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# Damnum Absque Injuria: When Private Property May be Damaged without Compensation in Missouri

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# *DAMNUM ABSQUE INJURIA*: WHEN PRIVATE PROPERTY MAY BE DAMAGED WITHOUT COMPENSATION IN MISSOURI

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In perhaps no area of the law are the rules more contradictory, confusing and difficult to retain than in eminent domain, and one of the most puzzling concepts in this area is *damnum absque injuria,* damage without legal injury. Almost everyone is familiar with the constitutional provisions which guarantee that private property shall not be taken or damaged for public purposes without payment of just compensation to its owner.[1] However, there are many factual situations in which tangible damage is done to real property as a result of the state's exercise, or threat of exercising, the power of eminent domain, for which no compensation is paid. This article is intended to examine the source of the power of eminent domain and categorize the situations in which the owners of property cannot recover compensation even though their proprietary rights have been adversely affected.

## I. THE POWER OF EMINENT DOMAIN—SOURCES AND CONSTITUTIONAL LIMITATIONS

The power of eminent domain is inherent in the sovereign and is exercised by the state for public purposes as authorized by legislative enactment.[2] Political subdivisions of the state, such as cities, do not have the inherent power of condemnation but the state may delegate to these subdivisions specific powers of eminent domain to be carried out for public purposes.[3] Such power must be clearly given in express terms or by necessary implication and is strictly construed.[4]

Constitutional provisions limit the power and the manner of exercise of eminent domain in certain respects. State constitutional limitations[5]

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1. U. S. CONST. amend. V; amend. XIV, § 1; Mo. CONST. art. 1, §§ 26, 28.

2. State *ex rel.* State Highway Comm'n v. James, 356 Mo. 1161, 205 S.W.2d 534 (En Banc 1947); State *ex rel.* State Highway Comm'n v. Gordon, 327 Mo. 160, 36 S.W.2d 105 (En Banc 1931).

3. State *ex rel.* Schwab v. Riley, 417 S.W.2d 1 (Mo. En Banc 1967); *In re* Armory Site, 282 S.W.2d 464 (Mo. 1955).

4. State *ex rel.* Siegel v. Grimm, 314 Mo. 242, 284 S.W. 490 (En Banc 1926).

5. *See* Mo. CONST. art. I, §§ 26, 28; art. XI, § 4. Additionally, the Missouri Constitution also defines certain purposes as those which are public purposes for which private property may be condemned. *See* art. I, § 27 (excess property); art. I, § 28 (drains, private ways, etc.); art. III, § 48 (memorials, etc.); art. IV, § 41 (game conservation); art. VI, § 21 (slum clearance); art. XI, § 4(a) (corporate franchises).

are, of course, subject to the requirements of the United States Constitution, which provides in the fifth amendment that "private property [shall not] be taken for public use without just compensation," and in the fourteenth amendment that no state shall "deprive any person of life, liberty or property without due process of law . . . ." These constitutional provisions establish a yardstick by which the sufficiency of effectuating legislation may be measured.

Article I, section 26 of the Missouri Constitution uses very broad language when it states that "private property shall not be taken or damaged for public use without just compensation." It has been held many times that payment of damages to property owners is a prerequisite to the exercise of the power of eminent domain, and that the owner of property which is condemned may obtain injunctive relief preventing the state or political subdivision from exercising control over the property prior to the payment of damages.[6] However, despite the broadness of these constitutional provisions and the primacy of the concept of the payment of just compensation for taking or damaging property for public use, the courts have engrafted numerous exceptions to these constitutional requirements.

## II. Types of Damage to Private Property Caused by the Exercise of the Power of Eminent Domain for Which the Owner Is Not Entitled to Just Compensation

Although hundreds of condemnation actions affecting thousands of people are filed in Missouri courts every year, apparently no effort has been made by the appellate courts of Missouri, or commentators, to categorize and provide a logical framework for the numerous factual situations in which property owners are prevented from obtaining compensation even though the value of their property may be decreased as a result of the exercise of the power of condemnation. The following is a framework for the categorization of these situations which may be useful in counseling clients.

### A. *The Valid Exercise of the Police Power*

Perhaps to the jurisprudential purist it is erroneous to include the valid exercise of the police power as a separate type of damage for which no compensation is paid. It is true that the right to exercise eminent domain arises from the inherent police power of the sovereign and the police power encompasses many privileges other than that of the authority to condemn. However, Missouri courts have tended to view the exercise of the police

6. State *ex rel.* Penrose Inv. Co. v. McKelvey, 301 Mo. 1, 256 S.W. 474 (En Banc 1924); McGrew v. Granite Bituminous Paving Co., 247 Mo. 549, 155 S.W. 411 (1913); Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 1, 73 S.W. 453 (1903).

power as a type of eminent domain and therefore this category must come within the scope of this article.

Most valid exercises of the police power are unquestioned because they entail the use of police *authority*. For example, ordinances prohibiting or regulating parking, prohibiting left turns, and other statutes and ordinances which regulate and control traffic are so obviously properly within the scope of the police power that it is remarkable in this age of regulation to note that cases once arose challenging this authority.[7] However, the state may sometimes enact legislation which has the effect of prohibiting certain uses of private property which are not in themselves *mischievous*, and legally refuse to pay the owner of property so regulated for damage sustained by such legislation. It is important to examine the basis for this result.

