

# **CONDEMNATION RIGHTS:** **PUBLIC AND PRIVATE TAKINGS**

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## **I. PUBLIC TAKINGS:**

### **A. CONSTITUTIONAL AUTHORITY:**

1. **Article I, Section 10: Due Process - No loss of Property.**

*Mo. Const. Art. I, § 10 (2007)*

*That no person shall be deprived of life, liberty or **property** without due process of law.*

2. **Article I, Section 26: No taking of private property without just compensation:**

*Mo. Const. Art. I, § 26 (2007) Compensation for property taken by eminent domain -- condemnation juries -- payment -- railroad property*

*That **private property** shall not be **taken or damaged** for **public use** without **just compensation**. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.*

3. **Article I, Section 28: No taking unless: Public Use/Necessary**

*Mo. Const. Art. I, § 28 (2007)*

*§ 28. Limitation on taking of private property for private use -- exceptions -- public use a judicial question*

*That **private property** shall not be taken **for private use** with or without compensation, unless by consent of the owner, **except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law**; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be **judicially determined without regard to any legislative declaration that the use is public**.*

PUBLIC USE - EXCEPT...

Private “ways” of necessity AND drains and ditches (agriculture/sewers)

PROOF of PUBLIC USE: (NO DEFERENCE)

Any benefits that accrue to individuals are incidental to the public purpose.

PROOF of NECESSITY:

- i. Judicial Determination despite legislative determination
- ii. Necessity: Deference: unless...fraud, collusion

NEW LAW: CHAPTER 523.....no change to the constitution!!!

4. **Article VI, Section 21:**

Remove blight via E/D and transfer to private developer.

*Mo. Const. Art. VI, § 21 (2007)*

*§ 21. Reclamation of blighted, substandard or insanitary areas*

*Laws may be enacted, and any city or county operating under a **constitutional charter** may enact ordinances, providing for **the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas**, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by **eminent domain**, of property for such purposes, and when so taken the fee simple title to the property shall vest in the **owner, who may sell or otherwise dispose of the property** subject to such restrictions as may be deemed in the public interest.*

CONSTITUTIONALLY CHARTERED CITIES ONLY.

PUBLIC USE: The removal of BLIGHT

PROOF OF BLIGHT: Blight Determination: DEFERENCE

Ordinance finding "blight" is PRESUMED VALID unless clear proof by challenger that induced by fraud, collusion or bad faith or that the finding was arbitrary or not fairly debateable. 523.261

OR THAT FINDING WAS INCOMPLETE: Centenne Case.

NEW LAW: Codifies existing caselaw on "blight".

## **B. LEGISLATIVE AUTHORITY.**

1. Statutes (or city charters) have to grant the power (power is inherent in the state and can be granted only by the legislature.)
  - a. Authorizing Statutes must exist...both in name of eminent domain and in procedure.
  - b. Strict Construction of powers...Eilers, but not to destroy the legislative purpose? Riley 417/1 (MO 1967)
  - c. WHO'S GOT IT; WHO Doesn't ???  
Roads, Parks, Utilities, Schools, Airports  
Third class case study.
2. Ordinances - Authority granted by the entity itself.
  - a. Ordinances presumed valid
  - b. Ordinances/Redevelopment plans must be adhered to  
Terrell v. Nicholls 719/862( Mo ED 1986)

## **C. JUDICIAL AUTHORITY: COURT PROCEDURES**

1. Supreme Court Rule 86 Requirements:
  - a. Offer by condemning authority
  - b. Pleadings...
  - c. Attorneys for the Unknown
  - d. Publication
2. Chapter 523 (Standard Condemnation Legislation in Missouri)

*§ 523.010. Lands may be condemned, when--**petition--parties--**power of public utility to condemn certain lands, limitation*

*1. In case land, or other property, is sought to be appropriated by any road, railroad, street railway, telephone, telegraph or any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power, including the construction, when that is the case, of necessary dams and appurtenant canals, flumes, tunnels and tailraces and including the erection, when that is the case, of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations or any oil, pipeline or gas corporation engaged in the business of transporting or carrying oil, liquid fertilizer solutions, or gas by means of pipes or*

