

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
MAY 16 2011

City of Richmond Heights, Missouri)
)
 Plaintiff/Appellant,)
)
 v.)
)
 Ruth L. Gasway, et al.,)
)
 Defendants/Respondents.)

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No.: ED 95791

FILED

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CLERK, SUPREME COURT

Brief of Respondent Lillian Gasway

Appeal from the Circuit Court of St. Louis County
The Honorable Richard C. Bresnahan, Circuit Judge

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SCANNED

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment in an eminent domain proceeding tried in the Circuit Court of St. Louis County, Missouri, Division 18, the Honorable Richard C. Bresnahan, Circuit Judge, presiding. Although Appellant raises several issues in its Brief, including the issue of the constitutionality of Sections 523.039 and 523.061 of the Revised Statutes of Missouri, Appellant's assertion that said statutes are unconstitutional is not sufficient to remove jurisdiction from this Court. "The constitutional issue must be real and substantial, not merely colorable." *State ex rel. Missouri Highways and Transp. Com'n v. Greenwood*, 269 S.W.3d 449, 458 (Mo.App.W.D. 2008)¹. Therefore, this Court has jurisdiction of this Appeal pursuant to Article V, Section 3, of the Missouri Constitution.

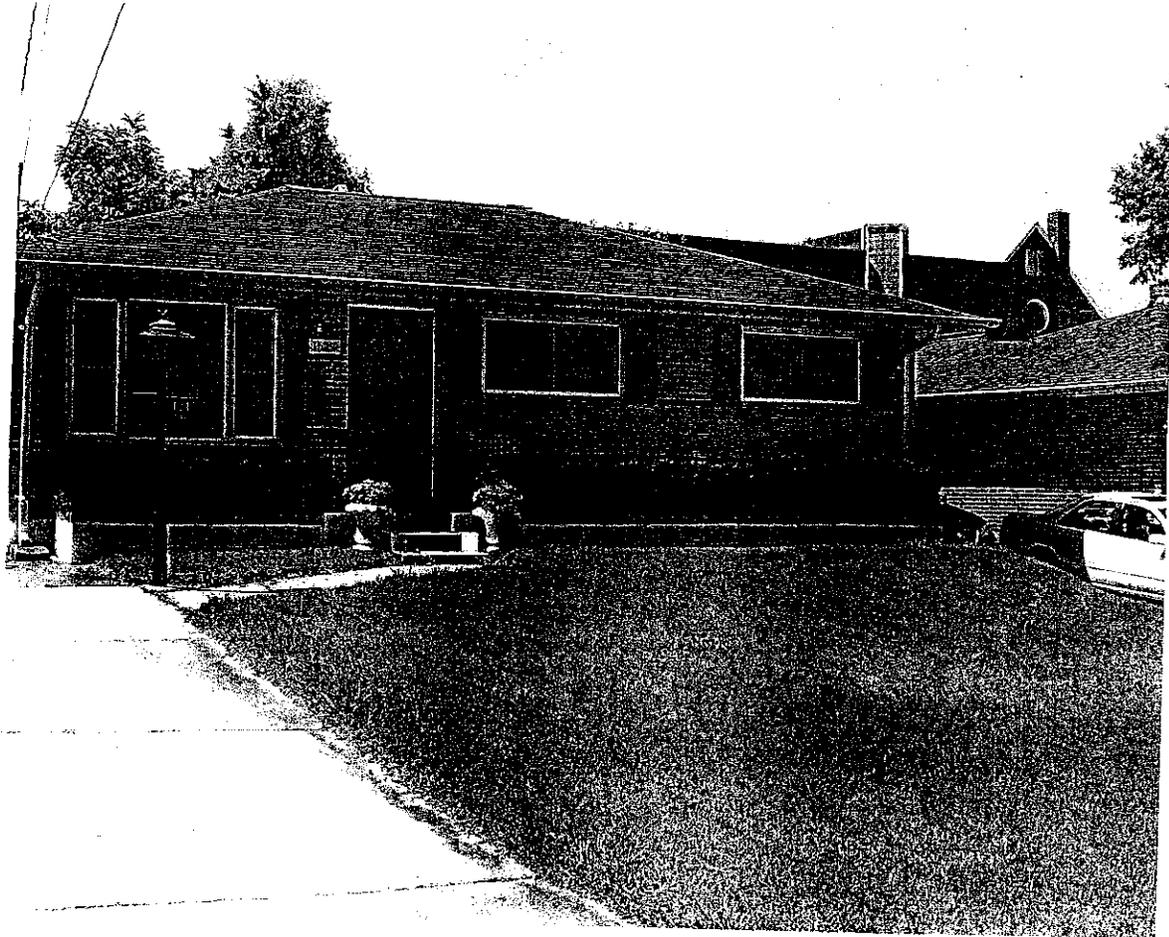
¹In *Greenwood*, Respondent/Defendant claimed Section 523.045 of RSMo violated the "just compensation" provisions of the Missouri Constitution; however, the Court of Appeals found that such constitutional claim was "merely colorable", thus, the Court had jurisdiction to review the claim.

STATEMENT OF FACTS

This case involves the acquisition by Appellant, the City of Richmond Heights, a municipal corporation, of a parcel of property located within what is arguably the most valuable land located in a populous and expanding commercial area in St. Louis County, Missouri, right at the corner of the intersection of Interstate 170 and Interstate 64. (Trial Transcript (“Tr.”) 74; Supplemental Legal File (“S.L.F.”) 16). Appellant desires to acquire the subject property as part of the Hadley Township Redevelopment Plan (“Plan”), which was approved and adopted by the City pursuant to Ordinance 4991. (S.L.F. at 17).

Respondent Lillian Gasway (“Ms. Gasway”) is the owner of 1517 Banneker, Richmond Heights, Missouri (“Property”). (Tr. 136). Ms. Gasway purchased the Property over twenty-five years ago because of the Property’s central location in St. Louis County with easy access to Interstate 170 and Interstate 65, which allowed her convenient travel to work and to family. (Tr. 139). When she purchased the Property, she took out a thirty-year mortgage, so after paying on the mortgage for the last twenty-five years, Ms. Gasway only has little less than five years left on her mortgage until she owns her home free and clear of any debt. (Tr. 135-136). Since her purchase of the Property, Ms. Gasway has invested much of her own money and time redecorating the home, installing new drywall, refinishing hardwood floors, updating all rooms of the home, and even finishing the basement where she spends her free time sewing. (Tr. 136-137). Over the last twenty-five years, Ms. Gasway has taken great pride in caring for her Property and Appellant’s expert even admitted that Ms. Gasway’s Property was

“perfectly good housing stock”; however, Appellant still included Ms. Gasway’s Property in its Plan to redevelop the area for commercial gain. (Tr. 136, 190). Ms. Gasway’s Property is depicted in the following photograph from evidence admitted at trial:



(Defendant’s Exhibit A; Appendix i)

On or about August 14, 2007, Appellant filed its Petition in Condemnation against Ms. Gasway and sought to condemn the Property pursuant to the Plan and the powers “authorized by Section 99.800, et seq. of the Missouri Revised Statutes of Missouri.” (S.L.F. 8). In addition, Appellant sought condemnation pursuant to “Section 99.820 of

the Tax Increment Financing Act, the local city ordinances, and Article III of the Redevelopment Agreement”. (S.L.F. 10). Appellant alleged that it was necessary for it to acquire the Property for the purpose of “redeveloping an area designated as a blighted area...to include a mixed use commercial and residential development.” (S.L.F. 19). An Order of Condemnation was entered on March 26, 2008, and the Report of the Commissioners pertaining to the Property was filed on July 11, 2008, which assessed Ms. Gasway’s damages as \$264,717.00 (two hundred-sixty four thousand seven hundred and seventeen dollars and no cents). (S.L.F. 26). Both parties, Appellant and Ms. Gasway, filed their exceptions to the Commissioners’ Report, which were sustained, and a jury trial was ordered by the court. (S.L.F. 30-34).

During trial of the exceptions, Appellant engaged David Phillips of Real Estate Analysts Limited, while Ms. Gasway engaged Ernest Demba of Demba Valuation Services, L.L.C., to testify as to their opinions of the highest and best use of the Property and the fair market value of the Property. (Tr. 5, 154). Both appraisers used the “sales comparison approach” in assessing the fair market value of the Property. (Tr. 174). Both appraisers used the same four criteria in assessing such use, which are: the use must be legally permissible, physically possible, financially feasible, and maximally productive. (Tr. 45-46, 170). Applying these criteria to their analyses, they arrived at different conclusions as to the Property’s highest and best use: Demba opined that the Property’s highest and best use is commercial assemblage and Mr. Phillips opined that the Property’s highest and best use is as a single family residential dwelling. (Tr. 44, 171).

Prior to trial, Appellant filed its Motion in Limine to exclude the testimony and opinion of Demba on several bases. (Legal File (“L.F.”) 10). More specifically, Appellant sought to exclude “any testimony” of Demba, any valuation by Demba on the theory of assemblage or plottage, any enhanced value of the Property by Demba as a result of Appellant’s intended use of the Property, the use of comparable sales purchased under threat of condemnation or pursuant to public assemblage projects or financed by Tax Increment Financing (“TIF”), the use of comparable sales more than five years prior to the date of the taking, and the use of Demba’s written narrative of the history of the Plan. (L.F. 10). In other words, Appellant sought to exclude Demba’s testimony because it was “highly speculative” and had “no probative value”. (L.F. 11). After a hearing in chambers in which Appellant and Ms. Gasway presented argument in support of their respective positions, the trial court chose to take the Motion in Limine with the case and rule on the issues as they arose in trial. (L.F. 14).

