IN THE SUPREME COURT OF MISSOURI

Appeal Number SC95064

AVERY CONTRACTING LLC,

Appellant-Plaintiff,

v.

RICHARD NIEHAUS, LISA J. NIEHAUS, ALICIA NIEHAUS, CREEKSTONE HOMEOWNERS ASSOCIATION, and MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION,

Respondents-Defendants.

On Appeal from the Circuit Court of Jefferson County, Missouri,
The Honorable Nathan B. Stewart, Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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FACTS ALLEGED IN APPELLANT'S PETITION

Apparently, all of the Respondents are dissatisfied with the Statement of Facts contained in the Appellant's Substitute Brief, as all of the Respondents have included a Statement of Facts in their respective Substitute Briefs. *See* Rule 84.04(f); *Niehaus/Creekstone Respondents' Substitute Brief* at 1-4; *MHTC Respondent's Substitute Brief* at 8-11.

The Respondents chose to file motions to dismiss the Appellant's Petition rather than filing an answer or other responsive pleading containing affirmative or other defenses or allegations the Respondents may wish to assert. The standard of review for a motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition; it assumes that all of plaintiff's averments are true and liberally grants to plaintiff all reasonable inferences therefrom. *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. Banc 1993).

The Statements of Facts in all of the Respondents' Substitute Briefs refer to matters that are not alleged in the Appellant's Petition, and said Statements of Facts are inconsistent with the allegations in the Petition in some instances. For example, the MHTC states: "Specifically, MHTC acquired all abutter's rights of direct access to the thruway of Route M from the Raebel Trust property and other rights for **$494,340.** (L.F. 8, 30)." *MHTC Respondent's Substitute Brief* at 8 (emphasis in original). The reference to page 30 in the Legal File is to a "fact" alleged in the MHTC Motion to Dismiss, not Appellant's Petition.

Page 8 of the Legal File is a reference to the Appellant's Petition, which alleges that the Commissioner's Report in the Condemnation Case is ambiguous, not that the MHTC acquired all abutter's rights of access for $494,340. LF at 8, 22-23. The MHTC states: "No allegation was made in the petition as to who owns this portion of Creekstone Dr., the nature of the access limitations that MHTC placed on Lot , or whether Plaintiff was an abutter of Lot 3." *MHTC Respondents' Substitute Brief* at 9, 31-33. Paragraph 17 of the Appellant's Petition quotes the legal description of the 1990 General Warranty Deed vesting the MHTC with title to Lots 2 and 3 of the Creekstone Subdivision. LF at 9. Despite the Petition's quotation from the deed of conveyance to the MHTC stating that the MHTC owns Lot 2 of Creekstone, L.F. at 9, the MHTC states that the "Niehaus property" consists of Lots 1 and 2 of Creekstone. *MHTC Respondent's Substitute Brief* at 30.

The MHTC goes into some detail about a meeting that occurred between Appellant and the MHTC that was "not documented in the Legal File." *MHTC Respondents' Substitute Brief* at 9, 10. Further, the MHTC alleges that "the Circuit Court of Jefferson County in a prior condemnation action regarding this subject property had previously determined that Plaintiff's direct access to Route M was prohibited **and** limited." *MHTC Respondents' Substitute Brief* at 10 (emphasis added). Such is not consistent with the allegations of the Appellant's Petition. LF at 8.

The Niehaus/Creekstone Respondents state that the Niehaus Respondents own a portion of Lot 3 of Creekstone. *Niehaus/Creekstone Respondents' Substitute Brief* at 2, 3. The Appellant's Petition alleges that the MHTC conveyed parts of Lots 14 and 15 of Creekstone to Respondent Richard Niehaus. LF at 10-11. The Appellant's Petition alleges that the MHTC owns Lot 3 of Creekstone, subject to the provisions in the 1990 General Warranty Deed granting the MHTC title, by quoting from that General Warranty Deed. LF at 9. The Niehaus/Creekstone Respondents also refer to a meeting of the Appellant and the MHTC that is not described in any pleading filed in the trial court. *Niehaus/Creekstone Respondents' Brief* at 2-3. The Niehaus/Creekstone Respondents allege: "Creekstone Drive would have to be widened to forty feet along its entirety to accommodate the increased traffic flow from Appellant's Property. L.F. 15." *Niehaus/Creekstone Respondents' Substitute Brief* at 3. The plat of Creekstone is not a part of the Record on Appeal to establish the width of Creekstone Drive easement, nor is the width of the easement of Creekstone Drive alleged in Appellant's Petition. It is not unusual for a road easement to be wider than the "as built" road constructed within the easement. Nothing in the record establishes that the existing easement of Creekstone Drive is less than forty feet wide.

The Eastern District Opinion is also inconsistent with the facts alleged in Appellant's Petition. For example, the Eastern District Opinion states: "Avery filed a petition in the trial court seeking the creation of a private roadway through neighboring

property in order to provide access from a landlocked parcel owned by Avery to a public road, Route M." Slip Op. at 1. The private road petitioned for in Plaintiff's Petition sought to connect the 50 Acres, More or Less to Moss Hollow Road, believed to be a county road, not Route M. LF at 14-15. See page 9 of Appellant's Motion for Modification and/or Rehearing and Application for Transfer filed in the Missouri Court of Appeals, Eastern District.

