

# Excerpt of Mo. Condemnation Practice (Mo.Bar 3d ed. 1996)

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## CHAPTER 3

### DISTRIBUTION OF COMMISSIONERS' AWARD

#### I. (§3.1) INTRODUCTION AND SCOPE OF CHAPTER

This chapter will address issues concerning the procedures associated with the distribution of the Commissioners' Award after the condemning authority has deposited the Award into the court's registry. Such procedures are governed mainly by § 523.053, RSMo 1994, as set out in §3.4, *infra*; but other statutory sections and certainly the Supreme Court Rules, as applicable, will be discussed.

This chapter will also address the general strategies surrounding the process of the distribution of the Commissioners' Award. These strategies are important to consider because the distribution determination is a final order which is dispositive for any future distribution or any future refund of a portion of the Commissioners' Award after a verdict or settlement is reached.

#### II. STATUTORY PROCEDURE

##### A. (§3.2) Named Party Defendants

As previously discussed in Chapter 2, a condemning authority must name all *necessary* parties as defendants in the condemnation lawsuit. Those necessary parties are persons or entities who, at the time the condemnation petition is filed, are either: (1) in actual possession of the premises to be affected by the taking and claiming title; or (2) claiming title to the premises vis-a-vis a properly recorded document in the county in which the property is located. *See* § 523.010.3, RSMo 1994; Rule 86.03; and *Seliga Shoe Stores, Inc. v. City of Maplewood*, 558 S.W.2d 328, 331 (Mo. App. E.D. 1977).

In addition to the necessary parties to the condemnation lawsuit, the condemning authority also has the right to name other persons or entities holding or claiming an interest in the subject property, such as the tenants in sufferance and month-to-month tenants. As an additional example, the condemning authority may also name the remaindermen to a life estate. But the condemning authority is under no duty to name such entities. Yet, if such persons/entities, *e.g.*, the remaindermen, are not so named in the lawsuit, their interest is not bound by the proceedings. *See* § 523.010.2.

Furthermore, the condemnor's naming of these necessary and permissive persons and entities as party defendants is *not* an admission that such persons or entities, in fact, have a *compensable* interest in the Commissioners' Award. Such naming of party defendants merely insures that the condemning authority has the ability to acquire that persons'/entities' interest regardless if the interest is a compensable one.

Therefore, to establish the compensability of an interest, an additional procedural determination must be made. Such discussion can be found in §3.4, *infra*.

##### B. (§3.3) Lump Sum Awards

Along with the above permissive and necessary parties to be named in the condemnation of a single property, the condemnor has an additional right to name, within the same petition, *other* necessary and permissive parties associated with *other* parcels within the same project for which the properties are to be acquired. Such right is delineated in § 523.020, RSMo 1994, to wit: "Any number of owners, residents in the same county or circuit, may be joined in one petition, and the damages to each shall be *separately* assessed by the same commissioners." (Emphasis added.) This "separate" assessment, emphasized in § 523.020, refers to separate assessments for each of the *separate properties*. *State ex rel. State Highway Comm'n v. Allison*, 296 S.W.2d 104 (Mo. banc 1956). Therefore, for each *single* property, the commissioners are to

determine the amount of damages as if the property belonged to one person/entity and, thereby, make *one lump sum* determination of the compensation. *Seliga Shoe Stores, Inc. v. City of Maplewood*, 558 S.W.2d 328 (Mo. App. E.D. 1977). In other words, the separately named defendants in *one* property *will not* have separate awards made to them by the commissioners. This lump sum Commissioners' Award, therefore, will have to be apportioned by either agreement between all of the named defendants or by court order after a distribution/apportionment hearing. Such distribution procedure is discussed in detail immediately below.

**C. (§3.4) Statutory Distribution Procedure**

Once this *one lump sum* award is made by the commissioners, and the Commissioners' Report is filed, and the Commissioners' Award pursuant to that Report is paid by the condemning authority, defendants will then receive a Notice of Payment of the Award from the clerk of the participating circuit court. *See* § 523.040, RSMo 1994. At that time, the defendants have a right to request the court to distribute the award to the proper parties claiming an interest in the subject property.

The distribution of the Commissioners' Award among defendants is governed by § 523.053, RSMo 1994, to wit:

1. *Within thirty days after the commissioners' award has been paid to the clerk of the court*, where there is more than one defendant, those defendants claiming a determinable interest in the proceeds of said award may file with the court an *agreement setting out the manner and the percentages* in which said award is to be divided among them. If no such agreement is filed during said thirty-day period, any defendant claiming such an interest may by *motion for distribution* petition the court in which said cause is pending for a *determination of the percentage* of the commissioners' award to which each of said parties is entitled; provided, that the *plaintiff in said condemnation action may have the right to intervene as an interested party in said proceeding*, whether it be by the filing of an agreement among the defendants or by the filing of a motion for distribution of the award, and shall be entitled to prior notice of the filing of said agreement or notice of the filing of the motion for said determination and distribution.

