

MISSOURI MUNICIPAL ATTORNEYS ASSOCIATION, 2018 SUMMER SEMINAR

EMINENT DOMAIN: PROCEDURES AND REQUIREMENTS FOR
OBTAINING AN ORDER OF CONDEMNATION

JULY 30, 2018

PAUL G. HENRY
DENLOW & HENRY
(314) 725-5151
pghenry@denlow.com

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SOURCES OF LAW: CONSTITUTION, STATUTES AND RULES

1. **Missouri Constitution**

- A. Article 1, Section 26: “Compensation for property taken by eminent domain - condemnation juries - payment - railroad property”
 - (a) “That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.”

- B. Article 1, Section 28: “Limitation on taking of private property for private use--exceptions --public use a judicial question.”
 - (a) “That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.”

2. **Missouri Court Rule 86, “Condemnation Proceedings”**

- A. Rule 86.02: Venue
“All proceedings for condemnation must be brought in the circuit court of the county and city of this state as provided by statute.”

- B. Rule 86.03: Parties
“The individual or individuals, village trustees, corporation or organization, private or municipal, that has authority to bring a condemnation proceeding shall be the plaintiff or plaintiffs in such condemnation proceedings; the owners of any or all of the property that is to be condemned, or the use of which is to be condemned, or which will be benefited by an improvement involved in a condemnation proceeding, or who may have an interest therein may be made parties defendant. If the proceedings seek to affect the properties of persons under guardianship, the guardians must be made

parties defendant. If the present owner of any land to be affected has a less estate than a fee, the person or persons having the next vested estate in reversion or in remainder and having future interest may, at the option of the petitioners, be made a party defendant; but, if any one having an interest in such property is not made a party, that person's interest shall not be bound by the proceedings. It shall not be necessary to make any persons parties defendants in respect to their ownership unless they are either (1) in actual possession of the property to be affected, claiming title or (2) have a title to the premises appearing of record upon the proper records of the county in which they lie. When legislation must be passed by a municipality before it is permitted to condemn property, it shall not be required in any case to bring any persons into the condemnation proceedings other than the owners of the property, or those interested therein, who were such at the time of the taking of effect of said legislation, and the parties claiming or holding through, or under, such owners, or parties interested, or any of them shall be bound by the proceedings as fully as if they were brought in.”

C. Rule 86.04: “Petition – Contents”

“The petition shall contain a description of the property or right which the plaintiff desires to acquire, use, or extinguish; if a dam is to be constructed across any watercourse, the petition shall contain the name of the watercourse, a description of the point at which it is desired to erect such dam and a description of any installations which it is proposed to erect in connection with the dam; the names of the owners of the property to be condemned, if known, or, if unknown, a statement that they are unknown; a statement of the foundation of the plaintiff's right to condemn the property involved in the condemnation proceedings; a general statement of the nature of the business, improvement or use for which the property is to be taken; a statement either that the condemner or owner can not agree on the proper compensation to be paid or that an owner is incapable of contracting, is unknown, can not be found or is a non-resident of the state; if any right of way be sought, the location and general route thereof shall be described and a copy of the construction plans required by Section 227.050 of the Revised Statutes of Missouri, 1949, shall be filed in the circuit clerk's office and made a part of each condemnation petition by reference; when property will be benefited by an improvement in connection with which condemnation proceedings are brought, a map of the benefit district involved, and a copy of any local legislation establishing the district shall be filed with the petition and made a part thereof; a prayer for the appointment of three disinterested freeholders, as commissioners, to assess the damages which such owners may severally sustain because of the condemnation of the property, and the use to which it is to be put and to

assess benefits in those instances in which it is proper to make such assessments.”

- D. Rule 86.05: “Summons, When to Issue, How Served - Publication, When”
“Upon the filing of the petition, a summons shall be issued giving the owners of the property involved at least ten days' notice of the time and place when said petition shall be heard, which summons shall be served in the manner provided for by these rules in ordinary civil cases. If the name, residence, or whereabouts of any of the owners be unknown, or if any of the owners do not reside within the state or for any other reason personal service cannot be had on them within the state, notice of the time and place of hearing of the petition shall be given by publication for three weeks consecutively, prior to the time of the hearing of the petition, in a newspaper published in the county in which the proceedings are pending, if one is published in said county, or, if no newspaper is published in the county, or the publishers shall refuse to publish the same, then by posting said notice for three consecutive weeks at the door of the courthouse of the county wherein the lands or any portion of them lie.”
- E. Rule 86.051: “Publication of Notice - How Often”
“The notice by publication referred to in Rule 86.05 shall be required to be published only once each week, but shall be published on the same day of each week.”
- F. Rule 86.07: “Different Owners May be Joined in One Petition”
“The owners of any numbers of tracts may be joined in one petition.”

3. **Statutes**

- A. Section 523.010: “Lands may be condemned, when — petition — parties — power of public utility to condemn certain lands, limitation. “
 - 1. In case land, or other property, is sought to be appropriated by any road, railroad, street railway, telephone, telegraph or any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power, including the construction, when that is the case, of necessary dams and appurtenant canals, flumes, tunnels and tailraces and including the erection, when that is the case, of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations or any oil, pipeline or gas corporation engaged in the business of transporting or carrying oil, liquid fertilizer solutions, or gas by means of pipes or pipelines laid underneath the surface of the ground, or other corporation created under the laws of this state for public use, and such corporation and the owners cannot agree upon

the proper compensation to be paid, or in the case the owner is incapable of contracting, be unknown, or be a nonresident of the state, such corporation may apply to the circuit court of the county of this state where such land or any part thereof lies by petition setting forth the general directions in which it is desired to construct its road, railroad, street railway, telephone, or telegraph line or electric line, including, when that is the case, the construction and maintenance of necessary dams and appurtenant canals, tunnels, flumes and tailraces and, when that is the case, the appropriation of land submerged by the construction of such dam, and including the erection and maintenance, when that is the case, of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipeline, liquid fertilizer solution pipeline, or gas line over or underneath the surface of such lands, a description of the real estate, or other property, which the company seeks to acquire; the names of the owners thereof, if known; or if unknown, a pertinent description of the property whose owners are unknown and praying the appointment of three disinterested residents of the county, as commissioners, or a jury, to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such road, railroad, street railway, telephone, telegraph line, or electrical line including damages from the construction and maintenance of necessary dams and the condemnation of land submerged thereby, and the construction and maintenance of appurtenant canals, flumes, tunnels and tailraces and the erection and maintenance of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipeline, or gas line over or underneath the surface of such lands; to which petition the owners of any or all as the plaintiff may elect of such parcels as lie within the county or circuit may be made parties defendant by names if the names are known, and by the description of the unknown owners of the land therein described if their names are unknown.

2. If the proceedings seek to affect the lands of persons under conservatorship, the conservators must be made parties defendant. If the present owner of any land to be affected has less estate than a fee, the person having the next vested estate in remainder may at the option of the petitioners be made party defendant; but if such remaindermen are not made parties, their interest shall not be bound by the proceedings.

3. It shall not be necessary to make any persons party defendants in

respect to their ownership unless they are either in actual possession of the premises to be affected claiming title or having a title of the premises appearing of record upon the proper records of the county.

4. Except as provided in subsection 5 of this section, nothing in this chapter shall be construed to give a public utility, as defined in section 386.020, or a rural electric cooperative, as provided in chapter 394, the power to condemn property which is currently used by another provider of public utility service, including a municipality or a special purpose district, when such property is used or useful in providing utility services, if the public utility or cooperative seeking to condemn such property, directly or indirectly, will use or proposes to use the property for the same purpose, or a purpose substantially similar to the purpose for which the property is being used by the provider of the public utility service.

5. A public utility or a rural electric cooperative may only condemn the property of another provider of public utility service, even if the property is used or useful in providing utility services by such provider, if the condemnation is necessary for the public purpose of acquiring a nonexclusive easement or right-of-way across the property of such provider and only if the acquisition will not materially impair or interfere with the current use of such property by the utility or cooperative and will not prevent or materially impair such provider of public utility service from any future expansion of its facilities on such property.

6. If a public utility or rural electric cooperative seeks to condemn the property of another provider of public utility service, and the conditions in subsection 4 of this section do not apply, this section does not limit the condemnation powers otherwise possessed by such public utility or rural electric cooperative.

7. Suits in inverse condemnation or involving dangerous conditions of public property against a municipal corporation established under Article VI, Section 30(a) of the Missouri Constitution shall be brought only in the county where such land or any part thereof lies.

- B. Section 523.020: “Different owners may be joined in one petition.”
Any number of owners, residents in the same county or circuit, may be joined in one petition, and the damages to each shall be separately assessed by the same commissioners.

