

Approved: March 16, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:12 a.m. on March 15, 1999 in Room 123-S of the Capitol.

All members were present except: Senator Oleen (excused)

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Phil Mellor, Chair, Kansas Judicial Council Eminent Domain Advisory Committee
Randy Hearrell, Kansas Judicial Council
Leonard Hall, City of Olathe

Others attending: see attached list

The minutes of the March 11 meeting were approved on a motion by Senator Bond and seconded by Senator Vratil; carried.

HB 2140—concerning eminent domain; relating to appraisal and compensation

Conferee Mellor testified in support of **HB 2140**. He reviewed the structure of his subcommittee and the recommendations it made to address weaknesses it identified in existing condemnation law. He covered the following subject matter in the bill: appointment of appraisers (Sec. 1); "woodshedding" (Sec. 2); and appraisal values (Sec. 3), and he discussed the subcommittee's concern over certain House amended language in Section 3 of the bill. Conferee Mellor briefly covered several Condemnation Worksheets attached to his written testimony. (attachment 1) Lengthy discussion followed. No action was taken on the bill at this time.

Conferee Hearrell testified very briefly in support of **HB 2140** agreeing with Conferee Meller regarding the recommendation by the subcommittee to use the Standard of Tax Valuation for valuing condemned property.

Conferee Hall testified in opposition to **HB 2140**. He questioned the need for an amendment to the Eminent Domain Act stating that there have been "hundreds of eminent domain proceedings" in Kansas and, with the exception of a few, equitable and just compensation has been awarded. He proposed an alternate definition for fair market value. (attachment 2)

Written testimony, opposing **HB 2140**, was submitted by the City of Overland Park. (attachment 3)

The meeting adjourned at 10:59 a.m. The next scheduled meeting is March 16, 1999.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 15, 1999

NAME	REPRESENTING
Kelly Kuetala	City of Overland Park
Dicki Lynn Hessel	Division of Budget
Kathy Porter	OIA
Byron M. Hearwell	Kansas Judicial Council
Phil Mellor	"
Leonard Hall	City of Olathe
Dick Bauman	KDOT
Mike Rees	KDOT
Kim Gulley	LKM
St. Ch.	Legislature
James Clark	KCDFA
Pat Hubbell	Woodlawn Farm
Deane Schulz	KTLA
Erik Sartorius	Johnson Co. Board of Realtors
Bill Henry	Ks Governmental Consulting
Kurt Galley	McMillan Gaches & Associates
Whitney Damm	Ks Bar Assn
Ron Smith	" " "
John Kieffhaber	Ks Health Care Assn.

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3-15-99

FLEESON, GOOING, COULSON & KITCH, L.L.C.

LAWYERS

CARL A. BELL
GERRIT H. WORMHOUDT
WILLARD B. THOMPSON
THOMAS D. KITCH
J. ERIC ENGSTROM
STEPHEN E. ROBISON
RON CAMPBELL
GREGORY J. STUCKY
CHARLES E. MILLSAP
EDWARD J. HEALY
LINDA K. CONSTABLE
WILLIAM P. TREYBAR
SUSAN P. SELVIDGE

DIXIE F. MADDEN
THOMAS J. LASATER
DAVID G. SEELY
MARY E. MAY
STEPHEN M. STARK
LYNDON W. VIX
WILLIAM L. TOWNSLEY III
JOHN T. STEERE
SCOTT D. JENSEN
JORDAN E. CLAY
JOHN R. GERDES
KENT A. MEYERHOFF

SIXTEENTH FLOOR · 125 NORTH MARKET
POST OFFICE BOX 997
WICHITA, KANSAS 67201-0997
(316) 267-7361
TELECOPIER
(316) 267-1754

DALE M. STUCKY
JAMES R. BOYD
PHILLIP MELLOR
OF COUNSEL

HOWARD T. FLEESON
(895-1957)

HOMER V. GOOING
(894-1986)

WAYNE COULSON
(910-1985)

PAUL R. KITCH
(911-1987)

DONALD R. NEWKIRK
(919-1997)

March 12, 1999

Mr. Tim Emert, Chairman and
Members of the Senate Judiciary Committee

Re: House Bill No. 2140
as Amended by House Committee

I am Phillip Mellor of Wichita, Chairman of the Eminent Domain Subcommittee of the Judicial Council. The Subcommittee is composed of lawyers who represent landowners, two major cities, two major public utilities and the Kansas Department of Transportation. My comments are made in support of the 1999 House Bill No. 2140 as Amended in the House.

The Eminent Domain Procedure Act was adopted in 1963 and, except for minor changes, has served well not only to control the procedures to be followed in administering the law, but to impose substantive rules relating to landowner's rights to their constitutionally mandated just compensation.

The March 19, 1997, Report to the Legislative Post Audit Committee, reviewing the Department of Transportation's acquisitions of Right-of-Way for highway projects, pointed out a number of weaknesses in existing condemnation law. In addition to that report, we have considered suggestions and recommendations made by the League of Municipalities and both landowner's and condemnor's attorneys from throughout the state.

SECTION 1.