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT HAS FAILED TO ALLEGE THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE 50 ACRES, MORE OR LESS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE THERE IS NO LONGER A REQUIREMENT OF PLEADING THAT NO PUBLIC ROAD PASSES THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL, IN THAT SECTION 228.340, RSMO 1986, HAS BEEN REPEALED, AND SECTION 228.342, REMO, PROVIDES, IN PART, THAT A PRIVATE ROAD MAY BE

ESTABLISHED IN FAVOR OF ANY OWNER OF REAL PROPERTY FOR WHICH THERE IS NO ACCESS, AND SECTION 228.342, RSMO, CONTAINS NO REQUIREMENT THAT NO PUBLIC ROAD PASS THROUGH OR ALONGSIDE THE LANDLOCKED PARCEL AS WAS THE CASE UNDER REPEALED SECTION 228.340, RSMO 1986.

The principal argument presented by Appellant under this Point is as follows:

(I) MAJOR PREMISE: Under generally accepted canons of statutory construction, the General Assembly of Missouri is presumed to know the existing law, and it is presumed that amendments to statutes have some substantive effect and are not meaningless acts. *State v. Liberty,* 370 S.W.3d 537, 552 (Mo. Banc 2012); *O'Neil v. Missouri,* 662 S.W.2d 260, 262 (Mo. Banc 1983); *Sermchief v. Gonzales,* 660 S.W.2d 683, 689 (Mo. Banc 1983); *City of Willow Springs v. Missouri State Librarian,* 596 S.W.2d 441, 444 (Mo. Banc 1980); *Kilbane v. Department of Revenue,* 544 S.W.3d 9, 11 (Mo. Banc 1976).

(II) MINOR PREMISE: By repealing the language of Section 228.340, RSMo 1986, stating: "that no public road passes through or alongside said tract or lot of land" and adopting in lieu thereof the words, "for which there is no access, or sufficiently wide access, from such property to a public road", it is presumed that the 1991 and 1993 legislation adopting and

amending Section 228.342, RSMo, was intended to substantively change the law.

(III) CONCLUSION: The language of repealed Section 228.340, RSMo 1986, quoted above no longer states a required element of a cause of action for a statutory way of necessity. *See Appellant's Substitute Brief,* at 46-48.

The Niehaus/Creekstone Respondents (as well as the Eastern District Opinion) completely ignore the principal argument just stated. The Niehaus/Creekstone Respondents (as well as the Eastern District Opinion) ignore the fact that the General Assembly repealed Section 228.340, RSMo 1986, requiring "that no public road passes through or alongside said tract or lot of land", and the Niehaus/Creekstone Respondents (as well as the Eastern District Opinion) continue to apply that language as a requirement for a cause of action for a statutory way of necessity under Section 228.342, RSMo, even though Section 228.342, RSMo, has never contained that language. *See Niehaus/Creekstone Respondents' Substitute Brief,* at 10-12.

By failing to address the principal argument under this Point (stated above) through the absence of any substantive discussion of the canons of statutory construction and by failing to give any reason why the General Assembly would amend the requirements for a statutory way of necessity without intending to substantively change those requirements in their Substitute Brief, the Niehaus/Creekstone Respondents leave the reasoning of the principal argument above intact and unchallenged.

Further, contrary to what is stated in the Niehaus/Creekstone Respondents' Substitute Brief, at 14-15, 17, nothing in the record before this Court shows that Appellant has or has admitted that Appellant has a presently existing legal right of access to the 50 Acres, More or Less, from a public road.

Also, there is no legal requirement that Appellant seek access from the MHTC before bringing an action under Section 228.342, RSMo. *Hill v. Kennoy, Inc.,* 522 S.W.2d 775, 777-778 (Mo. Banc 1975); *Moss Springs Cemetery Association v. Johannes,* 970 S.W.2d 372, 376 (Mo. App., S.D. 1998) ("At best, Appellant has the right to seek access from the Highway Department and again from Respondents. The right to ask is not the equivalent to the right to enforce."); *Spier v. Brewer,* 958 S.W.2d 83, 87 (Mo. App., S.D. 1997) ("An alternate route which is merely permissive does not provide any legally enforceable right to ingress and egress."). Anything to the contrary stated in the Niehaus/Creekstone Respondents' Substitute Brief is incorrect. *Niehaus/Creekstone Respondents' Brief* at 16-20.

II.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA,* AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS

ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE NO COUNTERCLAIM FOR A PRIVATE ROAD COULD HAVE BEEN INTERPOSED IN THE PRIOR CONDEMNATION CASE, IN THAT CONDEMNATION ACTIONS ARE *SUI GENERIS* AND NO COUNTERCLAIMS MAY BE INTERPOSED IN CONDEMNATION ACTIONS.

The Niehaus/Creekstone Respondents argue that access rights to the 50 Acres, More or Less, are *res judicata* even though said Respondents appear to concede that no counterclaim asserting any rights of access could have been brought in the Condemnation Case, citing *Gardner v. City of Cape Girardeau,* 880 S.W.2d 652 (Mo. App., E.D. 1994). *Niehaus/Creekstone Respondents' Substitute Brief,* at 20-22.

Gardner does not appear to be consistent with *Clay County Realty Company v. City of Gladstone,* 254 S.W.3d 859 (Mo. Banc 2008) and should not be followed.

