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Jane Doe
123 Main Street
Jefferson City, MO 55555

Dear Ms. Doe:

This letter is a follow-up to our conversation about your property rights concern. As I explained during our phone call, the purpose of the Ombudsman for Property Rights is to provide guidance about the condemnation process and procedures. § 523.277 RSMo.¹ The Ombudsman cannot provide legal advice. *Id.*

This letter does not constitute legal advice, rather it provides general guidance on the condemnation process and procedures. Additional information is available in the Missouri statutes—Chapter 523—and the Missouri Rule of Civil Procedure 86,² which applies in Missouri's courts. Though the Ombudsman cannot provide legal advice, should you have any questions about the general condemnation process or procedures, including those items discussed in this letter, please reach out to the Ombudsman again.

If you would like additional assistance in the form of legal advice about how the laws of the State of Missouri apply to your specific situation, if you would like someone to negotiate on your behalf, or if you would like someone to appear on your behalf before the circuit court, I encourage you to reach out to a private attorney. If you would like to find an attorney, I encourage you to visit the Missouri Bar's website (www.mobar.org) and to navigate to the "LAWYERSEARCH" option on the main screen. After clicking on the "LAWYERSEARCH" link, you will be directed to a page where you can search for an attorney by practice area. This function includes an option for "Real Estate – Eminent Domain and Condemnation."

¹ The Revised Statutes of Missouri are available at <https://revisor.mo.gov/main/Home.aspx>.

² The Missouri Rules of Civil Procedure are available at <https://www.courts.mo.gov/page.jsp?id=46>.

Condemnation Process and Procedures

The following is a summary of the general condemnation process. This section refers to the condemning authority generally as the “Company.”

As you will see, the condemnation process includes both pre-filing requirements and a two-part court process that seeks to answer: (1) whether the condemning authority may lawfully exercise eminent domain authority, and (2) what is the appropriate amount of damages owed to the property owner. The pre-filing requirements must be fulfilled before the Company files a condemnation petition.

If you agree to sell your property or an interest in your property (including an easement) prior to the filing of a condemnation petition and the transaction is completed, the Company will not file a condemnation petition. If the Company does not file a condemnation petition, the court process will not occur. Further, if you accept an offer from the Company after it has filed a condemnation petition, the court process will likely end.

- **Notice:** At least 60-days before filing the condemnation petition, the Company must provide the landowner with written notice of the intended acquisition by certified or registered mail. (§ 523.250 RSMo.). The notice must identify the interest in real property sought to be acquired, and include a statement of the legal description or commonly known location of the property, the purpose of the condemnation, and an explanation of the landowner’s rights to:
 1. Seek legal counsel at the landowner’s expense;
 2. Make a counteroffer and engage in negotiations;
 3. Obtain the landowner’s own appraisal of just compensation;
 4. Have just compensation determined preliminarily by court-appointed condemnation commissioners and, ultimately, by a jury;
 5. Seek assistance from the office of the ombudsman for property rights;
 6. Contest the right to condemn in the circuit court condemnation proceeding; and
 7. Exercise the rights to request vacation of an easement under the procedures and circumstances provided for in Section 527.188 of the Revised Statutes of Missouri.

(See § 523.250 RSMo.).

- If the Company does not intend to take the entire property, within 30-days of receiving the 60-day written notice described above, a landowner may propose in writing an alternative location for the property to be condemned. However, the alternative location must be on the same parcel of the landowner’s property as the property the Company seeks to condemn. The Company is required to consider the alternative location requested, and explain its acceptance or rejection of the alternative location. (§ 523.265 RSMo.).
- At least 30-days before filing a condemnation petition, the Company is required to present a written offer to the landowner. This offer must be held open for the 30-day period, unless the landowner reaches an agreement with the Company sooner. The Company is also required to provide the landowner with an appraisal made by a state-licensed or state-certified appraiser using generally accepted appraisal practices, or an explanation with

supporting financial data for its determination of the value of the property. (§ 523.253 RSMo.).