The most significant early case exempting the government from payment of damages arising from the regulation of use of property is *St. Louis Gunning Advertisement Co. v. City of St. Louis*.[8] In that case the City of St. Louis passed an ordinance regulating the height, the location, and the materials to be used in the constrution of billboards and signs. The ordinance contained language that "no billboard hereafter erected, altered, refaced or reconstructed" could exceed 14 feet in height above the ground or be larger than 500 square feet in area, and also imposed certain limitations with respect to open space between the ground and the bottom of the sign and provided for certain set-back requirements.[9] The plaintiff argued that many of its signs were in need of repair and that the effect of the ordinance would be to require it to rebuild most of the signs which it had already constructed, thus taking private property for public use without just compensation.

The court upheld the ordinance, noting that

> [t]he signboards and billboards upon which this class of advertisements are displayed are constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly.[10]

The court then held that the nuisances created by unregulated billboards could only be abated through the exercise of the police power of the state, and that this control and regulation did not infringe upon any constitutional rights of the property owner.[11] The court explained that every citizen holds his property subject to the police power of the state and

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7. *See* Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51 (En Banc 1926); Wilhoit v. Springfield, 237 Mo. App. 775, 171 S.W.2d 95 (Spr. Ct. App. 1943).
8. 235 Mo. 99, 137 S.W. 929 (1911).
9. *Id.* at 108-12, 137 S.W. at 930-31.
10. *Id.* at 145, 137 S.W. at 942.
11. *Id.* at 156, 137 S.W. at 946.

that even though laws and regulations may disturb the enjoyment of the property of the citizen, they do not amount to the taking of private property for public use. Rather, they simply regulate the use of property.[12]

Zoning ordinances are a form of regulation of the use of property which presented a considerable problem for the courts when they were originally adopted. In 1893 the Missouri "Boulevard Law,"[13] which allowed cities to enact ordinances designating certain streets as boulevards which would have "minimum set-back" requirements, was held by the Missouri Supreme Court to be unconstitutional.[14] The court did not find the concept of zoning inherently unconstitutional, but held that any statute which restricted the property owners' right to "freely use, enjoy and dispose" of any property constituted a "taking" for which just compensation must be paid.[15]

In the case of *In re Kansas City Ordinance No. 39946*,[16] the supreme court specifically upheld the constitutionality of an ordinance which established set-back requirements and prohibited commercial use of property on Gladstone Boulevard. However, the ordinance contemplated payment of damages to persons whose property was adversely affected by the ordinance. The court held that zoning ordinances of this type were a legitimate exercise of the police power in the interest of "health, safety, morality, general enjoyment, and education of the community."[17] It is interesting to note that the court in this case used as the basis of its holding the same reasoning it followed in the *Gunning* case. Ordinances which created boulevards were found to eliminate "nuisances," just as did the ordinance limiting the size and type of billboards.

The concept that zoning ordinances were within the police power solely because they prevented "nuisances," as well as the requirement of payment of damages to property owners whose use of their property was limited by zoning, was swept away by the remarkably liberal decision of a conservative United States Supreme Court in *Euclid v. Ambler Realty Co.*[18] The Euclid City Council had passed an ordinance establishing a comprehensive zoning plan for the village which divided it into six districts. Ambler Realty Company owned a tract which it had held for the purpose of developing for industrial uses. As a result of the zoning ordinance, this area was to be strictly residential.

Ambler argued that prior to the enactment of the ordinance its property was worth $10,000 per acre, but if the ordinance were applied to it, its market value would decline to no more than $2,500 per acre. It therefore sought to enjoin the enforcement of the ordinance on the ground that it constituted a violation of Ambler's right to due process and equal pro-

12. *Id.* at 162, 137 S.W. at 949.
13. Mo. Laws 1891, at 47.
14. City of St. Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893).
15. *Id.* at 534, 22 S.W. at 862-63.
16. 298 Mo. 569, 252 S.W. 404 (En Banc 1923).
17. *Id.* at 598, 252 S.W. at 409.
18. 272 U.S. 365 (1926).

tection of the law. The Supreme Court did not consider whether or not the effect of the ordinance was to take Ambler's property without just compensation. Rather, the court reviewed cases and authorities which supported the value of zoning laws, and held that it could not be said of the ordinance that it was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[19]

Armed with the Supreme Court's decision in *Euclid v. Ambler Realty Co.*, and, undoubtedly, in light of considerable public demand for the effectuation of zoning ordinances, the Missouri Supreme Court reversed its prior decisions requiring compensation for property depreciated in value as a result of zoning in *State ex rel. Oliver Cadillac Co. v. Christopher*.[20] There, Oliver Cadillac was refused a building permit because an automobile showroom and garage which it intended to build did not conform to the uses permitted by a St. Louis zoning ordinance which was to become effective two days later. The court upheld the zoning ordinance, stating that it would be impossible to create a comprehensive zoning plan for the city if compensation had to be paid to all property owners adversely affected. It then held that zoning ordinances similar to that enacted by St. Louis were valid exercises of the police power for which compensation need not be paid.[21]

Later, the court was to rationalize that "[e]very valid exercise of the police power is apt to effect the property of some one [sic] adversely."[22] Thus, the concept of the exercise of the police power without payment to adversely affected landowners has expanded considerably in the last fifty years. While the original cases which required compensation are probably more logically acceptable, the courts have recognized the arguably paramount need for adequate zoning and have permitted the enactment of zoning ordinances which do not provide for compensation.[23] At least the Missouri courts can be complimented on candidly dealing with the problem of denying compensation to adversely affected landowners.

