

IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC95064

AVERY CONTRACTING, LLC,
Appellant-Plaintiff,

v.

RICHARD NIEHAUS, LISA J. NIEHAUS, ALICIA NIEHAUS, CREEKSTONE
HOMEOWNERS ASSOCIATION AND MISSOURI HIGHWAYS AND TRANSPORTATION
COMMISSION,
Respondents-Defendants.

On Appeal from the Circuit Court of Jefferson County, Missouri
The Honorable Nathan B. Stewart
Cause No. 14JE-CC00089

RESPONDENT'S SUBSTITUTE BRIEF

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TRANSPORTATION COMMISSION
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JURISDICTIONAL STATEMENT

This case is an appeal by Plaintiff/Appellant, Avery Contracting, LLC, from a decision of the Missouri Court of Appeals-Eastern District that affirmed a Judgment entered by the Circuit Court of Jefferson County granting Defendant/Respondent Missouri Highways and Transportation Commission's (hereinafter, "MHTC" or "Commission") *Motion to Dismiss* for failure to state a claim upon which relief can be granted. The Missouri Supreme Court has appellate jurisdiction to hear this appeal under Article V, Section 10 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

Respondent MHTC does not adopt the Statement of Facts prepared by the Appellant because it is not fair and concise as required by Rule 84.04(c) Mo.R.Civ.P. and otherwise contains a significant amount of superfluous information.

In 1995, MHTC brought an action in eminent domain against the Raebel Living Trust to condemn certain property interests in a parcel of real estate in Jefferson County, Missouri [*State of Missouri, ex rel. Missouri Highways and Transportation Commission v. The Raebel Living Trust Dated August 17, 1994*, Case No. CV195-5715CC]. (L.F. 8). MHTC sought these interests for a highway construction project on Route M. (L.F. 8). Specifically, MHTC acquired all abutter's rights of direct access to the thruway of Route M from the Raebel Trust property and other rights for **\$494,340**. (L.F. 8, 30). Appellant Avery concedes that the property was thereby landlocked. (L.F. 8). At some subsequent point in time, the Raebel Trust conveyed its interests in the landlocked property to Mullins Custom Homes, LLC, which subsequently conveyed the property to the Plaintiff. (L.F. 7-8).

Separate from the Raebel parcel, in 1990, MHTC also acquired certain property interests from Clyde Johnson and Florence Johnson for the Route M

project. (L.F. 9). MHTC retained some of those interests (a portion of Lot 3), but also conveyed some of those interests in 2003 to Richard Niehaus (L.F. 10). In its conveyance to Niehaus, MHTC also retained all rights of access from that property to Route M. (L.F. 11). A portion of Creekstone Dr., now runs upon Lot 3. (L.F. 10). No allegation was made in the petition as to who owns this portion of Creekstone Dr., the nature of the access limitations that MHTC placed on Lot 3, or whether Plaintiff was an abutter of Lot 3.

At a time and location not documented in the Legal File, Appellant met with MHTC's staff to discuss the possibility of the Commission granting access to Route M or Lot 3 from Plaintiff's adjacent property. (Tr. 20 Li. 7-9, Tr. 21, Li. 2-3). MHTC has a formal permit process through which requests to allow access to roadways from neighboring properties are reviewed and considered. (Tr.19 Li. 24 - Tr. 21 Li. 17). Avery did not apply for a permit for a break in access. Instead, the meeting was described as "informal" by Plaintiff's counsel. (Tr. 20 Li. 7-9, Tr. 21, Li. 2-3). Exactly what was said at this informal meeting was not documented in the legal file, but Appellant took it to be a "verbal" denial of its plans. (Tr. 20 Li. 7-9, Tr. 21, Li. 2-3).

Plaintiff then filed this action in the Circuit Court of Jefferson County, Missouri on February 3, 2014. (L.F.5). In its Petition, Plaintiff, for reasons and legal theories cited therein, alleged that: (1) it had the right to force MHTC to

allow a private road to be built on Commission-owned right of way (Lot 3) pursuant to Chapter 228 RSMo.; and (2) MHTC cannot prohibit Plaintiff's direct access to Route M. (L.F. 13, 21).

MHTC responded by filing a *Motion to Dismiss Plaintiff's Petition*. (L.F. 28). In its written *Motion*, MHTC responded that the Plaintiff's petition should be dismissed because: (1) MHTC's right of way is not subject to the provisions of Chapter 228 RSMo. relating to the establishment of private roads by necessity; and (2) the Circuit Court of Jefferson County in a prior condemnation action regarding this subject property had previously determined that Plaintiff's direct access to Route M was prohibited and limited. (L.F. 28-30).

The parties appeared before Division 3 of the Circuit Court of Jefferson County, the Honorable Judge Nathan B. Stewart presiding, on May 30, 2014, to argue MHTC's *Motion to Dismiss*. (Tr. 2). At the hearing, the court and Respondent's counsel learned that although MHTC has a permit application and review process to review access requests from property owners, Plaintiff had never availed itself of that process. (Tr.19 Li. 24 - Tr. 21 Li. 17).

Appellant's counsel confirmed Plaintiff's failure to apply for a direct access permit and described a meeting between Commission employees and Avery as an "informal discussion" and that the Commission's decision was only "verbal". (Tr.

20 Li. 7-9, Tr. 21, Li. 2-3). Upon learning of the Plaintiff's failure to apply for a Commission permit to break the existing access limitations to Route M or Lot 3, the circuit court dismissed Avery's action without prejudice, citing its failure to exhaust administrative remedies. (Tr. 21, Li 7-10), (L.F. 58).

Plaintiffs then appealed the decision to the Missouri Court of Appeals-Eastern District. On April 14, 2015, the Eastern District Court of Appeals affirmed the decision of the Circuit Court of Jefferson County. Plaintiff further appealed to the Missouri Supreme Court and this Court accepted transfer of the case on September 22, 2015.

POINTS RELIED ON

I, II, III, and IV

APPELLANT'S POINTS RELIED ON I, II, III, AND IV ADDRESS ISSUES RAISED BY RESPONDENTS RICHARD NIEHAUS, LISA J. NIEHAUS, ALICIA NIEHAUS, AND CREEKSTONE HOMEOWNERS ASSOCIATION IN THEIR SEPARATE MOTION TO DISMISS AND ARE NOT RELIED ON BY RESPONDENT MHTC IN ITS MOTION TO DISMISS OR CITED BY THE CIRCUIT COURT IN GRANTING MHTC'S MOTION AND AS SUCH, MHTC TAKES NO POSITION ON THE ISSUES RAISED IN POINTS RELIED ON I, II, III, AND IV.

V

THE CIRCUIT COURT DID NOT ERR IN GRANTING THE COMMISSION'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BECAUSE SECTION 227.090 RSMO. DOES NOT MAKE SECTIONS 228.340-228.374 RSMO. GENERALLY APPLICABLE TO THE COMMISSION IN THAT SECTIONS 228. 340-228.374 RSMO. RELATE TO THE ESTABLISHMENT OF PRIVATE ROADS OF NECESSITY, NOT THE CONSTRUCTION, MAINTENANCE, OR OBSTRUCTION OF STATE HIGHWAYS.

