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## CONDEMNATION BLIGHT: COMPENSATING THE LANDOWNER IN MISSOURI

*State ex rel. Washington University Medical Center Development Corp. v. Gaertner*<sup>1</sup>

Urban redevelopment can claim responsibility for revitalizing many inner-city areas in the United States.<sup>2</sup> The process of redevelopment generally originates with a statutory grant of the state's condemnation power to urban redevelopers approved by the city.<sup>3</sup> The city then announces the creation of a "blighted area," an inner-city district recommended for redevelopment because of its physical deterioration, crime rate, or inability to pay taxes.<sup>4</sup> The redeveloper then condemns buildings one at a time, a procedure that often spans several years before the final building is taken.<sup>5</sup> This delay between the announcement of the blight and the condemnation of a particular building has created a peculiar phenomenon. Once occupants know that the area is earmarked for future destruction and rebuilding, they tend to abandon the area. This exodus deprives building owners of rental income they would have received but for the announced blight. Police protection typically dissipates. Landowners become unwilling to sink money into upkeep. Vandalism increases and deterioration accelerates. The market value of buildings may plunge between the announce-

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1. 626 S.W.2d 373 (Mo. En Banc 1982). For a critical view of the same case, see *Denial of a Landowner's Counterclaim: Another Obstacle on the Road to Just Compensation*, 50 UMKC L. REV. 353 (1982).

2. See 18 ENCYCLOPAEDIA BRITANNICA MACROPAEDIA 1084 (1978).

3. MO. CONST. art. VI, § 21 authorizes laws reclaiming blighted areas for redevelopment. MO. REV. STAT. § 353.130(2) (1978) allows a redevelopment corporation to acquire real property by eminent domain "only when so empowered by the legislative authority of the cities affected by this chapter." See *id.* § 533.060.

4. 626 S.W.2d at 375. The target areas are defined by statute as follows: "Blighted area" shall mean that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration, have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes.

MO. REV. STAT. § 353.020(2) (1978).

5. 626 S.W.2d at 376.

ment of blight and the condemnation of the particular building.<sup>6</sup> If the amount of compensation a condemning authority must pay is limited to the fair market value of the structure at the time it is actually condemned, the landowner's ultimate recovery may be only a fraction of what it would have been had condemnation occurred at the time of the announcement. This economic devastation to landowners is termed "condemnation blight."<sup>7</sup>

The *Gaertner* court faced just such a case. The landowner attempted to raise his demand for compensation as a counterclaim in a condemnation proceeding. The Missouri Supreme Court disposed of the case on the ground that a counterclaim may not be raised in a condemnation action but indicated in dicta that the landowner could bring his claim for lost rents in a subsequent tort action.

### I. THE CASE

On June 13, 1974, the St. Louis Board of Aldermen declared blighted an area that contained the landowner's apartment property.<sup>8</sup> On February

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6. *Id.* at 375-76. A discussion of the problem's scope is found in 7A P. ROHAN & M. RESKIN, NICHOLS' THE LAW OF EMINENT DOMAIN § 14.02[1][a] (rev. 3d ed. 1981):

Once it is known that a project is planned tenants may move out and become impossible to replace; land may become unsalable or salable only at a depressed price; maintenance of land and buildings may cease; ordinances prohibiting new construction may be passed; and police protection may drop off, thereby encouraging vandalism. The blight caused by a combination of any or all of these factors has a reinforcing effect: once begun, the decline feeds upon itself. . . . [D]elays of five years between planning and commencement of a condemnation action are common, and can extend for as long as thirteen years. When the award finally comes, it may be only a small portion of the land's original value.

7. "The term 'condemnation blight' is used to denote the debilitating effect upon value of threatened, imminent, or potential condemnation." 4 J. SACKMAN & R. VAN BRUNT, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.3151[5] (rev. 3d ed. 1981). The unfairness to the landowner may best be seen in *Gould v. Land Clearance for Redev. Auth.*, 610 S.W.2d 360 (Mo. App., W.D. 1980). In 1967, the landowner ran an eight-unit apartment, a fully occupied building valued at \$30,000 to \$35,000. In that year, Gould received notice that her property was being considered for redevelopment. In January 1969, Kansas City's City Council approved the urban renewal plan. The condemnor assured Gould that her structure would be acquired and advised her to make only minimal improvements. After 1969, the condemnor informed Gould repeatedly that acquisition of her property was imminent. Despite the need for major improvement she was cautioned to "just keep it up." Occupancy of the building fell to two. Thieves broke in and stole radiators and bathtubs. By 1978, Gould's property had yet to be acquired and had only negligible value. *Id.* at 362-64. The court of appeals affirmed the dismissal of Gould's petition for damages. *Id.* at 367. The court saw no evidence of "untoward activity or aggravated delay." *Id.* at 364.