Whether or not *Clay County Realty Company* overruled the procedural holding of *State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner,* 626 S.W.2d 373 (Mo. Banc 1982) barring the filing of counterclaims in condemnation cases, it is clear that at the time of the Condemnation Case mentioned in Appellant's Petition, the *Washington University* case was controlling precedent. No counterclaim for a statutory way of necessity could have or should have been filed in the Condemnation Case.

Even if damages for lack of access were finally determined in the Condemnation Case

because the predecessors in title of Appellant withdrew the condemnation award paid into the court, *see Niehaus/Creekstone Respondents' Substitute Brief* at 21-22, that does not preclude a statutory claim for a way of necessity under Section 228.342, RSMo. In *State ex rel. Missouri Highway and Transportation Commission v. Davis*, 849 S.W. 704 (Mo. App., E.D. 1993), the trial court admitted evidence in the form of expert testimony concerning the availability and cost of a statutory way of necessity under Section 228.340, RSMo 1986 (repealed), in assessing damages for the taking in *Davis*. The availability of a statutory way of necessity under Section 228.340, RSMo 1986 (repealed), after the condemnation case was concluded was a necessary prerequisite to finding that testimony concerning the availability and cost of relief under Section 228.340, RSMo 1986 (repealed) was probative of the damages of the taking in *Davis*.

III.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT APPELLANT'S CLAIMS ARE BARRED BY A STATUTE OF LIMITATIONS, AS ARGUED IN RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE A WAY OF NECESSITY IS AN

APPURTENANT RIGHT THAT RUNS WITH THE LAND AND DOES NOT ATTACH TO A PARTICULAR OWNER AND CANNOT BE EXTINGUISHED SO LONG AS THE WAY OF NECESSITY CONTINUES TO EXIST, IN THAT UNDER THE CONTINUING OR REPEATED WRONG RULE, EACH CONTINUATION OR REPETITION OF WRONGFUL CONDUCT IS CONSIDERED A SEPARATE CAUSE OF ACTION, SO THAT SO LONG AS THE STRICT NECESSITY REQUIRED BY SECTION 228.342, RSMO, EXISTS, SUCH STRICT NECESSITY IS OF AN APPURTENANT AND CONTINUING NATURE, WHICH MEANS THAT FOR PRACTICAL PURPOSES, A STATUTE OF LIMITATIONS CANNOT RUN SO LONG AS THE STRICT NECESSITY CONTINUES TO EXIST.

The Niehaus/Creekstone Respondents argue that "self-inflicted 'necessity' arose in 1995 upon the entry of the condemnation judgment in Raebel Condemnation." *Niehaus/Creekstone Respondents' Substitute Brief,* at 23.

Short v. Southern Union Company, 372 S.W.3d 520 (Mo. App., W.D. 2012) governs this Point. There is no authority for a self-inflicted harm exception to the rule in *Short.*

IV.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS NIEHAUS AND CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT COUNT I OF APPELLANT'S PETITION IS NOT RIPE, AS ARGUED IN RESPONDENTS NIEHAUS AND

CREEKSTONE HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS APPELLANT'S PETITION AND SUPPORTING SUGGESTIONS, BECAUSE THE ISSUES PRESENTED IN COUNT I OF APPELLANT'S PETITION ARE APPROPRIATE FOR JUDICIAL DETERMINATION, THE HARDSHIP ON APPELLANT CAUSED BY A DISMISSAL OF COUNT I OF APPELLANT'S PETITION IS OBVIOUS, IMMINENT AND CERTAIN, AND RULE 55.06(b) PROVIDES THAT A CLAIM COGNIZABLE ONLY AFTER ANOTHER CLAIM HAS BEEN PROSECUTED TO A CONCLUSION MAY BE JOINED WITH THE PRECEDENT ACTION IN A SINGLE ACTION WITH RELIEF GRANTED IN ACCORDANCE WITH THE SUBSTANTIVE RIGHTS OF THE PARTIES.

There is no legal requirement that Appellant seek access from the MHTC before bringing an action under Section 228.342, RSMo. *Hill,* 522 S.W.2d at 777-778; *Moss Springs Cemetery Association,* 970 S.W.2d at 376 ("At best, Appellant has the right to seek access from the Highway Department and again from Respondents. The right to ask is not the equivalent to the right to enforce."); *Spier v. Brewer,* 958 S.W.2d 83, 87 (Mo. App., S.D. 1997) ("An alternate route which is merely permissive does not provide any legally enforceable right to ingress and egress."). Counts I and II of Appellant's Petition present claims for alternative roads to the 50 Acres, More or Less, from a public road, Moss Hollow Road. Those claims can be joined under Rule 55.06. The argument of the

Niehaus/Creekstone Respondents to the contrary is without merit. *See Niehaus/Creekstone Respondents' Substitute Brief,* at 16-20 (Point I) and 24-25 (Point IV).

V.

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE MHTC IS NOT SUBJECT TO THE PROVISIONS OF CHAPTER 228, RSMO, AS ARGUED IN RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION, BECAUSE RESPONDENT MHTC IS SUBJECT TO THE PROVISIONS OF ARTICLE I, SECTION 28 OF THE MISSOURI CONSTITUTION CONCERNING THE RIGHT OF EMINENT DOMAIN FOR PRIVATE WAYS OF NECESSITY, AS IMPLEMENTED IN SECTIONS 228.342 TO 228.368, RSMO, IN THAT THE APPLICABLE EXEMPTION IN SECTION 228.341, RSMO, ONLY APPLIES TO ROADS OWNED BY THE MHTC, NECESSARILY IMPLYING THAT PROPERTY OF THE MHTC THAT IS NOT A ROAD OWNED BY THE MHTC IS SUBJECT TO SECTIONS 228.342 TO 228.368, RSMO, AND ANY PART OF CREEKSTONE DRIVE OWNED BY THE MHTC WOULD BE A PUBLIC ROAD.

