

No. SC89148

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI *ex rel.* C.F. WHITE FAMILY
PARTNERSHIP and LUPTON LIVING TRUST,

Relators,

v.

THE HONORABLE MARCO ROLDAN,

Respondent.

Original Proceeding on Petition for Writ of Prohibition
to the Jackson County Circuit Court, 16th Judicial Circuit,
Cause No. 0716-CV23316, the Honorable Marco Roldan, Presiding

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF PROHIBITION

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MISCELLANEOUS

Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*,
71 Mo. L. Rev. 721 (2006) 3

James W. Erwin, *Mo. Appellate Court Practice* §§ 13.2 & 13.4 10

PRELIMINARY STATEMENT

Having decided to ignore their statutory burden to establish ownership for purposes of “heritage value,” Defendants C.F. White Family Partnership and Lupton Living Trust (“Defendants”), seek an extraordinary writ to force the trial court to decide the issue expressly reserved solely for the commissioners or the jury. In doing so, Defendants not only disregard the plain language of the statute, but also the very purposes of an extraordinary writ. Instead of preventing an abuse of judicial power or enforcing a clear right, Defendants ask this Court to exceed the judicial power expressly established in the statute, and to change the law. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). The trial court correctly declined to exceed its jurisdiction. This Court should likewise decline Defendants’ request, including their invitation for advisory opinions. *See* Brief of Relators, p. 24 (requesting ruling on “future proceedings”).

In accordance with statutory requirements for condemnation proceedings, commissioners are appointed to assess the damages resulting from a condemnation. *See* RSMo. § 523.040 (noting the commissioners’ obligation to hear argument and review relevant information offered by the parties). This includes a determination of ownership necessary for the assessment of “heritage value.” *See* RSMo. § 523.039. Indeed, the statute specifically states that “[t]he 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.” *Id.* (emphasis added). Likewise, the plain language of the statute provides that once a condemning authority, such as the City of Independence, has paid

the damages assessed by the commissioners, it is entitled to possession of the condemned property. Possession of condemned property is not contingent on payment of any “heritage value,” and the statute does not require the trial court to determine “heritage value” before a jury trial when exceptions are filed. Yet, Defendants misunderstand and disregard these basic legal principles.

For example, Defendants remarkably argue without any citation or authority that: “It is a fundamental Constitutional right that just compensation must be paid before private property must be turned over for a public use.” Brief of Relators, p. 20. This is directly contrary to the condemnation statute, *see* RSMo. § 523.055, and long-standing United States Supreme Court precedent. *See Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 568 (1898) (“There can be no doubt that, if adequate provision for compensation is made, authority may be granted for taking possession, pending inquiry as to the amount which must be paid and before any final determination thereof.”).

Defendants ask this court to change the plain language of the statute and discard it as “superfluous” in order to avoid a result they do not like. Brief of Relators, p. 28. This is not the purpose of a writ nor should it be the role of this Court. Instead, Defendants had an opportunity, and still have an opportunity, to satisfy their burden for “heritage value.” The fact that they failed to take their first opportunity (before the commissioners) and cannot wait for their second opportunity (before the jury) is clearly insufficient to justify extraordinary relief and change the plain language of the statute. Thus, the Defendants’ petition should be denied and the preliminary writ quashed.

STATEMENT OF THE FACTS

A. The Missouri Legislature Passed New Legislation for Condemnation.

In 2006, the Missouri legislature passed legislation concerning condemnation proceedings, including provisions relating to the duties of commissioners, commissioners' reports, and the finding and assessment of "heritage value." *See* RSMo. §§ 523.001 *et seq.*; *see also* Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 Mo. L. Rev. 721 (2006).

The 2006 legislation defines a new category of compensation for "heritage value" as:

[T]he 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;

RSMo. § 523.001(2). Based on this definition, the statute expressly provides the forum for the underlying factual determination of "heritage value":

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.

RSMo. § 523.039(3) (emphasis added).

In order for the commissioners to make this factual determination, the statute provides as follows:

2. Prior to the issuance of any report . . . a commissioner shall notify all parties named in the condemnation petition . . . of the named parties’ opportunity to accompany the commissioners on the commissioners’ viewing of the property and of the named parties’ opportunity to present information to the commissioners.

3. The commissioners shall view the property, hear arguments, and review other relevant information that may be offered by the parties.