City of Edina v. School District of City of Edina,

267 S.W. 112 (Mo. banc. 1924)

Sheedy v. Missouri Highways and Transportation Commission,

180 S.W.3d 66 (Mo. App. S.D. 2005)

Harrison v. State Highways and Transportation Commission, 732 S.W.2d 214

(Mo. App. S.D. 1987)

Webb v. City of East Prairie, 221 S.W.2d 153 (Mo. 1949)

Article I, Section 28 of the Missouri Constitution

Article IV, Section 29 of the Missouri Constitution

Section 227.090 RSMo.

Section 228.190, RSMo.

Section 228.341 RSMo.

VI

THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S PETITION BECAUSE WHETHER APPELLANT IS REQUESTING DIRECT ACCESS TO HIGHWAY M FROM ITS PROPERTY OR REQUESTING A RIGHT OF WAY OF NECESSITY LATERALLY ACROSS STATE PROPERTY TO GAIN ACCESS TO MOSS HOLLOW ROAD (CLAIMED TO BE A COUNTY ROAD), BOTH ARE BARRED BY MISSOURI LAW IN THAT MHTC IS EMPOWERED TO AND HAS SO PURCHASED ALL OF APPELLANT'S ACCESS RIGHTS TO HIGHWAY M AND, IN THE ALTERNATIVE, A RIGHT OF WAY BY NECESSITY IS NOT AUTHORIZED BY ANY CONSTITUTIONAL OR STATUTORY PROVISION TO CROSS PUBLIC LAND.

Shepherd v. State ex rel. State Highway Commission,

472 S.W.2d 382 (Mo. 1968)

State ex rel. State Highway Commission v. James,

205 S.W.2d 534 (Mo. banc. 1947)

State ex rel. State Highway Commission v. Meier,

388 S.W.2d 855 (Mo. banc. 1965)

State ex rel. Missouri Highway and Transportation Commission v. Perigo,

886 S.W.2d 149 (Mo. App. S.D. 1994)

Article IV Section 29 of the Missouri Constitution.

Section 227.120 RSMo.

Section 228.342 RSMo.

VII

**THE CIRCUIT COURT DID NOT ERR IN DISMISSING PLAINTIFF'S
PETITION FOR FAILURE TO EXHAUST ADMINISTRATIVE
REMEDIES BECAUSE NO DECISION HAD BEEN MADE BY MHTC
REGARDING THE PROPOSED BREAK IN ACCESS FROM PLAINTIFF'S
PROPERTY TO ROUTE M OR LOT 3 IN THAT A DECISION IS
REQUIRED IN ORDER TO INVOKE JUDICIAL REVIEW.**

Columbia Athletic Club v. Director of Revenue,

961 S.W.2d 806 (Mo. banc. 1998)

In re the Formation of the Neosho Transportation Development District,

416 S.W.3d 326 (Mo. App. S.D. 2013)

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362 S.W.3d 415 (Mo. banc. 2012)

Brinson v. Whittico, M.D.,

793 S.W.2d 632 (Mo. App. E.D. 1990)

Section 536.150 RSMo

Section 536.010 RSMo

VIII

**APPELLANT'S EIGHTH POINT RELIED ADDRESSES VERBAL
COMMENTS FROM THE CIRCUIT COURT THAT WERE NEITHER
REFERENCED IN RESPONDENT MHTC'S MOTION TO DISMISS NOR
CITED BY THE CIRCUIT COURT IN GRANTING MHTC'S MOTION
AND AS SUCH, MHTC TAKES NO POSITION ON THE APPELLANT'S
EIGHTH POINT RELIED ON.**

ARGUMENT

FIFTH POINT RELIED ON

THE CIRCUIT COURT DID NOT ERR IN GRANTING THE COMMISSION'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BECAUSE SECTION 227.090 RSMO. DOES NOT MAKE SECTIONS 228.340-228.374 RSMO. GENERALLY APPLICABLE TO THE COMMISSION IN THAT SECTIONS 228. 340-228.374 RSMO. RELATE TO THE ESTABLISHMENT OF PRIVATE ROADS OF NECESSITY, NOT THE CONSTRUCTION, MAINTENANCE, OR OBSTRUCTION OF STATE HIGHWAYS.

Standard of Review

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of the plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Otte v. Edwards*, 370 S.W.3d 898, 901 (Mo. App. E.D. 2012).

A case transferred to the Supreme Court because of general interest and importance of question involved is the same as though it were brought in Supreme Court on original appeal. *Hayes v. Hayes*, 252 S.W.2d 323, 325 (Mo. 1952). This same standard of review applies to all eight of Appellant's Points Relied On.

Appellant, in section D of its Fifth Point Relied On, makes the argues that MHTC's property is not protected by Missouri's Bill of Rights. Yet no where in its brief has MHTC made such an assertion. In its brief and arguments, MHTC simply states that the Constitution and state statutes do not allow for the inclusion of publicly owned property into private roadways of necessity. It is Appellant's primary argument that the exclusion of MHTC's roadways, as provided in Section 238.341 RSMo. from private roadways of necessity therefore creates an inference that other properties owned by MHTC (that do not physically include a roadway) can be included in a private roadway of necessity by implication. As outlined below, MHTC disagrees with such an assertion. Respondent MHTC begins its response by reviewing the legal foundation for the creation of private roadways of necessity.

A. Constitutional Basis for Establishment of Private Roadways of Necessity: At the outset, it is important to note that Appellant in its Fifth Point Relied On, claims that the Commission is subject to Article I, Section 28 of the

Missouri Constitution as implemented by Sections 228.340-228.374 RSMo. In relevant part, Article I, Section 28 of the Missouri Constitution provides:

That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity...

MHTC is an agency of the executive branch of state government. *Missouri Highway and Transportation Commission v. Kansas City Cold Storage, Inc.*, 948 S.W.2d 679, 682 (Mo. App. W.D. 1997). It does not own private property or private property interests. As a part of state government, all of MHTC's property interests are public. On its face then, Article I, Section 28 cannot have any application to MHTC.

Article I, Section 28 provides authority to allow *private* property owners to take *private* property from other *private* property owners to establish a *private* roadway of necessity. But it does not serve as authority to allow a *private* property owner to take *public* property for the creation of a *private* roadway of necessity. Whatever rights Article I, Section 28 of the Missouri Constitution gives the Appellant to take *private* property for the establishment of a *private* roadway of necessity, they have no application to MHTC. Any ability by the Appellant to

force MHTC to allow the creation of a *private* roadway of necessity on its *public* right of way would have to come from another source of law.

B. Applicability of Sections 228.340-228.374 RSMo. to MHTC: In Count I of its petition, Plaintiff petitioned the circuit court seeking the creation of a private roadway of necessity pursuant to Section 228.340-228.374 RSMo. Doing so would have required the circuit court to order the proposed private roadway of necessity to be built on properties in which MHTC, the Niehauses, the Creekstone Homeowners Association all have an interest. Although state law permits the construction and maintenance of a private roadway of necessity from landlocked property over neighboring property owners, Plaintiff has erred in assuming that property owned by MHTC is subject to Sections 228.340-228.374 RSMo. Nothing in these provisions of law specifically allow for it. Further, it cannot be assumed that the state of Missouri is subject to laws of general applicability.

