

Summer 1979

## Preliminary Requirements for Condemnation in Missouri: Necessity, Public Use, and Good Faith Negotiations

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### Recommended Citation

Bradley J. Baumgart, *Preliminary Requirements for Condemnation in Missouri: Necessity, Public Use, and Good Faith Negotiations*, 44 MO. L. REV. (1979)

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# PRELIMINARY REQUIREMENTS FOR CONDEMNATION IN MISSOURI: NECESSITY, PUBLIC USE, AND GOOD FAITH NEGOTIATIONS

## I. INTRODUCTION

Upon receipt of a petition for condemnation an attorney for the defendant in the action reasonably might turn to volume two, sections 2331-2361 of Missouri Practice in order to get an idea of the procedures which are to be followed. Here he would find an invaluable step-by-step explanation of a condemnation proceeding. There is, however, a vexing problem in the use of a practice manual in this area. Missouri Practice, as well as other publications oriented toward practical usage<sup>1</sup> necessarily provides only a cursory view of some of the substantive issues which may arise in a condemnation action. This work will examine three of the more important substantive issues; public use, necessity and good faith negotiations. A land owner may only be deprived of his land by the exercise of the power of eminent domain if the taking is for a public use<sup>2</sup> and the land taken is necessary to fulfill this use.<sup>3</sup> Moreover, the condemnor must establish that there has been a good faith offer to purchase the land in question.<sup>4</sup> To put these issues in perspective, it will be helpful first to explore the legal principles underlying the exercise of condemnation and then to summarize the procedures that are to be followed in a condemnation proceeding.

## II. BACKGROUND

### A. *Power of Eminent Domain*

Eminent domain is the power of the government to take or authorize the taking of private property for public use without the owner's consent. The power is inherent in the sovereign to enable it to guard its own existence and promote the interests and welfare of the community at large. While no constitutional provision specifically vests the power of eminent domain in the state,<sup>5</sup> certain limitations of the power are enumerated in the Missouri Constitution. The constitution provides that private property shall not be taken for public use without just compensation.<sup>6</sup> It also states

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1. See Mo. Bar C.L.E., *Condemnation Practice, passim* (1973); Board of Regents v. Palmer, 356 Mo. 946, 204 S.W.2d 291 (1947).

2. Kansas City v. St. L. & S.F. Ry., 230 Mo. 369, 130 S.W. 273 (1910).

3. Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).

4. State *ex rel.* Highway Comm'n v. Cady, 372 S.W.2d 639 (K.C. Mo. App. 1963).

5. State *ex rel.* Coffman v. Crain, 308 S.W.2d 451 (Spr. Mo. App. 1958).

6. MO. CONST. art. I, § 26.

the limitation that private property shall not be taken for private use with or without compensation unless by consent of the owner, except for private ways of necessity and for drains and ditches across the lands of others for agricultural and sanitary purposes.<sup>7</sup>

The exercise of the power of eminent domain is a discretionary function vested in the legislature. The power may be exercised by the legislature itself, or more commonly, may be delegated by statute to a state agency, inferior government unit, or private or public corporation.<sup>8</sup> When the power is exercised by such an agency or other entity the general rules of law regarding eminent domain apply. The agency or entity<sup>9</sup> deriving condemnation power from a statute normally must exercise it in strict conformance with the statute.<sup>10</sup> However, charter cities and counties occupy a special position in regard to the exercise of the power of eminent domain. They need not always strictly observe the general rules laid down by enabling statutes or rules of court.<sup>11</sup>

### B. *Condemnation Procedures*

Prior to filing a petition the condemnor must make a good faith offer to purchase the desired property. This prerequisite is reflected in the Missouri Rules of Court,<sup>12</sup> where the contents of a petition in condemnation are spelled out. To be included in the petition is "a statement either that condemnor or owner cannot agree on the proper compensation to be paid or that the owner is incapable of contracting, is unknown, cannot be found or is a nonresident of the state." After the offer has been rejected, or one of the alternative circumstances is present the condemnor must file a petition in the circuit court of the appropriate county and city.<sup>13</sup> The appropriate court is where the land or a part thereof is located.<sup>14</sup> In addition to the statement concerning the good faith offer the petition must contain: a description of the land, the names of the owners of the property to be condemned or a statement that they are unknown, a statement of petitioner's authority to condemn, a general statement of the use for which the property is to be condemned, and a prayer for the appointment of three

7. *Id.* § 28.

