

Eminent Domain Law

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in Missouri

Questions arise as appraisers work to comply with new Missouri law

As fallout from the U.S. Supreme Court decision on *Kelo v. New London*, individual states have passed statutes that change government eminent domain activities.

While the Supreme Court upheld the right of government to acquire property rights, it also declared that each state may interpret this law. Many states have passed statutes that change eminent domain. While these new statutes reflect the current concerns of the citizens, they also have an effect on the methods used by eminent domain professionals and raise a number of issues. We must comply with our individual state's laws. These laws must be interpreted by a number of groups: judges, lawyers, the acquiring entities that have the power of eminent domain and the acquisition professions – right of way agents, appraisers and support personnel.

The biggest adjustment for appraisers affected by the new Missouri eminent domain law (Missouri HB-1944) pertains to the Income Approach (523.001(1)). Prior to this law, federal legislation would not allow this approach to be applied (see Yellow Book), although it has sneaked into eminent domain courtrooms via mineral valuation.

The new Missouri law allows these three traditional approaches:

- 1) Capitalization of Income
- 2) Sales Comparison Approach
- 3) Replacement Cost-Less-Depreciation

The new law allows these three approaches to be used "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." This begs the

question: In the case of a federally-funded project, is the Income Approach allowed?

In authorizing appraisers to use the Income Approach, as well as "using generally accepted appraisal practices," the state of Missouri has raised an entirely new set of concerns.

The opinion that follows is based upon 20 years of experience in market and eminent domain appraising. There are no generally accepted appraisal practices, neither for research nor for reporting. I do not say this lightly, having recently seen a Letter of Opinion without certification attached, from an Appraisal Institute member—one who teaches ethics! What is accepted from region to region and market to market varies wildly. This lack of uniform standards is steadily eroding appraiser professionalism in general.

Allowing the use of the Income Approach has problems. The sales comparison and the replacement-less-depreciation approaches are historical – they reflect the facts of the past, hopefully the recent past. However, the capitalization of income, also called the Income Approach, reflects the present value of future benefits based upon assumptions to materialize in the future. The new Missouri law allows the income approach to be the sole approach. While this may be legal per the changes in Uniform Standards of Professional Appraisal Practice (USPAP), this clause in the law is incomplete and misleading. All approaches should be provided or attempted, if applicable. Most practicing appraisers with years of experience will not, in good conscience, use just one method. The ongoing appraiser's dilemma is rationalizing payment received for an appraisal compared to the amount of research required to meet standards as s/he works to write a credible report. Those with low standards will do the least amount of work, knowing full well how

the appraisal will be used. Some seasoned appraisers participate in this arena of low standards because they believe their liability is covered by the exclusive use clause (whereby no one other than the client sees the appraisal) in the “limiting conditions and certification.”

The law also requires that one disclose the basis for the condemning authority’s eminent domain offer, an appraised value (523.253 -2(1)): “Any condemning authority shall, at the time of the offer, provide the property owner with an appraisal.” Eminent domain entities in Missouri must show the property owner the basis for their offer; this is usually an appraisal conducted by the condemning authority. In essence, this makes the appraisal a public document, since someone other than the client will see it and may make a judgment based upon it. There are numerous questions that this raises. What information does the appraiser owe the tract owner? How can the appraiser conduct a well-supported, non-biased report in this circumstance? Most appraisers do not want their appraisal methods and resultant values made known to the general public. This is especially true in Missouri, a “closed sale document” state. No sales amounts

are disclosed to the assessor’s office or with deeds at the recorder’s office. Some appraisers do not want their data (or lack thereof) known to their competitors. Some appraisers believe that they have ownership of sales known only to them and prefer to keep the rest of the area appraisers in the dark.

