

# Environmental Issues in Condemnation



Assuring the condemnor the same environmental information as the ordinary real estate buyer

*By Mary B. Bonacorsi*



**T**he current economic climate has spawned a host of municipal development projects, ranging from public works to urban redevelopment projects in partnership with private enterprise. Over the past several years, Missouri cities have undertaken scores of development projects and the pace of development is continuing.

Virtually all such development involves land acquisition from private parties. Most of the time, the parties reach agreement on price and other terms. Understandably, affected landowners sometimes may balk at the price, at the project, or both. Then the use of eminent domain is necessary to ensure that the project moves forward.

When the municipality and the affected landowner reach agreement on land acquisition, it is an ordinary real estate transaction. The parties discuss and agree to allocate the environmental risks of the acquisition. Their goal is to quantify their relative potential exposure and liability under the constantly growing maze of environmental law and regulation.

In private transactions, the seller will provide the buyer with information such as site history, copies of permits, location of underground tanks and other pertinent environmental information. Typically, the real estate contract permits the buyer to conduct environmental testing before closing and conditions closing upon a favorable environmental report. If testing discloses environmental

problems, the buyer can walk away or the parties may renegotiate price and other terms. This article discusses how a municipality can assure itself the same options as a real estate buyer when the use of eminent domain is necessary.<sup>1</sup>

A condemnor must have at least the same environmental reports on the property as an ordinary real estate buyer and the same opportunity to abandon the transaction, or reestablish price if the property proves to be contaminated. Without timely knowledge of environmental problems the condemnor bears the risk of acquiring contaminated property. Dealing with attendant cleanup issues may substantially increase the project's cost for land and delay construction while environmental issues and liabilities are sorted out.

For these purposes, a key distinction between condemnation and an ordinary real estate transaction is that, by definition, condemnation is the last resort. Missouri law requires the condemnor to make a good faith effort to acquire the property by contract. It permits exercise of the power of eminent domain only when the condemnor

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and the landowner cannot agree upon terms for property acquisition.

### **The Problem is Access**

Determining the environmental status of the property means having access and, potentially, the right to conduct environmental testing, including boring and extraction of soil samples. Even after resort to condemnation is necessary, it still makes sense to ask for the right of entry and to make an additional effort to reach agreement with the landowner, at least on this issue. It may be possible to reach such an agreement if the condemnor agrees to pay separate consideration for the right of entry, to restore the property disturbed by testing and/or share test results.

If the landowner has refused to sell, frequently he will refuse to allow access for environmental inspection and testing. Landowners recognize the leverage that the issue of pre-condemnation access provides. Moreover, delaying discovery of environmental contamination may mean a higher damage award in the short run. So the question is how and when the condemnor can legally obtain access to the property without liability to the landowner for trespass or inverse condemnation.

### **Pre-condemnation Access is Limited**

Several Missouri statutes authorize the state highway commission and railroad corporations to enter private property before condemnation for survey purposes, i.e., to determine the most advantageous route and to obtain an accurate legal description of the property to be taken. [Sections 227.120 and 388.210 R.S.Mo.] The Missouri Supreme Court has extended this right to other condemning authorities as a necessary incident to the condemnation process.

The right to conduct a pre-condemnation survey arguably also permits a general environmental inspection of the property, i.e., a Phase I environmental inspection. However, Missouri courts have held the right to do a pre-condemnation survey does not include the right to drill holes and remove soil or other

materials from the property for testing purposes. Absent the owner's consent, a pre-condemnation entry to drill and take soil samples has been considered an unconstitutional taking.

### **Civil Discovery Permits Post-Filing Access**

After the filing of the condemnation petition, however, the situation is different. In Missouri, the ordinary rules of civil procedure apply when consistent with the rules governing condemnation. Like most states, Missouri rules of civil procedure allow the condemnor to conduct discovery. The right to conduct discovery includes the right to obtain documents relating to the environmental status of the property, to inspect the property, to perform tests and take samples when such testing and sampling may produce relevant information. Certainly, the presence or absence of environmental contamination is a proper subject for discovery in condemnation actions.

At a minimum, environmental status may affect the property's fair market value and, consequently, the amount of just compensation to be paid for the taking. If the property is seriously contaminated, its environmental status may affect the condemnor's plans for the property and, in extreme cases, prompt the condemnor to abandon the condemnation entirely, just as any potential buyer may reconsider the transaction upon discovery of serious environmental problems prior to closing.

Given the need for "timely" environmental information, the condemnor should seek access for environmental inspection and testing at the earliest possible moment. A discovery motion can be filed simultaneously with the condemnation petition and heard when the Court hears evidence on the petition, typically thirty to sixty days after filing. While the discovery rules permit such testing, the Court also has discretion to condition testing upon adequate measures to protect the landowner's rights. For example, the Court may restrict the time and exact location of such testing to avoid interference with landowner's use and enjoyment of the property

and/or require the condemnor to restore property disturbed by the testing and to repair any damages caused by the testing.