*pipelines laid underneath the surface of the ground, or other corporation created under the laws of this state for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid, or in the case the owner is incapable of contracting, be unknown, or be a nonresident of the state, such corporation may apply to the circuit court of the county of this state where such land or any part thereof lies by petition setting forth the general directions in which it is desired to construct its road, railroad, street railway, telephone, or telegraph line or electric line, including, when that is the case, the construction and maintenance of necessary dams and appurtenant canals, tunnels, flumes and tailraces and, when that is the case, the appropriation of land submerged by the construction of such dam, and including the erection and maintenance, when that is the case, of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipeline, liquid fertilizer solution pipeline, or gas line over or underneath the surface of such lands, a description of the real estate, or other property, which the company seeks to acquire; the names of the owners thereof, if known; or if unknown, a pertinent description of the property whose owners are unknown and praying the appointment of three disinterested residents of the county, as commissioners, or a jury, to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such road, railroad, street railway, telephone, telegraph line, or electrical line including damages from the construction and maintenance of necessary dams and the condemnation of land submerged thereby, and the construction and maintenance of appurtenant canals, flumes, tunnels and tailraces and the erection and maintenance of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipeline, or gas line over or underneath the surface of such lands; to which petition the owners of any or all as the plaintiff may elect of such parcels as lie within the county or circuit may be made parties defendant by names if the names are known, and by the description of the unknown owners of the land therein described if their names are unknown.*

*2. If the proceedings seek to affect the lands of persons under conservatorship, the conservators must be made parties defendant. If the present owner of any land to be affected has less estate than a fee, the person having the next vested estate in remainder may at the option of the petitioners be made party defendant; but if such remaindermen are not made parties, their interest shall not be bound by the proceedings.*

*3. It shall not be necessary to make any persons party defendants in respect to their ownership unless they are either in **actual possession of the premises to be affected claiming title or having a title of the premises appearing of record** upon the proper records of the county.*

*4. Except as provided in subsection 5 of this section, nothing in this chapter shall be construed to give a public utility, as defined in [section 386.020, RSMo](#), or a rural electric cooperative, as provided in chapter 394, RSMo, the power to condemn property which **is currently used by another provider of public utility service**, including a municipality or a special purpose district, when such property is used or useful in providing utility services, if the public utility or cooperative seeking to condemn such property, directly or indirectly, will use or proposes to use the property for the same purpose, or a purpose substantially similar to the purpose that the property is being used by the provider of the public utility service.*

*5. A public utility or a rural electric cooperative may only condemn the property of another provider of public utility service, even if the property is used or useful in providing utility services by such provider, if the condemnation is necessary for the public purpose of acquiring a nonexclusive easement or right-of-way across the property of such provider **and only if the acquisition will not materially impair or interfere with the current use of such property by the utility or cooperative and will not prevent or materially impair such provider of public utility service from any future expansion of its facilities on such property.***

6. If a public utility or rural electric cooperative seeks to condemn the property of another provider of public utility service, and the conditions in subsection 4 of this section do not apply, this section does not limit the condemnation powers otherwise possessed by such public utility or rural electric cooperative.

**§ 523.039. Just compensation for condemned property, amount**

*In all condemnation proceedings filed after December 31, 2006, just compensation for condemned property shall be determined under one of the three following subdivisions, whichever yields the highest compensation, as applicable to the particular type of property and taking:*

*(1) An amount equivalent to the fair market value of such property;*

*(2) For condemnations that result in a homestead taking, an amount equivalent to the fair market value of such property multiplied by one hundred twenty-five percent; or*

*(3) For condemnations of property that result in any taking that prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking and involving property owned within the same family for fifty or more years, an amount equivalent to the sum of the fair market value and heritage value. For the purposes of this subdivision, family ownership of property may be established through evidence of ownership by children, grandchildren, siblings, or nephews or nieces of the family member owning the property fifty years prior to the taking; and in addition, may be established through marriage or adoption by such family members. If any entity owns the real property, members of the family shall have an ownership interest in more than fifty percent of the entity in order to be within the family line of ownership for the purposes of this subdivision. The property owner shall have the burden of proving to the commissioners or jury that the property has been owned within the same family for fifty or more years.*

§ 523.001. Definitions

For the purposes of this chapter, the following terms shall mean:

(1) "Fair market value", 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. If less than the entire property is taken, fair market value shall mean the difference between the fair market value of the entire property immediately prior to the taking and the fair market value of the remaining or burdened property immediately after the taking;

(2) "**Heritage value**", the value assigned to any real property, including but not limited to real property owned by a business enterprise with **fewer than one hundred employees**, that has been owned within the same family for **fifty or more years**, such value to be **fifty percent of fair market value**;

(3) "**Homestead taking**", any taking of a dwelling owned by the property owner and functioning as the owner's primary place of residence or any taking of the owner's property **within three hundred feet of the owner's primary place of residence** that prevents the owner from utilizing the property in **substantially the same manner as it is currently being utilized**.

