

Municipal Law Essentials:
CONDEMNATION PRACTICE

**Missouri Municipal Attorneys Association
Summer Seminar**

LEGAL REFERENCES GUIDE

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LEGAL REFERENCES GUIDE

I. LEGAL PRINCIPLES OF EMINENT DOMAIN

A. DEFINITIONS

1. **Eminent Domain** – The power of a governmental entity to take privately owned property, the power is an inherent element of sovereignty. *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 475 (Mo. 2013).
2. **Condemnation** – The judicial procedure for invoking the power of Eminent Domain and determining Just Compensation.
 - Condemnation is the proceeding by which a governmental entity takes private property. *Metropolitan St. Louis Sewer District v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 915 (Mo. 2016). (internal citation omitted).
3. **Taking** – The government’s actual or effective acquisition of private property either by ousting the owner or by destroying the property or severely impairing its utility. Black’s Law Dictionary (10th ed. 2014).
4. **Just Compensation** – A payment by the government for property it has taken under Eminent Domain – usually the property’s fair market value, so the owner is theoretically no worse off after the taking. Black’s Law Dictionary (10th ed. 2014).
 - United States Supreme Court and the Missouri Supreme Court have interpreted “just compensation” to mean “the ‘fair market value’ of the property at the time of the taking.” *Olson v. United States*, 292 U.S. 246, 255 (1934); *City of St. Louis v. Union Quarry*, 394 S.W.2d 300, 305 (Mo. 1965).
 - “The fair market value of land is 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.” *Union Quarry*, 394 S.W.2d at 305.
5. **Police Power** – The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government. Black’s Law Dictionary (10th ed. 2014).
6. **Property** – Refers to real property, as well as tangible and intangible personal property.

B. THE TAKINGS CLAUSE OF THE UNITED STATES CONSTITUTION

1. “[N]or shall private property be **taken** for public use, without just compensation.” U.S. CONST. amend. V. (emphasis added).

- a. The Fifth Amendment Takings Clause of the United States Constitution applies to the states through the Fourteenth Amendment. *Kelo v. City of New London*, Connecticut, 545 U.S. 469, 472 n.1 (2005).
- b. The touchstone of the Takings Clause is to prevent government “from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
- c. The Takings Clause of the Fifth Amendment “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).
 - The term “property” refers to the rights inhering in the person’s relationship to some thing, such as the right to possess, use and dispose. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984). Almost all interests in land are recognized as “property” under the Takings Clause – such as fee simples, leaseholds, easements, liens, restrictive covenants and some future interests.
 - The Takings Clause covers both tangible and intangible personal property. With regard to intangible property, in the absence of statutory language precluding a property interest, one looks to “whether... the alleged property had the hallmark rights of transferability and excludability.” *Peanut Quota Holders Ass’n, Inc. v. U.S.*, 421 F.3d 1323, 1330 (2005).
 - Indicators that an interest will be recognized as property include the ability to sell, assign, transfer, or exclude. *McGuire v. U.S.*, 707 F.3d 1351, 1362 (Fed. Cir. 2013). An interest having value does not, of itself, confer property status. *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932).

C. THE TAKINGS CLAUSE OF THE MISSOURI CONSTITUTION

1. “[P]rivate property shall not be taken or damaged for public use without just compensation.” Mo. CONST. art. I. § 26.
 - a. An important distinction between the U. S. Constitution’s Takings Clause and the Missouri Constitution’s Takings Clause is the “damaging” language, which was added in 1875 to make it clear that something less than an actual, physical invasion of property could give rise to the right to receive Just Compensation. *Hamer v. State Highway Commission*, 304 S.W.2d 869, 874 (Mo. 1957).
 - Under the Missouri Constitution’s Taking Clause, the payment of Just Compensation due for damage to the land need not be paid until the

damage is inflicted. *Guaranty Savings & Loan Ass'n v. City of Springfield*, 139 S.W.2d 955, 957, 346 Mo. 79, 85 (Mo.1940).

- “A property owner who voluntarily makes changes on his property in anticipation that a proposed public improvement will be constructed thereon or nearby does so at the risk of losing his investment if the public agency exercises its unquestioned right to abandon the project or move it to a different location.” *Hamer*, 304 S.W.2d at 874.
- With the exception of the damages provision in the Missouri Takings Clause, the clause is interpreted to match the “nearly identical” federal Takings Clause. *See State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 478 (Mo. 2013).

D. THE PUBLIC USE REQUIREMENT

1. A Taking of private property must be for a “public use.” U.S. CONST. amends. V.; MO. CONST. art. I. §§ 26 and 28. For much of our nation’s history the public use requirement meant use of private property by the public. *Rindge Co. V. Los Angeles*, 262 U.S. 700, 706 (1923).
2. There are three modern, important United States Supreme Court decisions dealing with the public use requirement – *Berman v. Parker*, a 1954 decision, *Hawaii Housing Authority v. Midkiff*, decided in 1984, and *Kelo v. City of New London*, decided in 2005. The precedents established in *Berman* and *Midkiff*, were heavily relied on by the Court in *Kelo* to determine if the public purpose of economic development fulfills the public use requirement.
 - a. In analyzing the public use requirement, the *Berman* decision blurred the distinction between the terms public use, Police Power, public purpose, public interest, and public welfare. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). The Court’s ambiguous language made the exercise of Eminent Domain easier by expanding the public use requirement from requiring property to be used by the public to simply requiring that property be used in furtherance of some public purpose, or that the use generally promotes the public welfare. The decision also emphasized that a high degree of judicial deference should be given to the legislative determination of what constitutes as a public use. *Id.* at 32.
 - b. Thirty years later, in *Midkiff*, the Court again expanded the public use requirement when it determined the term “public use” is the equivalent of public purpose. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984).

