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Summer 2006

## Eminent Domain Reform in Missouri: A Legislative Memoir

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### Recommended Citation

Dale A. Whitman, Eminent Domain Reform in Missouri: A Legislative Memoir, 71 Mo. L. Rev. 721 (2006)

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# Eminent Domain Reform in Missouri: A Legislative Memoir

*Dale A. Whitman\**

The Missouri General Assembly, like a number of other state legislatures,<sup>1</sup> undertook to reform its statutes relating to eminent domain during the 2006 legislative session. This article is the story of that effort and an analysis of the result.

I write from a personal perspective. I was fortunate to have been personally involved in many of the decisions that were made as the bill, House Bill 1944, made its way through the legislative process. This opportunity was, I think, fairly unusual for a law professor; in thirty-seven years of teaching property law, I had never previously been so closely engaged in the creation of legislation, and I suspect that few of my peers have done so.

Hence, I propose to write about what I think was right and wrong about the process that House Bill 1944 underwent. There are no villains in this story, but there are heroes — those who turned a potential legislative debacle into a workable and, for the most part, beneficial statute.

My hope is that this story, and my analysis of its results, will be of value to legislators, lobbyists, and interest groups in other states as they attack the issue of eminent domain reform in the future. Of course, every state is different; the forces that act on legislators and the personal and political agendas they follow vary over a wide range from state to state. However, I believe there are enough commonalities that this article about the Missouri experience can help to inform the process in other states. It may also be of value to the Missouri courts, and litigants before them, when they are called upon to interpret the impact of the 2006 amendments affecting eminent domain law in Missouri.

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1. According to the Institute of Justice, an organization lobbying for curtailment of the use of eminent domain power, about twenty states were expected to consider amendments to their eminent domain statutes in the upcoming (usually 2006) sessions of their legislatures. See John Kramer & Lisa Knepper, Grassroots Groundswell Grows against Eminent Domain Abuse, July 12, 2005, [http://www.ij.org/private\\_property/connecticut/7\\_12\\_05pr.html](http://www.ij.org/private_property/connecticut/7_12_05pr.html) (last visited July 12, 2006).

## I. MY INVOLVEMENT

As a long-time teacher of property and land use planning courses, I have a natural professional interest in eminent domain. In mid-March 2006, I was contacted by the Burlington Northern-Santa Fe Railroad (“BNSF”) and asked if I would be willing to serve as their consultant in tracking and analyzing the legislation on eminent domain that was to be considered by the Missouri General Assembly in its then-current session.<sup>2</sup> BNSF indicated that they would probably want me to meet with legislators as the bill progressed. I replied that I would enjoy doing so, but only on the condition that when I spoke to the legislators and their staff, I would have freedom to express my own views rather than being guided by the railroad’s desires. Imposing such a condition is perhaps unusual among those who are hired to attempt to influence legislation, but I had two reasons for imposing it. First, I did not want to undermine my own credibility with the legislators (a number of whom are acquaintances or former students of mine) by being considered a “shill” for the railroad. Second, I had an interest in aspects of the legislation — such as urban redevelopment — that were not of great concern to the railroad industry, and I wanted to be free to comment on those issues.

Fortunately, BNSF agreed to my insistence on exercising my independent judgment, presumably counting on my good will not to advocate positions that would be highly detrimental to them. To their credit, they were true to their word. They occasionally sent me memos and e-mails about aspects of the eminent domain bill that concerned them, but not once did they ask me to take a position contrary to my own best judgment or to change a position I had already taken. BNSF’s lobby firm, Gamble & Schlemeier, worked very closely with me in setting up appointments with legislators and staff, but they too respected my professional judgment and independence. Indeed, they seemed pleased to be able to introduce me to legislators by remarking, “We’re not telling Professor Whitman what to say.”

During the period from April 18 to May 5, when the bill was “Truly agreed to and finally passed,” I spent about twenty-two hours in the State Capitol in Jefferson City meeting with legislators and staff members. Most of my work was on the Senate side of the Capitol; by the time I became in-

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2. This initial contact was the result of the fact that in early 2006 I had performed a brief stint of consulting service for one of Missouri’s investor-owned electric utility companies. My work included testifying in February 2006 before a committee of the Missouri Senate on a bill to make a minor amendment to the state’s adverse possession statute, and it had a favorable result for the utility company. At that point, it was well known that a number of bills relating to eminent domain had been filed or were expected to be filed, but it was not yet clear which of them would receive serious consideration. The utility company’s counsel happened to be talking with executives of the BNSF (which is headquartered in Springfield, Missouri), and suggested that they might want to contact me about serving as a consultant on the pending eminent domain legislation.

volved, the House of Representatives had just adopted House Bill 1944 and it was ready to be sent to the Senate.

## II. THE BACKGROUND: *KELO V. CITY OF NEW LONDON, CONNECTICUT*

While statutory amendments relating to eminent domain might occur in any legislative session, it is no coincidence that Missouri and a number of other states undertook the effort in 2006. The legislative activity was a direct result of the public outcry that followed the United State Supreme Court's decision, on June 23, 2005, in *Kelo v. City of New London, Connecticut*.<sup>3</sup> It is doubtful that any Supreme Court decision since *Roe v. Wade*<sup>4</sup> excited so much public comment. Moreover, unlike *Roe*, over which public opinion was roughly evenly divided, the public expressions on *Kelo* were predominantly negative and critical.

The five-member majority in *Kelo* held that no violation of the "public use" clause of the Fifth Amendment occurred when the city used the eminent domain power to acquire a group of houses in the Fort Trumbell area of New London for the purpose of assembling land for a large redevelopment project.<sup>5</sup> The project was to contain mixed uses, including a research facility to be built by Pfizer, Inc., the pharmaceutical company, a hotel, restaurants, retail space, a U.S. Coast Guard museum, a "riverwalk," and other water-dependent commercial uses.<sup>6</sup> The city's aim was to spur economic development, and it estimated that the project would create more than a thousand jobs, increase tax revenues, and revitalize the downtown and waterfront areas of the city.<sup>7</sup>

The question before the court in *Kelo* was whether these objectives satisfied the "public use" clause.<sup>8</sup> Of course, the clause does not literally require a public use; it focuses instead on the requirement that compensation be paid, providing, "nor shall private property be taken for public use, without just compensation."<sup>9</sup> The necessity for a public use is implicit rather than explicit. Nonetheless, the Supreme Court has consistently read the clause as insisting that a public use is the *sine qua non* of legitimate exercise of the eminent domain power. However, that test has proven an exceptionally easy one to meet. As a majority of the court observed in 1925, "deference to the legislature's 'public use' determination is required 'until it is shown to involve an

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3. 125 S. Ct. 2655 (2005).

4. 410 U.S. 113 (1973) (finding a constitutional right to obtain an abortion during the first two trimesters of pregnancy).

5. *Kelo*, 125 S. Ct. at 2665.

6. *Id.* at 2658-59.

7. *Id.*

8. *Id.* at 2658.

9. U.S. CONST. amend. V.

impossibility.”<sup>10</sup> By the time the Court decided *Hawaii Housing Authority v. Midkiff*<sup>11</sup> in 1984, it could state that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”<sup>12</sup>

The facts of *Kelo* went farther than those in the court’s previous decisions upholding takings for urban redevelopment. In 1957 in *Berman v. Parker*,<sup>13</sup> the Court had endorsed as a permissible public use the condemnation of Berman’s department store as part of the Southwest Washington, D.C., redevelopment project.<sup>14</sup> While there was no claim that the store itself was a slum or was blighted, there was ample evidence that the area in which it was located was severely deteriorated.<sup>15</sup> The Court refused to demand that “public use” be determined on a parcel-by-parcel basis.<sup>16</sup> Instead, since the general area was blighted, the Court concluded that an area-wide solution was within the local government’s power, despite the fact that some non-blighted properties had to be taken in the process:

Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.<sup>17</sup>

Thus, while there was nothing wrong with Berman’s store, the dilapidated condition of its surroundings justified taking the store as well.

This is, at its core, the difference between *Berman* and *Kelo*. In *Kelo*, not only was Suzette Kelo’s house not blighted, but it was also not located in a blighted area.<sup>18</sup> The homes in the Fort Trumbull area were old but generally well-maintained. It would have been extremely difficult to justify taking them by eminent domain because of the conditions prevailing in the neighborhood.<sup>19</sup> The city’s justification was couched in terms of economic develop-

10. *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925).

11. 467 U.S. 229 (1984).

12. *Id.* at 241.

13. 348 U.S. 26 (1954).

14. *Id.* at 36.

15. *Id.* at 30-31.

16. *Id.* at 36.

17. *Id.* at 35.

18. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005).

19. *Id.* at 2664-65 (“[t]hose who govern the City were not confronted with the need to remove blight in the Fort Trumbull area.”).

ment — that is, that the taking would be good for the city and its inhabitants in economic terms, rather than that there was some physical or social problem to be solved within the area of the property to be taken.<sup>20</sup> In this way, *Kelo* moved a step beyond *Berman*.

While four members of the Court dissented,<sup>21</sup> the result in *Kelo* was not particularly surprising to those who follow the Court's approach to this area of the law. To illustrate, Professor Jeffrey Stake of Indiana University sent an e-mail to the Property Professors listserv of the Association of American Law Schools, inviting the list members to place themselves imaginarily before the decision in *Kelo* was announced and to state whether they thought the property owners would prevail, and what the division on the Court would be.<sup>22</sup> Twenty-five professors responded.<sup>23</sup> Only two (or 8%) indicated that they had expected the homeowners to prevail. The average estimate of the likely split on the Court was that the homeowners would receive three votes. They actually received four; the difference was accounted for by Justice O'Connor's vote against the city, which surprised most of the responding professors.<sup>24</sup>

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20. *Id.* at 2659-60.

21. Justice Kennedy concurred in the majority view, but cautioned that the courts should not take the asserted justifications of local governments for their takings at face value, but should be willing to inquire into their legitimacy, particularly where the risk of cronyism or favoritism in the transfer of the land to private parties is evident. *Id.* at 2669 (Kennedy, J., concurring).

Chief Justice Rhenquist and Justices O'Connor, Scalia, and Thomas dissented in an opinion written by O'Connor. *See id.* at 2675 (O'Connor, J., dissenting). She argued that, by authorizing eminent domain purely in the name of economic progress, the court had, in effect, written the "public use" clause out of the Constitution. *Id.* "[N]early any lawful use of real private property can be said to generate some incidental benefit to the public. *Id.* Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power." *Id.*

Finally, Justice Thomas filed his own dissent, taking a much more radical point of view. *See id.* at 2686 (Thomas, J., dissenting). He argued that no taking can be justified when the property will end up in private hands. *Id.* He concluded, "I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property." *Id.* This view would, of course, make virtually all redevelopment projects impossible, and would reverse more than a century of Supreme Court jurisprudence. *See, e.g.,* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (upholding the use of eminent domain to acquire land for an irrigation project to benefit farmers).

22. The original e-mail query was posted on October 3, 2005.

23. Professor Stake's analysis of the results was published on the list on May 19, 2006.

24. Only two of the twenty-five respondents said that they expected O'Connor to vote with the homeowners, and two more said that they did not know.

But aside from Justice O'Connor's dissent, there was little in the decision to shock experienced observers. As Professor Stake put it, "The larger message, it seems to me, is that the law did not change much with the *Kelo* decision. If we are representative of experts, most experts would have predicted the result and even the approximate size and members of the majority." Indeed, in a sense the outcome of *Kelo* was more favorable to property owners than prior case law would have indicated, both because of O'Connor's shift of position,<sup>25</sup> and because the majority opinion in *Kelo* contains language warning that no public purpose will be found if condemnation is employed by a city for corrupt purposes, out of favoritism, or to transfer land to a private owner outside the context of an overall plan of redevelopment.<sup>26</sup>

Thus, the outcome in *Kelo* struck many experienced observers as a minor change in the law, expanding only slightly the power of local governments under the "public use" clause. The surprise was the reaction of the media and pundits, who generally tended to treat the case as a horrible example of a Supreme Court run amok. Conservative commentators like Rush Limbaugh<sup>27</sup> and George Will<sup>28</sup> were joined by *USA Today*<sup>29</sup> and other ordinarily politically-neutral newspapers in condemning the decision. The *New York Times* applauded the decision as "a welcome vindication of cities' ability to act in the public interest,"<sup>30</sup> but it was difficult to find much support for it in other quarters. Editorials and columns in three major Missouri newspa-

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25. Justice O'Connor had written the unanimous opinion in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), upholding the power of the State of Hawaii to condemn land held in a concentrated fashion by large land trusts in order to distribute it to individual homeowners. Of course, in light of her subsequent retirement, announced on July 1, 2005, her views no longer have relevance for future litigants before the Supreme Court.

26. "While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use." *Kelo*, 125 S. Ct. at 2667. Justice Kennedy's concurrence contains much more explicit expressions of concern on this front.

27. See the transcript of the radio call-in conversation on the subject at [http://www.rushlimbaugh.com/home/stacks/liberals\\_stick\\_it\\_to\\_the\\_little\\_guy\\_in\\_eminent\\_domain\\_06\\_27\\_05\\_guest.html](http://www.rushlimbaugh.com/home/stacks/liberals_stick_it_to_the_little_guy_in_eminent_domain_06_27_05_guest.html) (last visited July 12, 2006).

28. See George F. Will, *Damaging Deference*, WASH. POST, June 24, 2005, at A31, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062301420.html>.

29. See Editorial, *I'd Leave Here Broke*, USA TODAY, Aug. 16, 2005, available at [http://www.usatoday.com/news/opinion/editorials/2005-08-16-homeowners-edit\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2005-08-16-homeowners-edit_x.htm).