- C. Section 523.030: “Summons, when to issue, how served — publication.”
Upon the filing of the petition, a summons shall be issued, giving such owner at least ten days' notice of the time when said petition will be heard, which summons shall be served by the sheriff of the county, in the same manner as writs of summons are or may be by law required to be served. If the name or residence of the owner is unknown, or if the owners, or any of them, do not reside within the state, notice of the time of hearing the petition, reciting the substance of the petition and the day fixed for the hearing thereof, shall be given by publication once each week for three consecutive weeks prior to the time of hearing the petition, in a newspaper published in the county in which the proceedings are pending, if one is published in the county, or if no newspaper is published in the county, or the publisher shall refuse to publish the same on tender of his usual charges for advertising, then by posting up said notice for three consecutive weeks at the door of the courthouse of the county wherein the lands or any portion of them lie.
- D. Section 523.250: “Notice of intended acquisition — mailing requirements.”
1. At least sixty days before filing of a condemnation petition seeking to acquire an interest in real property, the condemning authority shall provide the owner of record of such property with a written notice concerning the intended acquisition. Such notice shall include:
 - 1) Identification of the interest in real property to be acquired and a statement of the legal description or commonly known location of the property;
 - 2) The purpose or purposes for which the property is to be acquired;
 - (3) A statement that the property owner has the right to:
 - (a) Seek legal counsel at the owner's expense;
 - (b) Make a counteroffer and engage in further negotiations;
 - (c) Obtain such owner's own appraisal of just compensation;
 - (d) Have just compensation determined preliminarily by court-appointed condemnation commissioners and, ultimately, by a jury;
 - (e) Seek assistance from the office of the ombudsman

- for property rights created under section 523.277;
- (f) Contest the right to condemn in the condemnation proceeding; and
- (g) Exercise the rights to request vacation of an easement under the procedures and circumstances provided for in section 527.188.

An owner may waive the requirements of this subsection prescribed above in a writing executed by the owner.

2. The written notice required by this section shall be deposited in the United States mail, certified or registered, and with postage prepaid, addressed to the owner of record as listed in the office of the city or county assessor for the city or county in which the property is located. The receipt issued to the condemning authority by the United States Post Office for certified or registered mail shall constitute proof of compliance with this notice requirement; provided, however, that nothing in this section shall preclude a condemning authority from proving compliance with this notice requirement by other competent evidence.

E. Section 523.253: “Written offer, requirements — explanation of determination of property value.”

1. A condemning authority shall present a written offer to all owners of record of the property. The offer must be made at least thirty days before filing a condemnation petition and shall be held open for the thirty-day period unless an agreement is reached sooner. The offer shall be deposited in the United States mail, certified or registered, and with postage prepaid, addressed to the owner of record as listed in the office of the city or county assessor for the city or county in which the property is located. The receipt issued to the condemning authority by the United States Post Office for certified or registered mail shall constitute proof of compliance with this requirement; provided, however, that nothing in this section shall preclude a condemning authority from proving compliance with this requirement by other competent evidence. Nothing in this section shall prohibit the parties from negotiating during the thirty-day period.

2. (1) Any condemning authority shall, at the time of the offer, provide the property owner with an appraisal or an explanation with supporting financial data for its determination of the value of the property for purposes of the offer made in subsection 1 of this

section.

- (2) Any appraisal referred to in this section shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.

F. Section 523.256: “Good faith negotiation required, findings, remedies.”
Before a court may enter an order of condemnation, the court shall find that the condemning authority engaged in good faith negotiations prior to filing the condemnation petition. A condemning authority shall be deemed to have engaged in good faith negotiations if:

- (1) It has properly and timely given all notices to owners required by this chapter;
- (2) Its offer under section 523.253 was no lower than the amount reflected in an appraisal performed by a state-licensed or state-certified appraiser for the condemning authority, provided an appraisal is given to the owner pursuant to subsection 2 of section 523.253 or, in other cases, the offer is no lower than the amount provided in the basis for its determination of the value of the property as provided to the owner under subsection 2 of section 523.253;
- (3) The owner has been given an opportunity to obtain his or her own appraisal from a state-licensed or state-certified appraiser of his or her choice; and
- (4) Where applicable, it has considered an alternate location suggested by the owner under section 523.265.

If the court does not find that good faith negotiations have occurred, the court shall dismiss the condemnation petition, without prejudice, and shall order the condemning authority to reimburse the owner for his or her actual reasonable attorneys' fees and costs incurred with respect to the condemnation proceeding which has been dismissed.

G. Section 523.265: “Alternative locations for condemnation, procedure.”
With regard to property interests acquired by condemnation or negotiations in lieu of the exercise thereof, within thirty days of receiving a written notice sent under section 523.250, the landowner may propose to the condemning authority in writing an alternative location for the property to be condemned, which alternative

location shall be on the same parcel of the landowner's property as the property the condemning authority seeks to condemn. The proposal shall describe the alternative location in such detail that the alternative location is clearly defined for the condemning authority. The condemning authority shall consider all such alternative locations. This section shall not apply to takings of an entire parcel of land. A written statement by the condemning authority to the landowner that it has considered all such alternative locations, and briefly stating why they were rejected or accepted, is conclusive evidence that sufficient consideration was given to the alternative locations.

- H. Section 523.271: “Exercise of eminent domain over private property for economic development purposes prohibited — definition.”
1. No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.
 2. For the purposes of this section, "economic development" shall mean a use of a specific piece of property or properties which would provide an increase in the tax base, tax revenues, employment, and general economic health, and does not include the elimination of blighted, substandard, or unsanitary conditions, or conditions rendering the property or its surrounding area a conservation area as defined in section 99.805.
- I. Section 523.277: “Office of ombudsman for property rights.”
- The office of public counsel shall create an office of ombudsman for property rights by appointing a person to the position of ombudsman. The ombudsman shall assist citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and procedures. The ombudsman shall document the use of eminent domain within the state and any issues associated with its use and shall submit a report to the general assembly on January 1, 2008, and on such date each year thereafter.
- J. Section 523.282: “Blanket easements void, when — definitions.”
1. Any blanket easement created after December 31, 2006, shall be void as against public policy and wholly unenforceable. For the purposes of this section, the term "blanket easement" shall mean an easement in real property acquired by condemnation or negotiations in lieu of the exercise thereof where the instrument or order of

condemnation, by its terms, allows the easement holder to locate its facilities at an undefined location on, over, under, or across the burdened property.

2. Notwithstanding the provisions of subsection 1 of this section to the contrary, the term "blanket easement" shall not apply to any instrument containing language that upon completion of the initial structure explicitly fixes the burden, scope of use, and footprint within the express terms of the instrument and also contains an express statement that the location of the burden shall be fixed to the degree occupied by the initial structure upon completion of such structure. Nothing in this section shall prohibit the expansion or upgrade of the initially completed structure provided that the purpose or purposes and footprint of said expansion or upgrade were explicitly described in the original terms of the instrument.

K. Section 523.283: "Easement or right-of-way by certain entities fixed by use — definition — commissioners appointed by court — attorneys' fees and costs for prevailing property owners."

1. Easements or right-of-way interests acquired after August 28, 2006, by a private utility company, public utility, rural electric cooperative, municipally owned utility, pipeline, or railroad, by either formal condemnation proceedings or by negotiations in lieu of condemnation proceedings, are fixed and determined by the particular use for which the property was acquired as described in either the instrument of conveyance or in the condemnation petition. Expanded use of the property beyond that which is described in the instrument of conveyance or the condemnation petition shall require either an additional condemnation proceeding in order to acquire the additional rights or by new negotiations for the expanded use of the property and appropriate consideration and damages to the current owner of the property for the expanded use.

2. For purposes of this section, the term "expanded use" shall mean:

(1) The exclusion of use by the current owner of the burdened property from an area greater than the area originally described at the time of acquisition by the condemning authority; or

(2) An increased footprint or burden greater than the footprint or burden originally described in the instrument of conveyance or condemnation petition. As used in this subdivision, the term "increased footprint or burden" shall mean a different type of use or a use presenting an

unreasonably burdensome impact on the property, the landowner, or the activities being conducted on the property by the landowner.

- L. Relocation Assistance:
 - (a) Section 523.200: “Definitions.”
 - (b) Section 523.205: “Relocation assistance given, when — definitions — relocation plans — contents — residential payments — business payments — advance payments — waiver — notice — report — ineligibility for tax abatement, when — additional requirements.”
 - (c) Section 523.210: “Agencies authorized to establish rules and regulations.”
 - (d) Section 523.215: “Not to affect other condemnation compensation.”

CONDEMNING AUTHORITIES

4. **LEGISLATIVE AUTHORITY TO AUTHORIZE CONDEMNATION POWERS**

- A. The legislature has the right to authorize the exercise of the sovereign power of eminent domain. *Bd. of Regents for Ne. Mo. State Teachers Coll. v. Palmer*, 356 Mo. 946, 204 S.W.2d 291, 294 (1947). Unless restricted by the constitution, the power is unlimited and practically absolute. *State ex inf. Danforth v. State Env'tl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. banc 1975).

