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## Missouri Eminent Domain Reforms of 2006 Good Faith Negotiation Requirement: Cities Can Use Illegitimate Appraisals under *Kansas City v. Ku, The*

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## NOTES

# The Missouri Eminent Domain Reforms of 2006 “Good Faith Negotiation” Requirement: Cities Can Use Illegitimate Appraisals Under *Kansas City v. Ku*

*City of Kansas City v. Ku*<sup>1</sup>

### I. INTRODUCTION

In 2006, following a wave of public outcry over the *Kelo v. City of New London* decision<sup>2</sup> and the “disaster” in Sunset Hills, Missouri,<sup>3</sup> the legislature enacted the 2006 Eminent Domain Reforms.<sup>4</sup> This act created new protections for landowners, including a requirement that the would-be condemnor must attempt to purchase the land from the would-be condemnee engaging in “good faith negotiation” before filing a condemnation action.<sup>5</sup> One requirement of “good faith negotiation” is that the condemnor must make an offer to purchase the land at a price no lower than the land’s value, as established either by an appraisal or through “an explanation with supporting financial data.”<sup>6</sup> Where the condemnor uses an appraisal to establish the value of the land, that appraisal must have been “made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.”<sup>7</sup>

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1. *Kansas City v. Ku*, 282 S.W.3d 23 (Mo. App. W.D. 2009).

2. *Kelo v. City of New London* held that the use of eminent domain for the purpose of bare economic development, in the absence of blight elimination or other traditional justification, constituted a “public use” so as to allow a state to take private lands. 545 U.S. 469, 490 (2005).

3. The “disaster” in Sunset Hills, Missouri, was a situation in which a private redeveloper, having negotiated land purchase contracts under threat of condemnation, defaulted on a huge number of homes to be purchased. *Stein v. Novus Equities Co.*, 284 S.W.3d 597, 601 (Mo. App. E.D. 2009).

4. Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721 (2006).

5. MO. REV. STAT. § 523.256 (2000).

6. *Id.* § 523.253.2(1).

7. *Id.* § 523.253.2(2).

Missouri statutes require almost all real estate appraisals to be done by state-licensed or state-certified real estate appraisers.<sup>8</sup> Furthermore, Missouri requires all of those individuals to follow a set of standards promulgated by the federal government – the Uniform Standards of Professional Appraisal Practice (USPAP).<sup>9</sup>

In the instant case, the condemnees (the Kus) received an offer from Kansas City based upon an appraisal created by a licensed real estate appraiser.<sup>10</sup> They refused that offer, and when the City attempted to take the land by eminent domain the Kus presented expert testimony that the appraisal failed to comply with the standards of USPAP.<sup>11</sup> They argued that, therefore, the appraisal was not made using “generally accepted appraisal practices” and, thereby, the City’s actions did not constitute “good faith negotiation” under that term’s statutory definition in Missouri Revised Statute Section 523.256 (Good Faith Negotiation statute).<sup>12</sup>

The trial court found otherwise and permitted the condemnation to proceed.<sup>13</sup> In reviewing that decision, the Missouri Court of Appeals, Western District, interpreted the meaning of the two statutes (Good Faith Negotiation and USPAP-Compliance) as applied to this situation and held that “an appraiser in a condemnation proceeding must adhere to generally accepted appraisal practices – such an appraiser is not required to adhere to USPAP.”<sup>14</sup>

This Article argues that the holding of the Western District contravenes decades of Missouri statutory construction law, undermines significant public policy considerations, and indirectly implicates the Missouri constitutional guarantee of “just compensation” for takings by furthering a system of under-compensation. This Article speculates as to the potential policy reasons for such a holding and, finding only the considerations of judicial economy and condemnation proceeding efficiency (time and expense to the condemnor, the burden of which passes to taxpayers), this Article argues that such considerations must yield to the property interests clearly protected by the language of the Missouri legislature.

## II. FACTS AND HOLDING

### A. *The “Action” of the Case*

Appellants Chung Ho Ku and Myong Suk Ku own a property (the Ku Property) commonly known as 1219-21 Grand Avenue in Kansas City, Mis-

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8. *Id.* § 339.501.1 (2000).

9. *Id.* § 339.535.

10. *Kansas City v. Ku*, 282 S.W.3d 23, 26 (Mo. App. W.D. 2009).

11. *Id.*

12. *Id.*

13. *Id.* at 26-27.

14. *Id.* at 28.

souri.<sup>15</sup> The Ku Property is near the Power & Light Entertainment District, Sprint Center, and H&R Block World Headquarters in the downtown area.<sup>16</sup> In January of 2004, the Tax Increment Financing Commission of Kansas City (TIFC) adopted a resolution recommending that the City Council of Kansas City (the City Council) approve the 1200 Main/South Loop Tax Increment Financing Plan (the Redevelopment Plan).<sup>17</sup> The City Council, in March of 2004, passed an ordinance approving and adopting the TIFC's recommendation, designating a Redevelopment Area<sup>18</sup> and finding that the area was blighted.<sup>19</sup> To support this finding, the City Council cited defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, and the existence of conditions that endanger life or property by fire or other causes.<sup>20</sup>

In October of 2004, the TIFC adopted a recommendation that the boundaries of the Redevelopment Area expand to an area that included the Ku Property.<sup>21</sup> The City Council approved this recommendation, thereby including the Ku Property in the Redevelopment Area and Plan.<sup>22</sup> However, the City Council failed to make the Ku Property a part of a specific redevelopment project.<sup>23</sup> TIFC then filed a condemnation petition to obtain the Ku Property, but the court dismissed it "without prejudice" on the grounds that the Ku Property was not a part of a redevelopment project as required by Missouri Revised Statute Section 99.820.1(3).<sup>24</sup>

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15. *Id.* at 25.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 25-26. In Missouri, under the TIF Act, a "blighted area" is an area that, by reason of the predominance of defective or inadequate street layout, unsanitary 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. MO. REV. STAT. § 99.805(1) (2000). Another definition, found in the Urban Redevelopment Corporations Law, is identical except that it states "economic *and* social liability." *Id.* § 353.020 (2000).

20. Respondent's Brief at \*7-8, *Kansas City v. Ku*, 282 S.W.3d 23 (Mo. App. W.D. 2009) (No. WD69807), 2008 WL 5040727.

21. *Ku*, 282 S.W.3d at 25.

22. *Id.*

23. *Id.* at 25, 33. See *Kansas City Missouri*, Office of the City Clerk, Ordinance No. 041244, <http://cityclerk.kcmo.org/liveweb/Documents/Document.aspx?q=3yIU2kPCwCZa82csfTw0yzC4rhUaP6wPIK4XrITebKkdkolmpzaUi%2Bmo%2FIosKwtGjQATKP8%2BVQav4oCFVA%2Fvg%3D%3D> (last visited Sept. 22, 2009).

24. *Ku*, 282 S.W.3d at 25, 32-33. TIFC admitted to the court that the Ku Property was not, at that time, part of a redevelopment project. *Id.* at 25.

In November of 2005, the City Council made the Ku Property part of a mixed use redevelopment project.<sup>25</sup> Then, in May of 2006, the City Council declared the expanded Redevelopment Area blighted as a whole.<sup>26</sup> Having done so, the City then gave the Kus written notice of its intent to acquire the land.<sup>27</sup>

In September of 2007, after waiting for two years, the City delivered an offer to the Kus to purchase their property for \$390,500.<sup>28</sup> Included with this offer was a copy of an appraisal by Ed Severeid, a licensed real estate appraiser,<sup>29</sup> which valued the property at \$390,500.<sup>30</sup> The offer was signed by Patrick Ferguson, the City's Right of Way Agent.<sup>31</sup> The Kus rejected this offer and made a counter offer of \$2,000,000.<sup>32</sup> Finally, on November 6, 2007, the City filed a new petition for condemnation, and trial was set for March 17, 2008.<sup>33</sup>

### B. The Appraisal

"In determining the Property's fair market value, [the City's Appraiser, Ed Severeid,] first determined that the Property's highest and best use to be vacant and unimproved land for some form of planned business and commercial use [combined] with other tracts or parcels in the area."<sup>34</sup> As a result, he found that the improvements on the Ku Property had no significant contributory value to the property.<sup>35</sup> Flowing from that determination, he concluded that the capitalization of income<sup>36</sup> and the cost approaches<sup>37</sup> to valuation were inferior to the comparative market approach.<sup>38</sup> Finally, after applying the

25. *Id.*

26. *Id.* at 26.

27. *Id.*

28. *Id.*

29. Respondent's Brief, *supra* note 20, at \*15 ("Mr. Severeid is an MAI and a 'Certified General' licensed appraiser in the State of Missouri.")

30. *Ku*, 282 S.W.3d at 26.

31. Respondent's Brief, *supra* note 20, at \*15.

32. *Ku*, 282 S.W.3d at 26.

33. *Id.*

34. Respondent's Brief, *supra* note 20, at \*16.

35. *Id.*

36. This method entails, essentially, taking future expected rents from the property and discounting them to present value terms to find the value of the targeted real property. For a more complete discussion and an example of this methodology, see PropEx.com, Classroom: The Income Capitalization Approach, [http://www.propex.com/C\\_g\\_inc.htm](http://www.propex.com/C_g_inc.htm) (last visited Sept. 22, 2009).