Further, the Court concluded, it is enough that the Taking be “rationally related to a conceivable public purpose.” *Id.*

- c. In *Kelo v. City of New London*, the Court’s decision affirmed that a “public purpose” is any purpose within the government’s Police Power. *Kelo v. City of New London*, 545 U.S. 469 (2005). Therefore, the public use requirement is met if a Taking is for a public purpose, which is any purpose within the government’s Police Power. Thus, if a government appropriates private property to promote the public health, safety, and welfare of a community, the public use requirement has been met. This expansive interpretation of the public use requirement led the Court to hold that even Condemnation of unblighted private property for conveyance to private developers can be a public use, given a proper economic development purpose. The Court’s decision in *Kelo* failed to provide any standard for defining public use or distinguishing between public and private uses.
 - “To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.” *Id.* at 494 (O’Connor, J., dissenting).
3. Mo. CONST. art. VI. § 21 authorizes the use of Eminent Domain for redevelopment purposes. In 2006, Missouri reformed its Eminent Domain laws in response to *Kelo*’s expansive definition of public use.
- For example, in Section 523.261 RSMo., the Missouri legislature provided that in actions to condemn blighted, substandard, or insanitary areas under the Missouri Constitution, “any legislative determination that an area is **blighted**, substandard, or insanitary shall not be arbitrary or capricious or induced by fraud, collusion, or bad faith and shall be supported by substantial evidence.” This codified the substantial evidence requirement. *Centene Plaza Redev. Corp. v. Mint Properties*, 225 S.W.3d 431, 436 n.2 (Mo. 2007) (addition of the substantial evidence requirement was “merely a codification of existing case law stating that a legislative determination will be found arbitrary if it is not supported by substantial evidence”).
 - Also in 2006, in Section 523.271.1 RSMo., the Missouri legislature expressly limited the scope of the Eminent Domain power: “No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.” See *State ex rel. Jackson v. Dolan*, 398 S.W.3d

472, 482-83 (Mo. 2013) (“Economic development ‘unquestionably serves a public purpose.’ (citing *Kelo*, 545 U.S. at 484). Under § 523.271, however, the Missouri General Assembly has determined as a matter of this State's public policy that economic development may not be the *sole* purpose of a taking. The Port Authority failed to demonstrate a purpose that was in addition to economic development.”).

- Blight is not defined in the Missouri statutes and various statutes that authorize “blighting” determinations use differing standards. Blight is not easily definable because a determination of blight is not based on the condition of the property alone but on the existence of a negative externality stemming from the condition of the property. Generally, blight is found where the condition of the property causes an economic or social liability in the area where the property is located. See Sections 353.020 and 99.320 RSMo.
- Although the elimination of blight is a public purpose for purposes of Eminent Domain law, a non-charter municipality may not rely on general statutes referencing Condemnation for “public purposes” if the statutes predate Mo. CONST. art. VI, § 21. *City of North Kansas City v. K.C. Beaton Holding Co., LLC*, 417 S.W.3d 825 (Mo. App. 2014) (rejecting use of Section 88.497 RSMo. regarding Condemnation for streets, parks, etc., as basis for use of Eminent Domain for redevelopment purposes).

E. THE POWER OF EMINENT DOMAIN; DELEGATION

1. “The principal that private property may be taken for public uses can be traced back to English common law where it was presumed that the king held title to all the land.” Nichols §7.01[3]. Eminent Domain is recognized as a necessary power of the state essential to the growth and welfare of the community. The United States Supreme Court first established the existence of the power of Eminent Domain in 1875 in *Kohl v. United States*. The Court called the authority of the federal government to appropriate property for public use “essential to its independent existence and perpetuity.” *Kohl v. United States*, 91 U.S. 367, 371 (1875).
2. “The Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a **preexisting power** to take private property for public use, rather than a grant of new power.” *U.S. v. Carmack*, 329 U.S. 230, 242 (U.S. 1946). (emphasis added).
 - a. Shortly after *Kohl*, the United States Supreme Court declared that “[t]he right of Eminent Domain...appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.” *Boom Co. v. Patterson*, 98 U.S. 403, 406, (1878).

- The Missouri Supreme Court recognized the power of Eminent Domain in 1894, affirming “[t]he power of the state to appropriate private property to a public use is an **inherent element of sovereignty**.” *St. Louis, H. & K.C. Ry. Co. v. Hannibal Union Depot Co.*, 28 S.W. 483, 485 (Mo. 1894). (emphasis added).
3. As sovereigns, the federal government and state governments possess the inherent power of Eminent Domain. “The right of Eminent Domain rests with state and does not naturally inhere in counties, municipalities or public service corporations.” *State ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819, 820 (Mo. 1994). “The right [for various entities] to condemn,” therefore, “can be exercised only upon delegation from the state.” *Id.*
- a. Thus, in Missouri, the General Assembly delegates the power of Eminent Domain to various public and private entities, subject to limitations found in the United States and Missouri Constitutions, as well as other Missouri statutes. U.S. CONST. amends. V. and IV.; Mo. CONST. art. I. §§ 26 and 28; *Hodge*, 878 S.W.2d 819.
- Once delegated, “unless restricted by the constitution, the power [of Eminent Domain] is unlimited and practically absolute.” *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. 2008) (internal citation omitted).
 - “A municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly or impliedly granted it by the state.” *Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811 (Mo. 1985).
 - In Missouri, “Dillon’s Rule” governs basic questions of local governmental authority. It limits local authority to “(1) those [powers] granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.” *State ex rel. City of Blue Springs v. McWilliams*, 335 Mo. 816 (Mo. 1934), (citing 1 Dillon on Municipal Corporations § 89 (3d ed.)) Thus, a municipality must have statutory authority to adopt local land use controls. Moreover, statutory grants of power to municipalities will be strictly construed and any reasonable doubts as to whether the power has been so delegated will be resolved against the municipality. *City of Kirkwood v. City of Sunset Hills*, 589 S.W.2d 31, 35-36 (Mo. App. 1979).