**§ 523.040. Appointment of commissioners -- duties -- notice of property viewing**

1. The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be residents of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, **within forty-five days after appointment by the court**, which forty-five days may be extended by the court to a date certain with good cause shown, **after applying the definition of fair market value contained in subdivision (1) of section 523.001**, and after having viewed the property, shall return to the clerk of such court, under oath, their report in duplicate of such assessment of damages, setting forth the amount of damages allowed to the person or persons named as owning or claiming the tract of land condemned, and should more than one tract be condemned in the petition, then the **damages allowed to the owner, owners, claimant or claimants of each tract, respectively, shall be stated separately**, together with a specific description of the tracts for which such damages are assessed; **and the clerk shall file one copy of said report in his office and record the same in the order book of the court, and he shall deliver the other copy, duly certified by him, to the recorder of deeds of the county where the land lies (or to the recorder of deeds of the city of St. Louis, if the land lies in said city) who shall record the same in his office, and index each tract separately as provided in section 59.440, RSMo, and the fee for so recording shall be taxed by the clerk as costs in the proceedings; and thereupon such company shall pay to the clerk the amount thus assessed for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses prescribed in this section; and upon failure to pay the assessment, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the said company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect, to be filed with the clerk of the court, and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages shall be void.**

2. Prior to the issuance of any report under subsection 1 of this section, **a commissioner shall notify all parties named in the condemnation petition no less than ten days prior to the commissioners' viewing of the property** of the named parties' opportunity to accompany the commissioners on the commissioners' viewing of the property and of the named parties' opportunity to present information to the commissioners.

3. **The commissioners shall view the property, hear arguments, and review other relevant information that may be offered by the parties.**

**§ 523.055. Possession of land delivered, when, notice -- writ of possession, executed how**

In any action to condemn lands under the power of eminent domain, where the condemnor has paid into the office of the clerk of the circuit court the amount of damages assessed by commissioners pursuant to law, the circuit clerk shall give the owners or those in possession written notice of such fact within five days. **If the owners or those in possession do not deliver possession of the property condemned within ten days after the receipt of notice of the payment of the award, then on the request of the condemnor the court shall issue a writ of possession directing the sheriff to deliver the possession of such property to the condemnor forthwith; except that the court may upon the motion of the occupants or owners grant them such extension of time, not to exceed ninety days, as the court finds to be**

**reasonable under all the circumstances. However, any displaced owner of a principal place of residence shall have one hundred days from the date of the award. The writ of possession shall be executed in the manner provided by law for the execution of writs of possession in ejectment suits for the recovery of land. If a writ of possession is issued or a motion filed asking for an extension, then all costs accrued in executing the writ and in the hearing of the motion may be assessed against the said owners.**

**§ 523.250. Notice of intended acquisition -- mailing requirements**

1. At least **sixty days before filing** of a condemnation petition seeking to acquire an interest in real property, the condemning authority shall provide the owner of record of such property with a **written notice** concerning the intended acquisition. Such notice shall include:

(1) Identification of the **interest in real property to be acquired and a statement of the legal description** or commonly known location of the property;

(2) The **purpose or purposes for which the property is to be acquired**;

(3) A statement that the property owner has the right to:

(a) Seek **legal counsel** at the owner's expense;

(b) Make a **counteroffer** and engage in further negotiations;

(c) Obtain **such owner's own appraisal of just compensation**;

(d) Have just compensation determined preliminarily by court- appointed **condemnation commissioners and, ultimately, by a jury**;

(e) Seek assistance from the **office of the ombudsman** for property rights created under [section 523.277](#);

(f) Contest the right to condemn in the condemnation proceeding; and

(g) Exercise the rights to **request vacation of an easement** under the procedures and circumstances provided for in [section 527.188](#).

AND: right to suggest alternative location within 30 days of your receipt of this Notice of Intent. (not really required under this section ,but 523.065 requires that such consideration be given IF the property owner submits within 30 days...so, someone has to tell the property owner.

**An owner may waive the requirements of this subsection prescribed above in a writing executed by the owner.**

2. The written notice required by this section shall be deposited in the United States mail, certified or registered, and with postage prepaid, addressed to the owner of record as listed in the office of the city or county assessor for the city or county in which the property is located. The receipt issued to the condemning authority by the United States Post Office for certified or registered mail shall constitute proof of compliance with this notice requirement; provided, however, that nothing in this section shall preclude a condemning authority from proving compliance with this notice requirement by other competent evidence.