30. See Editorial, *The Limits of Property Rights*, N.Y. TIMES, June 24, 2005, available at <http://www.nytimes.com/2005/06/24/opinion/24fri1.html?ex=1277265600&en=741acedb6f96a28a&ei=5090&partner=rssuserland&emc=rss>.

pers, the *St. Louis Post-Dispatch*,<sup>31</sup> the *Kansas City Star*,<sup>32</sup> and the *Columbia Tribune*<sup>33</sup> castigated the Court for the *Kelo* decision. In Missouri as in a number of other states, pressure began to mount for legislative response.<sup>34</sup>

### III. THE GOVERNOR'S TASK FORCE

The first official reaction to *Kelo* in Missouri was not long in coming. On June 28, 2005, just five days after the decision was announced, Missouri Governor Matt Blunt<sup>35</sup> announced<sup>36</sup> the formation of a task force to examine “the use of eminent domain, especially when the proposed public use of the

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31. Editorial, *Thanks to the U.S. Supreme Court, Your Property Rights Are Diminished*, ST. LOUIS POST-DISPATCH, July 19, 2005, at B7 (“The highest court in our nation has put your property up for grabs.”).

32. Richard Epstein, *An Undercut from the Left*, KANSAS CITY STAR, July 6, 2005, at B7 (calling the decision “dreadful”). The Star’s own editorial writer was more moderate. See Chris Lester, *Eminent Domain Not Pure Evil*, KANSAS CITY STAR, July 5, 2005, at D10.

33. Walter Williams, *Socialists Disregard Framers’ Intent*, COLUMBIA TRIBUNE, July 3, 2005.

34. See, e.g., Kevin Collison, *Supreme Court Decision Wrecks Property Rights, Opponents Contend*, KANSAS CITY STAR, Sept. 20, 2005, at D1. Courts in general received a good deal of bashing as a result of the decision. The typical citizen may not draw a particularly sharp distinction between the United States Supreme Court and the supreme court of his or her state of residence. Acting partly out of concern for this sort of confusion, I wrote an op-ed article in early 2006 that was published in a number of Missouri newspapers, pointing out that the U.S. Supreme Court had merely permitted takings for economic development purposes, not mandated it, and that the ultimate arbiter of the uses of eminent domain in any state was the legislature. See Dale Whitman, *Don’t Blame Courts for Lawmakers’ Ideas; State Legislatures Responsible for Eminent Domain*, COLUMBIA TRIBUNE, Feb. 14, 2006, <http://www.showmenews.com/2006/Feb/20060214Comm010.asp> (last visited July 12, 2006).

35. There was little doubt that the Governor favored a major reform of Missouri’s eminent domain laws, although he never committed himself to any details. He appeared at an eminent domain rally at the State Capitol on January 25, 2006, sponsored by the Missouri Farm Bureau and the Eminent Domain Abuse Coalition, commenting, “We have a sacred obligation to ensure that the next generation of Missourians and Americans is as secure in their rights as property owners as we are today, and actually, we should ensure that they are more secure.” Missouri Farm Bureau Fighting for Your Rights, <http://www.mofb.org/eminentdomainreform/> (last visited July 12, 2006).

36. Exec. Order No. 05-15, June 28, 2005. The order made specific reference to the *Kelo* decision, and directed the Task Force to “develop a definition of ‘public use’ that allows state and local governments to use eminent domain when there is a clear and direct public purpose while at the same time ensuring that individual property rights are preserved” and to “develop criteria to be applied by state and local governments when the use of eminent domain is being proposed.”



property being acquired by eminent domain is not directly owned or primarily used by the general public.”<sup>37</sup> The Task Force consisted of nine members; Terry Jarrett, the Governor’s General Counsel, was appointed chair. Two of the Task Force members had already established strong public records favoring the curtailment of eminent domain: Leslie Holloway, Director of State and Local Governmental Affairs for Missouri Farm Bureau,<sup>38</sup> and Representative Steve Hobbs, a member of the Missouri House of Representatives and an officer in the Farm Bureau.<sup>39</sup> Overall, however, the composition of the Task Force was quite balanced, and included several members who were plainly knowledgeable and who might be expected to favor broad use of eminent domain.<sup>40</sup>

Commencing with an organizational meeting on August 4, 2005, the Task Force held a series of ten meetings during the fall and early winter of 2005, four of which were devoted primarily to hearing testimony from wit-

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37. See T.R. Reid, *Missouri Condemnation No Longer So Imminent; Supreme Court Ruling Ignites Political Backlash*, WASH. POST, Sept. 6, 2005, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501087.html>.

38. The Farm Bureau had been promoting a package of eminent domain “reforms” in the legislature without success for several years. See Missouri Farm Bureau Fighting for Your Rights, <http://www.mofb.org/eminentdomainreform/> (last visited June 4, 2006).

39. Hobbs, himself a farmer, had served on the Audrain County board of the Missouri Farm Bureau since 1995. See <http://www.house.state.mo.us/bills053/members/bio021.htm> (last visited June 4, 2006). He was elected to the House in 2002, and had sponsored eminent domain bills with the encouragement of the Farm Bureau in 2004 and 2005. See Josh Flory, *Group Set to Study Eminent Domain Laws*, COLUMBIA TRIBUNE, Aug. 3, 2005, <http://www.showmenews.com/2005/Aug/20050803News009.asp> (last visited July 12, 2006). See, e.g., H.B. 858, 93d Gen. Assem., Reg. Sess. (Mo. 2005) (The bill would have imposed much tighter and more restrictive definitions of blighted and abandoned property, and would have required condemning authorities to give landowners extensive notice of their rights in condemnation proceedings and to pay for a landowner’s appraisal).

40. The other members were Gerard T. Carmody, a trial lawyer with real estate experience; Chris Goodson, a St. Louis real estate developer experienced in rehabilitation projects; State Senator Chuck Gross, vice president of Business Development for UMB Bank; Lewis R. Mills, the state’s Public Counsel, which represents the public before the state Public Service Commission; Spencer R. Thomson, a lawyer with experience in redevelopment projects and tax increment financing; and Howard C. Wright, a former city attorney for Springfield and Cape Girardeau and lawyer for the Missouri Department of Transportation. See Press Release, Missouri Task Force on Eminent Domain, Blunt Appoints Members to Eminent Domain Task Force, July 20, 2005, <http://www.mo.gov/mo/eminentdomain/news/072005TaskForce.htm> (last visited July 12, 2006) [hereinafter *Appointments*].

nesses.<sup>41</sup> The witnesses expressed highly diverse views,<sup>42</sup> and included a number of farmers who felt that they had been treated unfairly by electric utility companies, the Missouri Department of Transportation, or other condemning authorities.<sup>43</sup>

The final report of the Task Force was released on December 30, 2005.<sup>44</sup> It contained eighteen “action item” recommendations, each of which called for legislation to be adopted by the General Assembly. A remarkably large proportion of those recommendations actually became part of the final bill enacted in 2006, though in some cases with very substantial changes. Those that fell by the wayside included a requirement that condemning authorities have a duty to submit to mediation,<sup>45</sup> a requirement that the commissioners appointed to make the initial determination of value be impartial and qualified to establish value,<sup>46</sup> and a proposed tightening of the statutory definition of “blight.”<sup>47</sup> Overall, the members of the Task Force must have considered their effort to have been quite worthwhile and successful, particularly in light of the diversity of views with which they must have approached their task.

It is significant that the Task Force did not take the radical step of recommending that eminent domain no longer be available for urban redevelopment projects. Given the strong redevelopment background of several Task Force members,<sup>48</sup> such a step would have been surprising. However, that result could have followed if the Missouri Secretary of State had certified the petition signatures of a group known as “Missourians in Charge” in the spring

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41. Minutes of all meetings except the last, held December 7, 2005, are available at <http://www.mo.gov/mo/eminentdomain/minutes.htm> (last visited July 12, 2006). Witnesses were heard at the meetings of Aug. 18, Sept. 15, Sept. 29, and Oct. 13.

42. I appeared before the Task Force in its meeting of Sept. 29, 2005, at the invitation of Chairman Terry Jarrett. I argued that the *Kelo* case was correctly decided, but that Missouri needed clearer statutory standards for findings of blight and more aggressive judicial review of such findings by local governments. Minutes, Missouri Task Force on Eminent Domain, Sept. 29, 2005, <http://www.mo.gov/mo/eminentdomain/minutes/EDTFMeetingMinutes092905.pdf> (last visited July 12, 2006).

43. See Minutes, Missouri Task Force on Eminent Domain, Oct. 13, 2005, <http://www.mo.gov/mo/eminentdomain/minutes/EDTFMeetingMinutes101305.pdf> (last visited July 12, 2006). One of the more extreme positions was taken by Rob Korff, President of the Carrollton, Missouri Farm Bureau. In his written statement, read by Leslie Holloway, he vigorously attacked condemnations by utilities and railroads, stating, “if a company is going to make money off of the process, well that is just plain WRONG, but they should have to pay 4-5 times the present value plus [a] 10% hassle fee.” *Id.*

44. Missouri Task Force on Eminent Domain, Final Report and Recommendations, Dec. 30, 2005, <http://www.mo.gov/mo/eminentdomain/finalrpt.pdf> (last visited July 12, 2006) [hereinafter *Final Report*].

45. *Id.* at Recommendation 5.

46. *Id.* at Recommendation 6.

47. *Id.* at Recommendation 16.

48. See *Appointments*, *supra* note 40.

of 2006. The petitions proposed a referendum on a state constitutional amendment providing:

Private property shall not be taken nor shall the existing rights to use, sell or possess private property be encumbered nor the property damaged if, at the time of such taking or interference, the public body taking such action, or its designee, intends to convey any interest in the property to a private party.<sup>49</sup>

The proposed constitutional amendment contained exemptions for abatement of nuisances, property acquired by utilities and railroads, concessions in public parks and similar facilities, and easements of necessity. Nonetheless, it would have denied the power of eminent domain to the great majority of urban redevelopment projects; condemnation would only be available in those projects in which the redevelopment would consist of publicly-owned land uses.<sup>50</sup> Of course, in most redevelopment projects, the local government has neither the resources nor the interest in doing the redevelopment work itself. Indeed, for governments to do so would probably be widely decried as “socialist.” In light of the very extensive use of redevelopment by St. Louis, Kansas City, and many smaller municipalities in Missouri, a change such as that represented by the proposed constitutional amendment would surely be considered by many – myself included – to be highly detrimental to the future of Missouri’s urban areas. Fortunately, the Governor’s Task Force did not take this position, and the Secretary of State, finding herself unable to verify sufficient petition signatures, rejected the proposed ballot issue.<sup>51</sup>

#### IV. THE LEGISLATIVE PROCESS: AN OVERVIEW

While a number of bills relating to eminent domain were filed in the 2006 session of the Missouri General Assembly, only one received serious consideration: H.B. 1944, filed by Representative Steve Hobbs of Audrain County. Hobbs had significant credibility as a result of having served on the Eminent Domain Task Force, and his close involvement with the Missouri Farm Bureau gave him considerable political leverage.<sup>52</sup> An additional advan-

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49. Proposed amendment at Sec. 2. The full text of the proposed amendment is available at <http://www.protectourhomesmo.com/docs/ProtectOurHomes.rtf> (last visited July 12, 2006).

50. *Id.*

51. See Jim Davis, *Carnahan Rejects Petitions on Eminent Domain*, KANSAS CITY BUSINESS JOURNAL, May 26, 2006, available at <http://kansascity.bizjournals.com/kansascity/stories/2006/05/22/daily30.html?surround=1fn>.

52. Missouri has about 158,000 farm operators out of a total population of about 3.6 million adults, or only 4.4 percent of the population. See ANN ULMER, PROFILE OF MISSOURI’S FARMS AND FARMERS, INSTITUTE FOR PUBLIC POLICY, UNIVERSITY OF MISSOURI-COLUMBIA, REPORT NO. 32-2005, July 2005, <http://www.truman.missouri>.

tage was the fact that Rod Jetton, Speaker of the House of Representatives, agreed to be one of the sixty-nine representatives who cosponsored the Hobbs bill.<sup>53</sup> It was clear that the House leadership had decided that the Hobbs bill was the one to be taken seriously. The bill followed quite faithfully the recommendations of the Task Force, although Representative Hobbs added a provision that was evidently intended to prevent utility companies and railroads from making expanded use of easements or transferring them to other entities,<sup>54</sup> an issue never considered by the Task Force.

The House Judiciary Committee held hearings on the Hobbs bill and reported it out favorably on April 3. Few changes were made by the Judiciary Committee, and with the approval of the Rules Committee, it was sent to and adopted by the full House on Wednesday, April 12. A number of amendments, described in detail below, were made on the floor of the House. The bill was then sent to the Senate.

I began meeting with members of the Senate the following week, working with Sarah Topp and Bill Gamble of the lobby firm of Gamble and Schlemeier. I prepared a memo briefly describing the features of the House bill that I felt were objectionable, and talked through it with perhaps a dozen Senators. It became immediately apparent to us that there was much less enthusiasm for the bill in the Senate than in the House. The Senate leadership delayed for

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edu/uploads/Publications/IPP32-2005.pdf (last visited July 12, 2006). Nonetheless, farm interests and the impact of the Missouri Farm Bureau weigh exceptionally heavily in the state's political calculus. During my conversations with members of the General Assembly and their staff during Spring 2006, I was constantly reminded of the unwillingness of many of them to take any action that would offend the Farm Bureau.

53. H.B. 1944 as introduced, <http://www.house.mo.gov/bills061/biltxt/intro/HB1944I.htm>. Summaries and full copies of all versions of the bill are available at <http://www.house.state.mo.us/bills061/bills/HB1944.HTM>. The following standard terminology used by the General Assembly is adopted here to designate the various versions of the bill as it proceeded through the legislative process:

HCS H.B. 1944: House Committee Substitute for House Bill 1944, *available at* <http://www.house.mo.gov/bills061/biltxt/commit/HB1944C.HTM>.