2. *Within thirty days after the filing of such motion*, the court having jurisdiction of said cause shall determine the percentage of the award to which each party having an interest therein is entitled. *Any party aggrieved of the determination of interests made by the court shall have the right of appeal therefrom*, and the same shall be considered as a final judgment for such purposes.

3. The respective interests of all parties in the award made as a result of the condemnation action, whether determined by said agreement or by the court, shall be *final and shall extend by percentage to any additional compensation awarded or any reduction of the award thereafter made, together with interest, on the trial of exceptions*, and said interests established shall be binding on all parties, plaintiff and defendant; provided, that *when the determinable interest of any defendant is not related to the difference in the value of the property before and after the taking by condemnation, such share set out in the agreement or the court's finding thereof shall not be affected by any increase or reduction so long as the final award is not less than such interest*.

4. Any evidence relating to the terms of said determination of interest shall *not be admissible as evidence* before the jury on the trial of said exceptions. [Emphasis added.]

**D. (§3.5)Comments About the Distribution Statutory Procedure**

Although the entire above-cited statute is effective and important, the emphasized portions of this statutory procedure deserve further comment.

1. (§3.6) DEFENDANTS' THIRTY-DAY TIME FRAME FOR AGREEMENT

Section 523.053.1, RSMo 1994, states that within a thirty-day period, an *agreement* for distribution among the named defendants may be filed. Practically speaking, provided no prejudice befalls plaintiff, agreements for distribution may be filed at any time prior to a determination of distribution by the court. *See State ex rel. State Highway Comm'n v. Southside*

*Nat'l Bank*, 585 S.W.2d 512 (Mo. App. E.D. 1979).

The thirty-day time frame is treated, in practice, more as a guide to the defendants in order to encourage the defendants to reach an agreement, without motion, within a thirty-day period after payment of the award has been made.

If no such agreement can be reached within that time, a motion for distribution may be filed. Yet, again, in practice, courts *do not* find that a motion filed *before* the expiration of these thirty days is “premature.” Therefore, although time frames are usually mandatory for parties to follow, this particular time frame has little, if any, effect in practice.

## 2. THE AGREEMENT/THE MOTION

### a. (§3.7) *Named Parties to the Agreement/Motion*

As previously mentioned, distribution agreements may be made among the named party defendants. Of course, those agreements must be made among the named party defendants and *not with outside third parties* who are not properly joined into the lawsuit. *See Ticor Title Ins. Co. v. Land Clearance for Redevelopment Auth. of Kansas City.*, 729 S.W.2d 236 (Mo. App. W.D. 1987).

Furthermore, *all* party defendants named as having an interest, compensable or not, in the property *must* be listed in the distribution agreement in order to properly request the court to distribute the Commissioners’ Award. Such “party defendants” include the named unknown parties, i.e., the “*attorney for the unknowns*” a/k/a the “guardian ad litem,” who should also be a signatory on any agreement and who should receive notice of hearing of any motion.

Practically speaking, most clerks of the circuit courts in Missouri are aware that all named defendants must be addressed in the court’s order as either:

1. Being in receipt of a percentage of the award; or
2. Having waived an interest in the Commissioners’ Award; or
3. Having no interest in the Commissioners’ Award.

Therefore, unless the defendants’ distribution agreement addresses all named party defendants, consenting defendants may experience difficulty in obtaining the distribution without an additional order of the court, which order addresses all named defendants.

### b. (§3.8) *Jurisdiction, Venue, and Change of Judge*

Although the jurisdiction and venue for the court participating in the distribution process is unalterable after having been established in the original condemnation proceedings, the judge in front of whom a party is to hold a distribution hearing may be subject to a change of judge request pursuant to Rule 51. *State ex rel. Wedemeier v. McKenzie*, 889 S.W.2d 99, 101 (Mo. App. E.D. 1994).

### c. (§3.9) *Agreement: Good Strategy*

Pursuing a distribution agreement and the required court orders reflecting the agreement is good strategy for party defendants who desire to avoid possible additional costs and legal fees associated with a possibly lengthy bench trial that may reveal many of the same or similar valuation issues to be addressed in the condemnation trial of exceptions.

Revealing such testimony, in an adversarial setting wherein the defendants are opponents fighting for the same monies, can be devastating for the victorious defendants in their trial of exceptions. Some defendants may seek protection from the use of admissions made during the distribution hearing by citing § 523.053.4, RSMo 1994, which states that “[a]ny evidence relating to the terms of said determination of interest shall not be admissible as evidence before the jury on the trial of said exceptions.” (Emphasis added.) But such language should not be so misconstrued. This language does *not* state that *valuation evidence* adduced at the bench trial for distribution is inadmissible. It merely states that the “*terms of [the] determination*” are not admissible (emphasis added).