At trial, Demba, after testifying to his extensive experience and credentials in the field of valuation for close to thirty years, opined that a typical house appraisal of Ms. Gasway’s Property was not proper, but based on the Property’s location in the center of commercial development, Demba opined that the proper type of appraisal of the Property was a commercial type. According to Demba, Ms. Gasway “owns the rights to a property which will be developed in the near future as something other than a house.” (Tr. 18). The Property is located at the intersection of Interstate 170, Interstate 64, and Hanley Road, which feed into Clayton Road; the Property is located in a position of “major traffic flow”, and according to Demba, “this is where the traffic flow is...where the

developers are going, and [] where the developers are continuously going.” (Tr. 30-31). Furthermore, Demba testified that the highest and best use would not be to continue using the Property as a residential home because “the value as a home was less than the value as a commercial assemblage.” (Tr. 46). Demba testified that it was “definitely” reasonably probable that another buyer would bid for the Property for the purpose of assemblage without the use of eminent domain. (Tr. 56). More specifically, Mr. Demba opined that it was “99 percent reasonable probability that the property would go from residential to commercial assemblage at a value of \$324,000.” (Tr. 104). At no time did Appellant object to this admission of Demba’s opinion during trial.

To arrive at the fair market value of the Property based on the highest and best use of commercial assemblage, Demba looked at nine similar “commercial assemblages” whereby residential homes were purchased and assembled for commercial use. (Tr. 57). Unlike residential sales that occur quite frequently, Demba testified that comparables of other assemblage projects occur over a greater time span and the final development of the residential properties into a commercial assemblage can take years with a ten year time frame being a “relatively recent sale.” (Tr. 60). Out of the nine comparable sales of commercial assemblages, Demba based his opinion on only four of those comparable sales: the Promenade, which was finalized in 1998; the Brentwood Square, which was finalized in 2000; Maplewood Commons, which was finalized in 2003; and The Boulevard, which was finalized in 2004 (Tr. 68, 70-71, 72-73). According to Demba, these projects were voluntary sales of residential homes that were assembled into larger commercial developments without the threat of condemnation. (Tr. 54, 58, 69, 73, 90,

101). Utilizing the sales comparison approach with the four comparable sales or “assemblages” stated prior hereto, Demba opined that the fair market value of the Property was \$324,000. (Tr.104). Again, Appellant never raised any of the objections initially raised in its Motion in Limine prior to the start of trial during the testimony of Demba. Demba’s summary of his conclusions, referred to in his testimony and in admitted evidence as the “Calculation Grid”, is provided on the following page:

CALCULATION GRID

Property Matrix						
#	Development	Price Paid	Date	Land Use	Retail Market	Source of Information
1	Galleria (Residential)	\$30.39	1989	Residential	Regional	Property Owner Counsel: S. Shult
2	Galleria (Commercial)	\$75.00	1989	Commercial	Regional	Property Owners' Counsel:
3	The Promenade	\$35.00	1998	Residential	Regional	Broker: Joe Johnson
4	Brentwood Square (Residential)	\$29.22	2000	Residential	Regional	C.O.V.
5	Brentwood Square (Commercial)	\$85.64	2000	Commercial	Regional	C.O.V.
6	Maplewood	\$35.00	2003	Mixed	Power Center	Principals / Property Owners
7	Schnucks (Des Peres)	\$33.67	1997	Commercial	Power Center	Desco Broker (Mike Antone)
8	St. Louis Blueprint	\$31.00	1995	Mixed	Regional	Purchaser / C.O.V.
9	Boulevard Tracts	\$75.00	2004	Residential	Regional	C.O.V.

Inflation Adjustment						
#	Development	Price Paid	Inflation Rate	Date	Multiplier	Adjusted Price (1)
1	Galleria (Residential)	\$30	2.50%	1989	1.60	\$48.58
2	Galleria (Commercial)	\$75	2.50%	1989	1.60	\$119.90
3	The Promenade	\$35	2.50%	1998	1.28	\$44.80
4	Brentwood Square (Residential)	\$29	2.50%	2000	1.22	\$35.60
5	Brentwood Square (Commercial)	\$86	2.50%	2000	1.22	\$104.34
6	Maplewood	\$35	2.50%	2003	1.13	\$39.60
7	Schnucks (Des Peres)	\$34	2.50%	1997	1.31	\$44.18
8	St. Louis Blueprint	\$31	2.50%	1995	1.38	\$42.73
9	Boulevard Tracts	\$75	2.50%	2004	1.10	\$82.79

Submarket Location / Highway Visibility						
#	Development	Adjusted Price (1)	Location	% Adjustment	\$ Adjustment	Adjusted Price (2)
1	Galleria (Residential)	\$48.58	Richmond Heights	0.00%	\$0.00	\$48.58
2	Galleria (Commercial)	\$119.90	Richmond Heights	0.00%	\$0.00	\$119.90
3	The Promenade	\$44.80	Brentwood	0.00%	\$0.00	\$44.80
4	Brentwood Square (Residential)	\$35.60	Brentwood	0.00%	\$0.00	\$35.60
5	Brentwood Square (Commercial)	\$104.34	Brentwood	0.00%	\$0.00	\$104.34
6	Maplewood	\$39.60	Maplewood	10.00%	\$3.96	\$43.56
7	Schnucks (Des Peres)	\$44.18	Des Peres	2.50%	\$1.10	\$45.28
8	St. Louis Blueprint	\$42.73	Richmond Heights	0.00%	\$0.00	\$42.73
9	Boulevard Tracts	\$82.79	Richmond Heights	0.00%	\$0.00	\$82.79

Retail Market Type Adjustment					
#	Development	Adjusted Price (2)	Retail Market	% Adjustment	\$ Adjustment
1	Galleria (Residential)	\$48.58	Regional	0.00%	\$0.00
2	Galleria (Commercial)	\$119.90	Regional	0.00%	\$0.00
3	The Promenade	\$44.80	Regional	0.00%	\$0.00
4	Brentwood Square (Residential)	\$35.60	Regional	0.00%	\$0.00
5	Brentwood Square (Commercial)	\$104.34	Regional	0.00%	\$0.00
6	Maplewood	\$43.56	Power Center	25.00%	\$10.89
7	Schnucks (Des Peres)	\$45.28	Power Center	25.00%	\$11.32
8	St. Louis Blueprint	\$42.73	Regional	0.00%	\$0.00
9	Boulevard Tracts	\$82.79	Regional	0.00%	\$0.00

Land Use Adjustment					
#	Development	Adjusted Price (2)	Land Use	% Adjustment	\$ Adjustment
1	Galleria (Residential)	\$48.58	Residential	0.00%	\$0.00
2	Galleria (Commercial)	\$119.90	Commercial	-59.48%	-\$71.32
3	The Promenade	\$44.80	Residential	0.00%	\$0.00
4	Brentwood Square (Residential)	\$35.60	Residential	0.00%	\$0.00
5	Brentwood Square (Commercial)	\$104.34	Commercial	-65.88%	-\$68.74
6	Maplewood	\$43.56	Mixed	-20.89%	-\$9.10
7	Schnucks (Des Peres)	\$45.28	Commercial	0.00%	\$0.00
8	St. Louis Blueprint	\$42.73	Mixed	0.00%	\$0.00
9	Boulevard Tracts	\$82.79	Residential	0.00%	\$0.00

Weighted Average Computation of Market Activity				
#	Development	Adjusted Price (Final)	Weight	Final Value Component
1	Galleria (Residential)	\$48.58	0.00%	\$0.00
2	Galleria (Commercial)	\$48.58	0.00%	\$0.00
3	The Promenade	\$44.80	20.00%	\$8.96
4	Brentwood Square (Residential)	\$35.60	20.00%	\$7.12
5	Brentwood Square (Commercial)	\$35.60	0.00%	\$0.00
6	Maplewood	\$45.35	30.00%	\$13.60
7	Schnucks (Des Peres)	\$56.60	0.00%	\$0.00
8	St. Louis Blueprint	\$42.73	0.00%	\$0.00
9	Boulevard Tracts	\$82.79	30.00%	\$24.84
	TOTAL		100.00%	\$54.52

Probability of Assemblage	99%
Value to Subject	\$53.98
Land Area	6,000
Indicated Value (Rounded)	\$324,000.00

(Defendant's Exhibit G-1, at Page 52; Appendix ii)

Appellant's expert Mr. Phillips, on the other hand, opined that the highest and best use of the Property was a residential home and assessed the fair market value of the home at \$112,000 even though he conceded that he used the same appraisal standards as Demba. (Tr.171, 186). However, on cross-examination, Mr. Phillips admitted that the very project going in place for which the Property was condemned includes commercial uses for assemblage. (Tr.188). Furthermore, Mr. Phillips agreed with Demba in that assemblage is in fact a "recognized method of valuation for a sales comparison approach." (Tr.196). And Mr. Phillips even conceded that it was reasonable for Demba to conclude that the assemblages of large commercial developments do not occur with as much frequency, so an appraiser is required to delve further back in time to obtain proper comparable sales. (Tr. 200). Lastly, Appellant read and stipulated to the admission of the following evidence during the cross-examination of its expert, Mr. Phillips:

"The city agrees first that it has acquired properties in the development area over the course of 15 years, including for a potential City Hall, for its maintenance shed, and for the elimination of dangerous buildings. Secondly, the city agrees that it's endeavored to sell all of those properties to prospective developers, including as recently as May of this year."

(Tr. 225)(emphasis added).