Longstanding legal precepts hold that general laws do not necessarily apply to the state. This is summarized in *City of Edina v. School District of City of Edina*, 267 S.W. 112 (Mo. banc 1924), as follows:

The question of the validity of tax bills against a courthouse square owned by the county for paving the streets adjacent to said square, was before the court, in *City of Clinton ex rel. v.*

Henry County, 115 Mo. 566, 22 S.W. 494, 37 Am St. Rep 415.

In that case the court, opinion per Black, J., held that the tax bills were void because the courthouse was general public property and belonged to the sovereign, and was used by in in performing a vital government function, and it was a principle of common law, well-established, "**that the Crown is not bound by a statute, the words of which***restrain or diminish any of his rights or interests, unless he be specially named therein.**" 1 Bl. Com. 262. The same principle applies in favor of the states in this country. Endlich on the Interpretation of Statute, s. 161....". *Id.* at 113. (*emphasis added*).

The cases on this subject in Missouri tend to arise from attempts by subordinate political subdivisions to require the state government to pay taxes to them, the prohibition of which is now enshrined in Article X, Section 6 of the Missouri Constitution. As noted above, MHTC is an agency of the executive branch of state government. This Court in the *Edina* case determined that unless the sovereign be specially named in legislation, it does not apply to the sovereign; therefore any argument that Sections 228.340-228.374 RSMo. apply against the state by implication would be invalid.

The private roadway of necessity provisions of Article I, Section 28 of the Missouri Constitution and Chapter 228 RSMo. are somewhat akin to the exercise of eminent domain; but they allow a *private* entity to take the property of another *private* entity. The procedure to establish such a private roadway in Chapter 228 RSMo. is similar, but not identical, to the public exercise of the eminent domain procedures of Chapter 523 RSMo.

However, just because state law allows a *private* property owner to take the *private* property interests of another *private* property owner to construct a *private* roadway of necessity, that **does not** mean that those same laws allow a *private* property owner to take *public* property interests held by the state as *sovereign* to construct a *private* roadway of necessity. If the intent of the General Assembly was for Sections 228.340-228.374 RSMo. to apply to properties owned by the state and to allow private individuals to exercise the state's power of eminent domain against the state and force a private roadway onto state property, then the state should have been specifically named as being subject to these statutes. However, no such mention is made of the state of Missouri generally or MHTC specifically in such statutes. In response, Appellant claims that Sections 228.340-228.374 RSMo. apply to MHTC by "implication". However in order for statutes to apply against the sovereign, the sovereign must be specifically named.

Nevertheless, Appellant still takes the position that the private road of necessity provisions of Sections 228.340-228.374 RSMo. somehow apply to MHTC. However, as an illustration, Section 228.341 RSMo. exempts any road owned by the United States or any agency thereof from the definition of private roadway. Therefore, does it follow that by implication, any other land owned by the United States is subject to inclusion in a private roadway of necessity? Of course not, but that is the logical conclusion if one accepts the Appellants's argument.

Section 227.090 RSMo. provides:

All laws of this state relating to the construction, maintenance or obstruction of roads, which do not conflict with the provisions of chapters 226 and 227, RSMo, and are consistent with the provisions of said chapters, shall apply to the construction, maintenance and obstruction of all state highways, and the duties and powers imposed by such laws on certain officials shall devolve upon the engineer, or other officer of the highways and transportation commission designated by the commission.

A similar issue was raised in *Sheedy v. Missouri Highways and Transportation Commission*, 180 S.W.3d 66 (Mo. App. S.D. 2005). In *Sheedy*, the property owners sued the Commission claiming that it had abandoned a 1.2 acre parcel of ground along Route 60 that it had purchased seventy years earlier. After years of not using the ground, the Commission expanded the highway to include the 1.2 acre tract that, by that time, was being used by the Sheedys for their own purposes. They claimed that under Section 228.190 RSMo., the 1.2 acre tract had been abandoned. The trial court granted summary judgment to the Commission and the Court of Appeals subsequently affirmed the trial court's decision. *Sheedy* at 68.

In *Sheedy*, the adjoining landowners also argued that Section 227.090 RSMo. acted to make the abandonment provisions of Chapter 228 RSMo. applicable to the State Highway System under the control and jurisdiction of the Commission. The Court of Appeals disagreed, finding that the abandonment provisions of Chapter 228 RSMo. did not apply because they were inconsistent with the maintenance, construction or obstruction of state roads. *Sheedy* at 74. Here, just as in *Sheedy*, the proposed application of the provisions of Chapter 228 RSMo. to the State Highway System is inconsistent with the construction and maintenance of that system. Instead it is consistent with the construction and

maintenance of *private* roads, which are not within the constitutional or statutory authority of the Commission.

The issue of the applicability of the abandonment provisions of Chapter 228 RSMo. via 227.090 RSMo. was also raised earlier in *Harrison v. State Highways and Transportation Commission*, 732 S.W.2d 214 (Mo. App. S.D. 1987). In *Harrison*, property owners brought an action against MHTC seeking a declaratory judgment that a temporary easement acquired for a borrow pit by MHTC 20 years earlier as part of a condemnation had expired. Like the adjoining landowner would later assert in *Sheedy*, the plaintiffs in *Harrison* claimed that the abandonment of roadways provision of Section 228.190 RSMo. applied to MHTC via the operation of Section 227.090 RSMo. *Harrison* at 219. However, with regard to Section 227.090 RSMo., the Court of Appeals stated:

Plaintiffs claim that sec. 227.090 has the effect of making the five-year nonuser portion to sec. 228.190 applicable to a state highway. It is at least arguable that sec. 227.090 does not have that effect. That statute deals with all laws of this state relating to the "*construction, maintenance, or obstruction of roads....*" It is, however, unnecessary to determine that issue, if it is one, because the 1959 easement is not "any public road" as that term is used in sec. 228.190. It is an easement obtained for use in

connection with the construction of the highway and by its terms it would cease upon completion of the eastbound and westbound lanes of Route 60 in Stoddard County. The public would not travel over the 1959 easement, for it is not a right-of-way easement. The 1959 easement is not a public road itself and any issue of its abandonment does not entail consideration of sec 228.190. *Harrison* at 220.

It is clear from both *Sheedy* and *Harrison* that Section 227.090 RSMo. serves as a mechanism that allows state statutes outside of those in Chapters 226 and 227 RSMo., which relate to the operation of *public* roads, to apply to the State Highway System *only to the extent that they are not inconsistent* with Chapters 226 and 227 RSMo. As a result, Sections 228.240-228.374 RSMo. only relate to the establishment of *private* roadways of necessity; they have absolutely no application to MHTC via 227.090 RSMo. regarding the construction, maintenance, or obstruction of a *public* road.

Beyond *Sheedy* and *Harrison*, Appellant's proposed reading of the law to allow a property owner to force a *private* roadway of necessity onto MHTC right of way and properties would be inconsistent with Article IV, Section 29 of the Missouri Constitution. In pertinent part, it provides:

The highways and transportation commission.... (iii) shall have authority to limit access to, from and across state highways and other transportation facilities where the *public* interests and safety may require. (Emphasis added).

The reason for this constitutional provision is to ensure that access limitations are implemented by professional traffic engineers in the interest of public safety. If the Commission's authority under this section was limited, as Appellant requests, extremely serious public safety problems would almost certainly result.

