

IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

**FILED**  
MAY 31 2011

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

**LAURA ROY**  
CLERK, MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

No: ED95791

**92039**

**FILED**

SEP 22 2011

**CLERK, SUPREME COURT**

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Reply Brief of Appellant City of Richmond Heights

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

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Kenneth J. Heinz #24242  
[kheinz@lawfirmemail.com](mailto:kheinz@lawfirmemail.com)  
Carl J. Lumley #32869  
[clumley@lawfirmemail.com](mailto:clumley@lawfirmemail.com)  
Edward J. Shuys #60471  
[eshuys@lawfirmemail.com](mailto:eshuys@lawfirmemail.com)

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.  
130 S. Bemiston, Suite 200  
St. Louis, Missouri 63105  
(314) 725-8788  
(314) 725-8789 (FAX)

ATTORNEYS FOR APPELLANT

**SCANNED**

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## INTRODUCTION

This appeal involves the determination of “just compensation” for the taking by eminent domain of the real property, owned by Respondent Lillian Gasway (“Ms. Gasway”), located at 1517 Banneker, Richmond Heights, Missouri (“Subject Property”). Central to the instant appeal is whether the trial judge’s decision to add a 25% premium to the jury awarded damages, for Homestead Value, violated Article I, Section 26 of the Missouri Constitution in that such award exceeds “just compensation” for the Subject Property. Further, this appeal considers whether the trial court erred in admitting the evidence of Ms. Gasway’s retained real estate appraiser Ernest Demba (“Mr. Demba”).

The Appellant City of Richmond Heights (“City”) herein incorporates fully the arguments made in its initial Brief.

## ARGUMENT

### **I. Ms. Gasway’s Statement of Facts contains improper argument**

Ms. Gasway’s Statement of Facts violates Rule 84.04(c) of the Missouri Rules of Civil Procedure, which requires that “[t]he statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument.” Ms. Gasway’s Brief begins with the following assertion:

“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...” *Respondent’s Brief* at 2.

Such unsupported argumentative rhetoric should not be contained within the Statement of Facts. Further, Ms. Gasway argues in her Statement of Facts that the City “included Ms. Gasway’s Property in its Plan to redevelop the area for commercial gain.” *Respondent’s Brief* at 3. In spite of Ms. Gasway’s assertion, the condemnation was found by the circuit court to be for a public purpose of redeveloping a blighted area, and not commercial gain as Ms. Gasway alleges. *S.L.F.* at 27. Furthermore, the trial was for the sole purpose of determining the fair market value of the property and not to examine the City’s motive or purpose for condemning the property, which had been previously judicially determined. *S.L.F.* at 27. Inflammatory remarks such as this on appeal and at trial are inappropriate when considering only the fair market value of the Subject Property.

**II. The Trial Judge’s award of a 25% premium in addition to the Jury’s award of fair market value damages violates Article I, Section 26 of the Missouri Constitution in that Ms. Gasway would receive more than “just compensation” for the Subject Property.**

**A. The City has preserved this issue on appeal**

“It is firmly established that a constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.” *Callier v. Director of Revenue, State of Missouri*, 780 S.W.2d 639, 641 (Mo. banc 1989) (internal quotations omitted). “The critical question in determining whether waiver occurs is whether the party affected had a reasonable opportunity to raise the unconstitutional act or statute by timely asserting the claim before a court of law.” *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 225 (Mo.

banc 1998). In the instant case, Ms. Gasway did not file her Motion for an award of Homestead Value until the morning of trial. *L.F.* at 17. The issue was never presented to the Commissioners. At the conclusion of the trial, after the Jury returned a verdict of \$300,000, the trial court entered its judgment, which included an award of \$75,000 for Homestead Value, pursuant to Section 523.039 RSMo. *L.F.* at 19. The City was not given an opportunity, prior to the Court's award of Homestead Value, to raise any challenge, constitutional or otherwise. Ms. Gasway suggests that by failing to raise its constitutional challenge during the trial phase of the case, the City waived the right to raise such a challenge. However, there was no opportunity to raise the constitutional issue during the trial, within the confines of "good pleading and orderly procedure" as the sole determination at trial was the fair market value of the property. *See e.g., Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 559 (Mo. App. W.D. 1983) ("The sole issue to be determined at trial was the fair market value of the condemned land on the date of the taking.") The Jury was not instructed to consider duration of ownership, and as such at no time during the trial, did the opportunity present itself for the City to raise the Constitutional challenge or even present evidence on that issue.<sup>1</sup> The City raised its constitutional challenge at the first available opportunity, which was in its Motion for a New Trial. *L.F.* at 21. The City should

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<sup>1</sup> The City is not disputing whether or not Ms. Gasway had owned the property for a sufficient period of time to satisfy the statutory criteria for a "Homestead Taking," rather, it challenges the constitutionality of such an award of a premium on top of the jury determination of fair market value.

not be deprived its right to raise its constitutional challenge due to Ms. Gasway's decision to file her Motion for Homestead Value the very day that the trial began.

