

MMAA Newsletter

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SPECIAL REQUESTS:

- **MMAA SUMMER SEMINAR.** The Missouri Municipal Attorneys Association Summer Seminar will be held at Tan-Tar-A Resort on July 16-18, 2010. See registration materials for the Seminar on the MML Web site at [MMAA Summer Seminar Registration](#), scroll down to MMAA Summer Seminar. Please make your reservations as soon as possible by calling 1-800-Tan-Tar-A.
- Please send us photos of your cities and towns so we can include them in our *Newsletter*.

Higher Charge To Connect City Sewer System Than Other Parts Of The Community Is Special Legislation

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The city of Sullivan (City) enacted an ordinance, which provided that connections to the City's sewer system built prior to a 1996 bond issue were charged connection fees that were substantially less than fees to connect to the sewer system constructed after the 1996 bond issue. The cost to hook up in the area served by the 1996 bond issue was 750 percent higher than the areas in the City served by the pre-1996 sewer system. A citizen challenged the ordinance on the grounds that the ordinance establishing the fees was special legislation under the Missouri Constitution. The trial court ruled in favor of the City and the plaintiff appealed to the Southern District, which held that the ordinance was special legislation and was therefore invalid. The court determined that the legislation was based on historical facts and geography (either before or after 1996 and in a certain area); therefore, under case law it was facially a special law. The City did not offer sufficient evidence to show that there was a substantial justification for the classification. The court determined that the application of the 1996 ordinance to areas that did not have sewers that were constructed with the 1996 bond proceeds, was not justification for the legislation. *City of Sullivan v. Sites*, (SD29596, 3/31/10).

Comment Howard. This opinion has far-reaching implications because many cities, counties and sewer districts differentiate between classes of customers who are served by the sewer system based on connection fees that are established to recover the cost of providing new sewers in areas that are developing within the city versus existing sewers that already have access to the sewer system. The April 12, 2010, edition of "Missouri Lawyers Weekly" had a front-page article on this case. The Southern District has now denied the motion for rehearing and the case is currently pending on motion to transfer to the Missouri Supreme Court.

Court Defines Good Faith Negotiations

The Planned Industrial Expansion Authority of Kansas City (Authority) prepared a redevelopment plan for the Ivanhoe Gardens Redevelopment Area (Ivanhoe Gardens) that authorized the Authority to condemn the property needed for the Ivanhoe Gardens. State law requires the Authority to give “existing merchants, residents and present businesses ... the first option to redevelop the area.” State law defines good faith negotiations that are required to be satisfied as a condition of condemning property. The Authority solicited proposals for the redevelopment of the Ivanhoe Gardens area. Three parties submitted proposals, none of which owned the centerpiece of the redevelopment for the Ivanhoe Gardens – an abandoned school building, owned by Brown Caldwell Christian Church (Brown-Caldwell). While the redevelopment proposals were under consideration, Brown-Caldwell entered into a contract to sell the Ivanhoe Gardens property for \$650,000 to Ivanhoe, a not-for-profit that represented the interests of the members of the community affected by the redevelopment project and who placed a bid for the redevelopment of the Ivanhoe Gardens. The Authority selected from the three proposals that were submitted, the redevelopment offer of Prairie Dog and, thereafter filed a condemnation of the Ivanhoe Gardens property. The trial court heard evidence concerning the appointment of commissioners and ruled that the Authority had not met its statutory obligation to negotiate in good faith because the offers were not made using generally accepted appraisal procedures. Ivanhoe also moved to dismiss the petition because it had a right of first refusal to redevelop the Ivanhoe Gardens area that the Authority had not honored. The Authority appealed the decision to the Western District that affirmed the trial court’s decision. The court ruled that under Subsection 523.256.2 RSMo, the trial court had jurisdiction to consider cross-examination testimony that showed the appraisers for the Authority did not use generally accepted appraisal practices, and that the offer made by the Authority, based on the appraisal, was not a good-faith offer. Some of the practices questioned by the court were using foreclosures as comparables, drastically reducing certain comparables without an adequate explanation and refusing to consider the sale by Brown-Caldwell to Ivanhoe as a comparable since the evidence showed it was an “at arm’s length” transaction. The court held that while the condemning authority need only show that its appraisal was made by a state-licensed appraiser who used generally accepted appraisal practice, the trial court is not required to take the appraisers testimony at face value without further inquiry to determine if generally accepted appraisal practices were used. The Western District upheld the trial court’s decision. In addition, the court approved the award of attorney’s fees for the trial and the appellate work. [*Planned Industrial Expansion Authority of Kansas City v. Ivanhoe Neighborhood Council*](#), (WD70655, 04/27/10).