To apply the private roadways by necessity provisions of Chapter 228 RSMo. against MHTC would also allow the Appellant to force the Commission to give up a property interest (for which it paid **\$494,340**) without its consent. This result would illogically allow Avery to use the sovereign power of eminent domain against part of the sovereign. But the Appellant cannot force the Commission to give up those rights because it has no power of eminent domain against the sovereign.

Whether the access is described as limited or prohibited, access to Route M from the subject property was previously acquired and paid for by the Commission (**\$494,340**) (L.F. 30), which is a branch of the state of Missouri, and should not be

taken from the sovereign. The same provisions of Article IV, Section 29 of the Missouri Constitution that grant authority to MHTC to limit access to Route M, also empower it to limit access to, over, and across the Commission's interest in Lot 3 for public safety reasons.

It is also important to note that this proposed application of the private roadways by necessity provisions of Chapter 228 RSMo. would be inconsistent with the statutory requirements that govern MHTC's ability to convey property interests. See, Section 227.290 RSMo. The Court of Appeals in *Sheedy* noted that Chapter 227 RSMo. allows the Commission to sell property interests in land when in its opinion, the advantageous use of any interest in land or leasehold has ceased. *Sheedy* at 74. (quoting Section 227.290 RSMo. 2000). No such determination has been made in this instance with regard to the access rights previously acquired by the Commission from the Raebel Trust or for Lot 3.

But allowing Appellant to establish a private roadway of necessity pursuant to Chapter 228 RSMo. on Commission right of way for Route M or Lot 3 would force MHTC to convey a property interest without the statutorily required Commission determination that the advantageous use of the land had ceased. Such an application would improperly hamper MHTC's ability to properly convey property interests as required in 227.290 RSMo. Put simply, the Appellant cannot

force the Commission to give up the desired rights here without violating the specific requirements of Section 227.290 RSMo.

(C) MHTC's Use of Lot 3 and Exclusion from Definition of Private

Road: In its Fifth Point Relied On, Appellant claims that its petition only alleges that the Commission owns a part of Lot 3 of Creekstone subdivision over which Creekstone Drive passes and that the petition does not allege that MHTC owns Creekstone Drive. Avery appears to be asserting that the nature of the Commission's interest in Lot 3 may influence whether or not a private roadway of necessity may be placed on MHTC's property.

At this point, it is very important to note some items that were never alleged in Plaintiff's petition that are now of critical importance. Plaintiff does not allege that it is an abutter of Lot 3. The record is clear that MHTC prohibited access from the remaining 50 acres to Route M and it is also clear that MHTC retained the right to limit access from the Niehaus property to Lot 3. (L.F. 10-11). However, there is nothing in the record, not even as an allegation, that MHTC prohibited access from the Niehaus property (Lots 1 and 2) to Lot 3. If that access was not specifically prohibited, then some abutter's right of access exists from the Niehaus property to Lot 3. As an abutter, Niehaus may have some right of reasonable access to Lot 3, but a property owner who is not an abutter (Avery) would have no such right. Appellant has never alleged or established that it is an abutting

property owner of Lot 3, which is a prerequisite to any claim that it has a "right" to break an access limitation to Lot 3.

However, as a legal issue, it does not matter if MHTC operates an actual roadway on Lot 3 or if it just owns unimproved property interests; just because a property held by MHTC does not presently have a road on it does not mean it is not being used for the benefit of the State Highway System. The failure to use the entire width of a public road at a certain point in time does not operate as an abandonment of any portion of it. *Webb v. City of East Prairie*, 221 S.W.2d 153, 154 (Mo. 1949). There is scarcely a public road in this state where a part of its boundary has never been actually used by the public. *Baughman v. Faulwell*, 137 S.W. 627, 628 (Mo. App. W.D. 1911).

Section 228.341 RSMo. states that, "A private road does not include any road owned by...the state of Missouri...or agency of the state of Missouri." As noted in *MHTC v. Kansas City Cold Storage*, the Commission is an agency of the executive branch of the government of the state of Missouri. This legislative carving out of roads owned by MHTC from the definition of private roads also means that state roads cannot be maintained as part of a private roadway of necessity under Sections 228.341 through 228.374 RSMo. Plaintiff's attempts to limit the application of 228.341 RSMo., by stating that the petition only alleges MHTC owns an interest in Lot 3 and not Creekstone Drive itself, reflects a glaring

omission in the Plaintiff's petition: it is unclear who actually owns the subject portion of Creekstone Drive on Lot 3. Ownership of the subject portion of Creekstone Drive on Lot 3 could be an important factor; it is possible that MHTC owns that part of Creekstone Drive, and, therefore too it would be exempt under Section 228.341 RSMo.

Lot 3, even though Route M, does not actually lie upon it, is a part of MHTC's right of way. As such, assuming solely for the purposes of argument that Sections 228.341 through 228.374 RSMo. did apply to MHTC via 227.090 RSMo., Lot 3 still could not be used to establish a private roadway of necessity because it is a part of the public right of way for Route M even though the state highway is not physically located on it at this time. It is a mistake of law to claim that if a portion of state highway right of way goes physically unused by the public that it ceases to be part of the roadway.

The Commission's rights of way may be used for a state highway at any time. In *Sheedy*, the subject property interest had been unused by the Commission for 60 years and in *Harrison*, the unused temporary easement for a borrow pit had been acquired 20 years earlier. However, MHTC decided that it needed to use those interests for public highways and when the adjacent property owners asserted that the Commission could not, the Courts of Appeals in both cases held that the

abandonment of roadway provisions of Chapter 228 RSMo. could not be applied against the Commission via Section 227.090 RSMo.

The same can also be said in the present instance. MHTC may need this interest in Lot 3 for future use in relation to Route M but would be unable to do so if Appellant were now allowed to place a private roadway on it.

Further, the usefulness of a parcel of property may not be immediately apparent, but, as shown above, in time they will be useful to the department's public transportation mission. The immediate need for the property was not known, but the properties were ultimately needed for the state highway system. If Appellant is correct, the properties in *Sheedy* and *Harrison* would have been subject to the establishment of private roadways and their public use for which they were acquired, would never have come to pass. Lot 3 presently does not have a roadway upon it, but that does not mean it will not serve an important function for the state highway system.

Article I, Section 28 of the Missouri Constitution clearly does not allow for the inclusion of publicly owned property into private roadways of necessity. No specific reference to such an allowance is included in Section 228.341 RSMo. The only way Appellant reaches that conclusion is by inferring such a possibility when Section 228.341 RSMo. expressly excludes the inclusion of MHTC's roadways

from inclusion in private roadways of necessity and Section 227.090 RSMo. makes Chapter 228 generally applicable to MHTC. In *Sheedy*, the Court of Appeals found that the application of the abandonment of roadway provisions of Chapter 228 do not apply to MHTC via Section 227.090 RSMo. Therefore, it is MHTC's position that Section 228.341 RSMo. also do not apply to the Commission. All portions of MHTC's right of way are held for uses related to, and for the benefit of, the state highway system, even those that do not presently have a roadway built upon them.