Hence, party defendants should be aware that any evidence regarding the condition of the premises and other valuation evidence which is adduced at the distribution bench trial may and, likely, will be used by the condemning authority against the party defendants in the future. Therefore, if at all possible, in such cases, parties should attempt to reach a distribution agreement and maintain a united front against the condemning authority.

A suggested form for distribution agreement can be found in the Forms Appendix in this deskbook.

d. (§3.10) *The Motion: Good Strategy, Sometimes*

Many times distribution agreements are not possible for many reasons. In fact, sometimes it can take more billable hours and more effort from defendants' attorneys to locate and negotiate an agreement with all named defendants than the time and effort it would have taken to argue a *simple* motion for distribution.

In practice, more often than not, defendants file motions with the court in which the condemnation matter originates. Interested parties will appear for the scheduled hearing, and they are permitted to file an answer to the motion prior to the hearing. Other parties may choose to file a waiver prior to the hearing, and some parties may choose to not appear at all. Provided all parties have been notified of the hearing on the motion for distribution and proof of such notice is shown to the court, if parties fail to appear for the hearing, the court's distribution order may find that the non-appearing parties "waived their interest in the Commissioners' Award."

The scheduled hearing date for the motion provides the deadline for performance of either an agreement or the hearing. Deadlines do seem to have a greater ability to encourage performance of duty than loose time frames associated with agreements. Therefore, such motion can actually be a cleaner and faster method of distributing the Commissioners' Award.

A suggested form for the motion for distribution can be found in the Forms Appendix in this deskbook.

3. (§3.11) PERCENTAGES

Whether the distribution order occurs as the result of an agreement or a hearing on the motion for distribution, § 523.053.1, RSMo 1994, reads that the court's order *must have the manner and the percentages in which the award is to be distributed*. The "manner" merely means the formal, legal names of the parties to whom the award is to be distributed. The "percentages" mean that the amount distributed to a particular defendant must not only be set out in a dollar amount, but it also must be set out as to what percent of the Commissioners' Award the amount of the distribution is. For example:

Commissioners' Award = \$100,000

Person A, *as named in the petition*, is entitled to \$20,000, *which is 20%* of the Commissioners' Award.

In fact, if such a percentage determination was *not* made prior to distribution of the Commissioners' Award from court, then the court should make such determination prior to the trial of exceptions. *State ex rel. State Highway Comm'n v. Morganstein*, 588 S.W.2d 472 (Mo. banc 1979), *appeal after remand* 649 S.W.2d 485 (Mo. App. W.D. 1983). If the court does not make such determination prior to the trial of exceptions, the court must make the determination after the trial of exceptions; otherwise, the case is subject to remand for such determination. *Id.* at 480-81.

In addition, as discussed below, the plaintiff/condemning authority also has the right to intervene to require that the manner for the distribution and the percentages be determined; therefore, defendants should always be prepared to establish the proper statutorily required manner and percentages for the distribution.

4. (§3.12) PLAINTIFF'S RIGHT TO INTERVENE

Pursuant to § 523.053.1, RSMo 1994, the plaintiff does have a right to intervene in this distribution procedure. The right of the plaintiff to intervene begins with its right to be notified of the agreement or motion. Therefore, all agreements or motions and notices of hearing must be served upon the plaintiff.

Thereafter, the plaintiff is provided the right to require the court's order to establish the manner for distribution and the separate percentages for each defendant receiving a portion of the Commissioners' Award. But it has been held that the

condemning authority does *not* have the right to intervene to convince the court that a named party defendant does not have a right to receive any portion of the award. *State ex rel. Behle v. Stussie*, 826 S.W.2d 71 (Mo. App. E.D. 1992). In fact, the *Behle* court did not view the state's potential inability to collect a potential refund judgment from a receiving defendant as an inability that should entitle the state to a stay of distribution. The appellate court went on to say that if the state were concerned about its ability to collect a refund judgment from the landowner, the state should and could protect itself by not depositing the money in the registry of the court and deferring acquisition of the landowner's interest in the land until after a final determination of compensation by a jury.

In addition, in *State ex rel. State Highway Comm'n v. Morganstein*, 588 S.W.2d 472 (Mo. banc 1979), the Court also found that, although condemning authorities have the right to intervene, they neither have the responsibility for apportionment of the Commissioners' Award, nor are they required to trace distribution of proceeds to the parties.