Article I, Section 28 of the Missouri Constitution states, in part:

> In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we

declare:

* * *

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

(Emphasis added.)

Article I, Section 28 of the Missouri Constitution is not self-enforcing with respect to ways of necessity. The express terms of that constitutional provision provide that the right to a way of necessity can only be enforced "in the manner prescribed by law". In *Rippeto v. Thompson,* 216 S.W.2d 505, 507 (Mo. 1949), this Court found that when there were no statutes implementing Mo. Const. art. I, Section 28, there was no right to a way of necessity under that constitutional provision.

The MTHC (as well as the Eastern District Opinion) interpret Mo. Const. art. I, Section 28 as only authorizing the General Assembly to implement ways of necessity through the taking of private property for construction of private ways of necessity and not through a combination of the taking of both private and public property for construction of private ways of necessity. *MTHC Substitute Respondents' Brief,* at 20-21. This is a very narrow view of what the General Assembly may "prescribe by law" under Mo. Const. art. I, Section 28.

In *Franklin County, ex rel. Parks v. Franklin County Commission,* 269 S.W.3d 26, 31 (Mo. Banc 2008), this Court stated:

> Taxpayers are incorrect in suggesting that the legislature has no authority except that expressly granted by the Constitution. "A State Constitution is not a grant of power as is the Constitution of the United States but, as to legislative power, it is only a limitation; and, therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute." *Kansas City v. Fishman*, 241 S.W.2d 377, 380 (Mo. banc 1951).
>
> In the present case, not only is there no constitutional provision limiting the legislature's ability to allow revenue increases that do not exceed the increase in the general price index, the Hancock Amendment provides that "the general assembly may enact laws implementing [the provisions of article X, sections 16-23] which are not inconsistent with the purposes of said sections V.A.M.S. Const. Art. 10, § 22(a)." Mo. Const. art. X, sec. 24(b).

Compare Tichenor v. Missouri State Lottery Commission, 742 S.W.2d 170 (Mo. Banc 1988) (where this Court construed the authority of the General Assembly to implement a non-self-

executing constitutional provision authorizing the Missouri State Lottery to include the power to authorize the Missouri State Lottery to participate in multi-state lotteries).

Although Mo. Const. art. I, Section 28 limits the taking of private property for private use, that constitutional limitation should not be read as limiting the authority of the General Assembly to implement Mo. Const. art. I, Section 28 only through the authorization of the taking of private property for the construction of private ways of necessity if the conditions set forth in Sections 228.341 to 228.374, RSMo, are met. The General Assembly has plenary authority to authorize the taking of public property for private ways of necessity unless the legislative authority of the General Assembly is limited by constitutional authority. *See Franklin County*, 269 S.W.3d at 31. Article I, Section 28 of the Missouri Constitution contains no limitations on the taking of public property for private ways of necessity. Further, the Constitution authorizes the General Assembly to implement Mo. Const. art. I, Section 28 "in the manner prescribed by law", which the General Assembly has done in part by enacting Section 228.341, RSMo, stating, in part:

> A private road does not include any road owned by the United States or any agency or instrumentality thereof, or the state of Missouri, or any county, municipality, political subdivision, special district, instrumentality, or agency of the state of Missouri.

If all of the property of the MHTC were already exempt from Section 228.342, RSMo,

by operation of law under *City of Edina v. School District of City of Edina*, 267 S.W. 112, 113 (Mo. Banc 1924); *Hayes v. City of Kansas City,* 362 Mo. 368, 241 S.W.2d 888, 892 (Mo. 1951); *Carpenter v. King,* 679 S.W.2d 866, 868 (Mo. Banc 1984); *Village of Big Lake v. BNSF Railway Company, Inc.,* 382 S.W.3d 125, 131 (Mo. App., W.D. 2012), and similar cases, then the express "governmental roads" exemption in Section 228.341, RSMo, would be totally superfluous. This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language. *Bateman v. Rinehart,* 391 S.W.3d 441, 446 (Mo. Banc 2013). This Court must presume the legislature knew the state of the law at the time of the enactment of Section 228.341, RSMo. *Smith v. Coffey,* 37 S.W.3d 797, 799 (Mo banc 2001). By exempting "roads" owned by certain governmental entities, Section 228.341, RSMo, necessarily implies that other governmental property that is not a road owned by the enumerated governmental entities may be included as part of a "private road" created under Sections 228.341 to 228.374, RSMo, if the other requirements of those statutes are met. The implementation of Mo. Const. art. I, Section 28 in Sections 228.341 to 228.374, RSMo, by the General Assembly through the authorization of the taking of public property for private ways of necessity is consistent with the purpose of Mo. Const. art. I, Section 28—which is to provide access so that real estate is not landlocked in Missouri. The Substitute Respondents' Brief of the MHTC does not refute the above-referenced

arguments and leaves those arguments intact and unchallenged. Footnote 1

Nor does the Substitute Respondents' Brief of the MHTC refute the following argument of Appellant with respect to the application of Section 227.090, RSMo, as interpreted in *Sheedy v. Missouri Highways and Transportation Commission,* 180 S.W.3d 66 (Mo. App., S.D. 2005) and possibly *Harrison v. State Highways and Transportation Commission,* 732 S.W.2d 214 (Mo. App., S.D. 1987):

