

Condemnation Practice

Presented by:
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Municipal Law Essentials
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Legal Principles of Eminent Domain

Definitions

- Eminent Domain:** An inherent power of a governmental entity to take privately owned property.
- Condemnation:** A judicial procedure for using the power of eminent domain and determining Just Compensation.
- Taking:** A government's actual or effective acquisition of private property either by diverting it to public use or by severely impairing or destroying its utility.
- Just Compensation:** A payment by the government for property it has taken using eminent domain—typically the property's fair market value; owner required to be “made whole.”
- Police Power:** An inherent power of a government to make laws to preserve the public health, morality, safety and welfare.
- Property:** Refers to real property, as well as tangible and intangible personal property.

The Takings Clause of the United States Constitution

“[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

- Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.”

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005)

- This condition “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Armstrong v. United States, 364 U.S. 40, 49 (1960)

- Payment of just compensation is the mechanism that shifts the burden of the taking to the “public as a whole.”



The Takings Clause of the Missouri Constitution

“[P]rivate 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...and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed....” Mo. CONST. art. I. § 26.

- Key difference: Requires payment before taking title
- “or damaged” language also different, but that does not affect public works projects in practice



Public Use Requirement

- A taking of private property must be for a “public use”
U.S. CONST. amend. V; MO. CONST. art. I §§ 26 and 28
- “[W]hen 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.”
Mo. CONST. art. I § 28



The Power of Eminent Domain; Delegation



- FEDERAL GOVERNMENT and STATE GOVERNMENT possess inherent power of Eminent Domain
- NOT INHERENT in counties, municipalities, or public service corporations
 - The right for these entities to condemn can only be exercised upon delegation from the state
 - The authority to exercise the power depends on the specific delegation language in statutes and whether a municipality is a statutory city, home rule charter city or special charter city.
 - 3rd and 4th class cities, for general types of public works: see §§ 88.497 & 88.667 RSMo
- This is an example of “Dillon’s Rule”

The Police Power

- Power to adopt regulations to promote public health, safety, and welfare of a community
- Generally, a regulation will be upheld as a valid exercise of police power if it bears a “substantial relation to the public health, morality, safety or welfare.”
 - *City of Independence v. Richards*, 666 S.W.2d 1 (Mo. App. 1983)



The Police Power, cont'