**§ 523.253. Written offer, requirements -- explanation of determination of property value**

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. The offer shall be deposited in the United States mail, certified or registered, and with postage prepaid, addressed to the owner of record as listed in the office of the city or county assessor for the city or county in which the property is located. The receipt issued to the condemning authority by the United States Post Office for certified or registered mail shall constitute proof of compliance with this requirement; provided, however, that nothing in this section shall preclude a condemning authority from proving compliance with this requirement by other competent evidence. Nothing in this section shall prohibit the parties from negotiating during the thirty-day period.

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.

**§ 523.256. Good faith negotiation required, findings, remedies**

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 [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](#).**

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.

**§ 523.259. Abandonment of condemnation, remedies -- applicability**

1. If any condemning authority abandons a condemnation, each owner of interests sought to be condemned shall be entitled to recover:

(1) Their reasonable **attorneys' fees, expert expenses and costs; and**

(2) The **lesser of:**

(a) The owner's **actual damages accruing as a direct and proximate result of the pendency of the condemnation** if proven by the owner; or

(b) The **damages required to be paid to an owner in the event of an abandonment under the terms of the applicable redevelopment plan or agreement.**

*In the event that the applicable redevelopment plan or agreement is silent as to damages required to be paid to an owner in the event of an abandonment, a court shall order the condemning authority to pay the owner's actual reasonable attorneys' fees and expenses, and shall award damages accruing as a direct and proximate result of the pendency of the condemnation if proven by the landowner.*

**2. The provisions of this section shall only apply to redevelopment plans or agreements entered into after December 31, 2006**

**§ 523.261. Legislative determinations of areas to be condemned to be supported by substantial evidence, hearing, appeal**

*Solely with regard to condemnation actions pursuant to the authority granted by [section 21, article VI, Constitution of Missouri](#) and laws enacted pursuant thereto, any legislative determination that an area is blighted, substandard, or unsanitary **shall not be arbitrary or capricious or induced by fraud, collusion, or bad faith and shall be supported by substantial evidence.** A condemning authority or the affected property owner may seek a determination as to whether these standards have been met by a court of competent **jurisdiction in any condemnation action filed to acquire the owner's property or in an action seeking a declaratory judgment.** Upon the filing of such a declaratory judgment or when such a defense is raised in a condemnation proceeding, **the circuit court shall give the case preference in the order of hearing to all other cases, except elections cases, to the extent necessary to conclude the case within thirty days of having been filed.** Either party may thereafter file an interlocutory appeal of the circuit court's order upholding or rejecting the legislative body's determination. **Any subsequent or interlocutory appeal to a higher court on the appeal of the legislative determination shall be given preference and concluded in an expedited manner similar to the manner set forth herein for a hearing in circuit court. An interlocutory appeal shall not stay proceedings in the court unless the court of appeals so orders.***

**§ 523.262. Power of eminent domain limited, how -- private entities to have power of eminent domain -- notice**

1. Except as set forth in subsection 2 of this section, the power of eminent domain shall **only be vested in governmental bodies or agencies whose governing body is elected or whose governing body is appointed by elected officials** or in an urban redevelopment corporation operating pursuant to a redevelopment agreement with the municipality for a particular

redevelopment area, which agreement was executed prior to or on December 31, 2006.

**2. A private utility company, public utility, rural electric cooperative, municipally owned utility, pipeline, railroad or common carrier shall have the power of eminent domain as may be granted pursuant to the provisions of other sections of the revised statutes of Missouri.** For the purposes of this section, the term "common carrier" shall not include motor carriers, contract carriers, or express companies. Where a condemnation by such an entity results in a displaced person, as defined in [section 523.200](#), the provisions of subsections 3 and 6 to 10 of [section 523.205](#) shall apply unless the condemning entity is subject to the relocation assistance provisions of the **federal Uniform Relocation Assistance Act**.

3. Any entity with the power of eminent domain and pursuing the acquisition of property for the purpose of constructing a power generation facility after December 31, 2006, after providing notice in a newspaper of general circulation in the county where the facility is to be constructed, shall conduct a public meeting disclosing the purpose of the proposed facility prior to making any offer to purchase property in pursuit thereof or, alternatively, shall provide the property owner with notification of the identity of the condemning authority and the proposed purpose for which the condemned property shall be used at the time of making the initial offer.