8. 626 S.W.2d at 374. An area may be designated as blighted notwithstanding

28, 1975, the Board approved a redevelopment plan submitted by the condemnor, a redevelopment corporation, to acquire property by eminent domain in the designated area. Property to be condemned included the landowner's apartments.<sup>9</sup> Two years later, on April 18, 1977, the condemnor instituted a condemnation proceeding against the landowner. Commissioners appointed by the trial judge<sup>10</sup> appraised the property at \$45,000. The condemnor excepted to the appraisal and requested a jury determination on the amount of damages.<sup>11</sup>

The landowner counterclaimed for lost rents spanning the three-year period between the designation of the property as blighted and the institution of condemnation proceedings. At trial, he claimed that, due to publicity and direct communication to tenants and owners, the impending condemnation became common knowledge. He further asserted that the activities of the condemnor caused loss of rental income from his property by inducing current tenants to vacate, encouraging vandalism, and discouraging prospective tenants from renting. He alleged that, beginning on the date the condemnor submitted its redevelopment plan,<sup>12</sup> an unlawful taking had occurred in violation of the Missouri Constitution<sup>13</sup> and the fifth and fourteenth amendments of the United States Constitution. He demanded the reasonable rental value of the property between the date of the plan's submission and the commencement of the condemnation trial but made no claim for the reduced market value of the property.<sup>14</sup>

The condemnor sought to prohibit the trial judge from further action until the counterclaim was dismissed. The Missouri Court of Appeals for the Eastern District ruled in favor of the condemnor and issued a writ of

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ing the presence of nonoffensive property in the area. *Parking Systems v. Kansas City Downtown Redev. Corp.*, 518 S.W.2d 11, 15 (Mo. 1975). Judicial review of a blighting ordinance is limited to whether the legislative determination was arbitrary, fraudulent, in bad faith, collusive, or beyond the scope of the city's power. *Allright Missouri, Inc. v. Civil Plaza Redev. Corp.*, 538 S.W.2d 320, 324 (Mo. En Banc 1976); *Maryland Plaza Redev. Corp. v. Greenberg*, 594 S.W.2d 284, 287 (Mo. App., E.D. 1979).

9. 626 S.W.2d at 374.

10. Appointment and duties of commissioners are governed by MO. REV. STAT. § 523.040 (1978); MO. R. CIV. P. 86.06.

11. A jury trial must be provided to determine compensation in a condemnation proceeding upon the request of either party. MO. REV. STAT. § 523.060 (1978).

12. The plan was submitted approximately four months after passage of the blighting ordinance. 626 S.W.2d at 374.

13. MO. CONST. art. I, § 26 provides "[t]hat private property shall not be taken or damaged for public use without just compensation." The section further provides that "the property shall not be disturbed or the proprietary rights of the owner therein divested" until the owner is paid.

14. 626 S.W.2d at 375.

prohibition.<sup>15</sup> The Missouri Supreme Court ordered a transfer.<sup>16</sup> In the supreme court, the condemnor reasserted its argument that a counterclaim is not cognizable in a condemnation proceeding.<sup>17</sup> The landowner maintained that a claim for lost rents arising out of the same transaction or occurrence as the subject matter of the proceeding constituted a compulsory counterclaim and *must* be raised in any civil action, including a condemnation proceeding.<sup>18</sup>

## II. PERMISSIBILITY OF COUNTERCLAIMS

The Missouri Supreme Court held that a counterclaim cannot be maintained in a condemnation proceeding.<sup>19</sup> Describing the issue as a recurring problem unresolved in Missouri,<sup>20</sup> the court chose between two procedural rules that suggested opposite conclusions. Missouri Revised Statutes chapter 523 deals with condemnation proceedings; upon a request for a jury to appraise the condemned property's value, "any subsequent proceeding shall only affect the amount of compensation to be allowed."<sup>21</sup>

15. State *ex rel.* Washington University Medical Center Redev. Corp. v. Gaertner, No. 42237 (Mo. App., E.D. 1980).

16. Transfer was ordered under MO. CONST. art. V, § 9 (1976); MO. R. CIV. P. 84.02.

17. The condemnor argued that in a condemnation jury trial the issue is limited to the amount of damages to be awarded the condemnee for the taking. Since the damages claimed by the landowner arose prior to the date of taking, they were not compensable in a condemnation action. A claim for lost rent, argued the condemnor, is an in personam action which cannot be brought in an in rem action. 626 S.W.2d at 375.

18. The landowner argued the language of the compulsory counterclaim rule: A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

MO. R. CIV. P. 55.32(a). The landowner further relied on *id.* 42.01 ("there shall be one form of action to be known as a 'civil action'"); *id.* 41.01(a) (civil rules "shall govern all civil actions"). The landowner asserted that a condemnation proceeding is a civil action and thus, under the Rules, the counterclaim was compulsory. 626 S.W.2d at 376-77.

19. 626 S.W.2d at 378.

20. *Id.* at 375. See Land Clearance Redev. Auth. v. Morrison, 457 S.W.2d 185, 199 (Mo. En Banc 1970) (court "need pursue no further the question of the proper method of raising" the issue sought to be raised by counterclaim); State *ex rel.* City of Creve Coeur v. Weinstein, 329 S.W.2d 399, 404 (Mo. App., St. L. 1959) (court "need not decide" if counterclaim is permissible in condemnation action).

21. MO. REV. STAT. § 523.050(2) (1978). See also MO. R. CIV. P. 86.08 (filing of exceptions to commissioners' award). "The effect of the filing of exceptions to the commissioners' award by either party is the same: a jury determination on the single issue of the fair market value of the property before and after the taking or

On the other hand, Missouri Rule of Civil Procedure 55.32(b) requires the filing of compulsory counterclaims in all civil actions.<sup>22</sup> The *Gaertner* court noted, "Where one statute deals with the subject generally and another statute deals with a part of the same subject in a more minute and definite way, repugnancy between them will be resolved in favor of the special statute over the general . . . ."<sup>23</sup> Therefore, the court reasoned, the specific rule limiting the jury issue to the amount of compensation must take precedence over the conflicting general compulsory counterclaim rule.<sup>24</sup> After disposing of the counterclaim, the court stated in dicta that the landowner's only remedy lay in a separate personal action sounding in tort.<sup>25</sup>

The *Gaertner* court based its conclusion that counterclaims cannot be maintained in condemnation proceedings on Missouri case law. A review of those cases, however, reveals scant authority regarding the procedural issue involved. In two condemnation decisions in the early 1960's, the Missouri Supreme Court permitted a counterclaim in one<sup>26</sup> and dismissed a counterclaim in the other for failure to state a claim on which relief could be granted.<sup>27</sup> The court did not analyze the procedural question in either case.<sup>28</sup> In 1965, the court decided a condemnation case in which the land-

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damages sustained by the defendant." *State ex rel. State Highway Comm'n v. Manley*, 549 S.W.2d 533, 535 (Mo. App., St. L. 1977).