PHCS H.B. 1944: Perfected House Committee Substitute for House Bill 1944 (i.e., the version actually passed by the House), *available at* <http://www.house.mo.gov/bills061/biltxt/perf/HB1944P.HTM>.

SCS H.B. 1944: Senate Committee Substitute for House Committee Substitute for House Bill 1944, *available at* <http://www.house.mo.gov/bills061/biltxt/senate/4100S.10C.htm>.

SS H.B. 1944: Senate Substitute for Senate Committee Substitute for House Committee Substitute for House Bill 1944 (i.e., the version actually passed by the Senate), *available at* <http://www.house.mo.gov/bills061/biltxt/senate/4100S.21F.htm>.

CCS H.B. 1944: Conference Committee Substitute for Senate Substitute for Senate Committee Substitute for House Committee Substitute for House Bill 1944 (i.e., the version truly agreed and finally passed by both houses), *available at* <http://www.house.mo.gov/bills061/biltxt/truly/HB1944T.HTM>.

54. H.B. 1944 as introduced, § 523.283.

several days in announcing who would be asked to handle the bill on the Senate side, or even to which committee it would be assigned. There seemed to be a fairly widespread view among likely Senate handlers that the bill represented considerable political risk. Since nearly any provision that was attractive to the Farm Bureau and property rights advocates seemed likely to be opposed by the real estate development community and the governments of the state's major cities, a close association with the bill evidently seemed to many senators a "no-win game."

Finally the bill was assigned to the Senate Pensions, Veterans' Affairs and General Laws Committee, and the Committee scheduled a hearing for April 25. There were so many witnesses that the hearing was carried over to the following morning. I testified, identifying a number of provisions of the House bill that I felt needed to be modified.<sup>55</sup> Many of the witnesses were farmers or Farm Bureau representatives who described the evils of eminent domain from their perspective. The Committee voted out the bill, again with relatively few changes, on April 27.

Now the Senate was faced with a genuine dilemma. It was widely recognized among Senators that the bill was in need of serious modification. The bill contained a number of provisions that were highly unacceptable to cities and developers, and other provisions that would have been quite damaging to utilities and railroads. Yet, it was not easy to find a member who would undertake the complex and potentially thankless job of turning the bill into workable and generally acceptable legislation. The Senate leadership turned to Senator Chris Koster of Harrisonville who agreed to take on the responsibility. Koster, the majority (Republican) Caucus Chairman, was an experienced trial lawyer who had served as Cass County Prosecuting Attorney for ten years before entering private practice. He had been a member of the Senate only since 2004, but had proven himself an extremely capable legislator.<sup>56</sup>

Koster's approach to rehabilitating the bill was predicated on hard work and tough negotiation. On Saturday and Sunday, April 29 and 30, he and his staff<sup>57</sup> invited into his office, one after another, representatives of every major interest group that had a stake in the bill. They worked essentially non-stop for eleven or twelve hours each day. I joined them at 2:00 pm on Sunday afternoon and stayed for the remainder of the day as we worked through multiple successive drafts of the bill. The process had already been a grueling

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55. My strongest criticism was reserved for the "heritage value" provisions of the bill, which I called "bizarre" and "nonsensical." See Josh Flory, *Eminent Domain Bill Gets Criticism from Professor*, COLUMBIA MISSOURIAN, Apr. 26, 2006, <http://www.showmenews.com/2006/Apr/20060426News006.asp> (last visited July 12, 2006).

56. See Koster's official Senate biography, <http://www.senate.mo.gov/06info/members/bios/bio31.htm> (last visited July 30, 2006).

57. The staff members included Aaron Washburn, Senator Koster's assistant; Misty Snodgrass of the Senate Majority Caucus Staff; and Brendan Cossette of the Senate President Pro Tem's office.

one,<sup>58</sup> when late on Sunday afternoon, Leslie Holloway, lobbyist for the Missouri Farm Bureau, and Representative Hobbs, the bill's original House sponsor, were invited into the office to go through what Koster hoped would be the final draft of his substitute bill. Both of them pronounced that his bill was acceptable to them, and Hobbs commented, "if you can get this through the Senate, I'll see that it passes the House."

Senator Koster then set about obtaining letters from each of the interest groups with whom he had met, expressing their approval of his draft.<sup>59</sup> Circulating these letters, he quickly gained the support of the majority of the members of the Senate, most of whom were probably only too happy to be able to vote for a bill that would not leave any important interest group angry. He introduced the draft as a substitute for the Senate Committee Bill on the morning of Tuesday, May 2, and it passed quickly with only a few minor floor amendments.<sup>60</sup> The bill was returned to the House, a conference committee was appointed,<sup>61</sup> and the senate version of the bill was then immediately reported out by the conference committee and passed by both houses.<sup>62</sup> In one week, a bill that was highly problematic and worrisome to many members of the Senate had been transformed into enacted legislation that was workable and had gained nearly universal support. It might be exaggeration to call this a political miracle, but it was certainly a prodigious feat of lawmaking.<sup>63</sup>

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58. Senator Koster described the process in an audio clip designed for radio station use, available at <http://www.senate.mo.gov/05info/press-room/actualities.html>.

59. I also provided a letter of endorsement at Senator Koster's request.

60. See *Journal of the Mo. S.*, May 2, 2006, at 953-55, 963-66. The first amendment adopted was for purely parliamentary purposes. See discussion *infra* note 108. Of the remaining nine amendments (of which seven were ultimately adopted), all but two were moved by Senator Koster and were in the nature of technical or "clean-up" amendments. The other two amendments were similarly of only minor substantive importance. The bill was then referred to the Senate Committee on Governmental Accountability and Fiscal Oversight, which reported it back with approval, and it was finally passed by the Senate on third reading the following day, May 3, with only one "nay" vote. See *Journal of the Mo. S.*, May 3, 2006, at 984, 987.

61. *Journal of the Mo. H.R.*, May 4, 2006, at 1536.

62. *Journal of the Mo. H.R.*, May 5, 2006, at 1563; *Journal of the Mo. S.*, May 5, 2006, at 1085. There were only three "no" votes on the final reading in the House and one "no" vote in the Senate. One of the three House "no" votes was cast by Representative Yaphett El-Amin of St. Louis, who felt the bill's compensation provisions unjustly favored farm landowners. According to a news report, she "told [Representative Steve] Hobbs the bill made her wish she were a farm girl. 'You solved your major problem, but you left me out in the cold,' she said." Virginia Young, *Blunt Gets Eminent Domain Bill*, ST. LOUIS POST-DISPATCH, May 5, 2006, at A7.

63. See James Goodwin, *Senators Agree on Eminent Domain*, SPRINGFIELD NEWS-LEADER, May 3, 2006, <http://www.news-leader.com/apps/pbcs.dll/article?AID>

## V. THE LEGISLATION: ISSUES AND NEGOTIATIONS

In reforming eminent domain, the Missouri General Assembly dealt with several major issues, including the issue that opened the door for consideration of eminent domain in the 2006 legislative session, the *Kelo* holding that economic development was a proper basis for condemnation.

### A. Economic Development

Redevelopment projects in Missouri can be carried out either by city and county governments through a "Land Clearance for Redevelopment Authority" that is automatically created by statute<sup>64</sup> in each county and each city over 75,000 population,<sup>65</sup> or by an Urban Redevelopment Corporation,<sup>66</sup> a private entity that operates pursuant to a redevelopment plan approved by a city or county.<sup>67</sup> Under preexisting law, both types of entities had the power of eminent domain,<sup>68</sup> but neither was permitted to use it except upon a finding by the local governing body that an area was "blighted" or (in the case of redevelopment authorities) "insanitary."<sup>69</sup>

There is, however, a third type of redevelopment project known as a "TIF," or Tax Increment Financing project.<sup>70</sup> In a TIF project, the costs of redevelopment are paid by bonds issued by the local government, typically on a tax-free basis. When the project is completed, ordinarily with a large increase in assessed valuation, the property taxes paid by the new owners of the

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=/20060503/NEWS01/605030357/1007 (last visited July 12, 2006) ("Sen. Jason Crowell, R-Cape Girardeau, called endorsements from the various groups 'nothing short of remarkable.' 'Right now they're cooking marshmallows and singing Kumbaya.'").

64. MO. REV. STAT. § 99.330 (2000).

65. Cities with populations under 75,000 have the option to create such an authority. *Id.* at § 99.320(6).

66. *Id.* at § 353.

67. *Id.* at § 353.060.

68. *Id.* at § 99.420(4) (granting eminent domain power to redevelopment authorities); *Id.* at § 353.130(3) (granting eminent domain power to redevelopment corporations).

69. *Id.* at § 99.330(2)(a) (redevelopment authorities); *Id.* at § 353.060 (redevelopment corporations).

70. *Id.* at § 99.801; see Julie A. Goshorn, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U. L.Q. 919 (1999); Josh Reinert, *Tax Increment Financing in Missouri: Is it Time for Blight and But-For to Go?*, 45 ST. LOUIS U. L.J. 1019 (2001); Kenneth Hubbell & Peter J. Eaton, *Tax Increment Financing in the State of Missouri*, MSCDC Economic Report Series No. 9703, Center for Economic Information, University of Missouri-Kansas City, June 1997, <http://cei.haag.umkc.edu/cei/EconRep/June97/9703.pdf> (last visited July 12, 2006).

land and buildings thereon rise accordingly. However, the property tax revenues paid to local government entities from the real estate within the project are frozen at the pre-project level, and the additional taxes are used to retire the bonds. In a sense, the project pays its own way through the diversion of added tax revenues to pay off the indebtedness. The project must be completed and the bonds paid in full within 23 years.<sup>71</sup>

The city's or county's TIF commission<sup>72</sup> and the governing body<sup>73</sup> must approve a TIF project before it can proceed. The local government can then use the power of eminent domain to acquire properties for the project. The area included within a TIF project must be blighted, a conservation area,<sup>74</sup> or an economic development area.<sup>75</sup> Thus, "pure" economic development is a sufficient justification for use of eminent domain in a TIF project in Missouri — precisely the situation approved by the U.S. Supreme Court in *Kelo* but widely condemned by property rights advocates.

Even in non-TIF projects, where pure economic development is not a permissible basis for the use of eminent domain, and blight or insanitary conditions must be found, it has been widely argued that Missouri local governments have abused the definition of blight by finding blighted conditions when no objective observer would find anything seriously wrong with the area. The statutory definitions of blight are admittedly vague.<sup>76</sup> Even a poorly-designed or outmoded street layout can justify a finding of blight.

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71. See MO. REV. STAT. § 99.810.3.

72. *Id.* at § 99.825.

73. *Id.* at § 99.820.

74. A conservation area is "not yet a blighted area but is detrimental to the public health, safety, morals, or welfare and may become a blighted area." *Id.* at § 99.805(3).

75. *Id.* at § 99.810.1(1). An economic development area is one that is neither blighted nor a conservation area, but "the governing body of the municipality finds that redevelopment will not be solely used for development of commercial businesses which unfairly compete in the local economy and is in the public interest because it will (a) Discourage commerce, industry or manufacturing from moving their operations to another state; or (b) Result in increased employment in the municipality; or (c) Result in preservation or enhancement of the tax base of the municipality." *Id.* at § 99.805(5).

76. For redevelopment authorities, the definition is:

"Blighted area," an area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.

*Id.* at § 99.320(3). The definition of blight for TIF project is identical. *Id.* at § 99.805(1). The definition for redevelopment corporations is similar:



Two illustrations of arguable abuse may suffice. In one case, a two-anchor suburban mall was declared blighted in order to qualify it as a TIF project despite the fact that it was highly successful and profitable. The city was convinced that two-anchor “dumbbell” malls were obsolete in layout, and that a mall with only two anchor stores would ultimately be unable to compete with larger regional shopping centers. The Court of Appeals, giving great weight to the city’s determination, found that the plaintiff — the operator of a competing shopping center — had not met its burden of showing that the city’s finding was arbitrary.<sup>77</sup> While no eminent domain action was involved in this case, it illustrates the great malleability of the concept of blight.

In another case, Target Corporation was the retail tenant in a building in St. Louis.<sup>78</sup> Target desired to demolish the store and replace it with a larger one, but the landlord declined to allow this. Target then enlisted the aid of a city council member, who had the city redevelopment authority study the property and make a finding that it was blighted. The city council then adopted a redevelopment plan, and the redevelopment authority appointed Target itself as the redeveloper. When the landlord refused its offer to buy the property, Target brought an eminent domain action. The landlord brought an action in federal court to enjoin the taking on the ground that it was not for a public purpose. The trial court granted an injunction, but the Eighth Circuit Court of Appeals reversed, holding that abstention was proper because of the predominance of state law issues and the fact that the state court eminent domain action was pending.<sup>79</sup> Whatever the condition of the store building, it is difficult to avoid the conclusion that eminent domain was employed here simply to force a landlord to sell out to its tenant.

Missouri courts have been extremely reluctant to disturb a finding of blight by local governments. Since their first redevelopment decision in 1954, they have held that the local findings must be allowed to stand unless they were arbitrary or were induced by fraud, collusion or bad faith.<sup>80</sup> The burden

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“Blighted area,” that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes.

*Id.* at § 353.020(2).

77. *JG St. Louis West Ltd. Liab. Co. v. City of Des Peres*, 41 S.W.3d 513 (Mo. Ct. App. 2001). *Cf.* *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265 (Cal. Ct. App. 2000) (finding inadequate evidence of blight in the fact that the area was characterized by many small, irregularly-shaped lots that made it difficult to develop “big box” retail stores).

78. *Aaron v. Target Corp.*, 357 F.3d 768 (8th Cir. 2004).

79. *Id.* at 777.

80. *State v. Land Clearance for Redevelopment Auth.*, 270 S.W.2d 44, 52 (Mo. 1954).

of proof on these issues lies with the party attacking the local government's findings.<sup>81</sup> Moreover, it is not essential that each parcel taken be blighted:

In order to have a blighted area it is not necessary that the total area, or any particular portion of it, constitute what is generally known as a slum. Also, an area may properly be determined to be blighted even though it may contain some vacant land or structures which are not themselves offensive.<sup>82</sup>

As a consequence of this deference to local governments, no appellate court in Missouri has ever reversed a local government's finding of blight.