After admitting the opinions of both experts, the trial court, consistent with Missouri law, left the determination of the fair market value of the Property to the jury. In light of the evidence and arguments set forth during trial, the jury assessed Ms. Gasway's damages at \$300,000. (L.F. 30). In addition, Ms. Gasway sought the addition

of prejudgment interest pursuant to Section 523.045 and homestead value pursuant to Section 523.039, which the trial court awarded, bringing the total amount of Ms. Gasway's damages to \$413,519.92. (L.F. 30-31).

Appellant subsequently submitted its Motion for New Trial, or in the Alternative, for Remittur. (L.F. 33). In said Motion, Appellant raised the following issues: 1) its Motion in Limine should have been sustained because Demba's opinion was based on the assemblage theory, included properties already owned by the Appellant, included comparable sales acquired with the use of condemnation, based the probability of assemblage on mere speculation, and violated the Project Influence Doctrine; 2) the comparable sales utilized by Demba in forming his opinion were already assembled, were not free market transactions, and were too remote in time; 3) the court erred in applying section 523.039 of RSMo. because the Plan was entered into prior to the effective date of the statute and is retrospective in violation of Article I, Section 13 of the Missouri Constitution and Article I, Section 10 of the U.S. Constitution; and 4) the court erred in applying Section 523.039 RSMo because it adds a "premium" in violation of Article I, Section 26 of the Missouri Constitution. (L.F. 21-24). After a hearing and arguments held on said motion and Ms. Gasway's reply thereto, the trial court denied Appellant's motion, and this appeal followed. (L.F. 32).

POINTS RELIED ON

I. The Trial Court, and Not the Jury, Properly Applied Sections 523.039 and 523.061 RSMo. and Added Twenty-Five Percent (25%) to the Jury's Determination of Fair Market Value of the Property for "Homestead Value" Consistent with the Legislature's Definition of Just Compensation in that the Addition of the Homestead Value is Permitted Because Such Does Not Violate the Just Compensation Clause of the Missouri Constitution.

City of Arnold v. Tourkakis, 249 S.W.3d 202 (Mo. banc 2008)

Kelo v. City of New London, Connecticut, 125 S.Ct. 2655 (2005)

Land Clearance for Redevelopment Authority of Kansas City, MO v. Kansas Univ. Endowment Asso., 805 S.W.2d 173 (Mo. banc 1991)

Murrell v. State, 215 S.W.3d 96 (Mo. banc 1984)

Planned Industrial Expansion Authority of Kansas City v. Ivanhoe Neighborhood Council, 316 S.W.3d 418 (Mo.App.W.D. 2010)

Rentscheler v. Nixon, 311 S.W.3d 783, 786 (Mo. banc 2010)

State ex rel. Dennis v. Williams, 240 S.W.2d 703 (Mo. banc 1951)

Westin Crown Plaza Hotel v. King, 664 S.W.2d 2 (Mo. banc 1984)

Art. I, Sec. 26, of the Missouri Constitution

Section 523.039 of the Revised Statutes of Missouri

Section 523.061 of the Revised Statutes of Missouri

Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO.L.REV. 721, 728 (Summer 2006)

II. The Trial Court Properly Admitted the Testimony and Opinions of Respondent's Expert Appraiser, Ernest Demba, Because Not Only was the Proper Foundation Laid for the Admission of the Opinion Based on the Assemblage Theory, Demba's Testimony that Such Assemblage was Reasonably Probable that the Assemblage Could Be Accomplished Without the Use of Condemnation was Properly Admitted, and As a Result, the Jury Verdict of \$300,000.00 was Reasonable.

City of Lee's Summit v. R&R Equities, L.L.C., 112 S.W.3d 38 (Mo.App.W.D. 2003)

Doe v. McFarlane, 207 S.W.3d 52 (Mo.App.E.D. 2006)

Gallagher v. DaimlerChrysler Corp., 238 S.W.3d 157 (Mo.App.E.D. 2007)

Greystone Hts. Redevelopment Corp. v. Nicolas Inv. Co., 500 S.W.2d 292 (Mo.App. 1973)

Kansas City Power & Light Co. v. Jenkins, 648 S.W.2d 555 (Mo.App.W.D. 1983)

Peters v. General Motors Corp., 200 S.W.3d 1 (Mo.App.W.D. 2006)

Rigali v. Kensington Homeowners' Ass'n, 103 S.W.3d 839 (Mo.App.E.D. 2003)

St. Charles Co. v. Olendorff, 234 S.W.3d 492 (Mo.App.E.D. 2007)

St. Louis Co. v. Meyer Properties, L.L.C., 250 S.W.3d 833 (Mo.App.E.D. 2008)

State ex rel. Missouri Hwy. & Transp. Com'n v. Edelen, 872 S.W.2d 551 (Mo.App.E.D. 1994)

III. The Trial Court Did Not Abuse Its Broad Discretion in Admitting Demba's Opinions and Testimony Because the Comparable Sales Utilized in His Analysis were Sales of Similar Residential Properties Assembled into Larger Commercial Developments Not Too Remote in Time, and Such Properties were Voluntary Sales not Acquired under the Threat of Condemnation; Furthermore, Demba's Adjustments were Based upon Data Reasonably Relied upon by Other Appraisers in His Field; and As a Result of the Trial Court's Proper Exercise of Discretion in Admitting Demba's Opinion, the Jury's Verdict was Proper.

Board of Public Bldgs. v. GMT Corp., 580 S.W.2d 519 (Mo.App.E.D. 1979)

City of Lee's Summit v. R&R Equities, L.L.C., 112 S.W.3d 38 (Mo.App.W.D. 2003)

City of St. Louis v. Vasquez, 341 S.W.2d 839 (Mo. 1960)

Gallagher v. DaimlerChrysler Corp., 238 S.W.3d 157 (Mo.App.E.D. 2007)

Greystone Hts. Redevelopment Corp. v. Nicholas Inv. Co., 500 S.W.2d 292 (Mo.App. 1973)

Missouri Hwy. Transp. Com'n v. Sisk, 954 S.W.2d 503 (Mo.App.W.D. 1997)

Missouri Hwy. Transp. Com'n v. Zeiser Motors, Inc., 949 S.W.2d 106 (Mo.App.E.D. 1997)

Peters v. General Motors Corp., 200 S.W.3d 1 (Mo.App.W.D. 2006)

Phoenix Redevelopment Corp. v. Walker, 812 S.W.2d 881 (Mo.App.W.D. 1991)

St. Charles Co. v. Olendorff, 234 S.W.3d 492 (Mo.App.E.D. 2007)

Shelby Co. R-IV Sch. Dist. v. Herman, 392 S.W.2d 609 (Mo. 1965)

State v. Pope, 74 S.W.2d 265 (Mo. 1934)

State ex rel. Dennis v. Williams, 240 S.W.2d 703 (Mo. banc 1951)

State ex. rel. Missouri Hwy. and Transp. Com'n v. Roberts, 926 S.W.2d 18
(Mo.App.W.D. 1996)

State ex rel. Missouri Hwy. and Transp. Com'n v. Roth, 687 S.W.2d 662 (Mo.App.E.D.
1985)

State ex rel. Missouri Hwy. and Transp. Com'n v. Vitt, 785 S.W.2d 708 (Mo.App.E.D.
1990)

ARGUMENT

I. The Trial Court, and Not the Jury, Properly Applied Sections 523.039 and 523.061 RSMo. and Added Twenty-Five Percent (25%) to the Jury's Determination of Fair Market Value of the Property for "Homestead Value" Consistent with the Legislature's Definition of Just Compensation in that the Addition of the Homestead Value is Permitted Because Such Does Not Violate the Just Compensation Clause of the Missouri Constitution.

A. Standard of Review

"The standard of review for constitutional challenges to a statute is *de novo*." *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). Furthermore, the trial court's interpretation of the Missouri Constitution is reviewed *de novo*. *Id.* "A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Id.* This Court shall "resolve all doubt in favor of the [statute's] validity" and "may make every reasonable intendment to sustain the constitutionality of the statute." *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007), citing *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). "If a statutory provision can be interpreted two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.*

1. By failing to raise certain constitutional issues during the trial portion of this case, Appellant has effectively waived any right to assert those constitutional issues on appeal.

For the first time, Appellant asserts constitutional questions and/or issues in regard to Sections 523.061 and 523.039. More specifically, at no time during the trial phase of the case did Appellant raise the issue of whether the application of Sections 523.039 and 523.061 RSMo. “constitutes an unconstitutional expenditure of public money for private gain.” (See Page 16-18 of the Brief of Appellant; L.F. 22-23). Furthermore, Appellant never raised the constitutionality of Section 523.061 at the trial level; “Section 523.061” is not even mentioned in any of Appellant’s post-trial filings. (L.F. 22-23). Appellant also raises for the first time on appeal the issue of the right to jury on the determination of fair market value. (L.F. 22-23). It is well settled law that constitutional questions must be raised at the very first opportunity to “prevent surprise to the opposing party, and to permit the trial court an opportunity to fairly identify and rule on the issue.” *Land Clearance for Redevelopment Authority of Kansas City, Missouri v. Kansas University Endowment Asso.*, 805 S.W.2d 173 (Mo. banc 1991). By failing to raise such issues during the trial phase of the case, Appellant denied Ms. Gasway “a fair opportunity to make an evidentiary response and denied the trial court a full opportunity to identify and rule on the issues.” *Id.* at 176. “[A]n attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought ... on appeal.” *Id.* Therefore, Appellant not only waived the right to raise any constitutional issue in regard to Section 523.061, Appellant also waived the right to raise the constitutional issue of whether Sections 523.039 and 523.061 constitute an “unconstitutional expenditure of public money for a private gain.” (Brief of Appellant, 16-18).

