

PROPERTY I (Sections 5, 6, 7, §)
Winter/Spring Semester 2024
Prof. Freyeremuth

MODULE A

Exclusion, “First-in-Time” Concept, and the Significance of Possession in Property
Trespass and “Takings”

Dates: Tuesday, January 16, 2024 (1:00 Make-up Hour)
 Wednesday, January 17, 2024
 Monday, January 22, 2024

Reading: Casebook pages 1-43 and the selected provisions of Missouri’s condemnation
 statute (which follows the discussion questions)

Discussion Prompts for Module A:

1. Questions about *Jacque v. Steenberg Homes*:
 - a) There are some very good and non-trivial reasons why Steenberg wanted to deliver the home across the Jacques’ farm rather than via the public road (including dangerous winter road conditions). Was the court correct to disregard these? If so, why?
 - b) The court awarded the Jacques \$1 in nominal damages, \$0 in compensatory damages, and \$100,000 in punitive damages. Why? Did the Jacques suffer compensatory harm? Why or why not (and if so, how should that harm be measured)?
 - c) Pages 10-11 include an excerpt from the famous article “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” by Guido Calabresi and Douglas Melamed. In the terminology of that article, did the *Jacque* court protect the Jacques by means of a property rule or a liability rule? On what specific ground do you base your conclusion?
 - d) Was the court in *Jacque* correct to give its ruling retroactive effect or should it have stated that its new ruling was a “change” in the law that should have only prospective effect (i.e., to govern parties in future disputes)? Why or why not?
 - e) Suppose that instead of the actual facts of the case, Steenberg Homes had delivered the home across the Jacques’ farm in a good faith belief that they were crossing public land, not knowing they had been on the Jacques farm until after the delivery was complete. Would there still be a trespass? Why or why not?
2. Questions about *State v. Shack*:
 - a) The court in *Shack* could have held that the migrant workers were “tenants” on Tedesco’s farm, which would have given the workers the right enjoyed by tenants to

receive guests. [In fact, courts in other states that have addressed similar disputes involving migrant workers have done just that, if the migrant workers are charged any sum for living on the farm. See *State v. Fox*, 510 P.2d 230 (Wash. 1973); *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972).] Why didn't the *Shack* court do that? Why might the court in *Shack* have been reluctant to reach the conclusion that the migrant workers were tenants? [Hint: what other impacts might such a conclusion have had on the relationship between Tedesco and the migrant workers?]

b) If the Jacques have the right to exclude Steenburg Homes from entering their farm, why shouldn't Tedesco likewise be able to exclude Tejas and Shack from entering his farm? What source of law does the court rely on as the basis of its holding? [Locate and identify the specific language in the court's opinion on which you base your conclusion.] What justifies distinguishing the two cases (*Jacque* and *Shack*)?

3. Your client Freyermuth owns the Tar Heel Grill (a restaurant that serves food and which also serves beer, wine, and liquor). He hates Duke basketball fans and children and is not fond of the potential risks associated with serving alcohol to persons carrying guns. He's asked you whether he can (i) refuse to admit and serve Duke basketball fans, (ii) refuse to admit and serve people carrying guns, and (iii) charge an additional \$10 "child fee" to guests who bring their children to eat at the Grill. What do you advise him and why?

4. The City of Columbia wants to take Bernie's land for a public park. Bernie would not have agreed to sell his land at any price, because the land had belonged to his grandfather. You may assume the appraised fair market value of the land is \$500,000. Should Bernie be able to refuse to sell to the City? Should the City have to pay Bernie more than \$500,000 on account of the idiosyncratic loss Bernie will suffer from his land being taken? If so, how much more? If Bernie's land is in Missouri, how would you answer (based on the Missouri statutes that appear at the end of these questions) and why?

5. Suppose that Mayor Buffaloe wants to buy Lambert's guest house. Lambert refuses to sell. The Columbia City Council then initiates a condemnation proceeding to condemn Lambert's guest house and designate it as the official residence of the Mayor of Columbia. Is this a legitimate public use? Why or why not? [What additional information would you want to know and why?]

6. Who was best suited to determine what's in the public interest of the citizens of New London, Connecticut: the New London city council, or federal judges? Why?

7. Suppose that the City of Columbia wants to take land along 9 square blocks along the Business Loop and convey it to a partnership affiliated with Stan Kroenke, who plans to build a mixed-use project that will include a new Google research facility, new retail, and 500 new residences (both townhomes and apartments). Would the Missouri statute allow the City of Columbia to undertake such a project? Why or why not? How would you proceed if you were on the City Council and wanted to proceed with the project?

**SELECTED PROVISIONS OF MISSOURI STATUTES
GOVERNING CONDEMNATION**

§ 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.

§ 523.039. 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.

§ 523.060. Right of trial by jury in condemnation proceedings — jury responsibility in determining fair market value.

1. Any plaintiff or defendant, individual or corporate, shall have the right of trial by jury of twelve persons, if either party file exceptions to the award of commissioners in any condemnation case.

2. Such jury shall use the definition of fair market value provided for in subdivision (1) of section 523.001.

§ 523.061. Determination of homestead taking and heritage value. — After the filing of the commissioners' report pursuant to section 523.040, the circuit judge presiding over the condemnation proceeding shall apply the provisions of section 523.039 and shall determine whether a homestead taking has occurred and shall determine whether heritage value is payable and shall increase the commissioners' award to provide for the additional compensation due where a homestead taking occurs or where heritage value applies, in accordance with the just compensation provisions of section 523.039. If a jury trial of exceptions occurs under section 523.060, the circuit judge presiding over the condemnation proceeding shall apply the provisions of section 523.039 and shall determine whether a homestead taking has occurred and shall determine whether heritage value is payable and shall increase the jury verdict to provide for the additional compensation due where a homestead taking occurs or where heritage value applies, in accordance with the just compensation provisions of section 523.039.

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.

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.

§ 523.261. 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.

§ 523.271. Exercise of eminent domain over private property for economic development purposes prohibited — definition.

1. No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.

2. For the purposes of this section, "**economic development**" shall mean a use of a specific piece of property or properties which would provide an increase in the tax base, tax revenues, employment, and general economic health, and does not include the elimination of blighted, substandard, or unsanitary conditions, or conditions rendering the property or its surrounding area a conservation area as defined in section 99.805.

§ 523.274. Consideration of each parcel of property — time limit on commencement of eminent domain acquisitions.

1. Where eminent domain authority is based upon a determination that a defined area is blighted, the condemning authority shall individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight. If the condemning authority finds a preponderance of the defined redevelopment area is blighted, it may proceed with condemnation of any parcels in such area.

2. No action to acquire property by eminent domain within a redevelopment area shall be commenced later than five years from the date of the legislative determination, by ordinance, or otherwise, that the property is blighted, substandard, contains unsanitary conditions, or is eligible for classification within a conservation area as defined in section 99.805. However, such determination may be renewed for successive five-year periods by the legislative body.

§ 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.