22. See MO. R. Civ. P. 55.32(a); note 18 *supra*.

23. 626 S.W.2d at 377 (quoting *State v. Bey*, 599 S.W.2d 243, 246 (Mo. App., W.D. 1980)). See also *State ex rel. Fort Zumwalt School Dist. v. Dickherber*, 576 S.W.2d 532, 536-37 (Mo. En Banc 1979).

24. 626 S.W.2d at 377.

25. *Id.* at 378 ("[L]andowner's relief lies in pursuing in a separate action the claim now alleged and stated in his counterclaim. Our prior cases have recognized such a right on the part of the landowner.").

26. In *State ex rel. State Highway Comm'n v. Schwabe*, 335 S.W.2d 15 (Mo. 1960), the court allowed a counterclaim in a condemnation proceeding. The counterclaim sought to reform the deed by which the landowners previously had conveyed property to the Commission. The landowners attempted to add a reservation of an access right of way allegedly left out due to a mutual mistake of fact. *Id.* at 22.

27. In *State ex rel. State Highway Comm'n v. Hammel*, 372 S.W.2d 852 (Mo. 1963), the court dismissed the landowner's counterclaim which sought specific performance of a purported agreement by the Commission to construct an overpass necessary for the landowner's access to his property. *Id.* at 853. The court held that the counterclaim failed to state a cause of action because the Commission had abandoned the plan and sought acquisition of the property by condemnation. *Id.* at 854-55.

28. See *State ex rel. State Highway Comm'n v. Hammel*, 372 S.W.2d 852 (Mo. 1963); *State ex rel. State Highway Comm'n v. Schwabe*, 335 S.W.2d 15 (Mo. 1960). Neither opinion addressed the permissibility of counterclaims in condemnation proceedings, despite the fact that MO. REV. STAT. § 523.050(2) (1978) has remained unmodified since 1939.

owner cross-claimed on an unrelated issue.<sup>29</sup> The court interpreted chapter 523 as a special statute, "largely containing its own specific procedures for condemnation issues only,"<sup>30</sup> and dismissed the cross-claim as beyond the purview of the condemnation proceeding.<sup>31</sup>

In a 1970 condemnation case, the landowner counterclaimed for the difference in market value between the date of taking and the date, two years earlier, when the urban redeveloper allegedly induced tenants to vacate. The court ruled that the claim failed to allege facts supporting a taking at the earlier date and neatly sidestepped the procedural issue.<sup>32</sup> The dissent, however, argued for the counterclaim's permissibility, reasoning that the compulsory counterclaim rule applies to all civil actions including condemnation proceedings.<sup>33</sup>

Though the *Gaertner* court relied solely on Missouri case law,<sup>34</sup> a 1981 New Hampshire case presents an almost identical fact situation. In *City of*

29. *Conduit Indus. Redev. Corp. v. Leubke*, 397 S.W.2d 671, 672 (Mo. 1965) (cross-claim for breach of contract).

30. *Id.* at 672-73.

31. 397 S.W.2d at 674. "Although Civil Rules procedures may be applicable where necessary to fill gaps and expedite proceedings, we do not consider that all civil procedure has been grafted onto condemnation proceedings without limitations as to controversies involving issues unrelated to condemnation." *Id.*

32. *Land Clearance for Redev. Auth. v. Morrison*, 457 S.W.2d 185, 199 (Mo. En Banc 1970). For an erroneous conclusion that *Morrison* stands for the permissibility of a counterclaim in a condemnation proceeding, see *State ex rel. State Highway Comm'n v. Wilcox*, 535 S.W.2d 131, 135 (Mo. App., St. L. 1976).

33. 457 S.W.2d at 201-02 (Finch, J., dissenting). The permissibility of a counterclaim in a condemnation proceeding was deemed so important that the drafters of the Uniform Eminent Domain Code included a provision allowing for it:

The defendant shall assert by way of counterclaim . . . all claims he has against the plaintiff relating to the property sought to be taken in the action. Any claim not so pleaded is forever barred. The counterclaim . . . and pleadings responsive thereto shall conform to the . . . Rules of Civil Procedure.

UNIF. EMINENT DOMAIN CODE § 505(b) (1974). The comment to § 505 established the section as an optional one "intended to prevent a condemnation action from becoming unduly complex or unnecessarily delayed through the routine filing of additional pleadings." *Id.* § 505 comment. As of June 30, 1980, no state had adopted the Code. Annot., 13 U.L.A. 1 (1980). For a note urging adoption of the Code in Missouri, see 47 MO. L. REV. 863 (1982).