37. This method entails, essentially, determining the value of the underlying land by analyzing comparable sales of comparable vacant land and then adding the depreciated reproduction value of the improvements that are on the property. For a more complete discussion and an example of this methodology, see *id.*

38. Respondent's Brief, *supra* note 20, at \*16.

comparative market approach<sup>39</sup> and making adjustments for certain factors (such as location, physical characteristics, and time of sales), he estimated the value of the Ku Property to be \$390,500.<sup>40</sup>

Severeid's appraisal stated, "It is difficult to put a specific USPAP Standard 2 identity on an Appraisal Report prepared for the City. However, for any inconsistencies with USPAP, Appraisers are protected by the USPAP Jurisdictional Exception provision."<sup>41</sup> Finally, Severeid's appraisal also included a certification that the appraisal was made in conformity with "appropriate state laws, regulations, policies and procedures."<sup>42</sup>

### C. At Trial

At trial, the Kus presented expert testimony that the City's appraisal was not performed in accordance with USPAP.<sup>43</sup> They argued that, because all appraisers are required to conform with USPAP, it is a part of "generally accepted appraisal practices" and that noncompliance would, therefore, lead to a conclusion that the City had not engaged in "good faith negotiations" as defined by Missouri Revised Statute Section 523.256.<sup>44</sup>

The Kus' expert witness, Maurice Kancel, a state-certified appraiser, testified that he reviewed Severeid's appraisal to check compliance with USPAP.<sup>45</sup> Kancel found that Severeid's appraisal had failed to meet six of the twenty standard USPAP requirements and that he did not agree with Severeid's analysis.<sup>46</sup> Kancel testified that Severeid should have used the capitalization of income method, instead of the comparable sales method, to value the Ku Property.<sup>47</sup> Kancel believed that, even in using the comparable sales approach, Severeid had used inappropriate sales data, as those sales were too remote in time.<sup>48</sup> Furthermore, while Kancel testified that the techniques and methodology that Severeid used were valid, he believed that the data and analysis upon which Severeid relied were inaccurate and insufficient.<sup>49</sup> Fi-

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39. This method entails, essentially, determining the value of the targeted real property by analyzing comparable sales. For a more complete discussion and an example of this methodology, see PropEx.com, Classroom: The Income Capitalization Approach, [http://www.propex.com/C\\_g\\_sales.htm](http://www.propex.com/C_g_sales.htm) (last visited Sept. 22, 2009).

40. Respondent's Brief, *supra* note 20, at \*17.

41. *Id.*

42. *Id.*

43. *Kansas City v. Ku*, 282 S.W.3d 23, 26 (Mo. App. W.D. 2009).

44. *Id.* (requiring an offer in compliance with Missouri Revised Statute Section 423.253, which requires that appraisals be "made by a state-licensed or state-certified appraiser using generally accepted appraisal practices").

45. *Id.*

46. *Id.*

47. Respondent's Brief at \*17-18, *Kansas City v. Ku*, 282 S.W.3d 23 (Mo. App. W.D. 2009) (No. WD69807), 2008 WL 5040727.

48. *Id.*

49. *Ku*, 282 S.W.3d at 26.

nally, Kancel presented his own opinion of the Ku Property's value, \$1,200,000.<sup>50</sup>

Notably, the instant court made no mention of testimony by Severeid, leading to an inference that neither the condemnor nor condemnee elicited his testimony.<sup>51</sup> Instead, the City responded to Kancel's testimony by producing Patrick Ferguson, the City's Right of Way Agent.<sup>52</sup> Ferguson had signed the original offer of \$390,500.<sup>53</sup> Ferguson testified that Severeid's appraisal was done in accordance with "generally accepted appraisal practices."<sup>54</sup> He also testified that Severeid's appraisal "discussed" the three standard approaches to appraising before selecting the comparative market approach as the most appropriate.<sup>55</sup> Unsurprisingly, Ferguson, like Severeid, also believed that the property's highest and best use was for redevelopment purposes and, therefore, believed the comparable sales approach to be the most applicable.<sup>56</sup>

Ferguson further testified that he approved of Severeid's methodology.<sup>57</sup> He admitted that he had not reviewed Severeid's appraisal for USPAP compliance because "he felt that such a review was not necessary."<sup>58</sup> Instead, he testified that, when he had read the appraisal, he "did not notice anything that would make him believe that the appraisal did not comply with USPAP."<sup>59</sup>

The trial court found that the City had complied with all conditions precedent to this condemnation action.<sup>60</sup> Accordingly, the trial court found in favor of the City and ordered the Ku Property condemned. The Kus appealed.<sup>61</sup>

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50. *Id.* at 26-27.

51. *See generally id.* This lends itself to the conclusion that Severeid did not, in fact, testify before the court. While it is true that the Kus could have subpoenaed Severeid, the City's decision not to produce him to support his own appraisal is notable.

52. *Id.* at 26.

53. *Id.*

54. *Id.*

55. *Id.*

56. Respondent's Brief, *supra* note 20, at \*15.

57. *Ku*, 282 S.W.3d at 26.

58. Respondent's Brief, *supra* note 20, at \*16.

59. *Id.*

60. *Ku*, 282 S.W.3d at 26.

61. *Id.* at 26-27.

### *D. The Appellate Court's Holding*

The Missouri Court of Appeals, Western District, examined the legislative relationship between the Good Faith Negotiation statute's<sup>62</sup> requirement that an offer be "made by a state-licensed or state-certified appraiser using generally accepted appraisal practices" and the USPAP-Compliance statute<sup>63</sup>

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62. The "Good Faith Negotiation" statute reads,

Before a court may enter an order of condemnation, the court shall find that the condemning authority engaged in good faith negotiations prior to filing the condemnation petition. A condemning authority shall be deemed to have engaged in good faith negotiations if:

(1) It has properly and timely given all notices to owners required by this chapter;

(2) Its offer under [Missouri Revised Statute Section 523.253] was no lower than the amount reflected in an appraisal performed by a state-licensed or state-certified appraiser for the condemning authority, provided an appraisal is given to the owner pursuant to [Missouri Revised Statute Section 523.253(2)];

(3) The owner has been given an opportunity to obtain his or her own appraisal from a state-licensed or state-certified appraiser of his or her choice; and

(4) Where applicable, it has considered an alternate location suggested by the owner under [Missouri Revised Statute Section 523.265].

If the court does not find that good faith negotiations have occurred, the court shall dismiss the condemnation petition, without prejudice, and shall order the condemning authority to reimburse the owner for his or her actual reasonable attorneys' fees and costs incurred with respect to the condemnation proceeding which has been dismissed.

MO. REV. STAT. § 523.256 (2000) (emphasis added).

Its counterpart, Section 523.253, sets out the standards for the offer and any supporting appraisal:

1. *A condemning authority shall present a written offer to all owners of record of the property.* The offer must be made at least thirty days before filing a condemnation petition and shall be held open for the thirty-day period unless an agreement is reached sooner.

....

2. (1) *Any condemning authority shall, at the time of the offer, provide the property owner with 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 of this section.*

(2) *Any appraisal referred to in this section shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.*

*Id.* (emphasis added).

63. The USPAP-Compliance statute reads, "State certified real estate appraisers and state licensed real estate appraisers shall comply with the Uniform Standards of



and held that “an appraiser in a condemnation proceeding must adhere to generally accepted appraisal practices [–] such an appraiser is not required to adhere to USPAP.”<sup>64</sup> The court then held, based on the appraisal’s own language and the testimony of Ferguson, that Severeid’s appraisal did comply with “generally accepted appraisal practices.”<sup>65</sup> Additionally, the court found substantial evidence to support a finding that Severeid’s appraisal was actually USPAP-compliant.<sup>66</sup> Furthermore, the court denied the Ku’s three other points on appeal and affirmed the judgment of the trial court in favor of condemnation.<sup>67</sup>

### III. LEGAL AND HISTORICAL BACKGROUND

This Section will examine the origin of Missouri’s USPAP-Compliance statute. It will then turn to look at the Good Faith Negotiation statute. Finally, it will explain the legal doctrines of statutory interpretation that apply when multiple statutes are implicated by a situation.

#### A. *The Origin of Missouri’s USPAP-Compliance Statute*

From January 1986 to the end of 1995, the United States experienced the Savings and Loan Crisis (S&L Crisis). This crisis had many similarities to the one we now face.<sup>68</sup> It included the closing of 1589 of the 3234 (nearly fifty percent) then-existing federally insured financial institutions.<sup>69</sup> Though this practice is not directly cited as a major contributing factor to the S&L Crisis,<sup>70</sup> one congressional subcommittee reported that poor appraisal practices “constituted a prominent factor in the insolvency of hundreds of financial institutions.”<sup>71</sup>

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Professional Appraisal Practice promulgated by the appraisal standards board of the appraisal foundation.” MO. REV. STAT. § 339.535 (2000).

64. *Ku*, 282 S.W.3d at 27-28.

65. *Id.* at 28.

66. *Id.*

67. *Id.* at 29-33.

68. See Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, 13 FDIC BANKING REV. 26 (2000), available at [http://www.fdic.gov/bank/analytical/banking/2000dec/brv13n2\\_2.pdf](http://www.fdic.gov/bank/analytical/banking/2000dec/brv13n2_2.pdf).

69. *Id.* at 26. Many of these closings were likely the result of the FIRREA’s conscious attempt to “clean up” the savings and loan industry, undertaken by closing insolvent institutions and paying insurance out to their depositors. *Id.*

70. See NORMAN STRUNK & FRED CASE, WHERE DEREGULATION WENT WRONG: A LOOK AT THE CAUSES BEHIND SAVINGS AND LOAN FAILURES IN THE 1980S 15-16 (1988).

71. See ASC Appraisal Subcommittee, ASC History, <https://www.asc.gov/default.aspx?id=6> (last visited Oct. 3, 2009).

In 1987, eight major American professional appraiser organizations<sup>72</sup> formed The Appraisal Foundation (TAF). TAF implemented a set of uniform standards governing the professional appraisal practice, known as the "Uniform Standards of Professional Appraisal Practice" (USPAP).<sup>73</sup> Soon thereafter, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA).<sup>74</sup> One part of FIRREA, entitled the "Real Estate Appraisal Reform Amendments," created the Appraisal Subcommittee.<sup>75</sup> The Appraisal Subcommittee is a federal oversight committee tasked

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72. The Appraisal Foundation, History of the Foundation, [http://www.appraisal.foundation.org/s\\_appraisal/doc.asp?CID=20&DID=103](http://www.appraisal.foundation.org/s_appraisal/doc.asp?CID=20&DID=103) (last visited Oct. 3, 2009). These eight included the American Institute of Real Estate Appraisers, the American Society of Appraisers, the American Society of Farm Managers and Rural Appraisers, the International Association of Assessing Officers, the International Right of Way Association, the National Association of Independent Fee Appraisers, the National Society of Real Estate Appraisers, and the Society of Real Estate Appraisers.

73. *Id.* The text of the USPAP and advisory opinions can be found at <http://209.190.242.26/html/USPAP2008/index.htm>. The Appraisal Foundation, <http://commerce.appraisalfoundation.org/html/USPAP2008/index.htm>. These standards were first created by the same organizations and one Canadian appraisal organization, the Appraisal Institute of Canada, in 1986. The Appraisal Foundation, History of the Foundation, [http://www.appraisalfoundation.org/s\\_appraisal/doc.asp?CID=20&DID=103](http://www.appraisalfoundation.org/s_appraisal/doc.asp?CID=20&DID=103) (last visited Oct. 3, 2009).

74. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, H.R. 1278, 101st Cong. (1989). The purpose of FIRREA is stated as follows:

- (1) To promote, through regulatory reform, a safe and stable system of affordable housing finance.
- (2) To improve the supervision of savings associations by strengthening capital, accounting, and other supervisory standards.
- (3) To curtail investments and other activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds.
- (4) To promote the independence of the Federal Deposit Insurance Corporation from the institutions the deposits of which it insures, by providing an independent board of directors, adequate funding, and appropriate powers.
- (5) To put the Federal deposit insurance funds on a sound financial footing.
- (6) To establish an Office of Thrift Supervision in the Department of the Treasury, under the general oversight of the Secretary of the Treasury.
- (7) To establish a new corporation, to be known as the Resolution Trust Corporation, to contain, manage, and resolve failed savings associations.
- (8) To provide funds from public and private sources to deal expeditiously with failed depository institutions.
- (9) To strengthen the enforcement powers of Federal regulators of depository institutions.
- (10) To strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.

*Id.* § 101.

75. *Id.* § 1102.

with monitoring state appraisal licensing, policies, practices, and procedures.<sup>76</sup> To give teeth to this new regulatory framework, it was given the power to deny certain benefits to a state if that state's appraisal standards did not meet or exceed the rules adopted by the Appraisal Subcommittee.<sup>77</sup> Finally, it was given express authority to monitor and review the actions of TAF.<sup>78</sup>

The organization of this oversight method can be explained as follows: (1) the federal government would have standards that it would oversee<sup>79</sup> and fund<sup>80</sup> and (2) the states would be required to have standards sufficient to please the oversight committee (and if they did not, then they would not have received help with the financial institution problems that were created by the S&L Crisis).<sup>81</sup> This pseudo-mandate structure led to the speedy adoption of TAF's USPAP by all fifty states.<sup>82</sup> Accordingly, Missouri adopted statutes requiring compliance with USPAP the same year that FIRREA was enacted.<sup>83</sup>

### *B. Statutory Regulation of Real Estate Appraisers in Missouri*

In 1990, the Missouri legislature passed the "Missouri Certified and Licensed Real Estate Appraisers Act."<sup>84</sup> Under this act, all real estate appraisers in the state of Missouri are required to be licensed or certified by the Missouri Real Estate Appraisers Commission.<sup>85</sup> In order to qualify, all applicants must meet minimum qualification requirements and pass a written examination equivalent to those required by TAF.<sup>86</sup> One example of these require-

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76. *Id.* § 1103.

77. *Id.* § 1117.

78. *Id.* § 1102(b).

79. *Id.*

80. *Id.* § 1108(b)(4).

81. *See id.* § 1117(b).

82. *See, e.g.*, KAN. STAT. ANN. § 58-4121 (1990); MO. REV. STAT. § 339.535 (2000).

83. MO. REV. STAT. § 339.535.

84. *Id.* § 339.500.

85. *Id.* § 339.501.1 ("Beginning July 1, 1999, it shall be unlawful for any person in this state to act as a real estate appraiser, or to directly or indirectly, engage or assume to engage in the business of real estate appraisal or to advertise or hold himself or herself out as engaged in or conducting such business without first obtaining a license or certificate issued by the Missouri real estate appraisers commission."). This statute, however, explicitly excludes from the license requirement "[a]ny employee of a local, state or federal agency who performs appraisal services within the scope of his or her employment; except that, this exemption shall not apply where any local, state or federal agency requires an employee to be registered, licensed or certified to perform appraisal services" and a few other categories. *Id.* § 339.501.5(3).

86. *Id.* § 339.515.1-2.

ments is that applicants must take a fifteen-hour national USPAP course and pass its associated course examination.<sup>87</sup>

Furthermore, under Missouri Revised Statute Section 339.535, all Missouri licensed or certified real estate appraisers, in carrying out their work, must comply with USPAP: "State certified real estate appraisers and state licensed real estate appraisers shall comply with the Uniform Standards of Professional Appraisal Practice promulgated by the appraisal standards board of the appraisal foundation."<sup>88</sup> In enforcing a code of conduct, USPAP provides extensive rules governing professional standards and competency standards, substantive appraisal methodology standards, and rules for departure from USPAP for the real estate appraisal profession.<sup>89</sup> Finally, it is important to understand that this code of conduct "has teeth" in Missouri, as noncompliance with USPAP is grounds for denial<sup>90</sup> or discipline<sup>91</sup> (i.e., revocation, probation, etc.) of a Missouri real estate appraiser license or certification.

### C. *The Origin of Missouri's Good Faith Negotiation Statutes*

While *Kelo v. City of New London*<sup>92</sup> represented little in the way of a change in the law of eminent domain takings,<sup>93</sup> the public reaction to its ruling and related eminent domain events caused the Missouri legislature to modify Missouri's eminent domain law, including the creation of the "good faith negotiation" requirement<sup>94</sup> at issue in *Kansas City v. Ku*.<sup>95</sup>

In *Kelo v. City of New London*, the United States Supreme Court found that land takings by eminent domain for the purpose of bare economic development satisfied the "public use" requirement of the Fifth Amendment.<sup>96</sup>

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87. See THE APPRAISAL FOUNDATION, THE REAL PROPERTY APPRAISER QUALIFICATION CRITERIA AND INTERPRETATION OF THE CRITERIA 6 (2009), available at [http://www.appraisalfoundation.org/s\\_appraisal/bin.asp?CID=117&DID=287&DOC=FILE.PDF](http://www.appraisalfoundation.org/s_appraisal/bin.asp?CID=117&DID=287&DOC=FILE.PDF).

88. MO. REV. STAT. § 339.535.

89. Respondent's Brief, *supra* note 20, at \*16 n.1 (citing 4 PHILIP NICHOLS, NICHOLS ON EMINENT DOMAIN § 13.01[2]).

90. Landfair v. Mo. Real Estate Appraisers Comm'n, No. 7-1635 RA, 2008 WL 2525094, at \*3, \*5 (Mo. Admin. Hrg. Comm. May. 13, 2008); MO. REV. STAT. § 339.532.1, .2(6)-(7).

91. Mo. Real Estate Appraisers Comm'n v. Plagman, No. 08-0286 RA, 2008 WL 5630974 (Mo. Admin. Hrg. Comm. Dec. 2, 2008).

92. *Kelo v. City of New London*, 545 U.S. 469 (2005).

93. Whitman, *supra* note 4, at 726 ("[T]he 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.").

94. MO. REV. STAT. § 523.256.2 (2000).

95. *Kansas City v. Ku*, 282 S.W.3d 23 (Mo. App. W.D. 2009).

96. *Kelo*, 545 U.S. at 490.

*Kelo* involved the taking of a section of non-blighted<sup>97</sup> land to be redeveloped for use in largely private pursuits, including a conference hotel, restaurants, shopping and commercial establishments, office space, residences, a marina, river walk, and a Coast Guard museum and state park.<sup>98</sup> The objecting parties, primarily owners of middle class residential property, argued that the condemnations violated the takings clause of the Fifth Amendment to the United States Constitution because such redevelopment did not fall within the definition of public use.<sup>99</sup> The Court held that economic development was not excluded from the scope of public use, finding that deference should be given to what the legislative body (in this case the municipal government of New London, Connecticut) believes will benefit the public.<sup>100</sup> The only limit placed on this deference is that the purpose behind the redevelopment must be legitimate and the means employed must not be irrational.<sup>101</sup>

Five days after the *Kelo* ruling, then-Governor Matt Blunt announced the formation of a task force to examine “the use of eminent domain, especially when the proposed public use of the property being acquired by eminent domain is not directly owned or primarily used by the general public.”<sup>102</sup> However, this was not the only event placing political weight behind such reform: there was an eminent domain “disaster” in Missouri’s own backyard, further fueling this legislative action – Sunset Hills, Missouri.<sup>103</sup>

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97. *Id.* at 475. In Missouri, a “blighted area” is an area which, by reason of the predominance of defective or inadequate street layout, unsanitary 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. MO. REV. STAT. § 99.805(1) (2000).

98. Stanley A. Leasure & Carol J. Miller, *Eminent Domain – Missouri’s Response To Kelo*, 63 J. MO. B. 178, 178 (2007). The Supreme Court of Connecticut found that the plan was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.” *Kelo*, 545 U.S. at 472 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (2004)).

99. *Kelo*, 545 U.S. at 475-76.

100. *Id.* at 485-89.

101. *Id.* at 488-89.

102. Whitman, *supra* note 4, at 727-29 (quoting Mo. Exec. Order, No. 05-15, June, 28, 2005, available at [http://www.sos.mo.gov/library/reference/orders/2005/eo05\\_015.asp](http://www.sos.mo.gov/library/reference/orders/2005/eo05_015.asp)); 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>).

103. *Id.* at 756-57 (“[I]ndeed, 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.”).

Less than a month after the *Kelo* holding, Missouri witnessed the destructive<sup>104</sup> effects that can be generated by the imprudent use of eminent domain.<sup>105</sup> In August of 2004, in the hopes of generating additional tax revenue, the Sunset Hills (a city in St. Louis County) board of aldermen designated Novus, Inc. as the “preferred developer” of a shopping mall project that would supplant homes in the Sunset Manor neighborhood of Sunset Hills.<sup>106</sup>

The city commissioned two consecutive blight studies on Sunset Manor, only the second of which found the area blighted.<sup>107</sup> After the second study found blight, the board of aldermen declared the area blighted and authorized the city to enter into a redevelopment agreement with Novus.<sup>108</sup> Novus had been negotiating contracts to purchase real estate under the threat of condemnation from August 2003 (long before the blight declaration) through July 2005 – all with closing dates set between August 27, 2005, and September 1, 2005.<sup>109</sup> Ultimately, Novus was unable to obtain adequate financing and never closed on the contracts, leaving a substantial number of homeowners with property that was “practically unmarketable” due to condemnation blight that severely depressed property values.<sup>110</sup>

The aftermath of Sunset Manor included a negligence claim, brought by some of those homeowners against the city, for a failure to adequately supervise Novus.<sup>111</sup> This claim was ultimately defeated on the basis of sovereign

104. *Id.* at 757.

105. See Leasure & Miller, *supra* note 98, at 185-86.

106. *Parish v. Novus Equities Co.*, 231 S.W.3d 236, 239 (Mo. App. E.D. 2007) (appellate opinion reciting some of the facts of the Sunset Hills incident in the context of a suit against the city for damages arising from the incident).