You will recall that the act requires that upon the filing of a petition for condemnation, the court sets a time for considering the petition (K.S.A. 26-502). The plaintiff must then give notice to interested parties of the time for consideration of the petition and appointment of appraisers (K.S.A. 26-503). If the judge finds "from the petition" that plaintiff has the power to condemn and that the taking is necessary for the lawful purposes of the

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3-15-99
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plaintiff, then the judge shall appoint appraisers. Please note that the determination of the power and right to take is made from the petition itself; there is no "hearing" and no evidence is introduced as to those questions. The notice which was given to the parties must relate to the appointment of appraisers, else why were they given a notice and an opportunity to be present and, presumably, to participate in the proceedings? Most judges, but not all of them, are glad to have the participation of the parties in nomination of, or objection to, specific persons to serve as appraisers. We believe it should be the invariable rule. One of the problems addressed by the Performance Audit Report is the appointment by judges of persons who have no qualifications or experience in the appraisal of real property. Participation by the parties will help alleviate that apparent problem. We are aware of a case in which the appraisers appointed by the judge believed themselves to be incompetent to do the work and so hired their own experts to advise them. The parties were not given any opportunity to participate in the analysis of such outside advice or, indeed, even to know the identity of the advisors. In another case, the court appointed a man who receives 40% of his annual income as a hired appraiser by the plaintiff. He may have done a good job, but the parties will never believe it and they should have absolute confidence in his impartiality. We submit then that the parties, both landowners and condemnors, should be permitted to participate to some degree in the selection of appraisers. Our proposal would not impair the court's absolute discretion in selecting appraisers and, in our experience, would not cause any delay in the proceedings because such hearings normally take no more than thirty minutes.

SECTION 2.

Section 2. of the bill prohibits "woodshedding" and is, unfortunately, necessary in many instances and is designed to insure fair and equal opportunity by both parties to participate in the presentation of appraisal material to the court-appointed appraisers. The amendment made in the house, page 2, lines 6 - 14 clarifies the committee's intent and is helpful.

SECTION 3.

The most significant part of the bill is contained in Section 3. As you may be aware, the Kansas Real Estate Appraisal Board adopts as its standards of appraisal practice, the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Foundation. Those standards specify that in normal

appraisals of real estate, the appraiser is required to use the three classic approaches to value or explain why it is inappropriate to do so. Those approaches are: the comparable sales approach, the cost approach and the income approach. The Appraisal Institute, which is the oldest, most prestigious organization of its kind, makes similar requirements as does every other nationally recognized appraisal organization. The principle is expressed in our tax appraisal statute, K.S.A. 79-503a (appendix 1). In Kansas condemnation cases, however, we have judge-made law which cuts across the grain of all professional standards by ruling that if comparable sales exist, then that approach must be used to the exclusion of the others.

That rule, perhaps, helps to explain the large number of landowners who have expressed dissatisfaction at the appraisal process applied to their properties in condemnation cases. The 1997 Legislative Post Audit Committee Report touches on that subject with respect to the acquisition of right-of-way for highway projects by the Kansas Department of Transportation. It is a sad comment on the perception of the procedure when only 53.5% of landowners polled felt they received fair treatment. This might also help explain the very wide differences between the condemnor's appraisal and the awards of the court-appointed appraisers (see sample sheets attached from Sedgwick, Reno, Shawnee, Cowley and Crawford counties, appendices 2 - 12).

Right now, when new highway construction appears to be essential to the continued economic growth of the state, is a good time to assure more consistent fairness in the appraisal of land subject to condemnation and more perception of fairness by the citizens of Kansas.

HOUSE AMENDMENT TO SECTION 3.

We are very concerned about the addition of the words on lines 8 and 9 at page 4 of the House Bill, which were added by the house. We are apprehensive that unless the contrary is clearly indicated, the court may believe it is the authority to determine the appropriateness of the method of appraisal and we will be back in the same situation we now deplore. It isn't a legal problem, it's an appraisal problem and if the determination is to be made on what approach or approaches to use by anyone, it should be made by the appraiser.

Members of the Senate Judiciary Committee
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As a matter of fact, in cities, it's quite common to find many sales which can be considered comparable so long as you are talking about residential property, but in rural areas, or where factories or warehouses or dozens of other types of properties are concerned, problems arise which defy the comparable sales method of appraisal.

SUMMARY

Section 1, line 18. The bill is intended to make the notice required by K.S.A. 26-503 meaningful and to give the landowners some opportunity to participate in the proceedings. That participation would not deprive the judge of any of his discretionary powers, nor would it prolong the proceedings.

Section 2. As amended in the House, Section 2 will let everyone have the same advantages and place no one at a disadvantage.

Section 3. Appraisers should be allowed to do their work according to accepted professional appraisal standards. It should not be up to a judge to determine the proper appraisal approach.

Respectfully yours,



Phillip Mellor
For the Judicial Council

PSM:ljv
Enc.

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CIVIL CODE SUBCOMMITTEE
EMINENT DOMAIN STUDY

Phillip Mellor, Chair
125 N. Market, Ste. 1600
Wichita, KS 67202
(316) 267-7361
(316) 267-1754 FAX

George A. Lowe
110 W. Loula St.
Olathe, KS 66051
(913) 782-0422
(913) 782-0532 FAX

Greg A. Bengtson
129 S. 8th St.
Salina, KS 67402
(785) 823-6325
(785) 823-1868 FAX

Douglas J. Moshier
City Hall, 13th Fl.
455 N. Main
Wichita, KS 67202-1635
(316) 268-4681
(316) 268-4519 FAX

Galen E. Biery
Kansas Gas Service
7421 W. 129th St.
Shawnee Mission, KS 66225
(913) 319-8620
(913) 319-8622 FAX

David Rapp
2000 Epic Center
301 N. Main
Wichita, KS 67202
(316) 267-2000
(316) 264-1518 FAX

Jerry Goodell
515 S. Kansas Ave.
Topeka, KS 66603-3999
(785) 233-0593
(785) 233-8870 FAX

Michael B. Rees
Chief Counsel
Kansas Dept. of Transportation
DSOB 779-S
Topeka, KS 66612
(785) 296-3831

John Hamilton
3401 S.W. Harrison St.
Topeka, KS 66611
(785) 267-2410
(785) 267-2942 FAX

John Strahan
Dept. Of Transportation
Docking State Office Bldg.
Room 799S
Topeka, KS 66612
(785) 296-3831
(785) 296-0119 FAX

Teresa J. James
301 N. Main St. #600
Wichita, KS 67202-4806
(316) 269-2100
(316) 269-2479 FAX

- (h) rental or reasonable rental values;
- (i) sale value on open market with due allowance to abnormal inflationary factors influencing such values;
- (j) restrictions imposed upon the use of real estate by local governing bodies, including zoning and planning boards or commissions; and
- (k) comparison with values of other property of known or recognized value. The assessment-sales ratio study shall not be used as an appraisal for appraisal purposes.