8. *See generally* MO. CONST. art. III, § 48; art. IV, § 41; art. VI, § 21; RSMO ch. 523 (1969); *Annbar Assoc. v. Westside Redev. Corp.*, 397 S.W.2d 635 (Mo. En Banc 1965).

9. RSMO §§ 388.210-.410 (railroads), 227.120 (highway commission), 204.340 (sewer districts) (1969).

10. *State ex rel. R.W. Filkey, Inc. v. Scott*, 407 S.W.2d 79 (St. L. Mo. App. 1966).

11. MO. R. CIV. P. 86.01. Constitutional charter cities derive their power from the constitution. MO. CONST. art. VI, § 19(a). *But see* *Bueche v. Kansas City*, 492 S.W.2d 835 (Mo. 1973).

12. MO. R. CIV. P. 86.04.

13. MO. R. CIV. P. 86.02.

14. RSMO § 523.010 (1969).

commissioners in a commissioner's hearing to assess the damages flowing from the taking.<sup>15</sup> Upon the filing of the petition the clerk issues a summons which must give ten days notice of the commissioner's hearing on the petition.<sup>16</sup> At this hearing, unless the defendant landowner challenges the right of the condemnor to exercise the power of eminent domain or the condemnor fails to establish a good faith offer to purchase and a refusal, the appointment of three commissioners follows.<sup>17</sup> After viewing the premises the commissioners file their report with the clerk of the circuit court which includes a description of the property and the amount of net damages sustained as a result of the taking.<sup>18</sup> The condemning authority may pay the clerk of the court the assessed damages and take possession of the property.<sup>19</sup> Within ten days after notice of the award has been given, either party may file written exceptions to the report of the commissioners.<sup>20</sup> If exceptions are filed, a trial by jury, or by judge if a jury is waived, is held and the damages of the property owner are determined in the adversary setting.<sup>21</sup>

### III. SUBSTANTIVE PREREQUISITES TO CONDEMNATION

#### A. *Necessity*

Prior to the exercise of the power of eminent domain the condemnor determines that the taking of the particular interest in the property is necessary. This determination of necessity is the responsibility of the legislature or the grantee of the power of eminent domain.<sup>22</sup> Courts consider the matter a legislative rather than a judicial question;<sup>23</sup> consequently they will not upset the determination unless there is evidence of fraud, bad faith or arbitrary exercise of legislative discretion,<sup>24</sup> or unless the power to determine necessity is beyond the scope of a charter or statute.<sup>25</sup> One court stated that the determination of necessity was "not . . . subject to review unless the taking ends up being for a private purpose."<sup>26</sup> Thus,

15. MO. R. CIV. P. 86.04.

16. MO. R. CIV. P. 86.05.

17. MO. R. CIV. P. 86.06; VOLZ, LOGAN, BLACKMAR, *Methods of Practice*, 2 MISSOURI PRACTICE SERIES 321 (1961). For the good faith negotiations requirement, see *School Dist. of Clayton v. Kelsey*, 355 Mo. 478, 196 S.W.2d 860 (1946); *State v. Cady*, 372 S.W.2d 639 (K.C. Mo. App. 1963).

18. MO. R. CIV. P. 86.06; VOLZ, LOGAN, BLACKMAR, *Methods of Practice*, 2 MISSOURI PRACTICE SERIES 321 (1961).

19. *Kansas City v. McElroy*, 331 S.W.2d 28 (K.C. Mo. App. 1959).

20. MO. R. CIV. P. 86.08.

21. *Id.*

22. *In re Armory Site*, 282 S.W.2d 464 (K.C. Mo. App. 1955).

23. *State ex rel. Coffman v. Crain*, 308 S.W.2d 451 (Spr. Mo. App. 1958).