**B. An award of a Homestead Value subject to Section 523.039 RSMo violates Article I, Section 26 of Missouri Constitution**

Article I, Section 26 of the Missouri Constitution mandates that "private property shall not be taken or damaged for public use without just compensation." The Missouri Supreme Court subsequently interpreted the Missouri Constitution's use of the term "just compensation" as being "the full and perfect equivalent in money of the property taken, but no more... [and] is the fair market value of the property at the time of the taking." *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300, 305 (Mo. 1965) (Internal citations omitted).

Ms. Gasway argues in her Brief that the Legislature's enactment of Section 523.039 RSMo does not violate any definition of just compensation set forth in the Missouri Constitution because no such definition exists. While the Missouri Constitution itself does not define the term "just compensation," its use has been consistently defined by the Missouri Supreme Court to be the fair market value of the property, no more and no less. Consequently, Section 523.039 RSMo, purports to redefine the term "just compensation" as used in the Missouri Constitution, and as determined throughout the just compensation provision's history by the State's highest court.

Section 523.039(2) RSMo provides that in the event that the defendant has owned the Subject Property for 25 years or more, "just compensation" is "an amount equivalent to the fair market value of such property multiplied by one hundred twenty-five percent." Such a

definition of “just compensation” is clearly contrary to how the term has been used in the Missouri Constitution. Ms. Gasway suggests that it is entirely within the purview of the Missouri General Assembly to supplement the Missouri Constitution with its own definitions of terms that have previously been judicially defined. *Respondent’s Brief* at 18. However, this position is untenable. If one followed Ms. Gasway’s reasoning to its logical conclusion, then if the State Legislature chose to adopt legislation that provided that “just compensation” was equal to 50% of the fair market value of the property, such legislation would not be violative of the Article I, Section 26 of the Missouri Constitution. This of course would be an absurd result, for which even Ms. Gasway would cry “foul.”

Article I, Section 26 of the Missouri Constitution forms part of the Bill of Rights, therefore, any legislative act contrary to its terms, as defined by the courts, is void. *Quinn v. Buchanan*, 298 S.W.2d 413, 418-419 (Mo. banc 1957). Consequently, the State Legislature does not have the plenary power that Ms. Gasway suggests to alter the scope and application of a provision of the Missouri Bill of Rights.

**III. Demba’s use of an assemblage value should have been excluded as it is impermissible under Missouri Law**

**A. The City has preserved the issue on Appeal**

Again Ms. Gasway asserts that the City failed to preserve this matter on Appeal, however, the City did indeed adequately preserve this point on appeal. On August 12, 2010, a little over two weeks before the trial began, the Court entered the following ruling on the City’s Motion in Limine to exclude the testimony of Mr. Demba:

“Since rulings on Motions in Limine are always interlocutory and since the Court can generally only evaluate the testimony of an expert witness based upon the actual testimony in court, where the testimony must be preceded by the laying of a sufficient foundation for the admissibility of the opinion of the expert and further since a substantial portion of an expert’s testimony, after the laying of a sufficient foundation for admissibility of said testimony, goes to the weight and not the admissibility of the evidence, the Court will take the Motion in Limine with the case and rule on the issues as they arise.” *L.F.* at 14; *Appendix* at A1 (emphasis added).

As such, the trial court had not ruled on the Motion in Limine prior to the time that the trial began, and the trial court instead determined to consider the matter as the issues arose at trial. In *The Estate of Gross v. Gross*, 840 S.W.2d 253 (Mo. App. E.D. 1992), this Court found that resubmitting a previously denied Motion in Limine was sufficient to preserve an objection on appeal. *Id.* at 260. The *Gross* Court further stated that “[a]ll that is required of any objection to evidence is the objection be sufficiently clear and definite so that the trial court will understand the reason for the objection.” *Id.* “Having heard argument on the initial motion in limine, the trial court clearly understood the basis of the re-submitted objection at trial.” *Id.* The City cannot be held to have waived its arguments based on ambiguities based in the court’s pre-trial order. The Western District similarly found that “it is sufficient to preserve an issue by resubmitting the motion in limine at trial.” *State v. Davis*, 186 S.W.3d 367, 375 (Mo. App. W.D. 2005) (“When the court and prosecutor mutually understand that

defendant did not intend to repudiate his prior objection, the court will acknowledge its continued validity.”).