When Representative Hobbs drafted the original version of H.B. 1944, he took a fairly modest approach to changing the rules set out above. The bill simply provided that, "No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes."<sup>83</sup> This provision was widely considered to be essential since it accomplished the bill's fundamental purpose of reversing the Kelo decision. There was little opposition to this provision, either because it was not regarded as a major impediment to redevelopment within the state, or perhaps because it was regarded by the redevelopment community as inevitable.<sup>84</sup> However, the Hobbs bill also have required, in every redevelopment project, a finding that *each parcel* of property in the area to be condemned met the relevant statutory definition of blighted.<sup>85</sup> This would have seriously curtailed redevelopment, forcing a piecemeal approach in any project in which sound properties and blighted ones were intermingled, and resulting in the inability to assemble land parcels of the size needed for some types of projects.<sup>86</sup>

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81. *Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 16 (Mo. 1974).

82. *Id.* at 15 (citations omitted).

83. H.B. 1944 as introduced, § 523.271.

84. As noted above, the only form of eminent domain available in Missouri that would be barred by this language was a taking in a "economic development area" for a TIF project. *See supra* note 75.

85. H.B. 1944 as introduced § 523.274 (emphasis added). The bill also provided that "if any parcel of property in the area is determined not to meet the relevant statutory definition of blighted, the authority to acquire the property shall expire." *Id.* A third, rather confusing, provision in the original bill stated that "[p]rivate property may be taken through the use of the power of eminent domain only after making a determination of blight of the property or a determination that the taking is for a public use." H.B. 1944 as introduced, § 1.1. It was difficult to see what this statement would have added to the "not solely for economic development" language, particularly since the Missouri courts had consistently held that elimination of blight was a public use since *State v. Land Clearance for Redevelopment Auth.*, 270 S.W.2d 44 (Mo. 1954).

86. As already noted, the Missouri courts had not previously required that *all* properties in the project area be blighted. *See supra* note 85 and accompanying text.

Finally, Hobbs' bill provided that farmland could not be declared blighted,<sup>87</sup> a provision that was never substantially changed and remained in the enacted legislation.<sup>88</sup> Aside from its obvious symbolism as a victory for the Farm Bureau, it is unclear that this provision has any practical significance. While it may be conceivable that farm property could fit within the definition of blight,<sup>89</sup> there is no reported case in Missouri in which farmland was determined to be blighted by a local government, and no one to whom I spoke in many hours of conversations in the Capitol while these debates were going on mentioned any illustrative case.

The House Judiciary Committee added some procedural provisions regarding blight in redevelopment projects. Its version of the bill provided that:

any legislative determination that an area is blighted, substandard, or insanitary shall not be arbitrary or capricious and shall be supported by substantial evidence; that such procedural and evidentiary standards have been met shall be reviewable by a court of competent jurisdiction.<sup>90</sup>

This language would make no discernable change in the standard of review that Missouri courts have been using for more than fifty years. The courts have generally treated the phrases "not arbitrary and capricious" and "supported by substantial evidence" as two ways of saying the same thing.<sup>91</sup> It is difficult to see how this language would have any effect at all on judicial review of blight determinations.

The House Committee bill also provided, for the first time, a procedure for interlocutory appeal of a trial court's finding of blight, and stated that the Court of Appeals should "give the case preference in the order of hearing to all other cases, except elections cases, to the extent necessary to conclude the case within thirty days of having been filed."<sup>92</sup> This point is not a trivial one. Under prior Missouri practice, a landowner who believed that the trial court had erred in finding the condemnation to be a proper exercise of the condem-

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87. H.B. 1944 as introduced, § 1.1. The originally filed bill referred not only to farmland, but also to "vacant land that has never been developed," but the latter phrase disappeared in the House Judiciary Committee version of the bill, *see* HCS H.B. 1944, § 1.1, and never reappeared; *see* CCS H.B. 1944, § 1.1. The "vacant land" provision could have been hugely problematic to redevelopment in some cases.

88. CCS H.B. 1944, § 1.1.

89. *See supra* note 76.

90. HCS H.B. 1944, § 523.261. The language appears in the final bill; CCS H.B. 1944, § 523.261.

91. *See, e.g.*, *JG St. Louis West Ltd. Liab. Co. v. City of Des Peres*, 41 S.W.3d 513, 516 (Mo. Ct. App. 2001) ("We affirm the judgment in that City's approval of the TIF project was not arbitrary, was fairly debatable, and was supported by substantial evidence.").

92. HCS H.B. 1944, § 523.261.

nor's authority had little choice but to wait until the conclusion of the trial to appeal. This could mean the expenditure of a great deal of money in the valuation phase of the trial — an expenditure that would be unnecessary and irrelevant if the condemnor lacked the power to condemn.<sup>93</sup> In theory, an extraordinary writ might be obtained to allow an interlocutory appeal, but testimony before the Eminent Domain Task Force indicated that such writs were rarely granted.<sup>94</sup> Hence, the Task Force had recommended that a more flexible appeal process be created.<sup>95</sup>

The House Committee also loosened up noticeably the “every parcel must be blighted” language of Representative Hobbs’ originally-filed bill. Instead, it provided that in redevelopment condemnations:

the condemning authority shall individually consider each parcel of property in the area with regard to whether the property meets the relevant statutory definition of blight. If the condemning authority finds that the area is predominantly blighted, it may proceed with condemnation of any parcels in such area.<sup>96</sup>

Presumably “predominantly” would mean more than fifty percent of the properties, although it was unclear whether this would be measured in terms of number of parcels, land area square footage, building square footage, or by some other method.

Finally, the House Committee modified Representative Hobbs’ original language prohibiting the use of the eminent domain “solely for economic development.” Instead, it provided:

No condemning authority shall acquire a fee interest in any real property through the process of eminent domain if the sole reason

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93. Eminent Domain Task Force, Transcript of Hearing, Aug. 18, 2005, at 104-110 (testimony of Thomas Barzee, City Counselor, North Kansas City, Missouri), available at <http://www.mo.gov/mo/eminentdomain/minutes/transcript081805.pdf>.

94. Barzee indicated that his research showed the extraordinary writ was granted less than five percent of the time. *Id.* at 110.

95. *Final Report, supra* note 44, at 26. The Task Force recommended:

[T]he General Assembly should enact legislation providing for an appeals process where either a condemning authority or a landowner can file a declaratory judgment action in the circuit court of the county where the property is located to obtain judicial review of the condemning authority’s designation of blight, with a *de novo* standard of review. The legislation should require that the case is expedited, similar to elections cases.

*Id.*

96. HCS H.B. 1944, § 523.274.

for condemnation is potential or anticipated tax revenue by any political subdivision or state government.<sup>97</sup>

This language would have effectively narrowed the prohibition, since under the TIF statute itself, economic development includes not only increasing tax revenue or employment, but also discouraging businesses from moving to another state and increasing unemployment.<sup>98</sup> Hence the economic development provisions of the TIF statute would have been left largely intact by this language.

In the floor debate, the House returned to Hobbs' original language, "for solely economic development."<sup>99</sup> Moreover, for the first time, the House-perfected bill provided a definition of "economic development," and it was a broad definition indeed, comprising "increase in the tax base, tax revenues, and employment."<sup>100</sup> The House floor debate left the Committee's language on standard of judicial review and interlocutory appeals intact,<sup>101</sup> as well as the "predominantly blighted" standard for creation of redevelopment areas.<sup>102</sup>

In the Senate, the bill was assigned to the Pensions, Veterans' Affairs and General Laws Committee. The Committee retained the judicial review standard in the House perfected bill, but dropped (perhaps inadvertently) the provision for interlocutory appeal of blight determinations. The Committee's bill also returned to the "all parcels must be blighted" approach of the original Hobbs bill.<sup>103</sup>

Even more significantly, the Senate Committee changed "[n]o condemning authority shall acquire private property through the process of eminent domain for solely economic development" to "for *predominantly* economic development."<sup>104</sup> Both Senator Koster and I considered this extremely problematic. As Koster astutely pointed out in a conversation we had before the Senate Committee released its version of the bill, nearly all redevelopment projects have at least two purposes: to get rid of blighted or substandard properties, and to encourage economic development. These two objectives are not mutually exclusive, but rather are entirely compatible. There is no way anyone can rationally judge which of these objectives *predominates* in a particular project. Hence, if the "predominantly" test were enshrined in law, redevelopment might not come to an end in Missouri, but it would certainly bog down in a great deal of unnecessary and indeterminate litigation.<sup>105</sup>

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97. *Id.* at § 523.271.

98. MO. REV. STAT. § 99.805(5) (2000).

99. PHCS H.B. 1944, § 523.271.

100. *Id.* at § 523.271.2.

101. *Id.* at § 523.261.

102. *Id.* at § 523.274.

103. SCS H.B. 1944, § 523.274.

104. *Id.* at § 523.271.

105. *Id.* at § 523.271.1.

It was now up to Senator Koster and his staff, working with the relevant interest groups, to make sense of this mish-mash. They realized that they were writing what would probably be the final legislative language — as indeed turned out to be the case, almost without exception.<sup>106</sup> The judicial review language from previous versions was retained, and Koster's bill provided for calendar priority of the blight determination at both at the trial court and appellate levels. Koster's bill also made it clear that blight determinations could be reviewed either within the context of a pending eminent domain action or in a separate declaratory judgment action.<sup>107</sup>

The substitute bill prepared by Senator Koster also returned to the House perfected bill's statement that "[n]o condemning authority shall acquire private property through the process of eminent domain for *solely* economic development," eliminating the Senate Committee's substitution of "predominantly" for "solely."<sup>108</sup> However, Senator Koster was still concerned that, because of the frequent coincidence of blight removal and economic development purposes in the same redevelopment project, the courts might reject a project because it was motivated in part by economic development objectives. To counter this concern, I drafted at his request the following sentence, which he included in the bill: "[e]conomic development . . . does not include the elimination of blighted, substandard, or unsanitary conditions, or conditions rendering the property or its surrounding area a conservation area as defined in section 99.805, RSMo."

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106. See *supra* note 62 and accompanying text.

107. SS H.B. 1944, § 523.261. The declaratory judgment provision was new, but had been recommended by the Eminent Domain Task Force. See *Final Report, supra* note 44, at 26.

108. CCS H.B. 1944, § 523.271. The bill actually introduced by Senator Koster as a substitute for the Senate Committee Bill on Tuesday, May 2, 2006, did not contain the language in the text. Instead, it contained, under the foregoing section number, the strange and somewhat puzzling statement that:

The state of Missouri hereby rejects the findings of the United States Supreme Court in *Kelo v. New London*, 125 S. Ct. 2655 (2005), and the laws of this state shall be interpreted to prohibit the use of eminent domain for private economic purposes.

When I saw this language, I immediately e-mailed Senator Koster's office, pointing out that it made little sense and differed from what had been agreed to with the various interest groups two days earlier. Aaron Washburn, Koster's assistant, assured me that Koster himself planned to offer an amendment on the floor of the Senate, restoring the language on which agreement had been reached. This was in fact accomplished by a little pre-choreographed dance of floor amendments between Senators Koster, Scott, Klindt, and Shields. *Journal of the Mo. S.*, May 2, 2006, at 953-54. The purpose of this odd maneuver was to allow Senator Koster, under some arcane Senate rule that I do not purport to understand, greater control of *other* floor amendments that might be offered. Whatever the basis for the tactic, it appeared to work, since all other amendments offered on the Senate floor were technical, minor, and essentially friendly. *Id.* at 963-966.

Senator Koster also developed an ingenious compromise on the question of whether every parcel in a redevelopment project must be blighted, as the Senate Committee bill had said. His language provided that:

the condemning authority shall individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight. If the condemning authority finds a preponderance of the defined redevelopment area is blighted, it may proceed with condemnation of any parcels in such area.<sup>109</sup>

While the term “preponderance” is admittedly vague and susceptible to more than one interpretation, the inclusion of the phrase “shall individually consider each parcel” was enough to satisfy the objections of those who had previously wanted to demand that every parcel be blighted. The result was a provision that, although somewhat ambiguous, was mutually acceptable and would seldom be a barrier to actual redevelopment projects.

One might wonder why no version of HB 1944, from initial to final, attempted to clarify the definition of “blight” in the Missouri statutes, despite the fact that the definition was widely criticized as vague. At least in the Senate, I could detect no enthusiasm at all for such an endeavor. Redefining blight was widely regarded as a morass that could consume huge resources of time and energy with very little payoff.<sup>110</sup> Even the Eminent Domain Task Force, while recommending that the definition be clarified,<sup>111</sup> concluded that “a complete overhaul of the blight definition is not obtainable.”<sup>112</sup> One senator remarked to me that Missouri might adopt a “check list” definition similar to that of Illinois, which lists thirteen factors representing various aspects of urban deterioration, and then provides that at least five of the factors must be shown to exist in order to warrant a finding of blight.<sup>113</sup> But no one wanted to take on this task.

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109. SS H.B. 1944, § 523.274.

110. Indeed, that may be a fair characterization. See Colin Gordon, *Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305 (2004) (providing an excellent review of the various definitions and their problems, but expressing little optimism that definition free from the risk of manipulation can be crafted).

111. *Final Report*, *supra* note 44, at 25 (commenting that “the definition of blight should be tightened so that condemning authorities have to make some additional determinations, above and beyond the factors listed in the current definition of blight, before land can be blighted for eminent domain”). The Task Force was not specific as to the nature of the definitional changes that should be made.

