IN THE SUPREME COURT
STATE OF MISSOURI

Appeal No. SC92470

ST. LOUIS COUNTY, MISSOURI
Appellant/Plaintiff

v.

RIVER BEND ESTATES HOMEOWNERS ASSOCIATION, et al.,
Respondents/Defendants

Appeal from the Circuit Court of St. Louis County, Missouri
Division No. 36

Honorable Ellen H. Ribaudo, Circuit Judge

BRIEF OF RESPONDENTS DEREK NOVEL, *et al.*

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JURISDICTIONAL STATEMENT

According to the Appellant's Jurisdictional Statement, the basis for its appeal directly to this Court is that it challenges the constitutionality of Sections 523.039 and 523.061 R.S.Mo. ("Heritage Value" statutes). The Respondents agree that the Court has jurisdiction under such circumstances, but disagree that the Appellant properly invoked the Court's jurisdiction for the reasons stated in Respondents' Suggestions in Opposition to Jurisdictional Statement, which is incorporated herein. The Court treated the Respondents' Suggestions as a motion to transfer and denied the same.

STATEMENT OF FACTS

The Respondent does not wish to supply any additional facts other than those already found in Appellant's brief, yet the Respondent cannot stipulate across the board to the Statement of Facts in that they are colored with biased characterizations of the evidence. "'The statement of facts shall be a fair and concise statement of the facts relevant to the question presented for determination without argument.' A biased and slanted statement of facts violates Rule 84.04(c)." *Hoer v. Small*, 1 S.W.3d 569, 572 (Mo.App. E.D. 1999)(*quoting* Rule 84.04(c)) Specifically, these portions of the Appellant's Statement of facts contain biased or inaccurate descriptions of the facts:

Pages 11 and 13: In several instances, the Appellant suggests that testimony at trial included "sentimental value" of the Respondent's Property. The description of the testimony as "sentimental" is improper commentary and argument. While the Appellant may want the Court to view the testimony in this light, this is the subject of contention found elsewhere in the argument, below.

Page 13: The Appellant states that the jury awarded the Respondents $31,000 more than the Respondents' valuation testimony. This is not a true statement. The amount of the jury verdict directly correlates with the evidence. The Appellant's statement here is due, in part, to a mathematical error that it made in its Motion for New Trial and which it repeats here. See the Respondents' discussion of Point VI for a more detailed explanation.

Page 13: The Appellant states that Respondents objected to the Appellant's appraiser's "observations on the level of sophistication" of an individual who was a party to one of the comparable sales. As discussed in Point IV, below, the witnesses were allowed to make such observations. The only objection by the Respondents was to questions relating to a real estate transaction that was not relevant as a comparable sale to the Subject Property.

To the extent that Appellant's Statement of Facts contains the foregoing and other improper commentaries on the evidence, the Respondents object. However, the Statement of Facts contains most of the essential facts that are necessary to allow the Court to rule on the issues raised in Appellant's brief.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR WITH REGARD TO THE RECORDING OF PROCEEDINGS BELOW IN THAT THE APPELLANT CAN SHOW NO PREJUDICE FROM ANY MISSING PORTION OF THE TRANSCRIPT AND APPELLANT FAILED TO USE DUE DILIGENCE TO CORRECT THE TRANSCRIPT.

Rule 81.12.

Skillicorn v. State, 22 S.W.3d 678 (Mo. 2000)

State v. Borden, 605 S.W.2d 88 (Mo. 1980)

II. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE RELATING TO THE HISTORY OF THE SUBJECT PROPERTY NOR FROM EXCLUDING EVIDENCE THAT THE HERITAGE VALUE STATUTE WOULD INCREASE THE AMOUNT OF THE JURY VERDICT BECAUSE THE COURT DID NOT ABUSE ITS DISCRETION IN THE ADMISSION OR EXCLUSION OF THE EVIDENCE AND ANY ERROR TO THE ADMITTED EVIDENCE WAS NOT PRESERVED FOR APPEAL THROUGH TIMELY OBJECTIONS.

Miller v. O'Brien, 168 S.W.3d 109 (Mo.App. W.D. 2005)

City of Joplin v. Flinn, 914 S.W.2d 398 (Mo.App. S.D. 1996)

State ex rel. State Highway Comm'n v. Thurman, 428 S.W.2d 955 (Mo.App.E.D.1968)

State ex rel. State Highway Commission v. Herman, 546 S.W.2d 488 (Mo.App. 1976)

III. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF THE OWNER'S PREVIOUS OUT OF COURT STATEMENT BECAUSE THE RECORD SHOWED THAT THE STATEMENT WAS MADE FOR SETTLEMENT PURPOSES, NOT AS AN OPINION OF VALUE.

J.A. Tobin Const. Co. v. State Highway Com'n of Missouri, 697 S.W.2d 183 (Mo.App. W.D. 1985)

IV. THE TRIAL COURT DID NOT ERR IN ADMITTING APPRAISER DEMBA'S TESTIMONY REGARDING COUNTY'S COMPARABLE SALE NOR IN LIMITING TESTIMONY REGARDING A TRANSACTION NOT USED AS A COMPARABLE BECAUSE THE ADMISSION AND EXCLUSION OF SAID EVIDENCE WAS NOT AN ABUSE OF THE COURT'S DISCRETION AND BECAUSE THE COUNTY DID NOT OBJECT TO ANY OF THE ADMITTED EVIDENCE.

City of Joplin v. Flinn, 914 S.W.2d 398 (Mo.App. S.D. 1996)

State ex rel. State Highway Com'n v. Recker, 648 S.W.2d 568 (Mo.App. E.D. 1983)

Quality Heights Redevelopment v. Urban Pioneers, 799 S.W.2d 867 (Mo.App. W.D. 1990)

V. THE TRIAL COURT DID NOT ERR IN EXCLUDING OPINION TESTIMONY BY COUNTY'S NON-RETAINED EXPERT WITNESSES CONCERNING POTENTIAL DEVELOPMENT OF THE SUBJECT PROPERTY, BECAUSE THE TESTIMONY WAS BEYOND SCOPE OF NON-RETAINED EXPERT TESTIMONY, THE COUNTY DID NOT ESTABLISH A SUFFICIENT FOUNDATION FOR THE OPINIONS, AND THE COUNTY FAILED TO PRESERVE THE EXCLUDED EVIDENCE THROUGH AN OFFER OF PROOF.

Rule 56.01(b)(4),(5)

State ex rel. Missouri Highway and Transportation Commission v. Gannon, 898 S.W.2d 141 (Mo.App. E.D. 1995)

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo.1997

Kehr v. Knapp, 136 S.W.3d 118 (Mo. App. 2004)

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

VI. TRIAL COURT DID NOT ERR BY ENTERING JUDGMENT FOR NOVELS IN THAT THE JURY VERDICT WAS WITHIN THE RANGE OF VALUATION EVIDENCE.

State ex rel. State Highway Comm'n v. Kemper, 542 S.W.2d 798 (Mo. Ct. App. 1976)

State ex rel. State Highway Com'n v. Zahn, 633 S.W.2d 185 (Mo.App. W.D. 1982)

VII. THE TRIAL COURT DID NOT ERR IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE A CONSTITUTIONAL EXERCISE OF THE LEGISLATURE'S AUTHORITY TO ALLOW FOR ADDITIONAL COMPENSATION TO OWNERS IN CONDEMNATION ACTIONS AND THE COUNTY WAIVED ALL CONSTITUTIONAL OBJECTIONS BY FAILING TO RAISE THEM AT THE EARLIEST OPPORTUNITY.

Article I, §26 MO CONSTITUTION

Land Clearance for Redevelopment Authority of City of St. Louis v. Henderson, 358 S.W.3d 145 (Mo.App. E.D. 2011)

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 43 S.Ct. 684 (U.S. 1923)

Akers v. City of Oak Grove, 246 S.W.3d 916 (Mo. 2008)

State of Kansas ex rel. Nick Tomasic, Wydandotte County v. The Unified Government of Wyadndotte County, 962 P.2d 543 (Kansas 1998)

VIII. THE TRIAL COURT DID NOT ERR IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BEACAUSE SAID STATUTES ARE NOT UNCONSTITUTIONAL UNDER THE MISSOURI CONSTITUTION ARTICLE III, §38(a) AND ARTICLE VI, SECTIONS 23 AND 25 AND THE COUNTY WAIVED ALL CONSTITUTIONAL OBJECTIONS BY FAILING TO RAISE THEM AT THE EARLIEST OPPORTUNITY.

Article III, §38(a) MO. CONSTITUTION

Article VI, §23 MO. CONSTITUTION

Article VI, §25 MO. CONSTITUTION

§523.001 (3) *R.S.Mo.*

City of St. Louis v. Butler, 219 S.W.2d 372 (Mo. banc 1949)

Rice v. Ashcroft, 831 S.W.2d 206 (Mo.App. W.D. 1991).

State of Kansas ex rel. Nick Tomasic, Wydandotte County v. The Unified Government of Wyandotte County, 962 P.2d 543 (Kansas 1998)

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IX. THE TRIAL COURT DID NOT ERR IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE WITHIN THE CONSTITUTIONAL LIMITS OF LEGISLATIVE AUTHORITY AND DO NOT VIOLATE MISSOURI CONSTITUTION ARTICLE I, §26 AND THE COUNTY WAIVED ALL CONSTITUTIONAL OBJECTIONS BY FAILING TO RAISE THEM AT THE EARLIEST OPPORTUNITY.

Article I, §26 MO CONSTITUTION

Rule 70.03

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

Leonard Missionary Baptist Church v. Sears, Roebuck and Co., 42 S.W.3d 833 (Mo.App. E.D. 2001)

Akers v. City of Oak Grove, 246 S.W.3d 916 (Mo. 2008)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WITH REGARD TO THE RECORDING OF PROCEEDINGS BELOW IN THAT THE APPELLANT CAN SHOW NO PREJUDICE FROM ANY MISSING PORTION OF THE TRANSCRIPT AND APPELLANT FAILED TO USE DUE DILIGENCE TO CORRECT THE TRANSCRIPT.

Point I of Appellant's Brief revisits the issue raised in its Motion to Remand filed just one week prior to its Brief. Appellant (hereinafter, the Appellant will also be referred to as "County" and Respondents as "Novel" or "Novel Family") claims that missing portions of the trial transcript entitles it to a new trial without regard to the merits of its appeal. The omissions from the transcript do not affect testimony, offers of proof, legal records or exhibits. Additionally, the County asserts that inaudibles in the transcript entitle it to a remand without providing any single instance where the inaudible materially prejudices its right to appeal. The County is not entitled to a remand. First, the County did not exercise due diligence to correct its perceived inadequacies with the transcript. Second, the County was not prejudiced, as demonstrated when reviewing the substantive portions of the County's brief. The only shortfalls with the record below are the result of the County's failure to adequately preserve issues on appeal through timely objections, offers of proof or in its motion for new trial.

It is the duty of an appellant to produce a record on appeal sufficient to allow the court to consider the points on appeal. See*, Rule 81.12*. However, in instances where the

record on appeal is incomplete or missing without the fault of either party, a case may be remanded for retrial if certain strict guidelines are met:

1st, that there are substantial and material portions of the transcript missing;

2nd, that the appellant must use due diligence to supply the omission or correct the defect; and

3rd, that the appellant must show that its right of appeal is prejudiced by the missing portions of the transcript.

In describing the general rule, the Court in *Skillicorn v. State,* 22 S.W.3d 678, 688 (Mo. 2000) stated: "An incomplete record on appeal does not necessarily warrant reversal, as relief is only appropriate if the appellant can demonstrate that due diligence was employed in an attempt to correct the shortcomings and that the incomplete nature of the record prejudiced him."

Every case reviewed by Novel Family's counsel on this point relate, in some way, to a transcript that is either completely lost or is missing material testimony. The County cites to no case where, as here, all the testimony was transcribed and the missing portions of the transcript were limited to a handful of sidebars.

