

IN THE SUPREME COURT OF MISSOURI

No. SC89148

C.F. WHITE FAMILY PARTNERSHIP, et al.,

Property of C.F. White Family Partnership and Lupton Living Trust,

Relators,

vs.

THE HONORABLE MARCO ROLDAN,

Respondent.

On Appeal from the Circuit Court of Jackson County at Independence, Division Sixteen
State of Missouri
The Honorable Marco Roldan

BRIEF OF RELATORS

Submitted by

Robert Denlow, #30005
Paul G. Henry, #37922
Denlow & Henry
7777 Bonhomme, Suite 1910
St. Louis, MO 63105
Phone: (314) 725-5151
Fax: (314) 725-5161
Attorneys for Relators

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

STATEMENT OF FACTS 7

POINTS RELIED ON 10

STANDARD OF REVIEW 11

ARGUMENT 12

I. THE RESPONDENT ERRED IN DECLINING TO CONSIDER AND
RULE ON RELATORS’ MOTION TO AWARD HERITAGE VALUE
FOR THE REASON THAT RESPONDENT’S REFUSAL DENIED
RELATORS OF THEIR RIGHTS TO DUE PROCESS AND JUST
COMPENSATION. 12

A. Just Compensation prior to House Bill 1944. 13

B. The new eminent domain legislation. 14

C. The respondent abused its discretion and denied Relators’ their right
to due process by refusing to consider and rule on Relators’ Motion
for Assessment of Heritage Value. 16

1. Due process in eminent domain. 17

2. Under the plain meaning of the eminent domain statute, the
Respondent has an absolute duty to determine if the Property
qualified for heritage value. 18

3. The filing of exceptions does not impact the duty of the Court to award heritage value. 20

D. Conduct of future proceedings on remand. 24

1. It is for the circuit judge to “apply” and “determine” heritage value 25

2. Heritage Value applies in partial takings. 28

CONCLUSION 34

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

FEDERAL CASES

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 S.Ct. 446, 66 L.Ed.2d 358
(1980) 17

U.S. CONSTITUTION

United States Constitution, Fifth Amendment 17
United States Constitution, Fourteenth Amendment 17

STATE CASES

Bi-State Development Agency of Missouri-Illinois Metropolitan Dist. v. Nikodem, 859
S.W.2d 775 (Mo.App. E.D. 1993) 17
City of Caruthersville v. Faris, 146 S.W.2d 80 (Mo. App. 1940) 18
City of Excelsior Springs v. Elms Redevelopment Corp., 18 S.W.3d 53 (Mo.App. W.D.
2000) 17
City of Kansas City v. Koklas, 849 S.W.2d 716 (Mo.App.W.D. 1993) 22
City of Sikeston v. Rolanco, Inc., 650 S.W.2d 729 (Mo.App. 1983) 22
Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284
(Mo.App. 1979) 28
Maudlin v. Lang, 867 S.W.2d 514 (Mo.banc 1986) 31

| | |
|--|------------|
| <u>Missouri & Iowa Ry. Co. v. Norfolk and Western Ry. Co.</u> , 910 S.W.2d 261 | 10, 19 |
| <u>Missouri Rural Elec. Co-op v. City of Hannibal</u> , 938 S.W.2d 903 (Mo.banc 1997) . . . | 26 |
| <u>Nohr v. LeFaivre</u> , 201 S.W.3d 72 (Mo.App. E.D., 2006) | 11 |
| <u>Osage Water Company v. Miller County Water Authority, Inc.</u> , 950 S.W.2d 569 (Mo.App. S.D. 1997) | 28 |
| <u>State ex rel. Maryland Heights Fire Protection District v. Campbell</u> , 736 S.W.2d 383 (Mo.banc 1987) | 31, 33 |
| <u>State ex rel. Missouri Highway & Transportation Commission v. Turner</u> , 857 S.W.2d 293 (Mo.App.W.D. 1993) | 24 |
| <u>State ex rel. Missouri Highway and Transp. Com'n v. Anderson</u> , 735 S.W.2d 350 (Mo.,1987) | 21 |
| <u>State ex rel. Missouri Water Co. v. Bostian</u> , 272 S.W.2d 857 (Mo.App. 1954) . | 10, 19, 28 |
| <u>State ex rel. Noranda Aluminum, Inc. v. Rains</u> , 706 S.W.2d 861 (Mo. 1986) | 11 |
| <u>State ex rel. State Highway Com'n v. Day</u> , 327 Mo. 122, 35 S.W.2d 37 (Mo.1930) . . . | 13 |
| <u>State ex rel. State Highway Commission v. Eilers</u> , 445 S.W.2d 374 (Mo. 1969) | 21 |
| <u>State ex rel. State Highway Commission v. Mahon</u> , 350 S.W.2d 111 (Mo.App.1961) | 23 |
| <u>State ex rel. Vaughn v. Morgett</u> , 526 S.W.2d 434 (Mo.App.1975) | 11 |
| <u>State v. Burgin</u> , 654 S.W.2d 627 (Mo.App. W.D. 1983) | 21 |
| <u>Union Elec. Co. v. Saale</u> , 377 S.W.2d 427 (Mo.1964) | 10, 13 |
| <u>Yeager v. Yeager</u> , 622 S.W.2d 339 (Mo.App. E.D. 1981) | 11 |