34. In addition to the cases discussed in notes 26-33 and accompanying text *supra*, the court relied on *State ex rel. State Highway Comm'n v. Joe D. Esther, Inc.*, 579 S.W.2d 155 (Mo. App., S.D. 1979). The court in that case, relying on *State ex rel. State Highway Comm'n v. Hammel*, 372 S.W.2d 852 (Mo. 1963), dismissed for failure to state a claim upon which relief could be granted a counterclaim for a mandatory injunction to restrain the Commission from entering the land. 579 S.W.2d at 157. The court did not address the procedural issue.

*Concord v. 5,700 Square Feet of Land*,<sup>35</sup> the New Hampshire Supreme Court decided a condemnation proceeding in which the landowner counterclaimed for breach of contract. The applicable statute, similar to Missouri's, limited the hearing to a determination of "just compensation."<sup>36</sup> The New Hampshire court permitted the counterclaim, noting that the condemnation statute did not expressly exclude counterclaims. Rather than relying on the general-specific distinction in statutory construction, the court reasoned that the overriding legislative intent in enacting the condemnation law was the speedy resolution of the damage issue.<sup>37</sup> Because the disposition of the counterclaim would ultimately affect the amount of compensation to be awarded the landowner, the counterclaim was permissible.<sup>38</sup>

Other states are divided on the issue,<sup>39</sup> but the reasoning of *City of Concord*, rather than *Gaertner*, appears consistent with policy considerations. The purpose of the compulsory counterclaim rule is to avoid a multiplicity of lawsuits and to dispose of litigation more efficiently by deciding related claims in a single action.<sup>40</sup> The *Gaertner* decision, however, will force the initiation of additional suits, resulting in added expenses for litigants and increased workloads for courts. Final resolution of the disputed compensation issue will be unnecessarily delayed. The general-specific statutory dis-

35. 121 N.H. 170, 427 A.2d 46 (1981).

36. N.H. REV. STAT. ANN. § 498-A:24 (Supp. 1981-1982). See MO. REV. STAT. § 523.050 (1978).

37. 121 N.H. at 172, 427 A.2d at 48. Similarly, MO. R. CIV. P. 41.03 states, "Rules 41 to 101, inclusive, shall be construed to secure the just, speedy and inexpensive determination of every action."

38. 121 N.H. at 172, 427 A.2d at 48. The court stated:

In the instant case, the defendant's counterclaim grew out of the circumstances surrounding the condemnation proceeding and was factually and logically related to the plaintiff's petition. Resolution of the defendant's claim actually resolved the matter of compensation and prevented the need for further proceedings. . . . Under these circumstances, we hold that it was proper for the trial court to allow the defendant's counterclaim.

*Id.*

39. For cases narrowly interpreting the range of issues allowable in condemnation proceedings, see *Metropolitan Atlanta Rapid Transit Auth. v. Datry*, 235 Ga. 568, 580, 220 S.E.2d 905, 913 (1975) (evidence of consequential damage from noise, smoke inadmissible); *Department of Transp. v. Newmark*, 34 Ill. App. 3d 811, 814, 341 N.E.2d 133, 135-36 (1975) (evidence of landowner's other property and "prior knowledge" inadmissible). Other courts have given broader scope to issues raised in condemnation actions. See *Block v. Orlando-Orange County Expressway Auth.*, 313 So. 2d 75, 77 (Fla. Dist. Ct. App. 1975) (certain counterclaims allowed); *Bailey v. State*, 57 Hawaii 144, 149, 552 P.2d 365, 367 (1976) (compulsory counterclaim must be pleaded in condemnation proceeding).

40. See *State ex rel. Buchanan v. Jensen*, 379 S.W.2d 529, 531 (Mo. En Banc 1964); MO. R. CIV. P. 55.32.



inction relied on by the court is a weak rationale when compared to these important policy factors, especially where the *Gaertner* decision is founded on the *absence* of references to counterclaims rather than an explicit statutory mandate.<sup>41</sup>

### III. REMEDIES FOR CONDEMNATION BLIGHT

The *Gaertner* court's denial of counterclaims bars their use as a remedy by victims of condemnation blight, but the court recognized the inequitable economic damage to landowners attributable to announcements of blight.<sup>42</sup> The *Gaertner* court faced two obstacles to providing alternative relief to Missouri landowners. First, the taking of property in Missouri, absent aggravated delay or untoward activity,<sup>43</sup> does not occur until either the condemnor pays the commissioners' award into the registry of the court or trial commences after the condemnor requests a jury determination.<sup>44</sup> Missouri courts consistently refuse to use any other date for valuation purposes.<sup>45</sup> Second, American law traditionally equates just compensation with fair market value at the time of the taking.<sup>46</sup> Despite a decrease in value caused by condemnation blight, Missouri courts limit a landowner's recovery to the market value of the condemned property at the date of taking. The effect of the rule is to preclude claims for either decreased value or lost rental income caused by the blight.<sup>47</sup>

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41. See 626 S.W.2d at 377. Since resolution of the counterclaim does directly affect compensation awarded to the landowner, the limitation of condemnation proceedings to "the amount of compensation to be allowed" should not preclude counterclaims. See MO. REV. STAT. § 523.020(2) (1978).

42. "Between the time of blighting and the time of taking, the property frequently has deteriorated substantially in value at great loss to the landowner." 626 S.W.2d at 376.

43. The date of valuation for a taking in Missouri can be moved back in time upon proof by the landowner of aggravated delay or untoward activity. See *Land Clearance for Redev. Auth. v. Morrison*, 457 S.W.2d 185, 199 (Mo. En Banc 1970); *Land Clearance for Redev. Auth. v. Massood*, 526 S.W.2d 354, 358 (Mo. App., K.C. 1975). As the court in *Massood* noted, the chances for either of these factors being found are slight: "[I]t is difficult to envision a situation, unusual circumstances excepted, when a condemning authority can be said to be guilty of 'aggravated delay' or 'untoward activity,' so far as a premature announcement of condemnation is concerned." 526 S.W.2d at 358.