#### 5. (§3.13) THE COURT'S THIRTY-DAY TIME FRAME TO ENTER ORDER

Section 523.053.2, RSMo 1994, also reads that *the court has only thirty days* after the *filing* of the motion for distribution to make a determination as to the proper parties to receive a distribution and to their distribution amounts and percentages. Missouri case law has addressed this issue in *State ex rel. Mo. Highway and Transp. Comm'n v. Muegge*, 842 S.W.2d 192 (Mo. App. E.D. 1992). The *Muegge* court found that the trial court's failure to hear a motion for distribution of condemnation award within thirty days was *not fatal to its jurisdiction*. Yet, practically speaking, if a motion is required to be heard by the court, defendants should inform the court of this statutory time frame within which the court must make its determination. Should the court not meet the thirty-day time frame, the extraordinary remedy of mandamus should be available to the defendants.

Of course, a court order is required, whether the distribution is determined by agreement or by hearing, as it has been held that "a condemnation award paid to the clerk of the court as provided by law cannot be distributed without an order of the court, thereby imparting to it the characteristics of a deposit in court." *Land Clearance for Redevelopment Auth. of City of St. Louis v. Zitko*, 386 S.W.2d 69, 84 (Mo. banc 1964). *See also State ex rel. State Highway Comm'n v. Gould*, 592 S.W.2d 172 (Mo. App. W.D. 1979).

Further, the court's order should comply with the statutory requirements of setting out the manner and percentages of distribution; otherwise, the appellate court will find same defective and remand for the trial court's determination pursuant to the statute. *See City of Columbia v. Baurichter*, 684 S.W.2d 903, 905 (Mo. App. W.D. 1985), and *State ex rel. Mo. Highway and Transp. Comm'n v. Roth*, 735 S.W.2d 19 (Mo. App. E.D. 1987).

Such "remand" cases should also be reviewed along with *State ex rel. Mo. Highway and Transp. Comm'n v. Wilson*, 864 S.W.2d 341 (Mo. App. W.D. 1993). The *Wilson* court found that, regardless of whether the court's order determined the statutorily required percentages, the State Highway Commission has a right to obtain restitution for any excess amount finally awarded over the Commissioners' Award, which had previously been paid into court and then partially distributed.

A suggested form for the court order can be found in the Forms Appendix in this deskbook.

#### 6. (§3.14) FINAL AND APPEALABLE ORDER

Pursuant to § 523.053.2, RSMo 1994, the percentages which are determined by order of the court are *final and appealable*. Therefore, any aggrieved party *must* pursue the appeal thereon or lose the right to so challenge the order at any time in the future. *See State ex rel. State Highway Comm'n v. Carlie*, 487 S.W.2d 873 (Mo. App. E.D. 1972), wherein the landowners and party to whom they had orally given permission to remove gravel from land filed cross motions for determination of their respective shares in the condemnation award. The court's order awarded the entire proceeds to the landowners and thereby denied the other defendant's claim to any portion of award. Such order was found by the *Carlie* court to be a final judgment as to the other party, for purposes of appeal.

On the other hand, the condemnor, although having the right to intervene, has been found to not be "an aggrieved

party” for purposes of appeal in *State ex rel. State Highway Comm’n v. Chicago, Burlington and Quincy R.R.*, 539 S.W.2d 760 (Mo. App. W.D. 1976), and *State ex rel. Behle v. Stussie*, 826 S.W.2d 71 (Mo. App. E.D. 1992).

Of course, the actual appeal from the court order of distribution is governed by Rules 78 and 81 of the Missouri Rules of Civil Procedure. *See also Carlie*, 487 S.W.2d 873, regarding the timeliness with which an appeal of an order of distribution must be filed.

7. (§3.15) PERCENTAGE DETERMINATION APPLIES IN TRIAL OF EXCEPTIONS OR SETTLEMENT

After the court orders distribution of the Commissioners’ Award, the finally determined parties, amounts, and percentages remain applicable for any future distribution or refund judgment, inclusive of any applicable statutory interest. *See* § 523.053.3, RSMo 1994.

a. (§3.16) *Attorney’s Responsibility to Inform Clients*

Although it may not be legislated or a matter of case law as yet in Missouri, it is best that an attorney for a defendant inform and document to that client that, even though the defendant/client receives a portion of the Commissioners’ Award, if Exceptions have been filed by either or any party, the *determination made by the commissioners of the amount of damages is not final*. Clients should be informed that the total amount of damages found to be proper compensation by the commissioners may increase or decrease with a verdict or settlement of the matter. With such possibility of a decrease in the amount of damages being possible, defendants/clients need to understand clearly that *the amount that they receive in a distribution order may be subject to being paid back with six percent interest, from the date of the filing of the Commissioners’ Report*, pursuant to § 523.045, RSMo 1994.

b. (§3.17) *The Collection Process of a Refund Judgment*

It should also be noted that, although the condemnation proceedings are *in rem* proceedings, such proceedings may be converted from *in rem* to *in personam* proceedings in the event of a refund judgment wherein the jury verdict is lower than the Commissioners’ Award. Collection of such refund judgment by the condemning authority, therefore, is not limited to the remainder property, if any. The condemning authority has the ability to collect against the other personal assets of the party defendant as well. *See State ex rel. State Highway Comm’n v. Eilers*, 445 S.W.2d 374 (Mo. 1969). Of course, the *in personam* judgment operates only to the extent of the previously established percentages in the court-ordered distribution.