RSMo. § 523.040 (titled “Appointment of commissioners—duties”). There is no similar provision for presentation to the trial court.

After the commissioners’ report is filed, and after “the amount of damages assessed by commissioners” is paid – which does not include “heritage value” – then the condemnor is entitled to possession of the condemned property or a writ of execution.

RSMo. § 523.055 (emphasis added); *see also* Mo. R. Civ. P. 86.06. The assessed damages by the commissioners, and any factual finding to determine “heritage value” is separate from an assessment of the increase in the award for the “heritage value”:

After the filing of the commissioners’ report . . . the circuit judge . . . shall determine whether heritage value is payable and shall increase the commissioners’ award to provide for the additional compensation due

RSMo. § 523.061; *compare with* RSMo. § 523.039(3).

This determination by the trial court judge of whether heritage value is payable not only depends on the fact-finding by the commissioners or jury, but also includes whether the condemnation results in a “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.” RSMo. § 523.039(3).

To the extent exceptions are filed and a jury trial is thereby initiated, the increase of the award based on “heritage value” would not come until after the “jury verdict.” *Id.* Yet, possession of the property is not delayed based on when the “heritage value” increase is assessed. *See* RSMo. § 523.055; *see also* Mo. R. of Civ. P. 86.06.

B. Defendants Did Not Follow the Plain Language and Seek a Writ.

On August 22, 2007, the City of Independence (“City of Independence”) filed an eminent domain action involving a partial taking of property located in the City of Independence (the “Property”). Commissioners were appointed and a hearing was conducted by the commissioners in which Defendants made a presentation, including the filing of materials and evidence. There is no dispute that the Defendants did not present evidence or seek to satisfy their burden at the commissioners’ hearing regarding any “heritage value” or the length of ownership of the Property. RSMo. § 523.039(3).

Defendants also did not request that the commissioners make a finding that Defendants had provided sufficient evidence as to whether the Property had been owned within the same family for fifty or more years. On December 4, 2007, the commissioners’ report assessing the damages for the Property was filed with the trial court. *See* Appendix (“Apx.”) A2-A4. The report, which was reviewed and approved

as to form by Defendants prior to its filing, specifically stated that the commissioners did not make a determination as to whether “heritage value” applied, nor did they make a factual determination as to whether the Property had been owned within the same family for fifty or more years. *See id.* Defendants made no effort to ask the commissioners to reconsider or change their report to consider “heritage value.” Additionally, at the time the report of the commissioners was filed, Defendants failed to request that the commissioners be required to make an evidentiary finding concerning ownership.

The City of Independence paid into the trial court the commissioners’ award of damages and thereby became entitled to possession. Unsatisfied with the damages assessed by the commissioners, on December 18, 2007, Defendants filed their Exceptions to the Commissioners’ Report with the trial court and demanded a jury trial. *See* Apdx. A5-A6. Despite having never attempted to satisfy their burden for the assessment of “heritage value,” on December 20, 2007, Defendants filed a Motion for Assessment of “Heritage Value” with the trial court. *See* Apdx. A7-A9. Without even waiting for a ruling on its Motion for Assessment of “Heritage Value,” on January 7, 2008, Defendants filed a Motion to Distribute the Commissioners’ Award. *See* Apdx. A10-A12.

On February 14, 2008, the trial court issued its Order denying “at this time” the Defendants’ Motion for Assessment of Heritage Value because exceptions to the Commissioners’ Report had been filed and a jury trial demanded. *See* Apdx. A1. Pursuant to Missouri law, Defendants have a second chance to establish their entitlement to “heritage value” by submitting evidence of ownership to the jury. Instead, they have bypassed the normal trial and appellate procedures and directly sought a writ first with

the Missouri Court of Appeals, Western District, which was denied, and now with this Court.

RESPONSE TO POINT RELIED ON^{1/}

I. RELATORS ARE NOT ENTITLED TO AN ORDER OF PROHIBITION OR MANDAMUS REQUIRING THE TRIAL COURT'S DETERMINATION OF HERITAGE VALUE BEFORE A JURY TRIAL, BECAUSE IT IS PREMATURE IN THAT THE RELATORS' FILING OF EXCEPTIONS RENDERED THE COMMISSIONERS' AWARD VOID AS *FUNCTUS OFFICIO*. – RESPONDING TO RELATORS' POINT I.

