
No. SC88647

IN THE SUPREME COURT OF MISSOURI

CITY OF ARNOLD, MISSOURI,
Appellant,

v.

HOMER R. TOURKAKIS and
JULIE TOURKAKIS,
Respondents,

On Petition from the Circuit Court of
Jefferson County, Missouri, Division Three
Case No.: 06JE-CC00142

MOTION FOR REHEARING

JAMES S. BURLING, CSB No. 113013

Pro Hac Vice

TIMOTHY SANDEFUR, CSB No. 224436

Pro Hac Vice

Pacific Legal Foundation

3900 Lennane Drive, Suite 200

Sacramento, California 95834

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-Mail: jsb@pacifical.org

E-Mail: tms@pacifical.org

MICHAEL A. WOLFF, No. 38207

Seigel & Wolff P.C.

7911 Forsyth Boulevard

Suite 300

Clayton, Missouri 63105-3860

Telephone: (314) 726-0009

Facsimile: (314) 726-5809

E-Mail: maw@seigelwolff.com

TRACY HUNSAKER GILROY,

No. 32289

The Gilroy Law Firm

231 South Bemiston Avenue

Suite 800

St. Louis, Missouri 63105

Telephone: (314) 965-3536

Facsimile: (314) 965-3560

Counsel for Respondents Homer R. Tourkakis, et al.

SUMMARY OF ARGUMENT

In their brief on the merits before this Court, Respondents Homer and Julie Tourkakis argued that the TIF Act contains no rules or procedures governing the use of eminent domain for redevelopment. *See* Resp. Brf. at 13-19. This was one reason why Respondents contended that the Act did not confer the power of eminent domain on third-class cities. Although this Court has now declared that the Act does grant the City that power, slip. op. at 4, it remains unclear what procedural mechanism is to be employed by the trial court on remand. This Court should grant rehearing to clarify what procedures are to be used by the trial court when hearing an eminent domain case pursuant to the TIF Act.

ARGUMENT

I

THE TIF ACT LACKS PROCEDURES

FOR CONDEMNATION IN THIS CASE

In his dissent to the opinion issued on March 18, Justice Teitelman noted that the TIF Act “provides absolutely no procedures by which third-class cities may exercise the power of eminent domain as part of a redevelopment project,” and “also fails to make any reference” either to the general eminent domain law or to any other statute which might provide such a procedure. Dis. op. at 2-3. The majority opinion,

however, does not respond to this point and does not explain what rules ought to be followed.

The Legislature frequently employs cross-references to provide procedural mechanisms for condemnation, *Meadow Park Land Co. v. Sch. Dist. of Kansas City*, 257 S.W. 441, 446 (Mo. 1923), but unlike all of the other statutes in Missouri law which confer the power of eminent domain,¹ the TIF Act contains no reference to any procedure for condemnation. Its sole reference to eminent domain comes in

¹ Missouri's other three acts regarding redevelopment—the Urban Redevelopment Corporations Law, Mo. Ann. Stat. § 353.010, *et seq.*; The Planned Industrial Expansion Law, Mo. Ann. Stat. § 100.300, *et seq.*, and the Land Clearance for Redevelopment Authority Law, Mo. Ann. Stat. § 99.300-99.660—all specify Chapter 523 as the procedural device to be employed. *See* Mo. Ann. Stat. § 353.130(3) (“An urban redevelopment corporation operating pursuant to a redevelopment agreement . . . may exercise the power of eminent domain . . . in the manner provided . . . in chapter 523.”); § 100.420(1) (“An authority . . . may exercise the power of eminent domain in the manner and under the procedure provided for corporations in chapter 523.”); § 99.460(1) (“An authority may exercise the power of eminent domain in the manner and under the procedure provided for corporations in chapter 523.”).

section 99.820(1)(3), which declares that “municipalit[ies]” may exercise the power subject to constitutional limitations. But it gives them no procedural tools for doing so, and does not incorporate or refer to any procedure. It is therefore unclear whether Chapter 523, Chapter 88, or Chapter 79 of the Missouri Statutes, or Missouri Supreme Court Rule 86 provides the procedure to be followed.