### B. *The "Rule of Common Injury"*

The greatest source of injustice which has arisen from the concept of *damnum absque injuria* stems from the "rule of common injury," which has been recognized by Missouri courts for almost 100 years. Perhaps as good a statement of the rule as any was made in one of the earliest cases,

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19. *Id.* at 395.

20. 317 Mo. 1179, 298 S.W. 720 (En Banc 1927). The majority opinion did not mention the cases it overruled. *Id.* at 1197, 298 S.W. at 727 (dissenting opinion of Graves, J.).

21. *Id.* at 1193, 298 S.W. at 724-25.

22. Flora Realty & Inv. Co. v. City of Ladue, 362 Mo. 1025, 1040, 246 S.W.2d 771, 779, *appeal dismissed*, 344 U.S. 802 (1952).

23. However, one important limitation on the police power is that zoning laws may not unreasonably eliminate or phase out nonconforming uses of property. Hoffman v. Kenialy, 389 S.W.2d 745 (Mo. En Banc 1965).

*Rude v. City of St. Louis*:[24] "[T]he property owner must show, to entitle him to recover damages . . . that the damages are peculiar to him, different in kind, and not merely in degree, from those suffered by other members of the community."[25] The significant effect of the rule is illustrated by the most typical factual situations in which it has been applied.

### 1. Traffic

The general rule is that abutting property owners have no right in the traffic, great or small, on a highway; they do not have a right to recover damages for a decrease in value of their premises by reason of diversion of traffic away from their property, nor do they have a property right to have the same amount of traffic pass their property, or move in the same direction.[26]

The presence of traffic not only affects access to and from property;[27] it also influences the business interests of property owners who depend on traffic to sustain their existence, such as motel and restaurant owners. It can also affect esthetic values which greatly influence the price of residential property. However, regardless of how much harm or benefit accrues to the owner of real property as a result of the movement of vehicles on the public roadways, this factor may not be considered in Missouri. For example, in *State ex rel. State Highway Commission v. Turk*[28] part of the defendants' dairy farm was taken for the construction of Interstate Highway 44. Defendants argued that the rule of common injury should not apply to them, as the amount of noise generated by diesel trucks ascending a grade near their home was greater than that heard by other persons residing in their neighborhood. The court disagreed, holding that although there may be a difference in degree, the annoyance from the noise was shared by all the residents in the neighborhood.[29]

Similarly, the condemnor may not claim that the affected property has been "benefited" by an increase in traffic. The same reason is used: The increased flow of traffic benefits the area generally, and not the condemnee's property specifically.[30] However, it has been held that where traffic on a road has the effect of severing one part of a tract from another, resulting in either inconvenience in its use or restriction in its future uses, traffic may be considered.[31]

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24. 93 Mo. 408, 6 S.W. 257 (1887).
25. *Id.* at 414-15, 6 S.W. at 258.
26. State *ex rel.* State Highway Comm'n v. Meier, 388 S.W.2d 855, 857 (Mo. En Banc 1965).
27. *See* pt. II, § B (2) of this article.
28. 366 S.W.2d 420 (Mo. 1963).
29. *Id.* at 422. *See also* Chicago Great W. R.R. v. Kemper, 256 Mo. 279, 166 S.W. 291 (1915) (noise of trains).
30. State *ex rel.* State Highway Comm'n v. Parker, 387 S.W.2d 505 (Mo. 1965).
31. State *ex rel.* State Highway Comm'n v. Galeener, 402 S.W.2d 336 (Mo. 1966); State *ex rel.* State Highway Comm'n v. Clevenger, 291 S.W.2d 57 (Mo. 1956).

Traffic should be a factor considered in the payment of damages in condemnation. If residential property is burdened by an increase in traffic which results from the widening of a previously quiet street, this factor should be legally considered by the jury. If, on the other hand, property which is amenable to commercial uses is benefited by the channeling of traffic to the property (assuming that access is available), this should be viewed as a potential special benefit. The courts are in fact engaging in a legal fiction in stating that the presence or absence of traffic on roadways is common to the neighborhood as a whole, as anyone living on a busy street knows.

2. Interference with Access to Streets and Highways

The courts of Missouri have also uniformly held that where access to property is restricted as a result of highway or road improvements, but not eliminated, there is generally no recovery for inconvenience caused to the abutting property owners. Again, the rationale used to achieve this result is that limitation of access is sustained generally by other property owners and hence no compensation should be allowed.

The first class of cases arises from obstructions of streets or highways which allow traffic to go in one direction but not another. The rule that this type of obstruction does not result in compensable damage was established by a series of early cases,[32] the first of which was *Rude v. City of St. Louis*.[33] In the *Rude* case the landowner's property abutted a street on which railroad tracks were constructed at a lower elevation, thereby preventing travel to the south. However, the street was still open to the north. The court held that the inconvenience of not being able to go south was noncompensable because it was general to everyone wishing to use the street, even though the injury was greater to the abutting landowner.

A second class of street cases involves the rights of non-abutting property owners. In *Glasgow v. City of St. Louis*[34] the court held that no proprietary interest of a non-abutting real estate owner was affected when the city vacated a public street for the use of a private corporation. The court distinguished between the rights of abutting and non-abutting property owners, stating that "[t]here is no doubt but a property owner has an easement in a street upon which his property abuts, which is special to him, and should be protected."[35] This rule has been consistently followed by the Missouri courts, and recovery is never available to non-abutting property owners for vacation of streets or alleys.[36] However, if access to property is

32. Rude v. City of St. Louis, 93 Mo. 408, 6 S.W. 257 (1887); Fairchild v. City of St. Louis, 97 Mo. 85, 11 S.W. 60 (1889); Canman v. City of St. Louis, 97 Mo. 92, 11 S.W. 60 (1889); Glasgow v. City of St. Louis, 107 Mo. 198, 17 S.W. 743 (1891); Gorman v. Chicago, B. & Q. R.R., 255 Mo. 483, 164 S.W. 509 (1914).