(I) MAJOR PREMISE: Statutes relating to the same subject matter are *in pari materia* and should be construed harmoniously together, if possible. When it is impossible to harmonize two conflicting statutory provisions, the chronologically later and more specific statute will prevail over an earlier more general statute, and the later specific statute will be regarded as an exception to or qualification of the earlier general statute. *South Metropolitan Fire Protection District v. City of Lee's Summit, Missouri,* 278 S.W.3d 659, 666 (Mo. Banc 2009); *Romans v. Director of Revenue,*

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1 The MHTC Respondent's Substitute Brief argues that Sections 228.341 to 228.374, RSMo, do not apply to the MHTC because the MHTC is not specifically mentioned in those statutes. *MHTC Respondent's Brief* at 22-24. The MHTC ignores the fact that the MHTC is "specifically" mentioned in Section 228.341, RSMo, and only the "roads" of the MHTC are exempted by the language of Section 228.341. RSMo.

783 S.W.3d 894, 896 (Mo. Banc 1990); *State ex rel. Fort Zumwalt School District v. Dickherber,* 576 S.W.2d 532, 536-537 (Mo. Banc 1979); *Gasconade County v. Gordon,* 145 S.W. 1160, 1163 (Mo. 1912); *Anderson v. Ken Kauffman & Sons Excavating, LLC,* 248 S.W.3d 101, 107-108 (Mo. App., W.D. 2008).

(II) MINOR PREMISE: Sections 228.341 to 228.374, RSMo, and Section 227.090, RSMo, relate to roads and are *in pari materia*. Sections 228.341 to 228.374, RSMo, and Section 227.090, RSMo, can be harmonized if Sections 228.341 to 228.374, RSMo, are construed to relate to the construction of roads within the meaning of Section 227.090, RSMo. But even if Sections 228.341 to 228.374, RSMo, are not found to relate to the construction of roads within the meaning of Section 227.090, RSMo, and Sections 228.341 to 228.374, RSMo, and Section 227.090, RSMo, are found to be in irreconcilable conflict and repugnant to each other, then the later enacted and more specific statute, Section 228.341, RSMo, should prevail over the more general and earlier statute, Section 227.090, RSMo. Section 228.341, RSMo, should be read as an exception to or qualification of the earlier statute, Section 227.090, RSMo.

(III) CONCLUSION: Section 228.341, RSMo, the legislation making real estate of the MHTC other than "roads" subject to Sections 228.341 to 228.374,

RSMo, governs over any possible exemption from those statutes set forth in Section 227.090, RSMo.

The MHTC does not address the foregoing argument in its Substitute Respondent's Brief, and leaves the foregoing argument intact and unchallenged.

The MHTC argues that "it does not matter if MHTC operates an actual roadway on Lot 3". *MHTC Respondent's Brief* at 32. The 1990 General Warranty Deed vests the MHTC title to Lots 2 and 3 of Creekstone "including that portion of Creekstone Drive located in Lot[] 2, …; but less and excepting that portion of Creekstone Drive located in Lot 3 …, which shall be maintained by the Creekstone Homeowners Association established in Book 369, Page 1914". LF at 9-10. The plain language of this deed of conveyance means that the part of Creekstone Drive located on Lot 3 of Creekstone is a road maintained by Respondent Creekstone Homeowners Association on land owned by the MHTC and that part of Creekstone Drive located on Lot 2 of Creekstone is a public road owned by the MHTC. The MHTC never explains in its Substitute Brief how the MHTC can deny Appellant the right to use the "public road" portion of Creekstone Drive located on Lot 2 of Creekstone in a manner consistent with principles of equal protection, when the MHTC allows access over Lot 2 of Creekstone to all of the lot owners in Creekstone Subdivision and to members of the public entering onto Creekstone Drive from Moss Hollow Road. It also would seem to be very pertinent that the MHTC allows the public access over that part of Creekstone Drive located on Lot 3 of Creekstone which is owned by the MHTC and maintained by Respondent

Creekstone Homeowners Association (including allowing access to the lot owners in Creekstone Subdivision who access their homes or lots over that part of Creekstone Drive located on Lot 3 of Creekstone). How the MHTC can deny Appellant rights or privileges afforded to the lot owners in Creekstone and the public in a manner that is consistent with principles of equal protection is not explained in the Substitute Brief of the MHTC. *MHTC Respondent's Substitute Brief* at 31-33.

VI.

THE TRIAL COURT ERRED IN GRANTING RESPONDENT MHTC'S MOTION TO DISMISS APPELLANT'S PETITION AND ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON THE GROUND THAT THE COMMISSIONER'S REPORT IN THE CONDEMNATION CASE PURPORTEDLY CLEARLY LIMITS OR PROHIBITS ACCESS TO THE 50 ACRES, MORE OR LESS, AND RESPONDENT MHTC HAS PURPORTEDLY TAKEN AND PAID FOR THE RIGHT TO LIMIT OR PROHIBIT ACCESS TO THE 50 ACRES, MORE OR LESS, AND THE MHTC HAS NOT LIFTED ANY SUCH RESTRICTIONS OR PROHIBITIONS, SO THE RIGHT OF APPELLANT TO ACCESS THE 50 ACRES, MORE OR LESS, HAS ALREADY BEEN DETERMINED, BECAUSE ARTICLE IV, SECTION 29 OF THE MISSOURI CONSTITUTION GRANTS THE MHTC ONLY THE POWER TO LIMIT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, IN THAT SAID CONSTITUTIONAL PROVISION DOES