44. See *Conduit Indus. Redev. Corp. v. Luebke*, 397 S.W.2d 671, 674 (Mo. 1965); *St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144, 147 (Mo. 1964); *City of St. Louis v. International Harvester Co.*, 350 S.W.2d 782, 784 (Mo. En Banc 1961); *City of St. Louis v. Vasquez*, 341 S.W.2d 839, 848 (Mo. 1960).

45. 626 S.W.2d at 375.

46. Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME LAW. 765, 773 (1973).

47. As recently as 1979, the Missouri Supreme Court noted that condemnation blight was not compensable in Missouri. *Aronstein v. Missouri State Highway*

Under the constraint of these two rules, the *Gaertner* court suggested

Comm'n, 586 S.W.2d 328, 330 (Mo. En Banc 1979). In failing to recompense landowners for economic loss caused by condemnation blight, Missouri courts have compared it to threat of condemnation, initiation of condemnation proceedings, and preliminary negotiation toward condemnation, none of which are considered a "taking" or "damaging" under MO. CONST. art. I, § 26. See *State ex rel. State Highway Comm'n v. Samborski*, 463 S.W.2d 896, 903-04 (Mo. 1971); *Hamer v. State Highway Comm'n*, 304 S.W.2d 869, 874 (Mo. 1957).

In *State ex rel. City of St. Louis v. Beck*, 333 Mo. 1118, 63 S.W.2d 814 (En Banc 1933), the court rejected the landowner's request for compensation for lost rents and inability to rent the property during the pendency of the condemnation proceeding. The court stated that damages suffered by a condemnee due to the pendency of condemnation proceedings are not compensable in the proceeding. Damages awarded in condemnation must be for damage to the property itself rather than harm to the landowner personally. Because a loss of revenue is a personal loss, the court reasoned, it is not an element of just compensation. *Id.* at 1124-25, 63 S.W.2d at 817. Accord *Hamer v. State Highway Comm'n*, 304 S.W.2d 869, 874 (Mo. 1957). In *St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144 (Mo. 1964), the court again ruled against the landowner, who had objected to the trial court's limitation of property value to the date when the award was deposited with the court. The court dismissed the argument, establishing valuation at the time of the taking rather than any prior time. *Id.* at 147.

Missouri cases after 1939 rely on the language in *Danforth v. United States*, 308 U.S. 271, 285 (1939): "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered a 'taking' in the constitutional sense." *Danforth* concerned condemnation proceedings arising under federal flood control legislation, not urban redevelopment. The Supreme Court recently reiterated the same rule. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980), noted in 46 MO. L. REV. 868 (1981). The United States Court of Appeals for the Eighth Circuit has substantially followed the reasoning of *Danforth*. Construing Missouri law, the court wrote, "[T]he mere declaration of blight and other initial steps authorizing condemnation, even if they result in a decline in property values, do not constitute a taking requiring compensation to the property owner." *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), cert. denied, 444 U.S. 899 (1979). The court suggested, however, that action falling short of acquisition could amount to a taking if it deprived the landowner of most of his beneficial interest in the property and significantly depressed its value. *Id.* The language in *Garland* would provide a greater scope of recovery than the "untoward activity or aggravated delay" standard imposed by Missouri courts. See note 43 *supra*. Nevertheless, *Garland* does not recognize a landowner's right to recover lost rental income or decreased property value resulting from condemnation blight absent extreme circumstances. The case has been interpreted to preclude compensation for mere unsalability of property caused by knowledge of future governmental acquisition. *Allen Family Corp. v. City of Kansas City*, 525 F. Supp. 38, 41 (W.D. Mo. 1981).

Some members of the state's judiciary are critical of the position taken by Missouri courts:

A grossly premature announcement of condemnation, however well-moti-

two alternative types of damages available to landowners victimized by condemnation blight. Although not clearly articulated in the opinion, the first remedy would compensate landowners only for decreased property value caused by blight, while the second would limit a landowner's recovery to lost rental income.

#### A. *Decrease in Property Value*

The first solution suggested by *Gaertner* was the enactment of a statute that, while not changing the date of legal taking, would alter the valuation of the property by including compensation for the decrease in property value between the first announcement of condemnation plans and the initiation of the condemnation proceeding.<sup>48</sup> In effect, the date of property valuation would relate back to a time prior to the commencement of condemnation proceedings, thereby compensating the landowner for decreased value attributable to impending condemnation. Such legislation has been introduced in the Missouri General Assembly, but it has not been enacted.<sup>49</sup> Several states have adopted similar statutes.<sup>50</sup>

Even in the absence of statutory authority, courts in other states have allowed landowners to recover for decreased property value through judicial interpretation of just compensation, either by moving back the date of valu-

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ated and regardless of how or by whom initiated, may, as a practical matter, penalize property owners if the fair market value of the property is determined solely as of the date of the de jure taking. This is particularly true in situations involving the twentieth century innovation of urban redevelopment.

*Land Clearance for Redev. Auth. v. Massood*, 526 S.W.2d 354, 357 (Mo. App., K.C. 1975). *Accord* *State ex rel. State Highway Comm'n v. Armacost Motors*, 552 S.W.2d 360, 365 (Mo. App., K.C. 1977).