33. 93 Mo. 408, 6 S.W. 257 (1887).

34. 107 Mo. 198, 17 S.W. 743 (1891).

35. *Id.* at 204, 17 S.W. at 745.

36. *See* Wilson v. Kansas City, 162 S.W.2d 802 (Mo. 1942); Arcadia Realty Co. v. City of St. Louis, 326 Mo. 273, 30 S.W.2d 995 (1930); Christy v. Chicago, B. & Q. R.R., 240 Mo. App. 642, 212 S.W.2d 476 (K.C. Ct. App. 1948).

completely blocked so that the owner has no access whatsoever, he may then recover damages for the taking of the easement of access.[37] On the other hand, abutting owners may recover damages even though they retain access to other streets (although this fact may be considered in mitigation of damages).[38]

Limited access highways have caused a third class of cases to arise. Most of the decisions in this area rely on earlier opinions, such as *Rude,* concerning the blocking of access to city streets by railroads. As a result, the newer cases do not reflect much recognition of changing economic conditions.

In one such case, *State ex rel. State Highway Commission v. Clevenger,*[39] the landowner's property abutted old Highway 69. The State Highway Commission condemned an additional right-of-way for a new westbound lane adjoining the old highway. Apparently, the landowner still had access by way of a county road to the eastbound lane of Highway 69, but he was denied access to the westbound lane.[40] The owner claimed that he was entitled to damages for the taking of an easement of access to the new westbound roadway. However, the court held that because he had never had prior access to this new lane "the supposed deprivation of a right of *access to the road* itself could not constitute a compensable element of damage."[41] The court did not rely on the rule of common injury, but limited its decision to the fact that a landowner cannot recover damages for being deprived of access which he never before had possessed. The court did, however, distinguish the facts from those presented in *State ex rel. State Highway Commission v. James.*[42] In *James,* the court had upheld the power of the state to condemn property for a limited access highway, but went on to state "[i]n addition to an interest in the fee, abutting owners have an easement of access from their property to the highway. This constitutes a property right, an interest in land."[43]

In *State ex rel. State Highway Commission v. Meier*[44] the court went considerably further in applying the rule of common injury to restriction of access to limited access highways. In that case, a motel owner had previously had access by two driveways to Highway 67, which was then a two-lane highway. After the completion of the project, Highway 67 was to become a limited-access highway which would utilize the old pavement as an "outer roadway." However, ingress and egress to the property would not be

37. Knapp, Stout & Co. v. St. Louis Transfer Ry., 126 Mo. 26, 28 S.W. 627 (1894); Siemers v. St. Louis Elec. Terminal Ry., 348 Mo. 682, 155 S.W.2d 130 (1941).
38. Heinrich v. City of St. Louis, 125 Mo. 424, 28 S.W. 626 (1894).
39. 291 S.W.2d 57 (Mo. 1956).
40. *Id.* at 62.
41. *Id.*
42. 356 Mo. 1161, 205 S.W.2d 534 (En Banc 1947).
43. *Id.* at 1168, 205 S.W.2d at 537.
44. 388 S.W.2d 855 (Mo. En Banc 1965).

possible except at interchanges some distance to the north and south of the motel. The court held that the motel owner could not recover because the inconvenience occasioned by the limitation of access was common to other landowners in the neighborhood, and a condemnee may only be compensated for such items of damage as are special to him.[45]

On the same day of the *Meier* decision, the supreme court also handed down its decision in *State ex rel. State Highway Commission v. Brockfeld.*[46] There, the owner of a service station which previously adjoined and had direct access to a two-lane highway alleged that he was entitled to damages for loss of access when the old highway was reconstructed as a limited access highway with four lanes. At the completion of the project the service station would have access to a south "outer roadway" which paralleled the new highway and which would be connected to two interchanges approximately three miles east and west of the property.

The property owner alleged that, as a result of not having direct access to Interstate 70, his pre-existing easement of access to the old highway was taken, thereby entitling him to compensation. In a very confusing opinion, the court restated the rule that a complete blocking of an abutter's access is a taking of a property right in the nature of an easement, but that ingress and egress to a particular lane of a highway and direction of travel thereon can be regulated under the police power (without paying compensation) where an abutter is "furnished unrestricted right of access to a lane of the highway upon which his property abuts and which connects with the restricted lanes at designated points."[47] The court went on to state that

> [R]espondents have been furnished unrestricted access to a lane of the highway, an outer road on its right-of-way, along the entire front of their property. Therefore, any compensation resulting from this situation would have to be for circuity of travel rather than for loss of access to the highway.[48]

This is a remarkable result. As the dissenting opinion filed in the case points out, the court distinguished between property owners whose property is allowed access to a "service road" as opposed to an "outer roadway." If a frontage road is constructed allowing access to the freeway at only certain interchanges but which is itself in the highway right-of-way, then there has been no loss of access because the frontage road allows "unrestricted access to a lane of the highway" and, hence, there is no recovery for damages. On the other hand, if the property owner is located on a "service road" (which is a frontage road not within the limited access high-

45. *Id.* at 859.
46. 388 S.W.2d 862 (Mo. En Banc 1965).
47. *Id.* at 864.
48. *Id.*

way right-of-way), then there has been a denial of access and the property owner is entitled to compensation.[49]

This distinction is logically untenable and manifestly unfair to property owners who are unlucky enough to have their access road one which is designated as an "outer roadway" rather than a "service road." The result of being deprived of direct access to the highway is identical to both classes of property owners and all should be entitled to consideration of the damages sustained by them as a result of the state's action.