STATE STATUTES

Article I, § 26, *Missouri Constitution* of 1945 13

Article I, § 10, *Missouri Constitution* of 1945 17

§523.001 R.S.Mo. (2007) 12, 14, 16, 25, 26, 29, 31

§523.039 R.S.Mo. (2007) 13-15, 18, 20, 23, 25-27, 30-32

§523.040 R.S.Mo. (2007) 18, 21, 26

§523.045 R.S.Mo. (2007) 19

§523.050 R.S.Mo. (2007) 22

§523.055 R.S.Mo. (2007) 20

§523.060 R.S.Mo. (2007) 21

§523.061 R.S.Mo. (2007) 8, 10, 15, 18-23, 25, 28

Perfected H.B.1944 (93rd General Assembly, 2nd Regulation
Session, 2006) 3, 12, 13, 24, 25, 27

SUPREME COURT RULES/ORDERS

Supreme Court of Missouri, *en banc*, Order of April 15, 2008, Effective July 1, 2008, *IN RE: REVISIONS TO MAI-CIVIL*
Missouri Rule of Civil Procedure 86.08 22

STATEMENT OF FACTS

Parties. The Relators, C.F. White Family Partnership and Lupton Living Trust are the owners of approximately 45 acres of land located in the City of Independence, Missouri (the “Property”). The Respondent, Marco Roldan, is a Circuit Judge for the Sixteenth Judicial Circuit. The City of Independence is a municipality duly organized under the Missouri Statutes and located in the County of Jackson, Missouri. (A Relators’ Exhibit D¹)

Condemnation action. This condemnation was authorized on March 6, 2006, by the City Council of the City of Independence, Missouri through Ordinance No. 16279. This Ordinance authorized the use of eminent domain to acquire a portion of the Property. (Appendix 13, Relators’ Exhibit D). On August 22, 2007, Independence instituted condemnation proceedings (City of Independence, Missouri vs. C.F. White Family Partnership, et al., Cause No. 0716-CV23316-01) seeking to acquire the 15.4759 acres from the Property. (Appendix 15, Relators’ Exhibit D).

On September 25, 2007, the condemnation hearing was held before Respondent who, on October 30, 2007, issued an order of condemnation and appointment of commissioners. The Commissioners and the parties, along with their attorneys, met for the viewing of the Property and the hearing on damages on November 26, 2007. The

¹ All references to Relators’ Exhibits are those attached to Relators’ Suggestions in Support of their Writ.

Commissioners returned their report of damages, on December 4, 2007, assessing \$1,415,000 as damages for the taking of Relators' property. The Report states:

“The commissioners herein state they have not made a determination whether a homestead taking has occurred or whether heritage value is payable and the amount of the award for each foregoing parcel does not include any amount for a homestead taking or for heritage value.”

(Appendix 11, Relators' Exhibit C).

Both the Relators and the City filed exceptions to the Report of Commissioners. On December 12, 2007, the City paid into the registry of the Court the amount awarded by the commissioners. (Appendix 21, City's Exhibit C)

Motion for heritage value. Relators, on December 26, 2007, file their “Motion for Assessment of Heritage Value” pursuant to §523.061 R.S.Mo.(2007) (Appendix 2, Relators' Exhibit B). The Respondent declined to consider the merits of Relators' Motion and did not take evidence of the historic ownership of the property by Realtors' family. The Respondent, instead, denied the Motion for the time on the grounds that exceptions had been filed. (Appendix 1, Relators' Exhibit A).

Writ to the Court of Appeals for the Western District. On February 26, 2008, the Relators filed a Petition for Writ of Prohibition with the Missouri Court of Appeals, Western District seeking the same relief as is set forth in the present Petition. On February 29, 2008, the Court of Appeals, Western District denied Relators' Petition.

(Appendix 20, Relators' Exhibit E).

Current Proceedings. The Relators filed before this Court their Petition for Writ of Prohibition on March 6, 2008. On April 15, 2008, the Court issued its Alternative Writ of Mandamus. The Respondent filed its Return to the Writ on May 15, 2008.

POINTS RELIED ON

- I. **THE RESPONDENT ERRED IN DECLINING TO CONSIDER AND RULE ON RELATORS' MOTION TO AWARD HERITAGE VALUE FOR THE REASON THAT RESPONDENT'S REFUSAL DENIED RELATORS OF THEIR RIGHTS TO DUE PROCESS AND JUST COMPENSATION.**

Union Elec. Co. v. Saale, 377 S.W.2d 427 (Mo.1964)

State ex rel. Missouri Water Co. v. Bostian, 272 S.W.2d 857 (Mo.App. 1954)

Missouri & Iowa Ry. Co. v. Norfolk and Western Ry. Co., 910 S.W.2d 261 (Mo.App. W.D. 1995)

§523.061 R.S.Mo. (2007)

STANDARD OF REVIEW

A Writ of Mandamus is appropriate when a trial court judge “refuses to make a decision or to exercise his discretion....” Yeager v. Yeager, 622 S.W.2d 339, 341 (Mo.App. E.D. 1981)(citing to State ex rel. Vaughn v. Morgett, 526 S.W.2d 434 (Mo.App.1975). A Writ of Prohibition is also appropriate if there is a legal issue that may escape review for some time and which is being decided wrongly by lower courts whose opinions may become precedent, and the aggrieved party may suffer considerable hardship and expense as a consequence of such action. State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862-63 (Mo. 1986).