#### **§ 523.265. Alternative locations for condemnation, procedure**

With regard to property interests acquired by condemnation or negotiations in lieu of the exercise thereof, **within thirty days of receiving a written notice sent under [section 523.250](#)**, the landowner may propose to the condemning authority in writing an alternative location for the property to be condemned, which alternative location shall be on the same parcel of the landowner's property as the property the condemning authority seeks to condemn. The proposal shall describe the alternative location in such detail that the alternative location is clearly defined for the condemning authority. The condemning authority shall consider all such alternative locations. **This section shall not apply to takings of an entire parcel of land.** A written statement by the condemning authority to the landowner that it has **considered all such alternative locations, and briefly stating why they were rejected or accepted, is conclusive evidence that sufficient consideration was given to the alternative locations**

#### **§ 523.282. Blanket easements void, when -- definitions**

1. Any blanket **easement created after December 31, 2006**, shall be void as against public policy and wholly unenforceable. For the purposes of this section, the term "blanket easement" shall mean an easement in real property acquired by condemnation or negotiations in lieu of the exercise thereof where the instrument or order of condemnation, by its terms, allows the easement holder to locate its facilities at an **undefined location on, over, under, or across the burdened property**.

2. Notwithstanding the provisions of subsection 1 of this section to the contrary, the term "blanket easement" shall not apply to any instrument containing language that upon completion of the initial structure explicitly fixes the burden, scope of use, and footprint within the express terms of the instrument and also contains an express statement that the location of the burden shall be fixed to the degree occupied by the initial structure upon completion of such structure. Nothing in this section shall prohibit the expansion or upgrade of the initially completed structure provided that the purpose or purposes and footprint of said expansion or upgrade were explicitly described in the original terms of the instrument.

**§ 523.283. Easement or right-of-way by certain entities fixed by use -- definition -- commissioners appointed by court -- attorneys' fees and costs for prevailing property owners**

1. Easements or right-of-way **interests acquired after August 28, 2006**, by a private utility company, public utility, rural electric cooperative, municipally owned utility, pipeline, or railroad, by either formal condemnation proceedings or by negotiations in lieu of condemnation proceedings, are fixed and determined by the particular use for which the property was acquired as described in either the instrument of conveyance or in the condemnation petition. **Expanded use of the property beyond that which is described in the instrument of conveyance or the condemnation petition** shall require either an additional condemnation proceeding in order to acquire the additional rights or by new negotiations for the expanded use of the property and appropriate consideration and damages to the current owner of the property for the expanded use.

2. For purposes of this section, **the term "expanded use" shall mean:**

(1) The exclusion of use by the current owner of the burdened property from an area greater than the area originally described at the time of acquisition by the condemning authority; or

(2) An increased footprint or burden greater than the footprint or burden originally described in the instrument of conveyance or condemnation petition. As used in this subdivision, the term "increased footprint or burden" shall mean a different type of use or a use presenting an unreasonably burdensome impact on the property, the landowner, or the activities being conducted on the property by the landowner.

3. **Commissioners appointed by the court under [section 523.040](#) and, where applicable, a jury on a trial of exceptions from the commissioners' award shall be entitled to assume, in assessing the just compensation due for a taking, that the condemning authority shall exercise, from and after the date the property interest is acquired, each and every right acquired to the fullest extent allowed by the condemnation petition.**

4. If a property owner prevails in an action for trespass or expanded use **against a private utility company, public utility, rural electric cooperative, municipally owned utility, pipeline, or railroad**, such property owner may be awarded reasonable attorneys' fees, costs, and expenses.

**§ 523.286. Declaration of farmland as blighted prohibited -- definition**

1. No condemning authority shall declare farmland blighted for the purposes of exercising eminent domain.

2. For the purposes of this section only, the term "farmland" shall mean all real property classified as forest cropland or all real property used for agricultural purposes and devoted primarily to the raising and harvesting of crops; to the feeding, breeding, and management of livestock which shall include breeding and boarding of horses; to dairy operations, or to any combination thereof; and buildings and structures customarily associated with farming, agricultural, and horticultural uses. "Farmland" shall also include land devoted to and qualifying for payments or other compensation under a soil conservation or agricultural assistance program under an agreement with an agency of the federal government.