A. The County failed to undertake due diligence to correct the transcript.

As stated in *Skillicorn*, above, the duty to use due diligence is a prerequisite to obtaining the extraordinary remedy of a new trial when an appellant alleges that it has an incomplete record on appeal. The County did not meet this prerequisite. On June 13, 2012, the County filed the record on appeal including portions of the legal file and a 514

page transcript of proceedings. At that time, County's counsel notified Novel Family's counsel by phone that the transcript contained numerous "inaudible" notations and that sidebar bar proceedings were not recorded. On August 2, 2012, counsel for the County again contacted Novel Family's counsel by phone to obtain consent to extend the time to file Appellant's Brief. County's counsel stated that the primary purpose of the extension was to allow the parties to agree to a stipulation as to the omitted portions of the transcript. Still unaware of which portions of the transcript the County wanted to have clarified, Novel Family's counsel agreed to the extension and to review the County's proposed stipulation. The next day, the County filed its request for extension of time to file its brief, representing to the Court that an extension of time was needed "to obtain a stipulation regarding the recording omissions from Respondents." The Motion correctly stated that the Novel Family's counsel had consented to the extension. The Court granted the motion, giving the County up to August 27, 2012 to file its brief. However, Novel Family's counsel did not receive a proposed stipulation or any communications regarding the missing portions of the transcript prior to the County's Motion to Remand.

On August 20, 2012, one week before its brief was due, the County filed its "Motion to Remand to Trial Court for New Trial" together with a "Stipulation to Correct Omissions Pursuant to Rule 21.12(f)." In its Motion to Remand, the County stated that on the same day as the filing of its Motion to Remand it "submitted its reconstruction draft to opposing counsel on August 20, 2012 in an effort to stipulate to certain facts. *Stipulation discussions are in progress but are not complete* due to the challenge of such reconstruction effort…." (emphasis added) At no time before receiving the County's

Motion to Remand had the Novel Family's counsel received any other communication or proposal from the County regarding the stipulation.

Based on these facts, the County did not meet its duty to exercise due diligence. As stated above, County's counsel made no attempt to communicate with Novel Family's counsel regarding any stipulation or to discuss the missing portions of the transcript prior to filing its Motion to Remand. The County's inaction from the time it was aware of the content of the transcript up to the filing of its Brief does not equate to "due diligence" required under the case law.

The facts here are similar to those in *State v. Borden*, 605 S.W.2d 88 (Mo. 1980), where a portion of a transcript was missing due to a malfunctioning recorder. The missing portion contained the "State's cross-examination as well as the redirect and recross-examination of defendant, rebuttal testimony of two prosecution witnesses, and the first portion of the State's closing argument. In sum, approximately 42 pages of testimony and eight pages of argument are missing." The transcript in that case was just over 1,000 pages. The Court stated that "Reversal and retrial will not be required unless the appellant exercises due diligence to supply the omission or correct the defect and establishes prejudice as a result of inability to present a complete record. Defendant here has failed to meet these requirements. Nothing suggests an attempt to obtain by stipulation or motion the substance of the missing testimony or argument. Moreover, defendant has offered nothing to support her conclusory assertion that the omissions were prejudicial." *Id.* at *91, 92* (Citations omitted)

Here, the County seeks the extraordinary relief of a new trial which would have the effect of nullifying a jury verdict on the basis that the County alleges that the transcript contains omissions that impair its ability to appeal. The duty of due diligence was not met by the County by simply filing what was provided by the court reporter, by filing a self-serving "stipulation" without consultation or input from Respondents' counsel, and then making unspecified claims that it is prejudiced. It first had the duty to "attempt to correct the record by stipulation or by motion to the appropriate appellate court." *Borden* at 91-92. It did neither and therefore is not entitled to a new trial.

B. The County has not shown it was prejudiced by the transcript.

The County is not prejudiced by the alleged inadequacies of the record. The remaining eight points in its Brief proves that the transcript has not materially interfered with the County's right to an appeal. At no point in its Brief's remaining eight points does the County cite transcript omissions causing problems with its arguments and references to evidence. This is not surprising given the insignificant nature of the omitted and inaudible portions. For instance, only five (5) inaudibles occur during actual testimony, and they never interfere with a clear understanding of the proceedings. The missing sidebar arguments are not necessary for the County to present its appeal. In each case, all of the legal objections and rulings are well documented in other portions of the record, such as during arguments on the record that occurred when the jury was not present, in the County's Motion for New Trial and in its Proposed Stipulation. The Court

has a complete record of all the evidence to enable it to weigh and determine the propriety of the Court's rulings.

It is not enough for the Appellant to merely allege that it is prejudiced. An appellant must explain in detail how omissions in a transcript affect their appeal so the appellate court is not left with, "the chore of pinpointing each alleged error and then discerning any prejudicial impact." *State v. Koenig*, 115 S.W.3d 408, 416 (Mo.App. S.D. 2003) (*citation omitted)*. Other than the conclusory statement that it is prejudiced, the County never specifically states where and how it is materially prejudiced from obtaining full review of the trial court's rulings. Conclusory allegations of prejudice are not sufficient to justify a remand. *Borden, supra*. Furthermore, the County's assertion that it is prejudiced is contradicted by the remaining portion of its Brief wherein the County argues its substantive points unprejudiced by the condition of the transcript.

In its Suggestions in Opposition to the County's Motion to Remand, Novel categorically refuted any claim of prejudice by the County. It would be unnecessary to go into such detail here as the Suggestions are a part of this Court's record. Instead, this analysis is summarized as follows:

1. Transcript inaudibles are minor and irrelevant.

The County grossly exaggerates the inaudible deficiencies in the transcript. The trial transcript is 514 pages long and contains all of the testimony of all of the witnesses in direct, cross-examination, or offer of proof. While the County states that the transcript contains by its count 146 "inaudibles", it fails to inform the Court that only five (5) are

found in the actual testimony of witnesses and that only a few are found in portions of the transcript that are during proceedings relevant to the issues on appeal. This is similar to the situation considered in *Koenig*, 115 SW3d at 416, where the court held that 141 inaudibles in an 830 page transcript were substantively insignificant. Here, since only five instances of inaudibles occur during actual witness testimony, the Court has at its disposal virtually all of the evidence with which to review the trial court's rulings.

2. Missing sidebar arguments are not prejudicial as there is no material dispute of what occurred at these times.

Here, the County argues that the transcript prevents the Court from fully reviewing the substantive issues raised by the County. However, an examination of the County's arguments and the Respondents' counter to the substantive Points raised by the County reveals that there are no material disputes regarding the proceedings nor does the Court's review of any of the substantive arguments depend on missing portions of the transcript. The County is able to fully develop its arguments and the Court has a complete record of all relevant testimony from trial. The record is more than sufficient to afford a full review of the proceedings below.

C. Point I of the County's Brief is without merit and should be denied.

The County has failed to show that it was prejudiced by the transcript, which is virtually complete. It contains all the testimony and the one offer of proof made by the Appellant. The County additionally failed to make any good faith attempt to correct any deficiencies it perceived was necessary to complete its appeal. A motion to remand due

to an inadequate transcript "should be determined upon principles analogous to equitable doctrines rather than the strict rules of law. Appellant is not asking for something to which he is entitled as a matter of strict, absolute, legal right but for that which the court, in the exercise of inherent extraordinary powers, will grant to prevent a possible injustice being done to one who is himself wholly without fault or blame." *Stevens v. Chapin*, 227 S.W. 874, 875-76 (Mo.App. 1921). The County's actions and inaction do not warrant the use of "equitable" or "extraordinary" treatment by this Court. Prior to filing its brief, the County has twice represented to this Court that it was making an effort to work with Respondents to complete the transcript. It did so again in its Brief (App. Br. Pg. 28, fn. 3). It would be unfair and inequitable for this Court to reward the County for its exaggerated claims of prejudice compounded by its lack of diligence to correct the transcript.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE RELATING TO THE HISTORY OF THE SUBJECT PROPERTY NOR FROM EXCLUDING EVIDENCE THAT THE HERITAGE VALUE STATUTE WOULD INCREASE THE AMOUNT OF THE JURY VERDICT BECAUSE THE COURT DID NOT ABUSE ITS DISCRETION IN THE ADMISSION OR EXCLUSION OF THE EVIDENCE AND ANY ERROR TO THE ADMITTED EVIDENCE WAS NOT PRESERVED FOR APPEAL THROUGH TIMELY OBJECTIONS.

It is unclear what the County claims as error under its second point. First, the County alleges that error occurred during Novel's case in chief when evidence of the history of the Subject Property was *admitted* without objection through testimony of Mr. Demba (appraiser) and Mr. Novel (owner). Later, the County claims the trial court erred when it *excluded* evidence of the heritage value statute. In its point, the County is vague as to whether it claims error in both instances, or that only taken together does the inclusion and exclusion of the evidence result in error. The County's point should be denied because it combines multiple claims of error into a single point in violation of Rule 84.04, which preserves nothing for appeal. Substantively, the County's point fails because there was no abuse of discretion by the trial court.

A. The County's multifarious point does not preserve appeal.

The County's first point relied upon and ensuing argument presents a confusing, multifarious combination of allegations of error. The County argues that the trial court

erred in "admitting evidence relating to the Novel's attachment to and unwillingness to sell the subject property" (the Respondents refer to this evidence as the "history" of the Property). However, the County also seems to argue that error did not occur until the court later excluded "evidence that the jury verdict would be increased to account for the property's heritage value…" At one point in its argument the County's position seems to be that the court did *not* commit error in its ruling by including evidence of the history of the property until it *excluded* evidence of heritage value. The County compounds the confusion when it also suggests that exclusion of heritage value evidence lead to Respondents receiving "double recovery."

In *Miller v. O'Brien*, 168 S.W.3d 109 (Mo.App. W.D. 2005), the court stated, "Grouping multiple allegations of error in a single point relied on that do not relate to a single issue violates Rule 84.04(d)." *Id* at 112. "[A] brief impedes disposition on the merits if it fails to give notice to the other parties and to the appellate court of the basis for the claimed error." *Rogers v. Hester ex rel. Mills*, 334 S.W.3d 528, 533 (Mo.App. S.D. 2010). Here, it is not possible to segregate the County's arguments to determine whether it claims error occurred when there was evidence presented about the history of the property, or if it was the court's exclusion of heritage value, or if it was a cumulative effect of the two. The Court can only address the County's second point by setting aside the principle that, "An appellate court should not become an advocate for one of the parties in an effort to see if it can find a theory for reversal." *Stroup v. Facet Automotive Filter Co*., 919 S.W.2d 273, 277 (Mo.App. S.D. 1996). Point II of County's appeal should be denied on the basis that it does not meet the requirements of Rule 84.04.

However, the Respondent will attempt discuss each of the two rulings of the trial court to explain that each was a proper ruling and within the discretion of the court.

B. The standard of review here is "abuse of discretion."

"The admission or exclusion of evidence in condemnation cases is within the discretion of the trial court, and errors in the court's determination will not result in reversal unless there is substantial or glaring injustice." *State ex rel. Missouri Highway and Transp. Com'n v. Edelen*, 872 S.W.2d 551, 555 (Mo.App. E.D. 1994).

C. Evidence of the history of the property was admitted within the trial court's discretion.

The history of the Property was relevant to explain to the jury why the Property was in a vacant, undeveloped state at the time of trial. One of the themes of the County at trial was that the physical characteristics of the Property resulted in it being left vacant and undeveloped. This theme is repeated by the County in the opening paragraph of its Statement of Facts. (App. Br. 10) The evidence of the Property's history revealed that it was vacant and undeveloped at the time of taking because it had been held by the same family for over 100 years and was intentionally left vacant by them, even rejecting offers from developers to buy the Property. (Tr. 260, 7-19) This evidence was relevant to the value and to the highest and best use of the Property and well within the discretion of the court to admit as evidence.