B. The trial court properly applied the plain language of Sections 523.039 and 523.061 RSMo. and awarded an additional 25% to the jury's verdict in accordance with the definition of just compensation as set forth in Section 523.039.

Under the Missouri Constitution, Article I, Section 26, "private property shall not be taken or damaged for public use without just compensation." Mo. Const. Art. I, sec. 26. In 2006, the Missouri Legislature enacted Section 523.039 of the Revised Statutes of Missouri in an effort to set forth parameters in determining "just compensation." More specifically, the statute applies to "all condemnation proceedings filed after December 31, 2006," and sets forth the determination of just compensation for condemned property. §523.039 RSMo (2006). Under subsection 2, persons that are subjected to a "homestead taking" are entitled to just compensation at an "amount equivalent to the fair market value of such property multiplied by one hundred twenty-five percent." §523.039(2) RSMo. (2006). Throughout its argument, Appellant claims that fair market value of the Property is the only "just compensation" required; however, Appellant relies upon several cases to support its definition of "just compensation", but nowhere does Appellant indicate that the Legislature's enactment of Section 523.039 violates any definition of just compensation set forth in the Missouri Constitution because no such definition exists. (Brief of Appellant, 12-17). Therefore, because Section 523.039 is consistent with the language set forth in the Missouri Constitution, said statute is constitutional, and this Court should find as such.

Sections 523.039 and 523.061 is presumed to be constitutional and will not be found unconstitutional unless it “clearly contravenes a constitutional provision.” *Rentscheler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). Appellant must plead facts to support its constitutional attack, and the burden of proof rests on Appellant. *Westin Crown Plaza Hotel*, 664 S.W.2d at 5. A statute will not be invalidated on appeal unless it “palpably affronts fundamental law embodied in the constitution.” *Id.* In its Brief, Appellant cites to several cases that have interpreted the term “just compensation”; however, “just compensation” is an undefined term in the Missouri Constitution, and as a result, the Legislature’s enactment of Section 523.039 to define “just compensation” is consistent with the constitutional requirements of Article I, Section 26.

In 2005, the U.S. Supreme Court recognized that a city’s use of a redevelopment plan in the exercise of its eminent domain powers satisfied the constitutional requirement that a taking be for “public use.” *Kelo v. City of New London, Connecticut*, 125 S.Ct. 2655 (2005). In so holding, the Supreme Court “recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.” *Id.* at 2664. Furthermore, the Supreme Court noted the hardship condemnation places on individuals and emphasized that its opinion did not “preclude any State from placing further restrictions on its exercise of the takings power.” *Id.* at 2668.

As a result of the U.S. Supreme Court’s decision in *Kelo*, many states rushed to enact legislation to further protect their citizens in the event a city used its eminent domain powers to further development in its area that subsequently involved the “taking”

of a citizen's property. Missouri was one of those states. On June 28, 2005, only five days after the Supreme Court's ruling in *Kelo*, Missouri's Governor formed a task force to examine "the use of eminent domain, especially when the proposed public use of the property being acquired by eminent domain is not directly owned or primarily used by the general public." Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO.L.REV. 721, 728 (Summer 2006).

After extensive investigation by the Task Force and many hearings with various committees, including the House Judiciary Committee, the Legislature decided on certain key aspects to include in its amendments, one of which was to set forth parameters for determining "just compensation" and add language for those takings that resulted in a "homestead taking". *Id.* The 2006 amendments to chapter 523, including Section 523.039, made by the legislature was to "*strengthen* the rights of landowners in eminent domain actions." See also *Planned Industrial Expansion Authority of Kansas City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418 (Mo.App.W.D. 2010)(reviewed the legislature's purpose in amending Chapter 523).

Because Section 523.039 is nothing more than the Legislature's act to codify the determination of "just compensation" consistent with the limitations and language of the Missouri Constitution to further protect its citizens, Section 523.039 is constitutional. In its argument, Appellant cites several cases in support of its argument that "just compensation" is the "fair market value" of the property and nothing more. (Brief of Appellant, 12-16). Appellant even goes so far as to compare its taking of Ms. Gasway's home and the additional 25% of fair market value required to be paid by it under Section

523.039 to “sentimental value.” (Brief of Appellant, 13-14). All of these cases cited by Appellant, however, do not address the constitutionality of the Legislature’s actions in enacting the 2006 amendments. But the bottom line is this: NOTHING in Section 523.039 contravenes or contradicts the language of the just compensation clause of the Missouri Constitution. Therefore, Appellant has failed to meet its burden in proving the unconstitutionality of Section 523.039.

Lastly, Appellant, also for the first time on appeal, claims the award for a homestead taking amounts to “expenditure of public money for a private gain.” (Brief of Appellant, 17-18). No Court has yet to consider the constitutionality of Sections 523.039 or 523.061. Appellant argues that the award of a homestead allowance is not “just” to both the owner of the Property whose Property is being taken and to the public that must pay the bill. (Brief of Appellant, 17). Appellant, however, places the “gain” on the wrong party: Ms. Gasway is losing a home she has lived in for twenty-five years, a place she wanted to live her entire life, a place she would own free and clear of any mortgage in less than five years, only to be forced to incur in *addition* to the value of the property, change in neighborhood, proximity to friend and family, a new mortgage, prospectively more expensive replacement housing, financial uncertainty to obtain financing, moving costs, and immeasurable other time and expense to accomplish same . Appellant, on the other hand, is “gaining” property rights to a valuable piece of property in the center of St. Louis County and stands to “gain” millions. The Legislature considered the cost to landowners, such as Ms. Gasway, and the “gain” of cities and counties in exercising their eminent domain powers through the use of redevelopment plans. As a result, chapter

523, including Sections 523.039 and 523.061, were amended to protect the loss to landowners. Therefore, because neither of these statutes, Sections 523.039 nor 523.061, contradicts or contravenes the Missouri Constitution, this Court must uphold the constitutionality of both statutes and affirm the trial court's judgment.

C. Appellant waived any right to claim that Section 523.039 RSMo. violates the Missouri Constitution because a jury is required to determine “just compensation” as Appellant raises such issue for the first time on appeal; nevertheless, the trial court properly applied Section 523.039 and awarded the homestead allowance after the return of the jury’s verdict.

Appellant has failed to meet its burden of proof that Sections 523.039 and 523.061 are unconstitutional. First, and most importantly, in support of its argument, Appellant claims Article I, Section 26 requires that the jury or the commissioners determine the fair market value of the Property. (Brief of Appellant, 18). However, Appellant is a municipal corporation, and as a result, the “Constitution does not guarantee to individual defendants a trial by common-law jury of exceptions to award of damages in a condemnation proceeding brought by a special charter city.” *State ex rel. Dennis v. Williams*, 240 S.W.2d 703 (Mo. banc 1951); (S.L.F. 8). As set forth in greater detail in the previous section, the Legislature enacted Sections 523.039 and 523.061 to protect landowners from a city’s use of its eminent domain powers for its own “gain.”

Pursuant to the plain language of the statutes and reading them in conformity with the Missouri Constitution, it was the trial judge that was obligated to “determine whether

a homestead taking” occurred and “increase the *jury verdict* to provide for the additional compensation due where a homestead taking occurs.” Section 523.061RSMo. (2006) (emphasis added). Thus, in accordance with the plain language of these statutes, the trial court properly increased the jury award of fair market value of the Property to account for the additional value of the homestead taking that occurred. Therefore, because Sections 523.039 and 523.061 do not contravene or contradict the Missouri Constitution and can be read in conformity with it, said statutes are constitutional, and as a result, the trial court’s judgment shall be affirmed.

II. The Trial Court Properly Admitted the Testimony and Opinions of Respondent's Expert Appraiser, Ernest Demba, Because Not Only was the Proper Foundation Laid for the Admission of the Opinion Based on the Assemblage Theory, Demba's Testimony that Such Assemblage was Reasonably Probable that the Assemblage Could Be Accomplished Without the Use of Condemnation was Properly Admitted, and As a Result, the Jury Verdict of \$300,000.00 was Reasonable.

A. Standard of Review

The decision to admit or exclude expert testimony is a matter within the trial court's discretion and such decision will not be disturbed on appeal absent an abuse of discretion. *St. Charles County v. Olendorff*, 234 S.W.3d 492, 495 (Mo.App.E.D. 2007). Furthermore, when reviewing the denial of a motion for new trial, which the Appellant seeks in the instant case, the court also employs the abuse of discretion standard. *Gallagher v. DaimlerChrysler Corp.*, 238 S.W.3d 157, 162 (Mo.App.E.D. 2007). This abuse of discretion imposes a "high threshold" on the Appellant, who shall demonstrate that the purported abuse was "clearly against the logic of the circumstances before it and so arbitrary and unreasonable that the ruling shocks the sense of justice and indicates a lack of careful deliberation." *Id.* at 168. If reasonable persons can differ regarding the decision's propriety, the trial court's ruling is not an abuse of discretion. *City of Lee's Summit v. R & R Equities, LLC.*, 112 S.W.3d 38, 40 (Mo.App.W.D. 2003). "Even an erroneous ruling is not the basis for reversing a judgment in a condemnation case unless the ruling resulted in substantial and glaring injustice." *Id.*

1. Appellant waived the right to raise the issue of the admission of Demba's opinion on the theory of assemblage because although Appellant filed its Motion in Limine prior to the start of trial, Appellant NEVER objected to the admissibility of Demba's opinion and/or testimony at any time during the trial.