Comment Howard. This case is extremely important because it is the first case that examines in detail and finds that certain practices with respect to the appraisal used to make an offer for acquisition of land subject to condemnation was not made in good faith. It literally opens up the door for a full-scale examination of every appraisal made by the condemnor to the scrutiny of the trial court. The award of attorney fees for the trial and appellate court work to the condemnee increases enormously the ability and the interest of property owners to challenge the validity of the appraisal. Get ready to open up your pocketbooks and be prepared for more contentious condemnation proceedings. The May 3, 2010, edition of “Missouri Lawyers Weekly” had a full-page article on this case.

“trial court is not required to take the appraisers testimony at face value, without further inquiry to determine if generally accepted appraisal practices were used.”

“the award of interest is not a matter of right, but is discretionary with the trial court”

Ouch! County Pays \$109,222 In Interest On Commissioners Award After Abandonment Of Condemnation

St. Louis County (County) filed a petition of condemnation to condemn a number of parcels as part of the NorthPark tax increment financing project. On May 3, 2007, the court appointed commissioners awarded the landowners \$840,000. The County and the landowners filed exceptions to the commissioners’ report and requested a trial. The County did not pay the damages into the court and did not take title to or possession of the land while the proceedings were pending. Two years later on July 7, 2009, the County filed a motion to abandon the condemnation proceedings. The landowners filed a motion for assessment of interest pursuant to Section 523.045 RSMo, and requested the statutory amount of 6 percent per annum interest on the \$840,000 that amounted to \$109,222. The trial court entered judgment – awarded interest to the landowners in the amount requested, and the County appealed to the Eastern District. On appeal, the court held that the award of interest was not a matter of right, but was discretionary with the trial court, based on the loss of the right to receive and use the money and no other evidence of loss was required. Judgment affirmed. *St. Louis County, Missouri v. Watson, et al.*,² (ED93472, 03/30/10).

City Can Charge For Mandatory City-Wide Trash Service

A city is authorized to impose a citywide trash service upon its citizens. If the city chooses to make the service mandatory, a citizen may not legally refuse to pay for the trash service. The city may bill the service as part of the water bill, but only if the trash service fee is stated separately, and with the restriction that the city may not shut off other utilities for nonpayment of trash services. Att. Gen. Op. #17-2010.



Lack Of Standing To Intervene In TDD Case

Property owners located at the intersection of Clarkson and Kehrs Mill Road in Ballwin, Missouri, had a contract with Schnucks Market to construct a supermarket on the property. A number of transportation improvements would be made as part of the development of the property using sales tax funds from the transportation development district (TDD) tax. A petition for the creation of a TDD was filed in circuit court. The trial court held a hearing on the petition and determined that all of the prerequisites for the creation of the TDD were completed and entered judgment organizing the TDD district on August 11, 2009. On August 14, 2009, Robert Minbole et al. (Movants) filed a motion to intervene in the action as a matter of right under Rule 52.12(a)(2) to set aside the judgment arguing that the trial court should order a public hearing to give the Movants an opportunity to be heard. After a hearing on the motion, the trial court entered its judgment and order denying the motion that was appealed to the Eastern District. In order to intervene as a matter of right under Rule 52.12(a)(2), the intervener must show an interest in the subject matter; that the disposition of the action may impede its ability to protect its interest; and that the applicant’s interest is not adequately represented by existing parties. The trial court may deny a motion to intervene if any one of these requirements is not met; however, if all of the requirements are met the right to intervene is absolute. The Movants argued that

“Simply alleging you are a taxpayer or that you live close to the project is insufficient to allow intervention.”

their interest was due to their proximity as neighboring residents of the proposed TDD district, and that they would as taxpayers spend money in the district. Simply alleging you are a taxpayer or that that you live close to the project is insufficient to allow intervention. The Movants failed to allege in their petition to intervene that they were opposed to the improvements and they did not present any evidence at trial to show their opposition and how they would be impacted by the improvements. [In Re: The Creation of the Clarkson Kehrs Mill Transportation Development District, Behymer v. City of Ballwin](#), (ED93691, 04/27/10).