Similarly, in the instant case both parties and the trial court understood the basis and the grounds for the City’s objection to Mr. Demba’s testimony, and further all parties understood that the trial court was to consider the City’s Motion in Limine as the matters arose at trial. The City never indicated it had repudiated its objections. Unlike in *Davis* and *Gross*, the City was not required to resubmit its Motion in Limine to preserve the issue, as the Motion in Limine had not been denied prior to the trial. Thereafter, the City preserved the issue on appeal in its Motion for a New Trial and Notice of Appeal. *L.F.* at 21; *L.F.* at 28.

As such, the City’s objections to Mr. Demba’s testimony have been properly preserved on Appeal.

**B. The decision in *Greystone*<sup>2</sup> Precludes Mr. Demba’s use of an Assemblage Value**

The court in *Greystone* held that “a condemnee is not entitled to the benefit of a special value which can arise only by reason of the assemblage of its property with property either already owned by the condemnor or which the condemnor is acquiring as part of the same condemnation project.” *Id.* at 296. However, *Greystone* sets forth an exception to this holding, namely: “if, however, the property has a special utility of special availability, not only to the taker, but to the other parties who could use the property for the particular purpose

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<sup>2</sup> *Greystone Heights Redevelopment Corp. v. Nicholas Inv. Co.*, 500 S.W.2d 292 (Mo. App. W.D. 1973)

intended by the taker, then this utility or availability may be shown.” *Id.* at 297. The *Greystone* court opined that such exception may be satisfied “by proof that a third party was proposing assemblage of properties in Greystone Heights without resort to any power of eminent domain.” *Id.* at 298 (emphasis added). “Only by some such showing would there be created a competitive market demand for defendant’s land or the rock content which is contemplated by the exception under discussion.” *Id.* Thus, the *Greystone* exception is a far more arduous standard than Ms. Gasway has suggested in her Brief. *Respondent’s Brief* at 26. This standard is not satisfied simply by Mr. Demba’s testimony that he believed it is probable that another buyer would make a competitive bid for the property as part of an assemblage. *Respondent’s Brief* at 27; *Tr.* at 56.

*Greystone* requires proof that there exists an actual potential market participant considering a competing assemblage project, which would include the Subject Property, without the use of eminent domain. Only those developers responding to the City’s Request for Proposals, with the enticements of the lawful use of the power of eminent domain and Tax Increment Financing, have shown the slightest interest in acquiring the Subject Property as part of an assemblage project. No evidence of a competing interested buyer was adduced at trial.

Ms. Gasway cites *Kansas City Power & Light, supra*, at 564, in support of her interpretation of the limited exception under *Greystone*. However, the court in *Kansas City Power & Light* actually stated:

“*Greystone* required that a defendant “must show a reasonable probability that some third party would have made a specially high bid for defendant’s land...

had plaintiff's taking by condemnation not occurred, for a purpose competitive to that of Plaintiff." Granted, the condemnee has not shown that SJL & P [an electric company competing with the condemnor] would definitely have submitted such a bid had the condemnation not occurred, but definiteness is not required. *Greystone* requires only a reasonable probability. In light of the fact that the evidence shows that SJL & P was sufficiently interested in the site to attend meetings on its feasibility and commission a report on the suitability of the area for industrial use as well as jointly apply for the certificate of public convenience and necessity and for rezoning, we find that we must not interfere with the discretion of the trial court..." *Id.* at 563-564 (internal citations omitted).

In *Kansas City Power & Light*, therefore, unlike in the instant case a third party (SJL & P) had shown a cognizable interest in acquiring the property as part of an assemblage.

The law in Missouri, while not requiring that a defendant demonstrate that a third party would have made a bid for the a property as part of an assemblage project, does require that the defendant show a reasonable probability that there exists some other entity that may have been interested in an assemblage project. Ms. Gasway failed to identify such an entity and Mr. Demba's appraisal demonstrates his true belief that the use of eminent domain is an economic necessity for his envisioned commercial assemblage.