- Missouri municipalities are either statutory cities, home rule charter cities, or special charter cities. Statutory cities only have those powers specifically granted to them under the Missouri Statutes. *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 212 (Mo. 1986). Home rule charter cities can act without specific grants of power as long as the authority can be found in the local charter and is not in conflict with state or federal law. *State ex inf. Hannah v. City of St. Charles*, 676 S.W.2d 508, 512 (Mo. 1984). Special charter cities must look to their charters or state law to find a grant of authority before they may enact a regulation.

F. THE POLICE POWER

1. The Police Power is the power to adopt regulations to promote the public health, safety, and welfare of a community. The Police Power of a state is an inherent power that existed prior to the creation of the United States. *United States v. Lopez*, 514 U.S. 549, 567 (1995).
 - The Police Power is one of the most essential and least limitable of government’s powers. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915). It may extend to any conceivable public purpose. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).
 - The extent and limits of the Police Power is universally conceded to include everything essential to the public safety, health, morals and general welfare. *Lawton v. Steele*, 152 U.S. 133, 136 (1894).
 - Generally, a regulation will be upheld as a valid exercise of Police Power if it bears a “substantial relation to the public health, morality, safety or welfare.” *City of Independence v. Richards*, 666 S.W.2d 1 (Mo. App. 1983).
2. The power of Eminent Domain involves the Taking of property for public use and requires Just Compensation to the landowner, whereas the Police Power involves the use of private property, without compensation, in the interest of protecting the health, welfare, or safety of the community. *Id.* The exercise of either power may impair the fair market value of private property. When the value of private property is impaired due to the exercise of the Police Power, such as with zoning regulations, courts traditionally find the loss is not subject to the Just Compensation requirements of the United States and Missouri Constitutions. The powers are distinct but, over time, the course of law has been to merge the powers.
 - In the 1887 decision of *Mugler v. Kansas*, the United States Supreme Court rejected the idea that an improper or excessive use of the Police Power became

a Taking. In *Mugler*, a state alcohol prohibition law rendered a brewery practically worthless. The view of the *Mugler* Court was that regulations under the Police Power were not burdened by a requirement of compensation.

- The Court’s view, however, has evolved to address the intersection of the Police Power and the power of Eminent Domain. The powers intersect when the Police Power regulation completely impairs all beneficial use of a property. Such situations are characterized as regulatory Takings and require the payment of Just Compensation. The Courts expansion of the Takings Clause to include regulations is generally viewed as having arisen in the 1922 decision, *Pennsylvania Coal, v. Mahon*. Justice Holmes delivered the opinion of the Court, which held that “while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking...[as]...a strong public desire by a public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (U.S. 1922).
- Today, excessive Police Power regulatory measures affecting property rights are actionable under the Takings Clauses of the United States and Missouri Constitutions.

II. THE MISSOURI CONDEMNATION PROCESS

A. TWO-STEP PROCEDURE DESCRIBED AND SET FORTH IN CHAPTER 523, RSMO., AND RULE 86.

- The Missouri Supreme Court has explained that a two-step procedure in condemnation cases “guarantees to the public early commencement of the project while preserving to the individual landowners the right at a later date to extensively and thoroughly litigate all issues relating to damages for the taking.” *State ex rel. Missouri Highway and Transp. Com'n v. Anderson*, 735 S.W.2d 350 (Mo. 1987). This procedure consists of the following stages.
 - The first stage is a hearing on the petition to adjudicate the right of the condemner to condemn the property in question—in other words, to determine if the condemnation has been properly authorized by law.
 - The second stage establishes the landowner’s damages from the Taking. The court appoints commissioners to assess the landowner's damages and, upon payment of the commissioners' award, the condemning authority acquires the property and may proceed to utilize it as prayed in its petition for Condemnation.
- Either party may request a jury trial to establish the landowner's damages.

B. STEP-BY-STEP GUIDE THROUGH THE CONDEMNATION PROCESS (Part 1) – WHEN NO FEDERAL FUNDS ARE USED

1. *Determine what interests are being sought and how this will serve a public use.*
 - Not solely for economic development purposes
2. *Obtain legal description and title report.*
3. *Contact Property Owner(s) to discuss project and request donation. With donation, obtain a waiver of compensation signed and dated by Property Owner.*
 - Depends on type and quantity of property interests sought
 - Is the owner a public entity or being used for a public use? As a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of Eminent Domain being in each case insufficient; *State ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819 (Mo 1994).
4. *Get an appraisal or valuation of the land and interest sought.*
 - Best practice = State licensed appraiser
 - City should determine issues to be addressed in appraisal (consult with attorney).
5. *Provide the owner of record notice of the intent to acquire an interest in the real property at least sixty days before filing of a Condemnation petition. Pursuant to Section 523.250 RSMo., such notice must include:*
 - Identity of property interest to be acquired and legal description;
 - The purpose(s) for which the property is to be acquired;
 - Notify the Property Owner they have the right to:
 - Seek legal counsel at their own expense;
 - Make a counteroffer and engage in further negotiations;
 - Obtain their own appraisal of Just Compensation;
 - Have Just Compensation determined by court-appointed commissioners and, ultimately, a jury;
 - Seek assistance from office of ombudsman;
 - Contest the right to condemn in the Condemnation proceeding; and
 - Exercise the right to request vacation of an easement.

An owner may waive the above requirements in writing. Pursuant to Section 523.250.2 RSMo., written notice **must** be sent by certified or registered mail,

postage prepaid, addressed to the owner of record as listed in the office of the assessor in the county in which the property is located.