112. *Id.*

113. 65 *ILL. COMP. STAT.* 5/11-74.4-3 (2005). This definition applies only to improved land; the local government must find the five factors are present “to a mean-

In sum, the blight provisions of the final legislation did very little harm to redevelopment, but neither did they do much to clean up abuses. Landowners were placed in a better procedural posture when they sought to challenge findings of blight, but they could point to very little in the bill that improved their substantive chances of success. Beyond the prohibition of eminent domain in TIF projects for purely economic development purposes, and the requirement that the “preponderance” of a redevelopment area must be blighted, nothing of much consequence had changed. Some abusive conduct might have been deterred by a more rigorous definition of blight, but the political will and energy to write such a definition and make it law was absent.

### B. “Heritage Value” and “Homestead Value”

The Eminent Domain Task Force recommended that some provision be made for “heritage value” in the valuation of properties in eminent domain.<sup>114</sup> Neither a definition nor an explanation of “heritage value” was included in the Task Force’s report, but presumably it meant that some sort of premium above fair market value should be awarded to owners who had held their properties for a long time. Some members of the Task Force were dissatisfied with this rather vague recommendation, and felt that they could not support it “unless the term is narrowly defined to apply to properties like Century Farms [those held in a family for more than 100 years] or similar properties.”<sup>115</sup>

The heritage value concept was primarily supported by the Missouri Farm Bureau, which considered it a keystone of its legislative effort.<sup>116</sup> The Bureau’s intense interest was understandable from a purely economic viewpoint; of all of the properties in Missouri that have been held by a family for a very long time period, the vast majority are likely agricultural.

Representative Hobbs’s original bill followed the lead of the Task Force; it merely mentioned “the heritage or legacy value of the property” as one of a number of factors that should be taken into account in determining

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ingful extent” and are “reasonably distributed throughout the improved part of the redevelopment project.” *Id.* The California approach is similar. See CAL. HEALTH & SAFETY CODE § 33031 (West 1999).

114. *Final Report*, *supra* note 44, at 16.

115. The “Century Farm” program was created by the University of Missouri-Columbia College of Agriculture and the University’s Extension Division. See About The Missouri Century Farm Program, <http://extension.missouri.edu/centuryfarm/about.html>.

116. On April 18, 2006, I served as host for a radio talk show on KSSZ-FM in Columbia, Missouri, and had Leslie Holloway, the Missouri Farm Bureau’s lobbyist, as a guest. I asked her whether she could in good conscience support the House perfected version of the bill’s treatment of heritage value, which I considered to be absurdly generous. See PHCS H.B. 1944, § 523.040.3(4), discussed at note 119 *infra*. She replied that the Farm Bureau would not insist on such a generous provision, but was determined to obtain some form of substantial recognition for heritage value.



just compensation in eminent domain.<sup>117</sup> The House Judiciary Committee dropped out even this passing reference. However, on the floor during the House debate on the bill, Representative Hobbs offered an amendment, adopted by the House,<sup>118</sup> to define heritage value as follows:

If the real property has been in the same family for one year, the award for heritage value may be an additional amount not to exceed one percent of the original award of damages paid to the property owner. An additional percent increase shall be added for each year above one year, with the total award for heritage value not to exceed one hundred percent of the original award of damages paid to the property owner for the real property owned by the same family for one hundred years or more.<sup>119</sup>

This extraordinary provision was not limited to farms or any other specific type of property. It would have applied even to land owned by corporations or other entities, provided that a "family" had controlled at least fifty percent of the entity. It would have given every condemnee an extra one percent of value for each year the condemnee or his or her family had owned the property.

This provision must have seemed to the Farm Bureau a victory beyond its wildest dreams. I found it appalling.<sup>120</sup> It would not only increase the costs of land acquisition significantly for all types of condemning agencies, but would do so in a completely irrational fashion. Two houses, side by side and virtually identical, could generate wildly different awards because their owners had owned them for differing time periods. The owner of a "Century Farm" would get double the land's market value. In conversations with members of the Senate, and in my testimony before the Senate Pensions, Veterans' Affairs, and General Laws Committee, I attacked this provision as one above all others that simply could not be allowed to survive in the final act.<sup>121</sup>

My efforts seemed to have little effect; the Senate committee retained the concept precisely as the House had adopted it.<sup>122</sup> I had spoken to most of the members of the committee, and was certain that many of them did not approve of the heritage value language. The explanation for the vote was probably that by this time, it had become common knowledge that some indi-

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117. H.B. 1944 as introduced, § 1.2(3).

118. Journal of the Mo. H.R., Apr. 12, 2006, at 1014, 1017.

119. PHS H.B. 1944, § 523.040.3(4).

120. In testimony before the Senate Pensions, Veterans' Affairs, and General Laws Committee on April 25, I referred to the House's version of heritage value as "bizarre," "nonsensical" and "just weird." See Josh Flory, *Eminent Domain Bill Gets Criticism from Professor*, COLUMBIA TRIBUNE, Apr. 26, 2006, available at <http://www.showmenews.com/2006/Apr/20060426News006.asp>.

121. *Id.*

122. SCS H.B. 1944, § 523.040.3(4).

vidual senator would be asked to draft a substitute bill — one which presumably would rewrite the heritage value concept — that would be the actual version to be considered on the Senate floor. Hence, committee members may have felt that they could vote for the House version of the language and thereby appear to be supporting the Farm Bureau, while recognizing that the committee vote had little practical meaning in the Senate.

These actions placed the ball in Senator Koster's court. He realized that the Farm Bureau was going to insist on *some* version of heritage value, so he rewrote the concept in a rather ingenious way to minimize its adverse impact on condemners. In his version, which became the language of the final bill, heritage value would not come into play at all unless the property had been owned by the same family for fifty years or more, and the "heritage increment" was to be a flat 50% of fair market value.<sup>123</sup> While this approach could obviously result in a large windfall, it would accrue to only a very small number of landowners. The impact was further limited by language applying the heritage increment only if the taking "prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking."<sup>124</sup> Thus, it would not apply to the typical easement or highway taking of farm land, in which the great bulk of the property would remain useable for farming. When Koster explained this approach to me and I read the language, I was satisfied that the "fangs" of the heritage value concept had been pulled.

In addition, Koster inserted language that was designed to appeal to a much broader segment of the public. There was considerable talk in the halls of the Capitol during these debates that ordinary homeowners often suffered from eminent domain because, even with relocation compensation,<sup>125</sup> they inevitably sustained numerous intangible losses. Examples included the costs of finding another home, discarding furniture and fixtures that were not suitable for the new home, finding new schools, physicians, dentists, and other service providers, and the ordinary headaches of moving. Some homeowners told stories of simply being unable, because of rising housing prices, to replace the home that was taken with the money they had been paid. It would be difficult, perhaps impossible, for the typical homeowner to provide a financial accounting of all of these losses, but they were nonetheless considered, I think quite correctly, to be real and substantial.

To take these burdens into account, Senator Koster inserted language that gave an extra twenty-five percent of fair market value to any owner who suffered, in eminent domain, a "homestead taking," defined as a loss of his or her dwelling or of land within 300 feet of the dwelling which "prevents the owner from utilizing property in substantially the same manner as it was cur-

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123. CCS H.B. 1944, §§ 523.001(2), 523.039(3).

124. *Id.* at § 523.039(3).

125. *See infra* notes 185-192 and accompanying text.

rently being utilized on the day of the taking."<sup>126</sup> In effect, a homeowner is entitled to the extra twenty-five percent if he or she is forced to move as a result of the taking. This approach struck me as particularly adroit because, while obviously highly appealing to the general public, its costs to condemners were inherently self-limiting in that it applied only to homes. Indeed, as a practical matter, expensive luxury homes are rarely the subject to condemnation, simply because the people who live in such homes usually have enough political weight to get the condemnation diverted to some other location. Thus, the twenty-five percent increment will typically be calculated on the base value of a modest home. This struck me as a fair and balanced approach, and as representing at least one way in which members of the General Assembly could honestly tell their constituents that they had reformed eminent domain in Missouri.

### *C. Defining "Value"*

The statutory definition of value is directly related to the homestead taking and heritage value concepts discussed above. If twenty-five percent or fifty percent is to be added, it must be added to some base value. Every version of House Bill 1944 prior to the drafting of Senator Koster's Senate substitute was problematic in this respect. Representative Hobbs' initial bill provided that the commissioners, in reaching a valuation for the property, should consider:

comparable sales in the area, appraisal value of like property taken by condemnation, term of ownership of the property by the current property owner, current use of the property, availability of comparable property in the area, anticipated profits of the acquiring entity that results from the acquisition, in whole or in part, and any other relevant factors.<sup>127</sup>

It also defined "just compensation" to mean:

the amount determined by taking into consideration factors including, but not limited to, the fair market value of the property, the willingness of the owner to sell the property, the heritage or legacy value of the property, the highest and best reasonable use of the property, the availability of comparable property in the area, anticipated profits of the acquiring entity that results from the acqui-

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126. CCS H.B. 1944, §§ 523.001(3), 523.039(2).

127. H.B. 1944 as introduced, § 523.040.

sition in whole or in part, any other relevant factors, and associated reasonable relocation and replacement costs.<sup>128</sup>

The result was an unintelligible *mélange* of concepts, which may indeed have been the drafter's intent. Taken together, these two sections could reasonably be read to allow consideration of whatever the commissioners — and ultimately the jury — might want to consider, including some factors, such as owner's willingness to sell and the anticipated profits of the acquiring entity, that would have been impossible to measure. Subsequent versions of the bill tweaked this language, but did not make it rigorous or consistent.

Senator Koster recognized this as a serious problem and was determined to correct it. He believed, I think quite correctly, that if some owners were to receive an additional twenty-five or fifty percent, the extra award should be calculated on the basis of a standard "fair market value" appraisal and not some loose, multifactor-based figure. Otherwise, landowners might well be able to recover not just one windfall, but two.

To accomplish this, his draft defined "fair market value" to mean: the value of the property taken after considering comparable sales in the area, capitalization of income, and replacement cost less depreciation, singularly or in combination, as appropriate, and additionally considering the value of the property based upon its highest and best use, using generally accepted appraisal practices.<sup>129</sup>

The draft then defined "just compensation" as "fair market value" plus the heritage value or homestead taking add-ons discussed above, if applicable.<sup>130</sup> The three methods of appraisal mentioned in Koster draft are, of course, the standard approaches used in essentially all professional appraisals.<sup>131</sup> The hodge-podge approach of the earlier drafts had been laid to rest; the statute now had a definition of value with which any competent appraiser would be comfortable and familiar. This was, in my view, an extremely important and useful contribution.

#### *D. Obtaining and Paying for Appraisals*

In the usual eminent domain proceeding, the condemnor will usually obtain an appraisal if the value of the property is fairly high; in low-value acquisitions, the appraisal may be omitted on the ground that it would add propor-

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128. *Id.* at § 1.2(3). The language of the Senate Committee bill was identical. See SCS H.B. 1944, § 1.1.

129. CCS H.B. 1944, § 523.001(1).

130. *Id.* at § 523.039.

131. See, e.g., MARTHA R. WILLIAMS & WILLIAM L. VENTOLO, FUNDAMENTALS OF REAL ESTATE APPRAISAL (8th ed. 2001) (describing each of the three standard appraisal methods).

tionately too much to the condemnor's total expense. Landowners probably do not get their own appraisals very frequently unless they have decided to litigate the condemnor's offer or, in Missouri, the commissioners' determination.<sup>132</sup> Of course, appraisers for landowners famously arrive at high values, and appraisers for condemnors, at low values.

The Task Force recommended that the condemnor be required to make an "initial offer no lower than fair market value based on an appraisal by a certified appraiser."<sup>133</sup> Representative Hobbs included this requirement in the original bill,<sup>134</sup> provided that the condemnor was obligated to obtain an appraisal in the first place. The latter proviso was an apparent drafting error, since the bill never required the condemnor to obtain an appraisal. The error was corrected by the House Judiciary Committee, whose bill required condemnors to get appraisals by licensed appraisers and share them with landowners if the property was believed in good faith to have a value exceeding \$15,000.<sup>135</sup> For land values below that level, the condemnor merely had to provide "an explanation of the basis for its determination of just compensation."<sup>136</sup> If the landowner obtained his or her own appraisal, the condemnor was entitled to a copy.<sup>137</sup> The committee also added a requirement that the appraisal be based on:

sound, fair, and recognized appraisal practices which are consistent with the Uniform Standards of Professional Appraisal Practice in effect at the time of the appraisal, as promulgated by the Appraisal Foundation, and any additional applicable state or federal law or regulation practice governing acquisitions by the condemning authority.<sup>138</sup>

In floor debate, the House amended the threshold for requiring a condemnor's appraisal to \$10,000,<sup>139</sup> but made no other substantive changes.<sup>140</sup>

132. Under Missouri statutes, three commissioners appointed by the court make an initial determination of value. If the landowner wishes to contest this determination, he or she can have a jury trial on valuation in circuit court. MO. REV. STAT. § 523.040 (2000). The Task Force recommended legislative changes to ensure that the commissioners were qualified to determine land values. See *Final Report, supra* note 44, at 16, but this recommendation was not implemented in any version of H.B. 1944.

133. *Final Report, supra* note 44, at 13. The Task Force otherwise made no substantive recommendations concerning appraisals.

134. H.B. 1944 as introduced, § 623.262(2).

135. HCS H.B. 1944, § 523.250.2.

136. *Id.*

137. *Id.*

138. HPS H.B. 1944 § 523.250.4.

139. *Id.* at § 523.253.2(1).

140. Representatives of utility companies and railroads with whom I spoke were strongly of the view that the threshold for requiring an appraisal should be higher, not

When the bill came to the Senate, the Pensions, Veterans' Affairs, and General Laws Committee retained these provisions and also, for the first time, included a requirement that the condemning authority pay the expense of an appraisal obtained by the landowner.<sup>141</sup> It also added a penalty for condemnors who make "low-ball" final offers. Under this provision, the condemnor would be required to make an offer of judgment when filing its condemnation petition. If the final judgment exceeded this offer by fifteen percent or more, the condemnor would become liable for the landowner's attorneys' fees, appraisal expenses, and other costs.<sup>142</sup> It was my sense that this concept was received with considerable approval in the Senate, although some Senators commented to me that they felt the margin for error should be larger than fifteen percent.