107. Leasure & Miller, *supra* note 98, at 185. After the city commissioned its first blight study, which failed to find evidence to satisfy the burden of a blight finding, it hired a second firm to conduct another search in the hopes of finding evidence to satisfy its TIF ordinance requirements. *Id.* at 185-86 (citing Martin Van Der Werf, *If at First You Can't Blight Sunset Manor, Try, and Try Again*, ST. LOUIS POST-DISPATCH, Sept. 29, 2005, at C1).

108. *Parish*, 231 S.W.3d at 239.

109. *Id.*

110. Whitman, *supra* note 4, at 757. For further discussion of the concept of “condemnation blight,” see *id.* at 756-59 (“This term refers to damages that ensue when the ‘cloud of condemnation’ 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.”). Since Professor Whitman’s article, Missouri has recognized an action in inverse condemnation to remedy instances of “cloud of blight” damages when the delays associated with the condemnation (or lack thereof) constitute “aggravated delay” and/or result from “untoward activity” on the part of the condemner. *Clay County Realty v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008) (en banc). Arguably, such property values should return to their pre-clouded values and become marketable once more with the passage of time, depending on whether the shopping mall project was abandoned.

111. *Parish*, 231 S.W.3d at 340.

immunity because the city was acting in its “governmental capacity” in undertaking the redevelopment project.<sup>112</sup> However, this event also led to a recall election of aldermen and a repeal of the TIF ordinance authorizing the project.<sup>113</sup> Finally, it created a rallying call for the reform of Missouri eminent domain law. According to Dale Whitman, a professor at the University of Missouri School of Law, who acted as a consultant during Missouri’s subsequent legislative reform, “There was near universal agreement that the legislature had to do, or be seen to do, something that would prevent another similar disaster.”<sup>114</sup>

Compelled by the ruling in *Kelo* and the events of Sunset Hills, the Missouri Eminent Domain Task Force<sup>115</sup> gave recommendations relating to the following areas: “1. Redefining the scope of eminent domain; 2. Improving the criteria, procedure and process for exercising eminent domain; and 3. Providing penalties for condemning authorities that abuse the eminent domain process.”<sup>116</sup> Acting on these suggestions, the Missouri legislature took up, heavily modified, and quickly passed House Bill 1944.<sup>117</sup>

House Bill 1944 created new statutory sections that improved the substantive and procedural requirements placed on condemnors negotiating under threat of condemnation.<sup>118</sup> Notably, it created a “good faith negotiation” burden on the part of a condemning authority.<sup>119</sup> The main Good Faith Negotiation statute<sup>120</sup> requires that the court find that the condemning authority engaged in “good faith negotiations” prior to filing the condemnation petition.<sup>121</sup> It goes on to provide that “good faith negotiation” exists where the

112. *Id.* at 242-43.

113. Leasure & Miller, *supra* note 98, at 186.

114. Whitman, *supra* note 4, at 756; *see* Leasure & Miller, *supra* note 98, at 186 (quoting Whitman, *supra* note 4, at 757).

115. Members of the task force included Gerard T. Carmody, Chris Goodson, Senator Chuck Gross, Representative Steve Hobbs, Leslie Holloway, Lewis R. Mills, Spencer R. Thomson, Howard C. Wright, and Terry M. Jarrett. Leasure & Miller, *supra* note 98, at 190 n.3.

116. *Id.* (citing FINAL REPORT AND RECOMMENDATIONS OF THE MISSOURI EMINENT DOMAIN TASK FORCE, available at <http://www.eminentdomain.mo.gov/documents/finalrpt.pdf>).

117. Representative Steve Hobbs had filed the bill some time before the Sunset Hills event. Whitman, *supra* note 4, at 766 n.39. After the bill was picked up by the legislature, it was championed by Senator Chris Koster, who later became, and presently is, Missouri’s Attorney General. Whitman, *supra* note 4, at 732. For an extensive, first-hand account of the legislative process involved in H.B. 1944, *see* generally *id.*

118. H.B. 1944, 93d Gen. Assem., 2d Sess. (Mo. 2006), available at <http://www.house.mo.gov/billtracking/bills061/sumpdf/HB1944c.pdf>.

119. *Id.*

120. MO. REV. STAT. § 523.256 (Supp. 2008).

121. *Id.* (entitled “Good faith negotiations, requirement – dismissal of condemnation petition”).

condemnor has presented a timely offer above the value reflected in an appraisal performed by a state licensed or certified appraiser (pursuant to Missouri Revised Statute Section 523.253) where an appraisal is used.<sup>122</sup> If the court does not find good faith, it must dismiss the condemnation, without prejudice, and order the condemning authority to reimburse the owner for actual reasonable costs and attorneys' fees.<sup>123</sup>

The aforementioned offer requirement is further outlined in Missouri Revised Statute Section 523.253, which explains the time and form that the offer must take and provides that it must include either an appraisal or an explanation with supporting financial data for its determination of value.<sup>124</sup> Interestingly, no appraisal is required by this section, no matter what the expected value of the property is.<sup>125</sup> The statute does, however, provide that "[a]ny appraisal referred to in this section shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices."<sup>126</sup> So, notably, where an appraisal is used, it must be made using those "generally accepted appraisal practices" standards.

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122. *Id.* The complete statutory language is as follows:

A condemning authority shall be deemed to have engaged in good faith negotiations if:

- (1) It has properly and timely given all notices to owners required by this chapter;
- (2) Its offer under section 523.253 was no lower than the amount reflected in an appraisal performed by a state-licensed or state-certified appraiser for the condemning authority, provided an appraisal is given to the owner pursuant to subsection 2 of section 523.253 or, in other cases, the offer is no lower than the amount provided in the basis for its determination of the value of the property as provided to the owner under subsection 2 of section 523.253;
- (3) The owner has been given an opportunity to obtain his or her own appraisal from a state-licensed or state-certified appraiser of his or her choice; and
- (4) Where applicable, it has considered an alternate location suggested by the owner under section 523.265.

*Id.*

123. *Id.*

124. MO. REV. STAT. § 523.253.1-2(1) (Supp. 2009) (entitled "Written offer to property owners – appraisal").

125. MO. REV. STAT. § 523.253.2(1). Earlier drafts of H.B. 1944 included a requirement that an appraisal be undertaken if the property was believed in good faith to have a value exceeding \$15,000. Whitman, *supra* note 4, at 748.

126. MO. REV. STAT. § 523.253.2(2).



### D. Legislative Interpretation in Situations Implicating Multiple Statutes

Given that Missouri explicitly requires its real estate appraisers to follow USPAP and that Missouri's Good Faith Negotiation statute states that appraisals used in the negotiation process between a condemnor and the would-be condemnee must be made "by a state-licensed or state certified appraiser using generally accepted appraisal practices,"<sup>127</sup> a question arises as to whether the "generally accepted appraisal practices" requirement should be interpreted to require USPAP compliance. This is the key question addressed by this Article. To answer it, it is necessary to examine doctrines of statutory interpretation dealing with a situation in which two or more statutes are implicated by a given situation.

#### 1. Statutory Interpretation Generally

The primary rule in statutory construction is to ascertain the intent of the legislature from the language used in the statute, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.<sup>128</sup> However, if terms are statutorily defined<sup>129</sup> or have other judicial or legislative meanings, then such a definition will be presumed to control over the terms' plain and ordinary meaning.<sup>130</sup> Otherwise, when the court cannot ascertain the legislature's intent by reading the statute's language as a whole<sup>131</sup> with its plain and ordinary meaning, then the statute is considered ambiguous.<sup>132</sup> Courts can only look outside the plain meaning of the language in a statute when the language is ambiguous or would lead to an illogical result.<sup>133</sup>

When interpreting ambiguous statutes, "the ultimate guide is the intent of the legislature."<sup>134</sup> Statutes must be construed in light of the defects that they seek to remedy and the usages, circumstances, and conditions existing at

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127. *Id.* § 523.253.2(2).

128. *Cook v. Newman*, 142 S.W.3d 880, 886 (Mo. App. W.D. 2004) (citing *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251 (Mo. 2003) (en banc)).

129. *State v. Rousseau*, 34 S.W.3d 254, 259 (Mo. App. W.D. 2000) (quoting *State v. Hermanns*, 641 S.W.2d 768, 769 (Mo. 1982) (en banc)); see also *Broadway-Washington Assocs., Ltd. v. Manners*, 186 S.W.3d 272, 275-76 (Mo. 2006) (en banc).

130. *Cook*, 142 S.W.3d at 889-90 (Mo. App. W.D. 2004) (citing *Leiser v. City of Wildwood*, 59 S.W.3d 597, 603 (Mo. App. E.D. 2001)).

131. *Id.* at 886 (citing *J.B. Vending Co. v. Dir. of Revenue*, 54 S.W.3d 183, 188 (Mo. 2001) (en banc)).

132. *Id.* (citing *Stotts v. Progressive Classic Ins. Co.*, 118 S.W.3d 655, 664 (Mo. App. W.D. 2003)).

133. *Broadway-Washington Assocs.*, 186 S.W.3d at 275 (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. 1998) (en banc)).

134. *Cook*, 142 S.W.3d at 886 (citing *Long v. Interstate Ready-Mix, L.L.C.*, 83 S.W.3d 571, 577 (Mo. App. W.D. 2000)).

the time the act was adopted.<sup>135</sup> When doing so, the court will look to extrinsic matters, such as the statute's history, surrounding circumstances, and the objectives that the legislature hoped to accomplish with its enactment.<sup>136</sup> Additionally, courts have no authority to find an intent that is contrary to the apparent intent of the plain and ordinary meaning of a statute.<sup>137</sup>

To determine the intent of a statute, it should be read as a whole and in connection with other sections on the same or similar subject matter.<sup>138</sup> Furthermore, "it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times."<sup>139</sup>

## 2. Statutory Interpretation Between Statutes

"Statutes relating to the same subject should be harmonized and read together as constituting one law . . .,"<sup>140</sup> even if those statutes were enacted at different times.<sup>141</sup> "Where two statutes concerning the same subject matter, when read individually, are unambiguous, but conflict when read together, [the court] will attempt to reconcile them and give effect to both."<sup>142</sup> A useful illustration of these concepts in action is the case of *State ex rel. Ad Trend, Inc. v. City of Platte City*.