The only exception to this statutory language, which requires that percentages established operate in the event of any future distribution or refund judgments, is where the determinable interest of the defendant is *not related to the difference in the value of the property before and after the taking by condemnation, provided that the defendant’s share is not more than the final verdict or settlement*. *See* § 523.053.3, RSMo 1994. This particular language typically applies when a mortgagee receives a particular percentage of the Commissioners’ Award, and the verdict in the trial of exceptions is less than the Commissioners’ Award, thereby causing a refund judgment. This statutory language exempts such mortgagee from a payback provided the amount of the original distribution to the mortgagee is less than the verdict or settlement. *See State ex rel. State Highway Comm’n v. Thelnor, Inc.*, 485 S.W.2d 443 (Mo. App. E.D. 1972), *appeal after remand*, 543 S.W.2d 229 (Mo. App. E.D. 1976). *See also State ex rel. Mo. Highway and Transp. Comm’n v. Meramec Valley Elevator, Inc.*, 782 S.W.2d 642 (Mo. App. E.D. 1989).

But this language clearly does not provide for the exemption from a payback if the amount of the verdict or settlement is *in excess* of the mortgagee’s portion of the distribution of the Commissioners’ Award. In such a case, an *in personam* judgment would lie against the mortgagee as well as other defendants who had received a portion of the distribution.

In fact, in *State ex rel. Mo. Highway and Transp. Comm’n v. Wilson*, 864 S.W.2d 341 (Mo. App. W.D. 1993), even though a mortgage bank defendant filed a disclaimer of any interest in the Commissioners’ Award, the bank was found to be

liable for a payback because the bank, in fact, had received the monies vis-a-vis a unilateral agreement with the property. The *Wilson* court found that the state's right to restitution for excess amount awarded over the commissioners' condemnation award cannot be thwarted by such a unilateral agreement. Therefore, the mortgage bank defendant was able to be pursued for the collection of its proportionate share of the refund judgment.

### III. (§3.18) DETERMINATION AND VALUATION OF COMPENSABLE INTERESTS

A party defendant holding fee title to any or all of the condemned subject property clearly has a determinable interest in the property and, therefore, a compensable interest in the Commissioners' Award. The other possible party defendants that may have a determinable interest in the subject property are discussed below.

Of course, the burden of proving the *value* of the determinable interest in the subject property is on the party so asserting the interest. The process of the valuation of the compensable interest is also discussed below.

#### A. Holder of Deed of Trust—Mortgagee

##### 1. (§3.19) DETERMINABLE INTEREST

If the condemned subject property were encumbered with a properly recorded mortgage or a deed of trust at the time the Condemnation Petition was filed, the mortgagee/deed-of-trust holder would be required to be named as a party defendant. In fact, the courts routinely find that such an interest in the subject property is a determinable interest. *See Cassville Sch. Dist. v. McArtor*, 286 S.W. 729, 731 (Mo. App. S.D. 1926).

Fortunately, in the event of a partial taking, where the remainder of the subject property is sufficient to secure the remainder of the debt, a mortgagee or deed-of-trust holder will often *wave* any interest in the Commissioners' Award, provided the fee owner/mortgagor is not in arrears on the debt service.

##### 2. (§3.20) COMPENSABLE INTEREST/VALUATION

Usually, deeds of trust or mortgage documents will provide for the mortgagee's receipt of the distribution of monies equaling the outstanding debt upon a total or a partial taking of the subject property. Of course, such language will be highly persuasive in a distribution hearing to convince a court that the interest is compensable and the amount thereof *in the event of a total taking* of the subject property. *Cassville Sch. Dist. v. McArtor*, 286 S.W. 729 (Mo. App. S.D. 1926).

But *in a partial taking*, such language in the mortgage document requiring full payment of the outstanding debt, arguably, may be usurious, and therefore not found to be persuasive. In such a case, the lender will be required to persuade the court as to the value of its compensable interest.

In a partial taking, if the lender pursues a distribution of a portion of the Commissioners' Award, the lender should be prepared to present evidence of the value of the subject property both before and after the taking. The lender should also establish the value of the outstanding debt. If the value of the remainder *does not exceed* the value of the debt and if the lender can further establish precedent for its practices in not lending monies on such remainder properties, the court could be persuaded to distribute a portion of the Commissioners' Award equal to the amount of the debt, if possible. But a court could also be persuaded to distribute that portion of the Commissioners' Award which would return the bank's debt risk back to an appropriate proportion.

