Eminent Domain Task Force Meeting
September 15, 2005
State Capitol Hearing Room 6

The Eminent Domain Task Force meeting was called to order at 10:05 by Chairman Terry Jarrett.

Task force members present were: Terry Jarrett, Chris Goodson, Gerard Carmody, Senator Chuck Gross, Representative Steve Hobbs, Spencer Thomson, Leslie Holloway, Lewis Mills and Howard Wright. Also present were Sherry Fisher, Brian Grace and Chris Roark.

Minutes of the September 1, 2005 meeting were reviewed. Leslie Holloway made the motion to approve the minutes, seconded by Lewis Mills. Minutes approved for posting.

Terry Jarrett thanked everyone for their thoughts and prayers regarding his wife's illness. Terry's wife is doing well and on the road to recovery.

Expert guests in the area of Eminent Domain were invited to address the task force and answer questions. The first group to address the members consisted of Kevin O' Keefe, Attorney from the Curtis, Hines, Garrett & O'Keefe Law Firm in Clayton; Greg Dhorman, Assistant City Counselor for St. Charles County; and Steve Mauer, Attorney at Bryan Cave in Kansas City. These individuals have experience in representing local governments in eminent domain proceedings.

Mr. Dhorman explained the process St. Charles County uses for obtaining ownership of property when constructing new roads. The construction of roads in St. Charles County are mainly needed due to either existing roads not being safe or the need for new roads due to residential developments. Roads which have the higher accident rate are the first roads to be worked on. Typical road construction projects in St. Charles County are 1 ½ mile long. In a road construction project of this size, the development stage shows there are typically 45 different landowners to be contacted. Out of the 45 landowners involved in this particular project, only 3 could not reach agreement and the County was forced to enter into the condemnation process. Most of the land taken are partials and rarely are total takings required. Many months, and in some cases years, are spent acquiring the land rights for these construction projects. Mr. Dorman had previously worked in Virginia and noted that state uses "quick take" powers, but that is limited to roads and utilities. The condemnation process used in Missouri is different. We must file the condemnation petition, but must first go through the good faith bargaining process which is pre-requisite for filing petition; obtain service on the land owners and then set up a hearing date for any judicial hearing in a court and the burden of proof is on the condemning authority to show that the proper procedures were followed. At the conclusion of the hearing, the court appoints three commissioners and charges them with going out into the community to view the property, hear evidence from both sides and then return their report with the value. The report is then mailed out to all parties involved and only when the county receives the report that they then pay the monies directed in the report does the county take title to the right of way and easement necessary for the roadwork. This is a much longer and more cumbersome process than

the “quick take” process used in other states. He also noted that the “quick take” process cannot be used in Missouri because of the constitutional protection. After the commissioners’ hearing each side has the ability to take exceptions to the awards and ultimate end would be a jury trial.

Questions:

Q: Were most of the land owners aware of the road proposals before they were approached for sale?
A: Yes, through public hearings. There are also three and ten year transportation improvement plans which are also available to the public. Public hearings precede the right of way design stage which is used to solicit input for the design of the road itself.

Q: What are reasons why about 10% or less of the land owners hold out and not sell?
A: Most people are opposed to the project in general. Most of these land owners when they purchased their house were in the middle of a field and did not want neighbors and don’t like growth in general. However, the average land owners are agreeable to the acquisition.

Q: Are values of property owners increased due to improvements made in the roads?
A: Yes. Many times due to the improvements, the classifications of the property are changed or the elevations of the house to the road are raised or evened out. The opposite might be true if the elevation of the house is lowered because of the new road.

Q: What other typical factors go into considering what other road improvements are going into the three and ten year plans?
A: Most importantly in St. Charles County is the safety factor. The County Road Board considers the safety of our roads and the accident statistics are the most important factors in determining which roads are selected for improvements.

Q: Is it true that in Missouri the trend is to do more transportation sales tax or road impact fees because of the growth?
A: Definitely, in St. Louis County we rely heavily on the transportation sales tax to contribute.

Q: How does the construction of roads interplay with utility construction or acquisition?
A: The two are highly related because utilities use the road right of way. The local government can regulate how they do it and make sure they clean up the site when they are finished.

Q: What would be the impact to government and utilities if eminent domain were not available or severely limited or made more cumbersome or difficult?
A: In extreme cases, if eminent domain were not available we could not do the road projects because some people would just not sell. Without eminent domain roads, utilities, sewers, etc. just would not be built or installed.

Q: What are the legal requirements or statutory requirements to negotiate in good faith?

A: If good faith bargaining is not used, the petition would not be approved and the judge would not permit condemnation of the property.

Q: Are there any penalties involved?
A: No, but if you could not convince the judge that good faith bargaining was used; having to go back could cause project slippage. An example where good faith bargaining was thought to have occurred, but the petition was not approved by the judge was when the owner of the property in question refused the offer but did not let us know that they did not legally own the property but that the property was put into a trust. The good faith offer letter was then sent to the husband and wife as trustees of the trust.