Furthermore, and somewhat inexplicably, Ms. Gasway avers that "[Mr.] Demba did not consider the [Subject] Property's assemblage with other properties already owned by Appellant or subject to acquisition by Appellant as part of the Plan." *Respondent's Brief* at

29. By necessity this aversion is false, as Ms. Gasway's property is surrounded on all fronts with properties that are part of the City's Redevelopment Area, and so any proposed assemblage would involve assembling the Subject Property with properties being acquired by the City as part of the same condemnation proceedings. Mr. Demba's theorized assemblage runs afoul of the *Greystone* test for the admissibility of an assemblage value, in that it could not occur without assembling the property with those properties subject to the instant condemnation proceedings.

**C. Mr. Demba's Appraisal negates his asserted probability of an assemblage without the use of eminent domain.**

Despite Mr. Demba stating at trial that there was a reasonable probability that a developer would purchase the Subject Property as part of a commercial assemblage project without resort to eminent domain,<sup>3</sup> such testimony is entirely inconsistent with his Appraisal. In his Appraisal, Mr. Demba provides the following overview of the commercial redevelopment environment:

"With condemnation once again at their disposal, developers are wasting little time to begin those projects that have already been identified. Those developments, which will necessarily include viable properties, will require public financing. The recipe is simple: find the best balance of properties that aren't being utilized at their highest and best commercial uses with the most desirable location, put a majority of these properties under option contract,

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<sup>3</sup> *Tr.* at 56.

approach the proper political authorities, finance, condemn, and develop.”

*Defendant’s Exhibit G*, at 28<sup>4</sup> (emphasis added).

Mr. Demba even went so far as to emphatically state: “[g]iven the above facts and analysis, the evidence plainly shows that in today’s commercial re-development market, the power of condemnation and the availability of public financing are economic necessities.”

*Defendant’s Exhibit G*, at 29<sup>5</sup> (emphasis in original).

#### **IV. Mr. Demba’s appraisal methods are improper under Missouri Law**

In the interests of brevity, the City respectfully refers the Court to its lengthier discussion of these issues contained in its third point relied on in its Initial Brief.

##### **A. The City has preserved the issue on Appeal**

In response to the City’s Third Point Relied On, Ms. Gasway repeats the averment that she made with respect to the City’s Second Point Relied On, with regards to preservation of the issue on appeal. For the reasons set forth in Section III(A) of this Brief, Ms. Gasway’s assertion is erroneous and the City did in fact preserve the issue on appeal.

##### **B. Mr. Demba’s valuation vitiates the Project Influence Doctrine**

“Zoning generally falls within the project influence doctrine.” *Kansas City Power & Light, Supra*, at 560. “The probability of rezoning (or even an actual change in zoning) which results from the fact that the project which is the basis for the taking was impending, cannot be taken into account in valuing the property in the condemnation proceeding.” *Id.* (emphasis in original, internal quotations omitted). As Mr. Demba concedes, the Subject

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<sup>4</sup> *Appendix* at A5.

<sup>5</sup> *Appendix* at A6.

Property is zoned “Single Family Residential.” *Defendant’s Exhibit G* at 22.<sup>6</sup> Yet his proposed “Highest and Best Use” is “Commercial-Assemblage.” *Defendant’s Exhibit G* at 2.<sup>7</sup>

As part of its redevelopment efforts, and to allow for the potential construction of commercial properties, the Planning and Zoning Commission for the City approved the rezoning of the Subject Property, as part of the Redevelopment Area to “Planned Mixed Use.” *Defendant’s Exhibit G* at 39-40.<sup>8</sup> By virtue of the project influence doctrine, Ms. Gasway was not entitled to an enhanced value based upon a use that is only permissible under the zoning change enacted as part of the project for which the Subject Property was taken. Mr. Demba has further conceded that the “highest and best use” must be legally permissible. *Defendant’s Exhibit G* at 22.<sup>9</sup> Mr. Demba’s discussion as to whether a commercial assemblage project is legally permissible is at best unclear:

“Currently, the subject is zoned “R-3” Single Family Residential District, a residential zoning classification. However, it is located in very close proximity to multi-family, commercial, and planned development commercial districts. Therefore, it is obvious that the City realizes that the location is conducive to more intense uses. Additionally, the subject is located within an area known by private developers as an excellent place for commercial assemblage, with

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<sup>6</sup> *Appendix* at A3.