Columbia Wins Sewer Back-Up Case Caused By Grease

Rader's property in the city of Columbia (City) had a sewer backup in a finished basement. Rader sued the City for damages under a theory of inverse condemnation, contending the building had been reduced in value because of the damage to the basement. The cause of the sewer backup was that grease clogged up the sewer line that came from restaurants upstream to the Rader building. The City showed that it had a preventative maintenance program that included cleaning the sewer lines every five years although on the average they were cleaned every three years. In September of 2002, about two years before the sewer backup, an inspection of the line showed a little grease and grit but no further investigation was performed. The City had an ordinance that prohibited the introduction of large amounts of grease into the sewer system, and a requirement that food establishments have grease traps and required periodic maintenance by the restaurant. The jury rendered a verdict for the City and the trial court entered judgment consistent with the verdict that was appealed to the Western District. Rader submits that the court should have allowed evidence of subsequent preventative measures by the City arguing that the exclusionary rule that normally applied in negligence cases should not apply in inverse condemnation cases. The Western District, in a case of first impression, ruled that such evidence is inadmissible and the rationale in negligence cases is equally applicable to inverse condemnation cases. Rader also argued that it should have been allowed to prove that the City unreasonably failed to enforce its ordinance that barred introducing large amounts of grease into the sewer system by showing that the City began issuing NOV's after the Rader sewer backup to other restaurants. The Court noted that evidence of this type would result in mini trials of collateral issues and the decision to issue tickets was a governmental function, which cannot be the basis for liability to an individual citizen. Evidence of a backup caused by Wal-Mart in 2004 was also excluded because it presented significant dangers of confusing the issues, could mislead the jury, and had little probative value because it wasn't related to the Rader sewer backup. [Rader Family Limited Partnership, L. L. P. v. City of Columbia](#), (WD70907, 04/13/10).



Comment Howard. A jury verdict in this case was pretty impressive. The victory in this case was largely dependent upon having good procedures for your grease program. This is a great case to use to model your grease protection program. Congratulations to the city of Columbia.

“Commissioner not entitled to judgment because he acted with unclean hands.”

Sunshine Claim Barred Due To Unclean Hands

Purcell was one of three commissioners on the Cape Girardeau County Commission (Commission). Purcell pursuant to a lawful notice calling for a closed session made a motion at a Commission meeting to go into a closed session to discuss a “county auditor issue” and the “McBryde easement issue,” which were subjects that could lawfully be discussed in a closed meeting. Purcell secretly recorded the meeting without the knowledge of the other commissioners and afterwards contended that the meeting notice and the closed session discussions failed to comply with the Sunshine Law under Section 610.021 RSMo. Purcell filed a lawsuit requesting that the court declare the actions unlawful and that the Commission be enjoined from other violations of the Sunshine Law. The trial court ruled against Purcell and he appealed to the Missouri Supreme Court, which held that Purcell was not entitled to a judgment because he acted with unclean hands. If you have unclean hands, you are not entitled to equitable relief such as an injunction or a declaratory judgment. [*Purcell v. Cape Girardeau County Commission*](#), (SC90383, 04/06/10).

University Waived The Defense Of Sovereign Immunity Because It Had Self Insurance Plan

Plaintiffs filed a petition seeking damages from the curators of the University of Missouri alleging negligence relating to medical care provided to the plaintiff, while he was a patient at the University Hospital. The plaintiffs alleged that the defendants had waived their sovereign immunity because they had a self insurance plan. The trial court sustained the curators motion to dismiss on the grounds of sovereign immunity, and the plaintiffs appealed to the Western District. The Western District affirmed the motion to dismiss on the grounds that the allegations in the petition that the defendants had waived their sovereign immunity was simply a legal conclusion that the trial court did not have to accept as true. [*Hendricks v. The Curators of the University of Missouri, et al.*](#), (WD70398, 04/27/10).