5. **HOME RULE CHARTER COUNTIES**

- A. Article VI, Section 18 of the Constitution of the State of Missouri.
- B. The constitutional grant of powers to charter counties is contained in article VI, § 18 of the Missouri Constitution. Section 18(c) expressly provides for “the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision...” Missouri Constitution article VI, § 18(c). *See also Chesterfield Fire Protection v. St. Louis County*, 645 S.W.2d 367, 371 (Mo. banc 1983).
- C. The term “function” within the context of Section 18(c) includes “all of the activity appropriate to the nature of political subdivisions or municipalities which combine to produce services, those specific acts performed by political subdivisions or municipalities for the benefit of the general public.” *Chesterfield Fire Protection*, 645 S.W.2d at 371.
- D. A county charter enacted under article VI, § 18(b) of the constitution also carries with it an implied grant of such powers as are reasonably necessary to the exercise of the powers granted, so long as the exercise of such powers does not “ ‘invade the province of general legislation’ involving public policy of the State as a whole.” *Flower Valley Shopping Center, Inc. v. St. Louis County*, 528 S.W.2d 749, 754 (Mo. banc 1975) (citation omitted).” 935 S.W.2d 62

6. **CHARTER CITIES**

- A. Article VI, Section 19(a) allows charter cities to exercise all powers that the General Assembly could confer. Yet, as a general rule, a charter provision that conflicts with a state statute is void. That is, state statutes should be viewed as limitations on the broad grant of powers to a charter city.
- B. Charter city’s authority to condemn outside its limits. 851 S.W.2d 114.

7. **NONCHARTER CITIES**

- A. “Municipalities are creatures of statute and only have the powers granted to them by the legislature. Courts generally follow a strict rule of construction when determining the powers of municipalities.” (citation omitted) *Burks v. City of Licking*, 980 S.W.2d 109, 111 (Mo.App. S.D. 1998) (citing *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 28a, 288 (Mo. banc 1977)).

PRE-CONDEMNATION PROCEDURES AND ACTIVITIES

8. **60 DAY PRE-CONDEMNATION NOTICE OF ACQUISITION**

- A. Contents: (Section 523.250.1)
- (a) identifying the interest in real property to be acquired;
 - (b) the purpose for which the property is being condemned;
 - (c) and a statement of the property owner's rights
 - (1) including the right to seek legal counsel at the owner's expense,
 - (2) to make a counteroffer and engage in further negotiations,
 - (3) to obtain the landowner's own appraisal,
 - (4) have compensation determined by commissioners and, ultimately, by a jury;
 - (5) seek assistance from the office of the ombudsman for property rights created under section 523.277;
 - (6) contest the right to condemn in the condemnation proceeding;
 - (7) and exercise the rights to request vacation of an easement under the procedures and circumstances provided for in section 527.188.
- B. Manner of Delivery:
- (a) Section 523.250.1: 60 days prior to the filing of the petition
 - (b) Section 523.250.2:
 - (1) "United States mail, certified or registered, and with postage prepaid"
 - (2) "addressed to the owner of record as listed in the office of the city or county assessor for the city or county in which the property is located."
 - (3) "The receipt issued to the condemning authority by the United States Post Office for certified or registered mail shall constitute proof of compliance with this notice requirement"
 - (4) "provided, however, that nothing in this section shall preclude a condemning authority from proving compliance with this notice requirement by other competent evidence."
 - (i) What does this mean?
 - (ii) Proof of delivery by other means (i.e. hand delivery) or just proof that it was put in mail without producing the receipt?
 - (iii) Best practice to follow the statute unless owner is represented by counsel and a waiver is given in writing.

9. **WRITTEN OFFER**

- A. Timing:
 - (a) Section 523.253 states that a written offer shall be made to all owners of record must be made at least 30 days before filing a condemnation petition and shall be held open for the 30-day period.
- B. Delivery:
 - (a) The offer shall be mailed, either registered or certified.
 - (b) The offer shall be deposited in the United States mail, certified or registered, and with postage prepaid, addressed to the owner of record as listed in the office of the city or county assessor for the city or county in which the property is located.
 - (c) The receipt issued to the condemning authority by the United States Post Office for certified or registered mail shall constitute proof of compliance with this requirement; provided, however, that nothing in this section shall preclude a condemning authority from proving compliance with this requirement by other competent evidence.
 - (1) What does this mean?
 - (2) Proof of delivery by other means or can prove it was put in mail without producing the receipt?
 - (3) Best practice is to follow the statute or obtain waiver from counsel, if owner is represented.
- C. Contents:
 - (a) Statement of compensation (implied, not in statute)
 - (b) Appraisal or Explanation with supporting financial data shall be attached to offer.
 - (1) Section 523.253.2(1), the condemning authority shall provide the property owner, at the time of the offer,
 - an appraisal or
 - an explanation with supporting financial data
 for its determination of the value of the property.
 - (2) Section 523.253.2(2), any appraisal attached to the offer shall be
 - made by a state-licensed or state-certified appraiser
 - using generally accepted appraisal practices
 - (3) This may mean that an appraiser must show up in court to state that he used generally accepted appraisal practices and that he is certified. (See: Hearsay)
- D. Explanation with supporting financial data attached to offer
 - (a) Under Section 523.253.2(1), the condemning authority shall provide the property owner, at the time of the offer, an appraisal or an explanation with supporting financial data for its determination of

the value of the property.

10. CHANGING THE LOCATION OF A PROPOSED CONDEMNATION PROJECT - 30 DAYS AFTER RECEIVING THE NOTICE OF ACQUISITION

- A. Section 523.265
- B. The property owner who doesn't want the project, e.g. a pipeline, going down the middle of his property may, within 30 days of getting notice, request the condemning authority to consider an alternate location on his property. Keep in mind that the property owner cannot suggest that the project go on someone else's property. A response by the condemning authority is required. This section does not apply to condemnation of the entire property.
- C. Within 30 days after receiving a Notice of Acquisition, the owner targeted with potential condemnation on part of his land may demand the condemning authority to consider an alternate location. Procedure involves landowner proposing, in writing, alternate locations on the same parcel in sufficient detail.
- D. A written response by the condemning authority is required giving the reasons why the alternatives are rejected or accepted.

11. RIGHT TO ENTER LAND FOR SURVEY PRIOR TO CONDEMNATION

- A. Right to pre-condemnation survey: *State ex rel. Rhodes v. Crouch*, 621 S.W.2d 47 (Mo.banc 1981) (Pre-condemnation surveying is an inherent part of eminent domain, no specific statutory authority required); *Pogue v. Kamo Electric Cooperative, Inc.*, 795 S.W.2d 566 (Mo.App. 1990).
- B. *Missouri Highway and Transportation Commission v. Eilers*, 729 S.W.2d 471 (Mo.App. 1987) (Right to survey is limited to a surface survey which marks, measures and stakes the land and does not include a soil survey that requires drilling holes and taking rock cores.)
- C. *Pogue v. Associated Electric Cooperative*, 760 S.W.2d (Mo.App. S.D. 1988)(Electric cooperatives' authority to enter private land for purpose of conducting preliminary condemnation survey, did not, of itself, authorize cooperatives to cut down trees on property.)
- D. *Missouri Highway and Transportation Commission v. Eilers*, 729 S.W.2d 471, 473-474 (Mo.App. 1987)(Condemning agency must condemn a temporary construction easement for borings in order to bore holes on private property)
- E. *Gardner v. City of Cape Girardeau*, 880 S.W.2d 652 (Mo.App. 1994)
 - (a) Damages caused by pre-condemnation survey were recoverable in condemnation case.

- (b) Property owners were collaterally stopped from claiming damages in an inverse condemnation which should have been covered in the condemnation trial.

PETITION AND PARTIES TO BE NAMED

12. **PARTIES TO BE NAMED IN A PETITION**

- A. Rule 86.03, Parties
Necessary (proper) defendants shall include those “1) in actual possession of the property to be affected, claiming title, or” (which case law has interpreted “title” to be more than fee simple) “2) have a title to the premises appearing of record upon the proper records of the county in which they lie.”
- B. Section 523.010(3)
 - (a) Essential parties: requires that all parties having an interest in the property by reason of possession or title of record shall be joined as defendants.
 - (b) Section 523.010(3) states: “It shall not be necessary to make any persons party defendants in respect to their ownership unless they are either in actual possession of the premises to be affected claiming title or having a title of the premises appearing of record upon the proper records of the county.”

13. **MORTGAGE HOLDER IS NOT A NECESSARY PARTY**

- A. It would appear that a mortgage holder is not a necessary party under Rule 86.03. Mortgage holder is not in possession and does not have a title to the premises appearing of record.
- B. It is still advisable to name all lienholders as defendants.

14. **TENANT AS PARTY**

- (a) That under Rule 86.03 and Section 523.010(3), RSMo dealing with Parties to a condemnation lawsuit, said tenant is a necessary party to the condemnation action because it is in possession of the premises or, if the lease is recorded by title of record
- (b) Under Rule 52.12, said tenant has a right to intervene because its tenancy is so situated that the disposition of the condemnation action may as a practical matter impair or impede said tenant’s ability to protect its interest and business.