48. 626 S.W.2d at 378. "The ideal solution . . . would be for the legislature to make provision for the allowance of damages . . . or to provide for a different *time of taking* in cases where the condemnor has cast a cloud of blight upon the property in advance of the actual taking." *Id.*

49. Two bills allowing compensation for diminution in value were introduced in Missouri's 80th General Assembly. Both contained identical language:

In addition, the landowners shall receive just compensation for any damaging of the property or for any diminution in the value of the property prior to the date of taking, by the public project for which the property is condemned, or by any announcements or acts of the condemning authority, its officials, employees, agents, or contractors concerning such public project, if the trier of fact shall find that said damages or diminution in the value of the property are proximately caused thereby.

S. 413, 80th Gen. Assem., 1st Reg. Sess. § 3 (1979); S. 549, 80th Gen. Assem., 2d Reg. Sess. § 4 (1980). Neither was enacted.

50. *See* ILL. ANN. STAT. ch. 47, § 9.7 (Smith-Hurd Supp. 1980); MD. REAL PROP. CODE ANN. § 12-105(b) (1981); N.J. STAT. ANN. §§ 20:1-9, 40:55-21.10 (West Supp. 1981); PA. STAT. ANN. tit. 26, § 1-604 (Purdon Supp. 1980); WIS. STAT. ANN. § 32.09(5)(b) (West Supp. 1981).

ation to before the de jure taking or by determining value at the date of taking absent the effects of condemnation blight.<sup>51</sup> These courts rely primarily on *United States v. Miller*,<sup>52</sup> in which the United States Supreme Court held that where the government contemplated a series of condemnations, landowners of tracts later condemned could not benefit from appreciated values attributable to the project. The Court established “the date of governmental commitment” as the date of valuation.<sup>53</sup> Subsequently, some courts treated depreciation caused by a condemnation plan similarly.<sup>54</sup> The New York Court of Appeals fixed compensation, upon proof of condemnation blight, as the value of the property at the time of the de jure taking, “but for the debilitating threat of condemnation.”<sup>55</sup> Other courts have determined the date of valuation to be just before the condemner took “active steps” to implement the plan<sup>56</sup> or immediately preceding the time when the

51. See, e.g., *Tharp v. Urban Renewal & Community Dev. Agency*, 389 S.W.2d 453, 456 (Ky. 1965); *City of Shreveport v. Bernstein*, 391 So. 2d 1331, 1333-34 (La. Ct. App. 1980); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 258, 269 N.E.2d 895, 905, 321 N.Y.S.2d 345, 359 (1971); *City of Cleveland v. Carcione*, 119 Ohio App. 525, 533, 190 N.E.2d 52, 57 (1963). The two approaches achieve identical results—the landowner receives compensation for the full value of the condemned property, undecreased by the condemner’s activities.

52. 317 U.S. 369 (1943).

53. *Id.* at 377. In a later decision, the Court held that depreciation in value due to prospective condemnation cannot be considered in valuation. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961). The Court went on in dicta to recognize the abuses made possible by its decision: “It would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . [of condemnation] and then to take advantage of this depression in the price which it must pay for the property when eventually condemned.” *Id.* (quoting 1 L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 105, at 447 (2d ed. 1953)). See *Lincoln Loan Co. v. State ex rel. State Highway Comm’n*, 274 Or. 49, 56-57, 545 P.2d 105, 110 (1976) (compensation for condemnation blight recognized).

54. See *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (valuation set on date condemner “was committed” to project); *Foster v. City of Detroit*, 254 F. Supp. 655, 666 (E.D. Mich. 1966) (valuation “immediately before the city took any steps to carry out the work of the project”), *aff’d on other grounds*, 405 F.2d 138 (6th Cir. 1968). See generally Comment, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319 (1963).

55. *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 258, 269 N.E.2d 895, 905, 321 N.Y.S.2d 345, 359 (1971). The court went on to require proof by the landowner of affirmative acts by the condemner directly resulting in decreased property value. *Id.*

56. *City of Cleveland v. Carcione*, 118 Ohio App. 525, 533, 190 N.E.2d 52, 57 (1963). The court used prior valuation to compensate the landowner where, at the time of the condemnation proceeding, only the landowner’s building and 35 to 40 other buildings still stood out of 584 structures originally included in the project, and all of the landowner’s tenants moved out pursuant to letters sent to them by the condemner. *Id.* at 526-28, 190 N.E.2d at 53-54.

project's existence became "generally known."<sup>57</sup> A Louisiana court achieved a similar result by using the capitalization of rent method of valuation based on the building's full occupancy prior to the creation of the redevelopment plan.<sup>58</sup>

The United States Supreme Court has suggested that it may allow recovery of interim damages after a governmental unit has substantially impeded a landowner's use of his property. In *San Diego Gas & Electric Co. v. City of San Diego*,<sup>59</sup> the landowner brought an action for inverse condemnation against the city based on a zoning ordinance that deprived the landowner of its intended use of the property.<sup>60</sup> The Court disposed of the case on a procedural issue,<sup>61</sup> but five justices indicated their belief that a regulation of the use of property, falling short of condemnation, can constitute a taking.<sup>62</sup> Implementation of the plan would trigger the requirement of just compensation "where the effects completely deprive the owner of all or most of his interest in the property."<sup>63</sup> Although the case involved zoning, the same rule arguably could apply to cases of condemnation blight if courts found that an announcement of blight caused substantial deprivation of landowners' beneficial use of their property. The *Gaertner* opinion does not consider this body of decisions, no doubt because the counterclaim demanded only lost rents and the appropriate date for property valuation was not at issue.