Q: What is the panels thoughts on implementing a penalty for the condemning authority for not using good faith bargaining or for low balling?
A: If there are to be penalties, limit to "total" takes and use the appraised value of the property not the accessed value. There are laws specifically spelling out what constitutes good faith offers and this is the device used to make certain that good faith offers are made for acquiring land from the owners. It was also noted that there can be serious funding repercussions, including federal highway money, if the regulations and procedures are not adhered to in the evaluation process of deciding on the value of the property.

Q: What is the notification process for notifying land owners?
A: Public notices and then individual letters to the property owners

Mr. Steve Mauer spoke about the appraisal process and good faith offer. Downtown Kansas City is now in the process of renovating an 11 square block area, the greatest thing to happen to downtown Kansas City in a decade. As part of this process they had to acquire over 44 different parcels of land, brought suit on 22, and of all those suits there are only two left. The process has worked very well and during part of the appraisal process some land owners came forward and said their buildings were worth a whole lot more than what was offered. When they went back to the appraiser, he stated that he went to the office and the owner wouldn't let them look at parts of the buildings, such as the second floor. The commissioners valued the property higher but given what the appraisers had to work with they valued the property correctly. The land owner is not required to let the appraiser into the building or property or even talk with them.

Q: There has been discussion on the task force about recommending penalties to be enforced if the appraised amount is lower than the commissioners' award, the percentage not yet determined. Does the panel have thoughts or recommendations on what might be more manageable to protect the land owners from low ball offers, but at the same time not penalize inappropriately for circumstances as described?

A: Penalties should be limited to only "total" takes. With respect for a partial take for a road widening, opinions can vary widely as to what is the value of the remaining vs. the value of the whole. In any circumstance, limit the possibility of penalty to total take. Second, if it is going to be taken from anything, take from the appraised value not the assessed value utilized by the counties and used for establishing the tax rate by the county.

Q: Do you as a condemning authority always, as a matter of routine practice, look at the assessed value of the property from the county before making a good faith offer?
A: He can't state what everyone does, but the panel agreed that they do. The counties' system of property assessment is an effort to establish fair market value of the real estate of that county based on data they obtained by appraisers and historic data and knowledge of the market. Property owners have the right to appeal the assessed value of their property and challenge the assessed value of their property. Every two years property owners within the state receive a statement as to what their property is valued at. Most only appeal if they think their property is overvalued, not undervalued. If there is one base line, the assessed value of the property by the county is one that could be used and readily available, objective and informed valuation of the property. Assessed value of a home or property is the legal agreement between the owner and the governing body. The problem with establishing some sort of penalty for a bad faith offer is where we get into a partial take situation. What are the impacts of a sewer line, easement, etc? For instance, sometimes when a sewer line is put in, the property is now measured not by the acre, but by the foot because it is now developable and the property is now primed for the next subdivision or shopping center. You are now improving the property and doing the owner a favor. This doesn't mean however, that in the property owner's mind their property value has increased.

Q: Use hypothetical sewer line you talked about, you believe land owners are compensated fairly, but when the next assessment rolls around, the land owners have an increase in the value of their property and through no fault of their own, taxes go up, you have improved the value of their property. That can happen, right?
A: I don't believe so because the actual use of the property is always the counties' assessed value. If the land owner is using it as agricultural, it will be assessed at the lower level as opposed to 19% residential or 33% commercial. Utility easements may be different. In Kansas City when some rural property owners gave easement rights to utilities, they made special assessment against the land to help offset the actual cost of the utilities. In a sense, land owners are baring a double burden. State laws are being addressed to help this type of situation (Ridgeway).

Tax code can change if the land owners realize that they are sitting on top of more valuable land and chose to change the classifications from agricultural to commercial or residential. In Kansas City when a sewer or utilities easement is given, no extra costs are experienced by the land owner. The costs are usually borne by the city or by the residents using the service. If in the future, the land owner begins tapping into the utilities or sewer line, then they are charged.

Q: On low-balling – does the panel believe that penalties need to be assessed and if this would help?
A: The panel stated that they all believed that low-balling does not occur routinely and the safeguard currently in place is that the judge would throw out the petition of the condemning authority.

Mr. Carmody brought up the fact that the law of the state is that a "good faith" offer if it is in a form which could be accepted by the party on the other side. For instance, an offer of $1.00 for a $100,000 property, by law, could be deemed a "good faith" offer by the judge if he applies the

law of the state strictly, then the law of the state would not inquire into the amount of the offer, but only into the fact of the offer. Does the panel agree? None of the panel disagreed with Mr. Carmody, but all stated that in their experience had never seen this happen. Evidence has always had to be explained and shown as to how the amount was derived. Fact of the matter is a statutory device may need to be established to make certain it is a good faith offer. Circumstances may be the extreme where there are low-ball offers and land owners cannot afford to go through a process that is expensive and time consuming and frightening for them and that they have to accept the low ball offer. Give thought to this matter if the law is as I believe it is, defining good faith negotiations and that the adjective "good faith" had good meaning. Abuses do exist and the power of eminent domain in the wrong hands is very dangerous.