15. **NOTICE OF CONDEMNATION HEARING**

- A. 10 days is required for a condemnation hearing from the time of filing a petition. Rule 86.05
- B. For unknown parties or those that cannot be served, “by publication for three weeks consecutively, prior to the time of the hearing of the petition, in a newspaper published in the county in which the proceedings are pending.”

16. **PLEADINGS**

- A. Rule 86.04, Petition’s contents
 - (a) a description of the property sought to be condemned;
 - (b) the names of the owners of the property to be condemned, if known, or, if unknown, a statement that they are unknown;
 - (c) a statement of the foundation of the plaintiff’s right to condemn the property involved in the condemnation proceedings;
 - (d) a general statement of the nature of the business, improvement or use for which the property is to be taken;
 - (e) a statement either that the condemnor or owner cannot agree on the proper compensation to be paid or that an owner is incapable of contracting, is unknown, cannot be found or is a non-resident of the state;
 - (f) if any right of way be sought, the location and general route thereof shall be described and a copy of the construction plans required by Section 227.050 of the Revised Statutes of Missouri, 1949, shall be filed in the circuit clerk’s office and made a part of each condemnation petition by reference; (227.050 only applies to MoDOT)
 - (g) a prayer for the appointment of three disinterested freeholders, as commissioners, to assess the damages which such owners may severally sustain because of the condemnation of the property.
- B. Also, advisable to plead compliance with Notice to Acquire and Offer statutes.

17. **AMENDED PETITION**

- A. To reduce rights taken. *Union Electric Company v. Levin*, 304 S.W.2d 478 (Mo.App. E.D. 1957)(Trial rejects an amendment on the day of trial excluding condemnor’s right to place wires underground. It had erected electric lines above ground. Court of appeals held that it was error not to grant the amendment to the petition.)
- B. To give owners more rights.

- (a) *St. Louis, K. & N.W. Ry. Co. v. Clark*, 121 Mo. 169, 25 S.W. 192, and on motion rehearing 25 S.W. 906. (“No good reason can be seen why the condemning company should not have the right to announce, upon the trial, and have made a matter of record, if not done in its petition, the manner in which the right of way should be used...”)
- (b) *State ex rel. State Highway Commission v. Dunard*, 485 S.W.2d 657, 660 (Mo.App.1972)(“Our practice allows a condemnor, even after the commissioners have reported, to amend the petition to correct errors, misdescriptions, to reduce the extent of the taking, to grant additional rights to the landowner, or simply to avoid an unjust enrichment.”)

C. To increase taking.

- (a) A condemnor may not amend after the commissioners have reported ... to add lands, or otherwise change the issues substantially, or to prejudice the rights of the landowner. *State ex rel. Morton v. Allison*, 365 S.W.2d 563, 565; *City of Blue Springs, Missouri v. Central Development Association*, 684 S.W.2d 44 (1984). *State ex rel. Missouri Highway and Transp. Com'n v. McCann*, 685 S.W.2d 880, (Mo.App. W.D. 1984)

18. **TEMPORARY CONSTRUCTION EASEMENT'S COMMENCEMENT AND DURATION NEED NOT BE SPECIFIED**

- A. Nothing in the statutes or case law requires that a condemnor must plead the commencement of a temporary construction easement. *State ex rel. Missouri Highway and Transportation Commission v. Pracht*, 665 S.W.2d 697 (Mo.App. 1984)

19. **CONDEMNATION ORDERS ARE INTERLOCUTORY**

- A. Condemnation orders are interlocutory. *Norfolk and Western Railway Co. V. Greening*, 458, S.W.2d 268, 270 (Mo. 1970).
- B. Right to challenge condemnation is waived by owner if they take any of the commissioners award.
- C. Owners may seek a writ, except in cases dealing with a taking for blight, in which case, the right to appeal is automatic. Section 523.261
- D. The condemning agency may appeal if its right to condemn is denied or dismissed.

ANSWER, CROSS-CLAIMS

20. **RESPONSIVE PLEADINGS NOT REQUIRED**

- A. General rule is that a landowner is not required to file and answer or any other responsive pleading in condemnation action. *Arkansas-Missouri Power Co. v. Hamlin*, 288 S.W.2d 14, 18 (Mo.App. 1956)

21. **AFFIRMATIVE DEFENSES**

- A. To properly plead an affirmative defense, the factual basis for the defense must be set out in the same manner as is required for the pleading of claims under the Missouri Rules of Civil Procedure. *ITT Commercial Financial Corporation v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 383-384 (Mo.banc 1993); *Ashland Oil, Inc. v. Warman*, 869 S.W.2d 910, 911-12 (Mo.App. E.D. 1994)..

22. **COUNTERCLAIM**

- A. Filing of counterclaim not permitted. *State ex rel. Washington University Medical Center Redevelopment Corporation v. Gaertner*, 626 S.W.2d 373 (Mo.banc 1982)(Landowner sought damages for condemnation blight in a counterclaim. Landowner cannot file a counterclaim in a condemnation action.)
- (a) This was aimed more at the kind of damages that were sought than a blanket ban on a counterclaim
- B. However, see, *Clay County Realty v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008)(“protracted delay or untoward activity”.“Considering the constitutional prohibition against takings without just compensation, this Court holds that actions for condemnation blight are inverse condemnation claims that property owners may advance in order to recover consequential precondemnation damages, such as the claims brought by Property Owners in this case for increased operating costs and for lost rental and lease income.” *Id.* at 859.)
- (a) “Reversed” *Washington University* that indicated such damages were not compensable
- (b) No reason these damages are not now allowed as part of condemnation.
- (c) Maybe be *required* to claim such damages, or have them deemed waived by *res judicata*.

- C. Reconciling these decisions:
- (a) While *Washington University* is commonly cited for the proposition that there are no counterclaims, it was really decided on the merits of the type of claim being put forward – “condemnation blight”
 - (b) *Washington University* was reversed to the extent that damages relating to pre-condemnation damages can be admitted into the case
 - (c) The confusion was the owner’s choice in *Washington University* to file a counterclaim to assert an element of damages.
 - (d) An owner does not have to file a counterclaim, answer or any other pleading to assert damages that are related to the taking or the project.
 - (e) It certainly can be envisioned that an owner may try to file a counterclaim for matters totally unrelated to the taking. In such as case, the result would likely be that the counterclaim would not be permitted in the condemnation.

DEFENSES: ESSENTIAL PARTIES

23. **ESSENTIAL PARTIES NOT INCLUDED**

- A. Essential parties: Section 523.010(3), RSMo. requires that all parties having an interest in the property by reason of possession or title of record shall be joined as defendants.

DEFENSES: FAILURE TO COMPLY WITH STATUTE OR ORDINANCE

24. **STATUTORY AUTHORIZATION, ABSENCE OF**

- A. *City of North Kansas City v. K.C. Beaton Holding Co., LLC*, S.W.3d (Mo. 2014)
Third-class, non-charter city lacked statutory authority under Section 88.497 to condemn private property upon which fast food restaurant was operated for the purpose of redeveloping surrounding area to eliminate blight, as eliminating of blight did not qualify as “public purpose” within meaning of statute governing condemnation of private property by third-class cities; although statute generally conferred upon third-class cities power to condemn private property for any necessary public purpose, elimination of blight was only recognized to be a public purpose, through constitutional amendment and case law, subsequent to statute's enactment, and plain language of statute did not confer upon third class cities the authority to condemn private property to eliminate blight, either expressly or by implication.
- B. *State ex rel. Missouri Cities Water Company v. Hodge*, 878 S.W.2d 819 (Mo.banc 1994)(Court held that the City of Mexico lacked specific authority to condemn private waterworks system to create a public waterworks system.)
- C. *State ex rel. Missouri Highway and Transportation Commission v. Keeven*, 895 S.W.2d 587 (Mo.banc 1995)(MoDOT had the authority to replace destroyed wetlands for a highway project with other wetlands; that such action, being required by the federal authorities, was essential to completing the highway project. Relied upon a catch-all phrase: “for any other purpose necessary for the proper and economical construction of the state highway system.”)
- D. *State ex rel. State Highway Commission v. Pinkley*, 474 S.W.2d 46 (Mo.App. 1971) (Missouri Highway Commission does not have authority to condemn for roadside rest area because it is not necessary to a construction of a highway.)