NOT EMPOWER THE MHTC TO COMPLETELY PROHIBIT ALL ACCESS TO THE 50 ACRES, MORE OR LESS, FROM ANY PUBLIC ROAD, AND THE COMMISSIONERS' REPORT IN THE CONDEMNATION CASE IS AMBIGUOUS AS TO WHETHER SUCH COMMISSIONERS' REPORT LIMITS DIRECT ACCESS TO RELOCATED HIGHWAY M FROM THE 50 ACRES, MORE OR LESS, OR WHETHER SUCH COMMISSIONERS' REPORT PURPORTS TO COMPLETELY PROHIBIT ALL ACCESS TO ANY PUBLIC ROAD FROM THE 50 ACRES, MORE OR LESS.

The MHTC is correct in its citation of cases holding that the MHTC can abrogate an abutter's right of direct access to state highways or other transportation facilities under the authority granted in Mo. Const. art. IV, Section 29. *See MHTC Substitute Respondents' Brief,* at 36-39; *Shepherd v. State ex ref. State Highway Commission,* 472 S.W.3d 382, 386 (Mo. 1968); *State ex rel. State Highway Commission v. Hammel,* 372 S.W.2d 852, 855 (Mo. 1963); *Handlan-Buck Company v. State Highway Commission,* 315 S.W.2d 219, 222-223 (Mo. 1958); *State ex rel. State Highway Commission v. James,* 205 S.W.2d 534 (Mo. Banc 1947).

Appellant and the MHTC disagree when it comes to the "right" of the MHTC to completely prohibit access to the remainder after a partial taking condemnation under Mo. Const. art. IV, Section 29.

As conceded by the MHTC in its Substitute Respondents' Brief, rights of access have

two components: (1) the abutter's right of ingress and egress to and from his property and the abutting public highway (sometimes referred to as an abutter's right of direct access to a public road); and (2) the right to connect with and reach the system of public highways, which right is subject to reasonable restrictions under the police power of the State in protecting the public and facilitating traffic. *MHTC Substitute Respondents' Brief* at 39-42; *State ex rel. State Highway Commission v. Meier,* 388 S.W.3d 855, 857 (Mo. Banc 1965), *cert. den.,* 385 U.S. 204, 87 S.Ct. 407, 17 L.Ed.2d 300 (1966).

It is the position of Appellant that Mo. Const. art. IV, Section 29 only authorizes the Commission to limit the abutter's right of direct access to a state highway or transportation facility. Article IV, Section 29 of the Missouri Constitution does not authorize the MHTC to completely prohibit access to the remainder after a partial taking condemnation in the sense of prohibiting any right to connect with and reach the system of public highways. Although no Missouri case directly states that the foregoing proposition is the law in Missouri, Appellant's position is supported by existing case law. *See Schrader v. Quiktrip Corporation,* 292 S.W.3d 453, 456-457 (Mo. App., E.D. 2009) (determinative question is whether access has been denied); *D & H Prescription Drug Co. Inc. v. City of Columbia,* 977 S.W.3d 515, 519 (Mo. App., W.D. 1998) ("Missouri case law holds that the "complete blocking" of an abutting owner's (or lessee's) access to the system of roadways takes from him a property right"); *L & T Investment Corporation v. State ex rel. Missouri Highway and Transportation Commission,* 927 S.W.2d 509, 511 (Mo. App., E.D. 1996) (directed verdict

against inverse condemnation action was proper when MHTC provided access permit to property so that "access to the general system of streets and highways has not been destroyed or substantially impaired"); *Dulany v. Missouri Pacific Railroad Company,* 766 S.W.2d 645, 649 (Mo. App., W.D. 1988) (whether installation of a guardrail by the MHTC blocking access to Noland Road denied reasonable access to a public road was a jury question).

The only case cited by the MHTC in its Substitute Brief that appears to hold that the MHTC can prohibit all access to the system of public highways under Mo. Const. art. IV, Section 29 is *State ex rel. Missouri Highway and Transportation Commission v. Perigo,* 886 S.W.2d 149 (Mo. App. S.D. 1994). The discussion of *Perigo* in Appellant's Substitute Brief will not be repeated here.

The MHTC also concedes that the word "or" in the language of the Commissioners' Report stating: "[A]ll direct access to the thruway of Route M from the abutting property is herewith prohibited **or** limited" is disjunctive in its nature and ordinarily marks an alternative which generally corresponds to the word "either". LF at 22 (emphasis added); *MHTC Respondent's Substitute Brief,* at 47. To say that access is either prohibited or limited is inherently ambiguous, as access in the context of the Commissioners' Report is thereby reasonably susceptible of more than one construction when the word "or" is given its plain and ordinary meaning as understood by a reasonable, average person. *See Teets v. American Family Mutual Insurance Company,* 272 S.W.3d 455, 462 (Mo. App., E.D. 2008). Under the Commissioners' Report, access can either be limited or prohibited, and nothing in the

Commissioner's Report grants the MHTC the discretion to decide whether the access is limited or prohibited. The trial court's and the MHTC's interpretation of the Commissioners' Report giving the MHTC the discretion to decide Appellant's access rights as being either limited or prohibited on an ongoing basis whenever the MHTC desires is not grounded in law. *See MHTC Respondent's Substitute Brief,* at 47. The Commissioners' Report should have fixed the access rights to the 50 Acres, More or Less, at the time the Commissioner's Report was recorded in the Office of the Recorder of Deeds of Jefferson County, Missouri, pursuant to Section 523.040, RSMo. Granting the MHTC the discretion to determine the meaning of the ambiguous Commissioners' Report (as is suggested by the MHTC and the trial court, *MHTC Respondent's Substitute Brief* at 47) does not make the Commissioners' Report any less ambiguous in determining Appellant's access rights to the 50 Acres, More or Less.