6. *Provide relocation eligibility notice, if applicable.* Pursuant to Section 523.205 RSMo., if the land being acquired results in displaced persons, the municipality must provide a relocation eligibility notice as provided for in the Federal Uniform Relocation and Real Property Acquisition Policies Act of 1970 (42 USC §4601 *et seq.* and 49 CFR §24).
7. *Authorize the use of Eminent Domain to acquire specific interest(s) in the real property prior to delivery of the offer letter.* Legislative approval (i.e., an ordinance) is required for the offer letter. Generally, the ordinance authorizing the use of Eminent Domain should contain:
 - A description of the project and improvements;
 - The types of interests in real property sought;
 - The legal descriptions of real property for each interest sought;
 - The legislative findings regarding public purpose and necessity; and
 - Authority to make an offer and, if negotiations fail, to file condemnation proceedings.
8. *Provide a written offer to the owner(s).* Pursuant to Section 523.253 RSMo., the written offer must:
 - Be made **at least 30 days before filing Condemnation petition** and shall be held open for 30 days unless agreement is reached earlier.
 - Be sent by certified or registered mail to the owner(s) of record.
 - Include (1) the City's appraisal or (2) an explanation with supporting financial data.
 - Appraisal must be made by state-licensed or state-certified appraiser.
9. *Address the owner's proposed alternative locations, if applicable (only for partial Takings).*
 - Pursuant to Section 523.265 RSMo., within 30 days of receiving written notice, the landowner may propose to the City in writing an alternative location for the property to be condemned, which must be on the same parcel of property.
 - The City must consider all alternative locations and produce a written statement why such alternative locations were rejected or accepted. See Section 523.265 RSMo.
10. *File petition for Condemnation.* In general, petition should contain the following:
 - The name(s) of the owner(s) or interested parties of the property to be condemned;
 - Description of the property;
 - Description of the interest sought to be taken in the property;
 - Authority to bring a Condemnation action;
 - Nature of the improvement or use associated with the Taking;

- That good faith negotiations occurred but were unsuccessful or that an owner is incapable of contracting, is unknown, cannot be found or is a non-resident of the state (use language from statute);
- Copy of the construction plans required by Section 227.050 RSMo. shall be filed in the circuit clerk's office and incorporated by reference; and
- Prayer for the appointment of three disinterested commissioners to assess the damages which such owners may sustain because of the Condemnation.
- If heritage value is being claimed, counsel should make sure that the court, when appointing commissioners, orders the commissioners to determine whether the property was in the landowner's family for 50 years or more.

11. *Serve notice to the Defendants.* See Mo. Sup. Ct. R. 86.05 & 86.051

- Service can be made by:
 - Personal service;
 - Service by certified mail if out of state; or
 - Service by publication if parties name or their location is unknown or if parties are out of state.

12. *Condemnation Hearing* (a/k/a the "Necessity hearing"). Evidentiary hearing conducted by the circuit court to determine whether the Condemnation sought in the petition is authorized by law. Condemnor **must** establish the following:

- Due notice has been given to the necessary parties. Section 523.040 RSMo.;
- The condemnor has the authority to acquire the property by Eminent Domain, *State ex rel. Gove v. Tate*, 442 S.W.2d 541 (Mo. 1969).;
- Constitutional and statutory prerequisites to Condemnation have been complied with, *State ex rel. Devanssay v. McGurire*, 622 S.W.2d 323 (Mo. App. 1981).;
- The Taking is for public use; and
 - It is not necessary that the whole community or any large part of the community be benefited by Condemnation and it is sufficient for constitutional requirement of public purpose if there is **benefit** to any considerable number. *City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969).
- The Taking is necessary.
 - A legislative determination of necessity is not the subject of judicial inquiry, absent fraud, bad faith or the arbitrary exercise of legislative discretion. *Id.*

13. *Commissioner's Appointment.*

- Pursuant to Section 523.040.1 RSMo., three disinterested commissioners shall be appointed by the court to assess damages.

14. *Notice of Property Viewing/Hearing.*

- Pursuant to Section 523.040.2 RSMo., a commissioner shall notify all parties named in the Condemnation petition NO LESS THAN 10 DAYS before the commissioners' viewing of the property, notifying the parties of their right to accompany the commissioners and present information.

15. Commissioners' Viewing/Hearing.

- Pursuant to Section 523.040.3 RSMo., the commissioners shall view property, hear arguments and review other relevant information.

16. Commissioners' Report.

- Pursuant to Section 523.040.1 RSMo., the commissioners shall file their report with the court within **45 days** after their appointment, unless extended by good cause.
 - Pursuant to S. Ct. R. 86.08, immediately after the filing of the report, the clerk of the court shall notify the parties in the manner provided by Rule 43.02, **or** by posting the notice in the office of the clerk of court.

17. After the Commissioners File their Report with the Court.

- Pursuant to Section 523.061 RSMo., the Circuit Court shall determine whether a homestead or heritage value should be assessed and shall increase the commissioners' award if so.
- The condemning authority has 30 days to either pay awards or file exceptions to the commissioners report, **or both**.
- Pursuant to Section 523.050.1 RSMo., the commissioners' award becomes binding unless either party seeks a jury determination of the issue of damages by timely filing exceptions to the award within 30 days after service of the notice of the filing of the commissioners' report.
 - If no exceptions to the commissioners' report are timely filed, the report of the commissioners has the effect of a jury verdict. *City of St. Louis v. Pope*, 121 S.W.2d 861 (Mo. 1938).

18. Possession.

- The date of the Taking is the date upon which the condemnor pays the commissioners' award into court. Once the commissioners' award is paid, the condemnor has a right to possession and control of the subject property. *State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. 2006).
- Pursuant to Section 523.055 RSMo., within ten days after receipt of notice of the payment of the commissioners' award, the landowner must deliver possession of the property to the condemnor. Otherwise, the condemnor is entitled to apply for a writ of possession directing the sheriff to deliver possession of the property to the condemnor.
 - Landowner may obtain extension of time, not to exceed 90 days, to deliver possession. If the property owner is being displaced from the owner's primary residence as a result of the Condemnation, owner is entitled to extension of time of **100 days** from the date of the commissioners' award.