Prior to the start of trial, Appellant filed its First Motion in Limine to Exclude the Testimony of Ernest A. Demba on several bases, including any testimony concerning the theory of assemblage. (L.F. 10). On July 22, 2010, the trial court issued its ruling regarding Appellant's motion and stated it would "take the Motion in Limine with the case and rule on the issues as they arise." (L.F. 14). At no time during the testimony of Demba or prior thereto did Appellant object to the inadmissibility of Demba's opinion. (See Transcript for lack of objections). To preserve the issue of the admissibility of Demba's testimony and opinion for appeal, Appellant was required "to object at trial to the introduction of the evidence and to reassert the objection in post-trial motions." *Peters v. General Motors Corp.*, 200 S.W.3d 1, 16 (Mo.AppW.D. 2006). The simple filing and arguing of a motion in limine "preserves nothing for appeal." *Id.* Therefore, because Appellant failed to object to the testimony and opinion of Demba upon the introduction of such evidence at trial, Appellant waived its right to now assert objections to the admissibility of such evidence.

B. Demba's opinion was properly based on the theory of assemblage.

In deciding to admit expert testimony, this Court on numerous occasions has concluded that "an expert opinion of the value of real property must be based upon

substantial data, not mere conjecture, speculation, or unwarranted assumption.” *State ex rel. Missouri Hwy. & Transp. Com’n v. Edelen*, 872 S.W.2d 551, 555 (Mo.App.E.D. 1994). “The opinion must have a rational foundation.” *Id.* See also *Rigali v. Kensington Homeowners’ Ass’n*, 103 S.W.3d 839, 845 (Mo.App.E.D. 2003). This standard favors admission of expert testimony, as evidenced by this Court’s finding that “only in cases where the sources relied on by the expert are so slight as to be fundamentally unsupported should the opinion be excluded because testimony with that little weight would not assist the jury.” *Doe v. McFarlane*, 207 S.W.3d 52, 62 (Mo.App.E.D. 2006)(citation omitted); see also *St. Louis County v. Meyer Properties, L.L.C.*, 250 S.W.3d 833, 837 (Mo.E.D. 2008)(upholding the admission of the expert appraiser testimony, particularly where the expert’s opinions were subject to cross-examination and the opponent of the evidence is afforded the opportunity to present its own expert’s opinions).

1. The True Impact of *Greystone Heights Redevelopment Corp. v. Nicholas Inv. Co.* and The Proper Application of the Assemblage Doctrine

Appellant places extraordinary emphasis on *Greystone*; however, Appellant’s reliance is misplaced. 500 S.W.2d 292 (Mo.App. 1973);(see Brief of Appellant, 21-23). The *Greystone* case involved a 1960s redevelopment effort wherein the Greystone Heights Redevelopment Corporation secured condemnation rights to various properties located in a blighted area of Kansas City. *Id.* at 294. In *Greystone*, the court held that the defendant condemnee could not introduce evidence as to the value of the limestone

underlayment because defendant condemnee failed to produce evidence that the extraction of such rock was commercially feasible to anyone except the plaintiff condemnor. *Id.* In the present case, in strict reliance on the holding in *Greystone*, Appellant argues “all evidence of assemblage should have been excluded at trial” based on the principle that any assemblage of the Property would involve combination of the Property with other properties either owned by Appellant or currently subject to eminent domain under the same proceeding. (Brief of Appellant, 22). However, Appellant does note that *Greystone* permits evidence of assemblage when the condemnee can demonstrate that someone other than the condemnor could accomplish the assemblage without resorting to eminent domain. (Brief of Appellant, 23). Specifically, the court in *Greystone*, in no uncertain terms, held that “[i]f, however, the property has a special utility or availability, not only to the taker, but to the other parties who could use the property for the particular purpose intended by the taker, then this utility or availability may be shown.” *Id.* at 297.

The holding in *Greystone* does not require Ms. Gasway to present evidence of specific developers who are interested in purchasing the Property for the purpose of assemblage; Ms. Gasway, under *Greystone*, is only required to show the Property has a special utility or availability to other parties that may use the Property for the particular commercial purpose. *Greystone* merely requires that Ms. Gasway show a reasonable probability that a third party would bid for the same purpose competitive of that of Appellant. *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555 (Mo.App.W.D. 1983). Demba’s opinion and trial testimony certainly met this standard.

2. Demba testified throughout direct and cross examination that commercial assemblage of the Property was “reasonably probable.”

Appellant claims Demba failed to demonstrate that the commercial assemblage was reasonably probable. (Brief of Appellant, at 26). However, throughout his testimony, Demba testified that it was “definitely” a reasonable probability that a developer would bid for the Property and purchase it as part of a larger assemblage project without the use of eminent domain. (Tr.56). *Greystone* does not require Ms. Gasway to present evidence of specific developers who are interested in purchasing the Property for the purpose of commercial assemblage; *Greystone* merely requires that Ms. Gasway show a reasonable probability that a third party would bid for the same purpose competitive of that of Appellant. *Kansas City Power & Light Co.*, 648 S.W.2d at 564. The relevant inquiry is whether there exists legitimate market demand for Ms. Gasway’s Property for assemblage in commercial redevelopment. That demand was incontrovertibly proven at trial through Demba’s testimony and his sixty-three page opinion. Because evidence at trial indicated the high probability that the property would be used as part of a commercial assemblage without the use of eminent domain, Demba’s appraisal and testimony were properly admitted.

In the instant case, Demba employed data relied upon by others in his field and explained his methodology, reasoning, and conclusions in a sixty-three page report, then testified to the highest and best use to which the Property reasonably may be applied if sold on the open market. (Defendant’s Exhibit G-1). Appellant claims Demba’s opinion of 99% probability of assemblage was unfounded because Demba “is not an urban

planner” and his assertion that “assemblage was ‘probable’ was derived from his belief that condemnation was readily available.” (Brief of Appellant, 24). Using his skills, knowledge and experience, Demba also prepared a Calculation Grid that listed all the comparable sales, adjustments, and his probability of assemblage. (Defendant’s Exhibit G-1, at Page 52; Appendix ii). The simple assertion that Demba’s opinion is unfounded on these bases is “insufficient to elevate the argument beyond a question of the weight of the evidence.” *Olendorff*, 234 S.W.3d at 498. Appellant cross-examined Demba thoroughly, and the issue of the weight to give Demba’s opinion of 99% probability of assemblage was properly left for the jury. Thus, the trial court’s exercise of its broad discretion should not be disturbed.

3. Demba further testified that commercial assemblage of the Property would be accomplished without the use of eminent domain.

Throughout his testimony and without any objection from Appellant, Demba testified that the Property would, with definite reasonable probability, be assembled for commercial development without Appellant’s efforts and without the use of eminent domain. (Tr. at 56). Furthermore, Demba testified that he believes there is a ninety-nine percent (99%) of the probability of assemblage of the Property. (Tr. at 104). Appellant never objected to any of this testimony. (See Transcript for lack of objections). Thus, for the foregoing reasons, the trial court’s exercise of discretion should not be disturbed.

4. Demba’s opinion was properly admitted even applying the precedent of *Greystone*.

As set forth above, under *Greystone*, Ms. Gasway is not required to present evidence of specific developers who are interested in purchasing the Property for the purpose of assemblage, but she is only required to show that a third party would bid for the same purpose competitive of that of Appellant. *Kansas City Power & Light Co.*, 648 S.W.2d at 564. Furthermore, *Greystone* permits the admission of a property's special utility or availability if the property has such special utility or availability, "not only to the taker, but to the other parties who could use the property for the particular purpose intended by the taker." *Greystone*, 500 S.W.2d at 297. Demba testified extensively about the foundation for his opinion, including the available market data, economic activities of the area, the high demand of the Property to other developers and the location of the Property. (Tr., 6-18; 30-31; 56; 104). Thus, in Demba's opinion, it was all these other factors that supported the basis for his opinion that the highest and best use of the Property was commercial assemblage. Demba did not consider the Property's assemblage with other properties already owned by Appellant or subject to acquisition by Appellant as part of the Plan.

Appellant claims that any developer seeking to assemble the Property "would have to contend with the immense difficulties of acquiring the church and purchasing nearby residential properties...and securing the necessary zoning changes." (Brief of Appellant 28). However, Appellant did not raise any of these "challenges" to rebut Demba's opinion at trial. Based upon the evidence, Demba's opinion based on commercial assemblage was appropriate because "the possibility [of assemblage is] considerable enough to be a practical consideration and actually to influence prices." *Greystone*, 500

S.W.2d at 296. There was also ample evidence of the Property’s “special utility and availability.” Therefore, the trial court properly exercised its discretion in admitting Demba’s testimony.

C. By properly exercising its broad discretion in admitting Demba’s appraisal and testimony, the jury concluded based upon the evidence at trial that the fair market value of the Property was \$300,000.

As recited throughout this Brief, the trial court properly exercised its broad discretion in admitting Demba’s appraisal and opinion testimony. The jury had evidence of both Appellant’s expert’s opinion and Demba’s opinion, and after evaluating and weighing the credibility of each witness and the relevant facts of the case, the jury concluded that the fair market value of the Property was \$300,000, which was \$24,000 less than Demba’s appraised value. Therefore, the jury’s verdict is consistent with the evidence presented and admitted at trial.

III. The Trial Court Did Not Abuse Its Broad Discretion in Admitting Demba's Opinions and Testimony Because the Comparable Sales Utilized in His Analysis were Sales of Similar Residential Properties Assembled into Larger Commercial Developments Not Too Remote in Time, and Such Properties were Voluntary Sales not Acquired under the Threat of Condemnation; Furthermore, Demba's Adjustments were Based upon Data Reasonably Relied upon by Other Appraisers in His Field; and As a Result of the Trial Court's Proper Exercise of Discretion in Admitting Demba's Opinion, the Jury's Verdict was Proper.