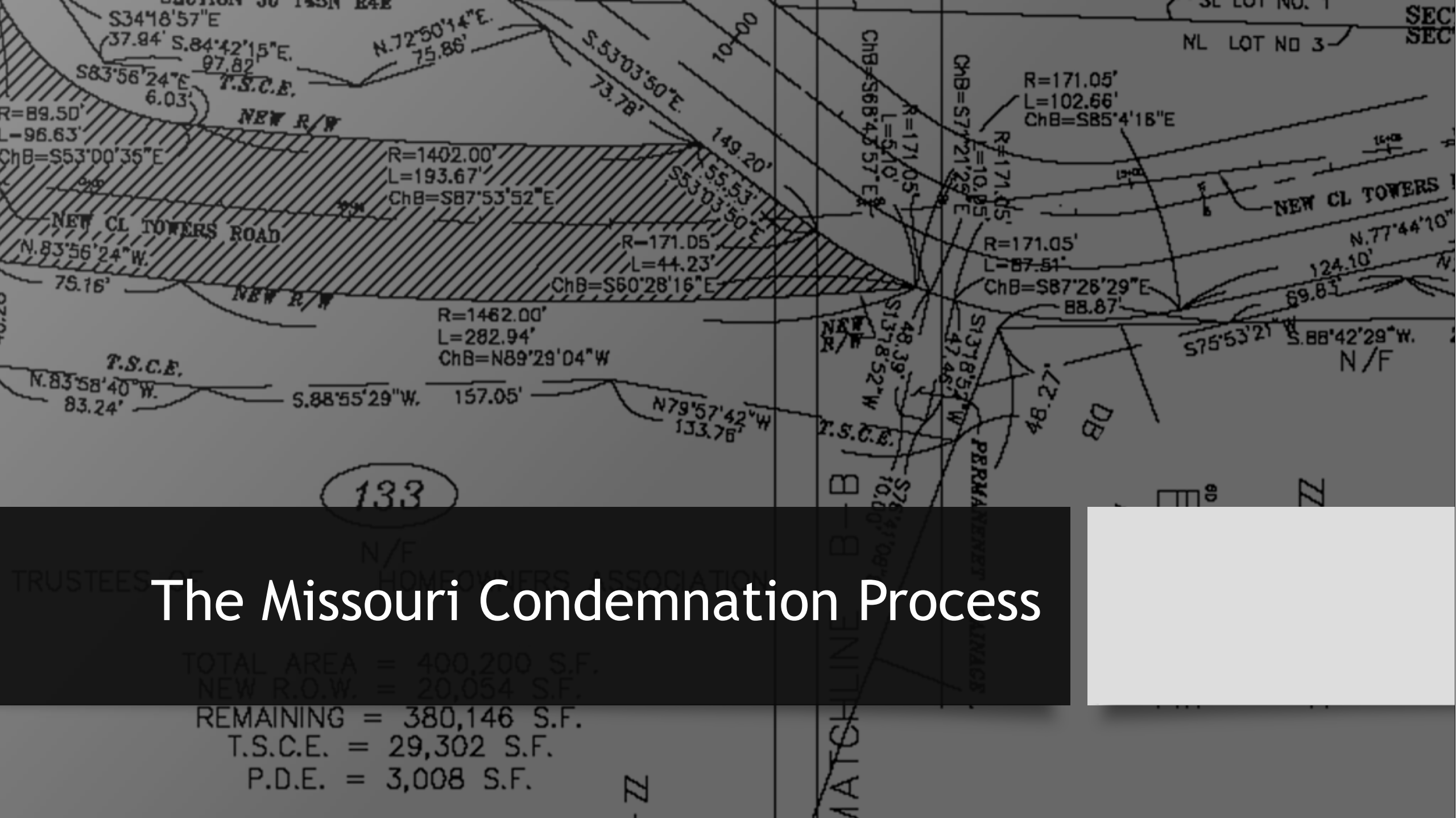


“Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare.”

Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 593 (1906)



But if a regulation goes “too far” then it will constitute a regulatory taking, for which compensation is required.



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The Missouri Condemnation Process

TOTAL AREA = 400,200 S.F.
 NEW R.O.W. = 20,054 S.F.
 REMAINING = 380,146 S.F.
 T.S.C.E. = 29,302 S.F.
 P.D.E. = 3,008 S.F.

First Steps (before going to court)

- Determine what interests are needed
 - Purpose of this project?
 - How will it serve a public use?
- Obtain legal description and title report
- IF USING FEDERAL FUNDS, ALSO:
 - Obtain environmental approval/clearance
 - Apply for notice to proceed/acquisition authority
 - MoDOT regulations

First Steps (Cont'd)

Is the owner a public entity? Is the property currently being used for a public use?

Is the property you need made up of more than one parcel of property?

Contact Property Owner(s)

- Discuss project
- Request donation (if desired)
 - With donation, obtain waiver of compensation
 - **If using federal funds, other steps *MUST* be completed first!**

Appraisal/Valuation/Acquisition Activity

IF NO FEDERAL FUNDS

- Appraisal or valuation of land and interest sought
- Consult with attorney to determine issues to be addressed in appraisal
- Best Practice = state-licensed appraiser

IF FEDERAL FUNDS USED

- Inform MoDOT prior to ROW activities starting
- Contract with:
 - state-licensed appraiser
 - review appraiser
 - negotiator (licensed real estate agent)

Exception to Appraisal Requirement

- Use of the Waiver Valuation when the acquisition is simple & \$10,000 or less
- Use Payment Estimate Form 136.8.34 (or similar)

**LOCAL PUBLIC AGENCY
WAIVER VALUATION - PAYMENT ESTIMATE**

District: _____
 County: _____
 Route: _____
 Project No.: _____
 Federal Project No.: _____
 Parcel No.: _____

1. Owner: _____

2. Identification of the Property: _____

3. Description of Acquisition: _____

4. Calculation of Value of Land to be Acquired:
 Land: _____ sf ac @ \$ _____ \$ _____

Basis for Value: _____

5. Summary:
 Value of Land Acquired: \$ _____
 Value of Improvements to be Acquired:
 Fee Owner _____ (Salvage Value \$ _____) \$ _____
 _____ (Salvage Value \$ _____) \$ _____
 Tenant Owner _____ (Salvage Value \$ _____) \$ _____

Damages to the Remainder:
 Permanent Easement: _____ sf ac @ \$ _____ \$ _____
 Temporary Easement: _____ sf ac @ \$ _____ \$ _____