<sup>7</sup> *Appendix* at A2.

<sup>8</sup> *Appendix* at A7-A8.

<sup>9</sup> *Appendix* at A3.

rezoning to accomplish assemblage often done in the past.” *Defendant’s Exhibit G* at 24; *Appendix* at A4.

Mr. Demba tacitly concedes that a commercial assemblage is not legally permissible absent a zoning change, the very zoning change that was procured by the City in conjunction with its Redevelopment Project. Therefore, Mr. Demba’s valuation violates the project influence doctrine, in that it seeks to add value to Ms. Gasway’s project on the back of the work undertaken by the City.

**V. The Jury’s excessive award of damages and the court awarded premium for Homestead Value serve to impermissibly compensate Ms. Gasway, not with the sum she lost but with the sum the City was perceived to be potentially gaining if it were to acquire the Subject Property**

As the U.S. Supreme Court has noted, “the dominant consideration [in awarding damages for a taking by condemnation] always remains the same: What compensation is “just” both to an owner whose property is taken and to the public that must pay the bill?” *U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 512 (U.S. 1979). Ms. Gasway’s argument in her brief loses sight of the fact that, the price must also be “just” to the City and its constituent taxpayers. For instance, her unsubstantiated claim that the City “is “gaining” property rights to a valuable piece of property in the center of St. Louis County and stands to “gain” millions,”<sup>10</sup> demonstrates that she sought, and was awarded, not what she perceived she “lost,” but instead what she considered the City to have “gained.” However, “[t]he question is, What has the owner lost?

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<sup>10</sup> *Respondent’s Brief* at 20.

not, What has the taker gained?" *Greystone, supra*, at 297. The judgment in this case served to compensate Ms. Gasway with a sum based on the purported amount the City may have gained if it had been able to complete the Assemblage Project, and not with a sum consistent with Ms. Gasway's losses, i.e. the fair market value of the property as it stood on the day of trial. This very scenario should be prevented by the constitutional prohibition on the expenditure of public funds for private gain. See Article VI, Sections 23 and 25 of the Missouri Constitution. As a consequence of the foregoing, the City and its taxpayers have suffered substantial and glaring injustice as a result of the unconstitutional award of damages. Such unconstitutional awards destroy the concept of redevelopment with its corresponding elimination of blight and crime and the possibility of new jobs.

## CONCLUSION

The trial court erred in awarding Ms. Gasway a premium of \$75,000.00 for homestead value in violation of Article I, Section 26 of the Missouri Constitution. The trial court further erred in admitting Mr. Demba's excessive and speculative valuation opinions and in denying the City's Motion for a New Trial.

As a result of the aforementioned errors, the jury awarded grossly excessive damages to Ms. Gasway, which award was in turn exacerbated by the trial court's improper award of a homestead premium, causing the City to be subjected to substantial and glaring injustice.

For the foregoing reasons, the judgment of the trial court should be reversed and remanded for a new trial with instructions to exclude any testimony from Mr. Demba or otherwise as to an assemblage value of the Subject Property. Further on remand, the trial court should be instructed not to award a premium on any jury award for homestead value.

Alternatively, the City respectfully requests that this Court transfers this cause to the Missouri Supreme Court for consideration of the Constitutional issues raised herein.

Respectfully submitted,



Kenneth J. Heinz #24242

[kheinz@lawfirmemail.com](mailto:kheinz@lawfirmemail.com)

Carl J. Lumley #32869

[clumley@lawfirmemail.com](mailto:clumley@lawfirmemail.com)

Edward J. Sluys #60471

[esluys@lawfirmemail.com](mailto:esluys@lawfirmemail.com)

CURTIS, HEINZ, GARRETT & O'KEEFE,  
P.C.

130 S. Bemiston, Suite 200

St. Louis, Missouri 63105

(314) 725-8788

(314) 725-8789 (FAX)

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

A copy of this brief and a disk containing the brief were mailed on the 31<sup>st</sup> day of  
May, 2011, to:

Steven E. Spoeneman  
Spoeneman, Watkins, & Harvell, LLP  
231 S. Bemiston, Suite 1070  
St. Louis, Missouri 63105

and

Jennifer Mary West  
800 Market Street, Suite 1660  
St. Louis, Missouri 63101



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 3761, excluding the cover, 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 virus-free through the Symantec anti-virus program.