In its reply brief to this Court the City alleged for the first time that the appropriate procedure for condemnation is set out in Chapter 523. Appellants’ Reply Brief at 14. The City did not cite Chapter 523 in its original eminent domain petition in the trial court, *see* LF 0011, or in its opposition to the motion to dismiss. Likewise, the City asserted for the first time in its Reply Brief that Missouri Supreme Court Rule 86 provided the proper procedure, but this too was not cited in the petition. LF 0011.

Rather, the City alleged in its petition that its eminent domain power was granted by Chapters 79 and 88 of the revised statutes as well as under the TIF Act. LF 0011. Yet the City did not plead, prove, or follow either of these sections in the proceedings below. Moreover, neither of those chapters applies to this case. Chapter 79 provides no procedure for condemnation. Moreover, it refers to fourth-class cities, whereas the City of Arnold is a third-class city. While Chapter 88 does provide a mechanism for condemnation, it is a public works statute, not a redevelopment statute.

Even if the City had properly alleged Chapter 523 as the procedure to be followed, it does not apply to this case either. It is a public works statute that by its terms applies only to condemnations by “road, railroad, street railway, telephone, telegraph” and other public utility corporations. Mo. Ann. Stat. § 523.010. Contrary to the City’s claim in its Reply Brief (at 14), this Court has never declared that Chapter 523 is a default condemnation procedure to be used in all eminent domain cases unless otherwise specified. *Conduit Indus. Redevelopment Corp. v. Luebke*, 397 S.W.2d 671, 673 (Mo. 1965), which the City cited as standing for this proposition, does not stand for it at all. That case simply acknowledges that Chapter 523 contains specific procedures for the condemnations to which it applies. *Id.* But the same can be said of Chapter 88, Rule 86, and other provisions of Missouri law.

This question is significant because Chapter 523, Chapter 88, Chapter 79, and Rule 86 differ in significant ways. Chapter 523, for example, provides for relocation assistance. *See* Mo. Ann. Stat. § 523.200, *et seq.* Chapter 88 and Supreme Court Rule 86 do not. Chapter 88 requires the court to appoint commissioners who prepare a report on the valuation of the land, and then requires that a city enact an ordinance confirming or denying that report within ten days, or the condemnation shall be dismissed with prejudice. Mo. Ann. Stat. § 88.050. Chapter 523, by contrast, contains no rule providing for dismissal with prejudice, and requires instead that the

commissioners prepare a report which the condemnee may then review, and, if the condemnee objects, to prepare a new report. Either party may ask that a new appraisal be done by a jury instead. Mo. Ann. Stat. § 523.050. Thus Chapter 523's procedures differ significantly from those of Chapter 88.

The statutes also provide different deadlines: Chapter 88 requires that any exceptions to the valuation report by the commissioners be filed within ten days after the filing of that report. Mo. Ann. Stat. § 88.033. Chapter 523 and Supreme Court Rule 86, on the other hand, provide a thirty-day deadline. Mo. Ann. Stat. § 523.050(1); Supreme Court Rule 86.08. And while Chapter 523 sets out a thorough procedure for apportioning compensation among multiple parties who have an interest in condemned land, *see* Mo. Ann. Stat. § 523.053, neither Chapter 88, Chapter 79, nor Rule 86 provide for such cases.

Thus the parties need guidance as to what procedures to follow in the court on remand.

II

IF NO APPROPRIATE PROCEDURES ARE APPLICABLE, ANY CONDEMNATION ACTION BY THE CITY WILL DEPRIVE THE TOURKAKISES OF DUE PROCESS OF LAW

In the absence of a regular, settled, fair procedure, the taking of private property would violate the Respondents' due process rights. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Moore v. Bd. of Educ. of Fulton Pub. Sch. No. 58*, 836 S.W.2d 943, 947 (Mo. banc 1992). Because the TIF Act provides no indication whether the condemnation proceedings on remand should be governed by Chapter 523, Chapter 88, Chapter 79, Rule 86, or some other provision, this Court's determination that the TIF Act authorizes the City to use eminent domain for redevelopment requires further clarification as to what procedure to use on remand.