C. GENERAL GUIDE THROUGH THE CONDEMNATION PROCESS (Part 2) – WHEN UTILIZING FEDERAL FUNDS (MoDOT LAND ACQUISITION PROCEDURES)

1. *Obtain Environmental Approval/Clearance.*
 - ROW may not be acquired until Federal Highway Administration (FHWA) has approved the environment document and Section 106 has been completed. City is responsible for submitting evidence that environmental and cultural requirements have been approved.
2. *Apply for Notice to Proceed for Projects with Federal Funds in Construction (not in acquisition).*
 - If no federal funds are used in ROW acquisition (even though they may be used in construction), City should submit one set of completed ROW plans to MoDOT with a Request to Proceed with ROW Acquisition.
 - MoDOT will notify City in writing to proceed with ROW acquisition after review.
3. *Apply for Acquisition Authority (A-Date) for Projects with Federal Funds in ROW acquisition.*
 - If federal funds are being used in ROW acquisition process, City must apply for MoDOT certifying approval of plans and environmental classifications, request for federal funds participation, estimate ROW acquisition cost, etc.
4. *Receive Acquisition Authority approval from District Office of MoDOT.*
 - MoDOT will obtain an A-Date from FHWA and notify City in writing of approval of ROW plans and that it may proceed with ROW activities
5. *Contract with consultants for acquisition activities.*
 - City must inform MoDOT before commencing ROW activities if it is necessary to contract for acquisition services.
 - Appraiser – must be state-license or state-certified appraiser (§ 523.253 RSMo.) and perform appraisal in conformance with MoDOT standards
 - Review Appraiser – must also be reviewed by second appraiser, also in conformance with MoDOT standards
 - Negotiator – negotiations must be conducted by someone other than appraiser or reviewing appraiser unless the payment estimate is less than \$10,000.00. Pursuant to MO Real Estate Commission requirements, negotiator for acquisition of property should be a licensed real estate agent.
 - Negotiator duties include:
 - Obtaining title report (consult with attorney to determine appropriate form)
 - Obtaining legal description
 - Determining whether appraisal v. evaluation is needed (consult with attorney)
 - If appraisal is needed, determining issues to be addressed in appraisal (consult with attorney)

6. *Donations require the owner to be fully informed of the right to payment of Just Compensation as determined by an appraisal.*
- Owner can waive right of an appraisal. See 49 CFR 24.102
 - Use of Waiver Valuation is allowed when:
 - The acquisition is \$10,000 or less
 - Land value is easily determined
 - Only nominal structural improvements are acquired
 - Only nominal access rights are acquired
 - There are no apparent damages to the remainder – other than simple easements and creation of nominal uneconomic remnants
7. *Notice to Owners (may include written offer if available).*
- At least **60 days before filing Condemnation petition**, City must provide written notice to property owner including:
 - Identity of property interest to be acquired and legal description;
 - The purpose(s) for which the property is to be acquired;
 - Notifying the property owner they have the right to:
 - Seek legal counsel at their own expense;
 - Make a counteroffer and engage in further negotiations;
 - Obtain their own appraisal of Just Compensation;
 - Have Just Compensation determined by court-appointed commissioners and, ultimately, a jury;
 - Seek assistance from office of ombudsman;
 - Contest the right to condemn in the Condemnation proceeding; and
 - Exercise the right to request vacation of an easement.
 - An owner may waive the requirements in writing.
 - Written notice must be sent by certified or registered mail, postage prepaid, addressed to the owner of record as listed in the office of the assessor in the county in which the property is located (§ 523.250 RSMo).
8. *Relocation Eligibility Notice, if applicable (§ 523.205 RSMo.).*
- If using federal funds, must provide a relocation eligibility notice as provided for in the Federal Uniform Relocation and Real Property Acquisition Policies Act of 1970 (42 USC §4601 *et seq.* and 49 CFR §24).
9. *Authorize the use of Eminent Domain to acquire specific interest(s) in the real property prior to delivery of the offer letter.* Legislative approval is also required for each subsequent offer letter. Generally, the ordinance authorizing the use of Eminent Domain should contain:
- A description of the project and improvements;
 - The types of interests in real property sought;
 - The legal descriptions of real property for each interest sought; and
 - The legislative findings regarding public purpose and necessity.

- 10. Provide a written offer to the owner(s).** Pursuant to Section 523.253 RSMo., the written offer must:
- Be made at least 30 days before filing Condemnation petition and shall be held open for 30 days unless agreement is reached earlier.
 - Be sent by certified or registered mail to the owner(s) of record.
 - Include (1) the City's appraisal or (2) an explanation with supporting financial data.
 - Appraisal must be made by state-licensed or state-certified appraiser.
- 11. Address the owner's proposed alternative locations, if applicable** (only for partial Takings).
- Pursuant to Section 523.265 RSMo., within 30 days of receiving written notice, the landowner may propose to the City in writing an alternative location for the property to be condemned, which must be on the same parcel of property.
 - The City must consider all alternative locations and produce a written statement why such alternative locations were rejected or accepted. See Section 523.265 RSMo.
- 12. File petition for Condemnation.** In general, petition should contain the following:
- The name(s) of the owner(s) or interested parties of the property to be condemned;
 - Description of the property;
 - Description of the interest sought to be taken in the property;
 - Authority to bring a Condemnation action;
 - Nature of the improvement or use associated with the Taking;
 - That good faith negotiations occurred but were unsuccessful or that an owner is incapable of contracting, is unknown, cannot be found or is a non-resident of the state (use language from statute);
 - Copy of the construction plans required by Section 227.050 RSMo. shall be filed in the circuit clerk's office and incorporated by reference; and
 - Prayer for the appointment of three disinterested commissioners to assess the damages which such owners may sustain because of the Condemnation.
 - If heritage value is being claimed, counsel should make sure that the court, when appointing commissioners, orders the commissioners to determine whether the property was in the landowner's family for 50 years or more.
- 13. Serve notice to the Defendants.** See Mo. Sup. Ct. R. 86.05 & 86.051
- Service can be made by:
 - Personal service;
 - Service by certified mail if out of state; or
 - Service by publication if parties name or their location is unknown or if parties are out of state.
- 14. Condemnation Hearing.** Evidentiary hearing conducted by the circuit court to determine whether the Condemnation sought in the petition is authorized by law. Condemnor must establish the following:

- Due notice has been given to the necessary parties. Section 523.040 RSMo.;
- The condemnor has the authority to acquire the property by Eminent Domain, *State ex rel. Gove v. Tate*, 442 S.W.2d 541 (Mo. 1969).;
- Constitutional and statutory pre-requisites to Condemnation have been complied with, *State ex rel. Devanssay v. McGurire*, 622 S.W.2d 323 (Mo. App. 1981).;
- The Taking is for public use; and
 - It is not necessary that the whole community or any large part of the community be benefited by Condemnation and it is sufficient for constitutional requirement of public purpose if there is benefit to any considerable number. *City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969).
- The Taking is necessary.
 - A legislative determination of necessity is not the subject of judicial inquiry, absent fraud, bad faith or the arbitrary exercise of legislative discretion. *Id.*

15. Commissioner's Appointment.

- Pursuant to Section 523.040.1 RSMo., three disinterested commissioners shall be appointed by the court to assess damages.

16. Notice of Property Viewing/Hearing.

- Pursuant to Section 523.040.2 RSMo., a commissioner shall notify all parties named in the Condemnation petition NO LESS THAN 10 DAYS before the commissioners' viewing of the property, notifying the parties of their right to accompany the commissioners and present information.

17. Commissioners' Viewing/Hearing.

- Pursuant to Section 523.040.3 RSMo., the commissioners shall view property, hear arguments and review other relevant information.

18. Commissioners' Report.

- Pursuant to Section 523.040.1 RSMo., the commissioners shall file their report with the court within 45 days after their appointment, unless extended by good cause.
 - Pursuant to S. Ct. R. 86.08, immediately after the filing of the report, the clerk of the court shall notify the parties in the manner provided by Rule 43.02, or by posting the notice in the office of the clerk of court.

19. After the Commissioners File their Report with the Court.

- Pursuant to Section 523.061 RSMo., the Circuit Court shall determine whether a homestead or heritage value should be assessed and shall increase the commissioners' award if so.
- The condemning authority has 30 days to either pay awards or file exceptions to the commissioners' report, or both.

- Pursuant to Section 523.050.1 RSMo., the commissioners' award becomes binding unless either party seeks a jury determination of the issue of damages by timely filing exceptions to the award within 30 days after service of the notice of the filing of the commissioners' report.
 - If no exceptions to the commissioners' report are timely filed, the report of the commissioners has the effect of a jury verdict. *City of St. Louis v. Pope*, 121 S.W.2d 861 (Mo. 1938).

20. *Possession.*

- The date of the Taking is the date upon which the condemnor pays the commissioners' award into court. Once the commissioners' award is paid, the condemnor has a right to possession and control of the subject property. *State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. 2006).
- Pursuant to Section 523.055 RSMo., within ten days after receipt of notice of the payment of the commissioners' award, the landowner must deliver possession of the property to the condemnor. Otherwise, the condemnor is entitled to apply for a writ of possession directing the sheriff to deliver possession of the property to the condemnor.
 - Landowner may obtain extension of time, not to exceed 90 days, to deliver possession. If the property owner is being displaced from the owner's primary residence as a result of the Condemnation, owner is entitled to extension of time of 100 days from the date of the commissioners' award.

21. *ROW Clearance Certification.*

- Before authorization to advertise the physical construction for bids, City must submit a ROW Clearance Certification Statement to MoDOT after all ROW has been acquired and legal and physical possession of all parcels has been obtained and relocation assistance has been made available.
- This can include obtaining case reports from counsel about the final disposition of condemnation cases, whether concluded by settlement or trial.

III. PRACTICE TIPS

A. In General

1. Take only the rights that are actually needed for the project.
 - Maximum Injury Rule: Landowners will argue that a jury should presume the condemnor will make the "most injurious use of its rights." *MHTC v. Cowger*, 838 S.W.2d 144, 146 (Mo.App. 1992) (discussed maximum injury rule), citing *Shell Pipe Line Corp. v. Woolfolk*, 53 S.W.2d 917, 918 (Mo. 1932). BUT, take note that deviations from plans during construction of the project can result in exposure to inverse condemnation claims, so easement terms/limits should not be unreasonably restrictive.

B. Selected Valuation Issues

1. General Damages and Inconvenience

- Any general damages—those applicable to all properties within useable range of the project—are not compensable. *State ex rel. Missouri Highway & Transp. Comm'n v. Mertz*, 778 S.W.2d 366, 368 (Mo.App. 1989).
- These noncompensable damages include:
 - Increased traffic
 - Noise
 - Unsightliness of construction project
- But general damages and inconvenience may, along with other factors, affect future use and, therefore, market value.
- Appraisers for landowners often look for ways to discuss them indirectly. Excluding them entirely from evidence at trial can be difficult, but jurors can be instructed to disregard them.
 - Missouri Approved Jury Instruction (Civil) 9.05 (modified to include general detriments, as provided for in the Notes on Use): “In determining the value of defendant's remaining property, you must not consider any general benefit or general detriment that is conferred upon all property within usable range of [the project].”

2. Business Losses

- Business losses are not compensable in condemnation cases. *State ex rel. Missouri Highway & Transp. Comm'n v. Wallach*, 826 S.W.2d 901, 903 (Mo.App. 1992).
- Commissioners and juries will still know the site is a business, however, so this may still affect their deliberations indirectly.