Other Damages: _____ \$ _____

Subtotal: (Maximum \$10,000) \$ _____

Fencing: _____ If @ \$ _____ - \$ _____
 _____ If @ \$ _____ - \$ _____

Total Fencing: \$ _____

Total Just Compensation: \$ _____

6. Uneconomic Remnant:
 Area _____ sf ac @ \$ _____ \$ _____

Prepared by: _____ Date: _____
 Approved by: _____ Date: _____

Written Notice to Property Owners (both tracks)

- Notice of intent to acquire at least 60 days prior to filing condemnation petition.
- Must include (per § 523.250 RSMo):
 - legal description
 - Purpose
 - Property owner's rights
 - Relocation* eligibility notice (if necessary)
- Must be sent by certified/registered mail addressed to owner of record
- Can be waived by owner

*Need a Relocation Policy in place (adopted by ordinance)



Authorization Ordinance (both tracks)

- Authorizing **ordinance** should contain:
 - Description of project & improvements
 - Types of property & interests sought
 - Legal descriptions for every interest sought
 - Legislative findings regarding **public purpose** & **necessity**
 - Authority to make an offer, *and if negotiations fail...*
 - Authority to file condemnation proceedings

Written Offer to Owners

- Made at least 30 days prior to filing petition
- Held open for 30 days unless agreed earlier
- Sent certified/registered mail
- Include appraisal or explanation with supporting financial data
 - Appraisal must be made by state-licensed or state-certified appraiser
- § 523.253 RSMo



Good Faith Negotiations



§ 523.256 RSMo requires good faith negotiations. Elements to satisfy:

- Proper & timely notice to owners
- Offer was \geq \$ in appraisal (or pay estimate)
- Appraisal performed by a state-licensed/certified appraiser) or \geq amount provided pay estimate provided to owner
- Owner was given opportunity to obtain appraisal from a state-licensed or state-certified appraiser
- Considered alternate location if suggested by owner under § 523.265
 - If no “Good Faith Offer” then petition for condemnation dismissed

Negotiations/Offers

With offer letter, consider including a **purchase agreement**:

- Describe property
- Purchase price
 - “... includes all compensation to which seller would be entitled in a condemnation action... including damages to the remainder...”
- Closing date
- Due diligence period for city
- Seller representations
- Full release

SALES AND PURCHASE AGREEMENT

Date: 6/7/2013

I / We will give for the following described property in Deed Book ____ Page ____ in Jefferson County, in the state of KY, and commonly known as:

Address: 123 Main Street Land Trust Louisville, KY 40241
The Sum of: Fifty Thousand Dollars and no/100 (\$50,000.00)

Payable as follows: All cash at closing.

Closing will be no sooner than 5 days and no longer than 45 days. Contract is subject to inspection or partner approval contingency (only if I am buying –otherwise take this out). Closing will take place within 45 days once court / attorney approval to proceed is received.

An unencumbered, marketable title to said property to be conveyed by deed of **General Warranty**, with the usual covenants such as any title company will insure, except easements of record, restrictive covenants of record as to use and improvement of said property, and except applicable regulations imposed by any planning and zoning commission, AND EXCEPT:

- Property taxes are to be pro-rated between Buyer and Seller as of closing date.
- Property is being purchased in AS IS condition.
- Seller gives buyer to put a lockbox on the house for inspections and contractor estimates.

As evidence of good faith binding this agreement, a deposit of One Hundred Dollars (\$100.00) is made herewith to be applied on purchase price upon passing deed or refunded should title prove uninsurable or if this offer is not accepted.

Alternative Locations (partial takings)

- Owner must propose within 30 days of receiving written notice (i.e., the “60-day Letter”)
- City must consider all proposed alternative locations
- City must produce written statement why locations rejected/accepted

See § 523.265 RSMo



Petition for Condemnation

- Identify ALL owner(s) or interested parties
- Legal description of property
- Legal description of interest sought to be taken in property
- Authority to bring action
- Nature of the improvement/use requiring taking
- State good faith negotiations occurred but were unsuccessful, and reason why
- Describe project
- Request for appointment of 3 disinterested commissioners to assess damages

**IN THE CIRCUIT COURT OF MEGA COUNTY
STATE OF MISSOURI**

CITY OF BALDERDASH, MISSOURI,)
)
Plaintiff,)
)
v.) Case No. _____
)
SPECULATORS TRUST, INC.,) Division No. _____
Serve at: John Q. Public)
330 Jefferson Street)
Balderdash, MO 65432)
)
and)
)
SUCH UNKNOWN HEIRS, SPOUSES,)
ALIENEES, DONEES, GRANTEES,)
SUCCESSORS AND ASSIGNS, THE LESSORS)
AND/OR LESSEES OF UNRECORDED LEASES)
OR TENANCIES, AND CREDITORS, IF ANY,)
)
Serve by publication,)
)
Defendants.)