The appraisal process utilized in the valuation of all real and tangible personal property for ad valorem tax purposes shall conform to generally accepted appraisal procedures which are adaptable to mass appraisal and consistent with the definition of fair market value unless otherwise specified by law.

History: L. 1982, ch. 391, § 2; L. 1990, ch. 346, § 3; L. 1995, ch. 254, § 5; L. 1997, ch. 126, § 42; July 1.

Cross References to Related Sections:

Private property protection act, see 77-708.

Research and Practice Aids:

Taxation = 348(3).

C.J.S. Taxation § 411.

Law Review and Bar Journal References:

"The Kansas Property Tax: Understanding and Surviving Reappraisal," P. John Brady, Brian T. Howes, and Greg L. Musil, 57 J.K.B.A. No. 3, 23, 27 (1988).

"Reappraisal—How Long Will It Last?" Bruce Landeck, 58 J.K.B.A. No. 1, 15, 18 (1989).

"Kansas Property Classification and Reappraisal: The 1986 Constitutional Amendment and Statutory Modifications," Nancy Ogle, 29 W.L.J. 26, 30, 47 (1989).

Attorney General's Opinions:

Factors for determining fair market value of property. 80-82.

Public utilities valuation of real and personal property. 80-83.

Powers and duties of county appraisers; removal from office. 82-270.

Classification of property; constitutionality. 90-10.

Powers and duties of director of property valuation; force and effect of directives. 91-134.

Effect of failure to consider factors to determine fair market value. 92-12.

Use of real estate ratio study as evidence of fair market value for tax purposes. 94-69.

Valuation of property in year following reduction on appeal; effect of 79-1460. 95-71.

Valuation of real property; change in value without physical inspection. 96-81.

CASE ANNOTATIONS

1. Section considered in determining validity of assessment of real property for uniformity and equality. Board of County Comm'rs v. Greenhaw, 241 K. 119, 126, 734 P.2d 1125 (1987).

79-503a. Fair market value defined; allowable variance; factors to be considered in determining fair market value; generally accepted appraisal procedures to be utilized. "Fair market value" means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. For the purposes of this definition it will be assumed that consummation of a sale occurs as of January 1.

Sales in and of themselves shall not be the sole criteria of fair market value but shall be used in connection with cost, income and other factors including but not by way of exclusion:

- (a) The proper classification of lands and improvements;
- (b) the size thereof;
- (c) the effect of location on value;
- (d) depreciation, including physical deterioration or functional, economic or social obsolescence;
- (e) cost of reproduction of improvements;
- (f) productivity;
- (g) earning capacity as indicated by lease price, by capitalization of net income or by absorption or sell-out period;

CONFIRMATION WORKSHEET

File 5-Jud.
3-15-99
8-2-11

PROJECT: 254-87 K5058-01,P1

COURT APPOINTED
APPRAISERS:

RICHARD KESSLER, TIM GOODPASTURE
GRANT TIDEMANN

DCC#

95 C 1132-C/A 2132

FILED:

Nov. 6, 1995

COUNTY:

SEDGWICK

REVIEW APPRAISER:

ROBERT WALTERS

AGENT:

COATES FIELD SERVICES

(Mary Elliott)

CITY:

KECHI

APPRAISER:

JOHN COOPER,
THOMAS MARTIN AND ROGER TURNER

ATTORNEY:

JOHN STRAHAN

Settlement

M A I

TRACT	OWNER	APPROVED APPRAISAL	DATE COURT RECEIVED MONEY	COURT AWARD	DIFFERENCE	PERCENTAGE
2	Thornton Thomisson	22,350.00	<i>175,000</i>	169,700.00	<i>147,350.00</i>	659%
3	Jay Rex Douglas	25,710.00		48,240.00	<i>22,530.00</i>	88%
4	Walz H&H Constr.	10,965.00		17,825.00	<i>6,860.00</i>	63%
6	S.A. Walz	22,590.00	<i>42,500</i>	42,380.00	<i>19,790.00</i>	88%
9	Daniel Phillippi	156,000.00		275,300.00	<i>119,300.00</i>	76%
46	Michael Logan	29,485.00		32,955.00	<i>3,470.00</i>	12%
47	Double W Inc.	790.00		48,065.00	<i>47,275.00</i>	5984%
		\$267,890.00 TOTAL APPRAISAL		\$634,465.00 TOTAL COURT AWARD	\$366,575.00 TOTAL OVER	

APPENDIX 2

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CONFIRMATION WORKSHEET

PROJECT: 254-87 K5058-01,P2

COURT APPOINTED
APPRAISERS:

RICHARD KESSLER, TIM GOODPASTURE,
GRANT TIDEMANN

DCC#

95 C 1132-C/A 2133

FILED:

Nov. 6, 1995

COUNTY: SEDGWICK

REVIEW APPRAISER: ROBERT WALTERS

AGENT: COATES FIELD SERVICES
(Mary Elliott)