24. *In re Armory Site*, 282 S.W.2d 464 (K.C. Mo. App. 1955); *In re Proceedings to Grade*, 270 S.W.2d 863 (Mo. 1954).

25. *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962); *Union Elec. Co. v. Jones*, 356 S.W.2d 857 (Mo. 1962).

26. *State ex rel. Highway Comm'n v. Shultz*, 241 Mo. App. 570, 243 S.W.2d 806 (Spr. Mo. App. 1951).

the standard of review is normally narrow, although a stricter standard of review applies when the exercise of the power of eminent domain is for a private way of necessity.<sup>27</sup>

The amount of property subject to the power of eminent domain is specifically limited by the Missouri Constitution to the amount reasonably necessary to effectuate the intended purpose.<sup>28</sup> The courts generally defer to the "delegated agents of the state as to the appropriate amount of property which should be appropriated."<sup>29</sup> The courts seem to be more willing to upset a determination of necessity when the extent of the interest taken is being questioned rather than the amount of land or the taking itself. For instance, in *Kansas City Power & Light Co. v. Kansas City* the court held that the taking of the fee is not necessary where an easement alone would accomplish the purpose.<sup>30</sup>

Since the issue is legislative, the necessity of the condemnation is a question which may be determined without notice and hearing.<sup>31</sup> The only available forum to attack the determination of necessity is in the commissioner's hearing on the condemnation petition. The issue should be raised sufficiently in advance of this hearing in order to give the condemnor adequate notice that it will be contested. This may be done either by answer<sup>32</sup> or by motion to dismiss.<sup>33</sup> The Missouri rules indicate that if the issue is not raised at this point the only issue to be determined at the commissioner's hearing is whether proper notice was given.<sup>34</sup> Only rarely can the issue of necessity be litigated subsequent to this hearing.<sup>35</sup>

### B. Public Use

It is axiomatic that private property may be appropriated through eminent domain only if the purpose of the action is "public," that is, if the

27. *Welch v. Shipman*, 357 Mo. 838, 210 S.W.2d 1008 (1948). From this it might be argued that when the taking is by a private agency there should be a heavier burden of proof on the necessity issue.

28. MO. CONST. art. I, § 27.

29. *State v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (En Banc 1949).

30. 448 S.W.2d 612, 615 (Mo. 1969).

31. *State ex rel. Coffman v. Crain*, 308 S.W.2d 451 (Spr. Mo. App. 1958).

32. VOLZ, LOGAN, BLACKMAR, *Methods of Practice*, 2 MISSOURI PRACTICE SERIES 320 (1961).

33. *State ex rel. Highway Comm'n v. Shultz*, 241 Mo. App. 570, 243 S.W.2d 808 (Spr. 1951). The issue has also been litigated in a mandamus proceeding when the State Highway Commission sought to force a circuit court to exercise its jurisdiction in a condemnation action. *State v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (En Banc 1949).

34. MO. R. CIV. P. 86.06.

35. *Kansas City Power & Light Co. v. Kansas City*, 448 S.W.2d 612 (Mo. 1969) (in a subsequent quiet title action it was determined that an easement was the extent of the interest taken in the prior condemnation action because only an easement was necessary to fulfill the intended use).

use made of the property by the condemning authority is one which may be labeled a public use.<sup>36</sup> In Missouri, the determination of this often crucial question regarding the public nature of a proposed use for condemned land is resolved to the judiciary.<sup>37</sup> The judicial determination may be made without regard to any legislative declaration made by the condempnor that the use is a public one, although a similar legislative determination of the question of necessity would be more or less conclusive.<sup>38</sup> As a consequence of the freedom of the courts to make their own determination of what is a public use the issue has been more often litigated than has the issue of necessity.

