

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

MISSOURI MUNICIPAL ATTORNEYS ASSOCIATION  
2018 SUMMER SEMINAR

JULY 30, 2018

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OVERVIEW OF PRESENTATION

- This covers the basics.
- All the citations here (and more) are in your materials.
- Forms – best source of forms is the Missouri Bar CLE “blackbook” on Condemnation.
- Change in the laws in 2006.
- Condemnation based on blight – more restricted by change in laws and for political reasons. Touched on a bit here, but practically its own body of law.

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OVERVIEW OF THE PROCESS

1. Preliminary
  1. What is the taking for?
  2. Identify the statutory authority.
  3. Information about the taking (property, project, owners, etc.)
2. Pre-Litigation Notices
  1. Notice of Acquisition
  2. Written Offer
3. Prepare Pleadings
4. Initiate Litigation
  1. Petition
  2. Response/Defenses of Owners
  3. Discovery
5. Condemnation Hearing
  1. Witness
  2. Evidence
  3. Orders

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**SOURCES OF LAW: CONSTITUTION, STATUTES AND RULES**

- **Missouri Constitution**
  - Article 1, Section 26: "Compensation for property taken by eminent domain - condemnation juries - payment - railroad property"
  - Article 1, Section 28: "Limitation on taking of private property for private use--exceptions -- public use a judicial question."
- **Missouri Court Rule 86, "Condemnation Proceedings"**
- **Statutes – Chapter 523**
- Condemnation is a *sui generis* proceeding and rules and the law are applied differently in condemnation actions. It is not until exceptions have been filed that a condemnation case takes on the characteristics of normal litigation. "Other rules of civil procedure apply in condemnation proceedings only when they are consistent with Rule 86." *State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner*, 626 S.W.2d 373, 377 (Mo. 1982).

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**CONDEMNING AUTHORITIES**

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**LEGISLATIVE AUTHORITY TO AUTHORIZE CONDEMNATION POWERS**

- 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 Envtl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. banc 1975).

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### HOME RULE CHARTER COUNTIES

- Article VI, Section 18 of the Constitution of the State of Missouri.
- 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).
- 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.
- 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

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### CHARTER CITIES

- 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.
- Charter city’s authority to condemn outside its limits. *City Of Cape Girardeau, v. Jett*, 851 S.W.2d 114 (Mo.App. E.D. 1993). However, only if in the same county where the city is located. *City of Springfield ex rel. Bd. of Pub. Utilities of Springfield, Mo. v. Brechbuhler*, 895 S.W.2d 583, 583 (Mo. 1995)

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### NONCHARTER CITIES

- “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).

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**PRE-CONDEMNATION PROCEDURES**

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

- Contents: (Section 523.250.1)
  - identifying the interest in real property to be acquired;
  - the purpose for which the property is being condemned;
  - and a statement of the property owner's rights including the right
    - to seek legal counsel at the owner's expense,
    - to make a counteroffer and engage in further negotiations,
    - to obtain the landowner's own appraisal,
    - have compensation determined by commissioners and, ultimately, by a jury;
    - seek assistance from the office of the ombudsman for property rights created under section 523.277;
    - contest the right to condemn in the condemnation proceeding;
    - and exercise the rights to request vacation of an easement under the procedures and circumstances provided for in section 527.188.

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

- Manner of Delivery:
- Section 523.250.1: 60 days prior to the filing of the petition
  - Section 523.250.2:
    - "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."
- What does this last clause mean?
- Proof of delivery by other means (i.e. hand delivery) or just proof that it was put in mail without producing the receipt?
  - Best practice to follow the statute unless owner is represented by counsel and a waiver is given in writing.

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### WRITTEN OFFER

Timing:

- 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.

Delivery:

- The offer shall be mailed, either registered or certified.
- 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.

What does this last clause mean?

- Proof of delivery by other means or can prove it was put in mail without producing the receipt?
- Best practice is to follow the statute or obtain waiver from counsel, if owner is represented.

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### WRITTEN OFFER

Contents:

- Statement of compensation (implied, not in statute)
- 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.
- 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
  - Note: 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)

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### GOOD FAITH OFFER STATUTE REQUIRES THE USE OF "ACCEPTABLE APPRAISAL PRACTICES" (CASE LAW)

- *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.
  - 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.
- *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 owners argued " 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.