3. Speculative Fears

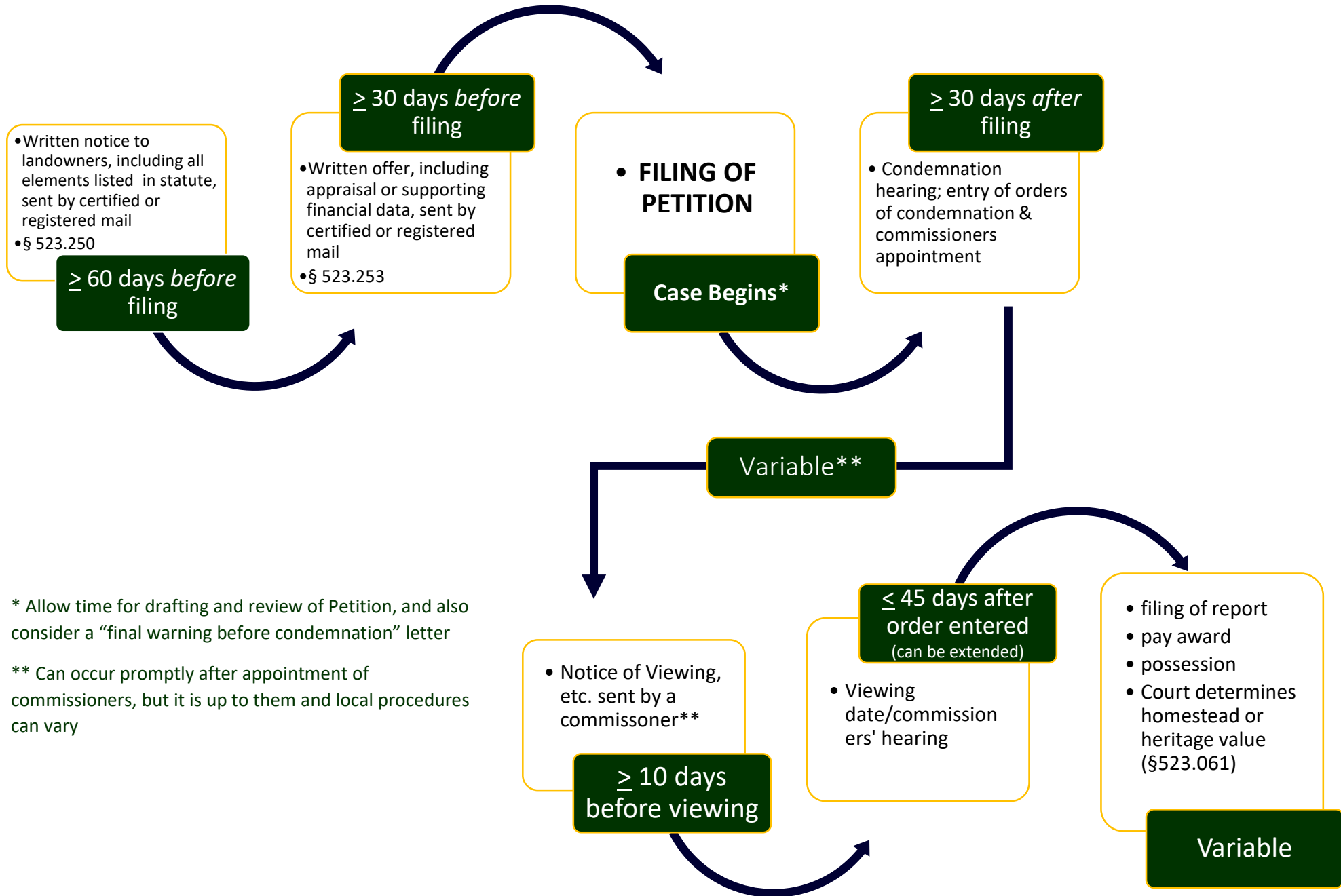
- Only acts to be performed during the construction work that are lawful, proper, and reasonably foreseeable—not speculative—may come into evidence. *Kamo Elec. Co-op. v. Baker*, 287 S.W.2d 858, 862 (Mo. 1956).
- Evidence about tortious acts by contractors, such as trespassing beyond the ROW and easements acquired, should be excluded.
- This same principle, that speculative claims must not be considered, can be used to oppose other speculative arguments, such as “drivers will speed and crash more often on a new street.”

4. Heritage and Homestead Values

- a. § 523.039 RSMo, as amended in 2006, states: For all condemnation proceedings filed after December 31, 2006, just compensation for condemned property shall be determined under one of the three following subdivisions, whichever yields the highest compensation, as applicable to the particular type of property and taking:

- i. An amount equivalent to the fair market value of such property;
 - ii. For condemnations that result in a homestead taking, an amount equivalent to the fair market value of such property multiplied by one hundred twenty-five percent; or
 - iii. For condemnations of property that result in any taking that prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking and involving property owned within the same family for fifty or more years, an amount equivalent to the sum of the fair market value and heritage value.
- b. § 523.001 RSMo contains the following definitions:
- i. “Heritage value” – fifty percent of fair market value
 - ii. “Homestead taking” -- any taking of a dwelling owned by the property owner and functioning as the owner's primary place of residence or any taking of the owner's property within three hundred feet of the owner's primary place of residence that prevents the owner from utilizing the property in substantially the same manner as it is currently being utilized.
- c. “Substantially the same manner” argument
- From 2006 until 2019, some landowners/attorneys tried to argue that *any* partial taking satisfied the criteria for heritage or homestead takings, simply because the part taken could not continue to be used in same manner as before.
 - This argument was specifically rejected in *City of Cape Girardeau v. Elmwood Farms, L.P.*, 575 S.W.3d 280 (Mo.App. 2019).
 - The correct test is whether the taking prevents the owner from utilizing the *whole property* in substantially the same manner as it was being utilized on the day of the taking.
 - This means the courts must perform a fact-dependent inquiry in each case, but often there are good arguments to be made against broad application to all takings.

Optimal Condemnation Timeline



* Allow time for drafting and review of Petition, and also consider a “final warning before condemnation” letter

** Can occur promptly after appointment of commissioners, but it is up to them and local procedures can vary

General Condemnation Timeline* - Checklist

* No federal funds are used

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For Starters

- What interests are being sought?
- How will this serve a public use?

Contact Property Owner

- Have you contacted property owner to discuss project?
- Have you requested donation?
- If donation received, did you obtain waiver of compensation?