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57. *Tharp v. Urban Renewal & Community Dev. Agency*, 389 S.W.2d 453, 456 (Ky. 1965).

58. *City of Shreveport v. Bernstein*, 391 So. 2d 1331, 1333-34 (La. Ct. App. 1980).

59. 450 U.S. 621 (1981).

60. *Id.* at 623. The landowner intended to use the property as a site for a nuclear power plant. When the landowner acquired the land, it was zoned in part for industrial purposes and in part as undeveloped. The city subsequently enacted a plan rezoning the area for long-range conservation purposes and announced its intent to acquire the land eventually. *Id.* at 624-25.

61. *Id.* at 633. Justice Blackmun's majority opinion refused to reach the merits of the case because the decision of the California Court of Appeals under review was not a final judgment. Justice Blackmun reasoned that since the state court had not resolved whether a taking had occurred, the Supreme Court was without jurisdiction to review the merits. *Id.*

62. Four justices joined in Justice Brennan's dissent. *Id.* at 636 (Brennan, J., dissenting). Justice Rehnquist concurred in the majority opinion but made clear his agreement with the dissent on the merits of the case. *Id.* at 633-34 (Rehnquist, J., concurring).

63. *Id.* at 652-53 (Brennan, J., dissenting). The rule enunciated by Justice Brennan would move back the actual date of the taking and require the payment of just compensation beginning on the date the regulation causing the taking became enforceable. The dissent did not specify the measure of compensation; the amount would be determined by "ordinary principles." *Id.* at 658 (Brennan, J., dissenting). However, the dissent said, "As a starting point, the value of the property taken may be ascertained as of the date of the taking." *Id.* at 659 (Brennan, J., dissenting).

Significantly, neither the case law interpreting the date of valuation nor the statutes changing the date of valuation compensate landowners for lost rents. Only the diminution of property value caused by the condemnor is added to the concept of just compensation. Therefore, passage of similar legislation in Missouri would not assist a *Gaertner*-type landowner who alleges only lost rental income.

### B. Lost Rents

The *Gaertner* court's second suggested remedy was that the landowner's only present form of relief lay in a separate tort action.<sup>64</sup> The court deemed the post-condemnation action a right already recognized in Missouri, but none of the cases cited by the court provides explicitly for that remedy.<sup>65</sup> The strongest support appears as dicta in the court's 1933 decision in *State ex rel. City of St. Louis v. Beck*,<sup>66</sup> which indicates that a personal action sounding in tort may be available: "The damages sustained from the institution and pendency of the condemnation proceeding itself, *if any*, must be an action sounding in tort."<sup>67</sup> The *Beck* court refused, however, to decide whether a subsequent action could be brought by the landowner.<sup>68</sup>

The *Gaertner* dicta suggests that the Missouri Supreme Court will allow a subsequent suit for recovery of lost rents. If limited to the facts of *Gaertner*, this may provide for recovery of lost rents caused by condemnation blight even though Missouri has not yet recognized recovery of decreased property value attributable to blight.<sup>69</sup> Significantly, claims for recovery of lost rents

64. 626 S.W.2d at 378.

65. The court cited *Land Clearance Redev. Auth. v. Morrison*, 457 S.W.2d 185, 193-94 (Mo. En Banc 1970), which merely quotes language from *State ex rel. City of St. Louis v. Beck*, 333 Mo. 1118, 1126, 63 S.W.2d 814, 817 (Mo. En Banc 1933). The court also relied on *Land Clearance for Redev. Auth. v. Massood*, 526 S.W.2d 354, 358 (Mo. App., K.C. 1975), a condemnation case in which the court dismissed the landowner's argument of condemnation blight. The *Massood* court discussed the theory of condemnation blight in dicta but did not mention a remedy for the landowner. The *Gaertner* court also cited *State ex rel. State Highway Comm'n v. Wilcox*, 535 S.W.2d 131 (Mo. App., St. L. 1976), in which the court of appeals erroneously cited *Morrison* as authority for the proposition that relief for decreased property value sustained before taking can be granted in a separate proceeding. *Id.* at 135. The same court, in fact, also incorrectly asserted that use of a counterclaim had been upheld in *Morrison*, when it had not. *Id.* See note 33 and accompanying text *supra*.

66. 333 Mo. 1118, 63 S.W.2d 814 (Mo. En Banc 1933).

67. *Id.* at 1123, 63 S.W.2d at 815 (emphasis added).

68. "We do not undertake to decide if the . . . [landowner] is entitled to any damages on account of the pendency or delay of the condemnation proceeding itself, and if there is any damage . . . it is of a personal character . . . and is not an element to be considered by the commissioners in assessing benefits and damages in this proceeding." *Id.* at 1126, 63 S.W.2d at 817.

69. 626 S.W.2d at 376.

due to impending condemnation have enjoyed less success across the country than claims for decreased value.<sup>70</sup>

Courts have been reluctant to compensate landowners for lost rents, based in part on the traditional distinction between property value as a *property* right, compensable under the taking clause, and lost rents as a *personal* right of the landowner, historically noncompensable.<sup>71</sup> Nevertheless, several courts have recently recognized the right to property as a personal right and allowed recovery of rental income.<sup>72</sup> The Wisconsin Supreme Court, in the landmark decision of *Luber v. Milwaukee County*,<sup>73</sup> stated that recovery of lost rental income caused by condemnation blight was an element of just compensation and ruled that a statute limiting recovery of lost rent was unconstitutional.<sup>74</sup> Loss of rent is similarly recoverable under just compensation in California, but only upon a showing that the condemnor acted unreasonably.<sup>75</sup> These courts determined that recovery of lost rent

70. Sackman, *Condemnation Blight—A Problem in Compensability and Value*, 1973 INST. ON PLAN. ZONING & EMINENT DOMAIN 157, 184-85. See, e.g., *Hempstead Warehouse Corp. v. United States*, 98 F. Supp. 572, 573 (Ct. Cl. 1951); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962).