CITY: N/A

APPRAISER: JOHN COOPER

ATTORNEY: J. STRAHAN/R. ASH

THOMAS MARTIN, ROGER TURNER

TRACT	OWNER	APPROVED APPRAISAL	DATE COURT RECEIVED MONEY	COURT AWARD	DIFFERENCE	PERCENTAGE
11	Sammy H. Kouri	14,200.00	70,000	86,930.00	72,730.00	512%
14	Central Development	6,895.00		15,690.00	8,795.00	128%
22	Albert Lies	28,950.00		28,950.00	0.00	0%
24	D.J. Fisher	31,060.00		66,580.00	35,520.00	114%
27	Victor Lygrisse	22,810.00		56,190.00	33,380.00	146%
37	Coy J. Burge	520,000.00		744,676.00	224,676.00	43%
38	Gary Fisher	9,040.00		111,560.00	102,520.00	1134%
40	Ted L. Lefler	37,235.00		79,060.00	41,825.00	112%
		\$623,915.00		\$1,189,636.00	\$375,101.00	
		TOTAL APPRAISAL		TOTAL COURT AWARD	TOTAL OVER	

CONDEMNATION WORKSHEET

file

1-9

PROJECT: 96-87 K 4459-01

COURT APPOINTED

APPRAISERS:

ED TAYLOR, GRANT TIDEMANN and ROGER ZERENER

DCC#

95 C 1832 C/A 2190

FILED:

Oct. 16, 1995

COUNTY: SEDGWICK

REVIEW APPRAISER:

CINDY WILSON

AGENT:

COATES FIELD SERVICES

(Mary Elliott)

CITY: N/A

APPRAISER:

HAL ERWIN

ATTORNEY:

RUSS ASH

TRACT	OWNER	APPROVED APPRAISAL	DATE COURT RECEIVED MONEY	COURT AWARD	DIFFERENCE	PERCENTAGE
9 21	Homer Nagle Jarold Tucker	3,500.00		20,000.00	16,500.00	471%
		116,165.00		240,000.00	123,835.00	107%
		119,665.00		260,000.00	140,335.00	
		TOTAL APPRAISAL		TOTAL COURT AWARD	TOTAL OVER	

APPENDIX 4

6-9

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CONDEMNATION WORKSHEET

1-10

PROJECT: 96-78 K 4458-01

COURT APPOINTED
APPRAISERS:

JOHN OSWALD, E.E. FRIZELL, & W.D. KIMMEL

DCC# 95 C 222 - C/A 2198

FILED: 12/12/95

COUNTY: RENO

REVIEW APPRAISER: CINDY WILSON

AGENT: A.J. SANTORO
(Mary Elliott)

CITY: N/A

APPRAISER: SUSAN MITCHELL

ATTORNEY: J. STRAHAN/R. ASH

TRACT	OWNER	APPROVED APPRAISAL	DATE COURT RECEIVED MONEY	COURT AWARD	DIFFERENCE	PERCENTAGE
4	George Schlickau	73,520.00		245,000.00	171,480.00	233%
		73,520.00		245,000.00	171,480.00	
		TOTAL APPRAISAL		TOTAL COURT AWARD	TOTAL OVER	

APPENDIX 5

1-10
lotus 2
"Renoschl"

1-10

CONDEMNATION WORKSHEET

PROJECT: 77-18 K4431-01 PT2

COURT APPOINTED
APPRAISERS:

JERRY MUNSON, ROBERT HAUBER, RAYMOND KING

DCC# 95 C 57W-C/A 2169

FILED: 7-10-95

COUNTY: COWLEY

REVIEW APPRAISER: RANDY SEALE

AGENT: RON PROCHAZKA
(ROB STORK)

CITY: N/A

APPRAISER: ROBERT TAGGART MA

TRACT	OWNER	APPROVED APPRAISAL	DATE COURT RECEIVED MONEY	COURT AWARD	DIFFERENCE	PERCENTAGE
14	John Chlids	3,080.00		6,080.00	3,000.00	97%
18	Lester Mitchell	11,915.00		13,000.00	1,085.00	9%
20	Barbara DeMars	6,010.00		7,010.00	1,000.00	17%
22	Raymond Walker	2,350.00		3,900.00	1,550.00	66%
24	McFarland Gravel	98,825.00		1,065,417.00	966,592.00	978%
25	Kenneth Graves	22,050.00		64,250.00	42,200.00	191%
27	Pauline Warren	20,210.00		30,000.00	9,790.00	48%
28	Glen Remsberg	12,240.00		15,920.00	3,680.00	30%
29	W. M. Lowrey	10,575.00		37,240.00	26,665.00	252%
		187,255.00		1,242,817.00	1,055,562.00	
		TOTAL APPRAISAL		TOTAL COURT AWARD	TOTAL OVER	

*Settled for 1.4 million
Ratio for 1,000,000*

APPENDIX 6

1-11

11-1

CONDEMNATION WORKSHEET

1-12

PROJECT: 77-18 K4431-01 PT1

COURT APPOINTED
APPRAISERS:

JERRY MUNSON, ROBERT HAUBER, RAYMOND KING

DCC#

95 C 57W-C/A 2152

FILED: 7-10-95

COUNTY: COWLEY

REVIEW APPRAISER: RANDY SEALE

AGENT: RON PROCHAZKA
(ROB STORK)

CITY: ARKANSAS CITY

APPRAISER: ROBERT TAGGART

TRACT	OWNER	APPROVED APPRAISAL	DATE COURT RECEIVED MONEY	COURT AWARD	DIFFERENCE	PERCENTAGE
11	William Bush	7,030.00		9,000.00	1,970.00	28%
		7,030.00		9,000.00	1,970.00	
		TOTAL APPRAISAL		TOTAL COURT AWARD	TOTAL OVER	