A. Standard of Review

The decision to admit or exclude expert testimony is a matter within the trial court's discretion and such decision will not be disturbed on appeal absent an abuse of discretion. *St. Charles County v. Olendorff*, 234 S.W.3d 492, 495 (Mo.App.E.D. 2007). Furthermore, when reviewing the denial of a motion for new trial in which the Appellant seeks in the instant case, the court also employs the abuse of discretion standard. *Gallagher v. DaimlerChrysler Corp.*, 238 S.W.3d 157, 162 (Mo.App.E.D. 2007). This abuse of discretion imposes a "high threshold" on the Appellant, who shall demonstrate that the purported abuse was "clearly against the logic of the circumstances before it and so arbitrary and unreasonable that the ruling shocks the sense of justice and indicates a lack of careful deliberation." *Id.* at 168. If reasonable persons can differ regarding the decision's propriety, the trial court's ruling is not an abuse of discretion. *City of Lee's Summit v. R & R Equities, LLC.*, 112 S.W.3d 38, 40 (Mo.App.W.D. 2003). "Even an

erroneous ruling is not the basis for reversing a judgment in a condemnation case unless the ruling resulted in substantial and glaring injustice.” *Id.*

“It is for the trial judge to exercise a wise judicial discretion in determining whether...two parcels are of sufficient similarity to have some bearing on the question of value. The jury verdict will not be upset on the ground of dissimilarity unless the trial court abuses its discretion, by permitting the consideration of sales so dissimilar in pertinent comparison factors as to give the jury no assistance in the determination of the market value. The trial court is allowed considerable latitude in this respect.”

City of St. Louis v. Vasquez, 341 S.W.2d 839, 850-851 (Mo. 1960)(emphasis added, citations omitted).

1. Appellant waived the right to raise the issue of the admission of the comparable sales relied upon by Demba in the forming of his opinion because although Appellant filed its Motion in Limine prior to the start of trial, Appellant NEVER objected to the admissibility of the comparable sales prior to the introduction of such evidence at trial.

Prior to the start of trial, Appellant filed its First Motion in Limine to Exclude the Testimony of Ernest A. Demba and several portions thereof, including the comparable sales relied upon by Demba in forming his opinion as to the fair market value of the Property. (L.F. 10). On July 22, 2010, the trial court issued its ruling regarding Appellant’s motion and stated it would “take the Motion in Limine with the case and rule

on the issues as they arise.” (L.F. 14). At no time during the testimony of Demba or prior thereto did Appellant object to the inadmissibility of Demba’s opinion or the comparable sales utilized by Demba in forming his opinion. (See Transcript for lack of objections). To preserve the issue of the admissibility of Demba’s testimony and opinion for appeal, Appellant was required “to object at trial to the introduction of the evidence and to reassert the objection in post-trial motions.” *Peters v. General Motors Corp.*, 200 S.W.3d 1, 16 (Mo.App.W.D. 2006). The simple filing and arguing of a motion in limine “preserves nothing for appeal.” *Id.* Therefore, because Appellant failed to object to the testimony and opinion of Demba upon the introduction of such evidence at trial, Appellant waived its right to now assert objections to the admissibility of such evidence.

B. Demba utilized comparable sales in his analysis that were made voluntarily, under similar conditions, and were not too remote in time.

Employed by both experts, the “comparable sales approach involves the comparison of the condemned property and voluntary sales of similar properties from the same general location...the differences between the comparable properties and the condemned property are analyzed and adjustments made to the comparables’ sale prices to calculate the market value.” *State ex rel. Missouri Highway and Transp. Com’n v. Roberts*, 926 S.W.2d 18, 21 (Mo.App.W.D. 1996). Appellant does not claim that Demba utilized the wrong approach in determining the value of the Property, but only claims that Demba used improper comparables in his analysis. (Brief of Appellant, 31). The trial court properly admitted the comparable sales evidence relied upon by Demba in finding:

- 1) the comparable sales were voluntary sales, not made under the threat of condemnation;

2) the comparable sales were reasonably close in time to the date of the taking; and 3) the comparable sales were residential homes assembled as part of a large commercial project, they constituted similar properties.

1. Appellant has failed to meet its burden of proof in demonstrating that the comparable sales relied upon by Demba were involuntary sales or sales made under the threat of condemnation.

“Comparable sales prices, which are prices of properties similarly situated to that involved in the condemnation proceeding, are admissible to aid the jury in determining the amount of damages. *Phoenix Redevelopment Corp., v. Walker*, 812 S.W.2d 881, 883 (Mo.App.W.D. 1991). Although the party seeking to use the comparable sales bears the initial burden of proving that the sale were voluntary, such burden is discharged because the law presumes the sale prices were “freely fixed and not under compulsion.” *Id.* The burden then rests with the opposing party to produce evidence that the comparable sales were not voluntary. *Id.* at 884.

For a property to be sold under “threat of condemnation” and be deemed “involuntary”, Appellant had the burden to prove *during trial* that the condemnation authority had a fixed purpose to institute condemnation proceedings if it could not buy the property being used in the comparable sales analysis at a satisfactory price, or that the condemnor threatened the seller with condemnation if a satisfactory sale price was not agreed upon. *Id.* Solely because property is purchased by one with the power of eminent domain is not in and of itself evidence that such sale was involuntary and require the application of the exclusionary rule. *Board of Public Bldgs. v. GMT Corp.*, 580 S.W.2d

519, 524 (Mo.App.E.D. 1979). Instead, this exclusionary rule is only applicable where the evidence shows that the sales were made “subsequent to the institution of condemnation proceedings to appropriate the property, or where there is evidence from which a trial judge reasonably should have concluded that the sale involved was not voluntary, or where the party opposing the admission of the evidence comes forward with evidence that the sale was other than voluntary.” *Id.* By introducing zero evidence as to the manner and circumstances of the acquisitions of the comparable sales relied upon by Demba, Appellant failed to meet its burden and the trial court properly admitted the evidence.

In his appraisal, Demba cited nine comparable sales in his analysis. (Tr., 88). Demba’s appraisal essentially tracked the modern and recent history of commercial development in the area surrounding and including the City of Richmond Heights and compared only the most similar and geographically proximate sales of residential homes purchased and assembled for larger commercial projects, just as he opined would occur with the Property. His analysis of those nine sales, which spanned fifteen years, painted an accurate and complete picture of the Property for the jury in considering the highest and best use of the Property and its fair market value. As such, the trial court properly admitted evidence of Demba’s appraisal.

Yes, Demba did testify at trial that he believed “that eminent domain is always – is there, I mean, the threat is always there;” however, this statement alone without further evidence from the Appellant that any of the comparable sales used by Demba were made “subsequent to condemnation proceedings” and/or any evidence that a particular, specific

comparable sale used by Demba was anything but voluntary, is insufficient to meet its burden that such sale was involuntary. Furthermore, Appellant cites to and relies upon the following language that “the burden of coming forward with evidence to demonstrate that a particular sale was involuntary shifts to the opposing party”; however, Appellant NEVER presented any evidence to demonstrate that any of Demba’s sales were made involuntarily. *Missouri Highway Transportation Com’n v. Zeiser Motors, Inc.*, 949 S.W.2d 106, 108 (Mo.App.E.D. 1997). Appellant seems to believe that the one simple statement from Demba as quoted above is sufficient to establish that the comparable sales were not voluntary, but Missouri law is completely clear: Appellant bears the burden of presenting evidence that the alleged “involuntary sales” were in fact “involuntary.” *Id.* Because of Appellant’s failure to present ANY evidence to rebut the presumption that such comparable sales used by Demba were voluntary, this Court should affirm the trial court’s exercise of discretion.

2. The comparable sales relied upon by Demba were not unreasonably remote in time.

“Evidence of the sale price of property which is sold reasonably near the time of the taking is admissible to aid the triers of fact in determining the compensation to which the owner is entitled for the taking of his property.” *Missouri Highway Transportation Com’n v. Sisk*, 954 S.W.2d 503, 509 (Mo.App.W.D. 1997). Appellant argues that because the comparable sales used by Demba occurred between 1998 and 2004 “are so far removed from today’s economic climate that to compare current property values to that era is too remote to be considered sufficiently ‘close in time.’” (Brief of Appellant,

33). First and most importantly, there is no bright line test in determining if a comparable sale was made too remote in time from the present taking to be considered in a comparable sale analysis. Each case rests on its own facts. Furthermore, the “dissimilarities of the comparable sales go to the weight of the evidence by the jury as opposed to the evidence’s admissibility.” *State ex rel. Missouri Highway and Transportation Com’n v. Roth*, 687 S.W.2d 662, 666 (Mo.App.E.D. 1985).