## **II. PRIVATE TAKINGS**

### § 244.010. Drainage for agricultural or sanitary purposes

The owner or **owners of all or any part of any tract or parcel of swamp, wet, flat or overflowed land in this state**, situated within or without any drainage or levee district organized under any laws of this state, shall have the right, under the provisions of this chapter, to drain or protect such **land for sanitary or agricultural purposes**, without forming such land into a district, by constructing an **open ditch, laying tile or building a levee**, and such ditch, tile or levee may be constructed through or across any tract or parcel of land situate between such land to be drained or protected and any lake, bayou, hollow, creek, artificial drainage ditch, river, depression or other outlet into which the waters from such swamp, wet, flat or overflowed land can be drained, provided the owner or owners of the land through or upon which such ditch, tile or levee must be built be **paid a sum equal to the value of land, if any, consumed in constructing such works and the amount of damages, if any**, that will be sustained by such land from the construction and maintenance of the improvement.

(1974) This section gives no right to obstruct a natural watercourse to the damage of upstream owners. [Dudley Special Rd. Dist. of Stoddard Cty. v. Harrison \(A.\), 517 S.W.2d 170.](#)

[Mo. Rev. Stat. § 244.010](#) did not do away with the landowners' rights under the "common enemy" doctrine; the landowners were within their rights under that doctrine to build a dike to ward off surface water and their neighbors were not entitled to damages as no water was cast upon their land and none caused any washing of their lands. [Senkevech v. Vaughn, 610 S.W.2d 399, 1980 Mo. App. LEXIS 2858 \(Mo. Ct. App. 1980\).](#)

### § 244.020. Disagreement on drainage methods--petition circuit court

1. When the owner or owners of the land to be drained or protected and the owner or owners of the land through or across which such improvements are to be built or constructed **fail to agree as to the location of the ditch, tile or levee or as to the value of land, if any, to be used, or the amount of damages, if any, that will result from constructing the improvements**, the owner or owners of the land desired to be drained or protected shall have the right to file with the circuit clerk their petition, which shall state the method of drainage or protection desired, the name or names of the owner or owners of the land to be drained or protected with a description of the land owned by each, and the name or names of the owner or owners of the land through or upon which such drain or levee must pass, with a description of land owned by each, and that the owners are unable to agree as to the best method to adopt for the drainage or protection of the swamp, wet, flat or overflowed land, the value of the land, if any, to be used for any ditch, tile or levee, or the amount of damages, if any, that should be paid the owner or owners of the land through or upon which the proposed improvements must be constructed. Said **petition shall pray the circuit court that commissioners be appointed to consider any and all matters not agreed upon by the landowners and to make a report and recommendations for the adjustment of such disagreements.**

2. **A rough plat of all land that will in any way be affected by the proposed improvements and indicating the approximate location and course of the ditch, tile or levee, shall be filed with said petition, but such plat need not be made by an engineer; provided,** that before any such owner or owners shall have the right to file any such petition he or they shall first tender in writing to the owner or owners of the land through or upon which such ditch, tile or levee

is to be constructed, **a sum of money equal to the amount of the value of the land, if any, that will be used in constructing the ditch, tile or levee, plus the damages, if any, that will accrue to the land and the cost of the crossings**, if any are needed, which said amount, in the estimation of the owner or owners of the land to be drained or protected, seems just compensation for the total cost of such items, **and the fact of said tender having been made and the amount of the same shall be stated in the foregoing petition.**

**§ 244.030. Filing of objections--hearing by court--appointment of commissioners**

1. Such petition, as soon as so signed, shall be filed in the office of the circuit clerk of the county in which is situate the land that will be affected by the proposed improvements; each person not having signed such petition, owning land that will be either damaged or benefited by the construction of the ditch, tile or levee shall be named as a party defendant in such action and served with a summons and a copy of the petition, as in ordinary civil actions. If such owner or owners of land be nonresidents of the state, then such service shall be had as provided in the civil code of Missouri.

2. **The court shall set a date to hear objections**, which such date shall be named in a notice accompanying such petition and given each owner of land and which **hearing shall not be more than twenty days from the return date**; such notice shall state the purpose sought as set out in the petition and that the person receiving such notice shall have the right to file objections to the petition. Any person whose land will be affected in any manner by the proposed ditch, tile or levee shall have the right to file his objection on or before the date set for such hearing and before the hour of such hearing. Such objection or objections shall be limited to a denial of the allegations as contained in the petition.

3. The circuit court shall hear such objections without unnecessary delay and if such **objections be overruled it shall appoint three disinterested residents of the county, not of kin within the second degree of consanguinity** to any person owning land to be affected, as commissioners, who before entering upon their duties shall be sworn to faithfully and impartially perform the duties imposed upon them by this chapter.