In the proceedings below, the Respondent refused to rule on the merits of Relators’ Motion for Heritage Value. If successful on the motion, the Relators would be entitled to over \$700,000 as the heritage value portion of just compensation for the taking of their property. Respondent’s Judgment will cause the Relators to endure lengthy litigation before a determination is made whether their compensation includes heritage value. Relators have no other remedy at law to enforce the payment of heritage value outside this Writ proceeding.

Respondent’s decision turned on its construction of various eminent domain statutes. As such, the review of this decision is *de novo*. Nohr v. LeFaivre, 201 S.W.3d 72, 73 (Mo.App. E.D., 2006).

ARGUMENT

I. THE RESPONDENT ERRED IN DECLINING TO CONSIDER AND RULE ON RELATORS' MOTION TO AWARD HERITAGE VALUE FOR THE REASON THAT RESPONDENT'S REFUSAL DENIED RELATORS OF THEIR RIGHTS TO DUE PROCESS AND JUST COMPENSATION.

This is a case of first impression considering the new “just compensation” provisions of the Missouri eminent domain statutes. In 2006, the Missouri Legislature approved House Bill 1944 (“HB 1944”) that effected numerous changes to Missouri’s eminent domain laws and procedures. An important change contained in HB 1944 expanded the scope of “just compensation” for certain property owners in eminent domain actions. One such provision for compensation is called “heritage value.” Heritage value was recognized by the Missouri Legislature as a special value that attaches to property owned by the same family for more than fifty (50) years. The new legislation provides that this class of owners will receive the fair market value of the property *plus* an additional 50% as “heritage value.” §523.001 R.S.Mo. (2007).²

In the underlying case, the Relators received a commissioners award for the taking of their property in the amount of \$1,415,000. (Appendix 10, Relators’ Exhibit C). Those funds were paid by the condemnor, the City of Independence (“the City”), and the

² All statutory references to Chapter 523 shall be, when not otherwise noted, R.S.Mo. (2007).

City now has possession of the Relators' property. The Relators moved that the Respondent award them the heritage value for their property that had been held by their family for nearly sixty (60) years. (Appendix 2, Relators' Exhibit B). The Respondent refused to consider Relators' Motion on the basis that exceptions were filed. The Respondent's action constitutes an abuse of its discretion that has prejudiced the Relators by denying their right to just compensation as guaranteed by Article I, § 26 of the Constitution of Missouri and as defined by the Legislature in HB 1944, now codified as §523.039 R.S.Mo. (2007). This Writ was brought to prevent further abuse of discretion in violation of Relators' constitutionally protected rights to due process and just compensation..

A. Just Compensation prior to House Bill 1944.

Historically, just compensation has been synonymous with "fair market value." The courts, charged with interpretation of the Constitution, created the "fair market value" definition of just compensation. "The ... function that the court performs in a condemnation proceeding is in the ascertainment of just compensation, unless the question of public use be drawn into the proceeding." State ex rel. State Highway Com'n v. Day, 327 Mo. 122, 125, 35 S.W.2d 37, 38 (Mo.1930). In this role, Missouri courts have defined "just compensation" by equating it with fair market value. In Union Elec. Co. v. Saale, 377 S.W.2d 427, 429 (Mo.1964), the Court stated, "'Just compensation' for the taking by condemnation of a part of a tract of land, *Mo.Const.*1945, Art. I § 26, *V.A.M.S.*, generally speaking, is the fair market value of the land actually taken...."

B. The new eminent domain legislation.

On January 1, 2007, the changes to Missouri's eminent domain law enacted by the legislature became effective. Among the changes was the creation of "heritage value." Heritage value applies in all condemnations filed after December 31, 2006, and is awarded for property that has been in the same family for more than fifty (50) years. Three sections of Chapter 523 of the Missouri Revised Statutes combine to explain heritage value, its relationship to just compensation, and the manner in which it is awarded. Those sections are as follows:

- §523.001 R.S.Mo. (2007), "Definitions." This defines three methods in determining "just compensation." "Heritage value" is defined as the value assigned to real property that has been owned by the same family for fifty (50) or more years. In such cases, the heritage value is determined to be fifty percent (50%) of the fair market value.
- §523.039 R.S.Mo. (2007), "Just Compensation for Condemned Property, How Determined." This establishes that "just compensation" is to equal the highest of three options: fair market value, homestead value or heritage value. The latter two will not apply in all cases. In the instant case, we are dealing with property owned for more than fifty (50) years by the same family. In such a case, the property owner is entitled the heritage value formula equaling one hundred fifty percent (150%) of the fair market value of the property, which is the highest yield of the three options. This section

also includes a provision whereby “family ownership” is defined.