- E. *Kansas City v. Ashley*, 406 S.W.2d 584 (Mo. 1966)(City did not possess any powers of the sovereign to enable it to condemn property already devoted to public use, and city was not entitled to condemn for street purposes strip of land on which tracks of railroad company were laid longitudinally.)
- F. *City of Smithville v. St. Luke's Northland Hosp. Corp.*, 972 S.W.2d 416 (Mo.App. W.D. 1998)(No authority to condemn private hospital for public hospital purpose.)
- G. *State ex rel. County of St. Charles v. Mehan*, 854 S.W.2d 531 (Mo. App. W.D. 1993)(No authority to condemn for a landfill outside of its city limits)

25. **FAILED TO ACQUIRE THE PROPERTY WITHIN DEADLINE AS REQUIRED UNDER STATUTE**

- A. *State ex rel. Broadway-Washington Associates, Ltd v. Manners*, 186 S.W.3d 272 (Mo. 2006) (Right to condemn expired. Condemnor failed to acquire the property by condemnation within the five years required under the Ordinance.)

26. **FAILURE TO FOLLOW THE DEFINITION OF BLIGHT UNDER CHAPTER 353**

- A. *Centene Plaza Redevelopment Corporation v. Mint Properties*, 225 S.W.3d 431 (Mo. 2007) (Court held that the redevelopment area failed to meet statutory definition of blighted area because of a lack of evidence of social liability.)

DEFENSES: NECESSITY

27. **NECESSITY AND PUBLIC PURPOSE - JURISDICTIONAL REQUIREMENT AND BURDEN OF PROOF**

- A. The burden is on the party seeking condemnation to prove both that the condemnation is for a public purpose and that it is a matter of public necessity. Both findings are jurisdictional prerequisites to condemnation. *State ex rel. State Highway Commission v. Curtis*, 222 S.W.2d 64, 68 (Mo. 1949); *State ex rel. Missouri Highway and Transportation Commission v. Perigo*, 886 S.W.2d 149, 152 (Mo.App. 1994).

28. **NECESSITY, ABSENCE OF**

- A. Issue of necessity involves whether the taking of the property is “necessary” for the condemnor’s purposes; that is, whether the designated location, the amount of property involved, and the interest taken are necessary to advance the condemning authority’s public purpose.
- B. General Rule: Absent fraud, bad faith, abuse of discretion, legislative decision will not be challenged. *Parking Sys., Inc., v. Kansas City Downtown Redevelopment Corp.*, 5418 S.W.2d 11 (Mo. 1974); *In re Armory Site in Kansas City*, f282 S.W.2d 464 (Mo. 1955)

29. **NECESSITY, ABSENCE OF: EXCESS CONDEMNATION**

- A. *State Highway Commission v. Curtis*, 222 S.W.2d 64, 68 (Mo.banc 1949) (The taking of property which allegedly exceeds the amount necessary for the project is not a public use issue for the judiciary; rather it is question of necessity for the legislature and therefore restricts the court’s review of this matter.)
- (a) Facts: Trial judge had held that excessive land was being taken and therefore said excessive land was not being taken for a public purpose. MoDOT filed a writ. Mo. Supreme Court stated that the trial judge failed to distinguish between public use and public necessity. *Id.* at 408.
- (b) The road to be constructed is to be a ‘limited access’ highway with two 26 foot divided pavements, one for westbound and the other for eastbound traffic. It is to be a continuation of an existing divided roadway. According to the plans the extension is to be built under two contracts, the south lane to be built first, though right-of-way is being now sought for the entire project. Then defendants filed a motion to strike from relator's petition ‘all that portion of the lands of these defendants (or the ‘easements for right-of-way’ over lands of

these defendants), which relator's present plans on file with the County Clerk do not show will be used for the construction of a roadway, which are not shown to be needed for immediate use, and which are not covered as a part of the contemplated road construction set out in the plaintiff's plans filed with the County Clerk as required by law.”

- (c) “In condemnation cases, whether or not land is being taken for a public use is a judicial question regardless of any legislative declaration that the use is public. Mo.Const. art. 1, sec. 28. Such question may sometimes be determined from the pleadings. *State ex rel. Cape Girardeau v. Engelmann*, 106 Mo. 628, 17 S.W. 759. But the public necessity or propriety for the exercise of eminent domain is a legislative or political question and is not the same as ‘public use.’ *City of Kirkwood v. Venable*, 351 Mo. 460, 173 S.W.2d 8; *State ex rel. Lane v. Pankey et al.*, Mo.Sup. 1949, 221 S.W.2d 195. The power to locate a state highway, to determine its width, type of construction and the extent of land necessary for economical and proper construction are vested in the sound discretion of the State Highway Commission, uncontrolled by the courts except to compel strict compliance with the statutes and to prevent the taking of private property for a private or non-public use. The Commission must comply with the statutes which it did in this case by filing its petition and plans showing its decision to appropriate certain described land for certain purposes, to wit, for the construction of an extension to an existing state highway.” *Id.* at 409-410.
- (d) However: “Even in the absence of actual fraud, a taking of property in the ostensible behalf of a public improvement in excess of what by any possibility could ever serve any public purpose would to that extent be a taking for a non-public use, 18 *Am.Jur.*, pp. 734, 736, secs. 107, 109, but the courts uniformly hold that the greatest weight must be given to the judgment of the delegated agents of the State as to the amount of property which should be appropriated.” *Id.* at 68.

30. **NECESSITY, ABSENCE OF: ALTERNATIVE ROUTES / ALTERNATIVE PLANS NOT ADEQUATELY CONSIDERED**

- A. General Rule: A determination of the location of a highway is, by the Constitution (Art. IV, §29), entrusted to the sound discretion of the commission. *State ex rel. State Highway Commission v. Riss*, 432 S.W.2d 193, 196 (Mo. 1968).

- B. *State ex rel. Missouri Highway and Transportation Commission v. Keeven*, 895 S.W.2d 587 (Mo.banc 1995) (Property owner must show that the Commission could not, upon consideration of the alternatives available to it, have reasonably chosen their land.)
- C. *State ex rel. Missouri Highway and Transportation Commission v. Perigo*, 886 S.W.2d 149 (Mo.App. 1994) (The design and placement of highway projects is solidly within the discretion of the Commission.)

31. **FAILURE TO CONSIDER ALTERNATE LOCATION UNDER SECTION 523.265, RSMo.**

- A. Procedure involves landowner proposing, in writing, alternate locations on the same parcel in sufficient detail. A written response by the condemning authority is required giving the reasons why the alternatives are rejected or accepted.
- B. “523.265. With regard to property interests acquired by condemnation or negotiations in lieu of the exercise thereof, within thirty days of receiving a written notice sent under section 523.250, the landowner may propose to the condemning authority in writing an alternative location for the property to be condemned, which alternative location shall be on the same parcel of the landowner's property as the property the condemning authority seeks to condemn. The proposal shall describe the alternative location in such detail that the alternative location is clearly defined for the condemning authority. The condemning authority shall consider all such alternative locations. This section shall not apply to takings of an entire parcel of land. A written statement by the condemning authority to the landowner that it has considered all such alternative locations, and briefly stating why they were rejected or accepted, is conclusive evidence that sufficient consideration was given to the alternative locations.”

DEFENSES: PUBLIC PURPOSE

32. **PUBLIC USE IS A JUDICIAL QUESTION WITHOUT REGARD TO ANY LEGISLATIVE DETERMINATION**
- A. Public use is a judicial question and its determination is without regard to any legislative declaration that the use is public. In contrast, public necessity is a legislative question.
 - B. “In determining the question of ‘public use,’ when that question is properly raised, a court may inquire into whether the public purpose stated is the real purpose or merely a sham. *Kansas City v. Hyde, supra*. In that case the city was proceeding under an ordinance for the opening of a public street. Objecting landowners raised the issue that the real purpose was not to open a street for the use of the public, but to provide a way for switch tracks to the property of the president of the board of aldermen and for his sole private use. That raised a question of fraud which, under proper allegations, a court may always consider.” *State Highway Commission v. Curtis*, 222 S.W.2d 64, 68 (Mo. banc 1949)(court was distinguishing public use from public necessity defenses)
 - C. *State ex rel. Missouri Highway and Transportation Commission v. Perigo*, 886 S.W.2d 149 (Mo.App. S.D. 1994) (Public use is not a proper subject of judicial inquiry, absent fraud or bad faith or unwarranted abuse of discretion.)
 - D. *City of Kansas City v. Hon*, 972 S.W.2d 407 (Mo.App. W.D. 1998)(“public purpose” should be broad and flexible)
 - E. *Schweig v. Maryland Plaza Redevelopment Corporation*, 676 S.W.2d 249 (Mo.App.E.D. 1984)(Court must accept legislative finding unless arbitrary or induced by fraud, collusion or bad faith).