In one instance, a buyer threatened a lawsuit if his sale amount was disclosed in an eminent domain appraisal, even though the sale was confirmed by the seller and the use of this sale was approved by the seller! Should a party to a sales transaction have the right to claim ownership of the information? If anyone should have access to sales information, it is the public, not the market players. These are the facts of Missouri eminent domain appraisal life; as they stand, they distort the values reported in the market and prevent appraisers from disclosing a full, unbiased and transparent view of the market to buyers. The argument for privacy of personal transactions is a hollow argument, supported by those who want to have an advantage in the market place. If the Missouri real estate market was opened and disclosure made mandatory, this would make the playing field level and equal to all.

Right of Way and Legal Process

Project Timeline - Best Case Scenario with Condemnation

	Number of Days												
	1	30	60	90	120	150	180						
Engineering plans checked and legal acquisition documents prepared ensuring plans match legal documents. Ownership & Encumbrances verified (15 days)	X												
Initial mailing: Notice & Purpose letter - agent		X											
Agent gets appraisals assigned		X											
Owner to submit realignment request to acquiring agency			X										
Appraisal received				X									
Agent makes Offer letter & legal documents, Agent Makes offer					X								
Negotiation —> to court house steps & beyond!					X								
Soonest date able to condemn - 30 day minimum from Offer (Missouri Law states 60 days from Notice/Purpose letter)						X							
Court Sets Hearing Date - Legal							X						
Hearing Commissioner sets 10-day minimum notice to property owner								X					
Condemnation commissioner decides Money in to court - 45 days												X	

“Should a party to a sales transaction have the right to claim ownership of the information?”

There are currently three types of value in eminent domain acquisition in the state of Missouri:

(523.001.(1))

This provision states the type of value, fair market value and the approaches used to develop this value for total acquisitions. Fair market, as such, is not specifically defined. Is this the same as market value as defined by federal regulations? This provision states that partial acquisitions are to use the value prior to the take less the value after the take. There is no mention of “special benefits” to the after value. Should the acquisition agency bill the tract owner if new road construction makes the owner’s property a convenience store site? There is no mention of any “uneconomic remnants” and how they are handled, yet these happen with most street realignments. Often a site is just not buildable in the after condition and the acquiring agency does not want the site.

(523.001.(2))

This new “heritage value” is applied to both residential and commercial property (100 employees or less) that has been in the same family for 50 or more years. Heritage value is a 50% addition to fair value, either total takes or partial acquisitions. The evidence of family ownership of 50% or more must be established by the property owner to the commissioners or jury. This implies that this is an automatic condemnation.

(523.001.(3))

This new “homestead taking value” focuses on the owner’s primary residence. No definition of primary is included. Homestead taking is a 25% addition to fair value, for total takes or partial acquisitions. This law is clouded by the clause stipulating that the area acquired has to prevent the owner from utilizing the property in substantially the same way as before the acquisition, and must also be within 300 feet of the owner’s primary residence.

There is also confusion over who may apply the homestead or heritage values. Is the acquiring agency to negotiate with this in mind or is this the duty of the court? (523.061) “After the filing of the commissioner’s report, the circuit judge presiding over the condemnation proceeding shall apply the provisions of section 523.039.” The docket will be very busy if this is only applied by the judge.

There may be an instance where heritage value and homestead value apply. One cannot combine these two values – there can be no adding heritage value and homestead value into a 75% of fair value plus fair value; it is either 25% or 50% above fair value (523.039): “That compensation that value that yields the highest compensation is applicable to that type of taking.”

This is just a sampling of ongoing questions. These new state statutes are a fact of life that we need to address and comply with. More questions arise everyday, which makes our work interesting. I am especially interested to see what will happen in regions split by state lines, where each state has different rules for eminent domain. Are we confusing the public enough? Surely some of the rules will have to be settled in a court of law to gain acceptance. Which ones? These changes will test our ability as an industry to keep abreast of which laws apply to the states where we practice. We have to continue to adapt and do the right thing.

Good luck to all appraisers facing these changes. ●

References:

Office of Ombudsman in the Office of Public Counsel within the Department of Economic Development at www.mo-opc.org .
State of Missouri’s HB-1944 law at www.moga.state.mo.us/. (Click on Join Bill Tracking and type bill number: hb-1944.)