Backus v. Fort St. Union Depot Co., 169 U.S. 557 (1898)

Schottel v. State, 159 S.W.3d 836 (Mo. banc 2005)

State ex rel. State Highway Comm'n v. Polk, 459 S.W.2d 346 (Mo. 1970)

RSMo. § 523.055

^{1/} Defendants' "Points [sic] Relied On" fails to comply with Missouri Rule of Civil Procedure 84.04(d)(3). "An insufficient 'point relied on' preserves nothing for this court's review." *State v. Nenninger*, 872 S.W.2d 589, 589-90 (Mo. Ct. App. 1994). Indeed, it is altogether unclear what relief Defendants are seeking. They requested prohibition and now simply claim "Respondent Erred." Brief of Relators, p. 10. They argue the supposed denial of their constitutional rights to "Due Process and Just Compensation," yet adjudication of constitutional rights are not appropriate for writ proceedings. *See State ex rel. Johnson v. Griffin*, 945 S.W.2d 445 (Mo. banc 1997). And finally, they inappropriately request this Court issue advisory opinions.

II. RELATORS ARE NOT ENTITLED TO AN ORDER OF PROHIBITION OR MANDAMUS REQUIRING THE TRIAL COURT'S DETERMINATION OF HERITAGE VALUE BEFORE A JURY TRIAL, BECAUSE RELATORS FAILED TO CARRY THEIR STATUTORY BURDEN IN THAT THE PLAIN LANGUAGE OF THE STATUTE REQUIRES PROOF OF OWNERSHIP BEFORE THE COMMISSIONERS OR JURY, NOT THE JUDGE. – RESPONDING TO RELATORS' POINT I.

Soto v. State, 226 S.W.3d 164 (Mo. banc 2007)

State ex rel. Baumruk v. Belt, 964 S.W.2d 443 (Mo. banc 1998)

Turner v. State, 245 S.W.3d 826 (Mo. banc 2008)

RSMo. § 523.039

ARGUMENT

Standard of Review

“To be entitled to a writ of mandamus, the relator must have a clear, unequivocal, specific right to have an act performed.” *Carmack v. Saunders*, 884 S.W.2d 394, 398 (Mo. Ct. App. 1994). Likewise, the respondent must have a “present, imperative, unconditional duty to perform the action sought.” *Id.* Thus, courts issue the writ of mandamus sparingly, and only to compel performance of a clearly established, presently existing right. *See State ex rel. Brentwood Sch. Dist. v. State Tax Comm’n*, 589 S.W.2d 613, 614 (Mo. banc 1979); *see also Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo. banc 2000) (holding the purpose of a writ of mandamus is to “execute, not adjudicate”); JAMES W. ERWIN, MO. APPELLATE COURT PRACTICE § 13.2 (MoBar 5th ed. 2002, 2007).

This Court has stated with respect to a writ of mandamus that a court can provide no remedy “that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus.” *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo. banc 1980). To check the exercise of this raw judicial power, a “writ of mandamus ‘will not lie to establish a legal right, but its office is to enforce one which has already been established.’” *State ex rel. Brentwood Sch. Dist.*, 589 S.W.2d at 614 (quoting *State ex rel. Crites v. Short*, 351 Mo. 1013, 174 S.W.2d 821, 823 (1943)). As such, mandamus is appropriate only to compel a “ministerial duty.” James W. Erwin, *Mo. Appellate Court Practice* § 13.4 (MoBar 5th ed. 2002, 2007) (citing and quoting *State ex rel. McDonald v. City of Brentwood*, 66 S.W.3d 46, 51 (Mo. Ct. App. 2001), and *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. Ct. App. 1998)).

Similarly, a writ of prohibition is an extraordinary remedy to be used with great caution and only in cases of extreme necessity. *See Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). So rare is relief by writ or prohibition that this Court has established only three limited circumstances when a writ is appropriate:

- (1) when the trial court's order was a clear abuse of discretion beyond the court's power;
- (2) when the trial court lacks personal or subject matter jurisdiction; and
- (3) where absolute, irreparable harm will occur if some relief is not granted.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994).