APPENDIX 7

21-1

21-1

CONDEMNATION WORKSHEET

14-Oct-96

ROUTE	COUNTY	PROJECT	C/A	TRACT	LAST NAME	FIRST NAME	DATE PAID		APPROVED APPRAISAL	COURT AWARD
4	89	K 3362-08	2210							
				6	ROCKERS	FLOYD	4/4/96	1X	\$2,795.00	\$20,000.00
				7	ALBOTT	W.L.	4/4/96	8X	\$1,860.00	\$15,000.00
				9	JADA INDUSTRIES		4/4/96	1.9X	\$5,980.00	\$11,400.00
				10	NEWSTROM	MERLYN	4/4/96	1.5 X	\$6,785.00	\$45,000.00
				13	BROADWALK LIMITED		4/4/96	2.9X	\$1,745.00	\$5,000.00
				14	HANDY	JENNIFER	4/4/96	4X	\$1,160.00	\$7,000.00
				15	BEAVER	HAIRM	4/4/96	3.9X	\$5,150.00	\$20,000.00
				17	NEFF	CLINTON	4/4/96	2.5X	\$8,425.00	\$21,000.00
				18	ADAMS	JANE	4/4/96	6.9X	\$2,880.00	\$20,000.00
				19	TOOMAY	SETH	4/4/96		\$2,255.00	\$20,000.00
				21	BAILEY	OLLIE	4/4/96		\$2,190.00	\$32,000.00
				23	WYATT	ALEXANDER	4/4/96		\$4,570.00	\$20,000.00
				24	HAROLD	WILLIAM	4/4/96		\$2,485.00	\$25,000.00

Shawnee County

1720
13140
5420
38215
3255
5940
14850
12575
17120
61670
70670
9170
56370
18770
50370
28870
14970
59470

1-14

ROUTE	COUNTY	PROJECT	C/A	TRACT	LAST NAME	FIRST NAME	DATE PAID	APPROVED APPRAISAL	COURT AWARD
				26	MARTIN	DAVID	4/4/96	\$2,820.00	\$18,700.00
				27	MANROSE	WILLIAM	4/4/96	\$4,625.00	\$25,000.00
				28	WRIGHT	JEFF	4/4/96	\$1,530.00	\$20,000.00
				29	HINKLE	MORRIS	4/4/96	\$2,920.00	\$17,000.00
				30	HABERKORN	ROBERT	4/4/96	\$1,830.00	\$25,000.00
				32	SYNDER	JANET	4/4/96	\$2,940.00	\$21,000.00
				34	GIESE	RICHARD	4/4/96	\$2,740.00	\$15,000.00
				35	HANDY	ROGER	4/4/96	\$4,440.00	\$15,000.00
				36	PRICE	GEORGE	4/4/96	\$2,120.00	\$21,000.00
				37	TRAXLER	DALE	4/4/96	\$4,945.00	\$23,000.00
				38	CAREY	ARTHUR	4/4/96	\$4,015.00	\$27,000.00
				39	SCHWANKE	DONALD	4/4/96	\$5,300.00	\$35,000.00
				41	NORDSTROM	ELMER	4/4/96	\$13,600.00	\$35,000.00
				42	MOORE	MARGARET	4/4/96	\$18,200.00	\$18,500.00
				43	JACOB	L. MERRILL	4/4/96	\$1,480.00	\$30,000.00

APPENDIX 9

h/c

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ROUTE	COUNTY	PROJECT	C/A	TRACT	LAST NAME	FIRST NAME	DATE PAID	APPROVED APPRAISAL	COURT AWARD
				44	PENDLAND	DOROTHY	4/4/96	\$975.00	\$3,500.00
				49	BRADFORD	NOBLE	4/4/96	\$600.00	\$10,000.00
				50	SHELINBARGER	BOB	4/4/96	\$5,760.00	\$30,000.00

District Court Case Number: 95 CV 1279

Date To Legal: 10/4/95 Attorney: STRAHAN
 Consideration Hearing: 1/5/96 Count Appraiser 1: LEWIS
 Appraisal Hearing: 3/5/96 Court Appraiser 2: SCHELLBACHER
 Appraisal Report Filed: 4/2/96 Court Appraiser 3: MCBRIDE
 Money Deposited in Court: 4/4/96

Agent: Appraiser: Reviewer:
 Miller RANDY SEALE CRAIG

APPENDIX 10

1-15

CONDEMNATION WORKSHEET

22-Aug-96

1-16

ROUTE	COUNTY	PROJECT	C/A	TRACT	LAST NAME	FIRST NAME	DATE PAID	APPROVED APPRAISAL	COURT AWARD
4	89	K 3362-07	2223	4	NOTT	GARY	8/9/96	\$11,280.00 11720	\$23,000.00 10470
				5	ATWOOD	JAMES	8/9/96	\$11,970.00 18030	\$30,000.00 15170
				7	LONG	VERON	8/9/96	\$22,735.00 34261	\$57,000.00 15190
				8	FRITZE	JOE	8/9/96	\$5,110.00 19890	\$25,000.00 38470
				15	WILLIAMS	DANNEY	8/9/96	\$4,975.00 25025	\$30,000.00 50370
				16	MARTIN	GEORGE	8/9/96	\$2,860.00 9140	\$12,000.00 32070
				17	COKE	DANA	8/9/96	\$560.00 6440	\$7,000.00 115070
				20	TAYLOR	DENNIS	8/9/96	\$1,650.00 117350	\$16,000.00 87070
				23	ROSS	CHRIS	8/9/96	\$11,305.00 6645	\$20,000.00 7770
				33	BARGER	JAMES	7/17/96	\$108,000.00 87000	\$195,000.00 8190
				38	ANDERSON	CHARLES	6/26/96	\$12,850.00 4515	\$17,365.00 3570
				41	ABNEY	ROBERT	8/9/96	\$0.00 400	\$400.00 40070
				46	DAVIS	ROBERT	8/9/96	\$400.00 600	\$1,000.00 15071