1. The County did not preserve this issue for appeal in that it did not object to the evidence during trial.

A review of the specific excerpts mentioned by the County in its Brief reveals that it failed to timely object to the evidence and thus did not preserve its point for appeal. *City of Joplin v. Flinn*, 914 S.W.2d 398, 401 (Mo.App. S.D. 1996)("A party must object to the evidence when offered in order to preserve the issue for appellate review."). The relevant portions of the transcript mentioned by the County include:

Testimony of Derek Novel:

(Tr 257:9-16 and other portions): The County quotes testimony of Mr. Novel when he discussed his familiarity with the Property, which dated back to his childhood. This testimony was relevant in that it demonstrated Mr. Novel's familiarity with the Property which went to his credibility. There was *no objection* by the County.

(Tr. 260:10-19): During this testimony, Mr. Novel described that his family had received offers for the Property from developers, but had turned them down out of a desire to retain the Property in the family. This evidence was relevant to explain that there was a market demand for the development of the Property. *State ex rel. State Highway Com'n v. Thurman*, 428 S.W.2d 955, 958 (Mo.App.E.D.1968)(A landowner may testify that he had "inquiries or offers to buy the property from others" to demonstrate desirability of and demand for the land). There was *no objection* to this testimony by the County.

Cross examination of Mr. Gonterman: (Tr. 338:13 to 339:6) Jeff Gonterman was one of two appraisers who testified on behalf of the County. On cross examination, the Mr. Gonterman was asked to explain the meaning of "willing

seller" in terms of how he selected his comparable sales and how they relate to fair market value. The questions included the common figurative analogy to someone acting under duress by having a "gun to the head." There was no suggestion, as Appellant argues, that the eminent domain powers had been use in a coercive manner. This questioning occurred *without objection* by the County during cross examination. The questioning was relevant to explain the process of selecting or rejecting transactions as comparable sales when appraising. Even if an objection had been made, the trial court has wide latitude to control cross examination of expert witnesses. See, *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 869 (Mo. 1993).

Cross examination of Mr. Demba (Tr. 251:15-21): Ernie Demba was the appraiser who testified on behalf of the Novel Family. On cross, he was invited to explain why the date of taking was an "unfortunate choice" to value the property. The County argues that Mr. Demba's response to its own question created error, but the County *did not object* or ask for the response to be stricken. In fact, instead of objecting, the County invited further testimony along the same lines by asking, "Why is that unfortunate, that date in particular?"

Closing Argument: The County cites to various portions of Novel's closing argument to suggest that there was an attempt to "incite passion and prejudice." First, the County did not preserve the right to appeal error for any portion of closing argument in its motion for new trial See, *State ex rel. State Highway Com'n v. Herman*, 546 S.W.2d 488, 492 (Mo.App. 1976)(Matters not raised in

motion for new trial are not preserved for review on appeal). Second, the County mischaracterizes the argument made by Novel's counsel where there is no instance where the jury is asked to act out of sentiment or passion. Third, the County *did not object* to the complained of argument at closing. The single objection by the County at closing occurred when the Novel Family counsel was discussing the background of a comparable sale. (Tr. 487:1-3). This is not clear in the County's Brief which quotes the objection out of context. Furthermore, even if there was a timely objection, "a trial court is allowed wide discretion in controlling argument of counsel." *Norfolk & W. Ry. Co. v. Greening*, 458 S.W.2d 268, 273 (Mo. 1970).

2. The County has not demonstrated that it was prejudiced by the inclusion of the evidence of the history of the property.

Even if the County timely objected to this evidence, it has failed to demonstrate that it was prejudiced. "[I]n condemnation cases ... errors in the court's determination will not result in reversal unless there is substantial or glaring injustice." *Edelen*, 872 S.W.2d at 555. Even if the evidence that the County objects to now (though not at trial) was improperly admitted, it was not prejudiced. The jury rendered a verdict that was within the range of evidence. (Tr:211:20 - 212: 5). "An appellate court cannot infer bias, passion or prejudice from a verdict within the range of testimony and the party raising that issue must show some incident or occurrence which created such bias, passion or prejudice." *M & A Elec. Power Co-op. v. Tomlinson*, 608 S.W.2d 571, 573 (Mo.App. S.D. 1980). The County has not met its burden to show passion on the part of the jury.

D. Evidence of heritage value was irrelevant and correctly excluded by the trial court.

The County's second complaint under this point is directed at the trial court's ruling that excluded evidence of heritage value. This evidence was properly excluded since it was completely irrelevant to any issue at trial - it does not relate to fair market value, it does not impact the highest and best use of the property and does not impact the credibility of any witness. It was apparent that the County wanted to use heritage value to encourage the jury to reduce its verdict by referring to a statute that the legislature passed for purposes of *benefitting* property owners like the Novel Family. Hypocritically, the County also intended to argue after trial *against* the trial court awarding heritage value in this case.

Heritage value in condemnation cases was created by statute in 2006 when the Missouri legislature established a statutory definition of just compensation. This definition includes one section that provides that in cases "involving property owned within the same family for fifty or more years, [just compensation shall be] an amount equivalent to the sum of the fair market value and heritage value...." §523.039. Elsewhere, "heritage value" is defined to be "fifty percent of fair market value." §523.001.2. The legislative definition of just compensation was included in what has been described as "sweeping reform of eminent domain." *Land Clearance for Redevelopment Authority of City of St. Louis v. Henderson*, 358 S.W.3d 145, 150 (Mo.App. E.D. 2011). The overriding purpose of the legislature "was to strengthen the rights of landowners in eminent domain actions." *Planned Indus. Expansion Authority of*

Kansas City v. Ivanhoe Neighborhood Council, 316 S.W.3d 418, 426 (Mo.App. W.D. 2010). The heritage value section of the eminent domain reform was the legislature's recognition that families who have had property for more than fifty years suffer a special form of harm that is not fully compensated when just compensation is limited to fair market value. The legislation also recognizes the harm that occurs when a person's home is taken or damaged in condemnation proceedings. In those cases, homeowners may be awarded a twenty five percent "homestead value." §523.001(3) *R.S.Mo.*

The procedure to award heritage value at trial is bifurcated between the jury and the judge. First, §523.039 provides that the owner "shall have the burden of proving to the ... jury that the property has been owned within the same family for fifty or more years." *Id.* If the jury makes such a finding, it falls on the judge to increase the verdict to provide for the heritage value. §523.061; *State ex rel. White Family Partnership v. Roldan*, 271 S.W.3d 569, 574 (Mo. 2008). In the present case, there was no need for the jury determine how long the Novel family owned the property because it was dealt with by stipulation. (Tr. 34:12-17)

In light of the purpose and statutory procedures for heritage value, there is no relevance to interject it into the jury proceedings. The trial court noted, "the fact they [the legislature] didn't allow the jury to determine what that amount is done very specifically." (Tr. 34:9-11) The fact that the judge is called upon to perform the mathematical calculation for heritage value and thereby adjust the amount of the verdict is not without precedent in eminent domain law. Similarly, it is the court, not the jury, who calculates interest on jury verdicts in condemnation actions, which the legislature set

at 6%. §523.045 *R.S.Mo*. As with heritage value, there is no relevance for a condemnor's attorney to inform the jury that the judge may assess interest on the amount of their verdict.

Since heritage value is not relevant to the value of the property, then the only *purpose* of informing the jury about heritage value is apparent: The County hoped that if the jury was told that the Novel family would get an additional 50%, that it would reduce its determination of damages by performing "reverse math." Such an application of the heritage value statute would run directly counter to the legislature's desire to strengthen the rights of property owners. *Ivanhoe Neighborhood Council*, *supra,* 316 S.W.3d at 426.

E. The County's "double recovery" argument is meritless.

In its Brief, the County argues that the court's rulings resulted in "double recovery" for the Novel Family. In this instance, the County appears to argue that it is the *cumulative* effect of the court's rulings that are error. Again, this demonstrates that the County's point is multifarious, vague and does not comply with Rule 84.04. There is no evidence that the jury awarded anything other than fair market value for the Property. The cases cited by the County have no application here. For instance, in the more recent case of *McGuire v. Kenoma,* LLC, ___ SW3rd ___, 2012 W.L. 2378131 (Mo. App. W.D. 2012), the issue was two verdicts by the same jury under two separate counts for the same injury in favor of the same defendants. Here, there is no evidence or record that the Novel family received anything more than one award for the fair market value of their

Property. The County's argument that the Novel Family received "double recovery" is not supported by the record.

Based on the foregoing, the judgment below should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF THE OWNER'S PREVIOUS OUT OF COURT STATEMENT BECAUSE THE RECORD SHOWED THAT THE STATEMENT WAS MADE FOR SETTLEMENT PURPOSES, NOT AS AN OPINION OF VALUE.

In its third point, the County argues the trial court erred when it excluded evidence of a statement made by Mr. Derek Novel at the commissioners' hearing. The evidence at issue was a statement wherein Mr. Novel referenced a figure of $496,000. The County argues that the statement was "an opinion of value" but Novel contended that the statement was made in the course and context of settlement and negotiations.

The admissibility of the statement was first raised at pre-trial. (Tr. 16-27) The County tried twice during the course of trial to admit the evidence. First, it attempted to cross examine Mr. Novel on the statement. (Tr. 269:12,13) Later, it was the subject of an offer of proof through the testimony of a St. Louis County right of way negotiator, Jim Herries. (429:4 to 433:21) The record supports the court's ruling that the statement by Mr. Novel was a statement made as an expression of his position in settlement, not a statement of his opinion of value.

Mr. Derek Novel was the only one of the approximately 20 members of the Novel family (Tr. 281:23-25) to testify at trial. He testified that he did not have an opinion of value of the Property. (Tr. 285,1-4) During cross examination, the County attempted to inquire whether Mr. Novel had stated an opinion of value in February, 2010, which is when the commissioners hearing had taken place. (L.F. 65) The question drew an

objection from Novel's counsel. (Tr. 269:14,15) The court adjourned for the day and the admissibility of the statement was argued the next morning. (Tr. 271 to 280)

Counsel for Novel argued that the statement was made as a settlement figure during negotiations, not an opinion of value. In support of the argument, Novel tendered to the court the deposition of Jim Herries, a County official who had been the chief negotiator with Mr. Novel. (Tr. 279:11,12) The deposition testimony of Mr. Herries indicated that, as the negotiator for the County, he had initially offered $238,154 for the Property and Mr. Novel countered with $645,000. (App A-10) The County rejected the $645,000. (App A-11) Mr. Herries was then asked: "All right. So you rejected the 645. How did the negotiations end up wrapping up?" (App A-12) His response was: "Wrapping up is that we came to a consensus after time of $496,000 total *settlement*." (Emphasis added) Mr. Herries then added the $496,000 settlement was contingent upon County's "upper management" approval but that he could not get it. (App. A-13) From that point of negotiations, Mr. Herries sent it to "legal for condemnation." (App. A-13) The deposition of the County official clearly shows that the $496,000 figure was the result of negotiations and not an opinion of value.

This is the only instance during trial when the County made an offer of proof. It did so through Mr. Herries, the County negotiator. Mr. Herries testified that the commissioners hearing took place at a St. Louis County government office building. (Tr. 431:21 to 432:4) He stated that he was there, along with other county officials and the commissioners. (Tr. 432:5-22) In this setting, it is understandable how Mr. Novel, a retired high school teacher (Tr. 255:6-24), and without legal representation at this time,

would consider the proceedings to be a mere continuation of the settlement discussions between himself and Mr. Herries. During the offer of proof, Mr. Herries testified that Mr. Novel made a statement at the commissioners hearing that Herries *characterized* as "an opinion of value." (Tr. 429:17-22) However, when the court inquired of Mr. Herries, "What were the words that he [Mr. Novel] used?" the response was "That I'll settle for 496,000." This is the exact figure that he and Mr. Novel and negotiated and agreed upon, though it was rejected by the County's "upper management." Herries also stated that Novel's statement was made after the "commissioners requested a *settlement* or what he thought the value was worth or what the property was worth." (Tr. 431:3-5) From this exchange, the deposition of Mr. Herries, and the other circumstances before the court, including the demeanor of the witnesses, the court acted within its discretion when it excluding Mr. Novel's statement as a product of negotiations and settlement - not an opinion of value.