In *Ad Trend*, the Missouri Court of Appeals, Western District, addressed the applicability of two Missouri statutes governing billboards.<sup>143</sup> The first statute, Section 71.288, provided that "[a]ny city or county shall have the authority to adopt regulations with respect to outdoor advertising that are more restrictive than the height, size, lighting and spacing provisions of 226.500 to 226.600 RSMo."<sup>144</sup> The second statute, Section 226.540, using

135. *Estate of Croom v. Bailey*, 107 S.W.3d 457, 463 (Mo. App. S.D. 2003) (quoting *Parrott v. HQ, Inc.*, 907 S.W.2d 236, 240 (Mo. App. S.D. 1995)).

136. *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 109 (Mo. App. W.D. 2008) (citing *Cook*, 142 S.W.3d at 887).

137. *Habjan v. Earnest*, 2 S.W.3d 875, 881 (Mo. App. W.D. 1999) (citing *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. 1993) (en banc)).

138. *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. 2005) (en banc) (citing *Mo. Dep't of Soc. Servs. Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 276 (Mo. 2001) (en banc)).

139. *Id.* (quoting *Buck v. Leggett*, 813 S.W.2d 872, 874-75 (Mo. 1991) (en banc)).

140. *State ex rel. Ad Trend, Inc. v. Platte City*, 272 S.W.3d 201, 205 (Mo. App. W.D. 2008) (quoting *State v. Gilmore*, 119 S.W.2d 805, 807 (Mo. 1938)).

141. *State ex rel. Smithco Transp. Co. v. Pub. Serv. Comm'n*, 316 S.W.2d 6, 12-13 (Mo. 1958) (en banc).

142. *Nichols v. Dir. of Revenue*, 116 S.W.3d 583, 586 (Mo. App. W.D. 2003) (quoting *Habjan v. Earnest*, 2 S.W.3d 875, 881 (Mo. App. W.D. 1999)).

143. *Platte City*, 272 S.W.3d 201.

144. *Id.* at 204.

permissive language, stated that “outdoor advertising shall be permitted within six hundred and sixty feet of the nearest edge of the right-of-way of highways.”<sup>145</sup>

The appellant argued that Section 71.288 could only be read to allow limitation of billboards along the enumerated factors (height, size, lighting and spacing) and to disallow the complete prohibition of new billboard construction.<sup>146</sup> The court looked to the intent of Section 71.288 and found that it was intended, broadly, as “the state’s election to allow local governments to exercise more than the minimum regulatory control necessary to maintain the state’s federal highway funds.”<sup>147</sup> The court also stated that the intent of chapter 226 (which includes Section 226.540) was to set minimum regulations in order to prevent Missouri from losing federal highway funds.<sup>148</sup>

Going beyond the facially permissive language of Section 226.540, the court, probably looking to the intentions of these two statutes, read them together to allow regulation by the city beyond the dimensions enumerated in Section 71.288 (size, height, lighting, and spacing) and to permit a complete ban on the construction of new billboards in Platte City.<sup>149</sup>

However, unlike the facts of *Ad Trend*, if a situation arises where the two statutes in question *cannot* be reconciled,<sup>150</sup> despite the efforts of the court, the court will have to apply a methodology for determining which statute will prevail.<sup>151</sup> If, and only if, the two statutes cannot be reconciled, the statute more specific to the matter at hand will prevail over the more general statute and be the applicable statute.<sup>152</sup>

Time may also be a factor: “[w]hen it is impossible to harmonize two conflicting statutory provisions, ‘[a]s a general rule, a ‘chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute.’”<sup>153</sup> “Furthermore, ‘[w]here one statute deals with a particular subject in a general way, and a

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145. *Id.*

146. *Id.* at 205-06. The ban is on all billboards not used to advertise products or services existing on the plot where the sign is located. *Id.* at 206 n.5.

147. *Id.* at 205.

148. *Id.*

149. *Id.* at 206.

150. One relatively straightforward situation for finding irreconcilable conflict is illustrated in *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, in which Section 287.110 stated that Chapter 287 would apply to all cases within its provision except those addressed in Section 287.120, thereby precluding the application of the remaining statutes of Chapter 287 to items addressed in Section 287.120. 248 S.W.3d 101, 107 (Mo. App. W.D. 2008).

151. *Id.* at 107-08.

152. *Nichols v. Dir. of Revenue*, 116 S.W.3d 583, 586 (Mo. App. W.D. 2003) (quoting *Andresen v. Bd. of Regents*, 58 S.W.3d 581, 587 (Mo. App. W.D. 2001)).

153. *Anderson*, 248 S.W.3d at 107 (quoting *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868, 872 (Mo. App. S.D. 2000)).

second statute treats a part of the same subject in a more detailed way, the more general should give way to the more specific.”<sup>154</sup>

### 3. The Role of Intent and Reasonableness When a More Specific Statute Would Prevail

The aforementioned rules must give way when legislative intent mandates or when an unreasonable legal framework will otherwise result. Despite the rule of statutory construction where, in the situation of two statutes that cannot be harmonized and the more specific prevails, the court is limited by the intent of the legislature, “a reviewing court must use rules of statutory construction that ‘subserve rather than subvert legislative intent.’”<sup>155</sup> “All canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent.”<sup>156</sup> Thus, where the rote application of other statutory construction rules would create a result that is contrary to the intent of the legislature, unreasonable, or absurd, the court must find a more fitting construction of the statutory framework.<sup>157</sup>

#### *E. The Briefs*

##### 1. Arguments of Appellant Ku

In their appellant brief, the Kus argued that the court lacked jurisdiction to enter an order of condemnation.<sup>158</sup> Missouri requires state-licensed and state-certified appraisers to “comply with the [USPAP]”<sup>159</sup> and mandates that “any [good faith negotiation] appraisal . . . shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.”<sup>160</sup> The Kus argued that, therefore, the City’s failure to provide a USPAP-

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154. *Id.* at 107-08 (quoting *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868, 872 (Mo. App. S.D. 2000)) (citations omitted).

155. *Id.* at 108 (quoting *Elrod v. Treasurer*, 138 S.W.3d 714, 716 (Mo. 2004) (en banc)).

156. *Id.* at 107 (quoting *Williams v. Nat’l Cas. Co.*, 132 S.W.3d 244, 249 (Mo. 2004) (en banc)).

157. *Id.* at 108-09.

158. See Reply Brief for Appellants at \*4-6, *Kansas City v. Ku*, 282 S.W.3d 23 (Mo. App. W.D. 2009) (No. WD69807), 2008 WL 5342798 (citing Missouri Revised Statutes Section 523.256, which states that, “[b]efore a court may enter an order of condemnation, the court shall find that the condemning authority engaged in good faith negotiations prior to filing the condemnation petition”) [hereinafter *Ku Brief*].

159. MO. REV. STAT. § 339.535.

160. *Id.* § 523.253.2(2) (stating that “[a]ny appraisal referred to in this section shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practice”).

compliant appraisal constituted a failure to use an appraisal “by a state-licensed or state-certified appraiser using generally accepted appraisal practices.”<sup>161</sup> The Kus further argued that, because the City’s offer was supported by an invalid appraisal, its offer should not constitute “good faith negotiation.”<sup>162</sup> Therefore, the court would not have had jurisdiction to enter a condemnation order.<sup>163</sup>

In pursuing this argument, the Kus asserted that, because Missouri requires any appraisal used in condemnation proceedings to be performed by a state-licensed or state-certified appraiser, it should necessarily entail that the appraisal is required to be in compliance with USPAP.<sup>164</sup> Next, the Kus argued that the Missouri legislature’s adoption of the language “generally accepted appraisal practices,” instead of an express USPAP requirement, should not be read to suggest a rejection of such a requirement, because such compliance was already required under the USPAP-Compliance statute, and the legislature need not create repetitive legislation.<sup>165</sup> The Kus then proffered a fairness argument, stating that the City’s position advocated for “standardless appraisals in condemnation law [while] all other state-licensed appraisals must comply with USPAP”<sup>166</sup> and that all other real estate appraisers, including those employed in condemnation situations, are subject to the loss of their license for USPAP non-compliance.<sup>167</sup>

Additionally, the Kus argued that the appraisal’s inclusion of Severeid’s certification as to USPAP compliance was simply “boilerplate” language that Severeid had left in the appraisal and thus should not have been given weight by the court.<sup>168</sup> Furthermore, they argued that USPAP compliance could only

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161. Ku Brief, 2008 WL 5342798 at \*5.

162. *Id.*

163. *Id.* at \*4-6 (citing MO. REV. STAT. § 523.256(2), which states, “A condemning authority shall be deemed to have engaged in good faith negotiation if: . . . (2) [i]ts offer under [MO. REV. STAT. §] 523.253 was no lower than the amount reflected in an appraisal performed by a state-licensed or state-certified appraiser for the condemning authority, provided an appraisal is given to the owner pursuant to [MO. REV. STAT. § 523.253.2] or, in other cases, the offer was no lower than the amount provided in the basis for its determination of the value of the property as provided to the owner under [MO. REV. STAT. § 523.253.2]”).

164. *Id.* at \*7 (relying on *Knob Noster Educ. v. Knob Noster R-VIII Sch. Dist.*, 101 S.W.3d 356, 361 (Mo. App. W.D. 2003) (stating that the court should “construe the provisions of a legislative act together and if reasonably possible, all provisions must be harmonized”) and *State ex rel. Smithco Transp. Co. v. Pub. Serv. Comm’n*, 316 S.W.2d 6, 12 (Mo. 1958) (holding that two statutory sections governing the transportation of milk should be considered together, even though the statutes were found in different chapters and were enacted at different times)).

165. *Id.* at \*7-8.

166. *Id.* at \*8.

167. *Id.* at \*6 (citing *Landfair v. Mo. Real Estate Appraisers Comm’n*, No. 07-1635 RA, 2008 WL 2525094 (Mo. Admin. Hrg. Comm. May 13, 2008)).

168. *Id.* at \*5-6.

exist within that appraisal if the “Jurisdictional Exception,” which allows derogation from USPAP on request of a client, was implicated.<sup>169</sup> They argued that the jurisdictional exception was not implicated because it requires an appraiser to adequately inform the landowners that the appraisal would be non-USPAP compliant, and Severeid had not so informed the Kus. Therefore, they asserted that the appraisal was not USPAP compliant.<sup>170</sup>

## 2. Arguments of Respondent City of Kansas City

In response to the Kus’ Brief, the City argued that, because the three methodologies for valuation are long-accepted methods of appraisal<sup>171</sup> and are adopted in the statutory definition of “fair market value,”<sup>172</sup> Missouri law does not require the use of one appraisal methodology over another.<sup>173</sup> The City argued that, therefore, selection of valuation methodology (arising from deviation from USPAP) should not be an issue.<sup>174</sup> Next, the City argued that claims about the deficiency of data used in an appraisal would scrutinize appraisals beyond the requirements of Missouri Revised Statute Chapter 523 for a “good faith negotiation” hearing in which, it suggested, the issue is not the valuation of the property.<sup>175</sup>

The City then argued that, because an earlier version of House Bill 1944 explicitly required USPAP compliance, but that requirement was removed prior to the final version,<sup>176</sup> the Good Faith Negotiation statute did not, in

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169. *Id.*

170. *Id.* at \*8.

