

CONDEMNATION:  
COUNTY:  
EMINENT DOMAIN:  
STATE HIGHWAY COMMISSION:

In the absence of agreement between the parties to a condemnation suit to the contrary, fixtures, attached to the land condemned, pass to the condemner. And, if the condemner wishes such fixtures removed, it must bear the expense of removal of said fixtures.



February 15, 1954

Honorable Max B. Benne  
Prosecuting Attorney  
Atchison County  
Rock Port, Missouri

Dear Sir:

By letter of December 19, 1953, you requested an official opinion, reading in part, as follows:

"\*\*\*\* When a utility pole line is located on private right-of-way, inside the fence line, along county roads or state highways, and a road-widening program requires the moving of such line, should the county or state, as the case may be, be required to bear the expense of moving such pole line? \* \* \*"

Your question is fully answered by the Supreme Court of Missouri in State ex rel. v. Haid, 332 Mo. 686, 59 S.W. (2d) 1057, quashing a writ of certiorari brought by the State Highway Commission against the Judges of the St. Louis Court of Appeals, to quash an opinion of that court in the case of State ex rel. State Highway Commission vs. Caruthers et al., 51 S.W. (2d) 126. The State Highway Commission had brought suit to condemn a right of way through defendant's land for Highway No. 61. A house, barn, and fences, were on part of the condemned land. The owner of the condemned land had moved those fixtures at his own expense. The trial court instructed as to damages, in part, as follows at 59 S.W. (2d), l.c. 1058:

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" \* \* \* and to this amount, if any, you should add the reasonable and necessary costs to the exceptors in moving the house and barn and the side fences in question off of the right of way condemned."

The Supreme Court declared this instruction good, if there were evidence on which to base it, i.e., if there were an agreement that the fixtures should be moved at the expense of the owner of the condemned land, saying l.c. 1059:

" \* \* \* In the case at bar, the house, barn, and fences, being fixtures to the land condemned, would pass to the condemner unless there was an agreement between the parties that such fixtures would be reserved by the owner and not taken into consideration in the condemnation proceeding. City of St. Louis v. St. Louis, I.M. & S. Railway Co., 266 Mo. 694, 182 S.W. 750, 754, L.R.A. 1916D, 713, Ann. Cas. 1918B, 881. Evidently such an agreement was made, because the opinion of the Court of Appeals states that the house, barn, and fences were not condemned. Such a thing could not have happened except by agreement of the parties because the fixtures were a part of the realty and could not be separated therefrom except by agreement. City of Kansas v. Morse, 105 Mo. 510, 519, 16 S.W. 893. Absent an agreement between the parties, the highway department would have been required to pay for the fixtures and remove them from the highway at its own expense. But where, as here, by agreement between the parties, the landowners reserve the fixtures and remove them from the highway, the cost of such removal is governed by the agreement between the parties, either express or implied, and not by the law governing the assessment of damages in condemnation. In this situation the landowner could not recover the cost of removing the fixtures

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from the condemned land unless the agreement between the parties so provided. Whether or not the agreement did so provide is not an open question here. The trial court instructed the jury that the landowners were entitled to recover the cost of removing the fixtures in addition to the value of the land taken and the damages to the remainder tract. This was a good instruction if there was evidence upon which to base it.\* \* \*" (Emphasis ours).

Thus, in the absence of agreement otherwise, the state or county, in condemning a right of way, would acquire those fixtures upon the right of way. Therefore, if the county or state wants such fixtures removed, the expense of removal must be borne by the state or county.

However, if the condemning authority does not want the poles in question, and the public utility wishes to retain such poles, the cost of removal thereof from the condemned land can be recovered by the utility.

#### CONCLUSION

In the premises, therefore, it is the opinion of this office that in the absence of agreement between the parties to a condemnation suit to the contrary, fixtures attached to land condemned pass to the condemner. And, if the condemner wishes such fixtures removed, it must bear the expense of removal of said fixtures. If, however, the condemning authority does not want said fixtures, and the owner of the fixtures wishes to retain ownership thereof, the cost of removal would be upon the condemning authority.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON  
Attorney General

PMcG:vlw