The courts have taken various views in the attempt to define the exact parameters of the term "public use."<sup>39</sup> The different views, however, may be grouped together under one of two broad positions. One position, which may be termed the "restricted use" position, opines that there is no public use unless the property to be condemned is taken into the direct control of the public or of public agencies, or the public has the right to use the appropriated property in some way.<sup>40</sup> The other position may be called the "expanded use" position. Any use that enlarges resources, increases industrial potential and promotes the productive power of a considerable number of inhabitants in a given area, or that leads to the growth of towns and creation of new resources for the employment of labor and capital, contributes to the general welfare and prosperity of the whole community. Such a use is deemed a public one under the expanded use position.<sup>41</sup>

Missouri courts have used the more expanded interpretation of what constitutes a public use. In Missouri it is not requisite to a finding of public use that all or even a large part of the community actually be benefited from the intended improvement; rather, it is sufficient if the improvement will be a considerable benefit to the public as a whole.<sup>42</sup> This expanded use view is well illustrated by the allowance of condemnation for urban renewal.<sup>43</sup> Slum clearance projects have been upheld against constitutional attack for many years.<sup>44</sup> Moreover, in a case where a private redevelopment corporation condemned land for urban renewal and

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36. *Dickey v. Tennison*, 27 Mo. 373 (1858). For a development of the public use concept over the years, see Comment, *What Use Is a Public Use in Eminent Domain?*, ST. LOUIS U. L.J. 316 (1957).

37. MO. CONST. art. I, § 28; *In re Colman Heights*, 401 S.W.2d 385 (Mo. 1966).

38. See notes 23-25 and accompanying text *supra*.

39. See Nichols, *The Meaning of Public Use In The Law of Eminent Domain*, 20 B.U. L. Rev. 615 (1940).

40. 1 J. LEWIS, *EMINENT DOMAIN* § 164 (2d ed. 1900).

41. P. NICHOLS, *EMINENT DOMAIN* 130-31 (2d ed. 1875).

42. *Arata v. Monsanto Chem. Co.*, 351 S.W.2d 717 (Mo. 1961); *In re Kansas City Ordinance No. 39946*, 289 Mo. 569, 252 S.W. 404 (En Banc 1923).

43. *Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. En Banc 1961).

44. *Laret Inv. Co. v. Dickman*, 345 Mo. 449, 134 S.W.2d 65 (En Banc 1939).

neither the government nor any governmental agency ever owned the property the condemnation was deemed to be for a public use and therefore constitutional.<sup>45</sup> Missouri's constitutional provisions are not viewed as a hindrance to this type of condemnation because the power of eminent domain may be properly delegated to private organizations as long as the use for which it is delegated and exercised is a public one.<sup>46</sup> Where private condemnation is sought for some private use other than those (such as sanitary drainage) specifically outlined in the Missouri Constitution, it is clear that the constitutional provision prohibiting a taking unless it be for public use would be offended.<sup>47</sup> Thus the Missouri courts generally have taken a liberal position with respect to what types of uses are public. The limits of Missouri's position would appear to be indicated in *Kansas City v. Kindle*<sup>48</sup> where the court held that the maintenance of the "character" of a neighborhood constitutes a public use.

In reviewing a determination of public use, the courts in Missouri ascertain whether the intended public use is probable. Condemnation of more land than will be needed immediately on a particular project will be sustained if the condemning authority can show that there is a "general plan" which requires the use of the excess property in the future.<sup>49</sup> There must be, however, evidence such as official action indicating the existence of a plan and not merely oral testimony as to future intentions.<sup>50</sup> When the implementation of the plan hinges upon some remote contingency the finding of a public use will not be sustained. In *Kansas City v. St. Louis-San Francisco Railroad*,<sup>51</sup> it was shown that the desired land would be put to a public use only if a viaduct were to be built. At that time the city could not adopt an ordinance for building the viaduct because it would violate the city charter to pass such an ordinance when the funds were not on hand for such a project. The court found that the intended public use was too speculative.<sup>52</sup>

The public use issue generally is raised in the same manner as the necessity issue,<sup>53</sup> that is, by answer or motion to dismiss. In addition to raising the question of public use by these methods, the issue may be reviewed

45. *Annbar Assoc. v. Westside Redev. Corp.*, 397 S.W.2d 635 (Mo. En Banc 1965).

46. *Id.*

47. *See, e.g., Welch v. Shipman*, 357 Mo. 838, 210 S.W.2d 1008 (1948).

48. 446 S.W.2d 807 (Mo. 1969).