The holding in *Brockfeld* was extended somewhat in *State ex rel. State Highway Commission v. DeMarco*.[50] There the owner of a service station was denied compensation because he was allowed access to a four-lane interstate highway on a "spur" outer roadway which terminated on his property, even though the "spur" provided travel in only one direction.[51]

Finally, the supreme court has also held that partial obstruction of access to property resulting from the construction of traffic islands is noncompensable.[52]

### C. *Depreciation in the Value of Property Arising from the Threat of Condemnation*

The indirect influence of a taking of private land for public use can also gravely affect the value of property. If the announcement of a new public works project causes land values to depreciate in the area involved, then, logically, the owner of the property affected should not be expected to underwrite the cost of the state's land acquisition by being prevented from showing to the trier of fact that the value of his property on the date of taking was depreciated by the announcement of the planned eminent domain proceeding. In a majority of the states which have considered the problem this is the law;[53] in Missouri it is not.

In *Brunn v. Kansas City*[54] a landowner whose property was taken for park purposes argued that he should be paid interest on an award for damages which resulted from the taking of his property. In that case the landowner had appealed a freeholder jury's assessment of damages which was affirmed by the Missouri Supreme Court. The landowner then brought another action to obtain interest on the judgment, which was denied. The supreme court held that inconvenience and delay were necessary incidents of the exercise of the power of eminent domain and that neither

> the ingenuity nor wit of man has hitherto been adequate to the discovery of any plan . . . for the establishment of boulevards, parks

49. *Id.* at 868 (dissenting opinion).
50. 422 S.W.2d 644 (Mo. 1968).
51. *Id.* at 649.
52. Kansas City v. Berkshire Lumber Co., 393 S.W.2d 470 (Mo. 1965).
53. *See* cases cited note 74 *infra*.
54. 216 Mo. 108, 115 S.W. 446 (1909).

> and streets, ideally equitable and free from inequalities and unfairness in an easily imagined case. I doubt not that such Utopian plan for the future is but the irridescent [sic] dream of a dreamer.[55]

From this inauspicious start many evils were spawned.

In *State ex rel. City of St. Louis v. Beck*,[56] the City of St. Louis passed an ordinance for the widening of a boulevard. The commissioner's hearing was held as to the assessment of benefits and damages but during the pendency of the proceedings a new ordinance was passed which changed the lines of the street. One of the condemnees sought to introduce evidence in the second Commissioner's hearing that his property had been damaged as a result of the pendency of the first action. The damage claimed resulted from the condemnee's inability to rent the property for a definite period of time; his inability to improve the property; his inability to sell the property at a fair price; and his inability to finance the property upon reasonable terms. The supreme court held that these alleged items of damage were not compensable because the "condemnation suit in no way affected the property itself and, therefore, did not damage the property."[57]

In conjunction with these decisions the supreme court held in *City of St. Louis v. International Harvester Co.*[58] that section 26 of article I of the Missouri Constitution requires that damages be assessed as of the date of taking, *i.e.*, when the amount of the Commissioner's award is paid into the registry of the court.[59]

These cases formed the foundation of the court's recent decision in *St. Louis Housing Authority v. Barnes*.[60] The *Barnes* case was the first in Missouri to squarely raise the question of whether the jury can consider the decline in value of property caused by the announcement of eminent domain proceedings. The court ruled that such evidence could not be introduced, holding that "if the appellants suffered damages for which the respondent is liable by reason of the condemnation action, such damages are not part of the damages for the taking and, under the *Beck* decision, are not an item of just compensation . . . ."[61]

The supreme court was urged to recant on these unfortunate cases in an excellent dissenting opinion filed in *Land Clearance for Redevelopment Authority v. Morrison*.[62] The key issue in *Morrison* was the propriety of the dismissal of the condemnee's counterclaim which alleged that the Authority had exercised domain over the property commencing on the day the

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55. *Id.* at 120, 115 S.W. at 450.
56. 333 Mo. 1118, 63 S.W.2d 814 (En Banc 1933).
57. *Id.* at 1125, 63 S.W.2d at 816.
58. 350 S.W.2d 782 (Mo. En Banc 1961).
59. *Id.* at 785. *See also* City of St. Louis v. Vasquez, 341 S.W.2d 839 (Mo. 1961).
60. 375 S.W.2d 144 (Mo. 1964).
61. *Id.* at 148. This holding was most recently followed by the supreme court in State *ex rel.* State Highway Comm'n v. Samborski, 463 S.W.2d 896 (Mo. 1971).
62. 457 S.W.2d 185 (Mo. En Banc 1970).

renewal plan was filed. The landowner pointed out that the Authority had held a public hearing making it clear that the property would be taken; had enticed tenants of the property to leave knowing that if the premises were vacated they would be vandalized and would depreciate in value; and had delayed filing the condemnation suit for 18 months, thereby making the property unusable. Based on this, the landowner sought an award for the decline in market value of the property from the filing of the plan to the date of taking almost two years later.