For example:

Subject property value before the taking: \$150,000  
Remainder property value after the taking: \$50,000  
The Commissioners' Award: \$100,000  
Debt amount: \$75,000  
Debt/Remainder value is 150%

Debt/Before value is 50%.

In this example, the lender could arguably receive an appropriate distribution of the Commissioners' Award in order to return the debt risk from 150% to 50%. In this example then, the lender is entitled to have fifty percent of the remainder value as the security for the outstanding debt, i.e., \$25,000 (fifty percent of remainder value of \$50,000); therefore, the bank which has a debt of \$75,000 should receive a \$50,000 distribution from the Commissioners' Award of \$100,000.

If the remainder subject property *does retain appropriate value* to wholly secure the remaining debt, the court may not be persuaded to distribute any monies to the lender. Or the court, again, may be persuaded to distribute that portion of the Commissioners' Award which would return the bank's debt risk back to an appropriate proportion.

For example:

Subject property value before the taking: \$150,000  
Remainder property value after the taking: \$100,000  
The Commissioners' Award: \$50,000  
Debt amount: \$75,000  
Debt/Remainder value is 75%  
Debt/Before value is 50%.

In this example, the lenders' risk arguably increased twenty-five percent due to the taking and, arguably, should be restored to the original risk level by the receipt of an appropriate distribution of the Commissioners' Award. In order for the lender to return to a fifty percent risk value, the debt would have to be reduced to fifty percent of the remainder value. Therefore, in this example, fifty percent of the remainder value in \$50,000, and the lender could be entitled to a distribution of \$25,000 in order to reduce the existing debt from \$75,000 to \$50,000.

Of course, each of the above-delineated *value* numbers in this example would be based on an expert's opinion, and the evidence of such values may be adduced at the distribution hearing and used against any party if possible. Therefore, it is best to arrive at an agreement with the lender as to either a waiver or a portion of the Commissioners' Award based on an analysis of the proportionate share of the increase in the lenders' risk due to the taking.

For a discussion of the risks of payback for mortgagees and deed- of-trust holders, see §3.16, *supra*.

## **B. Tenancies**

### **1. (§3.21) DETERMINABLE INTEREST**

A leaseholder possesses an interest in the subject condemned property for which he or she could be compensated, i.e., a leasehold can be a determinable interest. *State ex rel. State Highway Comm'n v. Johnson*, 592 S.W.2d 854 (Mo. App. E.D. 1979). But unless a written lease provides otherwise, a month-to-month tenant or a tenant at will does not have a compensable interest in the condemnation Commissioners' Award. *See Millhouse v. Drainage Dist. No. 48 of Dunklin County*, 304 S.W.2d 54, 58 (Mo. App. S.D. 1957); *Seliga Shoe Stores, Inc. v. City of Maplewood*, 558 S.W.2d 328 (Mo. App. E.D. 1977); *Land Clearance for Redevelopment Auth. of Kansas City v. Dunn*, 416 S.W.2d 948 (Mo. 1967); *State ex rel. State Highway Comm'n v. Demarco*, 445 S.W.2d 379, 383 (Mo. App. S.D. 1969); *State ex rel. State Highway Comm'n of Mo. v. St. Charles County Assocs.*, 698 S.W.2d 34 (Mo. App. E.D. 1985). *State ex rel. Mo. Highway and Transp. Comm'n v. Muegge*, 842 S.W.2d 192 (Mo. App. E.D. 1992). Yet, as mentioned in §3.2, *supra*, the condemning authority does maintain the right to name such a party as a defendant in order to insure that such party's interest is acquired.

### **2. (§3.22) VALUATION OF DETERMINABLE TENANCIES**

If a condemned subject property is encumbered with a written lease and that lease has specific provisions setting forth the respective rights of the parties in the event the demised property is condemned, such provisions are persuasive and controlling in the court's determination of whether such parties to the lease have a compensable interest in the

Commissioners' Award. *See State ex rel. Mo. Highway and Transp. Comm'n v. Jim Lynch Toyota, Inc.*, 835 S.W.2d 421, 424 (Mo. App. E.D. 1992). *See also State ex rel. Mo. Highway and Transp. Comm'n v. Muegge*, 842 S.W.2d 192 (Mo. App. E.D. 1992).

a. (§3.23) *Leasehold for a Term of Years*

Where the lease does not address the rights of the parties thereto in the event of a total or partial taking, the general rule for the valuation of the leasehold interest has been addressed by the Supreme Court of Missouri in *Land Clearance for Redevelopment Corp. v. Doernhoefer*, 389 S.W.2d 780 (Mo. 1965).