49. *State v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (En Banc 1949).

50. *Kansas City v. St. L. & S.F. Ry.*, 230 Mo. 369, 130 S.W. 273 (1910).

51. *Id.*

52. *See also St. Louis v. Butler Co.*, 223 S.W.2d 831 (St. L. Mo. App. 1949) (where a city attempted to condemn a dead end street which was located between two parcels of land which were privately owned, the court found the possibility of a public use too remote).

53. *See notes 31-36 and accompanying text supra.*

in a taxpayer suit challenging the propriety of using public funds for a particular purpose.<sup>54</sup>

### C. *Good Faith Negotiations*

In addition to a determination that the taking is necessary and that the purpose is a public one, the condemning authority must attempt in good faith to purchase the land from its owner. The Missouri statutes specifically provide that the condemning authority may file a petition in condemnation *only* if the "condemnor or owner cannot agree on proper compensation."<sup>55</sup> This requirement is waived if the owner is incapable of contracting, if he is unknown, cannot be found or if he is a nonresident of the state.<sup>56</sup> The prerequisite of good faith negotiations is implemented by the Missouri Rules of Court; the rules require that the condemnation petition include a statement that the owner and condemnor cannot agree on the price to be paid for the land.<sup>57</sup> Constitutional charter cities may be exempt from this requirement if their charter explicitly provides that negotiations are not required.<sup>58</sup>

The phrase "cannot agree on proper compensation" in both the statute and court rule has been interpreted to require these good faith negotiations.<sup>59</sup> The negotiations are jurisdictional; unless they have been pleaded and proved the court has no power to entertain a condemnation action.<sup>60</sup> The underlying rationale for the good faith negotiations requirement is that the power of eminent domain is exercised as a matter of necessity, and there is no necessity to condemn property until acquisition by negotiation has been attempted unsuccessfully. A landowner should not be brought into court, nor should dockets be burdened with condemnation litigation until it is shown affirmatively that private negotiations will not accomplish the desired end.<sup>61</sup>

The burden of proving and pleading good faith negotiations clearly rests on the condemning authority.<sup>62</sup> Once the condemnor has sustained his burden of proving good faith negotiations the condemnee then has the burden of proving bad faith in the negotiations.<sup>63</sup> Since the burden is on the condemnor to prove good faith negotiations it would seem to always be

54. *Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. En Banc 1961).

55. RSMo § 523.010 (1969).

56. *Id.*

57. Mo. R. Civ. P. 86.04.

58. *See* Mo. R. Civ. P. 86.01.

59. *State ex rel. Highway Comm'n v. Cady*, 372 S.W.2d 639 (K.C. Mo. App. 1963).

60. *School Dist. of Clayton v. Kelsey*, 355 Mo. 478, 196 S.W.2d 860 (1946).

61. *State ex rel. Highway Comm'n v. Cady*, 372 S.W.2d 639 (K.C. Mo. App. 1963).

62. *School Dist. of Clayton v. Kelsey*, 355 Mo. 478, 196 S.W.2d 860 (1946).

63. *Shelby County R-IV School Dist. v. Herman*, 392 S.W.2d 609, 612 (Mo. 1966); *School Dist. of Clayton v. Kelsey*, 355 Mo. 478, 196 S.W.2d 860 (1946).

in issue in a condemnation action and therefore need not specifically be raised by the condemnee.<sup>64</sup> Pleading good faith negotiations should not present too difficult a problem. There is, however, one caveat which should be brought to light. Even though a conclusory statement that the parties could not agree on proper compensation has been held sufficient to confer jurisdiction,<sup>65</sup> this form of pleading has been questioned by the Missouri Supreme Court.<sup>66</sup> The fault found with this type of pleading is that it does not allege that a settlement has been attempted or that offers have been made or rejected; thus it leaves room for the inference that the condemnor believed at the outset that no agreement was possible and therefore made no attempt to settle. Following the supreme court's direction, the petition should allege enough to show that bona fide negotiations have occurred but that the parties were unable to arrive at a settlement.