SIXTH POINT RELIED ON

THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S PETITION BECAUSE WHETHER APPELLANT IS REQUESTING DIRECT ACCESS TO HIGHWAY M FROM ITS PROPERTY OR REQUESTING A RIGHT OF WAY OF NECESSITY Laterally ACROSS STATE PROPERTY TO GAIN ACCESS TO MOSS HOLLOW ROAD (CLAIMED TO BE A COUNTY ROAD), BOTH ARE BARRED BY MISSOURI LAW IN THAT MHTC IS EMPOWERED TO AND HAS SO PURCHASED ALL OF APPELLANT'S ACCESS RIGHTS TO HIGHWAY M AND, IN THE ALTERNATIVE, A RIGHT OF WAY BY NECESSITY IS

**NOT AUTHORIZED BY ANY CONSTITUTIONAL OR STATUTORY
PROVISION TO CROSS PUBLIC LAND.**

In its Sixth Point Relied On, Plaintiff appears to be making two different arguments. First, Plaintiff questions MHTC's ability to exercise the power of eminent domain to acquire all access rights from a property to an adjacent state highway and second, Plaintiff claims that there is an ambiguity in the circuit court's 1996 order of condemnation on the subject tract. The Commission contests both of these claims.

(A) MHTC is Authorized to Acquire All Access Rights from Neighboring Properties to State Highways: It is indisputable that the Commission has been given authority to exercise the power of eminent domain to condemn private property for the construction and maintenance of the State Highway System pursuant to Section 227.120 RSMo. Likewise, it is indisputable that Article IV, Section 29 of the Missouri Constitution authorizes MHTC to limit access to, from and across state highways. MHTC may exercise this power by agreement of the abutting property owner as well as through eminent domain. *Shepherd v. State ex rel. State Highway Commission*, 472 S.W.2d 382, 386 (Mo. 1968).

In *State ex rel. State Highway Commission v. James*, 205 S.W.2d 534 (Mo. banc. 1947), the State Highway Commission brought a condemnation action that sought to limit direct access from neighboring property owners to the highway as follows:

Except as otherwise hereinafter specifically provided, no right or easement whatsoever of the use of, or direct access to, from or across the right-of-way above described or any highway now or hereafter constructed thereon, shall attach or belong to the abutting lands or to any person merely because of ownership of abutting lands.

The owners of two of the tracts to be condemned sought to strike the above limitation from the condemnation petition. *Id.* at 535. In rejecting the plaintiffs' claim, the Missouri Supreme Court held:

Lacking consent of the owner there is only one way to limit or extinguish this interest in land and that is by the exercise of the power of eminent domain. Section 8759 of the statutes grants the power of eminent domain to the Commission not only to procure 'right of way' but for any other purpose necessary for the *proper* and economical construction of the state highway

system. Section 29 of Article IV provides that limitation of access is a proper consideration in the construction of state highways where the public interest and safety may require and, therefore, announces a purpose for which condemnation may be had under the statute. The power to limit access is ‘subject to [such] limitations and conditions [as may be] imposed by law.’ Existing law, both statutory and constitutional, already limit and condition the taking of any interest in land by providing that just compensation must be ascertained and paid in the manner provided by statute. The general assembly is authorized to impose additional limitations and conditions. *Id.* at 537-538.

In *James*, the Missouri Supreme Court clearly held that MHTC had the authority under the state constitution and state laws to limit and extinguish the right of abutting owners to directly access a state highway through the use of eminent domain. In 1958, the Missouri Supreme Court acknowledged the *James* holding in *Handlan-Buck Company v. State Highway Commission*, 315 S.W.2d 219, 222-223 (Mo. 1958), when it stated,

In the case of *State ex rel. State Highway Commission v. James*, *supra*, cited by plaintiffs, this court en banc held that the

defendant commission had the authority to condemn or extinguish the right of an abutting owner to access to a state highway.

Again, in 1963, the Missouri Supreme Court in *State ex rel. State Highway Commission v. Hammel*, 372 S.W.2d 852, 855 (Mo. 1963) stated, “As noted, however, the commission may limit or extinguish the easement of access through the exercise of the power of eminent domain where the public interest or safety so require.”

In the present case, just as in *James*, MHTC used its power of eminent domain to prohibit or limit the right of access from Plaintiff's predecessor in title to the state highway and specifically stated such in its condemnation petition.

The leading case that addressed the nature of abutter's rights in Missouri is *State ex rel. State Highway Commission v. Meier*, 388 S.W.2d 855 (Mo. banc. 1965). In *Meier*, the Missouri Supreme Court stated:

An abutting owner's property right to 'access' is better described as the right of ingress and egress to and from his property and the abutting public highway. The right also includes the further right to connect with or reach the system of public highways, which right is also subject to reasonable restrictions under the

police power of the State in protecting the public and facilitating traffic. The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the State. Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property. The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury. The trial court, therefore, erred in admitting evidence of depreciation of the value of respondent's property by reason of the diversion of traffic and the so-called 'loss of access'.

While the petition in this case and the plans for the improvement may show that no abutting property owners shall have the right of direct access to the throughways, except as shown on the plans, this prohibition applies with equal force to all members of the general traveling public and the statement is a declaration under the police power of the State as granted to the State Highway Commission by the Constitution of Missouri 1945, Art. IV, Sec. 29, V.A.M.S. Damages caused thereby are damages without legal injury and are not recoverable.

Therefore, as far as respondent and her property rights are concerned she has the same right of ingress and egress from her remaining property to the highway right-of-way that existed before, but after she or her invitees enter upon the adjacent right-of-way of the highway, they are subject to the same regulations, inconveniences and controls that govern all other members of the traveling public. They must go to the established entrances to get on the throughways. The 'limited access' in this case is, therefore, only the limitation of access as applied to the throughways. That limitation is imposed by the

State Highway Commission under the police power of the State and that regulation applies to respondent and her invitees just like it does to everyone else using the highway. If it causes damage and inconvenience, it is a common inconvenience applicable to all. *Meier*, 388 S.W.2d at 857.

Meier, and a number of cases reported after *Meier*, indicate that although the Commission may limit direct access from neighboring property to a state highway in accordance with its police powers, some access must still be allowed. The facts of those cases do not indicate whether MHTC had condemned the right to prohibit all access from those remainder properties to the state highways in question.

Those cases only indicate that the Commission had limited the access from the remainder; that is to say the cases only indicate that MHTC had paid for the right to limit access. It does not appear in these cases that MHTC had actually paid for the right to completely prohibit access from the remainder properties to the state highways in question.

The present case is similar to *State ex rel. Missouri Highway and Transportation Commission v. Perigo*, 886 S.W.2d 149 (Mo. App. S.D. 1994). In *Perigo*, MHTC sought to condemn property for a project in Newton County related to the relocated Route 71. *Perigo* at 150. With regard to MHTC's ability to

acquire all access rights to a property and subsequently landlock the remainder, the Court of Appeals stated:

Relator's authority to decide the public necessity or propriety for a public highway is found in both constitutional and statutory provisions. *See Mo. Const. art. IV sec. 29*; Chapter 227, RSMo. "The power to locate a state highway, to determine its width, type of construction and *the extent of land necessary for economical ... construction are vested in the sound discretion of the State Highway Commission*, uncontrolled by the courts except to compel strict compliance with the statutes and to prevent the taking of private property for a private or non-public use." *Curtis*, 222 S.W.2d at 68 (emphasis ours). In Art. IV, sec. 29 of our Constitution, Relator is expressly authorized to construct "limited access" highways and § 227.120(13) vests Relator with authority to institute proceedings to condemn lands for right-of-way and "for any other purpose necessary for the proper and economical construction of the state highway system..." *See Curtis*, 222 S.W.2d at 67.