Shannon County

APPENDIX 11

1/6

91-1

CONDEMNATION WORKSHEET

14-Oct-96

ROUTE	COUNTY	PROJECT	C/A	TRACT	LAST NAME	FIRST NAME	DATE PAID	APPROVED APPRAISAL	COURT AWARD
69	19	K 3276-01	2250						
				1	PUCKETT	CALVIN	8/13/96	\$29,000.00 + 3500	\$32,500.00 x 12%
				2	PUCKETT	KEVIN	8/13/96	\$5,375.00 + 8905	\$14,820.00 x 166%
				3	BARONE	MICHAEL	8/13/96	\$400.00 680	\$1,000.00 + 150%
				4	PUCKETT	CALVIN	8/13/96	\$1,500.00 500	\$2,000.00 + 33%
				6	LONGO	AUGUST	8/13/96	\$10,375.00 12895	\$23,250.00 + 124%
				10	PERNOT	HERBERT	8/13/96	\$3,565.00 4823	\$8,388.00 + 135%
				20	WADE	THOMAS	8/13/96	\$5,210.00 3148	\$8,358.00 + 60%
				22	GALICHIA	ALLAN	8/13/96	\$1,615.00 10071	\$11,686.00 + 624%
				27	LLOYD	MERLE	8/13/96	\$3,480.00 12399	\$15,879.00 + 366%
				41	EVANS	JOHN	8/13/96	\$23,260.00 3890	\$27,160.00 + 17%
				116	DARNABY'S COUNTY HOUSE		8/13/96	\$125.00	\$150.00 + 20%

Crawford County

1-17

APPENDIX 12

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**TESTIMONY IN OPPOSITION TO HOUSE BILL NO. 2140
AND PROPOSED ALTERNATE DEFINITION FOR FAIR MARKET VALUE**

TO: The Honorable Tim Emert, Chairperson
Members of the Senate Committee on Judiciary, Room 123-S

DATE: March 15, 1999

RE: House Bill No. 2140 – Proposed Amendments to K.S.A. 26-504, 26-505 and 26-513
pertaining to condemnation by Kansas cities.

To the Members of the Judiciary Committee:

The City of Olathe opposes House Bill No. 2140. Throughout the state of Kansas, many cities, counties, utility companies and owners have been through hundreds of eminent domain proceedings under K.S.A. 26-501, et seq. With the exception of a few isolated cases, the proceedings have worked well in providing equitable and just compensation for the takings. There is no need to amend the Eminent Domain Procedure Act. It is recommended that no amendment to the Eminent Domain Act be adopted.

The City is in agreement with the City of Overland Park’s testimony in opposition to the proposed amendment. The City of Olathe’s main objection is to the proposed definition of fair market value. The proposed definition in Section 3e reads:

“Fair market value: ‘Fair market value’ means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. The fair market value shall be determined by the use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods as may be appropriate for the particular property, which is the subject of the action.”

This proposed definition will allow court-appointed appraisers and appraisers testifying in jury trials to choose among the different appraisal methods or a combination of such methods. This definition is contrary to the general rule set by the Kansas Supreme Court that a comparable sales appraisal approach shall be used when there have been sales of comparable properties in the same locale, near the time of the taking. Only when the property is so unique that there is no ascertainable market and no sales of reasonably similar or comparable property, the other methods – depreciated replacement costs approach or the income approach – may be used. See Exhibit 1 –In re Application of City of Great Bend for Appointment of Appraisers, 254 Kan. 699, 710, 869 P.2d 587 (1994) citing Board of Sedgwick County Comm’rs v. Kiser Living Trust, 250 Kan. 84, 92, (1992).

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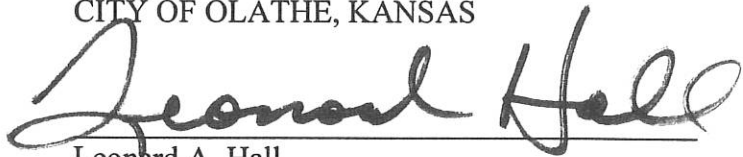
The Fifth Amendment of the U.S. Constitution states that property cannot be taken for public purpose without paying just compensation. The use of the income approach appraisal method can be speculative, since at the date of taking the parties usually do not know what effect the taking will have on the income of the property until after the completion of the improvement. Comparable sales data are based upon actual sales occurring in the same locale within a reasonable period of time to reflect the effect of the taking on the value of the property. The proposed amendment may still be contrary to the Kansas Supreme Court case law setting out a preference for the use of the comparable sales approach in eminent domain proceedings.

The Courts have not mandated the use of the comparable sales approach in all eminent domain proceedings. The Courts have broad discretion under the circumstances to warrant the use of the income or cost approach. (Page 712 of the Great Bend case.)

The vast majority of condemnation proceedings in Kansas involve utilities easements and street right-of-way dedication, for which the comparable sales appraisal method is properly used and provides just compensation for the taking. In Johnson County, due to improvements made after the taking, the appraised values of most properties have increased, not decreased.