A handwritten signature in black ink, appearing to read "Scott J. King", written over a horizontal line.

## Appendix

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Order and Judgment entered August 12, 2010 on Plaintiff’s Motion in  
Limine to Exclude Testimony of Ernest Demba, Appraiser, in City of  
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Defendant’s Exhibit G-1: Demba Appraisal Report, Pages 2, 22, 24, 28,  
29, 39 and 40.....A2

FILED

IN THE CIRCUIT COURT OF ST LOUIS COUNTY  
STATE OF MISSOURI

JUL 23 2010 18

JOHN M. GILMER  
CIRCUIT CLERK, ST. LOUIS COUNTY

City of Richmond )  
Heights )  
Plaintiff )  
)  
vs. )  
Ruth L. Gasway, et al )  
Defendant )

Date: 8-12-10

Cause No. 08SL-CC04039  
Division 18

ORDER AND JUDGMENT

Plaintiff's Motion In Limine To Exclude Testimony of Ernest Demba, Appraiser is called, heard and ruled as follows:

Since rulings on Motions In Limine are always interlocutory and since the Court can generally only evaluate the testimony of an expert witness based upon the actual testimony in court, where the testimony must be preceded by the laying of a sufficient foundation for the admissibility of the opinion of the expert and further since a substantial portion of an expert's testimony, after the laying of a sufficient foundation for admissibility of said testimony, goes to the weight and not the admissibility of the evidence, the Court will take the Motion In Limine with the case and rule on the issues as they arise.

cc: Carl Lumley  
Steven Spoeneman

SO ORDERED:

DATED: 8/12/10

  
Richard C. Bresnahan  
Judge, Division 18



**SUMMARY OF FACTS AND CONCLUSIONS**

**Client/Intended User**..... Mr. Steve Spoeneman, Esq.

**Property Location:**..... 1517 Banneker Avenue, Richmond Heights, MO 63117

**Tax Locator Number** ..... 20J-13-0849

**Ownership:** ..... Lillian C. Gasway, J/T Et. Al.

**Current Property Use** ..... Residential (Single Family)

**Parcel Size**..... 6,000 square feet (0.138 acres)

**Highest & Best Use As Though Vacant/Improved**..... Commercial - Assemblage

**Current Contracts, Options, and/or Listings:**

According to our information, as of the effective date of the value, the subject property was not listed for sale nor was it under contract or option for sale.

**Current Encumbrances:**

Other than typical governmental controls and restrictions, the subject is not known to be affected by any encumbrances that are considered to have a significant impact on value.

**Purpose of Appraisal** ..... Opinion of Market Value

**Intended Use of Appraisal Analysis** ..... Client Use Only for Possible Future Litigation

**Property Interests Appraised**..... Fee Simple Interest

**Effective Date of Value** ..... July 11, 2008

**Date of Report** ..... July 11, 2008

**Exposure Time Estimate** ..... 12 Months or Less

**Valuation:**

Final Value Opinion via Sales Comparison Approach ..... \$324,000

**ASSESSMENT DATA**

It should be noted that the Assessor's appraised value is indicated by mass appraisal techniques, which generally overlook the actual market components of any particular subject property, and is therefore, purely an indicator for assessment purposes. The assessment information is not relevant for condemnation purposes and is omitted herein.

**REGIONAL ANALYSIS**

As referenced above, the client is familiar with the St. Louis region; therefore, we will not develop a detailed regional analysis.

**NEIGHBORHOOD DATA AND ANALYSIS**

As referenced above, the client is familiar with the subject neighborhood; therefore, we will not develop a detailed neighborhood analysis.

**ZONING**

As referenced above, the client is familiar with the subject zoning regulations; therefore, we will not develop a detailed zoning analysis. The current zoning of the property is "R-3" Single Family Residential District.

**HIGHEST AND BEST USE**

The principle of highest and best use is a fundamental concept around which any valuation must be made. Briefly, this concept is defined, for real estate, as: *"That reasonable and probable use that will support the highest present value, as defined, as of the effective date of this appraisal"*. In order that the property be used at its highest and best use, the following conditions must exist:

1. The use must be legal;
2. The use must be within the realm of probability--it must be physically possible and more likely than speculative;
3. There must be a demand for such use;

**Legally Permissible**

Currently, the subject is zoned "R-3" Single Family Residential District, a residential zoning classification. However, it is located in very close proximity to multi-family, commercial, and planned development commercial districts. Therefore, it is the obvious that the City realizes that the location is conducive to more intense uses. Additionally, the subject is located within an area known by private developers as an excellent place for commercial assemblage, with re-zoning to accomplish assemblage often done in the past.