- The Company must engage in good faith negotiations prior to filing a condemnation petition in circuit court. (§ 523.256 RSMo.).
- **Circuit Court:** If the landowner is unable to reach an agreement with the Company, and the Company files a condemnation petition to condemn the property, the court will issue a summons giving the landowner at least 10-days' notice of the time when the court will hold a hearing on the petition. (§ 523.030 RSMo.).
- If a landowner would like to contest the necessity of the proposed taking, he or she “**must** plead and prove fraud, bad faith, or an arbitrary or unwarranted abuse of discretion of the condemner in its claim of ‘necessity’”³ *Missouri Pub. Serv. Comm’n v. H & W Inv. Co.*, 602 S.W.2d 41, 43 (Mo. Ct. App. 1980) (emphasis added); *see Mapco, Inc. v. Williams*, 581 S.W.2d 402, 405 (Mo. Ct. App. 1979). The landowner may make these allegations in either a motion to dismiss or an answer asserting affirmative defenses in the circuit court. Either of these filings should be filed **within thirty days** of receiving service of the condemnation petition. *See* Mo. R. Civ. P. 55.27, 55.25. Should you choose to file either an answer or a motion to dismiss, Missouri Rule of Civil Procedure 55.08 requires that pleading to “contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance.”⁴ Mo. R. Civ. P. 55.08; *see State ex rel. Mo. Highway & Transp. Comm’n v. Bush*, 911 S.W.2d 690, 692 (Mo. Ct. App. 1995) (concluding that this requirement applies to a pleading filed in a condemnation proceeding that contains affirmative defenses).
- Following this hearing, known as the “condemnation hearing,” the assigned circuit court judge will determine whether the Company may lawfully condemn the landowner’s property. This determination will likely include an inquiry as to whether the Company has the authority to condemn the landowner’s property. It will also include a determination as to whether the Company has complied with the necessary pre-filing requirements. The condemnation hearing is the first part of the court process.
- If the court determines that the Company may lawfully condemn the landowner’s property, the second part of the court process begins. In this part, the court determines the appropriate amount of damages due to the owner for the taking of his or her property. To

³ Importantly, courts have held that the “question of whether the taking of any given private property is ‘necessary’ and the extent and exact location of the property to be taken are matters of political or legislative determination which have been delegated to the condemning authority by virtue of the statute granting the right of eminent domain.” *Missouri Pub. Serv. Comm’n v. H & W Inv. Co.*, 602 S.W.2d 41, 43 (Mo. Ct. App. 1980) (citing § 523.010 RSMo.). Courts “may inquire into those questions relating to ‘necessity’ **only if** the protesting landowner alleges and proves that the condemner’s claim of necessity constitutes fraud, bad faith or an arbitrary and unwarranted abuse of discretion.” *Mapco, Inc.*, 581 S.W.2d at 405 (citations omitted) (emphasis added).

⁴ The Missouri Court of Appeals, Western District defined affirmative defense as “a defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s . . . claim, even if all the allegations in the complaint are true. An avoidance is an affirmative defense to an affirmative defense. An avoidance, like an affirmative defense, is to be pled in response to a preceding pleading.” *Rosales v. Benjamin Equestrian Ctr., LLC*, 597 S.W.3d 669, 683 (Mo. Ct. App. 2019) (internal quotation marks and citations omitted).

make this determination, the court will appoint three “disinterested” commissioners⁵ to assess the value of the condemnation and issue a report, after viewing the property, within 45-days of their appointment. (§ 523.040 RSMo.).

1. Prior to issuing their report and no less than ten days before viewing the property, the commissioners shall notify all parties named in the condemnation petition of the named parties’ opportunity to accompany the commissioners on the commissioners’ viewing of the property and of the named parties’ opportunity to present information to the commissioners. (§ 523.040.2 RSMo.).
2. The commissioners must view the property, hear arguments, and review other relevant information that may be offered by the parties. (§ 523.040.3 RSMo.).
3. The court will notify the landowner once the commissioners submit their report and give the landowner 30-days to file a response (known as an “exception”). (§ 523.050 RSMo.).
4. This response must be **written and filed within 30-days**. The response may include a request for a jury trial on the issue of damages or a request for a new appraisal. Either party may file a response. (§ 523.050 RSMo.).
5. After either party files a response, the issue of damages from the condemnation will be submitted to a jury, or, if a jury is waived, to the court. (§ 523.050 RSMo.; Mo. R. Civ. Proc. 86.08⁶).
6. A party’s response or a request for a new appraisal, will affect *only* the court’s determination of the appropriate amount of just compensation that the landowner will receive. (§ 523.050 RSMo.).