DEFENSES: ECONOMIC DEVELOPMENT

33. **PUBLIC PURPOSE - CANNOT CONDEMN SOLELY FOR ECONOMIC DEVELOPMENT**

- A. Section 523.271, RSMo.
 - (a) State legislature passed this law in 2006.
 - (b) Cannot condemn “solely” for “economic development”, no matter how it is disguised, e.g. as blight.
 - (c) “523.271. 1. No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.”
 - (1) “2. For the purposes of this section, "economic development" shall mean a use of a specific piece of property or properties which would provide an increase in the tax base, tax revenues, employment, and general economic health, and does not include the elimination of blighted, substandard, or unsanitary conditions, or conditions rendering the property or its surrounding area a conservation area as defined in section 99.805, RSMo.”
- B. *State ex rel. Jackson et al. v. Dolan*, 398 S.W.3d 472 (Mo. banc 2013) (The taking violated the statute that prohibited port authority from acquiring private property through eminent domain for solely economic development purposes - here, for building private storage facilities, which the condemning authority admitted was expressly solely for economic development. Missouri Supreme Court stated that: “...§ 523.271 as written defines “economic development” as an increase in all four of the factors listed in the definition, that is, an increase in “the tax base, tax revenues, employment, and general economic health.” Condemning authority has the burden of proof to show that the condemnation is not solely for economic development. That is, it does not increase one of the four factors in the definition of economic development.

DEFENSES: GOOD FAITH OFFER AND NEGOTIATIONS

34. GOOD FAITH OFFER STATUTE / NEGOTIATIONS DEFENSE AFTER 2006 EMINENT DOMAIN STATUTE, SECTION 523.253

- A. Statute: “523.253. Written offer to property owners--appraisal
- (a) “1. A condemning authority shall present a written offer to all owners of record of the property. The offer must be made at least thirty days before filing a condemnation petition and shall be held open for the thirty-day period unless an agreement is reached sooner. The offer shall be deposited in the United States mail, certified or registered, and with postage prepaid, addressed to the owner of record as listed in the office of the city or county assessor for the city or county in which the property is located. The receipt issued to the condemning authority by the United States Post Office for certified or registered mail shall constitute proof of compliance with this requirement; provided, however, that nothing in this section shall preclude a condemning authority from proving compliance with this requirement by other competent evidence. Nothing in this section shall prohibit the parties from negotiating during the thirty-day period.
 - (b) “2. (1) Any condemning authority shall, at the time of the offer, provide the property owner with an appraisal or an explanation with supporting financial data for its determination of the value of the property for purposes of the offer made in subsection 1 of this section.”
 - (c) “2.(2) Any appraisal referred to in this section shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.”
- B. Offer shall be made 30 days prior to filing condemnation petition and shall be held open for 30 days.
- (a) Section 523.253 states that a written offer shall be made to all owners of record must be made at least 30 days before filing a condemnation petition and shall be held open for the 30-day period. The offer shall be mailed, either registered or certified.
 - (b) The implication of the 30 day requirement is that the offer, which must have an appraisal or economic summary attached, cannot be cured with supplemental information within the 30 day period or at the condemnation hearing with testimony.
- C. Appraisal or explanation with supporting financial data attached to offer.

- (a) Under Section 523.253.2(1), the condemning authority shall provide the property owner, at the time of the offer, an appraisal or an explanation with supporting financial data for its determination of the value of the property.
 - (b) Under Section 523.253.2(2), any appraisal attached to the offer shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.
- D. Section 523.256, defines what constitutes good faith negotiations. The elements are:
- (a) All notices under the statute given to the property owner;
 - (b) Offer is no less than the condemning authority's appraised value prepared by a state-certified appraiser;
 - (c) Owner has had an opportunity to obtain his or her own appraisal;
 - (d) Condemning authority considered an alternate location suggested by the owner under section 523.265.
- E. *Planned Indus. Expansion Auth. of Kansas City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418, 426 (Mo. App. W. D. 2010)
- (a) “The Expansion Authority argues that the 2006 amendments to chapter 523 do not affect a condemning authority's requirement to negotiate in good faith. We disagree. The legislature enacted the 2006 amendments to chapter 523 in response to *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), which held that it did not violate the United States Constitution when private property was taken and given to another private entity for public development purposes even when the property was not located in a blighted area. Dale A. Whitman, EMINENT DOMAIN REFORM IN MISSOURI: A LEGISLATIVE MEMOIR, 71 Mo. L.Rev. 721, 723 (Summer 2006). Thus, the legislature's aim was to strengthen the rights of landowners in eminent domain actions. *Id.* The precise language at issue here—the requirement that any appraisal be conducted using generally accepted appraisal practices—was inserted “to prevent condemners from providing the landowner with slipshod or incompetent appraisals.” *Id.* at 749.2” *Id.* at 426.
 - (b) Standard of review: “[W]e will apply the standard announced in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).... In reviewing the circuit court's determination made pursuant to section 523.256, "the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it

erroneously declares the law, or unless it erroneously applies the law." *Murphy*, 536 S.W.2d at 32.”

35. **GOOD FAITH OFFER STATUTE REQUIRES THE USE OF “ACCEPTABLE APPRAISAL PRACTICES”**

- A. Under Section 523.253.2(2), any appraisal attached to the offer shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.
- B. *Planned Industrial Expansion Authority of Kansas City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418 (Mo. App. W.D. 2010) (Appraisals did not follow generally accepted appraisal practices as required by the statute and therefore no good faith negotiations. This is a condemnation action in which the trial court found that Appellant Planned Industrial Expansion Authority of Kansas City (“Expansion Authority”) failed to fulfill its statutory obligations to conduct good faith negotiations with the owners. The failure is the result of providing appraisals not complying with generally accepted appraisal practices. Examples: Drastic adjustments to the comparables, the date and type of comparables, failure to talk to the owner, failure to consider the \$650,000 recent purchase price of the subject property for which \$180,000 was being offered. Affirmed and remanded for determination of attorney’s fees).
- C. *City of Kansas City v. Hung Hoe Ku*, 282 S.W.3d 23 (Mo. App. W.D. 2009). (Appraisal need not comply with USPAP to be “generally accepted” appraisal practice. Allegation of failure to comply with USPAP prevents a good faith offer being made: “The Kus argue that the City's appraiser did not comply with required USPAP standards in making his appraisal of the Ku Property, and thus the City, in basing its offer on the appraisal, did not make a good faith offer to purchase the Ku Property.” *Id.* at 26. Court of appeals rejects property owner’s claim and states that Section 523.253.2(2) controls.)

36. **WHAT CONSTITUTES “SUPPORTING FINANCIAL DATA”?**

- A. *Carroll Electric Co-op v. Lambert*, 403 S.W.3d 637 (Mo.App. S.D. 2012)(Reversed the trial court’s rejection of the plaintiff’s appraisal report. “It is evident that the court did not even consider whether the Summary Appraisal Reports satisfied the alternative method of providing ‘an explanation with supporting financial data for its determination of the value of the property for purposes of the offer(.)’ By ignoring this alternative, the trial court misapplied the law.”
 - (a) Section 523.256 and 523.253:

- (1) Section 523.256 deals with the requirements of good faith negotiations which the trial court must find in the condemnation hearing. The offer must be not less than the appraisal or economic data provided under Section 523.253. Attorney's fees may be awarded if no good faith negotiations occurred.
 - (2) Section 523.253 states when and what must be sent to the property owner, e.g. 60 day notice, 30 day offer, attaching an appraisal or an explanation of the offer with supporting financial data. The statute includes the statement that if an appraisal is sent, it must comply with acceptable appraisal practices.
- (b) "A 'Summary Appraisal Report' was attached to each of the Landowners' Offer Letters. Each Summary Appraisal Report generally included the following: the identity of the fee owners; the owners' mailing address; the location of subject property; a description of subject property; a description of the area of the whole, area of acquisition, and area of remainder; a description of the basis for the condemned land's estimated value; the purpose of the appraisal; its intended use; its intended users; the property rights appraised; the effective date; date prepared; scope of work; highest and best use; exposure time; discussion of severance damage; discussion of enhanced value; history; sales comparison approach; and subject photographs, which included an aerial photo showing easement area. Although the reports referred to a legal description and survey of each property, neither was attached to the report." "At the hearing, Landowners' counsel argued that Carroll Electric "didn't send an appraisal. They sent part of an appraisal...." When Landowners' counsel questioned Allen about it, Allen agreed that the reports were actually summaries of appraisals. Carroll Electric argued that these summaries provided a determination of the value of property for purposes of its offer." *Id.* at 646-647.
- (c) Appellate court held: "Here, the trial court specifically found that Carroll Electric furnished Landowners with the "Summary Appraisal Reports," not "appraisals," yet the court applied the statutory requirements for appraisals. It is evident that the court did not even consider whether the Summary Appraisal Reports satisfied the alternative method of providing "an explanation with supporting financial data for its determination of the value of the property for purposes of the offer[.]" § 523.253.2(1). By ignoring this alternative, the trial court misapplied the law." *Id.* at 648-649.
- (d) The Court of Appeals did not determine if the appraisal summaries were sufficient to constitute "supporting financial data" but held the

trial court should have made that determination instead of dismissing the case because the summaries were not full appraisals. The case was remanded for that determination.