171. Respondent’s Brief, *supra* note 20, at \*7-8 (citing *State ex rel. Mo. Highway & Transp. Comm’n v. Roberts*, 926 S.W.2d 18, 21 (Mo. App. W.D. 1996) and *Del-Mar Redevelopment Corp. v. Assoc. Garages*, 726 S.W.2d 866, 869 (Mo. App. E.D. 1987)).

172. *Id.* at \*26 (quoting MO. REV. STAT. § 523.001(1), which states that “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 . . .”).

173. *Id.*

174. *See id.*

175. *Id.* at \*27.

176. In an earlier draft of H.B. 1944, the House Judiciary Committee included 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.” Whitman, *supra* note 4, at 748. In revising the bill, Senator Chris Koster substituted the final version requiring “generally accepted appraisal practices,” intending the final language to prevent condemners from providing the landowner with “slipshod or incompetent” appraisals. *Id.* at

fact, require USPAP compliance.<sup>177</sup> Additionally, the City argued that, because the City could simply provide financial data supporting its determination of value instead of an appraisal,<sup>178</sup> the court should not reasonably expect a condemnor to look past the experiences of a given appraiser in evaluating the appraisal.<sup>179</sup>

Finally, the City argued that Kancel, the Kus' expert, had acknowledged that the valuation methods are somewhat subjective<sup>180</sup> and that, therefore, experts will disagree on the methodology of appraisal. It argued that, because the City's in-house appraiser, Ferguson, accepted the appraisal, it should be sufficient for the court.<sup>181</sup> Finally, the City argued that Kancel's criticisms were insufficient to support a finding that the appraisal was statutorily deficient.<sup>182</sup>

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749. Arguably, this change was intended to expand the standards applied to these appraisals beyond the USPAP.

177. Respondent's Brief, *supra* note 20, at \*27 (citing Whitman, *supra* note 4, at 748).

178. *Id.* at 27-28 (referring to MO. REV. STAT. § 523.253.2(1), which allows the condemning authority to provide 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," and MO. REV. STAT. § 523.256(2), which provides that the offer must reflect no less than the value of either "an appraisal performed . . . or, in other cases[,] . . . the amount provided in the basis for its determination of value of the property as provided to the owner under [MO. REV. STAT. § 523.265.2]").

The city further stated that they should not be required to have a USPAP-compliant appraisal, "[e]specially given that in the alternative a condemnor could merely compile some 'financial data' of unspecified quality and be in compliance" under the second standard. Respondent's Brief, *supra* note 20, at \*28 (Mo. App. W.D.).

179. *Id.*

180. *Id.* at \*28.

181. *Id.*

182. *Id.*

## IV. THE INSTANT DECISION

In approaching the “good faith negotiation” question in the case, the Missouri Court of Appeals, Western District, framed the Kus’ argument as an argument that the City’s appraisal was “not in good faith.”<sup>183</sup> The court then restated the two statutory sections in question<sup>184</sup> and noted the Kus’ suggestion that the statutes could be read together to require USPAP compliance.<sup>185</sup> Despite this suggestion, the court found that the two standards, one requiring compliance with “generally accepted appraisal practices” and the other requiring that “appraisers shall comply with the Uniform Standards of Professional Appraisal Practice,” were in conflict and could not be harmonized.<sup>186</sup>

The court, citing *State ex rel. Nixon v. Overmyer*,<sup>187</sup> stated that, “[w]here two statutes addressing the same subject matter are in conflict and cannot be harmonized, the more specific statute controls over the more general statute.”<sup>188</sup> The court then held that Missouri Revised Statute Section 523.253, requiring “generally accepted appraisal practices,” was the more specific statute.<sup>189</sup>

Next, the court applied the “generally accepted appraisal practices” standard and found that, “[a]ccordingly, an appraiser in a condemnation proceeding must adhere to generally accepted appraisal practices[ – ]such an appraiser is not required to adhere to USPAP.”<sup>190</sup>

Having disposed of the legal question concerning whether USPAP compliance was required, the court then turned to the factual question of whether sufficient evidence of compliance with “generally accepted appraisal practices” existed in the Ku Property appraisal.<sup>191</sup> The court found sufficient evi-

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183. *Kansas City v. Ku*, 282 S.W.3d 23, 27 (Mo. App. W.D. 2009) (“The Kus argue that the City’s appraisal, which was conducted by Mr. Severeid, was not USPAP-compliant and, therefore, not in good faith.”). The distinction in how the court chose to frame the issue is important because choosing to frame it as “good faith” implies that the City would have had to act in bad faith to violate its duty when, in fact, the statute is worded to require specific actions to support a finding of “good faith negotiation.” The duty here is not, in fact, “good faith,” but a duty to engage in statutorily defined actions which constitute “good faith negotiation.”

184. MO. REV. STAT. § 339.535 (2000); MO. REV. STAT. § 523.253(2) (Supp. 2008).

185. *Ku*, 282 S.W.3d at 27-28.

186. *Id.*

187. 189 S.W.3d 711, 717-18 (Mo. App. W.D. 2006).

188. *Ku*, 282 S.W.3d at 28 (citing *Overmyer*, 189 S.W.3d at 717-18).

189. *Id.* (citing *Overmyer*, 189 S.W.3d at 717-18).

190. *Id.* This statement goes beyond the lesser potential holding of stating that the City’s appraisal was not required to comply with USPAP, but instead states that appraisers working for cities in these situations are not required to adhere to USPAP.  
*Id.*

191. *Id.*



dence of compliance with “generally accepted appraisal practices.”<sup>192</sup> In support of this decision, the court cited Ferguson’s testimony that Severeid’s appraisal was “done in accordance with generally accepted appraisal practices,” that the appraisal discussed the three standard approaches to appraising before selecting an approach, that Ferguson approved of Severeid’s methodology, and that Ferguson “did not notice anything that would cause him to believe Mr. Severeid’s appraisal did not comply with USPAP.”<sup>193</sup> The court then found that, even if USPAP compliance was required, there was substantial evidence that Severeid’s appraisal did actually comply with those standards.<sup>194</sup>

Having completely disposed of the “good faith negotiation” issue, the court went on to address the Kus’ other points on appeal.<sup>195</sup> After dealing

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192. *Id.*

193. *Id.*

194. *Id.*

195. These arguments included the following:

(1) That the city had failed to present evidence that it had complied with statutory time limitations in enacting the condemnation authorization ordinance. *Id.* at 28-29 (finding that because this issue was raised for the first time at appeal; that because neither party had requested specific findings of fact, and no specific finding of fact was made, that the fact issue should be found in accordance with the judgment; and that the argument failed even under plain error review, as no manifest injustice or miscarriage of justice exists).

(2) That the city’s blight determination had failed to find the Ku Property a social liability as well as an economic liability. *Id.* at 29-30 (finding that Missouri Revised Statute Section 99.805(1), which applies to TIF condemnations, is the operative statute, as it is more specific than Missouri Revised Statute Section 353.020, which applies to Urban Redevelopment Corporation condemnations, and, applying the more specific statute, which requires only a finding of “economic *or* social liability” instead of “economic *and* social liability”).

(3) That the blight determination was “arbitrary, capricious, and induced by fraud, collusion, or bad faith.” *Id.* at 31-32 (upholding the trial court determination that the purchase and sale agreement, between TIFC and a private redeveloper, to obtain the Ku Property provided no support for the claim of fraud or collusion); *see also id.* (finding that even if the agreement had been relevant, such an agreement was not shown as being either illegal or fraudulent – as required by the definition of collusion) (citing Stark Liquidation Co. v. Florists’ Mut. Ins. Co., 243 S.W.3d 385, 400 (Mo. App. E.D. 2007)).

(4) That the condemnation was barred by *res judicata* and collateral estoppel because of the previous dismissal of the condemnation act prior to the inclusion of the Ku Property in a specific redevelopment project. *Id.* at 32-33 (finding that the trial court had entered its order without prejudice – which permits the bringing of another action for the same cause, thereby preventing a claim-preclusion argument and that the only finding the court had made was that *at that time* the Ku Property was not a part of a redevelopment project).

with each of these issues in turn, the court affirmed the trial court's judgment of condemnation.<sup>196</sup>

## V. COMMENT

This Section will now discuss the propriety of the legal analysis, the potential reasons for the court's decision, and the public policy concerns that surround the decision.

### A. *The Court Incorrectly Applied the Tools of Statutory Construction*

This Section will first address why the two statutory provisions examined in *Ku* cannot be said to be in irreconcilable conflict, as the court held. Then, it will address why, even if the statutes had been in such conflict, the court should have directly addressed the intent of those two statutes and applied the intent of those statutes to create a rule that preserved USPAP compliance as one factor in determining whether an appraisal meets "generally accepted appraisal practices."

As previously discussed, the ultimate guide to statutory construction is the intent of the legislature.<sup>197</sup> When the statute's language is unambiguous and does not lead to an absurd result,<sup>198</sup> such intent is determined from the language of the statute itself<sup>199</sup> along with the language of related statutes.<sup>200</sup> First, a court looks to the statutory definitions if they are present,<sup>201</sup> but when there are no definitions provided, the court must examine the plain meaning of the language used in the statute to determine the legislative intent.<sup>202</sup>

196. *Id.* at 33.

197. *St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs*, 259 S.W.3d 526, 528 (Mo. 2008) (en banc) (citing *Nelson v. Crane*, 187 S.W.3d 868, 869-70 (Mo. 2006) (en banc)).

198. *Am. Nat'l Life Ins. Co. of Tex. v. Dir. of Rev.*, 269 S.W.3d 19, 21 (Mo. 2008) (en banc) (citing *Mary S. Riethmann Trust v. Dir. of Rev.*, 62 S.W.3d 46, 48 (Mo. 2001) (en banc)).