(1959) Circuit court of county in which lands sought to be subjected to an easement are located had jurisdiction of proceeding under this chapter notwithstanding such lands were included in district organized under chapter 242 by circuit court of adjoining county. [Dillen v. Remley \(A.\), 327 S.W.2d 931.](#)

**§ 244.040. Duties of commissioners**

**Within twenty days** after so qualifying, unless prevented by sickness or some other good cause, said commissioners shall proceed to view the premises and perform their duties. They shall be furnished by the clerk of the circuit court a copy of the plat of the land and proposed improvements filed with the petition under the provisions of [section 244.020](#). **They shall mark out the most practical route and location of the ditch, tile or levee, and they shall assess the benefits and damages, if any, that will accrue to each tract or parcel of land**, according to ownership, because of the proposed works; they shall specify the number of crossings, if any, that will be needed for the use and convenience of the public or owners of the land to be affected by the proposed works, and they shall make such recommendations as they may consider necessary for the use of the circuit court in deciding the cause. They shall make out their report in writing and after the same shall have been signed by at least two of said commissioners, it shall be filed in the office of the circuit clerk. **Said commissioners may employ**

**an engineer or surveyor to run levels, make measurements and obtain such other information as said commissioners may deem necessary to assist them in their work.**

**§ 244.050. Notification of commissioners' report--filing of objections**

**Within ten days** after the filing of the commissioners' report the clerk of the circuit court shall give notice of such filing to each landowner, and said notice shall state the hour and date at which the circuit court, provided there be not less than five days between the serving of such notice and **the date of hearing, will hear objections to said report.** Any person whose land will be affected by the improvements as shown by said commissioners' report, shall have the right, on or before the date set for **hearing of said report and before the hour set for said hearing, to file his objections to said report.**

**§ 244.060. Confirmation or rejection of report--payment of costs**

Said circuit court shall hear all such objections in a summary manner and without unnecessary delay, **and should it find that no objection should be sustained, the court shall approve and confirm said report,** but if the court shall find that any or all of the exceptions or objections should be sustained, it shall render its decree accordingly. **All additional costs incurred by hearing and determining such objections shall be apportioned by the circuit court to the landowners in proportion to the objections sustained or overruled.** If the report of the commissioners as confirmed, or as modified, shows that the damages and cost of necessary crossings exceed the amount tendered, under the provisions of [section 244.020](#), to the owner or owners of the land traversed by the works, the total court cost of the case, including **fees and expenses of commissioners, shall be paid by the petitioner or petitioners, but if the amount of such items be not greater than the tendered amount the cost shall be paid by the objectors.**

**§ 244.070. Limitation on improvements--dismissal of case, when**

1. The word "tract" and "parcel" of land as used in this chapter shall include town lots or other subdivisions of land according to ownership. Persons desiring to drain or protect land under the provisions of this chapter shall not be limited to a single ditch, tile or levee, but two or more of each or all three may be constructed for the drainage or protection of the same tract of land.
2. If the report of the commissioners, as approved or as amended by the circuit court shows the total cost of the improvements, including value of the land used, the amount of the damages and cost of crossings, exceeds the total benefits accruing to all the land from the proposed improvement, the court shall dismiss the case and tax the court costs against the petitioners. Thereafter any one or more persons owning any portion of the wet, swamp, flat or overflowed land shall have the right to construct the ditch, tile or levee at his or their expense, but if constructed under such conditions the other owners of land that will be improved shall not be taxed for any of the costs.

**§ 244.080. Appeals from circuit court decision**

Any person may appeal from the decision or decree of the circuit court as provided by law in other civil actions. **Such appeal shall not act as a supersedeas or delay** construction of either the ditch or levee or laying of the tile, but before such work shall be begun the owners of the land to be drained or protected **shall pay into the hands of the circuit clerk for the use of the parties whose land is taken or injured, the amount awarded to said party or parties by the circuit court.**

#### **§ 244.090. Disagreement on manner of construction--petition circuit court**

1. The owner or owners of the land benefited shall have the right, without obtaining permission of the circuit court, to construct the ditch or levee or lay the tile or to arrange to have such constructed or laid, but the damages resulting, if any, from the construction of the same shall be paid in cash to the owner or owners of the land taken or damaged, or **the sum awarded for such items shall be placed in the possession of the circuit clerk for the use of such persons, before such construction shall be begun.**

2. In case the **owners of the land benefited are unable to agree** among themselves as to the manner of constructing the ditch or levee or laying the tile or letting the contract for the same, **the circuit court shall have the power**, upon being petitioned by a majority of persons interested, after due notice has been given to other interested parties, to let the work of construction out to the lowest or best bidder, and after such costs have been determined, the circuit clerk, upon order of the circuit court, shall apportion the total cost to each tract or parcel of land according to ownership in proportion the benefits derived as ascertained and determined by the court, and such cost shall become a lien upon such land and remain the same until paid.