The supreme court found that the record in the case failed to reflect a situation of "aggravated delay or untoward activity on the part of the Authority . . . ."[63] The court also reviewed several cases from other jurisdictions where damages were allowed for depreciation in value of property during the pendency of the condemnation proceedings. In one, the Ohio case of *Sayre v. United States*,[64] the plaintiff alleged that notices and public announcements more than four years earlier, piecemeal acquisition of property in the area, refusal of applications for permits to repair and improve property, and deterioration of municipal services caused the property to become unrentable. The resulting vandalism caused even greater loss of value. The court held the allegations sufficient to state a cause of action against the city for a taking without just compensation.[65]

Another case reviewed was the Michigan case of *Foster v. City of Detroit*.[66] A housing plan for Detroit was first proposed in 1949; suit was filed over a year later, but was dismissed after ten years without decision. Meanwhile, an urban renewal project was developed for the area and new condemnation proceedings were commenced thirteen years after the original announcement of the housing plan. Plaintiffs had been warned at the time of the original notice not to make improvements, and issuance of building permits for the area was conditioned on signing a waiver of damages. Nonetheless, the city later ordered plaintiffs to make costly repairs to meet city standards or tear down the buildings since vandalism had destroyed the buildings after adjacent blocks had been condemned. The city was required to pay the value of the buildings before the depreciation, due to the city's actions.[67]

The final case reviewed was *City of Cleveland v. Carcione*,[68] which involved an urban renewal plan announced two-and-one-half years prior to the filing of eminent domain proceedings. In the interim the city welfare department ordered tenants on relief to move or have rent aid cut off, property was acquired and demolished in a piecemeal fashion (over 90% of the nearly 600 buildings had been razed before this suit was filed), and a

63. *Id.* at 199.
64. 282 F. Supp. 175 (N.D. Ohio 1967).
65. *Id.* at 186.
66. 254 F. Supp. 655 (E.D. Mich. 1966).
67. *Id.* at 662.
68. 118 Ohio App. 525, 190 N.E.2d 52 (1963).

lack of police protection resulted in destruction of the property through vandalism. The court held that determining damages at the time of trial would be unreasonable and unjust under the circumstances.[69]

The Missouri court acknowledged that the facts in these cases presented situations in which the traditional rules of valuation failed to meet constitutional requirements. However, the court distinguished the facts presented in *Morrison,* and stated that "[i]f such cases arise in Missouri, they will be dealt with on their facts."[70] The decision leaves unanswered the important question of what constitutes "aggravated delay" or "untoward activity" on the part of the condemnor such as will allow recovery for depreciation in value of the property after announcement of eminent domain proceedings.

The dissenting opinion in *Morrison* cogently distinguished the cases relied on by the majority and approved the rule that "where the condemning authority by its actions causes depreciation in value of the property prior to a taking in the usual sense, the landowner is entitled to compensation therefor."[71]

In reaching its result, the majority did not take into account a number of cases which follow the rule that any depreciation caused by a public improvement shall not be considered in determining fair market value. For example, the United States Supreme Court held in *United States v. Virginia Electric & Power Co.*[72] that

> [t]he court must exclude any depreciation in value caused by the prospective taking once the Government "was committed" to the project . . . . As one writer has pointed out, "it would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . of the construction of a government project and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned.[73]

This view is surely the better rule and is followed by the majority of courts which have considered the matter.[74] It is not reasonable to expect the

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69. *Id.* at 532, 190 N.E.2d at 57.

70. Land Clearance for Redev. Authority v. Morrison, 457 S.W.2d 185, 199 (Mo. En Banc 1970). The court also reviewed other cases where similar declines in value were held to be noncompensable. These cases are: Redevelopment Agency v. Maynard, 244 Cal. App. 2d 260, 53 Cal. Rptr. 42 (1966); Housing Authority v. Schroeder, 113 Ga. App. 432, 148 S.E.2d 188 (1966); and Naumann v. Urban Renewal Agency, 411 S.W.2d 803 (Tex. Civ. App. 1967).

71. Land Clearance for Redev. Authority v. Morrison, 457 S.W.2d 185, 204 (Mo. En Banc 1970) (dissenting opinion of Finch, J., in which Donnelly and Seiler, JJ., joined).

72. 365 U.S. 624 (1961).

73. *Id.* at 636.

74. *See* Murray v. United States, 130 F.2d 442 (D.C. Cir. 1942); Edlin v. Security Ins. Co., 160 F. Supp. 487 (S.D. Ill. 1957); State Road Dep't v. Chicone, 158 So. 2d 753 (Fla. 1963); Tharp v. Urban Renewal & Community Dev. Agency, 389 S.W.2d 453 (Ky. 1965); Lipinski v. Lynn Redev. Authority, 246 N.E.2d 429

landowner to partially underwrite the cost of public projects by denying him the fair market value of his property as it obtained before the announcement of the project. The Missouri rule is particularly harsh on inner-city property owners who may have a considerable investment in residences which are prone to be taken by urban renewal and highway projects. After the announcement of planned condemnation proceedings, the neighborhood typically deteriorates rapidly with tenants leaving the area and abandoning property which is, in turn, vandalized. The property owner finds that he cannot readily sell his property and is forced to either abandon his equity or continue to live in a rapidly deteriorating neighborhood. Then, when the condemning authority finally takes his property, the value of his land is reduced to the point that he has difficulty replacing it with another home. The burden of financing redevelopment projects and other public improvements should devolve upon the general taxpayers and not those persons who are unlucky enough to have their property taken in protracted eminent domain proceedings.[75]