- §523.061 R.S.Mo. (2007), “Determination of Homestead Taking, Heritage Value.” The procedures for adjusting a condemnation award when heritage value applies are found here. This provides for the court to adjust condemnation awards during two stages of litigation. First, the court is directed to apply the provisions of §523.039 after the filing of a Commissioners’ Report, and award the owners the heritage value of the property. The same determination is made, again, in the event of a jury verdict.

These provisions combine to establish that heritage value is an increase in just compensation equal to 50% of the fair market value. In other words, heritage value is not a separate amount to be paid in *addition* to just compensation. Just compensation has been enlarged to include, when applicable, the heritage value component. Payment of fair market value, alone, is not full payment of just compensation when the property qualifies for heritage value.

The central issue before the Court at which stage of condemnation proceedings it becomes necessary to determine whether heritage value applies, and when it must be paid to the owner.³ The plain statement by the legislature is that heritage value is part of just

³ This “central” issue leads to other important issues such as who is responsible for making the determination that heritage value must be paid and when heritage value is to

compensation, not added to it. The Respondent ruled that the filing of exceptions delayed the need to determine whether heritage value applies. The Missouri and Federal Constitutions provide the same requirement that just compensation must be paid before property is taken. Assuming that Relators' property qualifies for heritage value, the Respondent's ruling has limited the Relators' compensation to only 2/3 of what the legislature has mandated must be paid as just compensation. The Respondent has simultaneously deprived the Relators of their Constitutionally guaranteed rights to due process and to just compensation.

C. The respondent abused its discretion and denied Relators' their right to due process by refusing to consider and rule on Relators' Motion for Assessment of Heritage Value.

The Relators appeared before Respondent on February 14, 2008, prepared to present evidence (including witnesses and public records), to establish that the Property has been in the ownership of the same family since November 1, 1948, or fifty-nine (59) years prior to the taking. As a result, the "just compensation" to which the Relators are entitled for the taking of their property would include heritage value. §523.001 R.S.Mo. (2007). The Respondent refused to consider Relators' Motion on the basis that the parties had filed exceptions to the commissioners' award. (Appendix 1, Relators' Exhibit A)

1. Due process in eminent domain.

be paid in partial taking cases. These issues are also address in Relators' Brief.

The fundamental right of due process is guaranteed to Relator by operation of the Fifth and Fourteenth Amendments to the United States Constitution: “The Fifth Amendment guarantees that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation.” Under the Fourteenth Amendment, these protections apply to actions taken by the states. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). Likewise, Article I, §10 of the Missouri Constitution provides that "no person shall be deprived of life, liberty or *property* without due process of law." (emphasis added)

The Respondent’s refusal to consider the merits of the Relators’ Motion operated to deprive the Relators of their right to due process. The right to compensation in eminent domain proceedings must be protected by basic due process principles of notice and an opportunity to be heard. See Bi-State Development Agency of Missouri-Illinois Metropolitan Dist. v. Nikodem, 859 S.W.2d 775,778 (Mo.App. E.D. 1993); City of Excelsior Springs v. Elms Redevelopment Corp., 18 S.W.3d 53,58 (Mo.App. W.D. 2000). Here, Relators were not afforded the opportunity to be heard with regard to their right to just compensation as defined by the legislature to include heritage value.

2. Under the plain meaning of the eminent domain statute, the Respondent has an absolute duty to determine if the Property qualified for heritage value.

A guiding principle as we examine the new condemnation statutes was stated in City of Caruthersville v. Faris, 146 S.W.2d 80, 86 (Mo. App. 1940): "The power to condemn private property for a public purpose is in derogation of the common law and, hence, both the statute conferring the power and the proceedings under the statute are to be strictly construed in favor of the property owner."

Section 523.061 states that a circuit judge shall "apply" and "determine" the heritage value after the commissioners award is made. Section 523.061 does not state that the circuit judge shall "apply" and "determine" the heritage value only when exceptions are not filed. Section 523.061 plainly states: "After the filing of the commissioners' report pursuant to section 523.040, the circuit judge presiding over the condemnation proceeding shall apply the provisions of section 523.039 and shall determine...whether heritage value is payable and shall increase the commissioners' award to provide for additional compensation due...where heritage value applies, in accordance with the just compensation provision of section 523.039." (Emphasis added)

As previously noted, eminent domain statutes are to be construed narrowly in favor of property owners. "Since it involves the taking of private property for the use and enjoyment of others, the *whole process* is treated as an invasion of private rights, and a strict construction of the legislative grant of authority is exacted by the law, and doubts appearing in such grants are resolved in favor of the property owner." State ex rel.

Missouri Water Co. v. Bostian, 272 S.W.2d 857, 861 (Mo.App. 1954)(emphasis added).

When possible, all statutes are also to be given their plain meaning. Missouri & Iowa Ry. Co. v. Norfolk and Western Ry. Co., 910 S.W.2d 261, 266 (Mo.App. W.D. 1995).