Here, Relator designed newly relocated Highway 71 as a limited access highway. It had authority to do so. Art. IV, sec. 29. Being so designed and planned, the proposed highway left Albright's and Browning's remaining land without public access. **Whether “economical construction” of this 6.348 miles of Highway 71 was more likely achieved by paying Albright and Browning additional money to leave their property landlocked or by taking more land from the Copes and the Jansses for outer roads to serve the Albright and Browning properties, is a question for Relator initially to decide.** It is not a proper subject of judicial inquiry, absent fraud or bad faith or unwarranted abuse of discretion. *See State ex rel. State Highway Commission v. Eakin*, 357 S.W.2d 129, 134 (Mo. 1962); *Clothier*, 465 S.W.2d 632. *Id.* (*Emphasis added*).

Perigo is directly on point with the present case. So long as there is a public purpose served by the condemnation, it is the Commission's decision whether to either pay damages to a property owner and landlock a remainder or to provide some other means of ingress/egress. So long as a public purpose, typically motorist safety, is served and so long as the Commission pays just compensation

for the damage to the remaining property, MHTC may condemn all rights of public access. Here, the Commission previously decided to landlock the subject property, it did so through the use of eminent domain, and it paid **\$494,340** just compensation damages to Plaintiff's predecessor in title.

Abutter's rights include the right to have some limited access to the roadway and the right to connect the property to the roadway system. However, in the present case, it is undisputed that MHTC previously acquired all the abutter's rights to Route M. (L.F. 8). As a result, Plaintiff does not have any abutter's rights to Route M. With regard to Lot 3, no allegation has been made in the petition that Plaintiff is an abutter and, therefore, it could have no abutter's right of access to Lot 3.

MHTC acquired the abutter's rights to Route M from Plaintiff's predecessor in 1996 and paid all compensation that was due to the Plaintiff's predecessor. When Plaintiff purchased the property from its predecessor in title, its purchase price reflected the loss of access. If the Commission had not acquired all of the abutter's rights, the price paid by the Plaintiff for the property surely would have been significantly higher. If MHTC had not specifically acquired all abutter's rights, Plaintiff would have been entitled to limited access to the public system of roads as an abutting property owner. However, in the present case, MHTC specifically stated in its condemnation petition that all access from Plaintiff's

property to Route M was prohibited and it paid just compensation for those rights back in 1996. (L.F.8).

(B) No Ambiguity in Previous Condemnation Order: Having determined that the Commission can exercise the power of eminent domain to condemn access rights from neighboring property owners, the only remaining issue is whether it did so in this instance. It is at this point in the analysis that Plaintiff claims that there is an ambiguity in the previous order of condemnation.

On December 4, 1995, the Circuit Court of Jefferson County entered an order of condemnation, following testimony at a condemnation hearing and the filing of a verified petition and plans for the project on Route M for which access rights and land were to be acquired. (L.F. 8).

The Report of Commissioners dated on or about April 18, 1996 entered in the case of *State of Missouri ex rel. MHTC v. The Raebel Living Trust*, Case No. 195-5715CC (Twenty-third Judicial Circuit of Missouri, at Hillsboro, Jefferson County) specifically provided that all abutter's rights of direct access to the thruway of Route M from the subject remainder property was "herewith prohibited or limited". (L.F. 8).

Plaintiff now claims that there is an ambiguity due to the use of the words "prohibited" and "limited". (Tr. 18-19). Plaintiff appears to assert that the access

restriction has to be one or the other, but cannot be both (Tr. 18-19). The trial court disagreed and observed:

Well, as I read that, that was an alternative. They could either limit or prohibit, but doesn't define them. My reading of it was: They can limit or prohibit access.

The word "or" is disjunctive in its nature and in its ordinary sense marks an alternative which generally corresponds to the word "either". *Hawkins v. Hawkins*, 511 S.W.2d 811, 812 (Mo. 1974). Any fair reading of the language in the Report of Commissioners can only lead to the conclusion that access could either be prohibited or that it could be limited under some circumstances. The use of the word "limited" simply acknowledges that MHTC in its discretion may allow some access, but limit it to what it determines is reasonable under existing facts and circumstances. *L&T Investment Corp. v. State ex rel. Missouri Highways and Transportation Commission*, 927 S.W.2d 509, 510-511 (Mo. App. E.D. 1996). No fair reading of that language could lead to the conclusion that access could only be one or the other.

If there was an irregularity in the wording of the order of condemnation, the property owner, Raebel Trust, had the opportunity to litigate that issue. Instead, the Raebel Trust dismissed its exceptions to the commissioners' award and

withdrew the **\$494,340** that had been paid into the court by MHTC. At that point, the Raebel Trust lost the ability to challenge any alleged irregularities in the condemnation order. Because the Raebel Trust withdrew the \$494,340 Commissioners Award from the registry of the trial court, the Raebel Trust and its successors in title are precluded and estopped from asserting on appeal any alleged irregularities in the proceedings that occurred prior to the withdrawal. *Jackson County v. Hesterberg*, 519 S.W.2d 537, 545 (Mo. App. W.D. 1975).

Upon the withdrawal of the **\$494,340** by the Raebel Trust and the dismissal of its pending exceptions, the condemnation process was completed. The right to prohibit or limit access passed absolutely to the Commission. Plaintiff is now attempting to re-litigate an issue that it and its predecessors in interest were estopped from litigating once the **\$494,340** Commissioners' award was withdrawn from the court by the Plaintiff's predecessor in title.

Through the exercise of eminent domain, the Commission previously paid just compensation to the Plaintiff's predecessor in title for the right to prohibit or limit direct access from the Plaintiff's property to the state highway. A successor in interest, Plaintiff is now bound by that prior limitation of access. The present situation is reminiscent of the situation that arose in *State ex rel. State Highway Commission v. DeMarco*, 422 S.W.2d 644 (Mo. 1961). In *DeMarco*, MHTC filed a condemnation petition against two property owners (Little Piney Oil Co. and

W.L Jaques and wife) seeking property interests for the construction of Interstate 44. Commissioners were appointed and damage awards to the property owners were made. Both property owners and MHTC filed exceptions to the commissioners' awards. MHTC paid the awards into court and those awards were withdrawn by the property owners. During the preparations for the exceptions trials, MHTC learned that it had previously acquired the subject land from the property owners and it then moved to dismiss the condemnation. As part of its dismissal motion, MHTC sought the return of the condemnation awards it previously paid into court. The circuit court heard the evidence and concluded that MHTC had previously acquired the property and therefore the defendants had no legal claim to the monies paid in the condemnation proceeding. Defendant property owners appealed the decision. In affirming the trial court, the Court of Appeals stated:

Here the commission concedes that the entire action as it pertained to these defendants was filed in error because of an oversight in their Planning Department, and they were in fact seeking to condemn lands they had previously purchased by deeds in 1953. The presence of this fact makes it obviously clear that titles to the lands described in the petition were not at any stage of this proceeding, nor could they have been, divested

from the defendants. To reach such conclusion only requires the elementary thought that it was impossible to take something from the defendants that they in fact did not own. What basis is there for the argument of defendants that they should be allowed to retain the awards? Since they lost nothing, arguably, the only justification would be that a landowner having found the condemning authority in such an error may retain such award as a windfall to himself and as a penalty to the condemning authority. The statement itself precludes any thought of attempting to rationalize such a result. The fact an error was made does not within itself justify the unjust enrichment of a party thought to be the owner of lands previously acquired by the state. *Id.* at 646-650.