Defendants originally sought only a writ of prohibition in this Court. *See* Defendants' Petition for Writ of Prohibition. In their current brief to this Court, Defendants now seek alternatively a writ of prohibition or a writ of mandamus. *See* Brief of Relators, p. 11. They fail, however, to satisfy any of the criteria for the issuance of either extraordinary writ. Accordingly, their petition should be denied and the preliminary writ quashed.

I. RELATORS ARE NOT ENTITLED TO AN ORDER OF PROHIBITION OR MANDAMUS REQUIRING THE TRIAL COURT'S DETERMINATION OF HERITAGE VALUE BEFORE A JURY TRIAL, BECAUSE IT IS PREMATURE IN THAT THE RELATORS' FILING OF EXCEPTIONS RENDERED THE COMMISSIONERS' AWARD VOID AS *FUNCTUS OFFICIO*. – RESPONDING TO RELATORS' POINT I.

The central issues in this case depend on the interpretation of several condemnation provisions, including some recently enacted legislation concerning the application of a bonus amount for “heritage value.” There are no cases interpreting the new legislation in the factual context presented in this case. As such, the City of Independence certainly agrees with Defendants that this case is one of “first impression.” See Brief of Relators, p. 12. For this reason, the Defendants’ petition for a writ should be denied. See *State ex rel. Brentwood Sch. Dist.*, 589 S.W.2d at 614 (holding that “writ of mandamus ‘will not lie to establish a legal right, but its office is to enforce one which has already been established’”); *State ex rel. Chassaing*, 887 S.W.2d at 577 (requiring a clear abuse of discretion for a writ of prohibition).

Beyond merely the threshold requirements for the issuance of a writ, the Defendants’ petition for an extraordinary writ should further be denied in this case because the trial court correctly interpreted the statute consistent with the plain language of the statute, the statutory framework, and the rules of statutory construction.

A. A Writ Should Not be Utilized to Circumvent the Ordinary Procedure for Reviewing a Court’s Statutory Interpretations.

Writs are specifically reserved for extraordinary circumstances, and should not be utilized to address merely disputes about the interpretation of a statute. Indeed, the very standards for the issuance of a writ command a “clear, unequivocal, specific right” or a clear abuse of discretion, and therefore counsel against the issuance of a writ in this case. *Carmack*, 884 S.W.2d at 398 (reciting standards for mandamus); *see State ex rel. Chassaing*, 887 S.W.2d at 577 (reciting standards for prohibition). The Defendants’ own brief argues there are conflicts in the statutory provisions at issue and requests this Court’s immediate intervention to address these supposed conflicts. *See* Brief of Relators, pp. 24-28. This is not, and should not be, the standard for extraordinary writs.

If Defendants’ proposed standards for extraordinary writs were correct, then no issue of statutory interpretation would ever proceed through the lower courts. Instead, all questions of interpretation could bypass the lower courts and go directly to the Missouri Supreme Court. This is contrary to the fundamental operation of the Missouri judicial system as established by the Missouri Constitution and would render this Court a court of general jurisdiction for a large swath of claims. The attendant problems with such a “new and unwise” use of extraordinary writs are numerous. *State ex rel. Mason v. County Legislature*, 75 S.W.3d 884, 888-89 (Mo. Ct. App. 2002) (detailing only some of the problems connected with the consideration of constitutional questions by way of writ, including avoidance of traditional remedies, subversion of statutory provisions, and rushed reasoning without the benefit of a record).

Not the least of the problems presented by Defendants' petition for an extraordinary writ in this case, is the increased likelihood of advisory opinions. This Court, of course, "cannot offer advisory opinions on issues that may arise in the future." *Schottel v. State*, 159 S.W.3d 836, 841 (Mo. banc 2005) (cited in *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 188 (Mo. banc 2006)); see *In the Matter of the Estate of Van Cleave*, 574 S.W.2d 375, 376 (Mo. banc 1978) (holding that the Court cannot and does not issue advisory opinions). Yet, that is exactly what Defendants seek in asking this Court to render opinions on "future proceedings" not considered or adjudicated by the trial court. See Brief of Relators, p. 24; see also *id.* p. 25 (requesting this Court to "address these issues to guide the trial court on remand").