The Norfolk case considered the statute requiring interest on condemnation awards. The interest statute is similar to the heritage value legislation in that interest is included as part of the just compensation to be awarded to property owners, but is calculated by the court as a percentage of the fair market value as determined by a jury. §523.045 R.S.Mo. provides, in part: “interest on the amount of any subsequent verdict [or award] ...shall be added to said verdict or award and paid to said named person or to the clerk for them.” In Norfolk, the condemnor argued that it did not owe interest on the verdict amount because it did not take possession of the property until after the trial. Norfolk, at 267. The trial court, there, did award the interest. The court of appeals examined the language and stated that the plain meaning applied and held that, “The language of section 523.045 unequivocally requires the payment of interest by the condemnor, as adjudged by the trial court, and leaves no room for interpretation.” Id. The same is true with the heritage value statute that directs that the court “shall increase the commissioners’ award to provide for additional compensation due.” §523.061 R.S.Mo. The duty of the Respondent to consider the Relators motion was *unequivocal* and leaves *no room for interpretation*.

The new provisions in the Missouri eminent domain statute, as found in §523.039, redefine just compensation to consist of both the commissioners’ award (which is “fair

market value”) and heritage value. It is a fundamental Constitutional right that just compensation must be paid before private property must be turned over for a public use. Hence, heritage value, as an element of just compensation, must be paid as a necessary condition for title to pass to a condemnor and before the condemnor is vested with the right of possession. §523.055 (Right of possession does not occur until after payment of the commissioners award).

The City has physical possession of Relators’ property but the Relators have not been fully paid just compensation owed to them. This is just the type of deprivation of property rights for which there is no adequate remedy that a writ of mandamus is designed to intervene against.

3. The filing of exceptions does not impact the duty of the Court to award heritage value.

The Respondent’s Order states the Relators’ motion was denied “at this time” because of the filing of exceptions. The fact that either party filed exceptions does not excuse the Respondent of its duty to assess heritage value. The heritage value statute plainly provides that “after the filing of the commissioners’ report,” the circuit judge shall apply and determine heritage value. §523.061. There is no mention of exceptions in the statute except to say that the same process will be repeated *if* a jury trial is held.

The provisions of §523.061 R.S.Mo. (2007) must be read in the context of existing condemnation procedures. “[S]tatutes relating to the same or similar subject matter, even though enacted at different times and found in different chapters, are *in pari materia* and

must be considered together when such statutes shed light on the statute being construed.” State v. Burgin, 654 S.W.2d 627, 631 (Mo.App. W.D. 1983)(citing to State v. Kraus, 530 S.W.2d 684, 686-87 (Mo. banc 1975)). In the first stage of condemnation proceedings, the commissioners determine the fair market value, and only the fair market value, of the property taken. §523.040(1). In the second stage, the jury is also required to determine *only* the fair market value of the property taken. §523.060(2).

The purpose of the commissioners award is to provide a substitute for the land so that the condemnor can proceed with its project while allowing the property owner to litigate its damages. State ex rel. Missouri Highway and Transp. Com'n v. Anderson, 735 S.W.2d 350, 352 (Mo.,1987); State ex rel. State Highway Commission v. Eilers, 445 S.W.2d 374, 376 (Mo. 1969)(“In Missouri it is well settled that eminent domain proceedings are *in rem* rather than *in personam* proceedings, and that when an award is made and paid into the registry of the court, the fund is substituted for the land and becomes the res.”) Property owners rights are only protected when the *entire property* is substituted by payment of *full* compensation. In those cases where heritage value applies, the “just compensation” for the property is not limited to fair market value, but also includes a fifty percent (50%) increase over and above the fair market value of the property.

Another consideration of how heritage value fits into prior and existing condemnation procedures involves the filing of exceptions. Both §523.050(1) and Rule 86.08 provide that exceptions to a commissioners award must be filed within thirty days

after the service of the notice of award. The right to a jury trial on the issue of compensation is waived if exceptions are not timely filed. City of Sikeston v. Rolanco, Inc., 650 S.W.2d 729, 731 (Mo.App. 1983); City of Kansas City v. Koklas, 849 S.W.2d 716 (Mo.App.W.D. 1993). According to the Respondent's order, the filing of exceptions eliminates the owners' ability to have heritage value considered. It follows then, that an owner who wishes to file exceptions would only have thirty days to have the court add heritage value. Therefore, according to the premise of Respondent's Order, when exceptions are filed, the court loses the ability to make a heritage value determination. An owner's right to heritage value technically cannot be determined prior to the commissioners award because the court is to "apply" and "determine" heritage value after the filing of the commissioners report. §523.061. There is no indication that the legislature intended to give property owners a thirty day clock in which they may exercise their right to this important new aspect of just compensation.

An owner may not even have thirty days to determine its right to heritage value. The Respondent ruled that the Motion would not be considered because exceptions were filed. Owners are not the only party who may file exceptions. Condemnors, such as the City here, may and frequently do file exceptions as well. As a result, following the reasoning in Respondent's Order, a condemnor can cut a property owners' right to have heritage value added to a commissioners award *immediately* by filing its own exceptions. Surely, the legislature would not intend to place such control over heritage value in the hands of the party responsible for its payment.