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**WHAT CONSTITUTES "SUPPORTING FINANCIAL DATA"?**

*Carroll Electric Co-op v. Lambert*, 403 S.W.3d 637 (Mo.App. S.D. 2012)

- "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."
- 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.
- The appellate court never discussed what "supporting financial data" means.

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**COMBINING NOTICE OF ACQUISITION WITH OFFER LETTER**

- Can the offer be included in the Notice of Acquisition?
- Statute is silent.
- No apparent reason why not:
  - Served on same parties
  - Served in same manner
- Frequently, they are combined.

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

- Section 523.256, passed in 2006 with Section 523.253, 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.
- "The legislature enacted the 2006 amendments to chapter 523 in response to *Kelo v. City of New London* ... 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)

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### GOOD FAITH OFFER / NEGOTIATIONS - PRE 2006 EMINENT DOMAIN STATUTE

- 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)
- Negotiations: Some 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)
- In *Cape Girardeau v. Robertson*, 615 S.W.2d 526 (Mo.App.E.D. 1981)
  - A permanent easement was sought for sloping purposes. No monetary offer was made. (Condemning agency offered grass seeds.)
  - 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.
- *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 ...'"

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### Good faith offer actually entails good faith negotiations.

- *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.")
- *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.")
- Uniform Relocation Act Standard, "every reasonable effort..." *City of Columbia v. Baurichter*, 713 S.W.2d 265, 266 (Mo. banc. 1986). It is very important to note that this 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.
- 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)
- *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.
- 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).

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### PROPOSING A CHANGE IN THE LOCATION OF A PROPOSED CONDEMNATION PROJECT

Section 523.265

- 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.
- A written response by the condemning authority is required giving the reasons why the alternatives are rejected or accepted.
  - No deadline, but must show response at the condemnation hearing.
- This section does not apply to condemnation of the entire property.

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**AUTHORITY TO ENTER LAND PRIOR TO CONDEMNATION**

- Pre-condemnation land 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).
- No other pre-condemnation power to access: *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.)
- Leave trees alone: *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.)
- *Gardner v. City of Cape Girardeau*, 880 S.W.2d 652 (Mo.App. 1994)
  - Damages caused by pre-condemnation survey were recoverable in condemnation case.
  - Property owners were collaterally stopped from claiming damages in an inverse condemnation which should have been covered in the condemnation trial.

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**INSTITUTING CONDEMNATION PROCEEDINGS**

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**PARTIES TO BE NAMED IN A PETITION**

- 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."
- Section 523.010(3)
- 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.
  - 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."
- Always get a title report  
 It is advisable to name all lienholders as defendants.  
 Safety: Name "unknowns" and publish  
 Attorney for unknowns – not used much any longer  
 Tenants - Rule 86.03 and Section 523.010(3) - Tenant is a necessary party to the condemnation action if it is in possession of the premises or if the lease is recorded.

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### PETITION

Rule 86.04, Petition's contents

- a description of the property sought to be condemned;
- 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 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;
- 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)
- 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.

Also, advisable to plead compliance with Notice to Acquire and Offer statutes.

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### PROCESS

- File petition (often with plans and proposed orders)
- Get assigned to judge
- Go to judge for a date for the condemnation hearing
  - Common to have judge sign an order setting condemnation hearing
  - Allow time for personal service and publication
- Notify summons clerk of date to put on summons
- Add date to notice of publication, if applicable
- Have judge sign the orders needed for notice of publication

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### AMENDED PETITION

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.)

To give owners more rights.

- *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...")
- *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.")

To increase taking.

- 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. McCarroll*, 685 S.W.2d 880, (Mo.App. W.D. 1986)
- With the 2006 requirements for Notice of Acquisition, this may now be true at any time in the case.

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**NEED NOT SPECIFY DURATION OF TEMPORARY  
CONSTRUCTION EASEMENT**

- 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)

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**NOTICE OF CONDEMNATION HEARING**

- 10 days is required for a condemnation hearing from the time of filing a petition. Rule 86.05
- 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.”

