school, Townsend Elementary, testifies to this fact: in 2008, it had 343 African American students, six

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Black Jack, Missouri 2000 Census, *available at*

[http://www.co.st-louis.mo.us/plan/dempro/Black\\_Jack.pdf](http://www.co.st-louis.mo.us/plan/dempro/Black_Jack.pdf) (last visited Mar. 27, 2009).

<sup>69</sup> Interview with anonymous member of the Paddock Woods community, St. Louis, Mo. (Feb. 17, 2009).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*



white students and two Asian students.<sup>72</sup> This gradual resegregation in housing and schools is all too familiar to fair housing practitioners.

What the *Jones v. Mayer* decision challenges is the racial narrative we tell of steady progress towards racial enlightenment in America, a slow improvement in the rights of African Americans, from the Emancipation Proclamation to *Brown v. the Board of Education*, the modern day civil rights movement, and the election of Barack Obama as the first African American president. In fact, the movement towards racial equality has not been steady. The aborted period of Reconstruction—during which the Civil Rights Act of 1866 was passed—quickly led to a great retreat in race relations, from which the country was unable to recover until the civil rights movement of the 1950s and 1960s. Despite the existence of this early Civil Rights Act, in the end, fair housing enforcement was realized only because of the supreme sacrifice of its chief proponent. Read this way, *Jones v. Mayer* is less an affirming decision than a token down payment on a century old debt.

A century and a half after Senator Trumbull worked to pass a law to eradicate all discrimination between blacks and whites, we are still working to remove badges of slavery. Many are the pressures that seek to retreat from the goal of racial equality. Let us continue to work, not only to enforce our existing fair housing laws, but to find ways to create truly balanced and integrated living patterns and to finally dismantle the system of racial segregation that perpetuates racial inequality,

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<sup>72</sup> Mo. Dep't of Elementary and Secondary Educ., *2007-2008 School Accountability Report Card, Hazelwood Sch. Dist., Townsend Elementary Sch., available at* <http://dese.mo.gov/planning/profile/building/arsd0960884250.html> (last visited Mar. 10, 2009).