The task force has a list of 32 items that it is exploring and questioned the panel on specific items.

Item # 1, Notification of landowners. Panel said they go through a long deliberate process of notifying land owners and all sorts of public notice and letters are always sent to property owners about a public hearing. Publish and post always. If anything, what the panel hears the most is that there is too much notice and talk about new roads, bridges, new sewers, etc. Discussed Penner family dilemma. How can task force eliminate the cloud that land owners are under in development and re-development content this notion that somebody's property is under the cloud of taking. Specifically in economic development context or plan. Statute says 5 years that you have to exercise the power of eminent domain. Correct. Other statues in the state where there is no similar limitation. Those are the kinds of specifics the task force would like to discuss. Solutions to help the land owners without necessarily ruining what we have in terms of growing the state.

Panel said the 5 year taking limitations under TIFF statutes has not been problematic and its applications to some other type of economic development may be feasible. Some of them may be difficult, such as LCRA and agencies involved with nuisance abatement, difficult to peg. 5 years seems to be manageable.

On the subject of Notification … meetings are subject to sunshine laws and have not found a politician yet who does not tough highly visibly about a prospect of a great economic opportunity and make sure that everyone knew about it at the earliest opportunity. Very little likelihood that a reasonably attentive community member is not aware of the possibility of an impending development.

Item # 4, Landowner Bill of Rights. One recommendation by panel member would be that the process takes too long. If it's going to happen, lets just make it happen. Let me get what I'm going to get and get on down the road. Some times you can have a temporary property easement last for years. Consider putting a time limit on temporary easements for construction purposes … use it or lose it provision. If you don't get underway in a year or something like that, you lose it. Make the condemning authority plead how long I am going to take it. Plead from the day it starts.

Stating a defined time for easements would solve the #3 issue.

On road constructions easements, defining a one year time limit would generally not work, but spelling out the defined time limit may help (i.e. one year to do this part, 6 months to do next part, 3 months for final) could be considered. Rule 86.04 pleads how long condemning authority would take.

Don't take easement, or deposit money, until project is ready for that part of job. Time limit can start running at the time of deposit. Limitation time limit already in TIF statutes. Time limit (5 years) on project approval.

Condemning authority can actually pay the money in take ownership of the property, file exceptions, go through whole process and if the jury awards a great big number the condemning authority can still say "I give it back" and they can get the money they already paid in. Cannot disturb building or property.

Item # 7, Relocation costs, attorney fees and cost of condemnation. Interested in panel's comments … is this a problem? In TIF it is common to pay a lot of relocation costs, federal rules are followed. Some areas have adopted this practice. Attorney fees – typically contingency may vary, generally attorney fees are 1/3 over the last offer received for the take. Most of time the clients will pay the expenses, etc. and will come off the top of the award.

Items #9 and 10, Dealing with commissioners … does panel see any advantage to having some instructions to the commissioners, how they value property, etc? Panel said absolutely. New commissioners are usually educated by the old commissioners as to proper scope of their duties, written instructions are available in some areas. No procedural requirement in place for that now, just a practice of doing it. Training and prior qualifications for commissioners would be good judgment. Scale of the taking may judge the scale of the qualifications. Having a retired judge of the commission panel may be good idea. Key is uniformity across state.

Item # 26, Delegation of eminent domain power both to private and public entities. What is panel's perception to granting power to many? Panel members believe that requiring the PSC to come down on the folks that are abusing eminent domain is valuable option. Private companies have been source of problem in past. PSC does not have regulation to stop these private companies from exercising eminent domain once they have given them the power. Suggestions - make the private developer if they want to do eminent domain prove to the commission or authority that they have done all the notice, etc. Require PSC to sit up and take notice that when they get a complaint about an abusing authority, make PSC hold hearing on that. Library has their own authority; fire districts have their own authority, etc. Too many pockets have this great power. Power should be back at the elected official level. That would work except that you have many small sub-divisions that aren't elected. Counties should have the power of eminent domain for fire, water, sewer, etc. Some uses of eminent domain are to clear title. Example – private sewer company, who was also the land developer, who was also the realtor, got all their power from eminent domain and they got the power from PSC. No one to supervise that.