199. *St. Louis Police Officers' Ass'n*, 259 S.W.3d at 528 (citing *Nelson v. Crane*, 187 S.W.3d 868, 869-70 (Mo. 2006) (en banc)).

200. *George Weis Co. v. Stratum Design-Build, Inc.*, 227 S.W.3d 486, 489 (Mo. 2007) (en banc) (citing *Cook Tractor Co., Inc. v. Dir. of Rev.*, 187 S.W.3d 870, 873 (Mo. 2006) (en banc)); *St. Louis Police Officers' Ass'n*, 259 S.W.3d at 528 (citing *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. 2005) (en banc)).

201. *Am. Nat'l Life Ins. Co. of Tex.*, 269 S.W.3d at 21 (citing *President Casino, Inc. v. Dir. of Rev.*, 219 S.W.3d 235, 239 (Mo. 2007) (en banc)). When such definitions are not present, the court can also look to definitions contained in statutes concerning the same subject. *Id.* (citing *President Casino, Inc. v. Dir. of Rev.*, 219 S.W.3d 235, 240 (Mo. 2007) (en banc)).

202. *State ex rel. Broadway-Washington Assocs., Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. 2006) (en banc) (citing *Ports Petroleum Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001) (en banc)).

If, however, the statute is determined to be ambiguous when applying a plain meaning read, or if such a reading would lead to an absurd result,<sup>203</sup> a court must look more deeply at the legislation to determine how to construe it. In order to do so, the court will look to extrinsic matters, such as the statute's history, the surrounding circumstances, and the objectives the legislature hoped to accomplish in its enactment.<sup>204</sup> The court will also take into consideration statutes that involve similar or related subject matter (when they shed light upon the meaning of the statute in question).<sup>205</sup>

## 1. The Intent of the USPAP-Compliance Statute

Missouri Revised Statute Section 339.535 reads, "State certified [and] . . . state licensed real estate appraisers shall comply with the [USPAP]. . . ." Generally, the use of the word "shall" connotes a mandatory duty.<sup>206</sup> Therefore, all certified or licensed real estate appraisers are required to follow USPAP. Furthermore, Missouri Revised Statute Section 339.501.1 states that "it shall be unlawful for any person in this state to act as a real estate appraiser, or to directly or indirectly, engage or assume to engage in the business of real estate appraisal . . . without first obtaining a license or certificate issued by the Missouri real estate appraiser commission."<sup>207</sup> Therefore, no appraisals are allowed, except when made by an individual that is required to comply with USPAP.

Clearly, the intent of the legislature, from the plain meaning of the USPAP-Compliance statute and its closely related statutes, as read together, was to ensure that all appraisals made in this state were done in a fashion that conforms to the standards of conduct found within USPAP.

There can be little argument that this statute, when standing alone, is ambiguous. However, when construed with the Good Faith Negotiation statutes, an ambiguous or absurd result may or may not exist. Therefore, this Section will examine extrinsic matters surrounding the USPAP-Compliance statute to help understand the intent of the legislature in a way that will allow us to better construe those statutes together.

Two principal reasons for the enactment of this statute seem apparent. The first is that the legislature is, much like the legislature in *Ad Trend*, at-

203. *Id.* (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. 1998) (en banc)).

204. *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 109 (Mo. App. W.D. 2008) (citing *Cook v. Newman*, 142 S.W.3d 880, 887 (Mo. App. W.D. 2004) (en banc)).

205. *George Weis Co.*, 227 S.W.3d at 489 (citing *Cook Tractor Co. v. Dir. of Rev.*, 187 S.W.3d 870, 873 (Mo. 2006) (en banc)).

206. *St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs*, 259 S.W.3d 526, 528 (Mo. 2008) (en banc) (citing *Bauer v. Transitional Sch. Dist.*, 111 S.W.3d 405, 408 (Mo. 2003) (en banc)).

207. MO. REV. STAT. § 339.501.1 (2000).

tempting only to establish minimum standards and not exclusive or exhaustive standards.<sup>208</sup> The *Ad Trend* court determined that the intent of that statute was to establish minimum requirements in order to lessen the negative impact of billboard advertisements on highways and not to prevent regulation beyond its own requirements.<sup>209</sup> The second principal reason for this statute was to help rectify some of the evils that had led to the S&L Crisis – one of which, as mentioned, had been poor appraisal practice.<sup>210</sup> One additional reason for such a statute would seem to be not only to create minimum standards of appraisal practice but also to foster uniformity in appraisal practice and, therefore, uniformity in appraisal valuations.

Here, the goal of the federal mandate, adopted by the USPAP-Compliance statute, was to create minimum standards of conduct for real estate appraisal. The intent of the two statutes at issue in *Ku* should not be construed in a way that removes other minimum standards of conduct because both standards can work together in the condemnation setting to produce results that both statutes intended to produce – appraisal uniformity and accuracy (from the USPAP-Compliance statute) combined with an equalization of bargaining power (from the Good Faith Negotiation statute).

## 2. The Intent of the Good Faith Negotiation Statute

Missouri requires a court to find that “good faith negotiations” occurred prior to the filing of the condemnation petition.<sup>211</sup> As a part of that requirement, an offer to purchase the targeted property must be made by the condemnor.<sup>212</sup> If an appraisal is used, that offer must be at a value no lower than an appraisal that “shall be made by a state-licensed or state-certified appraiser using generally accepted appraisal practices.”<sup>213</sup>

The plain and ordinary language indicates that the condemnor has to try to purchase the property in lieu of condemnation.<sup>214</sup> The condemnor must make an offer that reflects the value that a state-certified or state-licensed real estate appraiser would place on the property.<sup>215</sup> The purpose of requiring such licensure or certification may lie within a separate Missouri statutory section that allows non-certified and non-licensed individuals who are em-

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208. See *supra* notes 141-47 and accompanying text.

209. State *ex rel.* *Ad Trend v. Platte City*, 272 S.W.3d 201, 205-06 (Mo. App. W.D. 2008).

210. See ASC Appraisal Subcommittee, ASC History, <https://www.asc.gov/default.aspx?id=6> (last visited Oct. 3, 2009) (a congressional subcommittee reported that poor appraisal practices “constituted a prominent factor in the insolvency of hundreds of financial institutions”).

211. MO. REV. STAT. § 523.256 (Supp. 2008).

212. *Id.* § 523.253.1.

213. *Id.* § 523.256(2).

214. See *id.* § 523.256

215. See *id.*

ployees of certain agencies to give appraisals.<sup>216</sup> By requiring such licensure or certification, this statute prohibits the condemnor from relying on appraisals made by interested employees who are not bound by the constraints of USPAP.

Furthermore, the statute goes beyond simply requiring that the condemnor use an appraisal – it actually places the burden of the appraisal being made in conformity with “generally accepted appraisal practices” on the condemnor.<sup>217</sup> If the appraisal is not made using “generally accepted appraisal practices,” the condemnation action gets dismissed, and the condemnor is taxed the targeted condemnee’s costs.<sup>218</sup> Therefore, a condemnor is not intended to be able to isolate itself from its burden by saying, “We shouldn’t be held responsible for expecting the appraisal to be a ‘good’ appraisal.”

Therefore, the intent of this statute is to force the condemnor to negotiate with the landowner and to do so with an offer that reflects the value produced by a relatively neutral individual that is bound by USPAP rules of conduct. The statute is intended to help equalize the bargaining power of the would-be condemnors and condemnees. By equalizing this buying power, it prevents the condemnor from providing overtly low-ball offers.

The benefit, to landowners, of preventing this conduct is two-fold. First and foremost, it prevents the condemnor from forcing the landowner to take a low-valued offer of the property due to the threat of condemnation. Second, and more importantly, it prevents gamesmanship on the part of the condemnor.

In Missouri, “just compensation” for land taken in condemnation is the fair market value at the time of the eventual condemnation.<sup>219</sup> This “gamesmanship” exists where the condemnor makes a low-ball offer expecting the landowner to decline and is then able to advantageously (1) collect additional property taxes during the delay between the offer and the taking (over two years for the Kus), (2) force the property value into the dumps through the phenomenon of condemnation blight,<sup>220</sup> and (3) finally take the property at a greatly reduced appraisal value (at the eventual time of the taking).<sup>221</sup>

216. MO. REV. STAT. § 339.501.5(3)-(5) (2000).

217. MO. REV. STAT. § 523.253.2 (Supp. 2008).

218. *Id.* § 523.256.

219. Washington Univ. Med. Ctr. Redevelopment Corp. v. Gaertner, 626 S.W.2d 373, 375 (Mo. 1982) (citing as examples Conduit Indus. Redevelopment Corp. v. Luebke, 397 S.W.2d 671, 674 (Mo. 1965); St. Louis Housing Auth. v. Barnes, 375 S.W.2d 144, 147 (Mo. 1964); Land Clearance for Redevelopment Auth. v. Massood, 526 S.W.2d 354, 355-57 (Mo. App. W.D. 1975); Harris v. L.P. and H. Construction Co., 441 S.W.2d 377, 384 (Mo. App. W.D.1969)).

220. Harold L. Lowenstein, *Redevelopment Condemnations: A Blight or a Blessing Upon the Land*, 74 MO. L. REV. 201 (2009).

221. *See id.*

In considering further extrinsic matters, one should examine the previously discussed origins of these statutes.<sup>222</sup> On the tails of the Sunset Manor “disaster”<sup>223</sup> and the *Kelo* decision, the intent of the legislature was to put procedural safeguards in place to keep condemners more honest and create a system that is more fair to condemnees.

### 3. Reading the Good Faith Negotiation and USPAP-Compliance Statutes Together

The primary question here concerns what standards a condemnation appraisal must meet. The Good Faith Negotiation statute should be construed in a way that defines the standard of “generally accepted appraisal practices” as those standards that are generally accepted in the real estate appraisal field. Missouri requires all real estate appraisers to follow USPAP,<sup>224</sup> and, because the appraisals are required to be made by licensed or certified real estate appraisers using “generally accepted” standards, condemnation actions should be no exception. The best construction of this statute, if the court were seeking to avoid a requirement of a “to-the-letter” following of USPAP, would be to require “substantial” compliance with USPAP as a part of “generally accepted appraisal practices” and leave it to the trial court as a factual determination.