**Financially Feasible**

At this point, it must be determined what use would be the most financially feasible within some price or cost limit and provide a positive net return to the land. It is our considered opinion that the most financially feasible use for the subject site would be commercial in nature, specifically for commercial or mixed-use assemblage.

The most notable characteristic lending to a commercial assemblage use is the location in close proximity to a major intersection of Hanley Road and Highway 40 (The New I-64). With access via a major east-west highway, a major north-south arterial roadway, and via a Metro Station within walking distance, it is a well-located and easily accessible area.

The surrounding properties are made up of older single family and multi-family properties, street-front commercial, and some governmental and church uses. The entire confluence of the intersection of Highway 40, Interstate 170, and the Brentwood Boulevard and Hanley Road interchanges is developed commercially or slated to be developed as such in the very near future.

Given its access to the regional transportation grid, close proximity to other similar commercial developments, highly visible neighborhood location, and based on based on the other considerations listed above, it is our opinion that the most financially feasible use for the subject tract would be commercial in nature.

Realty, Pace Properties, Walpert Properties, GJ Grewe, and Desco Commercial. Most of these are privately held local companies, but some work in conjunction with Real Estate Investment Trusts and other out-of-town developers.

The exercise of eminent domain power, which allows these re-developments flourish, slowed considerably throughout 2004 as its use for purely economic development purposes was challenged. This challenge occurred in the St. Louis Metropolitan Area (the result of an epic disaster in Sunset Hills at the hands of Novus Development), but also throughout the country, most notably when the Supreme Court granted Certiorari for *Kelo v. City of New London*. While this power was being reigned in from a political and public relations perspective, the resulting economic uncertainty manifested itself via greatly reduced (almost zero) redevelopment initiatives.

With the subsequent handing down of the Supreme Court's decision in *Kelo* (before the date of value) and the political backlash in Missouri subdued via eminent domain reform, these planned re-developments have been taken off the back burner. With condemnation once again at their disposal, developers are wasting little time to begin those projects that have already been identified. Those developments, which will necessarily include viable properties, will require public financing. The recipe is simple: find the best balance of properties that aren't being utilized at their highest and best commercial uses with the most desirable location, put a majority of these properties under option contract, approach the proper political authorities, finance, condemn, and develop. This process is really nothing more than finding land while ignoring the improvements, the property rights of the owners who wish to stay, and the price tag that come along with it.

While Tax Increment Financing does not necessarily imply condemnation and vice versa, it is a generally accepted fact that the re-development of predominantly viable properties require both the power of condemnation (due to the viability of the properties) and public financing in order for the redevelopment to be more economically viable for the developer. This new development, in turn, serves the public purpose of providing increased tax revenue to the municipality for its citizens' use.

While the subject neighborhood is zoned R-3 residential and many of the surrounding property uses are also high-density residential, it is also bound by Dale Avenue / Highway 40 to

the North, Hanley Road to the West, and the Maplewood Commons Shopping Center to the South. The Metro South Line is located on the far side of Hanley Road and the both sides of Hanley are developed commercially. Given the location and public infrastructure available at the subject's neighborhood, assemblage for a commercial redevelopment is most reasonable use of the subject property.

*Given the above facts and analysis, the evidence plainly shows that in today's commercial re-development market, the power of condemnation and the availability of public financing are economic necessities. Given both our subject's and the surrounding properties' shared attributes of being simultaneously very well-located and under-utilized, the nature of the local economy, and the financial and social motivations of the City of Richmond Heights, and the local development community, we will assume that there will be a TIF component to any re-development in the area. In short, commercial redevelopment of the subject site is inevitable. It is through this lens which we view the valuation project. This is the normal market activity, and via these activities, a market value opinion can be obtained.*

The appraisers assume that the subject property would have sold at the indicated opinion of value within 12 months of exposure time on the market with the date of value coinciding with the date of sale.

## **THE HADLEY TOWNSHIP REDEVELOPMENT PROCESS**

### **Introduction**

The Hadley Township Redevelopment is an interesting case because it illustrates how the real estate market and a group of negatively-affected citizens can drive redevelopment from the bottom up. In order to properly analyze a project such as this, one needs to know the history of the area and its people and how that history has guided its interaction with market forces over time.