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(Mass. 1969); Housing & Redev. Authority v. Minneapolis Metropolitan Co., 273 Minn. 256, 141 N.W.2d 130 (1966); Becos v. Masheter, 15 Ohio St. 2d 15, 238 N.E.2d 548 (1968); Wadsworth v. Manufacturers' Water Co., 256 Pa. 106, 100 A. 577 (1917); and State v. Carswell, 384 S.W.2d 407 (Tex. Civ. App. 1964). *Cf.* United States v. Certain Lands, 47 F. Supp. 934 (S.D.N.Y. 1942); City of Oakland v. Partridge, 214 Cal. App. 2d 196, 29 Cal. Rptr. 388 (1963); Atchison, T. & S.F. Ry. v. Southern Pac. Co., 13 Cal. App. 2d 505, 57 P.2d 575 (1936); and Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E.2d 790 (1961).

75. The court in *Morrison* could have found Missouri precedent for ruling the other way. In St. Louis Elec. Terminal Ry. v. MacAdaras, 257 Mo. 448, 166 S.W. 307 (1914), the property in question was condemned for railroad freight and passenger depot purposes. The overall plan for condemnation included the taking of the condemnees' property, but before this property was taken construction of the new depot was partially completed. The property owner sought to have the increase in value of his property resulting from the construction of the depot considered in determining his damages. The court rejected this argument, and found that in light of the fact that the construction of the depot and the taking of the condemnee's property were all part of one continuous act, any enhancement in value as a result of the depot could not be considered. The court stated:

> If, when property is taken *in toto,* as here, it be the rule that the owner can have considered, as an element of his damages, the enhanced value of the property occasioned by a partial construction of the railroad, and its incidents (such as depots, switches, etc.), then the converse of the proposition should likewise be true; i.e., that, if a partial construction of the contemplated road and its incidents, above named, had depreciated the property sought to be taken, then the railroad should have the benefit of such depreciation, when it actually came to the taking of the property. No court would stand for this latter rule, and yet it is the very converse of the one sought to be enforced here. The proper rule, when the whole property is being taken, is not to allow the jury to consider either enhancements or depreciation brought about by the construction of the improvement for which the property is being taken. In other words, the value should be determined independent of the proposed improvement. *Id.* at 463, 166 S.W. at 310.

This language can certainly be interpreted to mean that because a possible depreciation in value caused by the construction of the public improvement is not to be considered, the property should be valued at a time prior to the announce-

D. *Speculative and Remote Consequences*

It is stated generally that

> "[i]n arriving at just compensation in condemnation proceedings the damages awarded must be definite and certain; they are not to be based upon contingent, speculative and remote possibilities, but upon considerations of reasonable probability; the damages awarded should be those reasonably to be expected from the taking."[76]

The types of damages which the courts have most often held to be "speculative" involve possible future improper or illegal use of the condemned property and loss of future profits from businesses.

1. Future Improper or Illegal Uses of Condemned Property Taken in Part

The temptation of condemnees' attorneys to argue to juries the possible horrors of breaking or falling electric transmission lines seems to be very great. Such an argument, or evidence concerning it, is a routine source of reversal of jury awards, however. For example, in the frequently cited case of *Missouri Power & Light Co. v. Creed*,[77] the owner of a dairy farm over which a power line easement was to be impressed introduced several factors which the court considered speculative and violative of the rule that future improper use of the easement cannot be considered in assessing damages.

The landowner's witnesses testified that the presence of strangers patrolling the easement might frighten cattle on the property so that they would stampede, lose weight, and perhaps be crippled. The court found that such testimony was proper because this was a "reasonable probability of fact" arising from the proper use of the easement.[78] However, additional testimony concerning the likelihood of the electric company's employees introducing hog cholera by their patrolling was rejected as too speculative. Other testimony concerning the chance that gates might be left open, or that employees of the condemnor might deliberately trespass off the right-of-way and do damage to the remaining pasture, was held to be in contravention of the basic theory that recovery must be limited to damages, present or prospective, which arises from risks and hazards which are known or may be reasonably expected to result from the construction and maintenance of the power line in a proper and legal manner. By the same token,

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ment of the contemplated condemnation proceeding. Strangely, the Missouri Supreme Court cites the language above in the majority opinion in *Morrison*. *See* 457 S.W.2d at 197.

76. Land Clearance for Redev. Corp. v. Doernhoefer, 389 S.W.2d 780, 786 (Mo. 1965).

77. 32 S.W.2d 783 (St. L. Mo. App. 1930).

78. *Id.* at 788.

testimony concerning the possibility of a wire breaking was viewed as a consequence not reasonably to be apprehended.[79]

Later, in *State ex rel. Kansas City Power & Light Co. v. Gauld*,[80] an argument to the jury that electric wires might break on an easement and injure or kill persons or livestock was held improper in that it was purely speculative because the evidence showed that the transmission line was equipped with circuit breakers.[81]

In *State ex rel. N.W. Electric Power Cooperative, Inc. v. Waggoner*,[82] a witness was allowed to discuss the possible effect of hunters shooting at power lines. The appellate court held that such evidence was purely speculative and conjectural, and that "[i]f a hunter did such a foolish and wrongful act there is an available remedy against the wrongdoer."[83] All of these cases are illustrative of the general rule that possible tortious, wrongful or illegal acts are not compensable in eminent domain proceedings.[84]