The standard of review here is whether the trial court abused its discretion. It did not. After the court made the determination that the statement by Mr. Novel was a continuation of settlement negotiations, it took the proper steps to exclude it. The general rule in Missouri is "that a settlement offer is inadmissible because of the policy of the law favoring the settlement of disputes." *J.A. Tobin Const. Co. v. State Highway Com'n of Missouri*, 697 S.W.2d 183, 186 (Mo.App. W.D. 1985). The cases cited by the County regarding statements of value given during commissioners hearings are not helpful to its point. In the most recent case, *Land Clearance for Redevelopment Authority of City of St. Louis v. Henderson*, 358 S.W.3d 145 (Mo.App. E.D. 2011), the court noted that all

previous cases were only "allowed statements made at the commissioners' hearing to be used for impeachment purposes" after "the landowners testified to the value of their land." *Id.* at 157. Those cases have no application here, as Mr. Novel did not testify to value. In *Henderson*, the court approved the admissibility of a written summary by the condemnor that contained a statement of value for the property. *Id.* That is not the case here. The trial court determined that the proffered statement was not a statement as to the value of the property, but was an amount that would be accepted for settlement purposes.

For the foregoing reasons, County's third point should be denied and the judgment of the trial court affirmed.

IV. THE TRIAL COURT DID NOT ERR IN ADMITTING APPRAISER DEMBA'S TESTIMONY REGARDING COUNTY'S COMPARABLE SALE NOR IN LIMITING TESTIMONY REGARDING A TRANSACTION NOT USED AS A COMPARABLE BECAUSE THE ADMISSION AND EXCLUSION OF SAID EVIDENCE WAS NOT AN ABUSE OF THE COURT'S DISCRETION AND BECAUSE THE COUNTY DID NOT OBJECT TO ANY OF THE ADMITTED EVIDENCE.

In its fourth point, the County presents another confusing argument. The County begins by criticizing Novel's appraiser's use of two comparable sales and his description of FEMA's flyover technique when making flood maps. The County's discussion of the appraiser's testimony on those issues is not relevant to its actual point. The County eventually gets to its point that it contends that the sale price for a property next to the "Terra Vista" property should have been admitted into evidence even though no one used it as a comparable sale to establish the value of Novel's property. The County argues that Novel's appraiser rejected the "Terra Vista" transaction as a comparable sale because the seller of said property was unsophisticated. To rebut this, the County sought to introduce the sale price for the property adjoining the "Terra Vista" property, which were both at one point owned by the same seller. The County ineffectively argues that the sale price of the adjoining property would have demonstrated that the seller was, in fact, sophisticated and, therefore, would support the merits of the Terra Vista sale as a comparable sale.

The evidence that is the subject of this point on appeal involves *two* different sales of different property at different periods of time made under different circumstances. The County, in its Brief, obfuscates the facts such that only a close reading reveals that there are two transactions at issue:

> *First Sale (Terra Vista/Levinson property)*: Both transactions at issue involved Mr. Walsh as the seller. Walsh owned a large tract of land adjacent to the south of the Novel Property. In 2003, Walsh sold a portion of his property to a home developer name Levinson for purposes of developing a subdivision called "Terra Vista." (187:6-8; 248:1-13) That sale was used by the County's appraiser, Mr. Gonterman, as a comparable sale. (Tr.307:14-16) In his direct examination, Mr. Demba testified on behalf of the Novel Family that he was aware of this sale and that he had not relied upon it, in part, because the seller, Walsh did not have access to information that the buyer, Levinson, had regarding the status of the flood plain on the property. (235:3-11)
>
> *Second Sale (Millstone property):* When Walsh sold a portion of his property to Levinson for the development of the Terra Vista subdivision, he continued to live on his remaining land which also adjoined the Novel Property. There, he maintained a residence for years until he sold that tract to M.B. Properties ("Millstone"). The sale to Millstone was introduced into evidence by the County during the testimony of its appraiser, Mr. Gonterman. (Tr. 312:14 to 313:15) His testimony established that

Millstone, "acquired the property hoping to get … the construction or be a part of the construction for the Page/Olive connector." (Tr. 312:15-18) Mr. Gonterman continued to testify regarding this transaction until he was asked of the purchase price, whereupon Novel objected that the evidence was "totally irrelevant." (Tr. 313:16-20) The court sustained the objection after which the County asked one additional question about the transaction before moving on to other matters. (Tr. 314:14-16)

A. Standard of review is abuse of discretion.

As stated before the "admission or exclusion of evidence in condemnation cases is within the discretion of the trial court, and errors in the court's determination will not result in reversal unless there is substantial or glaring injustice." *Edelen*, *supra,* 872 S.W.2d at 555.

B. **The testimony of Demba regarding the first sale to Levinson (Terra Vista tract) was relevant to explain a comparable sale relied upon by the County's appraiser**.

The testimony of Mr. Demba related to the First Sale (Terra Vista), which was the 2003 sale between Walsh and Levinson, a home developer. He testified at various points in his direct and cross regarding the transaction and the information about the status of the floodplain on the property that was available to each of the parties in that transaction. (Tr. 185:16-186:2; 197:23-25; 235:3-11) He stated that he had personal discussions with the engineer that did the water study on the Walsh property and with Walsh, himself. (Tr: 196:5 to 198:9) Based on these discussions, Demba determined that Mr. Walsh sold

property to Levinson unaware that it had been removed from the floodplain due to improvements to a nearby levee district. His testimony was that Levinson, the developer of the Terra Vista subdivision, however, was aware that the property in the First Sale was developable. (Tr:235:3-11) He also testified that Walsh accepted a considerable amount of non-cash consideration in the transaction. (Tr 185:16 to 186:1,2) The purpose of this testimony was to indicate that the sale relied upon by the County as a comparable sale was sold at a deflated price because of the non-cash consideration and because Walsh did not have access to the same information as Mr. Levinson, the developer, who bought the property. Demba's testimony was relevant in that it allowed the jury to weigh the significance of the First Sale as a comparable. Even though Mr. Demba based his testimony on personal interviews with persons such as Mr. Walsh, himself, the County asserts that Mr. Demba's testimony about the First Sale was "baseless speculation" (App. Br 48). However, the County made *no objection* at trial to this relevant testimony and thus has not preserved its admissibility for appeal. *Joplin v. Flinn*, *supra*, 914 S.W.2d at 401.

C. Testimony of Gonterman regarding the Second Sale to Millstone was not relevant and was properly excluded in the court's discretion.

The trial court sustained Novel's objection to the admission of the purchase price that Mr. Walsh received from Millstone for the portion of his property that remained after the Terra Vista sale. The County argues this was error and that it should have been permitted to present evidence that Mr. Walsh obtained a price that exceeded the fair market value and that he used homestead value to bargain for a higher price. However,

this evidence was not preserved for appeal. The only evidence that the County preserved for appeal was the purchase price for the property, which was excluded after objection. (Tr. 313:16-21) If there was additional evidence beyond the purchase price that the County wished to elicit from Mr. Gonterman regarding the Second Sale, it did not make a record through an offer of proof and it is not preserved for appeal. In *State ex rel. State Highway Com'n v. Recker*, 648 S.W.2d 568 (Mo.App. E.D. 1983), the owner offered the testimony of a contractor to rebut earlier testimony about the cost of developing property. After an objection by the condemning agency, the owners "abandoned any further pursuit of the matter." The appellate court refused to consider the appeal because "an alleged error in excluding evidence is not preserved for review unless an offer of proof is made by the party seeking to introduce the evidence which sufficiently demonstrates the relevance of the testimony." *Id.* at 572.

The only evidence the County preserved for appeal was the amount of the purchase price between Walsh and Millstone in the Second Sale. Novel's counsel objected to the price as being irrelevant. (Tr. 313:19) The court correctly sustained the objection. This transaction was not used as a comparable sale by any of the witnesses. Since it was not a comparable sale, then the purchase price of the Second Sale (Millstone) has no relevance to the value of the Subject Property. Also, the evidence was of questionable relevance to explain Walsh's level of sophistication in much earlier First Sale for Terra Vista.

The County argues that the purchase price of the Second Sale (Millstone) would have demonstrated that the seller Walsh acted in a sophisticated manner which the

County argues would in turn show that Mr. Walsh was also a sophisticated seller at the time of the First Sale (Terra Vista). The County's reasoning is not supported by the fact that the transactions were made many years apart and under different circumstances that would have involved different considerations, a different real estate market, and different players (i.e. lawyers and brokers) or the absence of them. The County's contention that the purchase price for a property, taken on its own, establishes the sophistication of a seller in *another* transaction many years earlier is highly speculative.

The County was not prevented from using the First Sale (Terra Vista) as a comparable sale. Further, the County, through its appraiser, Mr. Gonterman, was allowed to testify and comment about Mr. Walsh's capabilities at the time of the transaction. Gonterman characterized Walsh as "savvy" (Tr. 310:19) and that when he sold his property to Levinson in the First Sale (Terra Vista) that he was "an educated and knowledgeable seller." (Tr 312:1-3).

As the County notes in its brief, Novel also argued that the sale was inadmissible under the project influence doctrine. The project influence doctrine excludes sales that are influenced by the project for which a property is being acquired. See, *Quality Heights Redevelopment v. Urban Pioneers*, 799 S.W.2d 867, 870 (Mo.App. W.D. 1990)(Sales of three other properties were excluded because the prices were influenced by the existence of the project.) The County claims that no evidence suggested that the Second Sale (Millstone) was influenced by the project. The County is wrong. Mr. Gonterman, the County's own witness, stated on direct that the Second Sale was entered into by Millstone, "hoping to get … bidding or be involved in the construction or

be a part of the construction for the [project]" (Tr. 312:14-19) Earlier, Gonterman testified that he met Mr. Walsh because the property involved in the Second Sale was also "involved in the eminent domain." (Tr. 309:1) The evidence that the Second Sale was motivated and influenced by the project was thus established through Mr. Gonterman's testimony. Indeed, the County's brief cites that the seller Walsh in the Second Sale (Millstone) was "so savvy as to incorporate into the sale the twenty-five percent homestead value increase that might have been available to him had his residence been condemned." Homestead value, like heritage value, is a condemnation concept and such a statement by the County clearly demonstrates that Mr. Walsh was under threat of condemnation at the time of the sale to Millstone.

For the foregoing reasons, Respondents request this court deny the County's fourth point and affirm the trial court's judgment.

V. THE TRIAL COURT DID NOT ERR IN EXCLUDING OPINION TESTIMONY BY COUNTY'S NON-RETAINED EXPERT WITNESSES CONCERNING POTENTIAL DEVELOPMENT OF THE SUBJECT PROPERTY, BECAUSE THE TESTIMONY WAS BEYOND SCOPE OF NON-RETAINED EXPERT TESTIMONY, THE COUNTY DID NOT ESTABLISH A SUFFICIENT FOUNDATION FOR THE OPINIONS, AND THE COUNTY FAILED TO PRESERVE THE EXCLUDED EVIDENCE THROUGH AN OFFER OF PROOF.

The fifth point relied upon by the County relates to the trial court's discretion in controlling the scope of the testimony of witnesses designated by the County as non-retained experts. The witnesses in question were two employees of the City of Chesterfield. The Property is located in the City of Chesterfield and the City's employees were identified two months before trial, after the County had been granted a continuance for the purpose of identifying new witnesses. (Tr.36:1-5) The County identified three employees of the City of Chesterfield as non-retained experts, including the City's planning and development director (Aimee Nassif), a civil engineer (Jeff Paskiewicz) and the director of planning and public works. (App. A-21) The only information disclosed by the County regarding the witnesses was their names and their titles. (App. A-21) Unlike retained experts, a party is not required to required to disclose the general nature of the opinions of non-retained experts. See, Rule 56.01 (b)(4),(5).