It would be best to leave the matter of the Court's instructions to the Court-appointed appraisers and the definition of fair market value to the wise discretion of the District and Appellate Courts to handle the vast diversity of eminent domain issues which may appear before each Court. Each eminent domain case can be substantially different. Do not attempt to amend the eminent domain act based upon what happened in a few eminent domain cases, when the amendment to the eminent domain act will affect the vast majority of eminent domain cases where the eminent domain act works well.

CITY OF OLATHE, KANSAS

A handwritten signature in black ink that reads "Leonard A. Hall". The signature is written in a cursive style and is positioned above a horizontal line.

Leonard A. Hall
Assistant City Attorney

In re Application of City of Great Bend for Appointment of Appraisers

permits alternative methods when appropriate under Kansas law. It thus permitted an alternative approach on the facts of this case.

The parties agree that Oakes used the market data approach to value the real estate interests but used a cost approach to value at least some of the improvements. Oakes used the cost approach to value all of the improvements that would remain on the property after the taking, added that to the value of buildings taken by the ponding easement, and then reached a total value of all improvements.

The value of all improvements that were to be left on the property was \$233,700; the total value of buildings that were to be removed because of the ponding easement was \$105,000. Oakes then added the value of the land to the value of the improvements for a total of \$422,000 as the "before-taking" value of the property. For the "after-taking" value, he determined that the best use of the 59.49 acres remaining would be dry cropland, which he valued at \$450 per acre, taking into consideration the impact of the ponding easement. To that total land value of \$26,770, he added the value of the remaining improvements, for a total value of the property of \$273,500 after the taking. According to Oakes, the Essmillers' damages amounted to \$148,500 and were defined by the difference between the before value and the after value.

This court recently reiterated the three generally accepted methods of appraising real property:

"(a) the market data approach which is based upon what comparable properties had sold for; (b) the depreciated replacement cost or cost approach which is based upon what it would cost to acquire the land and to build equivalent improvements less depreciation; and (c) the income approach or capitalization of income which is based upon what the property is producing or is capable of producing in income." *Board of Sedgwick County Comm'rs v. Kiser Living Trust*, 250 Kan. 84, 92, 825 P.2d 130 (1992).

In *Kiser*, this court held that the market data approach was "the most common method of valuing real property and [that it] should be used when there have been sales of comparable properties in the same locale, near the time of the taking. When the property is so unique that there is no ascertainable market and there are no sales of reasonably similar or comparable property, the other methods—depreciated replacement cost approach or the income approach—may be used." 250 Kan. at 92.

In re Application of City of Great Bend for Appointment of Appraisers

Under Kansas law, the market approach is preferred, but other methods may be used if there are no "comparables" from which to develop the market data. The parties agree that Oakes used the cost approach because he considered the improvements to be unique or special and because it was difficult to find similarly improved farms to make direct sales comparisons. Oakes testified that it was hard to find other 80-acre tracts that were so highly improved. He chose the cost alternative because he believed it would be "more fair to the property owner" given the low additional value typically given improvements on over-improved farms. There is within the record a basis for admission of expert testimony based on the cost approach.

The Essmillers cite *In re Central Kansas Electric Coop., Inc.*, 224 Kan. 308, 582 P.2d 228 (1978), to support their contention that hog farming operations are not unique and that the market data valuation should have been required. In *Central Kansas Electric Coop.*, we rejected the notion that the use of property for hog farming amounted to a special or unique use that made it appropriate to use an alternative to the market value approach. 224 Kan. at 314. We held that "[t]he use of the property for swine production is no more unique than would be the production of cattle, poultry, sheep or some other operation which might involve the use of special buildings or location." 224 Kan. at 316.

Unlike the property in *Central Kansas Electric Coop.*, Essmillers' property was not only used as a hog farming operation but was also used as a farm residence and headquarters for a large grain farming operation, a custom grain and feed-mixing business, and a custom farm-spraying business. Oakes' testimony in this case established that he did not necessarily consider the hog farming operations on Essmillers' property unique. He did consider the Essmiller property to be overimproved and determined that the more fair way to address that overimprovement in his appraisal was to value the improvements separately on a cost basis. It was his opinion that if the property was sold on the open market, potential buyers would not pay the full value for all of the improvements. Under the above circumstances the record supports the trial court's ruling allowing Oakes to use the

In re Application of City of Great Bend for Appointment of Appraisers

cost approach to value the improvements. See *Kiser*, 250 Kan. at 92.

The Essmillers also contend on appeal that it was not appropriate to rely on the cost approach to value improvements in this case because the trial court did not rule in advance of trial that there were no comparables and that the property was indeed unique. They properly note that in *Kiser*, 250 Kan. at 88-89, and *Ellis v. City of Kansas City*, 225 Kan. 168, 172, 589 P.2d 552 (1979), the trial courts determined before trial that the property was unique and the proposed comparables could not be used, and that an alternative to the market data approach should be used to value the property. Neither case requires, however, that such a determination must be made before trial or be forever barred. The source of this purported requirement that any "uniqueness" determination be made before trial is *City of Shawnee v. Webb*, 236 Kan. 504, 694 P.2d 896 (1985). In Syl. ¶ 4 of *Webb*, this court held stated that "the trial court has broad discretion in determining *what* other sales of real estates are comparable. Such determination should be made prior to trial." (Emphasis added). Although *Webb* held that the determination of what sales are comparable should be made before trial, it did not require that it be determined *before trial* that there are no comparables. In *Webb*, the issue was whether the trial court erred in excluding three proposed comparables. The condemnor in *Webb* originally proposed 10 comparables and then added 2 more after the trial court determined that 3 were not comparable and could not be used. Although it might have been better for such determinations to be made here before trial, the trial court's failure to do so in this case is not reversible error provided its ultimate determination was proper.