In *DeMarco*, MHTC was spared from having to pay again for property interests that it had previously acquired due to its mistake. In the present case, however, there was no mistake, MHTC already paid for the right to prohibit or limit access from Plaintiff's property to the state highway. The subject property was already burdened by this access limitation before Plaintiff acquired the remainder from its predecessor in title. Presumably, the price that Plaintiff paid for the property

reflected that lack of direct access to the state highway. Plaintiff now seeks a windfall by pursuing the present inverse condemnation claim to require that MHTC pay again for property interests that it previously acquired from Plaintiff's predecessor in title at a cost of **\$494,340**.

The Commission should not now be asked to nullify the access rights that it paid fair market value for in the Raebel Trust condemnation case. The Plaintiff admits in its pleadings that all access was acquired by the Commission from its predecessor in title, the Raebel Trust. (L.F. 8). As a result, Plaintiff acquired the remainder property from the Raebel condemnation subject to that previously recorded limitation of access. No interpretation of the condemnation petition or the recorded Commissioner's Report is needed, as Plaintiff admits that access to Route M, a state highway, is controlled by the Commission, which has not lifted any of its access restrictions from Plaintiff's property.

MHTC's primary problem with the original petition, Appellant's brief in the Court of Appeals and Appellant's substituted brief herein, is their significant lack of clarity as to what it really wants. MHTC has never been given any sort of a request or application with any plat showing what Avery wants. If direct access to Highway M is desired, then the term "right of way by necessity" has no place. Section 228.342 authorizes a private road of "strict necessity" over property owned by others. Avery's 50 acres, as it abuts Highway M, has no intermediate private

owners. What Avery seems to want, but so inartfully describes, is a “break in access”, as so found in Judge Odenwald’s opinion below. MHTC’s authority to acquire and restrict access to highways in the interest of protecting public safety is “well established”. *State ex rel Missouri Highways and Transportation Commission v. Perigo*, 886 S.W.2d 149, 152-153 (Mo.App. S.D. 1994). *State ex rel. State Highway Commission v. James*, 205 S.W. 2d 534 (Mo banc. 1947). In this instance, Respondent MHTC previously paid Appellant’s predecessor in title **\$494,340** for those rights. The powers necessary to limit Avery’s access to Highway M are found in Section 227.120 RSMo. and 227.130 RSMo, and most fundamentally in Article IV Section 29 of the Missouri Constitution:

...(iii) shall have authority to limit access to, from and across state highways...where the public interest and safety may require.

See also, *State ex rel State Highway Commission v. Clevenger*, 291 S.W.2d 57, 62 (1956) and *State ex rel Highway and Transportation Commission v. Spencer*, 820 S.W.2d 87 (Mo.App. 1991).

Alternatively, MHTC’s *Engineering Policy Guide* (an on-line document defining how Respondent conducts business) Section 941.2 Entrance Requests Within Controlled Access Right of Way outlines how Appellant could have requested a break in access. Appellant has never requested Respondent consider

such a break in access. Having never seen a plan sheet or plat accompanying such a request, it is impossible for MHTC to envision what Avery wants, nor consider whether sight distance, topography, traffic speed and entrance spacing would allow consideration for such a request.

Condemnation in any form is *sui generis*, *State ex rel Washington University Medical Center Redevelopment Corp. v. Gaertner*, 626 S.W.2d 373 (Mo banc. 1982) so that such powers must be strictly construed. Condemnation is in derogation of the free rights of real property ownership and thereby can only be used when specifically authorized. Neither Article 1, Section 28 of the Missouri Constitution nor Section 228.342 RSMo. provide for the condemnation of a right of way of necessity across public or state lands. Without a specific source of power, Avery cannot achieve what it wants here. For example, see *Missouri Highways and Transportation Commission v. Eilers*, 729 S.W.2d 471 (Mo.App. 1987) where soils surveys were found to be different than surface surveys and hence not authorized. Right of way by necessity is in essence an eminent domain statute. Therefore, Section 228.342 RSMo. must be strictly construed just as in *Eilers*; no clear right to cross public property is spelled out so it is improper for Avery to try to take from or across MHTC's public right of way for any reason associated with a private road.

SEVENTH POINT RELIED ON

THE CIRCUIT COURT DID NOT ERR IN DISMISSING PLAINTIFF'S PETITION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BECAUSE NO DECISION HAD BEEN MADE BY MHTC REGARDING THE PROPOSED BREAK IN ACCESS FROM PLAINTIFF'S PROPERTY TO ROUTE M IN THAT A DECISION IS REQUIRED IN ORDER TO INVOKE JUDICIAL REVIEW.

At the outset, it is important to note that there are some matters in Appellant's Seventh Point Relied On with which MHTC can agree. A contested case under 536.010.4 RSMo. means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing. MHTC agrees that there is no statute that requires the Commission to have a hearing on the record for requests for breaks in access by neighboring property owners. As such, any decision of MHTC to deny a request from a neighboring property owner to break access to a state highway cannot be considered a contested case for purposes of the Administrative Procedures Act.

It is possible that MHTC's decision to deny a request for a break in highway access would therefore be a noncontested administrative decision for purposes of the Administrative Procedures Act. A noncontested case under the Missouri

Administrative Procedure Act is one without any requirement of a formal, adversarial hearing of the type required in contested cases. *Mosley v. Members of the Civil Service Bd. for City of Berkley*, 23 S.W.3d 855, 858 (Mo. App. E.D. 2000). MHTC agrees that the Missouri Supreme Court has ruled that exhaustion of administrative remedies is not a jurisdictional prerequisite of judicial review in noncontested cases. *Strozewski v. City of Springfield*, 875 S.W.2d 905, 907 (Mo. banc. 1994). Although MHTC does not concede that any decision by it to deny direct access to a state highway while exercising its authority under Article IV, Section 29 of the Missouri Constitution is an noncontested decision under Section 536.150 RSMo., this case is not about the nature of judicial review of either a contested or noncontested administrative decision.

MHTC did not assert as a basis of its motion to dismiss that exhaustion of administrative remedies was required in this case. Instead, it was the circuit court that raised the issue. MHTC's permit application process is not a statutorily required process. It was created to help MoDOT review the safety of proposed breaks in access, but it is not a contested administrative decision that requires an administrative hearing on the record. It is possible that a decision regarding a proposed break in access is a noncontested decision from which judicial review may be had pursuant to Section 536.150 RSMo. But even if that were the case, there is still the requirement that some decision actually be made.

The Appellant's problem is that it did not clearly establish in the record that any decision whatsoever had actually been made, much less whether it was contested or noncontested or something else entirely. Before judicial remedies may be had, a decision must have been made. The previous decision by MHTC to landlock this parcel, including the opportunity of the previous property owner to challenge that decision, had been decided long ago in the 1996 condemnation. Appellant never applied for a permit from MHTC to allow a break in access to the highway. Plaintiff only "informally" met with MHTC staff. (Tr. 20 Li. 7-9, Tr. 21, Li. 2-3). Therefore there was literally no decision for the circuit court to review.