2. Loss of Future Profits from Business Operations

Another area in which the courts have denied payment of damages to persons whose property is taken in condemnation is that involving losses due to business interruption or discontinuance of business. When evidence of this type has been offered, the courts have uniformly held that it is "too speculative" and cannot be admitted. This does not include, of course, evidence tending to show that the value of property is enhanced by possible future uses.[85]

In *City of St. Louis v. St. Louis I.M. & S. Ry.*,[86] the landowner sought compensation for the cost of removing his stock of goods and fixtures to his new location and installing them therein; the depreciation in value of these goods and fixtures caused by the removal and reinstallation; and for the injury to his business caused by its interruption during the period of moving. The court held that such damages were too "speculative" and remote for consideration and should not be allowed.[87] In *City of St. Louis v. Paramount Shoe Manufacturing Co.*,[88] the court approved the rule that no recovery can be allowed for loss of profits or for injury to business as such, which are too speculative and remote to be considered. However, the

79. *Id.*
80. 360 Mo. 795, 230 S.W.2d 850 (En Banc 1950).
81. *Id.* at 806, 230 S.W.2d at 856.
82. 319 S.W.2d 930 (K.C. Mo. App. 1959).
83. *Id.* at 935.
84. *See* KAMO Elec. Coop. v. Baker, 287 S.W.2d 858 (Mo. 1956); Southwestern Bell Tel. Co. v. Jennemann, 407 S.W.2d 85 (St. L. Mo. App. 1966).
85. "[T]he jury may consider uses of the land for which it is reasonably suitable, having regard to the existing business wants of the community, or such as may be reasonably expected in the future." *In re* Armory Site, 282 S.W.2d 464, 470 (Mo. 1955).
86. 266 Mo. 694, 182 S.W. 750 (Mo. 1915).
87. *Id.* at 707, 182 S.W. at 753-54.
88. 237 Mo. App. 200, 168 S.W.2d 149 (St. L. Ct. App. 1943) Court.

court allowed evidence tending to show that as a result of the taking of part of the condemnee's property, it would be hindered by the inability to expand its building.[89]

In *St. Louis Housing Authority v. Bainter*,[90] part of the property on which a service station was located was condemned, and the owner introduced evidence showing the amount and value of gasoline sold at the station. The owner argued that a recognized standard for determining the fair market value of service station property is based on its reasonable rental value, which, in turn, relates to the average number of gallons sold per month. The condemnor argued that it was improper to show the volume of business done by the station in that it introduced the element of loss of future profits from the operation of the business. The court rejected this view, holding that

> evidence of gallonage of gasoline sold on the premises is properly admitted . . . on the issue of rental value and fair market value of the premises condemned where, by accepted standards and criteria in the trade or business, rentals and values of such property are based thereon.[91]

In contrast, the court in *State ex rel. Kansas City Power & Light Co. v. Salmark Home Builders, Inc.*,[92] upheld a jury instruction which withdrew from the jury's consideration testimony concerning the present fair market value of land which was based on future profits which the owner might anticipate if the property was subdivided and improved for residential lots. The court once again stated the rule that damages for injury for the remainder of land after it is taken must be direct and certain at the time of appropriation and not remote or speculative, and that loss of profits in its usual regard is too speculative to be considered as a basis for damages.[93]

Therefore, the rule is clear that anticipated future profits and interruption from business caused by eminent domain proceedings may not be considered. However, where the nature or volume of business is relevant in ascertaining the fair market value of the property, or future inconvenience to business operations, then such evidence may be introduced.

## III. Conclusion

The trend at the federal level is to expand the scope of compensation to those affected by governmental activity. Perhaps the best example is the Federal-Aid Highway Act of 1968.[94] This Act provides for a relocation assistance program, including relocation payments to owners of property

89. *Id.* at 215, 168 S.W.2d 154.
90. 297 S.W.2d 529 (Mo. 1957).
91. *Id.* at 535.
92. 375 S.W.2d 92 (Mo. 1964).
93. *Id.* at 98-99.
94. 23 U.S.C. §§ 502-11 (Supp. IV, 1968).

taken for federal aid highways. The displaced property owner is guaranteed reimbursement for moving himself, his family, his business, or his farm operation, including personal property.[95] He is also entitled to a replacement housing allowance of up to $5000 added to the "acquisition payment," to enable him to purchase a comparable dwelling if he has actually occupied the condemned property for not less than one year prior to the initiation of negotiations for acquisition. If he does not meet this requirement, but if he has occupied the property for not less than 90 days prior to the initiation of negotiations, he is entitled to a payment not to exceed $1,500.[96] The Act also requires the state to reimburse the owner for recording fees, transfer taxes, penalty costs for prepayment of mortgages, and a pro-rata portion of real property taxes.[97] None of these payments are subject to federal income taxation.[98]

Congress has definitely taken a step in the right direction by enacting this statute, but similar relief should be available to persons whose property is taken for non-federally financed highways and other public improvements. New state legislation should provide that the fair market value of property taken will be determined without the consideration of any increase or decrease in value caused by the initiation of the condemnation proceeding or the presence of the improvement itself. However, if property is taken subsequent to a prior public improvement this factor should be taken into account.

While certain exercises of the police power or the power of eminent domain result in increases or decreases in the value of property, not all of these effects should be taken into account in determining fair market value. However, the significant change in the extent and type of public improvements which are now being undertaken, accompanied by the broader base of real property ownership, requires that new methods of determining value be instituted to protect the constitutional guarantee that private property shall not be taken for public use without just compensation.

95. *Id.* § 505.
96. *Id.* § 506.
97. *Id.* § 507.
98. *Id.*