The impropriety of a writ is particularly poignant in this case where the supposed statutory conflict may not even apply, see *infra* Point II, and may have been resolved by the trial court following a jury trial. Indeed, when the Defendants asked for the "heritage value" bonus – despite failing to establish their burden before the commissioners – the trial court merely determined that it could not make the determination "at this time" because exceptions had been filed (invoking a jury trial and thereby vacating the Commissioners' Award). Defendants baldly assert that they "have no other remedy at law to enforce the payment of heritage value outside this Writ proceeding." Brief of Relators, p. 11. This is not true, since they can pursue their burden and obtain heritage value following a jury trial that they already requested. Accordingly, the trial court's decision is not appropriate for an extraordinary writ of prohibition or mandamus.

B. The Trial Court’s Decision to Deny Heritage Value “At This Time” is Consistent with the Plain Language of RSMo. § 523.010 *et seq.*

“The general rule of statutory construction requires a court to determine the intent of the legislature based on the plain language used and to give effect to this intent whenever possible.” *Soto v. State*, 226 S.W.3d 164, 166 (Mo. banc 2007); *Hovis v. Daves*, 14 S.W.3d 593 (Mo. banc 2000). The words used in the statute are to be given their “plain and ordinary meaning.” *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443, 446 (Mo. banc 1998). The plain language of the statutory provisions in this case unquestionably supports the trial court’s decision:

- the commissioners’ award of damages does not include heritage value; *see* RSMo. § 523.040
- possession of the land is granted on payment of the “amount of damages assessed by commissioners”; *see* RSMo. § 523.055

The Defendants’ principal argument on appeal is that the City of Independence should not be able to obtain possession of the subject property without paying the bonus amount for “heritage value.” *See* Brief of Relators, p. 16 (arguing that “the ‘just compensation’ to which Relators are entitled for the taking of their property would include heritage value”). They go so far as to argue that “[t]he Missouri and Federal Constitutions provide the same requirement that just compensation must be paid before property is taken.” *Id.* (emphasis added); *see also id.* p. 20 (“It is a fundamental Constitutional right that just compensation must be paid before private property must be turned over for a public use.”). Yet, Defendants provide no authority for this proposition,

which is directly contrary to the plain language of the statute and controlling United States Supreme Court precedent. *See Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 568 (1898).

The statute specifically defines “just compensation” and also establishes what payment is necessary by a condemning authority before it is entitled to possession of the property. Missouri law provides that a condemning authority is entitled to possession on the payment of the “damages assessed by commissioners,” which does not include “heritage value.” RSMo. § 523.055; Mo. R. Civ. P. 86.06 (providing that upon making payment of amount assessed by the commissioners, “it shall be lawful for the condemner to take possession and hold the interest in the property”). Indeed, fair market value, which is the basis of the damages assessed by the commissioners (and if applicable the jury), is specifically differentiated from “heritage value.” *See* RSMo. § 523.039 (defining just compensation as “the sum of the fair market value and heritage value”) (emphasis added). It is simply not the case, as Defendants claim, that “possession is conditioned on a timely payment of just compensation.” Brief of Relators, p. 24 (emphasis added). Under Missouri law, possession is conditioned on the payment of the “amount of damages assessed by commissioners,” which even Defendants concede does not include heritage value. RSMo. § 523.055; *see* Brief of Relators, p. 23 (arguing that “heritage value” should be added to the commissioners’ award).

Furthermore, in direct contrast to the Defendants’ unsupported argument, the United States Supreme Court long ago determined that payment of just compensation is not required before property is taken. In *Backus v. Fort St. Union Depot Co.*, 169 U.S.

557, 568 (1898), a property owner argued that he had a “constitutional right to have the amount of his compensation finally determined and paid before yielding possession.” *Id.* The Supreme Court then posed the question: “is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof?” *Id.* Noting that the answer had already been answered, the Supreme Court held “[t]here can be no doubt that, if adequate provision for compensation is made, authority may be granted for taking possession, pending inquiry as to the amount which must be paid and before any final determination thereof.” *Id.*

Consistent with the plain language of the statute, and longstanding United States Supreme Court precedent, it is perfectly lawful for the City of Independence to take possession of the property at issue prior to a determination of the heritage value and payment of just compensation. Accordingly, the trial court’s interpretation of the statute should be affirmed.