Proving good faith negotiations may either be done by oral testimony of inability to agree or may be done by showing facts and circumstances which support the good faith negotiations allegation.<sup>67</sup> An offer sufficient to create a binding contract upon acceptance must be made to the landowner.<sup>68</sup> This does not mean that the condemning authority must offer any particular amount of money. In fact, under appropriate circumstances the condemnor may contend that the benefit to any remaining land outweighs or is equal to the value of the land sought, and so no money need be offered.<sup>69</sup> Where the property is held by husband and wife in tenancy by the entirety an offer which is rejected by one of the co-tenants satisfies the requirement.<sup>70</sup> After one co-tenant has refused an offer it is clear that it will be necessary to resort to the courts in order to acquire the land. Since the possibility of partition exists when land is held in other forms of joint ownership this reasoning may not apply to land held in joint tenancy or tenants in common. While there are no cases dealing with this issue in Missouri there are cases from other jurisdictions which do not draw this distinction between tenants by the entirety and other forms of co-tenancies.<sup>71</sup>

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64. See notes 31-36 and accompanying text *supra*.

65. State *ex rel.* Highway Comm'n v. Cady, 372 S.W.2d 639 (K.C. Mo. App. 1963).

66. State *ex rel.* Weatherby Advertising v. Conley, 527 S.W.2d 334 (Mo. En Banc 1975).

67. State *ex rel.* Highway Comm'n v. Cady, 372 S.W.2d 639 (K.C. Mo. App. 1963). There also appears to be no reason why the parties may not stipulate that good faith negotiations have taken place. See 29 C.J.S. *Eminent Domain* § 224(4).

68. State *ex rel.* Highway Comm'n v. Pinkley, 474 S.W.2d 46 (St. L. Mo. App. 1971).

69. State *ex rel.* Highway Comm'n v. Cady, 372 S.W.2d 639 (K.C. Mo. App. 1963).

70. M & A Elec. Pwr. Coop. v. Georger, 480 S.W.2d 868 (Mo. 1972).

71. Town of Dovian v. Kavookjian, 151 Conn. 659, 202 A.2d 147 (1964); Town of Hertford v. Harvis, 263 N.C. 776, 140 S.E.2d 420 (1965).

Whether an offer may be considered in bad faith on the basis of the adequacy of the amount has been discussed in several cases nationwide.<sup>72</sup> This "market value of land" theory<sup>73</sup> contemplates that an offer should approximate the actual damages resulting from the taking in order to be in good faith. The majority of the courts which have considered the theory have rejected it. While Missouri has not specifically dealt with the question it seems likely that Missouri would join this majority or maybe even impliedly has. In *School District of Clayton v. Kelsey*,<sup>74</sup> an offer of \$15,000 was not considered in bad faith even when the actual damages determined by the jury was \$34,500. The Missouri Supreme Court has also upheld an offer which was one-sixth the landowner's alleged damages in the face of an attack on the good faith of the offer.<sup>75</sup> These cases indicate that the relationship between the offer and the market value of the property to be condemned is not significant in the determination of good faith.<sup>76</sup>

The good faith negotiations requirement takes on added dimensions when there is federal money involved in the project for which condemnation is desired. This is due to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,<sup>77</sup> hereinafter referred to as the URA. Under the Act, to receive money from the federal government the condemning authority must follow specific procedures in attempting to purchase the property prior to bringing any condemnation action. The condemning authority must obtain an appraisal of the property. The landowner must be afforded an opportunity to accompany the appraiser on the latter's visit to the land. The appraiser must submit his calculation of either the value of the improvements on the land or the cost of removing them. The appraiser also establishes what just compensation should be for the desired property. The amount is never to be lower than the fair market value. A summary of how the appraiser's final figure was reached is to be furnished to the owner. The condemning authority must then make an offer to purchase the land; it must offer, at minimum, the appraised amount. The purposes of these requirements are fourfold: to avoid litigation, to relieve congestion in the courts, to assure consistent treatment for owners in the many federal programs, and to promote public confidence

72. See Annot., 19 A.L.R.2d 211 (1963).

73. *Wampler v. Trustees of Indiana Univ.*, 241 Ind. 449, 172 N.E.2d 67, 90 A.L.R.2d 204, 211 (1961).