Due process requires that the Tourkakises know beforehand what rules will apply to their case. Without such knowledge, they will not be afforded the adequate hearing to which they are entitled. *Cf. Goe v. City of Mexico*, 64 S.W.3d 836, 840 (Mo. Ct. App. 2001) (failure to provide adequate procedure in condemnation case violated due process); *see also Baker v. Commonwealth of Pennsylvania*, 489 A.2d 1354, 1359 (Pa. 1985) (“[E]lementary notions of fairness require the

[government] to exercise its discretion in an orderly manner under uniform procedures made known to the public in advance.”); *McKinley v. Review Bd. of the Indiana Employment Sec. Div.*, 301 N.E.2d 845, 846 (Ind. 1973) (“[E]lementary notions of fairness . . . become acutely paramount where . . . [the affected party] is not familiar with the rules concerning the hearing procedure The right to be heard embraces the right to fair opportunity for preparation on all issues to be heard.”).

The Respondents therefore ask that this Court grant rehearing to clarify what statutory procedure to follow in future condemnation proceedings by third-class cities under the TIF Act.

CONCLUSION

Respondents’ motion for rehearing should be granted.

DATED: March 31, 2008.

Respectfully submitted,

By _____
TIMOTHY SANDEFUR, *Pro Hac Vice*

JAMES S. BURLING, CSB No. 113013
TIMOTHY SANDEFUR, CSB No. 224436
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: jsb@pacificlegal.org
E-Mail: tms@pacificlegal.org

MICHAEL A. WOLFF, No. 38207
Seigel & Wolff P.C.
7911 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105-3860
Telephone: (314) 726-0009
Facsimile: (314) 726-5809
E-Mail: maw@seigelwolff.com

TRACY HUNSAKER GILROY,
No. 32289
The Gilroy Law Firm
231 South Bemiston Avenue, Suite 800
St. Louis, Missouri 63105
Telephone: (314) 965-3536
Facsimile: (314) 965-3560

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document were served by first-class U.S. mail, postage prepaid this 31st day of March, 2008, to:

Gerald T. Carmody
Kelley F. Farrell
Carmody MacDonald P.C.
120 South Central Avenue, Suite 1800
St. Louis, MO 63105

Robert K. Sweeney
P.O. Box 20
503 Main Street
Hillsboro, MO 63050

Michael F. Barnes
AmerenUE
1901 Chouteau Avenue
M/C 1310
St. Louis, MO 63103

William C. Dodson
P.O. Box 966
Imperial, MO 63052

David P. Abernathy
Laclede Gas Company
720 Olive Street, Room 1402
St. Louis, MO 63101

John F. Medler, Jr.
Southwestern Bell Telephone L.P.
One AT&T Center, Room 3558
St. Louis, MO 63101

Marc B. Fried
Dennis J. Kehm, Jr.
Office of the County Counselor
County of Jefferson, Missouri
P.O. Box 100
Hillsboro, MO 63050

Kenneth C. Jones
Missouri American Water Co.
727 Craig Road
St. Louis, MO 63141

Jovita M. Foster
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, MO 63102-2740

Robert D. Vieth
Trustee
7805 Cassia Court
St. Louis, MO 63123

TIMOTHY SANDEFUR, *Pro Hac Vice*

JAMES S. BURLING, CSB No. 113013
TIMOTHY SANDEFUR, CSB No. 224436
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: jsb@pacificlegal.org
E-Mail: tms@pacificlegal.org

MICHAEL A. WOLFF, No. 38207
Seigel & Wolff P.C.
7911 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105-3860
Telephone: (314) 726-0009
Facsimile: (314) 726-5809
E-Mail: maw@seigelwolff.com

TRACY HUNSAKER GILROY,
No. 32289
The Gilroy Law Firm
231 South Bemiston Avenue, Suite 800
St. Louis, Missouri 63105
Telephone: (314) 965-3536
Facsimile: (314) 965-3560