C. The Statutory Structure and the Rules of Construction Further Support the Trial Court’s Decision.

In the event that legislative intent cannot be derived from the plain and ordinary meaning of the statute, courts may consider the statutory structure and rules of statutory construction. These rules include, among others, the rule that a statute is given meaning and harmonized with existing statutes or statutory provisions. *See Citizens Elec. Corp. v. Dir. of Dep’t of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989) (including provisions found in different chapters and enacted at different times); *see also Bachtel v. Miller*

County Nursing Home Dist., 110 S.W.3d 799, 801 (Mo. banc 2003) (stating that “provisions of a statute are not read in isolation but construed together, and if reasonably possible, the provisions are harmonized with each other”).

In addition, courts presume that the legislature knows the state of the law, and enacts only those statutes which would have meaning and purpose. *See State v. Conduct*, 65 S.W.3d 6, 13 (Mo. Ct. App. 2001) (citing *State ex rel. Dir. of Rev. v. Gaertner*, 32 S.W.3d 564, 567 (Mo. banc 2000), and *State v. Rousseau*, 34 S.W.3d 254, 262 (Mo. Ct. App. 2000)). In this case, the statutory structure and existing law fully support the trial court’s interpretation of the statute at issue.

The statute in this case sets up two separate methods for deciding fair market value – by commissioners or by a jury. If a party rejects the assessment of damages by the commissioners by filing exceptions, it becomes of no effect or “*functus officio*,” as if it never even happened and the commissioners had never been appointed. *See State ex rel. Mo. Highway & Transp. Comm’n v. Turner*, 857 S.W.2d 293 (Mo. Ct. App. 1993); *see also State ex rel. State Highway Comm’n v. Polk*, 459 S.W.2d 346, 351 (Mo. 1970); *State ex rel. State Highway Comm’n v. Meadows*, 444 S.W.2d 225, 226 (Mo. Ct. App. 1969); *see also* Mo. R. Civ. P. 86.08. Once exceptions are filed, then the parties are entitled to a jury trial to assess the fair market value.

The provision for asserting “heritage value” in the statute parallels the two methods for deciding fair market value and does not contemplate that a trial court must determine “heritage value” after the commissioners’ award and before the jury trial. Indeed, such an interpretation would render some of the statutory language superfluous.

See Turner v. State, 245 S.W.3d 826, 828 (Mo. banc 2008) (stating that the Court presumes “that the legislature did not insert idle verbiage or superfluous language in a statute”).

RSMo. § 523.061 provides that the trial court “shall determine whether heritage value is payable and shall increase the commissioners’ award.” The statute then provides that “[i]f a jury trial of exceptions occurs under section 523.060, the circuit judge presiding over the condemnation proceeding . . . shall determine whether heritage value is payable and shall increase the jury verdict.” *Id.* If the Defendants’ interpretation of this statute were correct, then it would render a portion of this statutory language superfluous. It would make no sense, and would be duplicative and superfluous, to have a trial court “determine whether heritage value is payable” after a jury trial if the trial court was already required to determine whether heritage value is payable after the commissioners’ award and before the jury. This language, and the structure that it recognizes, should not be rendered superfluous. Instead, the proper interpretation would be to require a determination of heritage value (provided the property owners met all of the other criteria) before a jury trial only if no exceptions were filed.

Moreover, this statutory structure is entirely consistent with the long-standing doctrine of “*functus officio*,” and should be interpreted accordingly. In this case, the parties filed exceptions to the commissioners’ award before any motion was made to determine “heritage value.” By the time Defendants filed their motion for “heritage value,” the commissioners’ award was void and was as if it had never even happened. Thus, there was nothing for the trial court to determine until a jury verdict was rendered.

In accordance with the rules of statutory construction, the legislature is presumed to have understood this law and the statute should be interpreted consistently.

For these many reasons, the Defendants' petition for a writ should be denied and the preliminary writ quashed.

II. RELATORS ARE NOT ENTITLED TO AN ORDER OF PROHIBITION OR MANDAMUS REQUIRING THE TRIAL COURT'S DETERMINATION OF HERITAGE VALUE BEFORE A JURY TRIAL, BECAUSE RELATORS FAILED TO CARRY THEIR STATUTORY BURDEN IN THAT THE PLAIN LANGUAGE OF THE STATUTE REQUIRES PROOF OF OWNERSHIP BEFORE THE COMMISSIONERS OR JURY, NOT THE JUDGE. – RESPONDING TO RELATORS' POINT I.