Get Appraisal/Valuation

- Have you consulted with an attorney to determine issues to be addressed in appraisal?
- Have you contacted a state-licensed appraiser?

Written Notice to Property Owners

- Is it 60 days in advance?
- Does it identify property you are interested in acquiring and state the legal description?
- Does it state purposes for which the property is to be acquired?
- Does it notify property owner(s) of their rights?
- Did you send it by certified/registered mail, with postage prepaid, to the owner of record?
- Will acquisition result in displaced persons? If so, have you given relocation assistance?

Authorization by Ordinance

- Was authorization granted prior to offer letter?
- Does ordinance contain description of project and improvements?
- Does ordinance contain types of interests in real property sought?
- Does ordinance contain legal descriptions of real property for each interest sought?

Written Offer to Owners

- Is it **at least 30 days** before you plan on filing condemnation petition?
- Was it sent by certified or registered mail to the owners of record?
- Does it provide City's appraisal or an explanation with supporting financial data?
- Is the offer for at least the amount reflected in the appraisal or supporting financial data?

Written Response to Alternative Locations

- Did owner(s) propose alternative locations within 30 days of receiving notice?
- If so, have you considered all alternative locations?
- Have you produced a written statement why alternative locations accepted/rejected?

General Condemnation Timeline When Using Federal Funds (MoDOT Land Acquisition Procedures) - Checklist

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For Starters

Have you obtained environmental approval/clearance?

Apply for Notice to Proceed/Acquisition Authority

- Will federal funds be used in ROW acquisition?
- If not, submit completed ROW plans to MoDOT with Request to Proceed with ROW Acq.
- If YES, apply to MoDOT for Notice to Proceed and Acquisition Authority.
- Have you received Acquisition Authority from MoDOT?

Contract with Consultants for Acquisition Activities

- Have you informed MoDOT prior to ROW activities commencing?
- Have you contacted a state-licensed appraiser?
- Have you contacted a review appraiser?
- Have you contacted a negotiator, who is a licensed real estate agent, to conduct negotiations?

Written Notice to Property Owners

- Is it 60 days in advance?
- Does it identify property you are interested in acquiring and state the legal description?
- Does it state purposes for which the property is to be acquired?
- Does it notify property owner(s) of their rights?
- Did you send the notice by certified/registered mail, with postage prepaid, to the owner of record?
- Will acquisition result in displaced persons? If so, have you given relocation assistance?
- Does it contain a relocation eligibility notice?

Written Offer to Owners

- Is it **at least 30 days** before you plan on filing condemnation petition?
- Was it sent by certified or registered mail to the owners of record?
- Does it provide City's appraisal or an explanation with supporting financial data?
- Does each letter have **legislative approval giving you the authority to condemn?**
- Is the offer for at least the amount reflected in the appraisal or payment estimate?

Written Response to Alternative Locations

- Did owner(s) propose alternative locations within 30 days of receiving notice?
- If so, have you considered all alternative locations?
- Have you produced a written statement why alternative locations have been accepted/rejected?

Board Ordinance Authorizing Condemnation Petition

Has Board approved ordinance?

Filing the Petition

- Does petition contain names of property owners or interested parties?
- Does petition contain legal description of the property?
- Does petition state authority to bring condemnation action?
- Does petition state nature of improvement or use associated with the taking?
- Does petition state good faith negotiations occurred but were unsuccessful?
- Does petition contain copy of construction plans?

Condemnation Hearing: Must Establish

- Has due notice been given to parties?
- Have constitutional and statutory prerequisites been complied with?
- Is the taking necessary and for public use?

Commissioners' Appointment

- Have 3 disinterested commissioners been appointed to assess damages?

Notice of Property Viewing

- Commissioners will notify parties **ten days** before the scheduled viewing of the property.

Property Viewing

- Commissioners will view property, hear arguments, and review other relevant information

Commissioners' Report

- Commissioners' report is due **45 days after their appointment** (but can be extended)

Determination of Homestead/Heritage Takings

- Circuit Court will determine whether homestead or heritage value should be assessed and will increase commissioners' award accordingly.

Notice of Payment

- After condemnor has paid award into Court, circuit clerk will give notice of payment within 5 days

Possession

- Owners must deliver possession **within 10 days after** receipt of notice of payment
- If not, court MAY extend deadline up to 90 days (if reasonable).
- If persons being displaced, possession delivered within 100 days of date of commissioners' award**

ROW Clearance Certification

- Has all ROW been acquired?
- Has all legal/physical possession of all parcels been obtained?
- Has relocation assistance been made available?
- THEN**, City must submit ROW Clearance Certification Statement to MoDOT

Filing the Petition

- Does petition contain names of property owners or interested parties?
- Does petition contain legal description of the property?
- Does petition state authority to bring condemnation action?
- Does petition state nature of improvement or use associated with the taking?
- Does petition state good faith negotiations occurred but were unsuccessful?
- Does petition contain copy of construction plans?

Serve Defendants: Choose One

- Personal Service
- Certified mail (if out of state)
- Publication (if parties name or location unknown)

Condemnation Hearing: Must Establish

- Has due notice been given to parties?
- Have constitutional and statutory prerequisites been complied with?
- Is the taking necessary and for public use?

Commissioners' Appointment

- Have 3 disinterested commissioners been appointed to assess damages?

Notice of Property Viewing

- Commissioners will notify parties **ten days** before the scheduled viewing of the property.

Property Viewing

- Commissioners will view property, hear arguments, and review other relevant information

Commissioners' Report

- Commissioners' report is due **45 days after their appointment** (but can be extended)

Determination of Homestead/Heritage Takings

- Circuit Court will determine whether homestead or heritage value should be assessed and will increase commissioners' award accordingly.

Notice of Payment

- After condemnor has paid award into Court, circuit clerk will give notice of payment within 5 day

Possession

- Owners must deliver possession **within 10 days after** receipt of notice of payment
- If not, court MAY extend deadline up to 90 days (if reasonable).
- If persons being displaced, possession delivered within 100 days of date of commissioners' award**