Each of three cases relied upon by Appellant in support of its argument can be easily distinguished from the case at hand. First, in *State v. Pope*, the court of appeals, in 1934, affirmed the trial court’s refusal of the condemnees’ request to introduce evidence of the pre-Depression cost of their property, finding that the evidence was properly excluded given that the value was affected by the largest economic crisis in U.S. history. 74 S.W.2d 265, 270 (Mo. 1934). *Pope* did not involve expert analysis by a professional appraiser, and more importantly, the appellate court in *Pope* recognized the broad deference owed to the trial court’s ruling on the admissibility of evidence. *Id.*

In *Shelby County R-IV Sch. Dist. v. Herman*, the court affirmed the trial court’s exercise in discretion in declining to admit evidence from “an entirely different economic era.” 392 S.W.2d 609, 614 (Mo. 1965). The lay witness did not seek to introduce evidence of a comparable sale but evidence of his own purchase twenty-three years prior to the taking. *Id.* Just as the court in *Pope*, the Supreme Court affirmed the trial court’s exercise of its broad discretion. *Id.* Similarly, in *Sisk*, the court chose not to institute a bright-line rule as what constitutes a sale too remote in time and upheld the trial court’s exercise of its broad discretion in excluding evidence of a comparable sale conducted

twenty-years prior to the subject taking. 954 S.W.2d at 509. In so holding, the court repeated the long established principle, “the trial court has considerable discretion in determining whether [the] test of admissibility is met.” *Id.*

In short, the cases cited by Appellant provide no bright-line rule as to the number of years that render a comparable sale too remote in time. If anything, all the cases relied upon by Appellant make it distinctly clear: it is an exercise of the trial court’s broad discretion. The comparable sales relied upon by Demba occurred in 1998, 2000, 2003, and 2004, respectively. (Tr., 108). Demba chose these four specific comparable sales out of the nine because based upon his knowledge, skill, experience and education, he opined that they were the most “similarly situated” to the Property, or in other words, they were voluntary sales of residential homes acquired for the purpose of assembling them into larger, commercial parcels. *State ex rel. Missouri Highway and Transportation Com’n v. Vitt*, 785 S.W.2d 708, 713 (Mo.App.E.D. 1990). Unlike in a typical appraisal of a single family dwelling whereby comparisons are made to sales of “similarly situated” single family dwellings close in time and in the same vicinity, the appraisal on the Property had to compare sales of “similarly situated” residential property that had been purchased and assembled for larger commercial developments, which occurs over an extended amount of time unlike sales of single family dwellings that occur frequently.

To support his opinion as to the fair market value of the Property, Demba had to compare sales of properties “similarly situated” to the Property that were assembled for commercial development; to achieve this burden, Demba looked at assemblages of “similarly situated” properties that occurred within the vicinity of the Property within a

reasonable time period. The oldest comparison is eleven (11) years from the date of taking. This evidence was uncontroverted at trial and largely unaddressed in Appellant's Brief. As such, this Court should affirm the trial court's exercise of sound discretion.

3. The comparable sales relied upon by Demba were extremely similar to the Property at issue.

Appellant seems to now claim that the comparable sales used by Demba were also not "similar" to the Property at issue. As discussed at great length above, commercial assemblage was, according to Demba, the Property's highest and best use, and as a result, Demba was required under the comparable sales approach to compare "similar" properties, i.e. residential properties like Ms. Gasway's that had been purchased and then assembled as part of a larger commercial development. Because the trial court properly exercised its discretion in admitting Demba's opinion on the basis of the assemblage theory, it was proper for the court to also admit comparable sales of commercial assemblages.

4. Appellant waived any right to object to the adjustments utilized by Demba in his appraisal as Appellant raises such issue for the first time on appeal; nevertheless, the trial court did not abuse its discretion in admitting the adjustments for certain conditions made by Demba to the comparable sales used in reaching his opinion.

Contrary to Appellant's claim that Demba's testimony and opinion is "devoid of any explanation" as to how he reached specific figures and adjustments, Demba testified at great length during both direct and cross examination about the nature and rationale for

his opinions and adjustments employed. (Tr. 90-98, 10-112). Counsel for Appellant and Ms. Gasway thoroughly examined Demba concerning his figures and adjustments and the bases for each. At no time did Appellant object to the admissibility of Demba's opinion and adjustments during trial. Furthermore, Appellant never raised the specific issue of the admissibility of the adjustments employed by Demba in its post-trial motion. (S.L.F. 22-23). Appellant does not attack Demba's credentials and does not cite to specific facts to support its contentions. (S.L.F. 22-23). The simple conclusory statement that "Demba's precise numbers are not supported by any empirical data, instead they are based upon Demba's simple assertions" without more is "insufficient to elevate the argument beyond a question of the weight of the evidence." *Olendorff*, 234 S.W.3d at 498. Therefore, Appellant's argument is unfounded and insufficient to justify disturbing the trial court's exercise of sound discretion.

5. Appellant waived any right to object to Demba's assemblage valuation as Appellant raises such issue for the first time on appeal; nevertheless, the trial court did not abuse its discretion in admitting Demba's valuation on the basis of assemblage as it is a recognized valuation method by those in the appraisal field.

Once again, Appellant seeks to exclude Demba's opinion on the basis that the use of the assemblage valuation was "improper and unauthorized." (Brief of Appellant, 35). For several reasons, which all appear to be repetitive arguments asserted elsewhere in its Brief, Appellant claims Demba's assemblage valuation method was improper because Demba:

“1) admitted that he believed the threat of condemnation is an ever present market condition; 2) admitted that he was unsure as to whether eminent domain, or the threat thereof, had been used to acquire his comparable sales; 3) admitted that his comparable sales were all acquired prior to the current housing market decline; 4) relied upon comparable sales that were not similar to the Subject Property in that they were acquired pursuant to public assemblage projects; 5) used arbitrary “adjustment” figures to inflate the Subject Property’s valuation; and 6) used an unexplained arbitrary value of 99% to represent his asserted probability of assemblage.”

(Brief of Appellant, 35-36). In response to these claims, throughout her Brief, Ms. Gasway has already set forth her reasons and supporting case law as to why the trial court exercised sound discretion in admitting Demba’s opinion and appraisal, and for the sake of brevity, Ms. Gasway would ask this Court to refer to her responses set forth in Sections II(B)(3) and III(B)(1-4) of her Brief. As further response, although Appellant argues that Demba’s use of the assemblage method was “improper and unauthorized”, its own expert, Mr. Phillips admitted on cross-examination that the assemblage theory was a “recognized method of valuation for a sales comparison approach.” (Tr. 196). Mr. Phillips even conceded that it was reasonable for Demba to conclude that the assemblages of large commercial developments do not occur with as much frequency so an appraiser must go further back in time to obtain proper comparable sales. (Tr. 200). Therefore, for the reasoning set forth herein and throughout this Brief, the trial court’s exercise of sound discretion should not be disturbed.

C. Demba’s opinion and appraisal do not violate the Project Influence Doctrine.

Appellant misconstrues Demba’s opinion as being based on the redevelopment project of the City of Richmond Heights, rather than the “probability” of commercial assemblage by any number of developers that continuously flood the area. (Brief of Appellant, 36; Tr. 30-31). In fact, Demba’s opinion only relies on other properties outside the project area. (Demba’s Exhibit G-1). In support of its argument, however, Appellant does not cite to any portion of Demba’s testimony or opinion that he enhanced the value of the Property based on the probability assemblage with other properties that are part of the Richmond Heights’ Plan because no such testimony exists, and instead, Appellant relies on its conclusory statement that the fact “Richmond Heights was acquiring the property for an assemblage project did not entitle Gasway to an increased value.” (Brief of Appellant, 36). The trial court properly exercised its sound discretion in admitting Demba’s appraisal and testimony because there is no such evidence that Demba’s opinion violated the Project Influence Doctrine, and as a result, such decision should be affirmed by this Court.

D. The trial court’s proper exercise of discretion in admitting the opinion and testimony of Demba and the jury’s subsequent verdict was not an injustice to Appellant.

As recited throughout this Brief, the trial court properly exercised its broad discretion in allowing Demba’s appraisal and opinion testimony. The jury had evidence of both Appellant’s expert’s opinion and Demba’s opinion, and after evaluating and

weighing the credibility of each witness and the relevant facts of the case, the jury concluded that the fair market value of the Property was \$300,000, which was \$24,000 less than Demba's appraised value. Therefore, the jury's verdict is consistent with the evidence presented and admitted at trial.

CONCLUSION

The trial court properly applied the plain language of Sections 523.039 and 523.061 of the Revised Statutes of Missouri and awarded Ms. Gasway a homestead allowance consistent with the just compensation clause of the Missouri Constitution. In addition, the trial court properly exercised its discretion in admitting the opinion and testimony of Demba, with no objection from Appellant, at trial. As a result, the trial court properly denied Appellant's Motion for New Trial.

For the foregoing reasons, the trial court's judgment should be affirmed.

Respectfully submitted,



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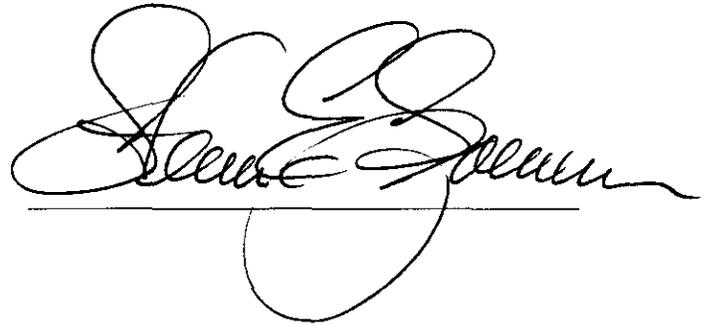
CERTIFICATE OF SERVICE

A copy of this brief and a disk containing the brief were mailed on the 16th day of May, 2011, to:

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A handwritten signature in cursive script, appearing to read "Steven J. Blum", is written over a horizontal line. The signature is fluid and stylized, with large loops and a long tail.