In a hotly contested condemnation, the landowner frequently resists the condemnor's right to perform tests at such an early stage of the proceedings. The landowner will seek to delay such testing to avoid discovery of information that may reduce his damages. He may meet with some success. Missouri courts have limited the use of discovery before the initial hearing on the condemnation petition, allowing such discovery only on issues related to the proper exercise of the power of eminent domain, i.e., whether the condemnor has authority to condemn the property. In contested cases, discovery on issues related to the value of the property may not be permitted before the Court decides the condemnor's authority to condemn and enters an order of condemnation.

### **Timing is Everything**

After the initial hearing and entry of an order of condemnation, the Court appoints condemnation commissioners to view the condemned property and assess damages.

The tension between the interests of the condemnor and the landowner is greatest during the time between the entry of the order of condemnation and this assessment of damages. If the landowner is successful in delaying discovery before damages are assessed, the damage award will not reflect the potentially adverse impact of environmental contamination on the value of the property.

The condemnor has several choices at this stage of the proceedings. It may or may not request a jury trial on the question of damages. In the absence of a clean environmental report, failure to request a jury trial in a timely manner following the commissioners' award is usually a mistake.

Also, the condemnor may or may not pay the amount of the damage award into court to obtain title to and possession of the property. Payment of the damage award before an environmental assessment is another potential

mistake. If the condemnor discovers serious environmental contamination after it obtains possession, it will have the practical, if not legal, responsibility to deal with cleanup issues in the course of constructing the project.

Its only alternatives after the initial "price" is set by commissioners are to pursue its remedies against the former owner under the environmental laws and/or to proceed to a jury trial on damages based on a valuation which factors in the effect of contamination on market value. Once the condemnor deposits the commissioners' award, however, the former owner has the right to obtain payment from the Court.

At a minimum, the risk to the condemnor under either of these scenarios is an uncollectible judgment against a former owner who has long since received payment of the commissioners' award. This is a risk the typical real estate buyer does not face. A well-advised buyer has the contractual right to inspect and test the property and to refuse to close without price concessions if the environmental report is unfavorable.

A condemnor may conduct environmental tests "after" entry of the commissioners' award whether or not it chooses to pay for and take possession of the property. Obviously, if it takes possession, no court involvement is necessary for such testing. If it chooses to delay payment, it may conduct environmental tests through discovery assuming a jury trial on damages has been requested.

However, Missouri courts have not considered whether such testing can be compelled "before" entry of the commissioners' award. Until the issue is decided, the condemnor should continue to seek early access. Only by obtaining such access can the condemnor protect itself against the risk of an unrealistically large commissioners' award for a contaminated parcel. Like a buyer of real estate who discovers the subject property is environmentally contaminated and wants to renegotiate the price, the condemnor should know if there are environmental problems before the price is set by the condemnation commissioners. —>



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Both conferences will be held at the Galt House Hotel, Fourth Street at River, Louisville, Kentucky 40204. For hotel reservations, call (502) 589-5200. Mention the conferences to receive special room rates.

### Obtain Assessment Before Taking Title

In any event, the condemnor should avoid payment of the commissioners' award before knowing the results of environmental testing. Few buyers would close a real estate purchase without knowing the environmental status of the property, particularly if there is any realistic expectation of environmental contamination. Payment of the commissioners' award is equivalent to closing the purchase contract. Upon such payment, the condemnor acquires title to the condemned property, becomes potentially responsible for cleanup costs and has limited rights to abandon the condemnation.

By delaying payment of the commissioners' award until environmental reports are completed, the condemnor preserves its right to abandon the condemnation proceedings on account of environmental contamination and avoids unknowing assumption of legal or practical responsibility for environmental remediation.

If it chooses to proceed after determining the extent of contamination, the condemnor can better evaluate its alternatives to minimize the cost and delays to the project on account of environmental contamination. ■

*Mary Bonacorsi is a litigation partner in the St. Louis office of Thompson Coburn law firm. She has diverse experience and expertise in condemnation matters, having represented condemning authorities as well as landowners. She has resolved eminent domain matters for redevelopment projects throughout the St. Louis metropolitan area and is now primarily responsible for condemnation proceedings in southern Illinois on a 17-mile expansion of the St. Louis Metrolink rapid transit system. Ms. Bonacorsi is a graduate of Washington University School of Law and is an member of IRWA Chapter 37.*

-Notes

<sup>1</sup>In an ordinary real estate transaction, the buyer can sometimes protect himself from environmental liability by obtaining representations and warranties from the seller as a matter of contract. The condemnor has no such contractual remedies available in the event of environmental problems, making prior knowledge of such problems even more critical.