PETITION IN CONDEMNATION

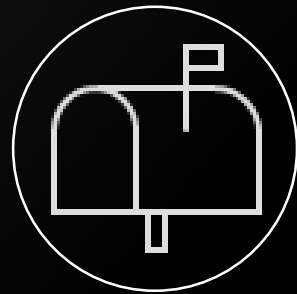
The City of Balderdash, Missouri (the "City"), for its cause of action states the following:

1. City is now, and was during all relevant times, a fourth class city organized and operated pursuant to Chapter 79 of the Revised Statutes of Missouri.
2. Name(s) of ALL owner(s) or interested parties of property
3. Description of property
4. Description of interest sought to be taken in property
5. Authority to bring action
6. Nature of the improvement or use associated with taking
7. State good faith negotiations occurred but were unsuccessful, and reason why
8. Copy of construction plans
9. Request for appointment of 3 disinterested commissioners to assess damages

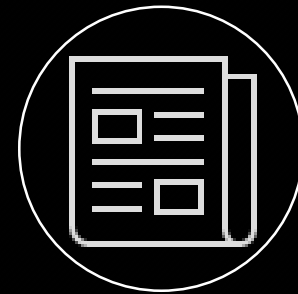
Serve Notice to Defendants



Personal



Certified
Mail
and/or



Publication

Condemnation Hearing [a.k.a. “Necessity Hearing”]

- Condemnor *MUST* establish:
 - Due notice given
 - Authority to use eminent domain
 - Compliance with constitutional and statutory prerequisites
 - Necessity (right to appropriate private property for the use and benefit of the public)

Appointment of Commissioners

- 3 'disinterested' commissioners
- Appointed by court
- Duty to schedule viewing and provide notice to parties
 - (often delegated to condemnor)
- View property and assess damages

Property Viewing/Commissioners' Hearing

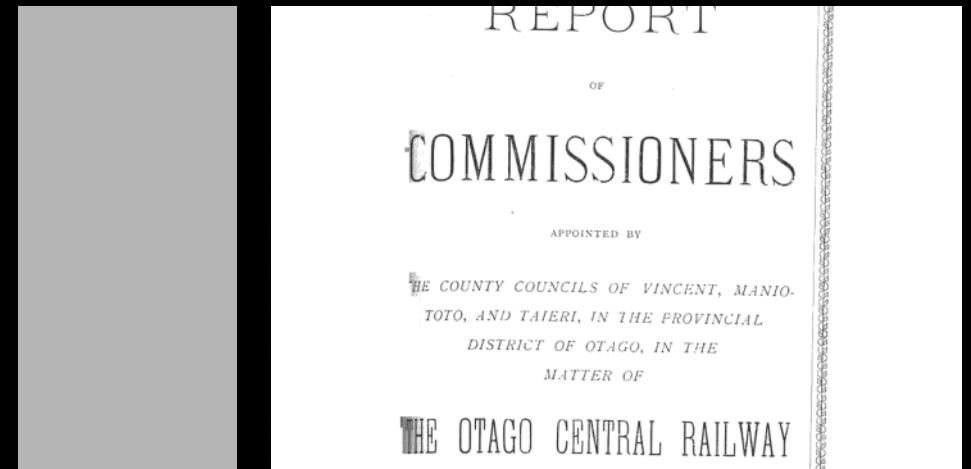
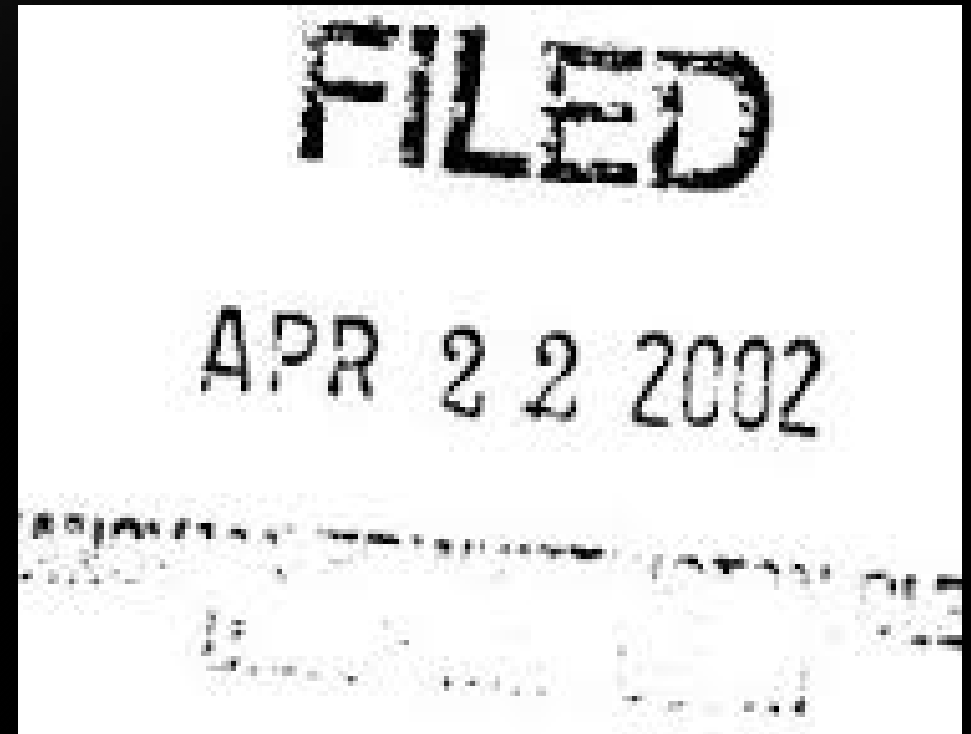
Commissioners:

- view property
- hear arguments
- review any other relevant information



Commissioners' Report Filed with Court

- 45 days of APPOINTMENT
- Court immediately notifies parties



Determination of Homestead/Heritage Takings

- Determined by court after commissioners' report filed
- Could possibly increase commissioners' award
- Burden of proof is on the LANDOWNER
 - (elements to prove discussed below)
- Heritage value compensation is not part of the "just compensation" mandated by the Constitution.
 - It is additional compensation for a statutorily defined class whose land is subject to taking.

After Commissioners' Report Filed

- **30 DAYS** to pay awards, file exceptions to report, **OR BOTH**
- Commissioners' award binding unless jury determination sought by either party
- Condemning authority can take property upon payment of commissioners' awards to the court
 - Failure to pay awards can lead condemning authority to forfeit right to condemn property for **TWO YEARS**

- The date of the Taking is the date upon which the condemnor pays the commissioners' award into court.
- **Once the award is paid, the condemnor has a right to possession of the subject property (subject to § 523.055 RSMo).** *State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. 2006).
- Owners must deliver property within **10 days AFTER receipt of notice of payment**
- Owners may ask court to extend time up to 90 days
- If owner is being displaced, possession delivered within **100 days** of date of commissioners' award

Possession

Possession

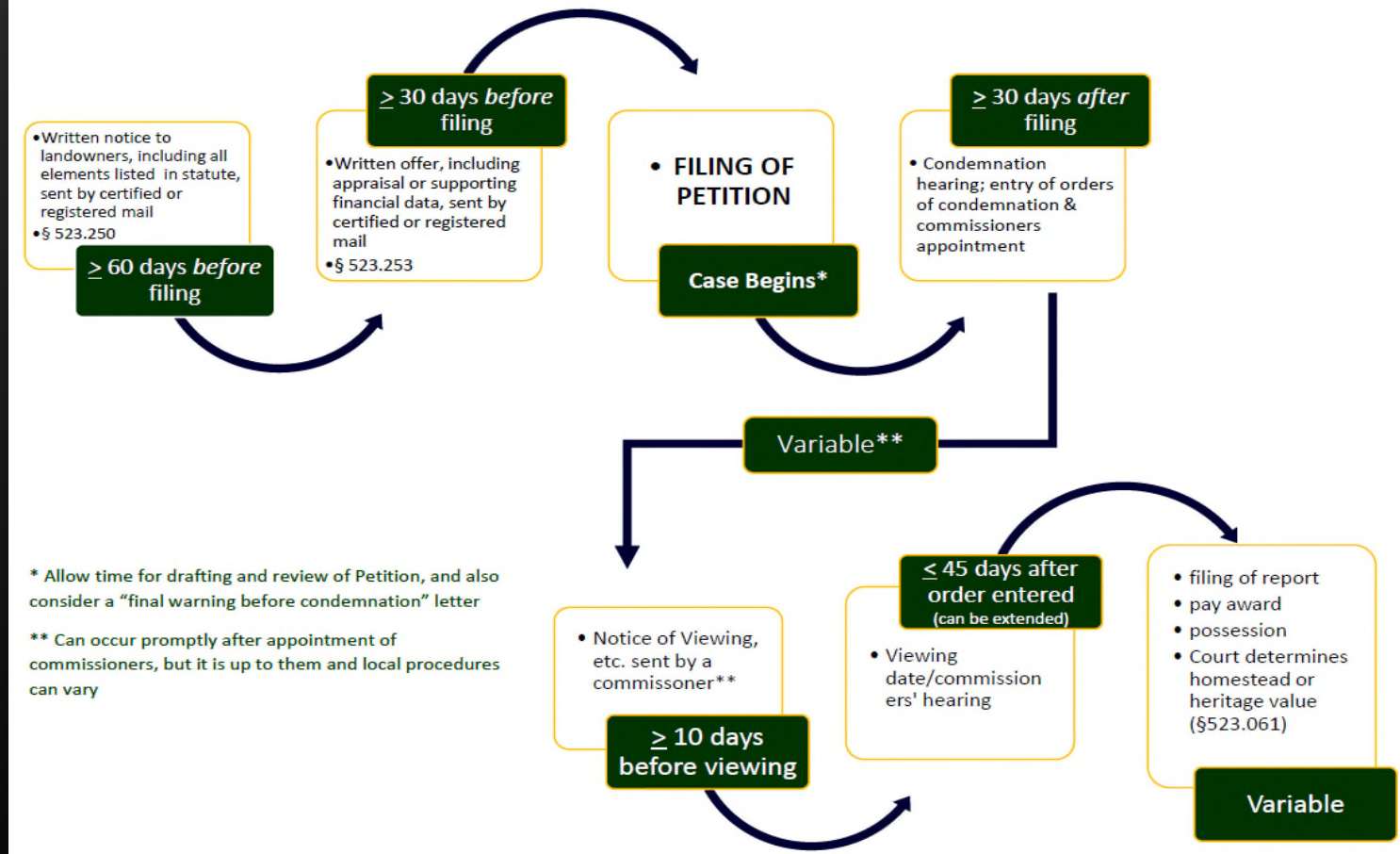
IF FEDERAL FUNDS USED

- All ROW has been acquired
- All legal/physical possession of parcels obtained
- Relocation assistance made available
- City **MUST** submit ROW Clearance Certification Statement to MoDOT

**BUT What if I
Change my
Mind? Can I
back Out?**

Abandonment

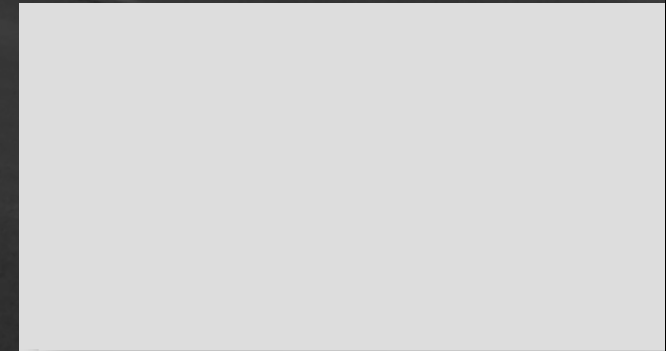
- A condemnor may abandon a condemnation IF it has not:
 - Paid the commissioners' award into court; or
 - Taken physical possession of the subject property
- BUT, in cases involving redevelopment or other types of pre-condemnation agreements, § 523.259 RSMo entitles an owner to recover:
 - (1) Reasonable attorneys' fees, expert expenses and costs; and
 - (2) The lesser of:
 - (a) The owner's actual damages; or
 - (b) The damages required to be paid under the terms of the redevelopment plan or agreement