⁵ Section 523.040.1 requires the commissioners to be

residents of the county in which the real estate or a part thereof is situated, and in any city not within a county, any county with a charter form of government and with more than one million inhabitants, or any county with a charter form of government and with more than six hundred thousand but fewer than seven hundred thousand inhabitants at least one of the commissioners shall be either a licensed real estate broker or a state-licensed or state-certified real estate appraiser.

Section 523.040.4 also requires, in certain instances, that one of the commissioners be a “farmer who has been engaged in farming . . . for a minimum of ten years in the county where such property is situated.” Specifically, that provision states, in full:

In any eminent domain proceeding involving agricultural or horticultural property, for purposes of constructing an electric plant subject to a certificate of convenience and necessity under subsection 1 of section 393.170 at least one of the disinterested commissioners appointed by the court shall be a farmer who has been engaged in farming, as defined in section 350.010, for a minimum of ten years in the county where such property is situated. The provisions of this subsection shall not apply to applications filed pursuant to section 393.170 prior to August 28, 2022.

⁶ Rule 86.08 is available at <https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/92ec05366e717f1086256ca6005215fd?OpenDocument>.

7. The Company may, after paying the amount of the commissioners' award to the clerk of the court for the owner or owners of any property involved, take possession of the property or subject it to the public use set out in the condemnation petition. (§ 523.050 RSMo.; Mo. R. Civ. Proc. 86.08).
- **Property valuation:** Just compensation for condemned property shall be determined by the one method below that yields the highest compensation. (§§ 523.001, 523.039 RSMo.). After the commissioners issue their report or a jury determines the appropriate amount of just compensation, the judge presiding over the condemnation proceeding decides whether a homestead taking has occurred or whether heritage value is payable, and increases the amount of just compensation accordingly.⁷ (§ 523.061 RSMo.).
 1. An amount equal to the **fair market value** of the property. This value considers comparable sales in the area, capitalization of income, and replacement cost less depreciation. It also considers the value of the property based on its highest and best use, using generally accepted appraisal practices.
 - If less than the entire property is taken, the fair market value shall mean the difference between the fair market value of the entire property immediately prior to the taking and the fair market value of the remaining or burdened property immediately after the taking. Both the direct damages from the condemnation and consequential damages should be considered.⁸ *State ex. rel. Mo. Highway & Transp. Comm. v. Horine*, 776 S.W.2d 6, 10 (Mo. banc. 1989).
 2. For **homestead property**, an amount equal to the fair market value of the property multiplied by 125%. Homestead property is a taking of a dwelling owned by the landowner and functioning as the landowner's primary residence or the taking of any of the landowner's property within 300 feet of the landowner's primary residence *and* that prevents the landowner from using the property in substantially the same manner as its current use.
 3. Where the taking prevents the landowner from using the property in substantially the same manner as its current use, *and* the property was in the landowner's family for 50 or more years, an amount equal to the sum of the fair market value and **heritage value** (heritage value is 50% of fair market value).
 4. In limited circumstances, a fourth option exists. Where "an electrical corporation as defined in section 386.020, except for an electrical corporation operating under a cooperative business plan as described in section 393.110" seeks to take "any

⁷ When a landowner requests heritage value in a condemnation action, prior to the assigned circuit court judge determining whether it is payable, the disinterested commissioners and/or the jury, after instruction from the circuit court judge, must first determine whether the property has been owned by the same family for 50 or more years. *See* § 523.039(3) RSMo.; *State ex rel. C.F. White Fam. P'ship v. Roldan*, 271 S.W.3d 569, 574-75 (Mo. banc. 2008). After the commissioners and/or the jury make this determination, the assigned circuit court judge will determine whether heritage value is payable. § 523.061 RSMo.