Panel was asked about process and how they would recommend solving issue service territory having condemning authority reviewed? Process would apply more broadly to company like

Ameren. Recommend one of two things. Either before they can condemn that would have to state purpose, get approval from either the PSC or the county in which the property is located so that at least someone is reviewing their determination because the standard is that once you have the power of eminent domain the judge has to defer to the determination and can't argue. Nobody to look at it and say, wait a minute, this is not the best place. Sometimes condemning authority using as a profit motive or to line their pockets and didn't give proper notice, etc. Make the condemnation forced to file be approved by PSC or county commission where the property is located. Task force member emphasized that with this proposal, at some point putting in the political process. Questioned whether political motivation would overshadow the justification and be extremely bureaucratic. Municipality should be higher authority.

Discussion about libraries in particular and how they are not governed by higher authority and are self-sufficient. Draw distinction between building a library using eminent domain and running a sewer line for a fire station. If library can't obtain land using negotiation process then they should not be allowed to use eminent domain. Task force committee does not have time to go through list of companies that have been given eminent domain authority to decide who should have authority and who should not. Ultimately, general assembly could construct the balance. Use recommendation process … library comes up with plan; they go the municipality who grants eminent domain.

Item # 32, Discussion on interlocutory appeals. Once the condemning authority pays the money into court, it sits there and if the land owner comes in and takes the money out, then the only issue remaining is the value of the property. The land owner can no longer say, but you should have never taken it in the first place. None of the pre-requisites to condemn it are still there, they are gone. Unfair hardship on land or property owner who may need money and there should be something the task force can do. Probably the exception rather than the rule in dealing with something like this. Requiring appeal at earlier stage may serve everyone well. Mandatory appeal could be very helpful, how is task force going to structure that. For many property or land owners in the blight case, have everyone participate in the early appeal process and appeal can be done in the development process. Condemning authority should have appeal right also. Appeals should have short window. Challenge blight only. Early blight determination in development stage. Normally land owners can't appeal until the end of the case, and only after complete process can the land owner take appeal of the very first decision by the judge. Can be time consuming. Interlocutory appeal would give the right to say that decision is wrong and go straight to the court of appeals to get a review of that decision. On condemning side, the time for an appeals court decision could be crucial. Could really slow down projects. Suggestion would be to make private companies, before they can file for condemnation, get approval from the body that gave them eminent domain power, be it the county or the PSC. Rural electric coops are not subject to PSC, need something different for them.

The eminent domain task force asked that the panel supply specific recommendations or proposals for consideration to the task force and send to Terry Jarrett as quickly as possible. Clear that there are going to be some changes and it would be helpful if professionals such as the panel have specific recommendations on legislative changes or rules changes and get them to the task force for consideration. Need specifics.

Asked for Kevin O'Keefe's overview of the blight of West County Mall. Terry Jarrett asked if this could wait until later in the afternoon. Mr. O'Keefe agreed to stay and address the task force later in the day.

Adjourned for 15 minute lunch.

The second panel consisted of MoDOT. Pete Donovan, Attorney and Terry Sampson, Right of Way Director. Also present on the second panel was Robert Angstead with Newman Comley & Ruth (mediator).

MoDOT has a success rate of between 89 and 91%. Follow uniform relocation assistance and rural property acquisition act (uniform act) on every property. Followed on all cases. Ensure that all property owners are treated fairly and all property owners that are displaced as a result of the project are treated fairly. Responsibility of balancing property right for the property owner and also for the tax payers of the state is a delicate matter and do it the best they can. Detail on what we do on environmental side. Work with DNR, Dept of Conservation and SEMA to ensure that projects do as little damage as possible in the selection of where the projects go. Consider endangered species, flood plains, wet lands, parks, air, water and social and economic impacts. Hold series of public meetings with purpose of notification of some of the concepts that are being tossed around. Project Management team determines early what impacts there are and how we can avoid some of the impact to the properties. Through public meetings get land owners ideas and input into the projects. When preliminary plans are done have public meeting with presentation and get feedback. Also have location hearings, policy requirements and have design public hearings that will show individual impact of property and work with owners to get changes implemented if there are changes the owners would like to see. Right of Way process explained. First stage after public meetings is description writing. Determine who the correct title owners are, prepare legal documents. Fee study is done for appraisal problems. Look at parcels that are affected, determine problems or complexity issues and assign appraisers based on this study who are experienced to handle that type of appraisal. Fee appraisers are hired when issues may become complex or situation dictates. Approaches typically used are sales comparisons (compare like properties) or income approach. Approved list of fee appraisers that MoDOT uses. One of the goals of the department is to increase list of approved appraisers so that there will be a big pool state wide and to get property owners more involved in the process. We think that property owners may be used to help in the selection of the appraisers and get them more involved in the process. Once appraisal is completed, review is done of the appraisal and is done by an in-house reviewer who is state certified and has to comply with uniform standards of appraisal practice. Negotiation is next step – have approved offer to make to land owner. Negotiator in 90 some percent of the time goes to the house or business and meets with the property owner, sits down, gives them brochure explaining process, give them a highway map, business card, colored plan sheet showing the effect on their property and the larger affect of the overall project. Offer is in writing. Give owner copy of the appraisal, copy of the general warranty deed and date that they need to convey property to us by, copy of the escrow agreement, sales agreement and request for tax payer ID number. Negotiator typically spends an hour or more in the first meeting going over details and serve as liaison between property owner and the department, counter offers or additional information that is sought or that the department didn't supply. Administrative settlements are made based on this information which are