Furthermore, even if the appraisals used by condemners were not required to comply with USPAP standards, this new statute should not be construed to absolve appraisers for non-compliance with USPAP. Arguably, in stating that “an appraiser [in a condemnation action] is not required to adhere to USPAP,”<sup>225</sup> the court has done exactly that – prevented disciplining of appraisers employed for condemnation purposes for derogation from their USPAP duties. Furthermore, the court’s own “More-Specific Statute Prevails” statutory construction tool cuts against such a construction, as the USPAP-Compliance statute is the more specific statute when it comes to appraiser discipline because, in that case, appraiser discipline is the subject matter.

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222. *See supra* Part III.A.

223. Whitman, *supra* note 4, at 756 (“[I]ndeed, 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.”).

224. MO. REV. STAT. § 339.535 (2000).

225. *Kansas City v. Ku*, 282 S.W.3d 23, 28 (Mo. App. W.D. 2009).

#### 4. “More-Specific Statute Prevails” Causes an Absurd Result and Confounds Legislative Intent

It may be argued that the inquiry into whether “good faith negotiation” has occurred is so unique to the situation of simply determining whether the court should hear or dismiss the condemnation that we should not consider the validity of an underlying appraisal. However, because the court is defining what “generally accepted appraisal practices” means within this statute, it is also defining what it means for other statutes. By construing these statutes to require something less than USPAP compliance, the court opens the door to these appraisals being admissible as evidence of actual value at a later condemnation proceeding. This happens through the operation of Missouri Revised Statute Section 523.001, which defines the way in which property will be valued at an eventual condemnation. This statute defines a method of reaching fair market value that requires the use of “generally accepted appraisal practices.”<sup>226</sup>

Therefore, by reading “generally accepted appraisal practices” not to require compliance with USPAP, through the rule of statutory construction that “[s]tatutes relating to the same subject matter should be construed consistently” (and, therefore, cases defining terms within one statute can be used to interpret related statutes using the same language),<sup>227</sup> the court effectively makes condemnors able to use these non-USPAP-compliant appraisals to establish “fair market value” of taken land despite the fact that all appraisals in non-condemnation contexts must comply with USPAP. This causes a disconnect between the statutory definition of “fair market value” and the real world of “fair market value.”

Additionally, a question arises as to whether appraisals done on behalf of the potential condemnee still have to comply with USPAP. The court’s holding, that “an appraiser in a condemnation proceeding . . . is not required to adhere to USPAP,”<sup>228</sup> certainly points to a negative answer – that appraisers working on behalf of condemnees also do not have to follow USPAP. The court should not carve out an area of otherwise established law on the conduct of real estate appraisers and replace it with an unsettled and untested “generally accepted” standard that takes little guidance with those appraisal rules. This will only add to transactional costs and damage that can result from condemnations.

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226. MO. REV. STAT. § 523.001(1) (Supp. 2008).

227. See *State v. Jeffries*, 272 S.W.3d 883, 884 (Mo. App. S.D. 2008) (citing *Reed v. Dir. of Rev.*, 184 S.W.3d 564, 567 (Mo. 2006) (en banc)) (construing the terms “affront” and “alarm” from cases defining the term in other statutory provisions from the one in question); *Cook v. Newman*, 142 S.W.3d 880, 892 (Mo. App. W.D. 2004) (en banc) (citing *Weston Point Resort Condo. Owners’ Ass’n, Inc. v. Floro*, 796 S.W.2d 928, 930 (Mo. App. S.D. 1990)).

228. *Ku*, 282 S.W.3d at 28.

Simply put, this legislative act was intended to make things fairer for would-be condemnees, and the court's construction of the statute clearly cuts against such a fairness concern. Now, appraisals in condemnation are not required to follow the standards that all other appraisals are required to follow. Such a double standard for appraisals appears to be an absurd result that contravenes the intention of the legislature in its enactment. Interestingly, such a determination may very well place Missouri's laws at odds with FIRREA.

### *B. Pure Speculation Regarding the Court's Reasons Behind Its Broad Holding*

The only immediately apparent reasons for the court's holding with regard to the interaction of the statutes in question are (1) judicial economy and (2) expedient and inexpensive condemnations (for the condemnor and, consequently, the taxpayer).

The court's interest in keeping such extensive inquiry into the to-the-letter compliance of an appraisal with USPAP is notable, as it requires courts to effectively become experts on the rules governing appraisal practice. Such expertise is probably best left to the Missouri Real Estate Appraisers Commission, which deals in the discipline of appraisers. However, this concern, while valid, should ultimately give way to the public policy concerns that lay behind the legislative acts in question.

Additionally, the court must be concerned with the added expense that such a compliance requirement would place upon a city. In the event that an appraisal fails to conform to "generally accepted appraisal practices," a city would be saddled with the costs that the condemnee incurred in defending the condemnation action to that point. However, the party that can most easily avoid this cost is most assuredly the condemnor, who can keep an eye on its own real estate appraiser employees, agents, and contractors.

The final concern is the most compelling. It is well documented that re-development projects take significant amounts of time and, during their development life (including their extensive pre-condemnation stage), cause great damage to individuals within the area. The longer such a project takes to come to the eventual condemnation, the more condemnation blight will burden the land involved. Therefore, causing additional delay by allowing extensive fact-inquiry into the validity of an appraisal may seem burdensome. However, creating an entirely new standard for appraisers in condemnation actions – and allowing deviation from standards of conduct required in non-condemnation appraisals – is not the answer. Additionally, such an argument should fail based on the fact that the condemnor is, again, the least-cost avoider. By simply monitoring its appraisers, the condemnor can prevent the later dismissal of their condemnation actions.



### C. *Sufficiency of Evidence Holding*

First, this Section will examine the court's findings of sufficiency of evidence with regard to "generally accepted appraisal practices." Then it will examine its findings of sufficiency of evidence with regard to USPAP compliance.

#### 1. "Generally Accepted Appraisal Practice" Sufficiency

The court points to the following facts to hold that the "generally accepted appraisal practices" standard was met in this case: Ferguson testified (1) that Severeid discussed the three standard approaches to appraising property before selecting an approach to use, (2) that Severeid's appraisal was done in accordance with "generally accepted appraisal practices," and (3) that he approved of Severeid's methodology and did not notice anything that would cause him to believe the appraisal did not comply with USPAP.<sup>229</sup>

The first point that the court relied upon seems faulty due to Missouri Revised Statute Section 523.001, which defines "Fair Market Value" for condemnation actions under Chapter 523 (the chapter governing condemnation proceedings) as "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>230</sup>

On close examination, it is notable that valuation must be done after considering (1) comparable sales, (2) capitalization of income, (3) replacement cost less depreciation, and, (4) as appropriate, the value based on highest and best use – and that valuation must be done using "generally accepted appraisal practices."<sup>231</sup> The nuance of the language of this statute is that this valuation must consider all of those things *and* do so using these practices. Therefore, it should be argued that simple fulfillment of the requirement that those things be considered should not, alone, fulfill the "generally accepted appraisal practices" compliance requirement, or such a requirement would not have been included. Furthermore, one must give meaning to the fact that the legislature included the requirement of "generally accepted appraisal practices" in addition to a requirement to consider the various methodologies because (1) "[p]resumably, the legislature intends that every word, clause, sentence, and provision of a statute have effect"<sup>232</sup> and (2) "a presumption exists

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229. *Id.*

230. MO. REV. STAT. § 523.001(1) (Supp. 2008).

231. *Id.*

232. *Cook*, 142 S.W.3d at 892 (citing *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 252 (Mo. 2003) (en banc)).

that the legislature does not insert idle verbiage or superfluous language in a statute."<sup>233</sup>

The second and third points relied on by the court seem questionable, as they include bare assertions and opinions from Ferguson, an individual with a large incentive for bias. Such a bias is based on the fact that he was the original city employee who signed the offer to the Kus and the fact that he would be interested in carrying out the condemnation to further the project. However, the fact that these points are based on the opinion of someone who is arguably an expert should be sufficient, given the nature of the proceeding, so long as cross-examination is allowed to expose weak points in the conclusion. That being said, the weighing of his testimony, including his bias, would be something for the trial court and could, conceivably, lead to a conclusion of "generally accepted appraisal practices."

## 2. USPAP Compliance Factual Sufficiency

The court pointed to the following facts to hold that the USPAP-Compliance standard was met in this case: first, the arguably "boilerplate" assertions of USPAP compliance found within the appraisal itself;<sup>234</sup> second, Ferguson's testimony (1) that Severeid discussed the three standard approaches to appraising property before selecting an approach to use, (2) that Severeid's appraisal was done in accordance with generally accepted appraisal practices, and (3) that he approved of Severeid's methodology and did not notice anything that would cause him to believe the appraisal did not comply with USPAP.<sup>235</sup>

Much like the last section, each of these items includes opinion testimony of someone who is arguably an expert, and any bias regarding these matters should be weighed by the court in making a factual determination. Setting aside the factual determination of the trial court, which seems to have engaged in limited inquiry and given significant weight to seemingly biased testimony, the court's opinion in *Ku* seems reasonable, as the decision of whether to give Ferguson's testimony weight was not before the appellate court.

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233. *Id.* (citing *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 252 (Mo. 2003) (en banc)).

234. *See supra* notes 166-68 and accompanying text.

235. *Kansas City v. Ku*, 282 S.W.3d 23, 26 (Mo. App. W.D. 2009).

## VI. CONCLUSION

While the ultimate decision of the court in *Ku*, when based on factual sufficiency, is the correct decision under Missouri law, the court's broad holding contravenes legislative intent, thereby sidestepping decades of statutory construction law. Additionally, this holding works against a large number of public policy concerns, including fairness in providing property valuations (which can now more easily deviate from those in the free market and thereby allow condemnors to bargain in bad faith), uniformity (for the same reasons), and the trickle-down effect that it will have on substantive condemnation valuations by allowing non-USPAP-compliant appraisals to taint the final valuation process.

This is an unfortunate holding for Missouri private property rights, and it is disappointing to see such a factually poor test case<sup>236</sup> harm the potential for a good step in Missouri law. This holding will greatly break down the bargaining power that the legislature had intended to place in the hands of would-be condemnees by requiring "good faith negotiation." For now, the choice faced by the "average Joe" landowner who owns land that is under the threat of condemnation and receives an offer supported by a USPAP-deficient appraisal is to either (1) sit under a declaration of blight, waiting for his property to decline in value due to condemnation blight and for the condemnor to perform an eventual condemnation, thereby receiving "just compensation" at that depressed value, or (2) sell to the condemnor based on an appraisal valuation that is substantively unfair, in that it does not have to comply with the standards set out for all free-market appraisals.

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236. "Factually poor" in that the sufficiency determination prevents review of the underlying legal principle.

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