VII.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT APPELLANT HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, BECAUSE THERE IS NO REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES, IN THAT NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED FOR ACTIONS UNDER 42 U.S.C. SECTION 1983 AND/OR NO EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED UNDER SECTION 536.150, RSMO,

AND/OR NO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT EXISTS FOR THE EXERCISE OF THE MHTC'S POWER TO LIMIT ACCESS UNDER MO. CONST. ART. IV, SECTION 29, AND/OR THE COMMISSIONER'S REPORT DOES NOT PROVIDE FOR ANY ADMINISTRATIVE REMEDIES FOR ACCESS PERMIT REQUESTS TO THE 50 ACRES, MORE OR LESS.

The MHTC concedes that this matter is not a contested case under the Administrative Procedure Act, Chapter 536, RSMo. *MHTC Respondent's Brief* at 54-55. There can be no exhaustion of administrative remedies requirement unless the matter is a contested case under the Administrative Procedure Act, Chapter 536, RSMo. *Strozewski v. City of Springfield,* 875 S.W.2d 905, 906-907 (Mo. Banc 1994). There is no legal requirement that Appellant seek access from the MHTC before bringing an action under Section 228.342, RSMo. *Hill,* 522 S.W.2d at 777-778; *Moss Springs Cemetery Association,* 970 S.W.2d at 376 ("At best, Appellant has the right to seek access from the Highway Department and again from Respondents. The right to ask is not the equivalent to the right to enforce."); *Spier v. Brewer,* 958 S.W.2d 83, 87 (Mo. App., S.D. 1997) ("An alternate route which is merely permissive does not provide any legally enforceable right to ingress and egress."). There is no requirement to exhaust administrative remedies in this case.

VIII.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT DISMISSING APPELLANT'S PETITION ON ANY PURPORTED BASIS THAT THE

"SUBDIVISION ROAD EXEMPTION" IN SECTION 228.341, RSMO, APPLIES, BECAUSE THE "SUBDIVISION ROAD EXEMPTION" IN SECTION 228.341, RSMO, IS NOT APPLICABLE IF THE PRIVATE ROAD CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE, IN THAT THE ROAD PETITIONED FOR BY APPELLANT CAN BE DESCRIBED BY METES AND BOUNDS WITHOUT REFERENCE TO ANY SUBDIVISION PLAT, DECLARATION OR INDENTURE.

STANDARD OF JUDICIAL REVIEW

Appellant is aware of this Court's precedent that in reviewing the propriety of the trial court's dismissal of a petition, this Court considers the grounds raised in the defendant's motion to dismiss and does not consider matters outside the pleadings. *See, e.g., Foster v. State,* 352 S.W.3d 357, 359 (Mo. Banc 2011); *City of Lake Saint Louis v. City of O'Fallon,* 324 S.W.3d 756, 759 (Mo. Banc 2010). Here, the Appellant's Petition seeks to tie a road established under Section 228.342, RSMo, to Creekstone Drive. Appellant's Petition asks for a declaration of the application of the subdivision road exemption in Section 228.341, RSMo, to this matter in the manner or manners prayed for in Appellant's Petition. See paragraphs 34-40 of Appellant's Petition; LF at 16-17. In determining whether the Appellant's Petition states a claim upon which relief may be granted, Point VIII of Appellant's Substitute Brief will need to be addressed, even though none of the Respondents

raised the subdivision road exemption in Section 228.341, RSMo, in any motion to dismiss filed herein.

Additionally, it is not clear whether the presumption that dismissals are based on the grounds alleged in written motions to dismiss is a legally binding and conclusive presumption or whether oral statements of the trial judge in open court can rebut that presumption. *See* the comments of the trial court at Tr. at 6; *Walters Bender Strohbehn & Vaughan, P.C. v. Mason,* 316 S.W.3d 475, 478-481 (Mo. App., W.D. 2010). If this rule is truly a presumption, then it is likely that the presumption can be rebutted. Further, in cases where trial courts err procedurally by deciding merits where they should not, courts of appeal have chosen nevertheless to review the merits when a remand would be futile. *Clifford Hindman Real Estate, Inc. v. City of Jennings,* 283 S.W.3d 804, 808 (Mo. App., E.D. 2009) (trial court ruled declaratory judgment claimant had no standing and gratuitously ruled against claimant on the merits; a remand based solely on the standing issue would likely result in an unnecessary second appeal "where Appellant would not receive a fresh look at the merits from the trial court"; therefore, review of the legal questions decided by the trial court was warranted).