CERTIFICATE OF COMPLIANCE

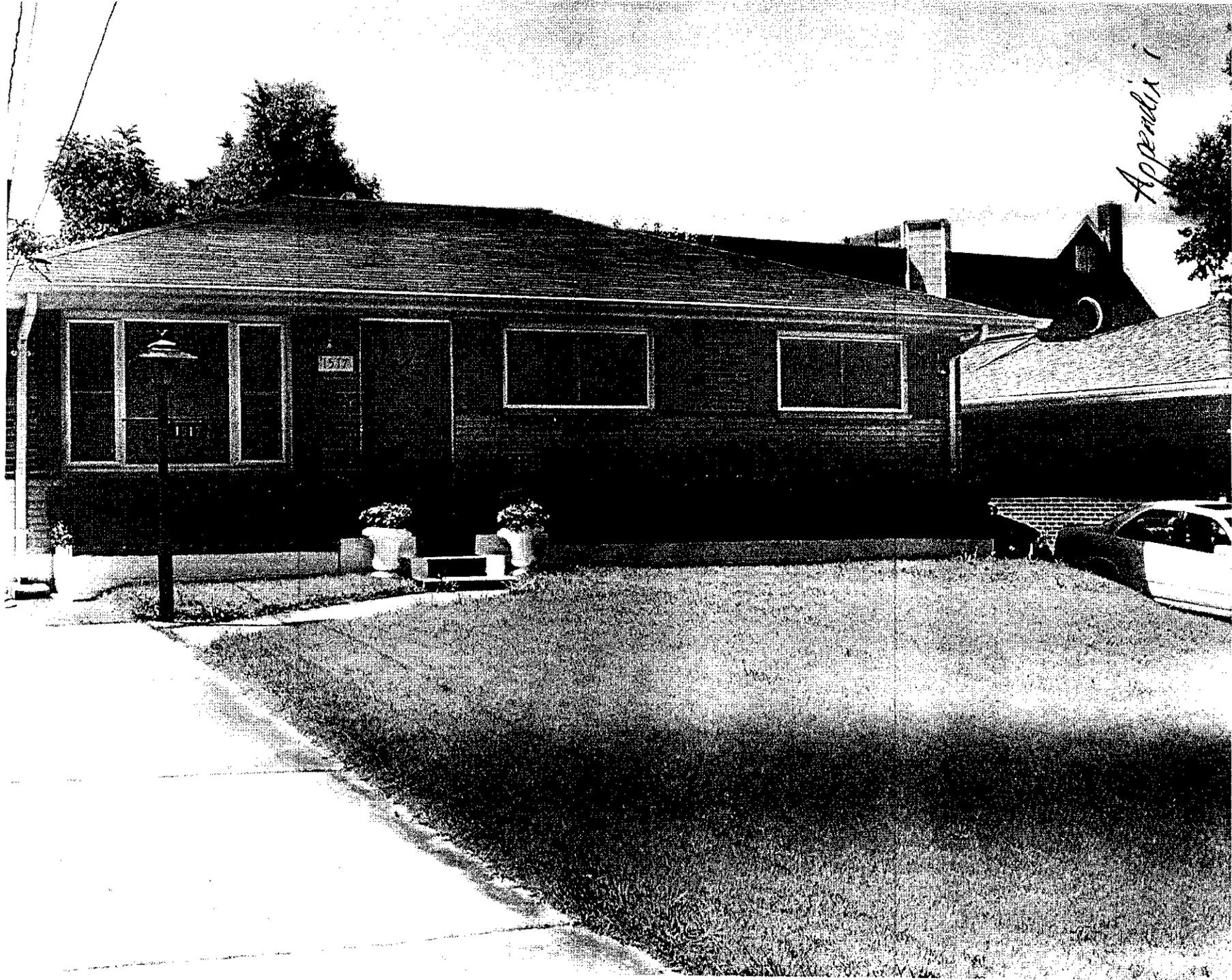
The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in this brief is 10,069 words, excluding the cover page, table of contents, table of authorities, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found to be virus-free through the McAfee anti-virus program.



APPENDIX

Appendix i



CALCULATION GRID

Property Matrix						
#	Development	Price Paid	Date	Land Use	Retail Market	Source of Information
1	Galleria (Residential)	\$30.39	1989	Residential	Regional	Property Owner Counsel: S. Shuh
2	Galleria (Commercial)	\$75.00	1989	Commercial	Regional	Property Owners' Counsel
3	The Promenade	\$35.00	1998	Residential	Regional	Broker: Joe Johnson
4	Brentwood Square (Residential)	\$29.22	2000	Residential	Regional	C.O.V.
5	Brentwood Square (Commercial)	\$85.64	2000	Commercial	Regional	C.O.V.
6	Maplewood	\$35.00	2003	Mixed	Power Center	Principals / Property Owners
7	Schnucks (Des Peres)	\$33.67	1997	Commercial	Power Center	Desco Broker (Mike Antone)
8	St. Louis Blueprint	\$31.00	1995	Mixed	Regional	Purchaser / C.O.V.
9	Boulevard Tracts	\$75.00	2004	Residential	Regional	C.O.V.

Inflation Adjustment						
#	Development	Price Paid	Inflation Rate	Date	Multiplier	Adjusted Price (1)
1	Galleria (Residential)	\$30	2.50%	1989	1.60	\$48.58
2	Galleria (Commercial)	\$75	2.50%	1989	1.60	\$119.90
3	The Promenade	\$35	2.50%	1998	1.28	\$44.80
4	Brentwood Square (Residential)	\$29	2.50%	2000	1.22	\$35.60
5	Brentwood Square (Commercial)	\$86	2.50%	2000	1.22	\$104.34
6	Maplewood	\$35	2.50%	2003	1.13	\$39.60
7	Schnucks (Des Peres)	\$34	2.50%	1997	1.31	\$44.18
8	St. Louis Blueprint	\$31	2.50%	1995	1.38	\$42.73
9	Boulevard Tracts	\$75	2.50%	2004	1.10	\$82.79

Submarket Location / Highway Visibility						
#	Development	Adjusted Price (1)	Location	% Adjustment	\$ Adjustment	Adjusted Price (2)
1	Galleria (Residential)	\$48.58	Richmond Heights	0.00%	\$0.00	\$48.58
2	Galleria (Commercial)	\$119.90	Richmond Heights	0.00%	\$0.00	\$119.90
3	The Promenade	\$44.80	Brentwood	0.00%	\$0.00	\$44.80
4	Brentwood Square (Residential)	\$35.60	Brentwood	0.00%	\$0.00	\$35.60
5	Brentwood Square (Commercial)	\$104.34	Brentwood	0.00%	\$0.00	\$104.34
6	Maplewood	\$39.60	Maplewood	10.00%	\$3.96	\$43.56
7	Schnucks (Des Peres)	\$44.18	Des Peres	2.50%	\$1.10	\$45.28
8	St. Louis Blueprint	\$42.73	Richmond Heights	0.00%	\$0.00	\$42.73
9	Boulevard Tracts	\$82.79	Richmond Heights	0.00%	\$0.00	\$82.79

Retail Market Type Adjustment					
#	Development	Adjusted Price (2)	Retail Market	% Adjustment	\$ Adjustment
1	Galleria (Residential)	\$48.58	Regional	0.00%	\$0.00
2	Galleria (Commercial)	\$119.90	Regional	0.00%	\$0.00
3	The Promenade	\$44.80	Regional	0.00%	\$0.00
4	Brentwood Square (Residential)	\$35.60	Regional	0.00%	\$0.00
5	Brentwood Square (Commercial)	\$104.34	Regional	0.00%	\$0.00
6	Maplewood	\$43.56	Power Center	25.00%	\$10.89
7	Schnucks (Des Peres)	\$45.28	Power Center	25.00%	\$11.32
8	St. Louis Blueprint	\$42.73	Regional	0.00%	\$0.00
9	Boulevard Tracts	\$82.79	Regional	0.00%	\$0.00

Land Use Adjustment					
#	Development	Adjusted Price (2)	Land Use	% Adjustment	\$ Adjustment
1	Galleria (Residential)	\$48.58	Residential	0.00%	\$0.00
2	Galleria (Commercial)	\$119.90	Commercial	-59.48%	-\$71.32
3	The Promenade	\$44.80	Residential	0.00%	\$0.00
4	Brentwood Square (Residential)	\$35.60	Residential	0.00%	\$0.00
5	Brentwood Square (Commercial)	\$104.34	Commercial	-65.88%	-\$68.74
6	Maplewood	\$43.56	Mixed	-20.89%	-\$9.10
7	Schnucks (Des Peres)	\$45.28	Commercial	0.00%	\$0.00
8	St. Louis Blueprint	\$42.73	Mixed	0.00%	\$0.00
9	Boulevard Tracts	\$82.79	Residential	0.00%	\$0.00

Weighted Average Computation of Market Activity				
#	Development	Adjusted Price (Final)	Weight	Final Value Component
1	Galleria (Residential)	\$48.58	0.00%	\$0.00
2	Galleria (Commercial)	\$48.58	0.00%	\$0.00
3	The Promenade	\$44.80	20.00%	\$8.96
4	Brentwood Square (Residential)	\$35.60	20.00%	\$7.12
5	Brentwood Square (Commercial)	\$35.60	0.00%	\$0.00
6	Maplewood	\$45.35	30.00%	\$13.60
7	Schnucks (Des Peres)	\$56.60	0.00%	\$0.00
8	St. Louis Blueprint	\$42.73	0.00%	\$0.00
9	Boulevard Tracts	\$82.79	30.00%	\$24.84
	TOTAL		100.00%	\$54.52

Probability of Assemblage	99%
Value to Subject	\$53.98
Land Area	6,000
Indicated Value (Rounded)	\$324,000.00

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Appendix ii