During pretrial, the testimony of the Chesterfield employees was raised when the Novel Family asserted that these witnesses should not be permitted to testify regarding specific opinions of the Subject Property for the reason that such opinions would be outside the scope of their designation as non-retained experts and due to a lack of foundation for the testimony of public officials. (Tr. 36:1 - 38:16) The Novel Family's objection to this testimony was also set out in its motion in limine. (L.F. 139-146) As the County states in its Brief, the court ruled that these experts would not be permitted to testify to "potential development issues relating to the Subject Property" or "regarding the Novels' expert's proposed development plans for the Subject Property." At trial, only two of the three named City employees were called to testify. Both of the witnesses testified at length regarding the City's development and floodplain procedures. Their testimony included opinion evidence not related specifically to the Subject Property or to other experts' opinions.

The County argues that the City of Chesterfield witnesses were qualified as experts in their respective fields and, thus, should have been allowed to give opinions regarding the potential development of the Subject Property and to rebut the testimony of the Novel Family's experts. The qualification of the witnesses was not the issue at trial. Their testimony was limited by the court because the County did not disclose that it intended to use the witnesses to testify to opinions formulated for purposes of trial, which would have put them in the category of *retained* experts. Also, the County did not lay a foundation that would have permitted the witnesses, as public officials, to give their opinions as to the development potential of the Subject Property. The County attempts to

focus the Court's attention on the qualifications of the witnesses. The Court will find this is another instance where the County failed to preserve its point on appeal through an offer of proof of the excluded evidence.

A. The County did not preserve the excluded evidence through an offer of proof.

To the extent that the County claims it was prejudiced by the trial court's ruling that limited the testimony of the Chesterfield witnesses, the County did not make an offer of proof of the evidence that the County claims it was "unfairly deprived" of presenting to the jury. Consequently, the Court has no record to determine if the trial court abused its discretion or to show that the County was prejudiced by the court's ruling. There is nothing in the record that would allow the trial court or this Court to fully understand what the testimony would have been if it had been admitted. Even in its Brief, the County is unable to make a consistent or specifically detailed statement of the excluded evidence. It only offers general statements of what it thought was excluded as evidence:

Pg 52: "County proffered the testimony of the Chesterfield experts to address the impact of development challenges on the value of Subject Property."

Pg. 53: "... testimony regarding the proposed villa development which served as the basis for the opinion of fair market value to which the Novels' appraiser testified."

Pg. 54: "prohibited Mr. Paskiewicz from testifying with respect to the development of the Subject Property and the potential developmental problems associated therewith."

Pg. 55: "an expert opinion on the probability of and risks tied to development of Subject Property."

Pg. 55: "testimony relating to the potential developmental problems associated with the Subject Property."

Pg. 56: "expert opinion on the application of the Chesterfield's zoning requirements and risks tied to development of Subject Property."

Pg. 57: analysis of the "merits of the development proposal relied upon by the Novels' expert."

Pg. 57: "testifying with respect to potential development issues relating to the Subject Property."

Pg. 57: "testimony relating to the potential developmental problems associated with the Subject Property"

Pg. 57: "testimony regarding the Novels' expert's proposed development plans for the Subject Property."

Pg. 59: "opportunity to lay a proper foundation and elicit testimony from the Chesterfield experts to rebut testimony relating to the feasibility of the development hypothesized by the Novels' appraiser"

Pg. 59: "an opinion as to engineering, flood plain and flood way considerations for development of the Subject Property."

Pg. 59: "the complexity of the study required for residential development in flood way and flood plain."

Pg. 60: "testify that such [zoning] approval was far from automatic."

Pg. 60: "opinions with respect to challenges and difficulties in development of the Subject Property."

Pg. 60: "specific challenges that a developer would encounter on Subject Property."

Pg. 61: "rebut any assertions that minimized the challenges of development of the Subject Property."

These generalized statements are not sufficient to inform the Court what the actual testimony of the witnesses would have been had it not been excluded. An offer of proof was necessary to allow this Court to determine what the specific opinions were, or if the witnesses had conducted a sufficient investigation of the Property as a foundation for their testimony (see discussion below), or if the opinions would have invaded the province of the Chesterfield public bodies that decide development issues, or other details to understand the ultimate relevance of the testimony and to determine if the County was prejudiced by the exclusion of the evidence.

In *Wilkerson v. Prelutsky*, 943 S.W.2d 643 (Mo.1997), the issue was the extent to which a treating physician should be permitted to testify. The trial court there allowed the physician's testimony as to treatment, but not any opinions regarding causation. The Court discussed the importance of an offer of proof: "While a secondary reason for an offer of proof is that it permits the judge to consider further the claim of admissibility, the primary reason is to include the proposed answer and expected proof in the official record of the trial, so that in case of appeal upon the judge's ruling, the appellate court may understand the scope and effect of the question and proposed answer in considering

whether the judge's ruling sustaining an objection was proper." *Id.* at 646 (*quoting* John W. Strong et al., *McCormick on Evidence* § 51 (4th ed. 1992)). An offer of proof "'must show all the facts necessary to establish the admissibility of the testimony sought to be introduced' and it must be 'specific and definite' and 'not a mere statement of the conclusions of counsel.'" *Cowen v. Perryman*, 740 S.W.2d 303, 309 (Mo.App. 1987) (emphasis in original; citations omitted). The Court has no record that informs it what specific opinions and facts the two witnesses would have given because the County did not make an offer of proof with either witness. This point, therefore, was not preserved for review.

B. **The City of Chesterfield's employees were designated as non-retained experts, which placed a limit on the scope of their testimony since they had no opinions regarding Subject Property developed during the ordinary course of their duties.**

The Missouri Rules of Civil Procedure distinguishes between retained and non-retained experts. See, *Rule* 56.01(b)(4),(5). When asked through interrogatories, a party must disclose any witness that is expected testify to expert opinions formed in anticipation of trial and in connection with the litigation. The disclosure must include the witness' qualifications and the general nature of their opinions. *Rule* 56.01 (b)(4). Similarly, a party must also disclose non-retained experts who will give opinions that were not formulated for purposes of trial. However, the disclosure of these types of witnesses is limited to their identity and their field of expertise. *Rule* 56.01 (b)(5); 2 *Mo Practice, Methods of Litigation,* §9.41 (4th Ed.) The difference between retained and

non-retained experts is the scope of their testimony. Retained experts have opinions that were formulated for trial. Non-retained experts have opinions that are formulated independent of trial. The designation of a witness as either a retained or non-retained expert, therefore, carries with it a representation of the scope of their testimony.

Cases that discuss the differences between retained and non-retained experts frequently involve the role of treating physicians. In *Kehr v. Knapp*, 136 S.W.3d 118, 123 (Mo. App. 2004), the court explained that a non-retained expert physician is one that testifies to opinions made and facts learned during the course of a patient's treatment, and a retained expert physician formulates opinions and learns facts for the purpose of litigation. In *Kehr*, the treating physician testified against his former patient. The court discussed his testimony, stating: "[I]t is clear that Dr. Piephoff functioned as a treating physician and not as a retained expert. ... [T]he scope of Dr. Piephoff's testimony was limited to a discussion of Mr. Kehr's care and treatment. At no time was Dr. Piephoff asked to provide an opinion regarding the appropriate standard of care, whether Dr. Knapp was negligent or whether Dr. Knapp's conduct resulted in a material lost chance of survival. ... An opinion regarding the stage of cancer was an important element in Dr. Piephoff's explanation of his treatment plan and was not an opinion developed in anticipation of litigation or trial. Likewise, Dr. Piephoff's opinion regarding Mr. Kehr's prognosis was based solely on facts learned during his care and treatment and was not an opinion developed for trial." *Id.* The court affirmed the trial court, reasoning: "A review of the record establishes that the trial court did not abuse its discretion in treating Dr. Piephoff as a treating physician or non-retained expert rather than a retained expert. At

trial, Dr. Piephoff limited his trial testimony to his care and treatment of Mr. Kehr as well as Mr. Kehr's prognosis and *did not offer any opinions developed solely in anticipation of litigation or trial*." *Id.* (emphasis added)

In *Kehr*, the party opposing the treating doctor's testimony insisted that the difference between a retained and non-retained expert is whether the witness is paid. The court rejected that argument in favor of distinguishing between the two types of witnesses by looking at the *scope* of the testimony - that is, a retained expert is one whose opinions are made in anticipation of litigation or trial. The court stated: "when determining whether a [witness] should be characterized as either a retained or non-retained expert, *the proper focus is on the scope of the proposed testimony.*" *Id.* at 124.

In the case before this Court, there is no evidence that the City of Chesterfield employees had ever considered the Subject Property in the normal course of their duties. In fact, Novel's motion in limine informed the trial court that during deposition, the witnesses stated they were not familiar with the Subject Property prior to being contacted by the County's legal counsel. (L.F. 145) Consequently, the Chesterfield witnesses did not have specific opinions regarding the Subject Property that would have been based solely on their existing knowledge. Applying the principles of treating physicians as non-retained experts, here the witnesses never "treated" the Subject Property. The only opinions they had would have been formulated in connection with the current litigation. By definition, testimony by these witnesses that would rebut the testimony of the Novel's experts would be related to trial.

The County designated the employees as non-retained experts. In its brief, the County states, "Mr. Paskiewicz and Ms. Nassif were identified to testify to their opinions with respect to challenges and difficulties in development of the Subject Property" (App. Br. 60) That is not the case. They were only identified by their name and their title with the City of Chesterfield. (A-21) The County never endorsed these witnesses to testify to matters or opinions arrived at by them outside the normal scope of their duties as Chesterfield employees.

Novel does not dispute that the testimony of these witnesses as non-retained experts was relevant to explain the hurdles and procedures that anyone would face when trying to develop property in the City of Chesterfield. Their knowledge and expertise in these areas were developed by them in the course of their duties as Chesterfield employees, not because of this litigation. If the County intended to have the witnesses formulate and testify to opinions relating to the Subject Property, the County had the obligation to put the Novel Family on notice by naming them as retained experts. They did not do so and consequently the trial court correctly limited the scope of their testimony to reflect their status as non-retained experts.

C. The County failed to lay a foundation for the City of Chesterfield officials to render expert opinions about the Subject Property.

Setting aside the issue of non-retained experts, the County failed to lay a foundation that would permit the Chesterfield witnesses to give specific expert opinions about the Subject Property. The Chesterfield witnesses' testimony established their knowledge regarding development and floodplain procedures for the City of Chesterfield.

However, the witnesses provided no testimony that would establish a foundation to support specific opinions about the Subject Property or to critique the opinions of other witnesses. The witnesses did not testify that they had any familiarity with the Subject Property or conducted any form of investigation that would support such opinions. In S*t. Louis County v. Boatmen's Trust Co.*, 857 S.W.2d 453 (Mo.App. 1993), the court recognized the general rule that an expert's training and experience goes to the weight rather than the admissibility of his testimony. "However, it is also the rule that a witness's background must indicate a *familiarity with the property* at issue and a basis for that knowledge, as well as the ability to give information which will assist the fact finder in determining the ultimate issue." *Id*. at 459 (emphasis added). See also, "[A]n expert's opinion must be founded upon substantial information, not mere conjecture or speculation, and there must be a rational basis for the opinion." *Rigali v. Kensington Place Homeowners' Ass'n*, 103 S.W.3d 839, 845 (Mo.App. E.D. 2003).

The County relies on the expert testimony statute §490.065(1) to support the qualifications of the witnesses as experts, which was never an issue at trial. The objection was to a lack of foundation, which is governed by a different portion of the expert testimony statute: "The facts or data in a particular case upon which an expert bases an opinion ... must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable." §490.065 (3) *R.S.Mo.* Recently, the opinion of an appraiser was rejected for a lack of foundation and, in part, because "he had not examined or assessed the property prior to the taking." *Glaize Creek Sewer Dist. of Jefferson County v. Gorham*, 335

S.W.3d 590, 595 (Mo.App. E.D.2011). In *Rigali*, the court held that an appraiser's testimony lacked foundation when he failed to testify to the comparable sales used to value the property. *Rigali*, 103 SW3d at 845. More on point with the present case is *State ex rel. Missouri Highway and Transp. Com'n v. Gannon*, 898 S.W.2d 141 (Mo.App. E.D. 1995), where a planning director was prevented from testifying to the likelihood of rezoning because he did not make the necessary investigation to support the opinion. In the present case, there was no foundation that would support any specific opinions that the witnesses had about the subject property or about the opinions of the Novel Family's witnesses. Neither witness testified that they were familiar with the Subject Property and neither stated that they made an investigation to determine how the Property could be developed.