settlements made above and beyond the original settlement. In the appraisal process we almost always ask the property owner to inspect and accompany us on the appraisal. Ask the owner if they know of like sales in the area that could be used as comparisons. After all negotiations are used to settle (91%) last year, alternate step is mediation. Mediation is not mandatory but it is mandatory that it be offered to the property owner. In every case, with the exception of title issue or design issue, mediation is used. Mediation waiver cannot be done at the local level.

Referred to Mr. Angstead regarding mediation. 46% of the owners who have sought mediation have settled. Two step process past mediation. File petition, hearing, 3 commissioners are chosen. Believe some sort of qualifications for the commissioners is a good thing. Wise to have qualifications for commissioners. File exception within 30 days goes to jury trial. Many legal settlements are made past that as well. Only 1% of the actual parcels that are condemned go to jury trial. Quality assurance done every year to see if our processes are working. 91% last year on successful negotiations. Looked at cost estimates, highest and best use analysis, appraisals and mediation. Also looking at incentive offers to sign. Send our customer opinion survey after every payment and 84% are satisfied with negotiation process. 88% feel MoDOT is trustworthy. Relocation assistance program – offer advisory assistance or payments to individuals displaced as a result of the project and/or who have to move items of personal property. Uniform act was recently updated and getting changes implemented now. It is critical to treat people fairly on every project.

Robert Angstead has been a mediator since 1992. Mediator in MoDOT's condemnation cases. Outline of process that he goes through (1) write land owner and MoDOT representative seeking date, location for mediation session and agree on date, time and location. Mediation is either at the MoDOT offices or at Mr. Angstead's office here in Jefferson City, in county court houses … places where it is not going to cost anybody anything. (2) appear and mediation and ask parties to sign mediation agreement that states 12 things. These are: everyone agrees to participate in the session, mediator is not a judge and has no authority to impose settlement, parties may consult with an attorney at any time during the session including using a telephone, mediator cannot represent either side, mediator has no interest in the outcome, explains what a caucus is and how it is used in the mediation session, information gained by the mediator in the caucuses cannot be shared with the other party, session is confidential, no statements made will be used in any proceedings, cannot subpoena mediator, anyone can terminate the mediation at any time, waive conflict with the mediator or involved parties. Mediations are informal and on a first name basis. Land owner goes first and then MoDOT goes. Questions are permitted to be asked by either party. Parties are then broken up in two separate groups to try and reach agreement or move closer. Typically an hour to an hour and a half is spent going back and forth between the two parties. A copy of the mediation guidelines will be sent to the task force for review. At some point either an impasse or a settlement is reached. If impasse is reached, mediator sends everyone off with strong urging to continue negotiations and that usually happens. If agreement is reached, papers are signed immediately during the mediation session.

Section of MoDOT manual on mediation will be sent to task force.

Questions:

Q: What is the cost associated with mediation and who pays?
A: Mediator's time is billed on a negotiated rate per hour including travel time. Landowner has no cost. The mediation is paid for entirely by MoDOT. A pool of mediators is used by MoDOT on a state-wide basis.

Q: Have there been concerns expressed by the land owners that the mediator is being paid by MoDOT?
A: Mediator tries to dispel this notion immediately. Landowners at first are very skeptical of mediator when being paid for by MoDOT but this issue is discussed and usually land owners become satisfied that the process is equal to all involved.

Q: Please discuss the McClaren case. In 2001 commission report was filed. Mr. McClaren never drew money out. Once money leaves MoDOT's hands and is in the hands of the court, MoDOT cannot control if the land owner takes it. Critical issue, having tried dozens and dozens of condemnation cases, the vast majority involve a breakdown in communication. That is why we believe mediation is a big help. In Mr. McClaren's case it is a situation where Mr. McClaren said there was going to be a drainage problem in the after condition. Three days before case was set to go to trial everyone got together and Mr. McClaren allowed MoDOT's appraisers to go on the property. Prior to this MoDOT was not allowed on the property. After the appraiser saw the damage and the drainage problem in his field, MoDOT in process of settling case. Probably a year and half of litigation could have been avoided if things had been communicated better. The taking of property, when the seller does not want to sell, is one of the most significant powers that government has besides the ability to tax and to send someone off to fight a war through the draft. This is an example of mediation would have been a big help. This was a federal grant project that MoDOT gave to the City of Washington, so the city had control of this project. Washington was building an airport. This was not a MoDOT condemnation.

Q: Common complaints regarding condemnation process?