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**DEFENDANTS’ PLEADINGS**

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**RESPONSIVE PLEADINGS NOT REQUIRED**

- General rule is that a landowner is not required to file an answer or any other responsive pleading in condemnation action. *Arkansas-Missouri Power Co. v. Hamlin*, 288 S.W.2d 14, 18 (Mo.App. 1956)
- Best practice for property owners is to file an answer with affirmative defenses or a motion to dismiss if there is an intent to contest the power to take for any reason.

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**COUNTERCLAIMS**

- 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.)
- 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.)
  - “Reversed” *Washington University* that indicated such damages were not compensable
  - No reason these damages are not now allowed as part of condemnation.
  - Maybe be required to claim such damages, or have them deemed waived by *res judicata*.
- Reconciling these decisions:
  - 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”
  - *Washington University* was reversed to the extent that damages relating to pre-condemnation damages can be admitted into the case
  - The confusion was the owner’s choice in *Washington University* to file a counterclaim to assert an element of damages.
- 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.

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**DEFENSES: ABSENCE OF STATUTORY AUTHORIZATION**

- *City of North Kansas City v. K.C. Beaton Holding Co., LLC* - Third-class, non-charter city lacked statutory authority under Section 88.497 to condemn private property upon which a 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.
- *State ex rel. Missouri Cities Water Company v. Hodge* - City of Mexico lacked specific authority to condemn private waterworks system to create a public waterworks system.
- *State ex rel. Missouri Highway and Transportation Commission v. Keeven* - MoDOT has 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.
- *State ex rel. State Highway Commission v. Pinkley* - Missouri Highway Commission does not have authority to condemn for roadside rest area because it is not necessary to a construction of a highway.)
- *Kansas City v. Ashley* - 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.)

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**DEFENSES: FAILURE TO ACQUIRE THE PROPERTY WITHIN DEADLINE AS REQUIRED UNDER STATUTE**

- *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.)

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**DEFENSES: FAILURE TO FOLLOW THE DEFINITION OF BLIGHT UNDER CHAPTER 353**

- *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 a blighted area because of a lack of evidence of social liability.)

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

- Section 523.265 – Adopted in 2006
- Procedure involves landowner proposing, in writing, alternate locations on the same parcel in sufficient detail. Within 30 days of receiving the notice of acquisition.
- A written response by the condemning authority is required giving the reasons why the alternatives are rejected or accepted.
  - No time limit but must show a valid response at the condemnation hearing.

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

- 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).
- *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.)
- *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.)

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**DEFENSES: NECESSITY AND PUBLIC PURPOSE - JURISDICTIONAL REQUIREMENT AND BURDEN OF PROOF**

- 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).

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**DEFENSES: ABSENCE OF NECESSITY**

- 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.
- 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)

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**DEFENSES: EXCESS CONDEMNATION**

- *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.)
- 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.

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**DEFENSES: PUBLIC PURPOSE**

- 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.
- “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)
- *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.)
- *City of Kansas City v. Han*, 972 S.W.2d 407 (Mo.App. W.D. 1998) (“public purpose” should be broad and flexible)
- *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).

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**DEFENSES: CANNOT CONDEMN SOLELY FOR ECONOMIC DEVELOPMENT**

- Section 523.271, RSMo. - Passed in 2006.
  - “No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.”
  - “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.”
- *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.)

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**CONDEMNATION HEARINGS**

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**DISCOVERY PRIOR TO CONDEMNATION HEARING**

- No cases dealing with discovery relating to the appraisal process to determine if appraisal was completed using "acceptable appraisal practices". Since 2006, this is an issue that must be shown during the condemnation hearing. Presumably, then, discovery regarding an appraisal should be permitted to the extent it is aimed to determine if it was completed using "acceptable appraisal practices."
- Appraiser's report is not discoverable for condemnation hearing. *State ex rel. Missouri Highway and Transportation Commission v. Anderson*, 735 S.W.2d 350 (Mo.banc 1987).
- 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).
- Jurisdictional discovery permissible. Discovery is permissible prior to condemnation hearing in order for property owner to challenge condemnor's authority to condemn.
  - Owner must file a motion to dismiss or affirmative defenses challenging the condemnation

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**MOTION FOR CONTINUANCE OF CONDEMNATION HEARING**

- Motions for Continuance are governed by Rule 65.03. *Union Elec. Co. v. Jones*, 356 S.W.2d 857, 863 (Mo. 1962)
- 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).
- 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).