In *Gannon*, *supra*, the witness was the planning director for St. Louis County who was called to give an opinion on the likelihood of rezoning of the property being condemned. The trial court excluded the official from giving such an opinion, citing a lack of foundation. The Gannon court pointed out that "an expert may give an opinion as to the reasonable probability of rezoning where it is based on a proper foundation." Gannon, 898 S.W.2d at 143 (citing *State ex rel. Missouri Highway. and Transp. Com'n v. Pedroley*, 873 S.W.2d 949, 953 (Mo.App. 1994)). The court listed the factors that make up such a foundation, such as a review of nearby rezonings, growth patterns in the area, sales of related properties and other factors. The trial court in *Gannon* rejected the offer of proof wherein the zoning director testified that he "had not made the investigation of the property he would have made if he had been making a rezoning recommendation on

this property in his official capacity." *Gannon* at 142. Similarly, in this matter, there is no foundation laid whereby the Chesterfield officials made an investigation of the Subject Property and the other listed relevant factors in order to make expert opinions about the Subject Property.

In *Gannon*, the condemning authority's attorney tried another route to get the "likelihood of rezoning of the Subject Property" opinion before the jury by asking the government official to give an opinion based on his general knowledge of the area and his experience: "The Commission then asked Powers his own opinion based on his knowledge of the area and his experience as 'land use manager of St. Louis County Planning and Zoning District' as to the likelihood of the subject property being rezoned to commercial." *Id.* Again, the trial court rejected this foundation. This other "back door" attempt is similar to what the County is attempting in this case - using expert *qualifications* as a substitute for a *factual* foundation for giving expert opinions on the Subject Property.

The likely reason there was no foundation is that each of the witnesses would be unable to provide one. In its motion in limine, the Novel Family alerted the court that, on the basis of deposition testimony, there was no foundation to their opinions. (L.F. 141-142) The Chesterfield planning official described the Chesterfield planning process, she explained that her investigation involves looking to the comprehensive plan and zoning (Tr. 444:18-24), then reviewing a site plan (Tr. 445:19-24), and then seeking comments from outside agencies like MoDOT, County Highway Department, the fire department and MSD. (Tr. 447:15-20) Similarly, the testimony of the Chesterfield engineer, Mr.

Paskiewicz, on the floodplain approval process revealed an equally detailed investigation that involves FEMA. Under *Gannon*, the County would have had to lay the foundation that the Chesterfield witnesses made the kind of inquiry for the Subject Property as they would have in their official capacities. No such foundation was made that the witnesses took any of these steps regarding the Subject Property.

D. **Standard of review is abuse of discretion.**

A trial court's ruling on the admission or exclusion of expert testimony is discretionary and will not be reversed unless there is a clear abuse of discretion. See, *State ex rel. Missouri Highway and Transp. Com'n v. Sisk*, 954 S.W.2d 503, 509 (Mo.App. W.D.1997). For the purpose of argument, even if the record established that the witnesses would have offered relevant and admissible evidence, the County has not shown that the trial court abused its discretion. "[A] trial court does not commit reversible error merely by excluding expert testimony that is relevant and admissible. … 'the admission or exclusion of expert opinion testimony is a matter within the sound discretion of the trial court....' An appellate court will not interfere with the exercise of that discretion unless it plainly appears that such discretion has been abused." *Hoffman v. Rotskoff,* 715 S.W.2d 538, 544 (Mo.App. E.D. 1986)(citations omitted). For the reasons stated above - exceeding the scope of non-retained experts and a lack of foundation to give expert opinions about the Subject Property - the trial court did not abuse its discretion in excluding testimony pertaining to the Subject Property but permitting other testimony dealing with government procedures on real estate development and challenges of developing property in Chesterfield.

VI. TRIAL COURT DID NOT ERR BY ENTERING JUDGMENT FOR NOVELS IN THAT THE JURY VERDICT WAS WITHIN THE RANGE OF VALUATION EVIDENCE.

For its sixth point, the County claims that the trial court erred in entering judgment because the verdict was not within the range of valuation evidence. The County's point is premised on an erroneous statement of the evidence that is contradicted by the record and by the County's own statements elsewhere in its Brief.

The jury verdict was in the amount of $1,300,000. The valuation testimony by the Novel family was through Mr. Ernie Demba. He testified that the property was worth $2 per square foot. At the end of his direct, the following exchange took place:

Q. So if I take 648,373 square feet and multiply it by $2.00, that would give me a value of $1,296,746, is that right?

A. That's true.

Q. So that's close to 1.3 million?

A. Yes.

Q. What does that represent to you?

A. That represents, in my opinion, the fair market value of the subject property as of March 11, 2010, which is, my opinion, of the just compensation due to the

5 property owners for the condemnation of their property.

(Tr:211:20 to 212:5). This testimony established evidence for the jury that the $1.3 million represented Mr. Demba's opinion as to the fair market value of the property. In closing, Novel Family's counsel stated that the evidence of damages was $1.3 million, which did not draw objection by the County. Later, in its own closing, the County stated twice that Mr. Demba's testimony was $1.3 million. (Tr: 493:23; 501:3) Essentially, the record undisputedly establishes that the Novel's evidence of damages created a range of evidence up to $1,300,000 which is the amount of the jury's verdict. Since the verdict is in the range of evidence, there is no basis for it to be disturbed, even if it is substantially closer to one of end of the range or the other. *State ex rel. State Highway Com'n v. Kemper*, 542 S.W.2d 798, 803-04 (Mo. App. 1976)(questioned on other holding by *Heins Implement Co. v. Missouri Highway and Transp. Com'n*, 859 S.W.2d 681 (Mo. 1993)).

The County's brief on this point is based on a glaring error that is carried over from its Motion for New Trial. The County states, "The Novels' appraiser, Ernest Demba, testified to fair market value of $1,269,000 - an amount $31,000 less than the fair market value as found by the jury." (App Br:63) Even if the "rounded" figure of $1,300,000 is disregarded for the moment, Mr. Demba's testimony was that the $2 per square foot times the square footage of the property was $1,296,746. The County, essentially, transposed the "9" and the "6" to arrive at its figure of $1,2*69*,000. The County made this same error in its Motion for New Trial. (L.F. 167) Such an error is understandable during that stage of litigation, since the County had only its notes as reference. However, on appeal, the County has the luxury of reference to the transcript.

Even elsewhere in its brief, the County correctly states the "non-rounded" figure in the Statement of Facts (App Br.:12), and three times in Point III (App Br.39,42,44). In each of these instances, the County correctly states that the testimony of Mr. Demba (before rounding) was $1,*296*,746. However, in its discussion of on this point, the County bases its argument on the erroneous figure that is used in its motion for new trial.

The County's argument has no merit in light of the factual record. The Novel Family's expert testified the $1,300,000 represented the fair market value of the property on the date of taking. There was no objection at to Mr. Demba's competence as a valuation witness. "The opinion of a qualified witness concerning the extent of damages constitutes substantial evidence. This court does not weigh the evidence and if an award is within the range of competent evidence, it is supported by substantial evidence and will not be disturbed." *State ex rel. State Highway Com'n v. Zahn*, 633 S.W.2d 185, 191 (Mo.App. W.D. 1982)(citations omitted).

Since the jury's verdict was within the range of competent evidence, the County's sixth point should be denied.

VII. THE TRIAL COURT DID NOT ERR IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE A CONSTITUTIONAL EXERCISE OF THE LEGISLATURE'S AUTHORITY TO ALLOW FOR ADDITIONAL COMPENSATION TO OWNERS IN CONDEMNATION ACTIONS AND THE COUNTY WAIVED ALL CONSTITUTIONAL OBJECTIONS BY FAILING TO RAISE THEM AT THE EARLIEST OPPORTUNITY.

The County's seventh point is the first of three wherein it contends that the Heritage Value statute is unconstitutional under the Missouri Constitution. For all of these points, the County has waived the right to challenge the constitutionality of heritage value statute when it paid heritage value on the commissioners' award without challenging the statute at that time on constitutional grounds. In this point, the County suggests that the legislature is powerless to participate in determining the amount of compensation that a property owner may be awarded for the taking of their property. It is universally recognized in all jurisdictions that have considered the matter that a legislature may always provide for compensation in condemnation actions so long as it does not reduce the amount of damages below what is constitutionally required for just compensation. Since heritage value, by definition, exceeds fair market value, it is a valid statute under the Missouri Constitution.

In reviewing the constitutionality of a statute, a statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. 2008). The Court shall "resolve all doubt in favor of the statute's validity" and "may make every reasonable intendment to sustain the constitutionality of the statute." *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007), *citing Westin Crown Plaza Hotel v. King*, 664 S.W.21d 2 5 (Mo. banc 1984). "If a statutory provision can be interpreted two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id*.

A. The County waived the right challenge the constitutionality of the Heritage Value statute.

A litigant is required to raise constitutional objections to statutes at the earliest opportunity and such objections must be specific. "In order to preserve a constitutional challenge, a party must raise it at the earliest opportunity, raise it with specificity, and maintain the objection throughout the proceedings. E.g., *City of St. Louis v. Butler*, 219 S.W.2d 372, 376 (Mo. banc 1949); *State v. Knifong*, 53 S.W.3d 188, 192–93 (Mo.App. W.D. 2001)." *Henderson*, *supra* at 150.

The first opportunity for County to object to the constitutionality of the heritage value statute was when the trial court ordered it to pay heritage value on the amount of the commissioners' award. Under §523.061, the trial court first applies heritage value at the time the commissioners' award is filed. This is true even in cases where the parties file exceptions. *White Family Partnership, supra*, 271 S.W.3d at 573. On May 12, 2010,

the Novel Family filed a "Motion for Assessment of Heritage Value" seeking to increase the amount of the commissioners award by 50%. (L.F. 95-97) The Motion was served on the County. (L.F. 97) The motion was set for hearing (L.F. 17) and on May 26, 2010, the trial court ordered the County to pay an additional amount of $160,000 as heritage value. (L.F. 98) The County voluntarily paid the $160,000 to the clerk of the court on June 14, 2010. (L.F. 100) The Novel Family moved to have the court order the heritage value paid to them, which was duly noticed, heard and granted (L.F. 110-122) During these proceedings, the County never raised a single objection to the award of heritage value to the Novel Family. The County made no objection when the court ordered heritage value paid; it voluntarily paid the amount without any reservation of objection; and when the Novel Family had the money paid to them the County's only response was a hand written memo that it "takes no position on the Pay Out Motion filed by defendants Derek Novel, et al, as to Parcel 8…" (L.F. 118)

The County waived all constitutional challenges to heritage value in 2010 when it did not oppose the assessment of heritage value on the commissioners' award. It is also noteworthy that the County did not file exceptions, as further indication that it did not object to the commissioners award, which was amended to include heritage value.

The County first raised its constitutional objection to heritage value on December 29, 2011 in a memorandum opposing the Novel Family's motion to assess heritage value on the amount of the jury verdict. (L.F. 153-155). However, the County's "earliest opportunity" to raise its constitutional challenges to heritage value occurred at the commissioners' stage in 2010. It had ample notice of those proceedings and was,

actually an active participant in the events. Since it failed to make the challenge in 2010, it waived the right to do so in 2011. "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Land Clearance for Redevelopment Authority of Kansas City, Missouri v. Kansas University Endowment Ass'n,* 805 S.W.2d 173, 176 (Mo. 1991). The County did not treat its challenge to the heritage value with "dignity" when it willingly paid the heritage value on the commissioners' award without a hint of dissent or opposition. The County waited 1 ½ years following the commissioners' hearing and its payment of the heritage value to attack the constitutionality of the heritage value statute. This is the kind of "afterthought" challenge that the courts repeatedly reject.