Senator Koster was thus faced with reconciling these provisions in his substitute bill. He dropped entirely the requirement that condemning authorities obtain appraisal; instead, condemnors could choose to obtain and give to the landowner either an appraisal or "an explanation with supporting financial data for its determination of the value of the property for purposes of the offer made in subsection 1."<sup>143</sup> This rendered irrelevant the earlier debate about the threshold land value that must be reached in order for an appraisal to become obligatory. The draft also provided that, if an appraisal was provided, it had to be made "by a state-licensed or state-certified appraiser using generally accepted appraisal practices."<sup>144</sup> This language sought to prevent condemnors from providing the landowner with slipshod or incompetent appraisals. At the same time, the penalty provision for "low-ball" offers was eliminated completely.

Senator Koster's substitute bill carried over a provision from every previous draft:<sup>145</sup> that the landowner had the right to obtain his or her own ap-

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lower, than the House Judiciary Committee's \$15,000. They were concerned that if no increase occurred, they would often be forced to spend several thousand dollars on appraisals for very small land acquisitions for easements. I agreed, and in my conversations with members of the Senate I recommended a \$25,000 threshold. In the event, the threshold became irrelevant, as discussed in the text.

141. SCS H.B. 1944 § 523.256(3). This was consistent with the Task Force's recommendation. See *Final Report*, *supra* note 44, at 13.

142. SCS H.B. 1944, § 523.042.

143. CCS H.B. 1944, § 523.254.2(1). The reference to "supporting financial data" was my suggestion, and was intended to provide the landowner at least some reasonable level of information about the way the offer had been formulated, in cases in which no appraisal was provided. Some earlier drafts had used the less precise phrase "explanation of the basis for its determination of just compensation." See PHCS H.B. 1944, § 523.253.2(1). The mention of "subsection 1" referred to the written offer the condemnor was obliged to submit to the landowner, which could not be for an amount less than the appraised value or other determination of value. See CCS H.B. 1944, § 523.256(2).

144. *Id.* at § 523.254.2(2).

145. See, e.g., PHCS H.B. 1944, § 523.256(3); SCS H.B. 1944, § 523.256(3).

praisal.<sup>146</sup> The Senate Committee's requirement that the condemnor pay for the condemnee's appraisal had been dropped, so the statement that the condemnee had the right to get an appraisal struck me as an unnecessary and somewhat silly statement; how could a condemnor possibly *prevent* a landowner from obtaining an appraisal? Senator Koster felt it did no harm to leave it in, regarding it as a "feel-good" provision that would be appealing to some legislators.<sup>147</sup>

### *E. Easement Provisions*

The Task Force had recommended that easements acquired by eminent domain should be extinguished (the Task Force said, somewhat inaccurately, "revert to the current owner of the underlying property,") if they were not used for ten years. It also recommended that restrictions be placed on the transfer of easements from one entity — typically a railroad or utility company — to another, although the precise nature of the restrictions was not made clear.<sup>148</sup> Representative Hobbs' original bill addressed both of these topics. It provided that an easement that was not used within ten years of its acquisition would be deemed abandoned and vacated, although the easement holder could attempt to preserve the easement by demonstrating in court that the delay in use had been a result of construction delays, environmental assessments, or other factors beyond the easement holder's control.<sup>149</sup>

I considered this provision highly objectionable and argued vigorously against it. From my viewpoint, its principal problem was that it would prevent a railroad, a utility, or a governmental agency such as the Missouri Department of Transportation from engaging in advance acquisitions for planning purposes. Suppose, for example, an electric utility recognized that, because of probable future population growth, the utility would be very likely to need a new distribution line to a certain area of the state 15 years in the future. It might be highly cost-effective for the utility to acquire the easement immediately, while land values were relatively low, rather than wait until shortly

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146. CCS H.B. 1944, § 523.256(3).

147. He also suggested that the provision might come into play if the landowner was prevented by illness, unavailability of appraisers, or some other reason beyond his or her control, from obtaining an appraisal.

148. *Final Report*, *supra* note 44, at 22. This provision was promoted strongly by the farm bureau. The incident that apparently precipitated the concern about transfer of easements was a case in which a local cooperative electric company had acquired easements over farmland for power lines and poles and had then, some years later, transferred these easements to a much larger investor-owned utility, which proceeded to erect taller towers than the farmers had expected. They reportedly took great umbrage over this event, although it seemed to me to present nothing more than a simple question of whether the scope of the easement had been exceeded.

149. H.B. 1944 as introduced, § 392.080.2. To its credit, the provision was prospective only, applying to easements created after the effective date of the act.

before the need eventuated, when acquisition might be much more expensive. In effect, the easement could be “banked” until needed. The ten-year automatic abandonment approach of Representative Hobbs’ bill seemed to me to stand in the way of this sort of highly desirable acquisition.

This provision appeared, with minor changes, in the House’s perfected version of the bill,<sup>150</sup> but was dropped in the Senate committee version. Senator Koster was under some pressure from farm interests to restore it in his substitute bill. To eliminate its detrimental effect on advance acquisition of easements, I suggested, and Senator Koster incorporated, the following language: “[t]he holder of any such easement shall be allowed to maintain the easement upon a showing that the holder, in good faith, plans to make future use of the easement.”<sup>151</sup> With this proviso, it should be quite easy for a utility or agency to demonstrate with internal documents that it obtained the easement for the purpose of future use, and thus to eliminate the risk of having it declared automatically abandoned. In effect, the bill as enacted simply incorporated the existing Missouri common law of easement abandonment, which requires a showing of intent by the easement holder to relinquish the easement.<sup>152</sup>

In another apparent attack on easement law, Representative Hobbs’ bill prohibited what he called “expanded use” of easements by private entities such as utilities and railroads unless the entity holding the easement engaged in a further condemnation or acquisition.<sup>153</sup> However, this provision was not nearly as severe as it appeared upon original examination. The relevant section defined “expanded use” as:

- (1) The exclusion of use by the current owner of the burdened property from an area greater than the area originally contemplated at the time of acquisition by the condemning authority;
- (2) An increased footprint greater than the footprint originally contemplated at the time of acquisition by the condemning authority;
- (3) An attempt to confer property rights of any nature whatsoever to another entity other than a successor-in-interest; or
- (4) Any altered use which substantially changes the ability of the current owner of the burdened property to operate farm machinery in the area of the property interest originally acquired by the condemning authority.

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150. PHCS H.B. 1944, § 3.

151. CCS H.B. 1944, § 3.

152. *See, e.g., McNulty v. Murray*, 93 S.W.3d 801 (Mo. Ct. App. 2002).

153. H.B. 1944 as introduced, § 523.283.



If one assumes that the original easement was specifically described by location on the servient land — as will usually be true of easements acquired either by deed and always of easements acquired by eminent domain for utility companies — the first two provisions of this definition would have essentially no impact at all on existing Missouri easement law. It was already true that if an easement's holder engages in a use exceeding the width of a defined easement, the holder is trespassing and is subject to an action for damages and potentially for an injunction.<sup>154</sup> Moreover, if the easement is non-exclusive, as the vast majority of easements are,<sup>155</sup> the servient landholder is not excluded from the easement's pathway, but is merely required to avoid unreasonable interference with the use under the easement.<sup>156</sup>

The third element of Representative Hobbs' definition of "expanded use" is difficult to interpret. If an easement holder attempts to transfer property rights to some other entity, it would seem that the entity is, by definition, a "successor-in-interest." Hence, this element seems to have no clear meaning at all.

The final element in the Hobbs definition of "expanded use" is a change in an easement that "substantially changes the ability of the current owner of the burdened property to operate farm machinery in the area of the property interest." Once again, it is not obvious how this definition would work with existing Missouri easement law. Missouri follows the doctrine of "unlimited reasonable use."<sup>157</sup> Unless the grant of the easement contains specific limitations on its use, the easement holder is limited only by the concept of reasonableness. In a given case, the courts might or might not determine that a change in the use of the easement that imposes greater limits on the landowner's ability to operate farm machinery is reasonable. Perhaps the term "substantially" in the definition would be construed as the equivalent of the current requirement of reasonableness.

Fortunately, the House Judiciary Committee dropped the last two elements of the "expanded use" definition in Representative Hobbs' original bill, and they never reappeared. The committee also rewrote the first two elements to define "expanded use" thus:

[T]he term "expanded use" shall mean the exclusion of use by the owner of the burdened property from an area greater than the area of the permanent easement originally acquired or use of the easement originally acquired beyond the scope of the uses allowed as

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154. *Morton v. Crider*, 126 S.W.3d 803, 807 (Mo. Ct. App. 2004).

155. Easements are presumed to be nonexclusive unless the documents creating them expressly provide for exclusivity. *Robert Jackson Real Estate Co., Inc. v. James*, 755 S.W.2d 343, 346 (Mo. Ct. App. 1988).

156. *Maasen v. Shaw*, 133 S.W.3d 514, 516 (Mo. Ct. App. 2004).

157. *Id.* at 518.

described in the instrument of conveyance or condemnation petition.<sup>158</sup>

While this change relieved a good deal of my concern about the meaning of the language, I was still worried that it might work an undesirable change in Missouri easement law. In Senator Koster's markup session on the bill, a further definition was added as follows: I contributed the bracketed language and strikeout.

As used in this subdivision, the term "increased footprint or burden" shall mean a different [type of] use or a use ~~that has greater~~ [presenting an unreasonably burdensome] impact on the property, the landowner, or the activities being conducted on the property by the landowner.<sup>159</sup>

My intent was simply to preserve existing Missouri easement law as intact as possible, recognizing that the holder of an easement could surcharge it only by making an unreasonable use or by converting it to a different type of use than had been authorized in the original grant. It is my view that the final language does so, and hence makes no change in existing law at all.

A third easement issue is the so-called "blanket easement;" one whose location on the servient land is not specifically described in the grant. While neither the Task Force nor Representative Hobbs' original bill made any reference to blanket easements, it was clear to me from discussions with a number of Senators that the Farm Bureau vigorously opposed them and wished to see them outlawed. I had considerable sympathy for this view, since I consider a "pure" blanket easement to be an onerous obligation on a landowner, and one which I would urge any client of mine to resist strenuously.

On the other hand, condemning agencies and utility companies have often found blanket easements to be quite useful. This is particularly true in the case of acquisitions of lengthy linear pipelines, power lines, or the like, when the precise location of some segments of the line cannot be known in advance. The blanket easement allows the condemning agency to make small, or even large, adjustments in the precise location of the line over an individual owner's property. As an engineer testified in one Missouri case:

Q. All right. All right. Why do you take an easement without saying exactly where across the piece of property the line is going to go?

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158. HCS H.B. 1944, § 523.283.2. The language of the perfected House bill was identical; PHCS H.B. 1944, § 523.283.2.

159. CCS H.B. 1944, § 523.283.2(2)

A. It has been my experience all through these years that a blanket easement is usually more satisfactory than a described easement to the property owners that manage the City, and the engineers. That way we can always discuss our problem and work out a logical location for the line. If it is described, sometimes you run into problems with something that's buried, or maybe the property owner will change his mind after he's signed one of those and don't want it there. And that's happened several times on this particular job also.

Q. So it gives you room to maneuver, is that correct?

A. Right.<sup>160</sup>

Under preexisting Missouri law, blanket easements were permissible.<sup>161</sup> It was not essential that the grant of an easement specify its precise location on the servient land. If the location was not fixed in the grant, it could be fixed later by agreement of the parties or by proof of actual use on the ground,<sup>162</sup> and if neither of these occurred, the circuit court could, at the request of either party, fix a location that would give the easement holder "convenient, reasonable and accessible use."<sup>163</sup>

Senator Koster's mark-up of his substitute bill took a position against blanket easements. It appears in the final act as follows:

Any blanket easement created after December 31, 2006, shall be void as against public policy and wholly unenforceable. For the purposes of this section, the term "blanket easement" shall mean an easement in real property acquired by condemnation or negotiations in lieu of the exercise thereof where the instrument or order of condemnation, by its terms, allows the easement holder to locate its facilities at an undefined location on, over, under, or across the burdened property.<sup>164</sup>

This language is prospective only, and thus avoids casting existing easements into doubt. Nonetheless, the terms of the provision are not free from uncertainty. Obviously an easement that is, by its terms, located "anywhere on Blackacre," would violate the statute. However, what about an easement the location of which on Blackacre is constrained, but not precisely identified? A

160. *Area Real Estate Assocs., Inc. v. City of Raymore*, 699 S.W.2d 461, 465 (Mo. Ct. App. 1985) (Pritchard, J., dissenting).

161. *Beery v. Shinkle*, 193 S.W.3d 435 (Mo. Ct. App. 2006); *Hall v. Allen*, 771 S.W.2d 50, 53 (Mo. 1989) (en banc).

162. *Helgeson v. Ochs*, 988 S.W.2d 545, 548 (Mo. Ct. App. 1999).

163. *Hall*, 771 S.W.2d at 53.

164. CCS H.B. 1944, § 523.282.

former student of mine who is currently counsel for an electric utility company raised this question with me shortly after the statute was passed. Would it be permissible, he asked, to preserve some flexibility in the language creating the easement? I advised him that I believed this would indeed be consistent with the statute. For example, a power line right-of-way might be described as “having a width of 100 feet measured from east to west, and having a center line lying between 350 and 400 feet east of the westerly boundary of Blackacre.” This sort of language would allow a fifty-foot region of flexibility, but the courts should not view it as an “undefined location” in the statute’s phraseology.