Even assuming the Defendants' interpretation of the statute is correct, the trial court still did not misinterpret the statute or abuse its discretion in denying heritage value before the jury trial. Defendants argue that the trial court's decision to deny "at this time" their Motion for Assessment of "Heritage Value" constitutes an abuse of discretion beyond the court's power. However, it is exactly the opposite. It is the requested relief by the Defendants – requiring the trial court to make the factual determination necessary for "heritage value" – that would constitute an abuse of discretion beyond the court's power. *See State ex rel. Chassaing*, 887 S.W.2d at 577. That determination is expressly left for the commissioners or the jury. *See RSMo. § 523.039*.

Moreover, because Defendants failed to raise the issue before the commissioners and then filed exceptions to their award and requested a jury trial, the factual

determination necessary for the assessment of “heritage value” is now with the jury and the award of this bonus amount cannot be made until after a jury verdict. Accordingly, Defendants are not entitled to a writ forcing the trial court to make a factual determination reserved solely for the commissioners or the jury.

A. The Trial Court Correctly Recognized That the Commissioners or the Jury Must Make Certain Factual Determinations.

The standard for determining whether the trial court abused its discretion is whether the trial court had a reasonable basis for its ruling. *See State ex rel. Norfolk v. Dowd*, 448 S.W.2d 1, 3-4 (Mo. banc. 1969). On February 14, 2008, the trial court issued an order denying “at this time” the Defendants’ Motion for Assessment of Heritage Value as a result of the parties’ filing exceptions to the Commissioners’ Report. Apdx. A1.

Essential to determining whether Defendants were entitled to a fact-finding by the trial court is the interpretation of RSMo. § 523.039(3), which provides that “[t]he 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.” *See* RSMo. § 523.039(3) (emphasis added). Once again, courts are bound to interpret the plain language of the statute. *See Soto*, 226 S.W.3d at 166. In no uncertain terms, this statute explicitly mandates that either the commissioners or the jury make the factual determination necessary to establish whether the property owner is entitled to “heritage value” damages, not the trial court.

Recognizing that the plain language of the statute completely undermines their position, Defendants resort to attacking the plain language based on supposed conflicts in

the statute and “various rules of construction.” Brief of Relators, p. 26.^{2/} They also ask this Court to rule that the plain language is “superfluous” and should be ignored. Brief of Relators, p. 28. This misstates the law and should be rejected. ““When statutory language is clear, courts must give effect to the language as written.”” *State ex rel. Baumruk*, 964 S.W.2d at 446 (quoting *M.A.B. v. Nicely*, 909 S.W.2d 669, 672 (Mo. banc 1995)). Nothing can be clearer than the language placing the burden with the property owners before the commissioners or the jury. Moreover, a Court is bound to give meaning to all of the language of a statute and interpret it in a way so as not to render any language superfluous – exactly the opposite of the Defendants’ position. *See Turner*, 245 S.W.3d at 828.

Defendants argue that this Court should reject the plain language of the statute and rewrite the statute to their liking – with the trial court making the factual determinations reserved exclusively for the commissioners or the jury. Yet, there is a reason that the legislature placed the fact finding with the trier of fact – either the commissioners or the jury. *See* RSMO § 523.039(3). The statute logically follows as §§ 523.040 and 523.060 vests the authority to determine fair market value for the property taken in the

^{2/} Defendants also argue that the supposed conflicts have been resolved by recently promulgated Missouri Approved Instructions. Brief of Relators, pp. 25-26. The Missouri Approved Instructions certainly do not trump the statutory language, and say nothing about the statutory requirement that property owners must carry the burden of proving ownership before the commissioners or jury.

condemnation action with either the commissioners or a jury and further provides the means to present the evidence.

B. The Trial Court Still “Determines” Whether Heritage Value is Payable.

This plain (and correct) reading of the statute does not leave the trial court without any role in its statutory mandate to “determine whether heritage value is payable.” *See* RSMo. § 523.061. Indeed, RSMo. § 523.061 indicates that the determination is to be made in accordance with RSMo. § 523.039. RSMo. § 523.039(3) then provides a two-part analysis: (1) a determination of whether the condemnation results in a “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 (2) whether “the property has been owned within the same family for fifty or more years.”