3. Such lien shall be enforced by suit brought on bills properly made out and certified to by the circuit clerk, such suit to be brought in the name of the state at the relation of the interested party or parties in any court of competent jurisdiction. All sums collected by such suit shall include the court cost incurred in bringing and conducting such suit and a reasonable attorney's fee to be fixed by the court hearing said cause.

#### **§ 244.100. Rights of owners after construction**

The owners of the land benefited shall have the right at any time after the ditch, tile or levee has been completed, to go upon the land through or upon which such works shall have been built and **repair the same, but no right to enlarge or change** the location of the ditch, levee or tile is granted under this **chapter without first obtaining consent of the owner or owners of land traversed**, either by free gift or purchase, but the owner or owners of the land drained or protected shall have the **right to petition for privilege from the circuit court to enlarge works already made or to make necessary additional improvements, and such petition shall be proceeded with in the same manner** as is provided in [sections 244.020](#) and [244.030](#) for original construction.

#### **§ 244.110. Compensation--appointment of special commissioners and surveyor**

1. The parties petitioning shall be liable for all costs incurred on account of any proceeding under this chapter. **Each commissioner shall receive for his services two dollars for each day employed and necessary expenses incurred in addition thereto; any surveyor for services rendered while working under the direction of the commissioners shall be paid three dollars per day and all necessary expenses.**

2. In case it becomes the duty of the circuit court to have the work constructed, as is provided for in [section 244.090](#), said court shall have the right to appoint a special commissioner, who may or may not be a surveyor, and not owning land that is affected in any way by the works, to take charge of the construction and report to said court from time to time as to the progress of said construction and make a full report when the same has been completed. Such commissioner shall, upon completion of the work, make a final report to the court, and said court shall, if it finds said work performed according to contract, accept and confirm said report.

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**§ 244.120. Amendment of petition--rights of landowner**

1. The petition as signed and filed under the provisions of this chapter may be amended at any time as other pleadings in other cases.
2. The owner or owners of land within or without any levee or drainage district organized under the laws of this state shall be permitted to connect a ditch, tile or levee constructed under the provisions of this chapter with any artificial ditch, drain or levee of any drainage or levee district on such terms as the board of supervisors of such drainage or levee district or the court, under which any such district has been organized, may prescribe.
3. A petition filed under the provisions of this chapter and any and all matters pertaining thereto may be heard and determined by the circuit court at any time at a regular, adjourned or special session.

1. Private drainage systems are not prohibited by statutes establishing public systems because the terms under which a private system may be joined to a public system may be prescribed by the public system or the court pursuant to [Mo. Rev. Stat. § 244.120\(2\)](#). [Kissinger Private Levee Sys. v. Mackey, 624 S.W.2d 64, 1981 Mo. App. LEXIS 3144 \(Mo. Ct. App. 1981\)](#).

2. Pursuant to [Mo. Rev. Stat. § 244.120\(2\)](#), a private drainage system did not have authority to prescribe the terms by which another private system could be joined to the levee system. [Kissinger Private Levee Sys. v. Mackey, 624 S.W.2d 64, 1981 Mo. App. LEXIS 3144 \(Mo. Ct. App. 1981\)](#).

**§ 244.130. Penalty for obstructing ditch--inspection of lands without owner's consent**

1. Any person or persons, copartnership or corporation willfully filling up or obstructing or impairing the usefulness of any ditch, tile or levee constructed under the provisions of this chapter shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be fined in a sum not less than fifty dollars nor more than two hundred dollars for each and every offense, or such person or persons, or the agent or agents of the copartnership or corporation responsible for such damage or injury having been wrought, may be confined in the county jail not less than thirty days nor more than six months.

2. The owner or **owners of the land desired to be drained shall have the right to go upon or send an engineer or surveyor upon the land through or upon which the ditch, tile or levee is to be built, without first obtaining consent** from the owner or owners of such land, for the purpose of making measurements, running levels and obtaining other information to be used in forming conclusions pertaining to the slope of the land, length of the improvements and proper location of the same; provided, **that notice of the purpose and intention of such act be first given in writing to the owner of the land through or across which the works are to be constructed.**