Moreover, the reference to the market data approach in the pretrial order does not necessarily mandate its use throughout trial, particularly where, as here, circumstances warranted the cost approach. The trial court has broad discretion to modify a pretrial order to prevent manifest injustice. *Frevela v. McAloon*, 222 Kan. 295, 564 P.2d 508 (1977). We hold that the trial court did not err in allowing Oakes to testify about the value of the property. His reliance on the cost approach to value the improvements was not contrary to state law.

In re Application of City of Great Bend for Appointment of Appraisers

The admissibility of expert testimony is within the trial court's discretion. The test on appeal is whether any reasonable person would agree with the trial court. If any reasonable person would agree, this court will not disturb the trial court's decision. See *Marshall v. Mayflower Transit, Inc.*, 249 Kan. 620, Syl. ¶ 8, 822 P.2d 591 (1991). We conclude that the pretrial order's requirement that the market data approach be used "as provided by law" did not mandate use of the market data approach with respect to all valuations where, as here, circumstances warranted the cost approach in accordance with Kansas law. We hold that the trial court did not abuse its discretion in allowing Oakes to testify about the value of the property or in admitting Oakes' report into evidence. His reliance on the cost approach to value the improvement was consistent with state law and, thus, consistent with the pretrial order.

The landowners also argue that the trial court erred in refusing to give the following instruction: "In determining the amount of your award you may consider the value of the property to the owner for his special use or purpose, or for any purpose to which his property is reasonably adaptable. These special uses or purposes must be real, not speculative, conjectural, or remote."

The landowners requested this instruction after the trial court allowed Oakes to testify about values using the cost approach to value improvements, arguing that use of the cost approach was based on a determination that the property had a special use or purpose.

If the jury instructions, read as a whole, fairly instruct the jury on the law governing the case, are substantially correct, and the jury could not reasonably be misled by them, the instructions will be approved on appeal. *Guillan v. Watts*, 249 Kan. 606, 617, 822 P.2d 582 (1991); *Leiker v. Gafford*, 245 Kan. 325, Syl. ¶ 1, 778 P.2d 823 (1989). Viewed as a whole, the instructions that the trial court gave properly and fairly instructed the jury on the law of the case.

Given our foregoing rulings in this case, the additional instructions that the landowners requested could have misled the jury, and the trial court did not err in refusing to give them. Viewing Oakes' testimony as a whole, he did not claim that he used the cost approach to value improvements because of any special use.

City Hall • 8500 Santa Fe Drive
Overland Park, Kansas 66212-2899
TEL 913.895.6080/6086 • FAX 913.895.5095
E-MAIL jsneffbr@opkansas.org

TESTIMONY IN OPPOSITION TO HOUSE BILL NO. 2140

TO: The Honorable Tim Emert, Chairperson
Members of the Senate Judiciary Committee
Room 123-S

DATE: March 15, 1999

RE: House Bill No. 2140 -- Proposed Amendments to K.S.A. 26-504, 26-505
and 26-513 pertaining to condemnation of easements by Kansas cities

Ladies and Gentlemen:

The City of Overland Park strongly opposes amendment to the Kansas General Condemnation Law. Overland Park utilizes these statutes in order to acquire easements for right-of-way and storm drainage improvements numerous times each year. In all of our years of acquiring hundreds of easements, we have had just a handful of appeals and no complaints about the system or the quality and integrity of the appointed appraisers. The system works well, and the proposed amendments will not improve the system, but will add to the cost, to the taxpayers, of acquiring property for improvements.

The following portion of House Bill No. 2140, Amended Sec. 2. of K.S.A. 26-505 states, *"The judge shall instruct the appraisers on matters including, but not limited to the following: (5) that, except for incidental contact for the purpose of verifying factual information relating to the subject real estate or to discuss scheduling matters, appraisers shall refrain from any ex parte meetings or discussions with representatives of the plaintiff or the property owners without first advising the adverse party and providing said party with the opportunity to be present."* Although the City would not object to a requirement that the appraisers disclose any substantive information received from either party to the other, it opposes the above-quoted language which would force the appraisers to speculate on the meaning of "incidental contact", and spend the time, and thus the taxpayers' money, contacting the opposing party, prior to discussing matters with the other party. Some of the properties involved in Overland Park condemnations are owned by out-of-state individuals or corporations that are difficult and sometimes, almost

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impossible, to contact, without long delays and numerous attempts. The requirement of advising the adverse party in these instances could delay the process significantly and add to the cost of the improvement project.

From the property owners standpoint, this amendment would be equally distasteful. In Overland Park condemnations, a significant number of the property owners are individual homeowners, many of them elderly. They would most likely contact an appraiser, who would then tell them that he could not converse with them until he was able to reach the City's representative and involve him/her in the discussion. Overland Park encourages property owners to speak unilaterally with the appraisers any time that they have a question or want to discuss an issue, as it feels that open dialogue will ultimately produce a better project and satisfied residents. If the bill, as amended, passes the legislature, Overland Park would like to interpret the language to allow it to give the appraisers blanket permission at the commencement of each condemnation to speak to property owners without contacting the City prior to each dialogue.

It has been Overland Park's experience that the Court appointed appraisers remain impartial and share any information that they obtain from one party with the others, if that information will influence their compensation decision, without the need for mandating legislation.

The cities of Kansas have functioned well for many years under the presently-configured eminent domain statutes. Therefore, Overland Park requests that you reject the proposed amendments, or at least that portion of House Bill No. 2140 dealing with ex parte discussions.

Thank you for your consideration.



Robert J. Watson
City Attorney



Jane Neff-Brain
Senior Assistant City Attorney