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### CONDEMNATION HEARING

- “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).

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### CONDEMNATION ORDERS ARE INTERLOCUTORY

- Condemnation orders are interlocutory. *Norfolk and Western Railway Co. V. Greening*, 458, S.W.2d 268, 270 (Mo. 1970).
- Right to challenge condemnation is waived by owner if they take any of the commissioners award.
- 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
- The condemning agency may appeal if its authority to condemn is denied or dismissed.

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### Four jurisdictional requirements:

- Authority to condemn - Condemnor must have the statutory authority to condemn and is authorized to do so in this case.
  - Public purpose - Taking is for a public purpose.
  - Necessity - Taking is necessary for the public purpose. Necessity is a matter for legislative determination
  - Good faith offer
- NOTE: For years, these requirements were (and still are) discussed as “jurisdictional”, but actually deal with a court’s “*limitation to act*.” *St. Louis County v. Berck*, 322 S.W.3d 622 (Mo. App. E.D. 2010)(Citing *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009))

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**COURTROOM PROCEDURE FOR PLAINTIFF'S ATTORNEY**

- Judicial notice:
  - Service upon all defendants.
  - Relevant statute authorizing condemnation.
- Through witness(es):
  - Identify ordinances authorizing condemnation.
  - Identify these documents as having been certified by the municipal clerk.
  - Explain project and public purpose.
  - Identify the subject property and the taking, and why it is necessary.
  - Notice of Acquisition (60 day letter)
    - Content
    - Proof of delivery
    - Timeliness
- Offer:
  - Timeliness
  - Content
  - Proof of delivery
  - Offer not accepted or rejected – other efforts at negotiating.
- Appraiser:
  - If appraisal provided with offer, must show that the appraiser was licensed and the appraisal followed acceptable appraisal practices
  - Appraiser may be the only competent witness for this, otherwise, hearsay will be a proper objection for its admission as to these two issues.
- Submit:
  - Order of condemnation
  - Order appointing commissioners
  - Oath for commissioners.

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**GOOD FAITH NEGOTIATIONS OCCURRED**

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:

- "(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."

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**ATTORNEY'S FEES AND COSTS IF NO GOOD FAITH**

- 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.
- *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.)

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### COMMISSIONERS, QUALIFICATIONS

- Three requirements to be a commissioner:
  - Freeholder (Considered 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))
  - Resident of the county where the subject property is located
  - Disinterested
- Broker/Appraiser: 523.040(1)
  - In 2011, the legislature added language that in St. Louis City and County and Jackson County, that "one of the commissioners shall be either a licensed real estate broker or a state-licensed or state-certified real estate appraiser..."
  - This may conflict with 86.06
  - In matters of procedure, Supreme Court rules trump statutes
- Disinterested
  - "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))
  - "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 interested. *City of Kansas City v. Powell*, 451 S.W.3d 724, 741 (Mo. Ct. App. 2014), as modified (Nov. 25, 2014)

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### COMMISSIONERS – PROCESS FOR SELECTING

- In the end, it's up to the judge
- Some judges don't want suggestions
- Some judges ask each side for some names
- In St. Charles County – Clerk has a list of names
- By charter, St. Louis County has its own list when it is condemning agency

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### HERITAGE VALUE

- Essentially, three statutes are involved. Heritage value has two requirements:
  - Heritage value requires the property to be held 50 years by the family, and
  - 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.
- Procedure for heritage value
  - Commissioners determine if property has been owned by same family for 50 years.
    - Owner must request the court to direct the commissioners to make a finding of 50 years of ownership.
  - Judge then "shall determine whether heritage value is payable"
    - Presumably, applying the "substantially same manner" test.

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### HOMESTEAD VALUE

- 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.
- Trial court decides whether a homestead bonus is applicable after commissioners award.
- No need for owners to request homestead determination at the time of the condemnation hearing.
- One cannot have both Heritage Value and Homestead Value – owner may choose the one that creates the higher value.

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