A wise utility company might buttress its position in this sort of easement acquisition by adding a covenant along the following lines:

Within \_\_\_ years of the date of this grant, the grantee shall construct the electrical power line authorized within the description of the easement as defined above and shall record in the Office of the County Recorder an amendment to this grant that states the precise location of the easement, which shall not exceed the width of 100 feet measured from east to west as authorized above. Upon the recording of such amendment, the location of the easement shall become fixed as shown in the amendment.

While I do not consider this additional covenant essential to the validity of the easement illustrated above, both landowners and utility companies would, I think, find it useful.

One additional provision of the final bill relates to easements and other partial acquisitions. It grants the landowner the right to propose an alternative location to the condemning authority, which, in turn, “shall consider” all such proposed alternatives.<sup>165</sup> This provision struck me as having very limited significance. The reason is that most easements are partial takings for lengthy, linear rights of way — for highways, utility lines, railroads, and the like — which by their nature must maintain alignment across a large number of parcels of land. A condemning authority may “consider” an alternative routing, but adopting it will typically require jogs in the alignment and hence will rarely make any sense in practical terms; hence, such proposals are very likely to be rejected.

I was concerned that the courts might impose some sort of “good faith” test for the condemnor’s consideration of the proposed alternative, perhaps similar to the requirement that federal agencies give good faith consideration to environmental impact statements under the National Environmental Policy

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165. CCS H.B. 1944, § 523.265. The provision appeared in Representative Hobb’s original bill; H.B. 1944 as introduced, § 523.265.

Act.<sup>166</sup> I believed this could impose significant and unnecessary potential costs on condemners, particularly if they were required to justify their “consideration” in litigation. Hence I drafted, and Senator Koster included in his markup, an additional sentence providing that “[a] written statement by the condemning authority to the landowner that it has considered all such alternative locations, and briefly stating why they were rejected or accepted, is conclusive evidence that sufficient consideration was given to the alternative locations.”<sup>167</sup> With this addition I considered the section unimportant but harmless.

### *F. Redevelopment Corporations and “Condemnation Blight”*

Two provisions of the eminent domain bill were strongly influenced by the Sunset Hills debacle.<sup>168</sup> In Sunset Hills, a St. Louis suburban municipality, a redevelopment corporation named Novus, Inc., secured city approval for a TIF project that involved the acquisition of 254 homes in order to construct a large shopping center. However, the redeveloper was unable to obtain the needed financing to carry out the acquisitions,<sup>169</sup> and the city ultimately repealed the TIF ordinance amid a flurry of lawsuits, political recriminations, and widespread anger and disappointment.<sup>170</sup> Many residents had already contracted to sell under threat of eminent domain, moved, and purchased other homes when the project fell apart.<sup>171</sup>

During my discussions on eminent domain with members of the Missouri General Assembly in the Spring of 2006, Sunset Hills was often mentioned to me; indeed, it had become virtually synonymous with what was thought to be wrong with eminent domain. There was near universal agreement that the legislature had to do, or be seen to do, something that would prevent another similar disaster.

The first response to Sunset Hills was simple; from its original draft, House Bill 1944 deprived redevelopment corporations of the right they had

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166. See, e.g., *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

167. CCS H.B. 1944, § 523.265.

168. A large archive of information on the matter is collected at <http://www.sunsethillslandgrab.org/>.

169. Acquisition costs were to have been funded by a different lender than the one committed to provide construction financing; the identity of the acquisition lender was never publicly disclosed. See Lisa R. Brown, *Sunset Hills: What Went Wrong? Novus Never Met Banks' Demands*, ST. LOUIS BUSINESS JOURNAL, Aug. 26, 2005, available at <http://www.bizjournals.com/stlouis/stories/2005/08/29/story1.html>.

170. The repeal occurred on Feb. 14, 2006. See Rick Frese, *Into The Sunset . . . Aldermen Vote to Scrap MainStreet at Sunset Hills Development*, <http://www.timesnewspapers.com/stories/20060217/mainstreet.html>.

171. *Id.*

previously held to exercise eminent domain.<sup>172</sup> Redevelopment corporations, as private entities, may continue to exist and operate, but they will have to enlist local governments to carry out the necessary condemnation actions. Whether this change would have made any difference in the outcome of the Sunset Hills fiasco is doubtful. One of the persistent charges of critics of the city government in that case was that the city was far too credulous in accepting the redeveloper's representations with respect to the availability of financing, commitments of retail tenants, and other aspects of the project.<sup>173</sup> The city might well have been willing to lend its eminent domain power to the developer as well.

The other prong of the legislative attack on the Sunset Hills problem was a provision dealing with what was generally termed "condemnation blight." This term refers to the damages that ensue when the "cloud of condemnation"<sup>174</sup> is cast over property, but in fact the taking never occurs or occurs only after a long delay. As a result, tenants may depart, buildings may become unrentable and unprofitable, capital values may fall, and properties may become practically unmarketable. Several jurisdictions have recognized landowners' claims for condemnation blight, usually on an "inverse condemnation" theory,<sup>175</sup> but Missouri courts have been uniformly unreceptive to the concept.<sup>176</sup>

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172. H.B. 1944 as introduced, repealing MO. REV. STAT. § 353.130.1-.3. In the final version of the bill, redevelopment corporations were permitted to continue exercising eminent domain power with respect to redevelopment agreements entered into with local governments on or before December 31, 2006. CCS H.B. 1944, § 353.130.1-.3.

173. See *supra* note 169.

174. The phrase was coined in *Lincoln Loan v. State Highway Comm.*, 545 P.2d 105, 106 (Or. Ct. App. 1976). See Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765 (1973).

175. See, e.g., *Klopping v. City of Whittier*, 500 P.2d 1345 (Cal. 1972); *In re Elmwood Park Project Section 1, Group B*, 136 N.W.2d 896 (Mich. 1965); *Johnson v. City of Minneapolis*, 667 N.W.2d 109 (Minn. 2003); *State ex rel. Dept. of Transp. v. Barsy*, 941 P.2d 971 (Nev. 1997); *GES, Inc. v. Corbitt*, 21 P.3d 11, 13 (Nev. 2001). The doctrine never gained wide acceptance, and there seems to have been little activity under it in recent years. See *State v. Hewett Prof'l Group*, 895 P.2d 755 (Or. 1995) (refusing to find condemnation blight where the plaintiff's damages were the result of his own actions rather than the government's); *DUWA, Inc. v. City of Tempe*, 52 P.3d 213 (Ariz. Ct. App. 2002) (refusing to recognize condemnation blight).

176. *State ex rel. Mo. Highway and Transp. Comm'n v. Matula*, 910 S.W.2d 355 (Mo. Ct. App. 1995); *State ex rel. Washington Univ. Med. Ctr. Redevelopment Corp.*, 626 S.W.2d 373 (Mo. 1982). See Bruce E. Castle, *Condemnation Blight: Compensating the Landowner in Missouri*, 48 MO. L. REV. 220 (1983); Julie Crittenden Dunkin, *Denial of Landowner's Counterclaim: Another Obstacle on the Road to Just Compensation*, 50 UMKC L. REV. 353, 361-64 (1982) (both criticizing the *Washington University* case).

In its final form, the 2006 eminent domain bill addressed condemnation blight by providing:

If any condemning authority abandons a condemnation, each owner of interests sought to be condemned shall be entitled to recover: (1) Their reasonable attorneys' fees, expert expenses and costs; and (2) The lesser of: (a) The owner's actual damages accruing as a direct and proximate result of the pendency of the condemnation if proven by the owner; or (b) The damages required to be paid to an owner in the event of an abandonment under the terms of the applicable redevelopment plan or agreement.<sup>177</sup>

The difficulty, of course, is that a condemnation presumably cannot be abandoned unless it has first been filed. Hence, the statute provides no remedies for pre-filing activities, however harmful they may be to landowners' interests. In the actual case of the Sunset Hills project, it is not clear from news reports that any condemnation actions were ever filed; plainly the vast majority of homeowners simply entered into contracts to sell to the redevelopment corporation,<sup>178</sup> although obviously with the background threat that they could be subjected to eminent domain if they did not reach agreement. For them, the new statute would have done no good even if it had been in effect. They were faced with a "mere" breach of contract by the redeveloper.

On the other hand, it is not easy to see how adverse precondemnation activities of governments or redevelopers can be effectively remedied by statute. The lines between reasonable and unreasonable delay, between legitimate and illegitimate activity by condemnors and between advance public disclosure of planned takings and "defamation" of neighborhoods may be too blurred to be defined usefully by legislation. The trick is to avoid imposing unfairly on private landowners the costs of projects, whether successful or failed, that were designed and intended to meet public needs. The courts may be much better suited than the legislature to this sort of allocation of risk. Nonetheless, the General Assembly could – and should – have signaled to the Missouri courts that they should entertain such claims. For example, 26 years earlier a bill that failed of passage in the General Assembly provided:

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177. CCS H.B. 1944, § 523.259. This narrow view of "condemnation blight" originated in the report of the Task Force. See *Final Report*, *supra* note 44, at 28.

178. The Washington Post reported that 229 of the 254 homeowners had entered into contracts of sale with Novus, Inc. See T.R. Reid, *Missouri Condemnation No Longer So Imminent; Supreme Court Ruling Ignites Political Backlash*, WASH. POST, Sept. 6, 2005, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501087.html>. A letter to the editor of the St. Louis Business Journal asserted that condemnation actions had been filed on ten percent of the homes in the project area. See Rob Hanson & Jan Mueller, *Novus Missteps Serve as Warning for Rock Hill*, ST. LOUIS BUSINESS JOURNAL, Sept. 9, 2005, available at <http://www.bizjournals.com/stlouis/stories/2005/09/12/editorial3.html>.

[T]he landowners shall receive just compensation for any damaging of the property or for any diminution in the value of the property prior to the date of taking, by the project for which the property is condemned, or by any announcements or acts of the condemning authority, its officials, employees, agents, or contractors concerning such project, if the trier of the fact shall find that said damages or diminution in the value of the property are proximately caused thereby.<sup>179</sup>

While perhaps imperfect, this language would have made at least a beginning. In this respect, the 2006 statute must be considered a lost opportunity. The chance to make “condemnation blight” a viable theory of recovery was, I suspect, simply inundated by the host of more complex and controversial issues before the legislators.<sup>180</sup>

### *G. Additional (but not Very Important) Reforms*

Much of the material in the final bill had, in my judgment, only or largely symbolic value. It did neither much good nor much harm, although it provided plenty of “talking points” for politicians and lobbyists.

Under the final bill, a condemning authority is required to provide a “notice of intended acquisition” to each landowner at least 60 days prior to filing a condemnation action.<sup>181</sup> The notice must contain certain basic information about the acquisition, including a description of the property to be acquired, the use to be made of it, and a summary of the landowner’s legal rights.<sup>182</sup> Additionally, the condemning authority must make a written offer of purchase to the landowner at least thirty days before filing an action, and must leave the offer open for the full thirty-day period unless agreement on a final price is reached sooner.<sup>183</sup>

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179. S.B. 549, 80th Gen. Assem., 2d Reg. Sess. (Mo. 1980), as quoted in *State ex rel. Washington Univ. Med. Ctr. Redevelopment Corp.*, 626 S.W.2d 373, 378 n.5 (Mo. 1982).

180. I must accept some share of the blame. I had not researched the history of “condemnation blight” theory in Missouri when I undertook my work on the 2006 bill, and was consequently not able to advocate effectively for change on this front.

181. CCS H.B. 1944, § 523.250.

182. One of the rights so listed is the right to “Obtain such owner’s own appraisal of just compensation.” CCS H.B. 1944, § 523.250.1(3)(c). I resisted this provision at least mildly, since it seemed to me a somewhat silly statement; how could a condemning authority possibly prevent a landowner from obtaining an appraisal? However, it became clear to me that the provision had a politically righteous ring to it among members of the General Assembly, and I abandoned my opposition to it.

183. CCS H.B. 1944, § 523.253. As noted above, the offer must not be less than the condemnor’s appraisal or other basis for valuation; *see supra* note 143 and accompanying text.



The final bill also imposed a duty of "good faith negotiations" on condemnors,<sup>184</sup> but upon analysis, this amounts to nothing more than compliance with the law. It includes providing the required notices mentioned above, making an offer no lower than the condemnor's appraisal or determination of value, giving the owner an opportunity to obtain his or own appraisal, and considering any alternative routing or location proposed by the owner. If the condemnor fails to meet these standards, the court can dismiss the condemnation petition without prejudice and impose the owner's costs and attorneys' fees on the condemnor.

The final bill strengthened the right to relocation payments for people and businesses displaced by eminent domain. Missouri has required such payments since 1971, provided that the condemnation is conducted by a public agency or a redevelopment corporation and that the taking was for a redevelopment project or was assisted with federal funds.<sup>185</sup> Under the amendments made by the final bill, the limitation to redevelopment projects was eliminated, and those displaced by ordinary condemnations for purely governmental purposes became entitled to relocation benefits.<sup>186</sup> Private condemnors, such as railroads and utilities, also became obligated for the first time to pay equivalent benefits.<sup>187</sup>

Those benefits were increased as well. Individual residents being displaced are now entitled to "actual moving costs, utility deposits, key deposits, storage of personal property up to one month, utility transfer and connection fees and other initial rehousing deposits including first and last month's rent and security deposit,"<sup>188</sup> with a minimum of \$1,000 (formerly \$500). Even month-to-month tenants now qualify.<sup>189</sup> Displaced businesses, which now include nonprofit and veterans' organizations,<sup>190</sup> have a choice of \$3,000 (formerly \$1,000) as a fixed moving allowance or their actual costs of "packing, crating, disconnection, dismantling, reassembling and installing all personal equipment and costs for relettering similar signs and similar replacement stationery."<sup>191</sup> In either case, the business may also recover up to \$10,000 in "reestablishment expenses" to cover "actual costs incurred for physical improvements to the replacement property to accommodate the particular business."<sup>192</sup> While these payments may not always be adequate to cover displacees' actual costs fully, they are far more satisfactory than before.