ARGUMENT

The Niehaus/Creekstone Respondents appear to miss the practical effect of their argument under this Point. *Niehaus/Creekstone Respondents' Substitute Brief* at 27-30. If the following conditions are found to exist, the practical result of the Niehaus/Creekstone

Respondents' interpretation of the "subdivision exemption" in Section 228.341, RSMo, advanced in their Substitute Brief will be the establishment of a new forty-feet wide road that may run alongside or adjacent to Creekstone Drive to allow access to the 50 Acres, More or Less, via Moss Hollow Road. If: (A) Appellant states a claim under Section 228.342, RSMo, for a private way of necessity (Point I), (B) Appellant is not allowed to tie the access road to be established under Section 228.342, RSMo, to Creekstone Drive because of the "subdivision exemption" in Section 228.341, RSMo, (C) there is no right to a service road over the MHTC Relocated Highway M right-of-way alongside or adjacent to that highway to allow access from Moss Hollow Road (Points V and VI); and (D) the trial court finds no alternative location for the access road to be established under Section 228.352, RSMo, other than through the Creekstone Subdivision, the practical result of the Niehaus/Creekstone Respondents' interpretation of the "subdivision exemption" in Section 228.341, RSMo, advanced in their Substitute Brief will be the establishment of a new road that may run alongside or adjacent to Creekstone Drive to allow access to the 50 Acres, More or Less, via Moss Hollow Road. Appellant recognizes that such a result is absurd and inconsistent with those parts of Sections 228.341 to 228.374, RSMo, requiring the road established to "be situated so as to do as little damage or injury and cause as little inconvenience as practicable to the owner or owners of the real property over which the private road shall pass." Section 228.345, RSMo; s*ee also* Section 228.352, RSMo.

The only way to interpret the "subdivision road exemption" in Section 228.341, RSMo, that will avoid the absurd result indicated above is to find that when only part of a road to be established under Section 228.342, RSMo, can be described by reference to a recorded subdivision plat or recorded subdivision indenture or declaration, such road is not a complete "road created by or included in any recorded plat referencing or referenced in an indenture or declaration creating an owner's association, regardless of whether such road is designated as a common element" within the meaning of Section 228.341, RSMo. The foregoing interpretation allows a road to be established under Section 228.342, RSMo, to tie onto a subdivision road so long as the road to be established under Section 228.342, RSMo, is described by a metes and bounds legal description and not by reference to any subdivision plat or any subdivision indenture or declaration. Any other interpretation of the "subdivision road exemption" leads to the absurd result of court-ordered access roads being laid out and constructed alongside or adjacent to already existing "subdivision roads". Such an absurd result cannot be the intent of the legislature in enacting Section 228.341, RSMo. *See Sheedy,* 180 S.W.3d at 72 ("[t]his Court must avoid interpretations that are unjust, absurd, or unreasonable.").

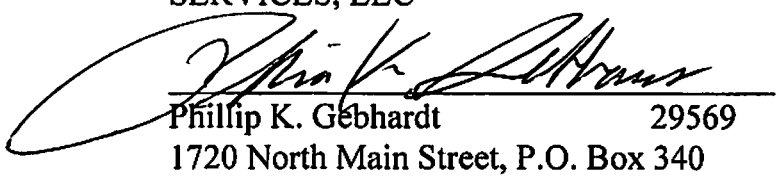
CONCLUSION

Common sense dictates that real estate should not be land locked. Missouri should not be pockmarked by landlocked parcels of real estate. For all of the foregoing reasons stated in this Substitute Reply Brief as well as the reasons stated in Appellant's Substitute Brief,

Appellant concludes that the trial court erred in dismissing Appellant's Petition. This Court should reverse the trial court's Judgments, and this Court should remand this matter for further proceedings consistent with such instructions as this Court may deem appropriate.

Respectfully submitted,

GEBHARDT REAL ESTATE AND LEGAL SERVICES, LLC



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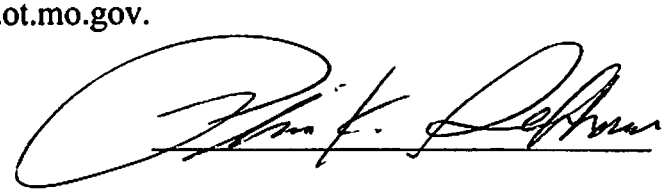
CERTIFICATE OF SERVICE

On this 24th day of November, 2015, electronic copies of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Jeffrey Brian Hunt, Attorney for Respondents Richard Niehaus, Lisa J. Niehaus, Alicia Niehaus, and Creekstone Homeowners Association, at jhunt@dubllc.com; John William Koenig, Jr., Attorney for Respondent Missouri Highways and Transportation Commission, at john.koenig@modot.mo.gov; Bryce David Gamblin, Co-counsel for Respondent Missouri Highways and Transportation Commission, at bryce.gamblin@modot.mo.gov; and Richard L. Tiemeyer, Co-counsel for Respondent Missouri Highways and Transportation Commission, at Rich.Tiemeyer@modot.mo.gov.



COMPLIANCE CERTIFICATION

In compliance with Rule 84.06(c), the undersigned does hereby certify that:

1. To the best of the undersigned's knowledge, information and belief, Appellant's Substitute Brief complies with Rule 55.03.

2. To the best of the undersigned's knowledge, information and belief, Appellant's Substitute Brief complies with the limitations contained in Rule 84.06(b).

3. To the best of the undersigned's knowledge, information and belief, Appellant's Substitute Brief, excluding cover, certificate of service, certificate required by Rule 84.06(c), and signature block, contains 7,543 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Substitute Brief was prepared.