A: Biggest complaint is just that the condemnation process is happening. No complaints about the MoDOT field people, negotiators, except that they are being cheap. MoDOT does not do private condemnations for developers. MoDOT condemnations are for public roads.

Q: Estimate of rough percentage where mediation is successful?
A: Roughly 50% are completed with closure. Mediations that settle do not always settle right there in the mediation room. Some parties continue to dialogue and often times within 2-3 weeks to a few months, settlement occurs.

Q: Do land owners in mediation bring counsel with them?
A: About half the time.

Q: If land owner agrees to mediation can the land owner request his own mediator?

A: Never had that happen, but if the mediator is on MoDOT's approved list, with qualifications, and/or if the mediation meets the qualifications that MoDOT's mediators meet, then MoDOT would probably agree to the land owners' mediation request.

Q: Does the subject of land being owned for several generations come up within the mediation sessions?
A: Not in any of my mediation cases.

Q: Is the process designed so that there is only one mediation session?
A: There is no cutoff as to when we stop talking. If the process is working, we should be working to settle the case at every stage of the process. Jury trial rate down to about 1 ½%. Often times we find that a breakdown in communications has occurred when a case cannot be settled and reaches the inside of a court room. MoDOT only offers one mediation session, but stresses continued dialog and has never turned down a subsequent mediation request. Mediations could go multiple days.

Q: On the sighting of route when the project is in its infancy how many route sighting when you have a public meeting do you show and what is the frequency that the top choice is the one that is ultimately decided on, especially after hearing public testimony?
A: Don't know statistics. Would have to ask someone in the design section. But because of the public hearing process MoDOT learns a lot about stuff that they didn't know. Had situations where we didn't know that there was an old public cemetery in the middle of our alignment. As a lawyer, when I find that out, the road goes somewhere else.

Q: When do the people that live along the route that is chosen find out, is it when the MoDOT representative comes to their house, or is there another meeting to let everyone know that this is the route chosen?
A: It depends on the size of the project, the number of acres impacted and the overall complexity. It is usually at the location hearing when the actual road layout is announced or the subsequent design hearing. On a smaller project, it is done by more word of mouth, by telephone, that sort of thing. The project manager may speak directly with the property owner on smaller projects.

Q: What is process for contacting people along the selected route?
A: Don't believe a letter is sent to everybody, but would have to check with project manager, but on smaller projects the project manager calls or goes to see the land owner. On larger projects, we advertise in newspapers, or radio. At design hearings invitations are sent to all affected property owner telling them about this meeting. Follow-up will be done on this particular question to make sure answer is correct.

Of great concern to everyone on this task force is the notion that many times the land owners know nothing about the taking of their land before they receive a certified letter in the mail and presented with an offer on the property (not necessarily talking about MoDOT) and the land owner has 5 days to respond. This is of great concern to everyone on the task force.

On larger project at the design hearing, letters are mailed to the property owners. On smaller projects, it is on a more personal level.

Comment from MoDOT official, have had occasion to try dozens and dozens of lawsuits, many of which were eminent domain cases, along with quite a few appeals, what I would like to suggest does not favor penalty provisions as a statutory fix for low offers. From MoDOT's perspective, just because a final result as a result of a jury trial, the award is higher than a previous offer, does not necessarily of itself indicate that is was a low-ball offer. Juries return verdicts for different reasons. In condemnation cases, many times they are not related to land values. Penalty provision is not the way to go and more importantly, other than the fact that just because the final amount is higher doesn't mean that somebody necessarily made a mistake. Generally, and from speaking with counterparts from other states, these provisions have the tendency to encourage people to loiter up. From our view, it is better to get people talking without introducing lots of awards. Other states usually have higher than 9% condemnation rates. General trend we believe from that kind of a statutory amendment would be to encourage rather than discourage litigation. Mediation is the better approach. MoDOT's approach is that if the land owner doesn't bring a lawyer to the mediation session, then MoDOT's lawyers stay away also.

The third panel group consisted of Judge Julian Bush from St. Louis City Circuit Court; Phillip Dennis, Commissioner and Patrick Cronin, City Attorney, Rocheport. This panel discussed judicial issues and procedures pertaining to eminent domain lawsuits.