Thus, taking all of Chapter 523 together, and placing §523.061 in its proper context with these other statutory provisions, there is no just reason to delay the determination of heritage value because exceptions have been filed. Upon the request of the Relators, the trial court was required to “apply the provisions of section 523.039 and shall determine whether a homestead taking has occurred” then to “increase the Commissioners’ Award to provide for the additional compensation due where ... heritage value applies, in accordance with the just compensation provision of §523.039 R.S.Mo. (2007).” Later, if a jury verdict is rendered, that verdict must also be adjusted to provide for heritage value. At this stage of litigation, it is unknown whether a jury verdict will actually occur. The possibility of a future jury verdict does not excuse the City of Independence from paying full compensation for the property at this time. See, State ex rel. State Highway Commission v. Mahon, 350 S.W.2d 111, 114 (Mo.App.1961)(The landowner may withdraw the amount of the commissioners' award when it has been deposited in the registry of the court, even though exceptions are pending.)

The City of Independence, in this case, as in any other condemnation case, had the option to *not pay the commissioner’s award at all*, and forego its right to possess the property. See, State ex rel. Missouri Highway & Transportation Commission v. Turner, 857 S.W.2d 293 (Mo.App.W.D. 1993). However, possession is conditioned on a timely payment of just compensation. Here, the City already has possession of the property and has lost the option of not paying the commissioners’ award. By taking possession of the Property, Independence bound itself to pay full compensation, which includes the

heritage value.

D. Conduct of future proceedings on remand.

Below, the City raised two defenses in support of its position that the Relators were not entitled to a determination of heritage value. Each of these defenses are based on the City's restrictive reading of the provisions of HB 1944. It is anticipated that, in the event the writ is made peremptory, the City may again raise these defenses against paying heritage value. The first is based on a conflict in HB 1944 that relates to who determines that the property has been owned by the White Family for more than fifty (50) years. Relators' position is that the trial court makes that determination. However, the City has stated its view that it is the commissioners who make such a finding. The second issue relates to whether, as here, heritage value applies to partial takings. Relators' position is that the plain language of the statute indicates that it does apply in partial takings, whereas counsel for the City contends that it applies in very limited situations. This is the Court's first opportunity to consider the heritage value provisions of HB 1944. The conflicts contained in the heritage value statutes are readily resolved from the language of the statutes without the need to resort to further expansion of the record below. In the interest of judicial economy and to avoid future appellate proceedings, the Relators request that the Court address these issues to guide the trial court on remand.

1. It is for the circuit judge to "apply" and "determine" heritage value

Before a property owner is entitled to heritage value, it must first show that the property being taken has been owned by its family for over fifty (50) years. There is a

conflict between two provisions of the new eminent domain laws as to who makes that determination. §523.061 plainly provides that the circuit judge shall “apply” and “determine” heritage value. Conversely, §523.039 states that the property owner shall have the burden of proving the fifty year family ownership requirement to the commissioners or jury. The burden of proof language in §523.039 seemingly undermines and conflicts with the duty and authority assigned to the circuit judge in §523.061 to “apply” and “determine” heritage value.

This Court has addressed this conflict when it approved the revisions to the Missouri Approved Instructions 9.01 and 9.02 (Appendix 30, 33) which are scheduled to become effective July 1, 2008. (Supreme Court of Missouri, *en banc*, Order of April 15, 2008, Effective July 1, 2008, *IN RE: REVISIONS TO MAI-CIVIL*). The Committee Comment to these instructions, approved by the Court, state, “Application of “heritage value” and “homestead taking” provisions of §523.001 (2) and (3), §523.039, and §523.061, RSMo, is a judicial function, not a jury function.” It follows that the same provisions, as they apply to commissioners, are a judicial function at this stage. The commissioners are to continue in their traditional role of assessing “fair market value” without regard to any heritage value issues.

Another indicator of this statutory conflict is found under existing §523.040 which prescribes the parameters of the duties of the commissioners. Under this Section, the commissioners’ obligations are restricted to making a finding of fair market value as defined under 523.001(1). The commissioners are not granted authority to decide any

part of heritage value. This is clearly inconsistent with the final sentence of Section 523.039 dealing with the property owner's burden of proof to the commissioners to prove the heritage value's fifty (50) year family ownership requirement.

When interpreting statutes, the paramount goal is to determine the legislative intent. Missouri Rural Elec. Co-op v. City of Hannibal, 938 S.W.2d 903, 905 (Mo.banc 1997). When there are conflicting provisions, courts are guided by various rules of construction ranging from adopting the "plain meaning of the statute," "avoiding absurd results," making the statutory provisions "harmonious," giving deference to the more "specific provision" or the "last provision passed," or "referencing all the applicable sections to each other," to name just a few. With one exception, all sections of Chapter 523 indicate that the circuit judge is to have authority to "apply" and "determine" the heritage value and that the commissioners and jury are to have no role. This would strongly indicate that the intent of the legislature is to exclude the commissioners and jury altogether from the heritage value process, and that the burden of proof provision in §523.039 cannot be made harmonious with the existing and new sections of Chapter 523.

If the City's interpretation is adopted, one result will be substantial confusion to the jury and the commissioners. §523.039 states that the property owner shall have the burden of proving to the commissioners or jury the fifty (50) year family ownership requirement. If such evidence was presented, the commissioners, technically speaking, and the jury certainly, would not know why they are making the determination of the fifty (50) year family requirement. Therefore, it would only create confusion and speculation

among the jury and the commissioners. It would, in all likelihood, introduce the concept of the 50% increase to be paid for heritage value. The statute clearly does not intend for the commissioners or jury to have a role in increasing an award or verdict, since that is expressly delegated to the trial court. Thus, any such evidence to the commissioners or jury would be prejudicial to the property owner.