⁸ The Supreme Court of the State of Missouri has explained that "damages for the value of the land taken" are direct damages. *State ex rel. Mo. Highway & Transp. Comm'n v. Horine*, 776 S.W.2d 6, 10 n.1 (Mo. banc 1989). Consequential damages are "any other damages that flow to the landowner as a consequence of the taking." *Id.*

agricultural or horticultural property . . . for the purposes of constructing an electric plant subject to a certificate of convenience and necessity under subsection 1 of section 393.170,” then “just compensation shall be an amount equivalent to fair market value multiplied by one hundred fifty percent, as determined by the court.” (§ 523.039.2 RSMo.). This option exists only if the electrical corporation filed its application pursuant to § 393.170 RSMo. *after* August 28, 2022. (*Id.*).

- Once the court determines the amount of damages owed for the property, the Company will pay that amount to the clerk of the court and the clerk will notify the landowner within five days. The landowner must deliver possession of the property to be condemned within 10 days after the receipt of notice of the payment of the award or make a motion for the court to grant the landowner an extension (not to exceed 90 days). If the landowner does not, the Company may make a motion for the court to issue a “writ of possession” directing the sheriff to deliver possession of the property to the Company. (§ 523.055 RSMo.).
- **Relocation expenses:** In certain circumstances, the Company must provide relocation assistance. Two statutory schemes govern when the Company must provide relocation assistance: (1) federal statutes located at 42 USC § 4601 to 42 USC § 4655⁹ and federal rules located at 49 CFR part 24 (including subparts);¹⁰ and (2) Missouri statutes located at § 523.200 to § 523.215 of the Revised Statutes of Missouri.
 1. Congress enacted the federal statutes to “establish[] a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance.” (42 U.S.C. § 4261(b)).
 2. If relocation assistance would be required as a condition of the receipt of federal funds and the purchase is made for the same public purpose through the same procedures, but “any public agency”¹¹ makes the purchase “solely through expenditure of state or local funds,” Missouri law may require relocation assistance be provided to displaced persons.¹² (§ 523.205.1 RSMo.).

⁹ These statutes exist at <https://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter61&edition=prelim>.

¹⁰ The Code of Federal Regulations can be found at <https://www.ecfr.gov/current/title-49/subtitle-A/part-24?toc=1>.

¹¹ A “public agency” is defined as

the state of Missouri or any political subdivision or any branch, bureau or department thereof, any public school district, and any quasi-public corporation created or existing by law which are authorized to acquire real property for public purpose and which acquire any such property either partly or wholly with aid or reimbursement from federal funds

§ 523.205(2) RSMo.

¹² A “displaced person” is defined as

any person that moves from the real property or moves his personal property from the real property permanently and voluntarily as a direct result of the acquisition, rehabilitation or demolition of or the written notice of intent to acquire such real property, in whole or in part, for a public purpose.

3. When neither § 523.205.1 RSMo. nor federal law requires relocation assistance, the Missouri statutes state that “[a]ny political subdivision, governmental entity, or corporation created under chapter 353, initiating condemnation proceedings which may necessitate displacement of persons . . . shall establish by ordinance or rule a relocation policy” (§ 523.205.2 RSMo.). The statute describes what the relocation policy must contain, including, in part “[p]ayments to all eligible displaced persons, as defined in section 523.200, who occupied the property to be acquired for not less than ninety days prior to the initiation of negotiations who are required to vacate the premises.” (§ 523.205.5(1) RSMo.). The Missouri statutes identify payments for both “displaced residential persons” and “displaced businesses.” (See §§ 523.205.6 and .7 RSMo.).

If you have any questions regarding this material, please do not hesitate to contact me. Again, if you would like legal advice about how the laws of the State of Missouri apply to your situation, would like someone to negotiate on your behalf, or would like someone to appear on your behalf before the circuit court, I encourage you to reach out to a private attorney.

Sincerely,



Lindsay VanGerpen
Senior Counsel
Phone: (573) 751-4857
Missouri Office of the Public Counsel and
Office of the Ombudsman for Property Rights

LEGAL DISCLAIMER: *The Missouri Ombudsman for Property Rights’ purpose is to provide guidance to Missouri landowners on the condemnation process and procedures. (RSMo. § 523.277). This guidance is not legal advice, and you would need to consult an attorney for legal advice regarding your rights and the merits of any challenges you may wish to make.*

§ 523.200(1) RSMo.