The second part of this analysis is expressly for the commissioners or jury. In contrast, there is no provision for the commissioners or jury to decide the first issue. This is consistent with accepted rules of construction and gives meaning to the trial court’s obligation to “determine” whether heritage value is payable in accordance with RSMo. § 523.061. Thus, a true interpretation of § 523.061 is that the trial court has the authority to determine heritage value based on the factual determination exclusively left for the commissioners or the jury.

Defendants ask this Court not only to order the trial court to disregard the plain language of the statute on the second part of the analysis, but also ask this Court to issue an advisory opinion concerning the first part of the analysis. The first part of the analysis

requires a determination of whether the taking “prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking.” RSMo. § 539.039(3). This issue was never decided by the trial court, as Defendants acknowledge by seeking a determination of “future proceedings,” and is clearly not appropriate as an advisory opinion. *See Schottel*, 159 S.W.3d at 841.

Faced with the plain language of the statute, one must question why the Defendants admittedly did not seek to carry their burden before the commissioners to establish the required evidence of ownership for purposes of heritage value. Is it because they desired to take the issue to this Court to overturn language that they did not like? Maybe. More likely, however, it is because they are worried their damage award before the commissioners or the jury may be reduced if the commissioners or the jury believe that Defendants may get a 50% bonus based on the length of ownership of the property. In fact, Defendants hint at this in their brief. They argue that following the plain language of the statute “would, in all likelihood introduce the concept of the 50% increase to be paid for heritage value” to the commissioners or jury. Brief of Relators, p. 27. This, according to Defendants, “would be prejudicial to the property owner.” Brief of Relators, p. 27. Prejudicial or not, this is exactly what the legislature wrote and cannot be written out of the statute simply because Defendants do not like it or believe they will receive less money as a result.

There is no question, nor do Defendants dispute, that they did not even attempt to satisfy their statutory burden to establish the factual basis for “heritage value” before the commissioners. In fact, the Commissioners’ Report, which Defendants reviewed and

approved as to form before its filing, explicitly states that the commissioners did not make such a finding. Defendants' petition for a writ forcing the trial court to make this factual determination simply ignores the clear language and violates the role of the courts. In contrast, the trial court's decision to decline the Defendants' Motion for Assessment of Heritage Value "at this time" is consistent with the statute.

C. Even Now, the Defendants Can Seek Heritage Value.

Although Defendants' efforts to avoid the plain language of the condemnation statute fail and should be rejected by this Court, they are not without recourse in this case. The statute provides that Defendants may request that the jury make the required factual determination necessary for the application of heritage value. Thus, Defendants are simply wrong when they are that they "have no other remedy at law to enforce the payment of heritage value outside the writ proceeding." Brief of Relators, p. 11; *see also id.* p. 17 (arguing that they were not "afforded an opportunity to be heard with regard to . . . heritage value"). In fact, the trial court's February 14, 2008 Order specifically reserves the right to determine this issue after the jury's factual determination. Apdx. A1.

In the event Defendants decide to pursue their evidentiary burden before the jury to establish the basis for "heritage value," the City of Independence would then have the opportunity to cross examine any witnesses, examine the veracity of the documentary evidence as well as provide any evidence that "heritage value" does not apply. Under these circumstances, it was perfectly within the trial court's jurisdiction, and consistent with the statute, for the trial court to deny heritage value until the authorized fact finder had made its required determination. Accordingly, Defendants cannot establish any

“absolute irreparable harm” justifying any extraordinary relief. *See State ex rel. Riverside Joint Venture v. Mo. Gaming Comm’n*, 969 S.W.2d 218, 221 (Mo. banc 1998). Their only other recourse is legislation – which despite their request, is not available in this Court.

CONCLUSION

For the foregoing reasons, the City of Independence, Missouri requests this Court deny Defendants’ petition for an extraordinary writ and quash the preliminary writ.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(b), I hereby certify that this Brief meets the typed volume limitation and that it contains 6,920 words, according to the word counting feature of the Microsoft Word software used to create this Brief. In addition, this Brief complies with Rule 84.06 in that the text of the body of the Brief is in 13-point Times New Roman type.

I further certify that the accompanying disk has been scanned for viruses and that it is virus free.

ATTORNEY FOR THE CITY OF
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2008, two true and correct copies of the above and foregoing brief, and a diskette containing the same, were served by depositing the same in the United States mail, first-class, postage prepaid and properly addressed as follows:

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RESPONDENT

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