Finally, the concept that the commissioners or the jury make the determination of heritage value appears to be a concept carried over from the earlier drafts of the statute when a heritage value increase was to be given at a rate of 1% per year for every year a property owner owned his property. Perfected H.B.1944 (93rd General Assembly, 2nd Regulation Session, 2006), <http://www.house.mo.gov/billtracking/bills061/billpdf/perf/HB1944P.PDF> and the Senate Committee Substitute <http://www.house.state.mo.us/content.aspx?info=/bills061/biltxt/senate/4100S.10C.htm> (last visited on June 8, 2008). Under these drafts, every owner was to be entitled to some form of heritage value on top of the fair market value. With the final draft, however, the legislature made a dramatic change by limiting heritage value only to properties that were owned for more than fifty (50) years and adding the section that is now §523.061 which commands that the circuit judge is to have the duty of applying heritage value. Thus, the burden of proof provision appears to be no more than an unintended carryover from the earlier attempts to base heritage value on a 1% per year basis, with the commissioners and jury making the determination. Under the final version, such powers were given to the circuit court. The burden of proof provision to the commissioners and jury is superfluous, leads to

confusion and is inconsistent with the more specific statutory requirements of §523.061.

2. Heritage Value applies in partial takings.

Another argument made by the City before the trial court was that in partial taking cases, heritage value only applies when the owner can no longer utilize its *remaining* property in the same manner as it was currently being utilized on the day of the taking. In general, the City's spin on heritage value flies in the face of that primary guiding principle in interpreting eminent domain laws: that they are to be construed in the favor of property owners and against condemners. See, Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284, 292-293 (Mo.App. 1979); State ex rel. Missouri Water Co. v. Bostian, 272 S.W.2d 857, 861 (Mo.App. 1954); Osage Water Company v. Miller County Water Authority, Inc., 950 S.W.2d 569, 572 (Mo.App. S.D. 1997). As will be seen below, the City advocates a reading of heritage value in a manner that not only restricts its application, but in the case of Relators, totally denies them payment of heritage value.

The City's argument below is based on language used in the description of "homestead value", that provides "...any taking of the owner's property within three hundred feet of the owners primary place of residence that prevents the owner from utilizing the property in substantially the same manner as it is currently being utilized." §523.001(3) Thus, the homestead language expressly provides that it shall apply in a partial taking that does not physically take a dwelling only when the remaining property cannot be used in substantially the same manner as before. In other words, homestead

value applies to those properties *used* by the owners as their residence. If a taking occurs that does not physically take the residence, homestead value will not apply unless the house can no longer be *used* as a residence. The the phrase “substantially the same manner” is found also in the heritage value section. The City wishes to infer that the test for heritage value must also depend on the ability of the owner to use the remaining property as before. The City’s argument fails because homestead value in partial takings is expressly dependent on ability to use the remaining property as a residence. Heritage value, on the other hand, contains no such language.

Heritage value, applies to “any taking that prevents the owner from utilizing property in substantially the same manner as it was currently being utilized...” §523.039(3). That section focuses on “property” subject to a “taking,” not the remaining property that has not been taken. If the legislature had intended to make heritage value dependent on the ability to use the remaining property in partial takings, it would have expressly done so as was the case with homestead value. The obvious intent of the legislature was to establish additional compensation in recognition of the value of property long held by families. Whether remaining property can or cannot be used as before does not detract from the fact of ownership by the same family for more than fifty years.

As the statutory language of the heritage value is closely examined, it becomes readily apparent that the City’s reading of the heritage value statute is erroneous. First, as indicated above, the requirement that the remaining property be usable is limited only

to homestead takings. Heritage value section specifically looks to the usability of the condemned property. It states: “For **condemnations of property** that result in any taking that prevents the owner from utilizing property in substantially the same manner...” (§523.039(3)(emphasis added). Second, heritage value is based simply on the fact of ownership of the property over a long period of time. Homestead is focused on *how a property is utilized* (as a residence) regardless of length of ownership. A requirement that the remaining property can still be used as before makes sense in determining homestead value, but the same cannot be said in heritage value cases which have nothing to do with how the property was being used before the taking.

The statutory rule of abiding by the plain and ordinary meaning of the statute supports Relators’ position the usability test applies to the property taken, not the remaining property, in a partial taking case. State ex rel. Maryland Heights Fire Protection District v. Campbell, 736 S.W.2d 383, 387 (Mo.banc 1987)(“It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible.”); Maudlin v. Lang, 867 S.W.2d 514, 516 (Mo.banc 1986)(Legislative intent should be determined by considering the plain and ordinary meaning of the terms in the statute.) The legislation creating heritage value does not distinguish between the property taken and the property remaining. The homestead value section expressly provides for a test in partial taking situations that expressly requires a determination is the remaining property can be used for its original purpose. The heritage value statutory language is clear that usability applies to the property taken, not to the

property remaining:

1. Heritage value is “**For condemnations of property** that result in any taking that prevents the owner from utilizing property in substantially the same manner...” (§523.039(3)).
2. Heritage value is “the value assigned to **any real property** ... that has been owned within the same family for fifty or more years....” (§523.001(2)).
3. Heritage value is to be awarded as “just compensation for **condemned property...**” (§523.039).