71. 4 J. SACKMAN & R. VAN BRUNT, *supra* note 7, § 12.3151[5].

72. Justice Stewart, writing for the United States Supreme Court, cut through the artificial distinction:

The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. . . . Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right . . . .

*Lynch v. Household Finance Corp.*, 405 U.S. 538, 551-52 (1972).

73. 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

74. *Id.* at 283, 177 N.W.2d at 386. The invalidated statute, WIS. STAT. ANN. § 32.19(4) (1961), limited recovery of lost rent to the amount lost in the year prior to condemnation to the extent that it exceeded the average annual rental losses caused by vacancies during the first four years of the five-year period preceding the taking. *Id.* at 275, 177 N.W.2d at 382. The decision was reaffirmed in *Maxey v. Redevelopment Auth. of Racine*, 94 Wis. 2d 375, 392, 288 N.W.2d 794, 802 (1980). *Accord City of Muskegon v. DeVries*, 59 Mich. App. 415, 419, 229 N.W.2d 479, 482 (1975).

75. *Klopping v. Whittier*, 8 Cal. 3d 39, 53, 500 P.2d 1345, 1355, 104 Cal. Rptr. 1, 11 (1972). The California Supreme Court in *Klopping* was confronted with a case in which the city made public announcements of an intent to condemn, abandoned the plan after one and a half years, and simultaneously announced an intent to resume condemnation proceedings. The landowner, in an action for inverse condemnation, claimed damages for lost rental income. The court stated that lost rent directly affects market value. *Id.* at 54 n.7, 500 P.2d at 1357 n.7, 104 Cal. Rptr. at 13 n.7. As a test for liability, the court adopted an unreasonable delay between precondemnation publicity and the ensuing condemnation action. *Id.* at 52, 500

falls within the scope of just compensation; if Missouri adopts a similar interpretation, loss of rental income would be recoverable within a Missouri condemnation proceeding.<sup>76</sup>

#### IV. CONCLUSION

*Gaertner* did not definitely establish a cause of action for loss of rental income. The only certain impact of the case will be the preclusion of counterclaims in condemnation proceedings. Under current Missouri law, neither lost rents nor decreased property value is compensable. The language in *Gaertner*, however, indicates a willingness to entertain future tort actions for loss of rental income induced by condemnation blight. This would signal a major shift in Missouri law. *Gaertner* says little about whether the court will permit the additional recovery of decreased property value in a tort action.

Requiring a subsequent tort suit to award relief to landowners, as suggested in *Gaertner*, is inconsistent with the general policy of consolidating related claims. It also imposes the burden of bringing the action on the landowner who has been the passive victim of condemnation blight. Additional statutory provisions, court rules, or a new judicial interpretation of just compensation in Missouri will be necessary to fairly recompense landowners.<sup>77</sup>

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P.2d at 1355, 104 Cal. Rptr. at 11. See also *Washington Mkt. Enters. v. City of Trenton*, 68 N.J. 107, 122, 343 A.2d 408, 416 (1975).

An appellate court in Louisiana also awarded lost rental income accruing as of the condemning authority's initially estimated date of condemnation. *City of Shreveport v. Bernstein*, 391 So. 2d 1331, 1333-35 (La. Ct. App. 1980). That decision, however, was grounded not on just compensation but on a special provision of the Louisiana Constitution which read, "The owner shall be compensated to the full extent of his loss." LA. CONST. art. I, § 4. *Bernstein* construed that provision to require compensation to the landowner for any economic loss caused by the condemnation, including lost rental income. 391 So. 2d at 1334-35.

76. MO. REV. STAT. § 523.050(2) (1978) differs from the Wisconsin and California statutes only in its limitation to the issue of "compensation" rather than "just compensation." The Missouri statute, however, must be interpreted in conjunction with MO. CONST. art. I, § 26, which uses the phrase "just compensation." See *Labor's Educ. & Political Club-Independent v. Danforth*, 561 S.W.2d 339, 343 (Mo. En Banc 1977). The language of the three statutes can be construed similarly.

77. Under the concept of just compensation, the landowner should be made whole for any public taking. In urban redevelopment projects this involves two distinct elements: compensation for the value of the property prior to any fluctuation in value caused by the project and reimbursement for any income, including rental income, lost because of the project. Moving back the date of valuation by statute would solve the depreciated value problem, but it would offer no relief for



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the landowner's loss of income between the valuation date and the date of the de jure taking:

Compensating the condemnee for the full undepressed *value* of his property does not compensate him for the lost *fruits* of that property while he remained as owner of the property and for the unrequited expenses he is put to in order to preserve his property until it is formally taken by the condemnor.

4 J. SACKMAN & R. VAN BRUNT, *supra* note 7, § 12.3151[5]. The post-condemnation remedy suggested by the *Gaertner* court places the burden of expenses and initiation of the suit on the landowner, who is merely attempting to recoup his loss caused by the condemnor. This form of relief is also inadequate.