Discuss process of condemnation. Judge Bush has been a circuit judge for over ten years for city and handled about ½ dozen condemnation suites. First learn about a condemnation case when petition is filed and then a summons is issued to the landowners. Consider whether or not the condemner has the power to condemn. The landowner usually has no defense for condemnation. Will usually find that the government or development agency has the authority to condemn. Rarely is this contested, never seen this contested, although have read about it a couple of times, blighting situation was involved. Usually no contest over the power to condemn. Then, appoint 3 commissioners, and charge them with obligation to make a fair appraisal of the property and report to the judge the value of the property. Report is received and at that point both parties have the option to challenge the commissioner's assessment. If either party files exceptions, then there is a jury trial. Most often the cases are settled before the jury trial. In the jury trial, just as in every other jury trial, the jury will place their evaluation on the property. If the evaluation is more than the commissioners awarded, the contemnor and either come up with the additional money or abandon the condemnation. Never had a trial of condemnation case as far as damages are concerned. Confident these are very simple trials. Land owner testifies as to what he believes the property is worth and the contemnor put testimony on by an appraiser and then it is up to the jury to determine value of the property. The only requirement today for a commissioner is that they be resident of the county and owns real property. Judge believes that he could appoint better qualified people if the qualifications were fewer not greater. Explain: disqualification for person who lives in an apartment. These people might be very bright and had owned property in the past, but currently do not. Could appoint people judge feels are better qualified if he does not have to labor under that restriction.

Mr. Dennis … recognizing that the developer often comes in with resources that are superior to the individual, one of the things that we do is try not to hold the individual to the higher standards of the developer. For instance, the developer has developed a slick packet with plan, pictures, etc. and paid appraiser with exhibit or his own and many of these things would not be available to the average landowner. The landowner can basically give you their testimony on the value of the property. Also look at four types of property that we see. First, we see totally dysfunctional properties (buildings that could not house anyone), second is undesirable building (may be some characteristics of this particular property that make them undesirable for a neighborhood that is being improved and those undesirables could be criminal activity, house itself has a look that is basically past. Next step up from undesirable is incompatible, in other words the development scheme does not allow that property to fit in. Top level is the acceptable level and could go either way. This means that the developer could leave the property in the plan of scheme but is part of the developer's interest to have the entire block rather than just pieces of the block. This means that the developer has control over the market price and other things a little better than if he had spots in the plan that he did not control. When we are looking at that we also ask the owner some questions. For instance, did they have insurance on the property? It goes a lot toward what they think the value is if they actually have insurance on the property. If there is no insurance then that says to us that the owner did not place as much value on the property. Also look at other things such as the type of brick used in the building, type of repairs that were done prior. Forbidden at looking at repairs or improvements that were done after the amount has been announced. Value is accessed at the time prior to the actual buying of the development. Cannot look at how many generations the property has been in the family. Often see land owners wants a lot more money than the developer wants to pay and it's always a matter of us sitting down and listening to all of the things just talked about and determine what the actual value is. Often the value is something in the middle. Commissioners then have to sit down among themselves and defend their points and have to come to conclusion and value as a group. Some city home owners who have lost their property have left the city and gone to the county. Concerned because these displaced home owners were members of the community and paid taxes.

On an appeals case the commission has looked at the delay of possession of property by condemning entity until appeals are settled. Title wouldn't pass until the end of the appeals.

Questions:

Q: Have any of you seen or experienced low balling?
A: The assessed evaluation is the floor. If low balling does occur, the judge has the course of action to throw it right back out.

Q: Do you see value in having a set of uniform instructions for the commissioners to give to them to help in evaluating assessments, similar to jury instructions?
A: Some commissioners who do the work don't have a clue, and some sort of set instructions would be good. Most of the commissioners are very intelligent people, but have asked what their charge is and what do they do next. Most of the time one lawyer is on the commissioners group and he takes the lead.

Legislation to put out list of suggestions of say at least one of the commissioners could be a lawyer or banker (someone with knowledge of land value). Best served when you have a commission cross section of people in different capacities. Generally speaking the judge wanted a lawyer on the panel and appoints people that he has confidence in and who he knows. Cross section of the community and therefore the judge usually tries to appoint commission with different races and genders on the commission.

Q: Is the number of commissioners too low, should the task force recommend adding more?
A: The bigger the committee is the harder it is to reach consensus. Suggest leaving at three. Issues can be handled better with three people with one being a tie breaker if there are problems. It would also be harder to fill up the number of commissioners if increased.
Someone is also going to pay the commissioners and the more that is required means extra charges.

Q: On the issue of fair market value, does the fact that the property has been in a family for generations have any effect on the value?
A: Sentimental value has no place in fair market value. Appraisers will not put value on the fact that land has been in the family for many generations. Compensation for emotional impact, etc. is considered by the commission.

Mr. Cronin discussed that they have never taken a farm that is in use. He said problems have occurred when they take a house that has been inherited and they have had it for 20 years and never had a tenant in it, never done any repairs and really needs to be torn down; but there is emotional attachment to the house. Almost every small town in Missouri is full of houses such as this. At some point someone has to face the truth, because that house destroys the value of the properties around it.

Q: Does the commission look at the value of a residential house which he going to be torn down and the property made into commercial use; does the commission take the value of the land that is being made into commercial or look at only residential value?

A: The commission looks at if the property taken is residence, then we look at what the owner can replace residence for. Look at displacement of the individual's property and replacement of a similar structure. Law looks at how the property was used when the developer filed and therefore if was residential and maintaining it as a residential property then that is what the commission looks at.