This waiver applies to the challenge raised in Points VII, VIII and IX of the County's Brief. Based on the foregoing, this and the following two points should be dismissed on the basis of waiver.

B. The challenge to the constitutionality of heritage value on the grounds stated in Point VII was additionally waived because the argument was not raised by the County at the trial level.

As previously stated, a challenge to the constitutionality of a statute must be raised at the *earliest* possible moment. Moreover, the party making the objection must:

"(1) raise such question at the first available opportunity;

(2) designate, by explicit reference, the specific constitutional provision claimed to have been violated;

(3) state the facts showing the violation; and

(4) preserve such question throughout for appellate review."

Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635, 654 (Mo.App. E.D. 2005) (numbering provided).

In this point, the County argues that the heritage value statute conflicts with the portion of Article I, §26 that requires the payment of "just compensation." The County argues that it was required to pay more than the amount required for just compensation when it was ordered to pay heritage value. This argument is presented for the first time in this litigation through the County's Brief. This argument does not appear in its Memorandum in Opposition to the payment of heritage value filed after trial and it does not appear in its motion for new trial. A party cannot raise the constitutionality of a statute for the first time on appeal. *Butler Co., supra*, 219 S.W.2d at 380. The County waived this point by failing to raise this challenge to the heritage value statute below.

C. The substance of the County's argument that the heritage value statute is unconstitutional under Article I, §26 fails.

This Court noted in *White Family Partnership, supra*, that the legislature, through §523.039 *R.S.Mo.* "enacted a statutory definition of just compensation." *White Family Partnership,* 271 S.W.3d at 572. The *White* court noted that the Constitution, itself, lacks a definition of "just compensation" but that the judiciary had defined it to mean "what a reasonable buyer would give who was willing but did not have to purchase, and what a seller would take who was willing but did not have to sell." *Id.* The Court has equated the reasonable buyer and seller test to "fair market value." See, *City of St. Louis v. Union*

Quarry & Const. Co., 394 S.W.2d 300, 305 (Mo. 1965). The heritage value statute provides that in a condemnation of property held by the same family for more than fifty years, just compensation shall equal "the sum of the fair market value and heritage value." §523.039(3). Elsewhere, the legislature defined "heritage value" to mean fifty percent of fair market value. §523.001(2).

Given the foregoing, a property owner who is entitled to heritage value receives at least the fair market value of the property. That is because under the statutory scheme described above "just compensation" for such owners is established first by determining the fair market value of the property and then adding fifty percent to that amount. §523.039(3); §523.001(2). Since courts have interpreted "just constitution" to mean, *at a minimum,* the fair market value of the property, then heritage value, by definition, complies with the Constitutional requirement. The County argues that Article I, §26 is *limited* to the judicial statement that just compensation is "fair market value" and that this provision serves to protect it government agencies from paying more. Its argument turns on the false premise that the legislature has no role in establishing the meaning of "just compensation."

The question of whether a state legislature may *increase* the amount of compensation that a property owner may receive as "just compensation" was best answered by an annotator with the observation, that "there seems to be substantial agreement that … the legislature, although it cannot direct that anything less than just compensation be made, may require more liberal compensation than that which would satisfy the constitutional requirement." *Deduction of benefits in determining*

compensation or damages in eminent domain, 145 A.L.R. 7 (2011 Cumm.). The power of the legislature to provide more than the minimum amount of compensation was recognized by the U.S. Supreme Court in *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684 (U.S. 1923), when it stated, "while the Legislature was powerless to diminish the constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded." *Id.* 262 U.S. at 676-77, 43 S.Ct. at 688. (Upholding state statute that provided for compensation related to personal property).

More recently, the condemning agency in *State of Kansas ex rel. Nick Tomasic, Wydandotte County v. The Unified Government of Wyadndotte County*, 962 P.2d 543 (Kansas 1998) advanced the same argument that the County is making here: That the requirement to pay an amount greater than the fair market value of the property (in that case, 25%) was unconstitutional because a government cannot be required to pay anything more than the minimum amount of just compensation. While citing to the *Joslin Mfg.* case, the Kansas court rejected the argument concluding with the statement that "[T]he constitutionally required just compensation 'is a minimum, not a maximum entitlement. The legislature cannot require an owner to accept less, although it is free ... to provide for more.'" *Id.* at 561 (*citations omitted).* Other states have arrived at similar conclusions when faced with this issue.[1]

[1] See, *Lore v. Board of Public Works*, 354 A.2d 812, 814 (Md. 1976)(*citing Joslin Mfg.*); *Daniels v. State Rd. Dep't*, 170 So.2d 846, 853 (Fl.1964) ("the State, speaking through its

As examples of other compensation permitted in condemnation, Federal law and legislatures in every state, including Missouri, have required condemning authorities to pay relocation monies for displaced parties as a result of condemnation. (Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 USCS §4601 et seq.; Missouri Relocation Assistance, 523.200 et seq. R.S.Mo.). Also, many states permit compensation for business damages in addition to the fair market value of the real property. A sample of states permitting the recovery of business damages or business goodwill in condemnation include California (Cal. Code Civ. Proc. §1253.510);

Legislature, may of course impose upon itself, and upon those to whom it delegates the right of eminent domain, an obligation to pay more than what the courts might consider a 'just compensation.'"); *Jersey City Redev. Agency v. Kugler*, 277 A.2d 873, 878 (1971) (legislature "may prescribe a rule of damages more favorable to the landowner than that which would satisfy the minimum requirement of the Constitution."); *Poudre Valley Rural Elec. Ass'n, Inc. v. City of Loveland*, 807 P.2d 547, 555 (Colo.1991); *In re Water Front in City of New York*, 83 N.E. 299, 300 (N.Y. 1907)("the Legislature may require more liberal compensation than that which would satisfy the constitutional requirement, but it cannot direct that anything less than just compensation shall be made"); *Orono-Veazie Water Dist. v. Penobscot County Water Co.*, 348 A.2d 249, 258 (Me.1975)("Legislators ... may prescribe a method of assessment more favorable to the owner than that which would satisfy the minimum requirement of either the Federal or State Constitutions.")

Colorado (C.R.S. 31-25-105); Florida (Fl. Stat. §73.071(3)(b); Oklahoma (OK. St. T. 27, §7.1); Vermont (29 V.S.A. §792, 30 V.S.A.§112); Wyoming (Wyo. Stat. §1-26-713).

Also, when it comes to the condemnation of public facilities, Missouri courts have set aside the fair market value measure (what a willing buyer and willing seller would agree to), and have required the replacement costs for a new facility to replace the used one being condemned. *Reorganized School District No. 2 v. Missouri Pacific Railroad Company*, 503 S.W.2d 153, 158-159 (Mo.App. E.D. 1973)(Replacement of a school shall be measured without deductions for depreciation or obsolescence.)

In Missouri, this Court has recognized that the Missouri Legislature has a role in establishing "just compensation" in the context of interest on a jury verdict in condemnation. This Court has recognized that pre-judgment interest on a condemnation award is a component of just compensation. *Akers v. City of Oak Grove*, 246 S.W.3d 916, 921 (Mo. 2008); *St. Louis Housing Authority v. Magafas*, 324 S.W.2d 697, 699–700 (Mo.1959). Once courts recognized the right to pre-judgment interest as a component of just compensation, an issue arose whether the jury or the trial court should assess interest. The Court resolved that issue in *State ex rel. State Highway Com'n v. Green*, 305 S.W.2d 688 (Mo. 1957). The Court determined that the trial court had no authority to award interest, and the amount of pre-judgment in a condemnation action must be determined by the jury. However, the Court specifically *invited* the Legislature to establish the authority of trial courts to assess and add interest on a condemnation award. It stated, "if it be desired that the trial court add the interest in the judgment, the authority so to do must be provided by a specific statute." *Id.* at 693. The Missouri Legislature, in fact, did

pass a statute dealing with pre-judgment interest. The statute not only resolved the procedural issue that the trial court make an award of interest, but it also provided that the rate is to be fixed at six percent. §523.045 *R.S.Mo.* More recently, in the context of an inverse condemnation case, this Court stated that, "In Missouri, the six percent interest rate provided in §523.045 reflects the *legislature's judgment of what is constitutionally required to achieve just compensation* for a direct taking. ... As such, this Court holds that prejudgment interest in cases involving indirect takings should be calculated at the same rate as in cases involving direct takings: six percent per annum." *Akers*, 246 S.W.3d at 922 (*emphasis added*). Additionally, the Legislature has provided for other kinds of compensation in eminent domain cases that are not related to fair market value, at all, such as relocation benefits. §523.200 *et seq. R.S.Mo.*

The County's argument that a provision found in the Missouri or Federal Bill of Rights should be construed as being a protection of the rights of a government agency is unfounded and without precedent. "Provisions of a Bill of Rights are primarily limitations on government, declaring rights that exist without any governmental grant, that may not be taken away by government and that government has the duty to protect." *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249, 253 (Mo. 1963).

For the foregoing reasons, the County's seventh point should be rejected by this Court and the judgment below affirmed.

VIII. THE TRIAL COURT DID NOT ERR IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BEACAUSE SAID STATUTES ARE NOT UNCONSTITUTIONAL UNDER THE MISSOURI CONSTITUTION ARTICLE III, §38(a) AND ARTICLE VI, SECTIONS 23 AND 25 AND THE COUNTY WAIVED ALL CONSTITUTIONAL OBJECTIONS BY FAILING TO RAISE THEM AT THE EARLIEST OPPORTUNITY.

In its eighth point, the County continues to argue against the constitutionality of the heritage value statute. As stated in response to their seventh point, the County waived the opportunity to challenge the constitutionally of heritage value when it failed to raise the issue at the earliest possible point in the proceedings, which was at the time it was ordered to pay heritage value on the amount of the commissioners award. The argument set out in Point VII is incorporated herein by reference as it applies to this point, as well. In addition, the County specifically also waived any constitutional challenge based on Article III, §38(a), because it did not make reference to that section of the Constitution until its Brief. A party cannot raise the constitutionality of a statute for the first time on appeal. *Butler Co.*, *supra* at 380.

In reviewing the constitutionality of a statute, a statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional

provision. *Tourkakis*, supra at 204. The Court shall "resolve all doubt in favor of the statute's validity" and "may make every reasonable intendment to sustain the constitutionality of the statute." *Murrell, supra,* at 102. "If a statutory provision can be interpreted two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id*.

The substance of the County's challenge herein is that the payment of heritage value conflicts with the prohibition found in the Missouri Constitution against using public funds to benefit private interests. The County cites to Article III, §38(a) and Article VI, §23 and §25 as the basis for its argument. These provisions essentially provide that that "public funds" are not to be granted for "private interests." The test to determine if a statute is consistent with these constitutional provision is, "If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal…." *Rice v. Ashcroft*, 831 S.W.2d 206, 209 (Mo.App. W.D. 1991). Heritage value is only payable in settings where the government is exercising its power of eminent domain. Eminent domain may only be used in situations where there is a public purpose. See, *State ex rel. State Highway Com'n v. Curtis*, 222 S.W.2d 64, 68 (Mo. 1949). Therefore, the payment of heritage value when eminent domain is authorized will be automatically tied to a public purpose. Here, the purpose is the construction of a highway of a "public road." (L.F. 25)

The County argues in its brief that payment to a condemned property owner for heritage value is illegal under Article III, §38(a) and Article VI, §23 and §25 because it serves no public purpose. As with Point VII, this is another attempt by the County to

argue that any legislative attempt to cause the condemning authority to pay more than fair market value is unconstitutional. When considering the application of Article III, §38(a) and Article VI, §23 and §25 in the context of condemnation actions, it is important to note that the essence of eminent domain authority is that it involves the taking of "private property." As a result, all payments for "just compensation" will be paid to private parties losing their property. This is distinct from other cases considering the scope of Article III, §38(a) and Article VI, §23 and §25 where the public expenditures are being challenged because private parties benefit and, therefore, allegedly violate said constitutional provisions. (See, e.g., *State ex rel. v. Industrial Development Authority of Jasper*, 570 S.W.2d 666 (Mo. 1978)(Public bond monies being spent to build a building to be used by a private business).