74. 196 S.W.2d 860 (Mo. 1946).

75. *Shelby County R-IV School Dist. v. Herman*, 392 S.W.2d 609 (Mo. 1965). See also *State v. Cady*, 400 S.W.2d 481 (K.C. Mo. App. 1965) (where the court found good faith negotiations when the condemnor had offered no money on the theory that special benefits exceeded damages, and the landowner was claiming \$2,800).

76. *Quaere* whether there is a point where an offer is so small in relationship to the value of the property as to constitute a sham indulged to establish jurisdiction and will be found in bad faith.

in federal land acquisition practices.<sup>78</sup> While these objectives are praiseworthy, the requirements of this federal statute may unduly burden local condemning authorities because of the complexities and expense of formal appraisals.

There is some suggestion that the precondemnation procedures section of the URA apply only when the federal money to be received by a particular project will be used in acquiring the desired property.<sup>79</sup> Although there is no square holding in Missouri, the supreme court has indicated that the URA requirements are triggered whenever federal money is *involved* in a project, regardless of whether the federal money will be used in acquiring the condemned property.<sup>80</sup>

The URA creates no rights in the condemnee even though it is designed partially to protect him.<sup>81</sup> The courts in Missouri, however, have in at least two instances found that a defendant in a condemnation action does have standing to assert that the federal procedures were not followed.<sup>82</sup> In *State ex rel. Weatherby Advertising v. Conley*<sup>83</sup> the court held that since there was a Missouri statute<sup>84</sup> requiring the Highway Commission to follow federal guidelines in order to secure federal funds, the condemnee had standing to assert the lack of compliance with the federal guidelines. There is an alternative method by which a condemnee may obtain standing to assert a lack of compliance with the URA. If the condemning authority has entered into a contract with a federal agency under which the condemnor agrees to follow the federal procedures and the federal agency agrees to supply money for a project, the condemnee may enforce the contract and require the condemning authority to comply with the federal procedures as a third party donee beneficiary of the contract.<sup>85</sup> It should be noted that the rights in this situation arise from the contract and not the URA. Therefore, when utilizing this approach a condemnee must pay close attention to the particular terms in the contract which he is enforcing.

78. *Id.*

79. *Rhodes v. City of Chicago*, 516 F.2d 1373 (7th Cir. 1975).

80. *State ex rel. Weatherby Advertising v. Conley*, 527 S.W.2d 334 (Mo. En Banc 1975). At least one United States District Court has specifically held that certain other sections of the Act are triggered when federal money is *involved* in the project. *Lake Park Home Owners v. HUD*, 443 F. Supp. 6 (S.D. Ohio 1976).

81. *Will-Tex Plastics Mfg., Inc. v. HUD*, 346 F. Supp. 654 (E.D. Pa. 1972), *aff'd.*, 478 F.2d 1399 (3d Cir. 1973).

82. *State ex rel. Weatherby Advertising v. Conley*, 527 S.W.2d 334 (Mo. En Banc 1975); *Bethone v. HUD*, 376 F. Supp. 1074 (W.D. Mo. 1972).

83. 527 S.W.2d 334 (Mo. En Banc 1975). Prohibition was held to be an appropriate remedy because the court lacked jurisdiction to proceed in the condemnation suit.

84. RSMo § 226.150 (1969).

85. *Bethone v. HUD*, 376 F. Supp. 1074 (W.D. Mo. 1972) (issue brought to court by suit for specific performance of the contract).

## IV. CONCLUSION

While the practice manuals, rules of court and Missouri statutes refer incidentally to the rights of a condemnee to raise the necessity, the public use and the good faith negotiations issues, the substance of these rights has remained tucked away in the case law. In some instances a condemnee may raise these rights in order to delay the proceedings because time to a condemnor usually means money. However unpraiseworthy this purpose is, asserting these rights serves another more important function. Raising these issues in a condemnation proceeding also insures that the power of eminent domain will only be used under the appropriate circumstances. This is important in a country which professes a high regard for the property rights of its citizens.

BRADLEY J. BAUMGART