The *Doernhoefer* Court stated that:

[T]he value of the leasehold should be determined from the testimony of qualified expert witnesses as that value which a buyer under no compulsion to purchase the tenancy would pay to a seller under no compulsion to sell, taking into consideration the period of the lease yet to run, including the unexercised right of renewal, the favorable and unfavorable factors of the leasehold estate, the location, type and construction of the building, the business of the tenant, comparable properties in similar neighborhoods, present market conditions and future market trends, and all other material factors that would enter into the determination of the reasonable market value of the property.

*Id.* at 784.

The *Doernhoefer* Court goes on to state that a lessee is entitled to a portion of the Commissioners' Award in an amount equal to the "bonus value," (emphasis added) if any, that the lessee enjoys under the existing leasehold interest. The "bonus value," sometimes referred to as the "leasehold savings" or "profit," is the *difference between the economic rental and the contract rental*. The "economic rental" is the "actual market value of the use and occupancy." *Id.* at 784. The "contract rental" includes the rental payment and all required maintenance costs and legally binding options.

According to the *Doernhoefer* principle, a lessee's interest in the property will only be compensable if the actual contractual rental payments are *below market value* for the rental payments made on comparable properties at the time of the payment of the Commissioners' Award into court. In such situations where the lessee enjoys a "bonus value," the value of that "bonus" must be capitalized over the remainder of the lease term to derive the present market value of the leasehold interest. *See Frontier Airlines, Inc. v. State Tax Comm'n*, 528 S.W.2d 943, 947 (Mo. banc 1975); *State ex rel. State Highway Comm'n v. Vitale*, 411 S.W.2d 174, 178[2] (Mo. 1967); *St. Louis County v. State Tax Comm'n*, 406 S.W.2d 644 (Mo. banc 1966); *Land Clearance for Redevelopment Auth. of Kansas City v. W. F. Coen & Co.*, 773 S.W.2d 465 (Mo. App. W.D. 1989).

Of course, the lessee carries the burden of proving existence of bonus value. *St. Louis County v. Boatmen's Trust Co.*, 857 S.W.2d 453 (Mo. App. E.D. 1993). Furthermore, such testimony and presentation thereof would be opinion evidence which would need to be adduced from a qualified witness. *See Frontier Airlines, Inc. v. State Tax Comm'n*, 528 S.W.2d at 945, and *Land Clearance for Redevelopment Auth. of Kansas City v. W. F. Coen & Co.*, 773 S.W.2d at 465. *See also St. Louis County v. Boatmen's Trust Co.*, 857 S.W.2d 453, where the court found that the trial court abused its discretion in accepting and relying on testimony of lessee's expert regarding comparable properties and in entering an order holding that there was bonus value on leases, even though properties designated as comparable by lessee's expert were, like leasehold property, out-lot parcels of large retail developments; leasehold property was part of a regional shopping center rather than a community-sized shopping center and highest and best use for comparable properties was for high-volume retail development, while highest and best use for leasehold property was free parking. The *Boatmen's Trust Co.* court also stated that, in these hearings for distribution, as in the trial of exceptions, the background of the expert witness who is testifying as to value of real estate must indicate familiarity with the property at issue and the basis for that knowledge, as well as the ability to give information which will assist the fact finder in determining ultimate issue. *See also Chapter 4* for additional discussion on valuation presentations.

b. (§3.24) *Tenant Improvements—Valuation*

Regarding the valuation of any tenant-performed improvements to the property, such improvements, without the written consent of the landlord, become realty and inure to the benefit of the landlord. Therefore, the tenant's compensable interest may not include such compensation. See *Century Elec. Co. v. Terminal R.R. Ass'n of St. Louis*, 426 S.W.2d 58 (Mo. 1968), and *State ex rel. State Highway Comm'n of Mo. v. St. Charles County Assocs.*, 698 S.W.2d 34 (Mo. App. E.D. 1985), citing *Innes Land & Leasing Co. v. Wyatt*, 56 S.W.2d 159 (Mo. App. S.D. 1933). In fact, even with the written consent of the landlord to remove improvements from the subject condemned property, the Supreme Court of Missouri has held that the evidence of the "bonus value" of the unexpired term and the value of the improvements must not be dealt with separately, but rather as a unit. See *State ex rel. State Highway Comm'n v. Samborski*, 463 S.W.2d 896, 902 (Mo. 1971).

c. (§3.25) *Tenant-Owned Structures*

A lessee, whose billboard sign structures were condemned along with leased land by the State Highway Commission, was entitled to a percentage of the market value of billboard structures, which must be ascertained as of the date when land was taken, and constituted in the total condemnation award to lessor. *State ex rel. State Highway Comm'n v. Volk*, 611 S.W.2d 255 (Mo. App. E.D. 1980). In *Volk*, the tenant had the right to remove the structures. Yet, during the process of the condemning authority acquiring the property, the landlord instituted an unlawful detainer action against the tenant to force him to remove the structures from the property prior to the condemnor's acquisition. The *Volk* court found that even though the unlawful detainer action was in fact pending, the state, in fact, had already acquired legal title to the property and, therefore, the tenant was entitled to the reasonable market value of the structures erected to support the billboard signs.