Optimal Condemnation Timeline

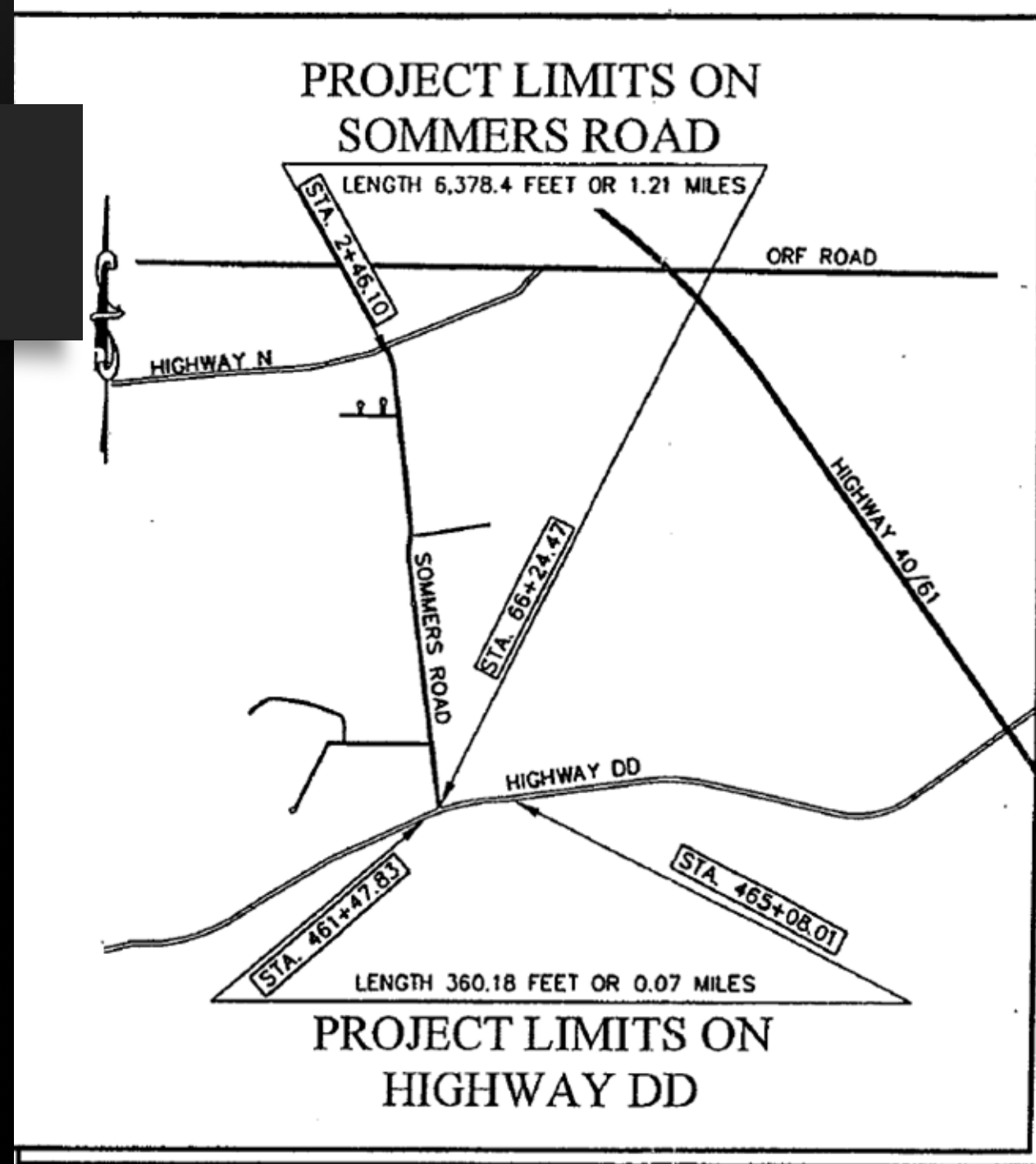


Practice Tips



Condemnation cases are *sui generis*

- Procedures set by Ch. 523 RSMo. and Rule 86
- Clerks, judges, and commissioners expect the Plaintiff to be the guide
 - Sometimes *pro se* owners, too - be procedurally transparent to ensure due process
- Have forms prepared for each step
 - MoBAR Condemnation Deskbook
 - Available through Fastcase on the MoBAR website; \$99/year subscription to one book, or other options



Some Unique Steps

- Filing Memo to Clerk
 - Include Proposed Order of Filing
 - May be used to set condemnation hearing date, which will be included on summonses
- Notice of Viewing Date
 - § 523.040.2 states a commissioner notifies the parties
 - Have notice signed by commissioners, directing Plaintiff's counsel to send it
- Commissioners Report & Notices of Filing
- Memorandum of Payment of Awards & Notices of Payments

IN THE CIRCUIT COURT OF MEGA COUNTY
STATE OF MISSOURI

CITY OF BALDERDASH, MISSOURI,

Plaintiff,

v.