If the legislature wanted the same type of determination for heritage value, it was capable of doing so, but it did not.

The distinction being drawn in the “utilization test” focuses on the nature of the rights taken for heritage value, not the impact on the ability to use any remaining property as with homestead value. Thus, in addition to the requirement that property be in the name of the same family for fifty (50) years or more, heritage value also requires that the taking deprives the owners of the use of the condemned property. The usability provision is relevant to cases involving subterranean easements such as a water or sewer easements. In such cases, it is common that the property owner may be able to use the condemned property after the taking in substantially the same manner as before the taking. In the case before this court, we are dealing with a fee simple taking whereby all rights of the prior property owners are being acquired by the condemnor. (See Plaintiff’s Petition for Condemnation, Paragraph 2 seeking “fee simple title, together with all appurtenances

thereunto belonging along, over, under, upon, across and through the parcels of land hereinafter described in this petition”) Here, the fee simple taking deprives the owners of *all* uses of the property. Consequently, heritage value applies in this case.

Finally, the interpretation advocated by the City can lead to unjust and absurd results in partial taking cases. This can best be shown by way of example: assume the condemnation in fee simple of forty-five (45) acres from a fifty (50) acre farm which has been in the same family for 100 years. Under the City’s interpretation, the fact that the farmer can still farm the remaining five (5) acres would deny him heritage value. Even though the farmer has lost most of his property, he is, according to the City, not to be entitled to heritage value under a statute which was designed to provide additional protection and value for long-term owners. Such absurd results, contrary to the clear purpose of such legislation, are to be avoided in statutory construction. State ex rel. Maryland Heights Fire Protection District v. Campbell, 736 S.W.2d 383, 387 (Mo.banc 1987). It is more reasonable to find that the legislative intent was to protect the farmer by the payment of heritage value for the lost acreage.

CONCLUSION

Absent intervention by this Court, Relators' right to just compensation will continue to be denied. The current situation, where the City of Independence has been granted the legal right to take Relators' property, but has not been required to pay "just compensation" as defined by statute, is repugnant to the law. The Relators cannot take their property back. They cannot bring an independent action for the heritage value of their property. Relators simply have no other form or legal redress to ensure that the plain meaning and intent of the Missouri eminent domain laws are carried out.

Wherefore, for the reasons stated herein, Relators respectfully pray that this Court make its alternative writ peremptory.

RESPECTFULLY SUBMITTED:

BY: _____

Robert Denlow (#30005)
Paul G. Henry (#37922)
7777 Bonhomme, Suite 1910
Clayton, MO 63105
(314) 725-5151
Fax: (314) 725-5161
Attorneys for Relators

CERTIFICATE OF COMPLIANCE PURSUANT

TO MISSOURI SUPREME COURT RULE 84.06(c) and (g) and LOCAL RULE 361

COMES NOW Robert Denlow, counsel for Relators, and for his Certificate of Compliance Pursuant to Missouri Supreme Court Rule 84.06(c) and (g) states as follows:

1. To the best of my knowledge, information and belief, Relators' claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Relators, were formed after reasonable inquiry under the circumstances. Moreover:

- a. Relators' claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Brief of Relators, are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- b. Relators' claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Brief of Relators, are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- c. The allegations and other factual contentions in the Brief of Relators have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

- d. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
2. The Brief of Relators complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).
3. The Brief of Relators approximately 6,436 words.
4. Relators contemporaneously herewith file a CD-ROM disk that contains the Brief of Relators.
5. The Brief of Relators was created using Corel WordPerfect ver. X3.
6. Relators have scanned the enclosed CD-ROM disk with Norton AntiVirus Corporate Edition with the most recently available anti-virus definitions table and said CD-ROM disk is virus-free.

DENLOW & HENRY

BY: _____
Robert Denlow (#30005)
Paul G. Henry (#37922)
7777 Bonhomme, Suite 1910
Clayton, MO 63105
(314) 725-5151
Fax: (314) 725-5161
Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief and appendix, and one CD-ROM, scanned to the presence of electronic viruses, containing an electronic copy of the brief, were mailed first class, postage prepaid, this ____ day of June, 2008 to:

Collin A. Dietiker
Assistant City Counselor
City of Independence, Missouri
111 East Maple Street
P.O. Box 1019
Independence, MO 64051-0519
Co-Counsel for Plaintiff-Respondent, City of Independence, Missouri

Steven E. Mauer
Jeremiah J. Morgan
Michelle C. Campbell
Bryan Cave LLP
3500 One Kansas City Place
1200 Main Street
Kansas City, MO 64105
Co-Counsel for Plaintiff-Respondent, City of Independence, Missouri

and

The Honorable Marco Roldan
Circuit Court of Jackson County at Independence
16th Judicial Circuit
Independence Courthouse Annex, Suite 232
Independence. MO 64050
Respondent