### **Identification & History**

The Hadley Township is located in the City of Richmond Heights, Missouri. This predominantly residential community is bound by Dale Avenue on the north, West Bruno Avenue on the south, Laclede Station Road to the east, and Hanley Road to the West. Land uses in the neighborhood include residences on the eastern portion with smaller commercial and office

In the end, "residential character" is more than just how a project looks, but also about how it performs. The Conrad development proposes to put more people in the project than the Michelson development. That is truly residential in character.

**Richmond Heights' Choice**

The planning process undertaken by the City seems sound. It was inclusive of all the affected parties in the community and collaborative in its results. There was a great exchange of ideas and the decision was made largely on the basis of reason. However, there was a great difference of opinion about the two final projects and that difference could most likely be attributed to truly differing visions for the area. In this respect, it seems that the process was a failure. When two completely different projects are presented and one is chosen without attempting to give both developers the opportunity to address their projects' perceived weaknesses, surely that vision was not achieved. The residential character of the overall area cannot be maintained if there is a net population loss as a result of the project. It is quite possible that this will be the case.

Despite the obvious advantages of the Conrad proposal and its more highly correlated conformity to the stated goals of the community, the City Council chose to go with Michelson's project by a 5-3 vote with one abstention. (Minutes, City Council of Richmond Heights, Special Workshop Meeting, February 2, 2006, 7) They chose something familiar and necessarily mediocre as a result. Michelson may have changed tactics downstream somewhat due to the perception that they were offering the most money to the residents. (Minutes, City Council of Richmond Heights, Special Workshop Meeting, February 2, 2006) It is quite possible that this fact alone was enough to sway public opinion in its favor. For those who are looking to sell for top dollar, this was their only consideration.

The narrative above reinforces our conclusion that without this specific project, another commercial development would have been built; therefore, we can ignore this specific development and use comps from other similar developments which are typical in the market.

**Property Acquisition**

On March 16, 2006, the Planning and Zoning Commission for the City of Richmond Heights unanimously approved a change in the City's Comprehensive Plan to allow for the Hadley Township Redevelopment. The zoning for the bounded area was a mix of commercial

and residential zones. It was changed to a Planned Development Mixed Use designation. (Minutes, Planning & Zoning Commission of Richmond Heights, March 16, 2006) Later that year, against the recommendation of the TIF Commission, the City Council adopted an ordinance approving the Redevelopment Plan and Redevelopment Project with Michelson. According to the Redevelopment Agreement, the City may use its power of eminent domain in the TIF district to secure any necessary parcels that cannot be acquired via negotiation and mediation. (REDEVELOPMENT AGREEMENT BETWEEN THE CITY OF RICHMOND HEIGHTS, MISSOURI AND MICHELSON COMMERCIAL REALTY AND DEVELOPMENT LLC, November 17, 2006, 15-19)

On April 24, 2007, the Eastern District handed down a slip opinion titled *Centene Plaza Redevelopment Corporation v. Mint Properties, Inc., et.al.* The Defendant property owners claimed that the new eminent domain ordinance standard for blight passed in 2006 applies retroactively to the previous ruling. The Court agreed. In doing so, the Court overturned a finding of “blight” from the Circuit Court. It relied on the following language from the new statute: “that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic *and social* liabilities.” Mo. Rev. Stat. §523.261 (emphasis added). The Court was unable to find any evidence in the record pertaining to social liability. Furthermore, the Court transferred the case to the Missouri Supreme Court for review because no standard had yet been developed and public policy concerns dictated such a finding. *Centene Plaza Redevelopment Corp. v. Mint Properties*, WL 1188315 (Mo.App. 2007).

An exhaustive review of the record so far produced with respect to this project (including the Woolpert LLP Report, the PGAV-authored RFP, City Council Minutes, TIF Commission Minutes, and Planning and Zoning Minutes, and Redevelopment PlanA) fails to once mention “social liability”). While the demographic and socio-economic data in the Woolpert Report may provide a basis for such a finding, it is difficult to know how this procedural error will impact the project, especially so late in the redevelopment game. (Woolpert, 4-5) It is also unknown whether the Court will reverse course, limit its decision to Chapter 353 Urban Redevelopment Corporations, or somehow extend the language including “social liability” to all condemning authorities based on public policy concerns and/or legislative intent.

From the above analysis, it is clear that a redevelopment of the subject area has been long-contemplated, well in advance of the current project. Investors have been buying up parcels