The *Volk* case should be read in conjunction with *State ex rel. State Highway Comm'n v. Vitale*, 411 S.W.2d 174 (Mo. 1967), which, although having made many of the improvements to the subject property and having a written clause in the lease stating that all improvements *terminated*, are the property of the tenant, *was not found to have a compensable interest in the improvements*. The Court stated that:

The wording in this lease in regard to "ownership" is peculiar. . . . Any "ownership". . . was actually temporary. . . . [A]nd the fact that the condemnation *before* its normal expiration would *not* operate to give the lessee the full value of the improvements; in other words, when the improvements were still charged with the reversionary interest. [T]he lessee *was not* . . . entitled to an added increment for the improvements.

*Id.* at 177. See also *State ex rel. Mo. Highway and Transp. Comm'n v. Quiko*, 923 S.W.2d 489 (Mo. App. S.D. 1996).

d. (§3.26) *Reversionary Interests—Valuation*

As previously mentioned, a reversionary interest may be considered as a determinable interest provided that the project for which the lands condemned will affect the subject property at the time the reversionary interest becomes effective. Of course, the valuation of such an interest and the potential damage incurred would be the challenge for the expert appraisers.

Experience in the valuation of estates is an absolute requirement for an appraiser to have in this type of case. In addition, attorneys should be familiar with the laws governing such estates, in general, and in the valuation thereof. For reference see Mo. Estate Planning (MoBar 1986, 1988, 1990). See also § 442.530, RSMo 1994, which provides, in relevant part:

When a party as tenant for life, . . . is entitled to the use of any estate, or part thereof, and . . . if the court in any legal proceedings awards a gross sum to be paid in lieu thereof, the sum shall be estimated according to the then value of an annuity of six percent on the principal for the probable life of such person. . . .

Section 442.530 further provides a table which helps to estimate the gross value of the life estate. Such estimated value is

then deducted from the total value of the property in order to determine the value of the reversionary interest. For further guidance see *United States v. 818.76 Acres of Land, More or Less, in Cedar and Dade Counties, State of Mo.*, 310 F. Supp. 210 (W.D. Mo. 1969), and *In re Burns*, 73 Bankr. 13 (Bankr. W.D. Mo. 1986).

**C. (§3.27) Taxing Authorities**

All property, unless exempted from property taxation because of religious or charitable ownership, is subject to the lien for taxes assessed by the local, county, and federal taxing authorities. Therefore, due to the existence of this determinable interest, condemning authorities name the appropriate taxing authorities as a party defendant.

In total takings, the collectors will pursue the full payment of the total lien. Surely, if back taxes are due, then the value thereof may not be in dispute.

But if the current year's taxes are due because of the statutory lien which attaches on January 1 of the current year, yet the property is acquired, say, in June of the current year, then it is arguable that the value of the interest is reduced by one-half of a year's assessment. But if such argument is not persuasive to the court, the fee owner must resort to recouping the payment of the additional one-half year under a "Relocation Payment" from the condemning authority. See Chapter 6, *infra*, for a further discussion on same.

In partial takings where the remainder property retains its value in order to be sufficient security for the lien of the taxes, the taxing authorities will usually waive any interest in the Commissioners' Award. But for those authorities who do not choose to waive, the above discussion regarding valuing such an interest would apply.

**IV. MISCELLANEOUS TOPICS**

**A. (§3.28) Jury Trials for Motions for Distributions**

Where persons, who alleged that as bona fide lessees they were entitled to share in a condemnation award, requested a jury trial that was denied, and proceeded to trial without objection, any right that lessees had to a jury trial was waived. *State ex rel. State Highway Comm'n v. Demarco*, 445 S.W.2d 379 (Mo. App. S.D. 1969).

**B. (§3.29) Withdrawal of Award—Effect on Appeal**

Where a defendant withdraws any ordered portion of the award from the court's registry, such defendant waives any right to appeal the court's order concerning the condemning authority's right to take the condemned property. The defendant would also waive the right to challenge the apportionment ordered by the court. Query how a defendant who does appeal the apportionment order prevents the distribution to the other defendants; a stay of distribution may or may not be in order in such situation.

The following cases address the issue of waiver: *Kansas City S. Ry. v. Second St. Improvement Co.*, 166 S.W. 296 (Mo. 1914); *State ex rel. Mo. Highway and Transp. Comm'n v. Meramec Valley Elevator, Inc.*, 782 S.W.2d 642, 647 (Mo. App. E.D. 1989), citing *State ex rel. State Highway Comm'n of Mo. v. Davidson*, 621 S.W.2d 126 (Mo. App. W.D. 1981).