Setting aside the fact that heritage value, by definition, will only be paid for property that is being acquired for a public purpose, the underlying purpose for providing heritage value serves a valid public purpose. The heritage value section of the eminent domain reform was the legislature's recognition that families who have had property for more than fifty years suffer a special form of harm that is not fully compensated when just compensation is limited to fair market value. §523.001(3) *R.S.Mo.* The legislature recognized that a family's long ties with their property, such as a home or farm, which often has been passed down from one generation to the next, and often with long-term sweat equity and family history involved, creates a special situation that is destroyed by condemnation and requires compensation.

The additional compensation for heritage values is analogous to relocation benefits

which are statutorily required to be given to displaced persons as a result of condemnation. §523.200 et seq., *R.S.Mo.* Although payment for relocation expenses is not required as part of "just compensation" under the constitution, the legislature stepped in to give this added compensation to mitigate the harm suffered by displaced families and businesses. Another analogy is to the payment of pre-judgment interest in condemnation cases which results in the expenditure of public monies above fair market value to property owners to insure they are made whole in recognition of the time value of money. *Jackson County v. Hesterberg*, 519 S.W.2d 537, 541 (Mo.App. W.D. 1975). As with relocation, the legislature stepped in to determine the procedure and amount of interest to be awarded to the property owner. §523.045, *R.S.Mo.* Such legislative action, whether to mitigate the harm (relocation) or to more fully indemnify the property owner for his losses (interest), recognizes the often spoken phrase by Justice Holmes in condemnation: "The question is, What has the owner lost? not, What has the taker gained?'" *Greystone Heights Redevelopment Corp. v. Nicholas Investment Co.,* 500 S.W.2d 292, 299 (Mo.App. 1973), citing Mr. Justice Holmes in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, l.c. 195, 30 S.Ct. 459, l.c. 460, 54 L.Ed. 725. (See also Respondent's Brief on Point VII on the issue that the legislature may provide for additional compensation above fair market value of the condemned property.)

The additional payment of heritage value above fair market value is permissible under Article III, §38(a) and Article VI, §23 and §25. As stated in *State of Kansas ex rel. Nick Tomasic, Wydandotte County v. The Unified Government of Wyadndotte County*, 962 P.2d 543, 559 (Kansas 1998), the Kansas Supreme Court, in affirming a 25%

additional payment to fair market value for properties being located within a certain redevelopment area, stated: "We know of no provision that prohibits the legislature from requiring a condemning authority to make additional payments beyond 'just compensation.' The Fifth Amendment to the United States Constitution requires only that just compensation be paid for the taking of private property. It does not prohibit a condemning authority from paying more than what is determined to be just compensation." (Note: In Kansas, just compensation is equated with fair market value as defined by statute, K.S.A 26-513(e).

On this Point, The County has not met its burden of showing that the legislature acted arbitrarily or unreasonably. See, *State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority*, 518 S.W.2d 68, 74 (Mo. 1975) ("Furthermore, determination of what constitutes a public purpose is primarily for the legislative department and it will not be overturned unless found to be arbitrary and unreasonable.") For the foregoing reasons, the County's Point VIII should be denied and the judgment should be affirmed.

IX. THE TRIAL COURT DID NOT ERR IN APPLYING SECTIONS 523.039 AND 523.061 R.S.MO. TO AWARD THE NOVELS ADDITIONAL COMPENSATION EQUAL TO FIFTY PERCENT OF THE JURY'S DETERMINATION OF FAIR MARKET VALUE AS "HERITAGE VALUE," BECAUSE SAID STATUTES ARE WITHIN THE CONSTITUTIONAL LIMITS OF LEGISLATIVE AUTHORITY AND DO NOT VIOLATE MISSOURI CONSTITUTION ARTICLE I, §26 AND THE COUNTY WAIVED ALL CONSTITUTIONAL OBJECTIONS BY FAILING TO RAISE THEM AT THE EARLIEST OPPORTUNITY.

In its ninth, and final Point, the County asserts one more constitutional challenge against the heritage value statute. This argument, which consists of a single paragraph, suggests that the procedure for awarding heritage value violates Article I, §26 of the Missouri Constitution because it was the judge, and not the jury, that did the mathematical calculation of multiplying the jury's determination of fair market value times fifty percent and then adding it to the jury's verdict. As stated in Novel's response to County's seventh point, the County waived the opportunity to challenge the constitutionally of heritage value when it failed to raise the issue at the earliest possible point in the proceedings, which was at the time it was ordered to pay heritage value on the amount of the commissioners award. The argument set out in Point VII is incorporated herein by reference as it applies to this point, as well.

A. The County waived its objection that heritage value should have been presented as a jury question when it did not tender an appropriate jury instruction.

The County's argument here is not directed against heritage value *per se,* but that the *procedure* of the heritage value statute violates the Constitution in that it is the judge, not the jury, that makes the mathematical calculation for heritage value. By failing to object or tender a jury instruction, the County waived its argument that, "None of the instructions with which the jury was charged operated to allow the jury to find the heritage value…" (App. Br. 72) The County should have attempted to cure what it now claims is error by tendering a jury instruction that it deemed proper under the circumstances. The instructions conference below occurred in what the trial court described "one of the fastest recorded times." (Tr. 433:23 - 435:12) The County tendered no instructions and made no objection to the instructions provided by Novel's counsel. Pursuant to Rule 70.03, the County cannot now claim that it was erroneous not to instruct the jury to determine heritage value when it did not object to the instructions given. See, also, *Leonard Missionary Baptist Church v. Sears, Roebuck and Co.*, 42 S.W.3d 833 (Mo.App. E.D. 2001), where the defendant in a property valuation case claimed error "in the trial court's failure to submit the issue of depreciation to the jury." *Id.* at 838. The claim of error was not preserved because the defendant had not tendered an instruction on deprecation. *Id*. (citing to *Culver-Stockton College v. Missouri Power and Light Co.*, 690 S.W.2d 168, 173 (Mo.App. E.D. 1985))

B. The heritage value statute does not conflict with Art. I, §26 because the jury still ascertains just compensation by determining fair market value and the judge only performs the mathematical calculation.

The County claims that it is unconstitutional for the judge to do the math to add the heritage value's 50% to the jury award. The argument is that under §523.039, heritage value is defined as being part of "just compensation", and under Art. I, §26, "such compensation shall be ascertained by a jury." Therefore, the County alleges, it is improper for the judge to add 50% heritage value to the jury's award - that is a job for the jury under Art. I, §26.

The procedure created by the heritage value statute in §523.061 gives the responsibility to the judge to complete the math necessary to award heritage value. See *White Family Partnership*, *supra*, 271 S.W.3d at 574. The jury determines the fair market value of the property and then the judge adds the heritage value, namely, 50% of the jury award. The significance of this procedure is that the jury is still vested with its constitutional role to *ascertain* just compensation by determining the fair market value of the property. When the jury determines the fair market value, it also determines the heritage value. The addition of heritage value by the court is merely a mathematical function whereby the amount is totally determined by the jury's award of damages and no discretion is left to the judge. The percentage of 50% is fixed by the statute and cannot be altered by the judge. Thus, this provision does not conflict with Art. I, §26 of the Constitution, which provides, "Such compensation shall be ascertained by a jury or board

of commissioners of not less than three freeholders, *in such manner as may be provided by law*." (emphasis added).

Allowing the court to do the math for heritage value is similar to pre-judgment interest in condemnation cases. In condemnation cases, the difference between the jury award and the commissioners' award is entitled to pre-judgment interest of 6%. As with heritage value, pre-judgment interest is deemed part of just compensation, its calculation is tied to the jury verdict, the rate is set by statute, and there is no discretion for the judge. As with heritage value, pre-judgment interest is, in effect, ascertained by the jury.

It was previously discussed in Point VII that the addition of heritage value to a jury's determination of fair market value is similar to the addition of interest. Both are simply mathematical calculations performed by the trial court based on the jury's assessment of fair market value. By statute, heritage value is incorporated into just compensation by definition. §523.039; *White Family P'ship, supra*, 271 S.W.3d at 572. Pre-judgment interest on a condemnation award was recognized by the courts as an inherent component of just compensation. See, *Akers*, *supra*, 246 S.W.3d at 921. In *Akers*, the Missouri Supreme Court wrote: "...The right to interest in a condemnation claim stems directly from the constitutional 'just compensation' requirement. 6A *Nichols on Eminent Domain* section 26E.02(4) (3d.ed 2006). In Missouri, the six percent interest rate provided in section 523.045 reflects the legislature's judgment of what is constitutionally required to achieve just compensation for a direct taking." *Id*. at 922. In *Jackson County v. Hesterberg*, 519 S.W.2d 537, 541 (Mo. App. 1975), the court went through a history of interest in condemnation cases and affirmed that interest is part of

"just compensation," stating: "All of the case law proceeds on the assumption that as a matter of constitutional right, the defendant is entitled to payment upon the condemnor's right to possession and title and that, therefore, any delay in such payment likewise entitled him to the 'interest.'"

After recognizing pre-judgment interest as a component of just compensation, the Court suggested that the Missouri Legislature empower trial courts to perform the function of performing the necessary mathematical calculations based on the amount of the jury's verdict. *Green*, *supra*, 305 S.W.2d at 693. The *Green* Court stated, "if it be desired that the trial court add the interest in the judgment, the authority so to do must be provided by a specific statute." *Id.* at 693. The Court reiterated its message to the Legislature at the end of its decision: "If called to its attention it may be that the legislature will conclude that the best method by which such may be accomplished i to provide statutory authority for the addition of the proper amount by the trial judge." *Id.* at 695. The Missouri Legislature did pass a statute dealing with pre-judgment interest that resolved the procedural issue that the trial court, *not the jury,* calculates pre-judgment interest and also fixed the rate of interest at six percent. §523.045 *R.S.Mo.* The Legislature's authority to establish the *amount* of interest (which is part of just compensation) was approved recently in *Akers*, when the Court adopted that rate to be applied to inverse condemnation cases because "the six percent interest rate provided in §523.045 reflects the *legislature's judgment of what is constitutionally required to achieve just compensation…" Akers*, 246 S.W.3d at 922 (*emphasis added*).

The heritage value statute and the interest statute are very similar in what they accomplish, and how they do it. First, both establish the *amount* that is to be added to the amount of fair market value as determined by the jury in terms of percentages. Second, both empower the trial court to apply the mathematical calculations to the amount of the jury verdict. The procedure in the interest statute that places the responsibility of performing the calculation on the trial court was approved by the Court before that statute was even passed and has been subsequently approved by the Court on more than one occasion in the cases discussed above. The same procedures in the heritage value statute are just as valid.

C. **Standard of Review.**

In reviewing the constitutionality of a statute, a statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. *Tourkakis*, supra at 204. The Court shall "resolve all doubt in favor of the statute's validity" and "may make every reasonable intendment to sustain the constitutionality of the statute." *Murrell, supra,* at 102. "If a statutory provision can be interpreted two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id*.

The County's argument here lacks substance and was waived when it did not tender an instruction to have heritage value submitted to the jury. On that basis, this point should be denied and the judgment below affirmed. The legislature's decision to adopt the procedural method described in §523.061 is consistent with Art. I, §26's "Such

compensation shall be ascertained by the jury" and Art. I, §26's "in such manner as may be provided by law."

CONCLUSION

The Respondents respectfully request this court to AFFIRM the Judgment below. The trial court did not abuse its discretion in the admission or exclusion of evidence, the verdict of the jury was well within the range of value evidence and the heritage value statute is constitutional.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this Respondents' Brief complies with the limitations contained in Rule 84.06(b), being less than ninety percent of 31,000 words (i.e. 27,900 words). There are 20,424 words in this brief, as counted by Microsoft Word, Microsoft Home and Office 2010. The font is Times New Roman, proportional spacing, 13-point.

I certify that a copy of this brief was served electronically this 10th day of October, 2012, on Carl W. Becker and Stephanie L. Hill, attorneys for Appellants.

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