Mr. Cronin said that the system that is in place is very fair when both sides have attorneys. Mainly, only the condemning side have attorneys. Whatever fairness there is, is because the attorney puts it in there and for that reason he would like to see some sort of training for the commissioners. Don't think they have to be qualified state appraisers, but he does think they ought to be in the lawyer, real estate or banking business.

Kevin O'Keefe returned to discuss the landmark mall blighting case in West St. Louis County. It involved a redevelopment project in St. Louis County (West County Mall). This was one of the early shopping centers and that facility marked the nature of development. Site is bounded on

three sides by roads. Fourth side is a cemetery. Mall sits on a 50 acre lot and had 500,000 sq. feet of shopping available and parking on the 50 acre site. The mall became economically disadvantaged and competition and growth by different forms and other malls became larger offering greater merchandizing. As a result, the West County Mall had increasing vacancies and season occupancy as opposed to long term leases, it had declining sales tax revenue and the revenue was critical to the city's ability to provide service to residents. Recognizing the circumstances, and recognizing that there was no place to go to add to the mall, the city exploited the possibility of utilizing tax increment financing for the economic revitalization of this economic engine (the county mall). One of the reasons why public involvement was considered to be potentially appropriate was because the site is hamstrung by its location. It had become ineffective in the late 1990's and in order to bring it up to a marketable condition would require in excess of 1,000,000 sq. feet of shopping and to do that on a 50 acre site there was no additional land available and meant that parking for the customers would have to be structured. Cost of parking space increased from $1,000 per space to $15,000 per space and required the construction of a parking garage integral to the project. The overall cost of the project was approximately $250 million and involved the utilization of $29 million in TIFF revenue tax increment financing. Condemnation was available to the developer or redeveloper (owner of the mall) in this case. This is what ultimately occurred. The reason Mr. Carmody wanted to bring this issue up is because the city met with the TIF commission originally and the city made the determination that the county mall was blighted. The blighting decision was made at a time when the mall was providing approx. 20% to the city revenue. Operating on what appeared to be a successful business. When charted out, revenues were rapidly declining and the assessed value of the property had declined, the competition of regarding rent was declining. There were also physical characteristics of deferred maintenance and the layout of utilities which fell into the traditional definition of blighting in TIF statutes. The key to the matter however was the determination was that the property was economically underutilized. This was a determination that the city made based on previous litigation with economic tools primarily a case in the City of Crestwood Drive-In. The redevelopment of the drive-in would be much more effective for the community as a whole that it be used in a manner that would generate more revenue for the city. On that basis, the city realized that West County Mall, which physically present, was not the economic engine that it had been and would have hoped to be. It was economically underutilized. City agreed to participate in the tune just shy of $30 million by tax increment financing. This decision was ultimately supported by the school district. It was also supported by the entire TIF commission including representatives of St. Louis County who sat on the TIF commission. The determination was challenged in court. Litigation ultimately found its way to the appellate court of Missouri. On the grounds that an affluent community with a functioning non-abandoned mall could not utilize the concept of blight in order to take advantage of available economic tools under the statute. Both the trial court and the court of appeals agreed with the city's determination that economic underutilization is indeed an inherent element in the concept of blight under the Missouri statute and under frankly common sense. It is not necessary to wait until deteriorization or physical abandonment of property in order to determine that its course is inevitable and that its role in the community has ceased to perform. That case has become important as other communities seek to apply the economic development statutes as tools that are available to them across the state. Because of its recognition first of all that in our separation of powers environment that it is not up the courts to make its independent judgment as to the best course of action that a community should pursue among its alternatives. Recognition

of the fact that economic underutilization a better idea that serves to provide a service base for the community to serve its residents and provide new environments for its neighbors and serves as a keystone to development of adjoining and nearby areas that has also occurred as a result of the city's infusion of this capital and credit in this case. Other areas nearby have also refurbished and redeveloped without utilization of eminent domain. Determination was appropriate to find the area blighted. In other areas of the city the use of eminent domain has been used as an economic development tool. Example: Hazelwood and Mills Outlet Mall area.

In the example of West County, eminent domain is certainly used for projects like that as Mr. O'Keefe pointed out. Topic of discussion because there are municipal bodies making findings to which courts give tremendous judicial deterrence.

Mr. Jarrett then discussed the focus for the next meeting. First, the preliminary report is due by October 1st. Terry will draft this report and e-mail drafts to all members of the task force. It will state history, charge, recommendations for consideration, and work yet to be done. No objections by the task force members for Terry to begin working on the preliminary report.

The next meeting scheduled for Thursday, September 29th at 10:00 am in Hearing Room #7.

Topic of next meeting to gather some panels dealing with public use, panel of folks that are in development to talk about their experiences, try to get together a panel of more rural views and also asked for a panel to discuss utility issues.

Meeting adjourned at 3:10 pm.