The Administrative Procedures Act does not provide guidance as to when an administrative decision has occurred; it simply states that it can be a decision or order. In the absence of a statutory definition, the words used in a statute will be given their plain and ordinary meaning. *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 809 (Mo. banc. 1998) (overruled on other grounds).

Webster's II New College Dictionary, (3rd Ed.), defines a decision as:

- decision:** 1. Judgment on an issue under consideration. 2. The act of making up one's mind or reaching a conclusion. 3. A verdict reached or judgment pronounced. 4. Firmness of character or action: RESOLUTENESS. 5. A victory won on

points, as in boxing when no knockout has occurred. 6.

Baseball. A win or loss accorded to a pitcher.

When the trial court inquired whether the administrative procedures had been exhausted, it learned that MHTC offers a permit process through which neighboring property owners may request access to a state highway. It further learned that Appellant had not actually filed an application for a permit for a break in access. Instead, Avery only had an informal meeting with MoDOT staff, at the conclusion of which it believed its request for a break in access would be verbally denied. With these factors in mind, it is unclear that a "decision" had been reached as that term is defined in the dictionary. An informal verbal response by MoDOT staff does not constitute "judgment on an issue under consideration " or "the act of making up one's mind or reaching a conclusion" or "a verdict reached or judgment pronounced" when an MHTC permit application procedure exists.

A break in limited access to a neighboring property is a real estate interest. If MHTC found itself in need of eliminating that access in the future, it would then have to pay just compensation to again regain that interest and eliminate the access. As such, the decision by MHTC to grant a break in access is a significant decision, not only for the neighboring property owner, but most importantly for the safety of the traveling public. Such a decision cannot be made in a haphazard

manner. Instead, any such decision must be subject to engineering review. In order to ensure that it makes deliberate and considered decisions, MHTC created its permit application process through which a property owner may request a break in access.

Although not required by statute, MHTC established this process in order to properly review requests for breaks in limited access and reach a professionally considered and sound engineering decision. Information on how to apply and the process involved is available on MoDOT's website as part of Section 941 of MoDOT's *Engineering Policy Guide*. Until that process has been pursued however, no decision has yet been made by the Commission. In order to get a decision (and then be able to seek some level of judicial review), Appellant must actually apply for a permit for a break in access. Instead, all that has happened herein is that Appellant has informally met with a MoDOT employee and received verbal input. Avery apparently did not like that input and instead of pursuing a permit request, filed the present action.

Without a decision, there was nothing for the circuit court to review. Without a decision to review, no claim against the Commission can be stated. That missing piece is reflected in the circuit court's order. Although the trial court referred to the reason for its dismissal order as the exhaustion of administrative

remedies, that phrase was meant in a broad context; the dismissal was ordered for a very basic reason: to get a decision. Once a decision has been made, an aggrieved party then can argue about what type of judicial relief, if any, is available.

The trial court dismissed the case against the Commission without prejudice so that the Appellant could go back to MHTC, file an application, and get a decision. It is possible that the application could be granted. It is also possible that it could be denied and even if the application was denied, it is also possible that the parties could reach an alternate accommodation. But if not, and if the Plaintiff remained aggrieved after filing a permit application and receiving a decision, it could then re-file its case.

In reviewing a bench tried case, the appellate court's concern is the correctness of the trial court's result, not the route taken to reach it. *In re the Formation of the Neosho Transportation Development District*, 416 S.W.3d 326, 328 (Mo. App. S.D. 2013). The circuit court may have referred to the basis for its decision to dismiss the case as the failure to exhaust its administrative remedies, but the court nevertheless reached the correct result. This matter simply is not yet ripe for judicial review. Justiciability requires that the Plaintiff's claim be ripe. *Mercy Hospitals East Communities v. Missouri Health Facilities Review Committee*, 362 S.W.3d 415, 418 (Mo. banc. 2012). Once the trial court

determined that the matter was not ripe for judicial review, it could have either dismissed the case without prejudice or it could have allowed the suit to pend until it was ripe for adjudication. *Brinson v. Whittico, M.D.*, 793 S.W.2d 632, 634 (Mo. App. E.D. 1990). Faced with that option, the circuit court dismissed the Plaintiff's case without prejudice. This dismissal was proper and appropriate.

In closing out its arguments related to its Seventh Point Relied On, Appellant makes two conclusory statements. First, Avery states, "The Commissioner's Report does not provide for any administrative remedies for access permit request to the 50 acres, more or less." That statement is correct, but it is entirely irrelevant. The Commissioner's report relates to the condemnation proceeding and determining the appropriate value for the property. It does not relate to a subsequent property owner that seeks access to a restricted-access route decades after the property rights were condemned. And it should also be noted that Section 523.050 RSMo. has its own judicial review mechanism which allows a property owner or a condemning agency to file exceptions to the commissioner's report.

The second conclusory statement made by Appellant at the close of its brief is, "No exhaustion of administrative remedies is required for actions under 42 U.S.C. Section 1983." In the present case, there are plenty of statutory provisions allowing for judicial review of administrative decisions and this matter is not really

a 42 U.S.C. 1983 action. But even if it was, it still would require a decision to have been made and as demonstrated in MHTC's arguments related to the Seventh Point Relied On, no decision has ever been made in this matter. All that has occurred is an informal verbal discussion between Plaintiff and an employee of MoDOT was held. The information needed for the Commission to make an engineering decision as to whether access can be broken was never provided by Appellant through the permit application process. This lack of information can be demonstrated from what is missing from the record. There are no maps or diagrams on file nor are there sight distance engineering reports demonstrating the location where a proposed break in access could be constructed in a safe location. Until such information can be provided, no decision can be made by the Commission and until a decision can be made by the Commission, no judicial review, whatever it may entail, may be had.

CONCLUSION

The Circuit Court of Jefferson County properly dismissed Plaintiff's Petition against MHTC because MHTC had not made any final decision on whether or not to allow direct access from Plaintiff's property to Route M or Lot 3. Beyond that, Plaintiff's petition failed to state a claim upon which relief could be granted in that: (1) Sections 228.340-228.374 RSMo. do not apply to MHTC; and (2) MHTC is constitutionally authorized to prohibit or eliminate access from Plaintiff's property to Route M, which it previously did in a 1996 condemnation. Plaintiff has simply failed to state a cause of action against MHTC. Accordingly, the Circuit Court of Jefferson County's order dismissing the petition against MHTC should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the Respondent's Brief with the attached Appendix was filed electronically with the Missouri Supreme Court on the 30th day of October, 2015 in compliance with the Court's applicable rules. The undersigned further certifies that the Respondent's Brief with attached Appendix was served via the Court's operating electronic filing system this same day upon Phillip K. Gebhardt, Gebhardt Real Estate and Legal Services, LLC, counsel for Avery Contracting, LLC and Andrew Drazen, Doster Ullom, counsel for co-respondents.

I further certify pursuant to Rule 84.06(b) and (c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and contains 11,486 words exclusive of the sections exempted by Rule 84.06(b) based on the word count program that is part of Microsoft Software. The undersigned counsel further certifies that the file provided to this Court and served on opposing counsel has been scanned by counsel's antivirus program and is free of viruses.


Bryce Gamblin