37. **UNDER 2006 STATUTE, SECTION 523.256, ATTORNEY’S FEES AWARDED IF NO GOOD FAITH NEGOTIATIONS OCCURRED**

- A. Statute: “523.256. Before a court may enter an order of condemnation, the court shall find that the condemning authority engaged in good faith negotiations prior to filing the condemnation petition. A condemning authority shall be deemed to have engaged in good faith negotiations if:
- (a) “(1) It has properly and timely given all notices to owners required by this chapter;
 - (b) “(2) Its offer under section 523.253 was no lower than the amount reflected in an appraisal performed by a state-licensed or state-certified appraiser for the condemning authority, provided an appraisal is given to the owner pursuant to subsection 2 of section 523.253 or, in other cases, the offer is no lower than the amount provided in the basis for its determination of the value of the property as provided to the owner under subsection 2 of section 523.253;
 - (c) “(3) The owner has been given an opportunity to obtain his or her own appraisal from a state-licensed or state-certified appraiser of his or her choice; and
 - (d) “(4) Where applicable, it has considered an alternate location suggested by the owner under section 523.265.
 - (e) “If the court does not find that good faith negotiations have occurred, the court shall dismiss the condemnation petition, without prejudice, and shall order the condemning authority to reimburse the owner for his or her actual reasonable attorneys' fees and costs incurred with respect to the condemnation proceeding which has been dismissed.”
- B. Attorney’s fees and costs if no good faith negotiations were made:
- (a) Section 523.256, states if the court finds that there were no good faith negotiations, then reimbursement for reasonable attorney’s fees and costs shall be assessed against the condemning authority.
 - (b) Section 523.256: “If the court does not find that good faith negotiations have occurred, the court shall dismiss the condemnation petition, without prejudice, and shall order the condemning authority to reimburse the owner for his or her actual reasonable attorneys' fees and costs incurred with respect to the condemnation proceeding which has been dismissed.”

- C. *City of Richmond Heights v. Waite*, 280 S.W.3d 770 (Mo.App. E.D. 2009)(Liquidated damage clause in written offer does not make it non-binding if accepted under general contract principles and, therefore, the offer was valid; furthermore, the City engaged in good faith negotiations under Section 523.256.)

38. **GOOD FAITH OFFER / NEGOTIATIONS DEFENSE - PRE 2006 EMINENT DOMAIN STATUTE**

- A. Section 523.256, passed in 2006, sets forth a list of items that MUST be met before a court can determine that that “good faith” negotiations occurred. There is no indication that this provision was intended to supplant all prior existing law regarding good faith offers and negotiations.
- (a) “The legislature enacted the 2006 amendments to chapter 523 in response to *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), which held that it did not violate the United States Constitution when private property was taken and given to another private entity for public development purposes even when the property was not located in a blighted area. ... Thus, the legislature's aim was to *strengthen* the rights of landowners in eminent domain actions.... Thus, section 523.253 gave landowners the *added* protections that an appraisal (or an explanation with supporting financial data) be included in the condemning party's good faith offer and that any appraisal be made using generally accepted appraisal practices.” *Planned Indus. Expansion Auth. of Kansas City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418 (Mo. App. W. D. 2010)(emphasis from original)
- B. Amount of Offer: Several cases state that the amount of the offer, itself, is not a determinative issue in determining good faith compliance. *City of Blue Springs, Mo. v. Central Dev. Association*, 684 S.W.2d 44 (Mo. App. W.D. 1985). However, a number of cases look to the adequacy of the value to demonstrate a reasonable basis for good faith negotiations and a reasonable offer. *Land Clearance for Redevelopment Authority of Kansas City v. Ridge*, 781 S.W.2d 104, 105 (Mo.App. 1989)
- C. Negotiations: Other cases address the extent of negotiations to show good faith was involved. *Shelby County R-IV School District v. Herman*, 392 S.W.2d 609 (Mo. 1965)
- D. In *Cape Girardeau v. Robertson*, 615 S.W.2d 526 (Mo.App.E.D. 1981), the court found that because the condemnor made no offer for the taking of a

permanent construction easement, its “offer” had not been made in good faith and denied an order of condemnation. (Note: the only taking was for a permanent easement for sloping purposes.)

- (a) A permanent easement was sought to sloping purposes. No monetary offer was made. (Condemning agency offered grass seed.) The *Robertson* court stated: “The City made no effort to pay for the "permanent construction easement" defined in its condemnation petition and, therefore, its offers could not be "good faith" offers.” *Id.* at 531.
- E. No offer made. *State ex rel. State Highway v. Cady*, 372 S.W.2d 639, 642 (Mo.App.W.D. 1963) (In this case, plaintiff never made an offer. Trial court granted a new trial after the condemnation trial. Court of appeals affirmed. Offer not made and therefore case remanded to trial court “consistent with this opinion. *Id.* at 642.)
- F. Option contract does not constitute a good faith offer.
 - (a) *State ex rel. Missouri Highway and Transportation Commission v. Black*, 702 S.W.2d 525, 526 (Mo.App. 1985). "Tender of an option to the landowner by the Commission was simply an offer to make an offer and no contract could exist until the optionee exercised the option by some unspecified date....In a condemnation case an option is closely analogous to the ‘offer-to-buy-conditioned-upon-my-approval-of-my-own offer’ found wanting in *State ex rel. State Highway Commission v. Pinkley, supra.*”
 - (1) Facts: Simple option agreement whereby the buyer had the unilateral right to purchase the property for a certain period of time. It was unilateral option.
- G. Good faith offer actually entails good faith negotiations.
 - (a) *State ex rel. State Highway Commission v. Pinkley*, 474 S.W.2d 46, 48-9 (Mo.App.E.D. 1971)(“...There must be a bona fide attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it.”)
 - (b) *State ex rel. State Highway v. Cady*, 372 S.W.2d 639, 642 (Mo.App. W.D. 1963)(“Our landowners should not be hauled into court, nor should dockets be burdened with such litigation until it is made to appear affirmatively that negotiations have been attempted and have

failed.”

- (c) Uniform Relocation Act Standard, “every reasonable effort...” *City of Columbia v. Baurichter*, 713 S.W.2d 263, 266 (Mo.banc 1986). It is very important to note that this Supreme Court case specifically said that all condemnors using federal funds MUST follow the Uniform Relocation Act and looked for federal case law to determine if the condemnor had complied with the URA. The court found no case law applying to these facts.

- H. Condemnor has burden of proof on good faith offer. *State ex rel. State Highway Commission v. Pinkley*, 474 S.W.2d 46 (Mo.App.E.D. 1971).

- I. Offer or negotiations after the petition is filed is irrelevant. See, *Cape Girardeau v. Robertson*, 615 S.W.2d 526, 531 (Mo.App.E.D. 1981)

- J. *City of Columbia v. Baurichter*, 713 S.W.2d 263 (Mo. 1986). Do not have to make an offer when there is confusion as to the state of title, or as to who owns the property. The requirement to make good faith negotiations is not a requirement to engage in futile or useless acts.

- K. There is no need to make an offer to tenants, if owners have already rejected offers. *State, ex rel., Missouri Highway & Transp. Com'n v. Rantz*, 43 S.W.3d 436 (Mo.App. S.D. 2001).

CONDEMNATION HEARINGS

39. DISCOVERY PRIOR TO CONDEMNATION HEARING

- A. Appraiser's report not discoverable for condemnation hearing. *State ex rel. Missouri Highway and Transportation Commission v. Anderson*, 735 S.W.2d 350 (Mo.banc 1987).
- (a) In cases where an appraisal is provided with an offer, *Anderson* was reversed to the extent that it held "the relationship between the market value of the property and the offer is not of material significance in determining the existence of the good faith negotiations required by § 523.010 and Rule 86.04." and that "the niceties of the manner in which an appraiser arrived at his appraisal, and perhaps even the appraisal itself, have no real significance at the initial hearing." *Planned Indus. Expansion Auth. of Kansas City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418 (Mo. App. W. D. 2010).
- B. Jurisdictional discovery permissible. *State ex rel. Rantz v. Sweeney*, 901 S.W.2d 289 (Mo.App. 1995) (This court held that discovery permissible prior to condemnation hearing in order for property owner to challenge condemnor's authority to condemn. *Id.* 293. Court distinguished from *Anderson* holding on the grounds that the discovery sought by the property owner pertained to valuation issues, which relate not the condemnation hearing but to the trial of exceptions. *Id.* at 292. Court also pointed out that such discovery is proper because no appeal is permissible following the court's approval of condemnation in the condemnation hearing. *Id.* at 292.)
- C. *State ex rel. Missouri Highway and Transportation Commission v. Bush*, 911 S.W.2d 690 (Mo.App. E.D. 1995) (Landowner's attorney attempted to take the deposition of MoDOT's engineers prior to the condemnation hearing to support its affirmative defense that the highway design was "arbitrary and capricious and in violation of the law." Court of appeals issued permanent writ refusing depositions of engineers. Court avoided granting the depositions under *Rantz* reasoning, namely permitting discovery on jurisdictional issues, by holding that the affirmative defense was defectively drafted under Rule 55.08. That is, the affirmative defense contained no facts to support its claim, as required under Rule 55.08 and that the request "is nothing but a fishing expedition to see if some possible attack on the necessity of the condemnation can be found. *Id.* at 692.
- D. *City of Wentzville vs. Dodson*, 133 SW3d 543 (Mo.App. E.D. 2004)
- (a) The appellate court abused its discretion in not granting continuance

for purposes of conducting limited discovery.