Prevailing Wage Re Maintenance

Joe Lauber from Williams & Campo PC reports: “The Missouri Court of Appeals Western District affirmed Judge Callahan’s decision that work done in accordance with a comprehensive water tower maintenance contract between Utility Service Company (USC) and the city of Monroe City was ‘maintenance’ and not ‘construction,’ and therefore was not subject to prevailing wage law requirements. Unfortunately, however, the court did not issue a published opinion.” The case primarily turned on the fact that USC established by affidavit that the facility, which was the subject of the contract was the water storage tower, including the tank, which DOLIR did not dispute. In view of that, the court analyzed the work to be done under the contract against the backdrop of the entire water tower. The court considered the existing facility and the tank, and determined that repainting, steel replacement and welding, and installation of an anti-climb device were “maintenance” as they did not change the size, type or extent of the existing facilities established by USC’s affidavit. Accordingly, the court determined that the work to be completed under the contract was not subject to prevailing wage law requirements. Joe also reported that there is currently pending, before the Missouri Supreme Court, another prevailing wage law case on the question of maintenance versus construction. Stay tuned for more on this issue. Copies of the briefs are on file with the MML if you need a copy. Congratulations to Joe!

Is Wright Wrong?

Michael White writes in response to a comment I made in last month's case *JGJ Properties v. City of Ellisville*. "Howard, I just read your summary in the *Newsletter*. It seems that the city is using a rather bizarre procedure if they are requiring zoning applicants to go before the board of zoning adjustment, which by statute and case law has no legislative authority whatsoever. As to your comment that you thought an applicant must show what amounts to a total taking in order to overturn a refusal to rezone, I am constrained to disagree. A correct statement of the law is that a property owner is entitled to a reasonable zoning classification. Thus, it is not the refusal to rezone that is challenged. Rather, it is the existing zoning which is claimed to be unreasonable. See, White, *The Law of Unreasonable Refusal to Rezone in Missouri - the Need for a Practical Injunctive Remedy*, 58 UMKC Law Review, 1 p. 65 (1989)."

Lou Czech Award Nominations

The committee appointed by the Missouri Municipal Attorneys Association is soliciting nominations for the Lou Czech Award, which will be presented at the Summer Seminar July 16-18, 2010, at Tan-Tar-A.

Nominees are limited to full members of the Missouri Municipal Attorneys Association and former members of the association gone from the state or profession less than three years. The committee will review the applications using the following criteria:

1. The individual's professional accomplishments in serving the public's interests and the various governmental jurisdictions wherein the nominee was employed.
2. The professionalism exhibited by the nominee in his/her relationship with elected officials, the public, and other local government professionals. The committee also will consider the nominee's time and effort spent in training and supporting young professionals just entering the field.
3. The individual's accomplishments in addition to service to the employing jurisdiction; time and effort spent serving the local, state, and international city attorneys associations; serving on Municipal League committees and in other capacities that have proven beneficial to the public welfare or the promotion of the profession of municipal law.
4. The nominee's record of ethical conduct in all private and professional matters that bear on the individual's acceptability of the Lou Czech Award.

If you have a nomination, please submit the name and reasons you think the person should receive the award to Richard Sheets, Missouri Municipal League, 1727 Southridge Drive, Jefferson City, MO 65109.

How To Obtain Opinions

The material contained in this *Newsletter* is summarized as a service to the MMAA members. Almost everything cited in the *Newsletter* is available on the Internet. There are a variety of places to search for cases on the internet. Below are several sites that I use for research. If you have questions or comments please feel free to email me at howardewright@mchsi.com.

Missouri: <http://www.courts.mo.gov/page.jsp?id=12086&dist=Opinions>

Federal: <http://www.ca8.uscourts.gov/onestop.html>.

Supreme Court: <http://www.supremecourtus.gov/>

Other sources: www.findlaw.com and <http://www.molawyersweekly.com/>.

The opinions cited in this Newsletter may be subject to revision or withdrawal prior to publication.