Farm interests had become concerned about the possibility of "stealth" land acquisition programs by private condemnors, such as utility companies.

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184. CCS H.B. 1944, § 523.256.

185. MO. REV. STAT. § 523.205 (2000).

186. CCS H.B. 1944, §§ 523.205.2, 523.205.15.

187. *Id.* at § 523.262.2.

188. *Id.* at § 523.205.6.

189. *Id.* at § 523.205.3(4).

190. *Id.* at § 523.205.3(1)(c).

191. *Id.* at § 523.205.7.

192. *Id.*

This concern was motivated by several incidents in which condemnors engaged in acquisitions by using agents who did not disclose the identity of their principals or the nature or scope of the projects for which land was being acquired.<sup>193</sup> The Task Force had recognized this as an issue the legislature should address, commenting that:

The General Assembly should enact legislation to include provisions requiring direct and concurrent written notice by a condemning authority, before initiating negotiations for acquisition, to all parties likely to be approached for property or easement acquisition. Such notice should include general descriptions of the following: property or easements proposed for acquisition, purpose of proposed acquisition, and hearing and appeal process.

To satisfy this concern, but in the narrowest manner possible,<sup>194</sup> Senator Koster included in his markup of the bill a provision requiring that an electric utility company preparing to build new generation facilities must either inform each individual landowner to whom an offer of purchase is made, or must conduct a public meeting after published notice and before any offers are made, disclosing the identity of the acquiring entity and the nature of the project.<sup>195</sup>

It is by no means clear that requiring such advance disclosure, particularly in large projects, is good policy. It is well known that developers of such projects can keep costs down by keeping their plans confidential and using undisclosed agents to acquire land.<sup>196</sup> Ultimately word is likely to leak out,

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193. Leslie Holloway advised me that the concern grew out of several incidents, one of which was the acquisition of land near Norborne in Carroll County, Missouri by Associated Electric Cooperatives for a generation facility. E-mail from Leslie Holloway, State and Local Governmental Affairs Director, Missouri Farm Bureau, to the author (July 5, 2006). Information about the Carroll County plant is available at <http://www.carrollcountyed.com/content.aspx?contentid=3&barid=1>.

194. Representative Hobbs' original bill had contained a much broader provision, applying to all types of condemning authorities and projects, and requiring that "[t]he condemning authority, at or before the time when the notices [to prospective condemnees] are sent, shall provide public notice, by means of public meeting, newspaper advertisement, or other similar means, of the general nature of the project and its proposed location." H.B. 1944 as introduced, § 523.250.4. This language survived through the Senate Committee version of the bill; SCC H.B. 1944, § 523.250.4.

195. CCS H.B. 1944, § 523.262.3. It might be argued that the notification of the nature of the overall project would be required in any event as part of the "notice of intended acquisition" under CCS H.B. 1944, § 523.250.2(2). But that provision merely mandates a statement of "the purpose or purposes for which the property is being condemned," and a very vague or general statement would likely suffice.

196. Perhaps the best-known illustration is the acquisition of land for the building of the "new town" of Columbia, Maryland, by developer James Rouse in the 1960s. In six months, Rouse managed to assemble 15,000 acres through 170 separate trans-

and prices are likely to rise accordingly; hence, the last few parcels may cost a great deal more than the first few. However, there is no evident reason that all landowners should benefit from the "publicity windfall" that inevitably arises when the nature of a large project becomes generally known.

In the debates in the Missouri General Assembly, farm interests broadly took the view that landowners had, in effect, an entitlement to the increment in value that would arise from publicity about a land acquisition program. However, the additional money flowing into landowners' pockets must ultimately flow out of the pockets of taxpayers or ratepayers. Given the fact that the benefitted landowners make no investment in the project and take on no risk of its failure, their claim of entitlement is weak at best. For this reason, I strongly supported Senator Koster's efforts to make the notification provision as narrow as possible.

A final provision of the bill, once again following the prompting of the Task Force, was the creation of an office of ombudsman for eminent domain to provide guidance "to individuals seeking information regarding the condemnation process and procedures."<sup>197</sup> In the original bill introduced by Representative Hobbs, the ombudsman would have been located in the Governor's Office of the General Counsel.<sup>198</sup> In the final bill, the office was placed within the Office of Public Counsel. The ombudsman was also instructed to "document the use of eminent domain within the state and any issues associated with its use," and to report annually to the General Assembly.<sup>199</sup> It is difficult to find fault with this concept, but the ombudsman's assignment to the Office of Public Counsel seems odd. That office's overall role is to represent utility customers in rate-making proceedings before and appeals from the Missouri Public Service Commission.<sup>200</sup> It has no particular expertise in eminent domain, and there was no discussion of providing additional funding to the Office to enable it to acquire such expertise. On the other hand, the state agencies that are knowledgeable about eminent domain, such as the Attorney General and the Department of Transportation, would also have strong conflicts of interest if they purported to advise landowners. The Office of Public Counsel, which at least has a pro-consumer orientation, may be as good a choice as any.

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actions. He used a variety of dummy buyers and front organizations, and even many of the people he employed were unaware of the purpose of the acquisitions. See JAMES A. CLAPP, *NEW TOWNS AND URBAN POLICY: PLANNING METROPOLITAN GROWTH* 123 (1971).

197. H.B. 1944 as introduced, § 523.277.

198. *Id.*

199. CCS H.B. 1944, § 523.277.

200. MO. REV. STAT. § 386.710 (2000).

### H. "Place of Religious Worship": Dodging the "Silliness" Bullet

Much to its credit, the Missouri General Assembly produced a final bill that was remarkably free from absurdities and nonsensical statements. Given the complexity of the topic and the strongly-felt political sensibilities involved, this was no small achievement. The potential for silliness is illustrated by the a floor amendment adopted by the House providing that "[n]o condemning authority shall have the right to acquire by the exercise of the power of eminent domain any real property . . . upon which a place of religious worship is situated."<sup>201</sup> Surprisingly, in the aftermath of the *Kelo* there was an apparent surge of concern among some religious groups that they might be singled out for takings because they fail to contribute to economic development.<sup>202</sup> This concern was bolstered by a few widely-publicized cases in which churches were threatened with eminent domain for economic development projects.<sup>203</sup> Someone in this orbit evidently got the attention of Representative Jeff Harris of Columbia, who offered the amendment.<sup>204</sup>

The "place of religious worship" exemption from eminent domain was, in my view, absurd.<sup>205</sup> One can easily imagine situations in which inability to acquire religious property could make a much-needed public project impossible or vastly more costly. My sense was that no one in the General Assembly expected the exemption to survive, and it did not. The Senate Pensions, Vet-

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201. PHCS H.B. 1944, § 5. The amendment contained a definition of "place of religious worship," and required that the sponsoring organization have qualified for tax-exempt status under Int. Rev. Code for ten consecutive years at the same location. The amendment was adopted by a vote of 154 to 0; see *Journal of the Mo. H.R.*, Apr. 12, 2006, at 1026. As Sarah Topp, the lobbyist with whom I was working, observed, "They all hid under their desks and voted yes."

202. See *The Pathway, H.B. 1944 is the One*, Mar. 23, 2006, <http://www.mbcpathway.com/2006archives/article-1999908153.htm>.

203. In March 2006, Long Beach, California began condemnation of a church owned by the Filipino Baptist Fellowship, and in Sand Springs, Oklahoma, the predominantly black Centennial Baptist Church was threatened with a taking for construction of a "big box" retail store. See *Kelo One Year Later Part 2*, Division of Labor, <http://divisionoflabour.com/archives/002706.php>; Erin Roach, *City Moves to Condemn SBC Church using Eminent Domain*, BAPTIST PRESS NEWS, Mar. 9, 2006, available at <http://www.bpnews.net/bpnews.asp?ID=22812>.

204. *Journal of the Mo. H.R.*, Apr. 12, 2006, at 1024.

205. But not as absurd as another attempted floor amendment in the House, this one to exempt from eminent domain property the "current use [of which] is for the purpose of selling, purchasing, or trading in firearms or weapons." Members of both houses had been subjected to a mail campaign by gun interests encouraging them to adopt an exemption for gun shops. This amendment was then further amended to exempt property that "will be used for the purposes of operating any establishment where embryonic stem cell research or somatic cell nuclear transfer (SCNT) occurs." This was too much even for the House, and the proposal failed by a vote of 23 to 129. See *Journal of the Mo. H.R.*, Apr. 12, 2006, at 1027-29.

erans' Affairs and General Laws Committee dropped it and it never reappeared.

## VI. CONCLUSION

In any legislative effort to revisit eminent domain law on a broad scale, the issues are likely to be contentious and hard-fought. On one side are arrayed state agencies, developers, housing advocates, utilities, and railroads. This line-up seems politically impressive, but in Missouri it was quite evenly matched by farming interests, which undertook, at least nominally, the role of representing landowners at large. Overall, the competing forces seemed to me quite well-balanced, with the Farm Bureau a vigorous and worthy opponent.

It would be unwise to expect too much from this sort of broad-scale legislative effort. Too many factors related to the self-interest of lobby groups tend to divert legislators from perfection. This is not merely a case in which, in Voltaire's words, the better is the enemy of the good; the better is often simply unachievable. Moreover, legislative tinkering with eminent domain is largely a zero-sum game. Every dollar and every day of delay that benefits landowners is also a dollar or day of delay that harms condemning authorities and the taxpayers and rate-payers that they represent. Inevitably, many issues must be resolved by rough political compromises that are inelegant at best.

Moreover, Missouri has no standing "law revision commission" like those of New York<sup>206</sup> or California.<sup>207</sup> The National Conference of Commissioners on Uniform State Laws has no model eminent domain law, and even if it did, adapting it to the needs and circumstances of a particular state would be a very substantial chore. Hence, institution of legislative reform in this area inevitably fell to an *ad hoc* group, the Governor's Task Force, with no particular cohesion of thought and no experience in legislative drafting. In a number of respects the Task Force did creditable work, but many of its recommendations were vaguely stated and some were incompletely thought out. Its report was far from a coherent statutory product with which the General Assembly could immediately begin work. It fell to Representative Hobbs and those who could be recruited to assist him to produce a bill, and some of that assistance was obviously quite parochial in nature.

In light of these limitations, the final bill was remarkably good. In my view, its insistence on the use of a standard appraisal definition of "fair market value"<sup>208</sup> and its provision for paying homeowners 125% of that value<sup>209</sup> were its greatest strengths, working together to protect consumers better while regularizing the valuation process and avoiding eccentric and unpredictable variations from one land parcel to another. Its most negative feature was its

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206. See N.Y. LEGIS. LAW § 32.4-A (McKinney 1991).

207. See CAL. GOV'T CODE § 8280 (West 1992).

208. See *supra* notes 127-70 and accompanying text.

209. See *supra* note 126 and accompanying text.

provision for paying 150% of value to “heritage value” landowners,<sup>210</sup> a feature that I consider wholly irrational, but which is greatly mitigated by the fact that it is likely to apply so rarely.

Many will see the final bill’s failure to deal effectively with the definition of “blight,” and its failure to address the want of serious judicial review of blight determinations by local governments, as disappointing.<sup>211</sup> In an abstract sense this is true, but it discounts the extreme difficulty of finding a legal solution, as distinct from a political solution, to this problem. Aside from barring use of eminent domain for exclusively economic development purposes – a result on which there was very wide consensus<sup>212</sup> – the General Assembly left it largely to the local political process to distinguish between legitimate and illegitimate takings. This may well be the best place for such decisions, at least in the sense that when a taking is authorized that offends local sensibilities broadly, the political repercussions on the decision-makers are apt to be most immediate and direct. The “throw the rascals out” attitude of the Sunset Hills<sup>213</sup> electorate illustrates this principle well.<sup>214</sup> Indeed, it is somewhat ironic that conservatives, who usually argue against centralization of political power and who favor local autonomy, have taken the view in the eminent domain controversy of 2005-06 that property owners need protection from local government by an “activist” Supreme Court.

Much of the remainder of the final bill was a fairly dull in policy terms. Easement law was left almost wholly intact, which is just where it ought to be in my view.<sup>215</sup> A variety of “landowner protection” notices, time delays, and rights to express views and opinions were adopted,<sup>216</sup> but it will be a rare case in which they will make any difference in the outcomes of condemnations. Landowners who believe they are being treated unfairly will still hire lawyers, as they have always done, and the lawyers will already know their clients’ rights. Landowners who do not feel they are being treated unfairly will continue to accept negotiated purchase offers or the awards of commissioners or juries, just as in the past.

In the final analysis, landowners cannot be made happy about eminent domain. By definition, they are being forced to sell land they would rather

210. *See supra* notes 113-24 and accompanying text.

211. *See supra* notes 92-95, 109-12 and accompanying text.

212. *See supra* notes 83-84 and accompanying text.

213. *See supra* notes 168-71 and accompanying text.

214. The mayor and all four members of the city council who were running for reelection were voted out of office on April 4, 2006 in favor of a slate of anti-eminent domain candidates. *See* Clay Barbour, *Sunset Hills Ousts Five over Eminent Domain*, ST. LOUIS POST-DISPATCH, Apr. 5, 2006, available at <http://www.stltoday.com/stltoday/news/special/srlinks.nsf/0/05A7952AD3B938FD86257147007982D5?OpenDocument>.

215. The one exception is the ban on “blanket easements,” which has real and substantial effect. *See supra* notes 160-65 and accompanying text.

216. *See supra* notes 165-67, 181-84, 197-200 and accompanying text.

keep or to sell for more money. Grumbling by eminent domain's "victims" is inevitable. But a civilized society cannot do without condemnations, for there are too many cases in which nearly everyone would agree that the public good to be served outweighs the private inconvenience. The system is still imperfect, but in Missouri it is better and fairer than before, and that is not a poor compliment to pay to such a complex and hard-fought piece of legislation.