- (b) The court said, “a party must show, by motion or otherwise, that there are reasonable ground to believe that the discovery sought is relevant to the subject matter involved in the pending action.” *Id.* at 549.

40. **MOTION FOR CONTINUANCE OF CONDEMNATION HEARING**

- A. Motions for Continuance are governed by Rule 65.03. *Union Elec. Co. v. Jones*, 356 S.W.2d 857, 863 (Mo. 1962)
- B. A Motion for Continuance lies soundly in the discretion of the court. See *Commerce Bank of Mexico, N.A. v. Davidson*, 667 S.W.2d 474, 476 (Mo.App. E.D. 1984).
- C. Court abused its discretion in not granting continuance for purposes of conducting limited discovery. *City of Wentzville vs. Dodson*, 133 SW3d 543 (Mo.App. E.D. 2004).

41. **CONDEMNATION HEARING, CONDEMNING AGENCY’S REQUIREMENTS**

- A. Four jurisdictional requirements:
 - (a) Authority to condemn
 - (1) Condemnor must have the statutory authority to condemn and is authorized to do so in this case.
 - (b) Public purpose
 - (1) Taking is for a public purpose.
 - (c) Necessity
 - (1) Taking is necessary for the public purpose.
 - (2) Necessity is a matter for legislative determination
 - (d) Good faith offer
- B. Courtroom procedure for plaintiff’s attorney
 - (a) Service upon all defendants: Ask the court take judicial notice of legal file, in particular to note service upon all defendants.
 - (b) Ask the court to take judicial notice of relevant statute authorizing condemnation.
 - (c) Through witness:
 - (1) Identify ordinances authorizing condemnation, blight and project and have court take judicial notice.
 - (i) E.g., Redevelopment agreement is part of ordinance

which authorizes condemnation.

- (2) Identify these documents as having been certified by the municipal clerk and have them admitted by judicial notice.
- (3) Witness should explain blighting conditions
- (4) Witness should explain project
- (5) Witness should identify the subject property

(d) Through witness:

(1) Notice of Acquisition (60 day letter)

- (i) Content
- (ii) Proof of delivery

(2) Offer:

- (i) Complied with statute
 - 1) Content
 - 2) Proof of deliver
- (ii) Offer not accepted or rejected.

(3) Appraiser:

- (i) If appraisal provided with offer, must show that the appraiser was licensed and the appraisal followed acceptable appraisal practices
- (ii) Appraiser may be the only competent witness for this, otherwise, hearsay will be a proper objection for its admission as to these two issues.

(e) Bring order of condemnation and oath for commissioners.

C. “The condemnation hearing is an evidentiary hearing in which the right or power of the condemnor to condemn the property in question is finally adjudicated. Consequently, the obligation of the condemnee to surrender the property upon payment of damages becomes binding. When the order of condemnation is entered, the substantive rights of the parties with respect to ownership of the property are determined.” *Washington University Medical Center Redevelopment Corp. v. Komen*, 637 S.W.2d 51, 54 (Mo.App. 1982).

D. Appeal an order of condemnation with a writ of prohibition. *State ex rel. Deveanssay v. McGuire*, 622 S.W.2d 323 (Mo.App. 1981); See *State of Missouri, ex. rel. United States Steel and Carnegie Pension Fund v. Hon. Jack L. Koehr*, 811 S.W.2d 385 (Mo.banc 1991) (Mayfair Hotel parking lot case).

E. Condemnation order is properly taken on appeal with the exceptions. *State ex rel. Rantz v. Sweeney*, 901 S.W.2d 289, 291 (Mo.App. S.D. 1995)(but remember that withdrawing monies constitutes a waiver of all jurisdictional

issues).

- F. In cases where the condemnation is for blight purposes, the order of condemnation may be directly appealed by the owner.

42. COMMISSIONERS, QUALIFICATIONS

- A. “Rule 86.06 Appointment of Commissioners - Duties - Standard for Damages” (1999). Three requirements to be a commissioner:
 - (a) Freeholders
This is unenforceable because to require the commissioner to be a landowner violates equal protection. See, *Quinn v. Millsap*, 491 U.S. 95, 105-106, 109 S.Ct. 2324, 2331 (1989)
 - (b) Resident of the county where the subject property is located
 - (1) There is no residency requirement in the constitution.
 - (2) There is a residency requirement in both the rule and statute.
 - (c) Disinterested
 - (1) “Section 523.040 requires the court to “appoint three disinterested commissioners, who shall be residents of the county in which the real estate or a part thereof is situated, and ... at least one of the commissioners shall be either a licensed real estate broker or a state-licensed or state-certified real estate appraiser” in order to assess the damages the owner(s) may sustain as a result of the taking. According to Black's Law Dictionary, “disinterested” means “[f]ree from bias, prejudice, or partiality; not having a pecuniary interest.” Black's Law Dictionary 536 (9th ed.2009).” *City of Kansas City v. Powell*, 451 S.W.3d 724, 740–41 (Mo. Ct. App. 2014), as modified (Nov. 25, 2014)
 - (d) Broker/Appraiser: 523.040(1)
 - (1) In 2011, the legislature added language that in St. Louis City and County and Jackson County, the following shall apply:
 - (i) “one of the commissioners shall be either a licensed real estate broker or a state-licensed or state-certified real estate appraiser...”
 - (2) This may conflict with 86.06
 - (i) In matters of procedure, Supreme Court rules trump statutes

- B. Disinterested
- (a) “‘disinterested’ means ‘[f]ree from bias, prejudice, or partiality; not having a pecuniary interest.’” *City of Kansas City v. Powell*, 451 S.W.3d 724, 740–41 (Mo. Ct. App. 2014), as modified (Nov. 25, 2014) (*quoting* Black's Law Dictionary 536 (9th ed.2009))
 - (b) “the fact that the same three commissioners were appointed by the same judge in other condemnation cases commenced as part of the [same] project” does not render them interest. *City of Kansas City v. Powell*, 451 S.W.3d 724, 741 (Mo. Ct. App. 2014), as modified (Nov. 25, 2014)

HERITAGE VALUE

43. DEFINITION OF HERITAGE VALUE

- A. Section 523.001, RSMo. applies to condemnations filed after 12/31/06.
- B. One cannot have both heritage value and homestead value - choose the one that creates the higher value.
- C. Essentially, three statutes are involved. Heritage value has two requirements:
 - (a) Heritage value requires the property to be held 50 years by the family, and
 - (b) The condemnation prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking.
- D. “523.001(2) ‘Heritage value’, the value assigned to any real property, including but not limited to, real property owned by a business enterprise with fewer than one hundred employees, that has been owned within the same family for fifty or more years, such value to be fifty percent of fair market value;”
 - (a) Note: The reference to a business is an example as the statute states “but not limited to”.

- E. “523.039(3) For condemnations of property that result in any taking that prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking and involving property owned within the same family for fifty or more years, an amount equivalent to the sum of the fair market value and heritage value. For the purposes of this subdivision, family ownership of property may be established through evidence of ownership by children, grandchildren, siblings, or nephews or nieces of the family member owning the property fifty years prior to the taking; and in addition, may be established through marriage or adoption by such family members. If any entity owns the real property, members of the family shall have an ownership interest in more than fifty percent of the entity in order to be within the family line of ownership for the purposes of this subdivision. The property owner shall have the burden of proving to the commissioners or jury that the property has been owned within the same family for fifty or more years.”
- (a) Note: This statute describes when heritage value is applied: When a property owned for 50 years cannot be utilized, either by reason of a total or partial take.
- (b) This statute defines the family.
- F. Section 523.061 - procedure for heritage value

HOMESTEAD VALUE

44. **HOMESTEAD VALUE**

- A. Homestead applies to all total takings and those partial takings where the taking comes within 300’ of the residence and causes a substantial interference with the use of the property.
- B. Trial court decides whether a homestead bonus is applicable. Section 523.061
- C. One cannot have both Heritage Value and Homestead Value.
- D. Under 523.001 and 523.039(2), in addition to fair market value, a homeowner is entitled to 25% of fair market value for a total taking or a partial taking where the taking is within 300' of the owner’s primary place of residence and prevents the owner from utilizing the property in

substantially the same manner as it is currently being utilized.

- E. “523.001(3) ‘Homestead taking’, any taking of a dwelling owned by the property owner and functioning as the owner's primary place of residence or any taking of the owner's property within three hundred feet of the owner's primary place of residence that prevents the owner from utilizing the property in substantially the same manner as it is currently being utilized.