JANE DOE, *et al.*,

Defendants.

Case No.:

**ORDER FOR FILING PETITION
AND SETTING DATE AND PLACE FOR CONDEMNATION HEARING**

On the 15th day of July, 2023, the Plaintiff City of Balderdash, Missouri, by counsel, presented its Petition praying condemnation of certain lands, properties, and interests therein, situated in Mega County, Missouri, for public road purposes, further praying that three qualified Commissioners be appointed to assess the damages, if any, caused by the establishment, location, construction, and maintenance of such public road improvements over and across the lands and properties described in Plaintiff's Condemnation Petition, taking into consideration in determining said damages, if any, the benefits to be derived by the Defendants, as well as the damages sustained by reason of the construction of the Project.

Said Petition having been duly considered and found legally sufficient on its face;

IT IS HEREBY ORDERED that the same be received and filed by the Circuit Clerk of Mega County, Missouri, and that the hearing on the Condemnation Petition be set for the ____ day of _____, 2023, at _____ a.m., or as soon thereafter as this case can be reached, at the Courthouse in the City of Balderdash, Mega County, Missouri.

IT IS FURTHER ORDERED that said Circuit Clerk issue proper Condemnation Summonses and cause them to be served, together with a copy of said Condemnation

Exhibits

- Give the Commissioners a packet with exhibits and summary
- Try to make construction plans, plats easier to understand
 - Have an informed witness, such as engineer or construction manager, talk the commissioners through them
 - Witness must be prepared to explain construction steps & avoid over-promising

Take Only What you Need

Maximum Injury Rule: Landowners will argue that a jury should presume the condemnor will make the “most injurious use of its rights.”

Having detailed construction plans helps limit these arguments, but not if the easements are more intrusive than necessary.

Closely examine:

- Sizes and locations of easements
- Descriptions of easement rights

Confronting
Certain Claims
*During
Negotiations
and/or at Trial*



General damages and inconvenience



Business losses



Speculative Fears



Heritage and Homestead Values

General Damages and Inconvenience

- Any general damages—those applicable to all properties within useable range of the project—are not compensable
 - *State ex rel. Missouri Highway & Transp. Comm'n v. Mertz*, 778 S.W.2d 366, 368 (Mo.App. 1989)
- These noncompensable damages include:
 - Increased traffic
 - Noise
 - Unsightliness of construction project
- But they may, along with other factors, affect future use and, therefore, market value
- Appraisers for landowners often look for ways to discuss them indirectly

Business Losses

- Business losses are not compensable
 - *State ex rel. Missouri Highway & Transp. Comm'n v. Wallach*, 826 S.W.2d 901, 903 (Mo.App. 1992)
- Commissioners and juries will still know the site is a business

Speculative Fears

- Only acts to be performed during the construction work that are lawful, proper, and reasonably foreseeable—not speculative—may come into evidence
 - *Kamo Elec. Co-op. v. Baker*, 287 S.W.2d 858, 862 (Mo. 1956)
- Evidence about tortious acts by contractors, such as trespassing beyond ROW and easements acquired, should be excluded
- Same principle can be used to oppose other speculative arguments, such as “drivers will speed and crash more often on a new street”

Heritage and Homestead Values *NOT AUTOMATIC*—Landowner Must Prove Elements

- Heritage Value—50% increase IF:
 - Property owned within same family for at least 50 years; and
 - Taking prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking
- Homestead Value—25% increase IF the taking:
 - is of the primary residence or within 300' of it; and
 - prevents the owner from utilizing the property in substantially the same manner as it is currently being utilized



Heritage and Homestead Elements

“Substantially the same manner” argument

- From 2006 until 2019, some landowners/attorneys tried to argue: ANY partial taking satisfied the test, because the part taken could not continue to be used in same manner as before.
- This argument was rejected in *City of Cape Girardeau v. Elmwood Farms, L.P.*, 575 S.W.3d 280 (Mo.App. 2019).
- The correct test is whether the taking prevents the owner from utilizing the ***whole property*** in substantially the same manner as it was being utilized on the day of the taking.
- Answer is fact-dependent

The background of the slide features a dark gray gradient with several large, faint question marks scattered across the top half. Below the question marks, there are numerous silhouettes of hands raised, suggesting a public meeting or a Q&A session. The overall theme is one of inquiry and community participation.

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Q & A