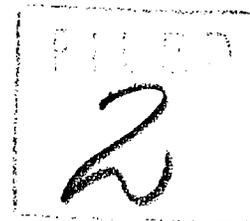


CONDEMNATION PROCEEDINGS: Section 523.040 RSMo 1949, requires a  
COMMISSIONERS' REPORTS: commissioner's report in a condemnation  
RECORDING FEE: proceeding to be recorded, and each tract  
WHEN COLLECTED: to be separately indexed in the deed records of the county in which the lands are located. Recording fee shall be taxed as costs, and recorder shall record report without tender or payment of recording fee in advance.

February 2, 1959

Honorable James H. Anderson  
Assistant County Counselor  
Jackson County  
Kansas City, Missouri



Dear Mr. Anderson:

This is to acknowledge receipt of your request for a legal opinion, which reads as follows:

"We have been asked by Mr. Nathan Scarritt, Recorder of Deeds of Jackson County, for an opinion concerning a 'Report of Commissioners' appointed for sewer districts, highways, public roads, etc., affecting real property situate in the County of Jackson.

"Under Section 523.040 RSMo 1949, the Recorder of Deeds is required to record in his office a copy of the 'Report of Commissioners' and the fee for so recording shall be taxed by the clerk as costs in the proceedings, and thereupon such company shall pay to the said clerk the amount thus assessed for the party in whose favor such damages have been assessed.

"However, in Section 59.320 RSMo 1949, it states the recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party required the record to be made.

"In Section 59.440 RSMo 1949, it states in the book to be known as 'The Abstract and Index of Deeds,' among other appropriate columns, a column describing the lands conveyed or affected shall be kept.

"Would you please give us an opinion as to whether a 'Report of Commissioners' shall be recorded and the fee for such recording collected later, and also, whether each tract of land described in the report of the commissioners shall be indexed separately?"

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Your inquiry, in reality, is three inquiries, which we have rephrased for convenience of discussion in the following order:

- (1) Shall the commissioner's report in a condemnation suit be recorded?
- (2) If such commissioner's report is required to be recorded, shall each tract described in the report be indexed separately?
- (3) If the commissioner's report is required to be recorded, shall the fee be paid before such recording, or may the recorder collect the fee at a later date?"

All statutory references herein are to RSMo 1949, unless otherwise specified.

Section 523.040 authorizes the court before whom a condemnation suit is pending to appoint appraisers to assess the damages which the owners of real estate may sustain by reason of the appropriation, and reads as follows:

"The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return to the clerk of such court, under oath, their report in duplicate, of such assessment of damages, setting forth the amount of damages allowed to the person or persons named as owning or claiming the tract of land condemned, and should more than one tract be condemned in the petition, then the damages allowed to the owner, owners, claimant or claimants of each tract, respectively, shall be stated separately, together with a specific description of the tracts for which such damages are assessed; and the clerk shall file one copy of said report in his office and record the same in the order book of the court, and he shall deliver the other copy, duly certified by him, to the recorder of deeds of the county where the land lies (or to the recorder of deeds of the city of St. Louis, if the land lies in said city) who shall record the same in his office, and index each tract

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separately as provided in section 59.440, RSMo 1949, and the fee for so recording shall be taxed by the clerk as costs in the proceedings; and thereupon such company shall pay to the said clerk the amount thus assessed for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid; and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the said company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect, to be filed with the clerk of said court, and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages shall be void."

The section imposes the duty upon the clerk of the court in which the condemnation proceedings is pending to file one copy of the report of the commissioners in his office, and to record it in the order book of the court. A second copy, properly certified by him, shall be delivered by the clerk to the recorder of deeds of the county where the land lies, or to the recorder of deeds of the City of St. Louis, if the land lies in said city. Upon receipt of the commissioner's report, the recorder shall record same in his office, and shall separately index each tract, as provided by Sec. 59.440.

In answer to the first inquiry, it is our thought that the report of the commissioners in a condemnation suit shall be recorded by the recorder of deeds of the county in which the real estate described in the report is located.

In answer to the second inquiry, it is our thought that when the recorder records the commissioner's report, he shall index each tract separately, as provided by Sec. 59.440.

In discussing the third inquiry, we refer you again to Sec. 523.040, supra, which specifically provides the fee for recording the commissioner's report shall be taxed by the clerk as costs in the proceeding. Sec. 523.070 provides what parties shall pay the costs in a condemnation proceeding and reads as follows:

"The cost of the proceeding to appropriate the right of way shall be paid by the company seeking the appropriation, up to and including the filing and copying of the report of the commis-

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sioners; and the court, as to any costs made by subsequent litigation, may make such order as in its discretion may be deemed just. The court shall allow the commissioners a reasonable compensation for their services, which shall be taxed as costs in the proceedings."

Thus, it is noted from the last-quoted section that the costs of the proceeding, up to and including the filing and copying of the commissioners' report, shall be paid by the applicant for condemnation, and the court may make such appropriate order as he deems necessary, with reference to the payment of costs subsequent to the filing of the commissioners' report. Certainly, the recording of the report would constitute costs up to this point, and the liability for the recording fees would be that of the applicant for condemnation.

The opinion request also calls attention to Sec. 59.320, to the effect that the recorder is not required to record any instrument until the legal fee for recording has first been paid or tendered to the recorder. Said section reads as follows:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party requiring the record to be made."

No exceptions of any kind are made in this section, and the general terms used therein are broad enough to include fees for recording commissioners' reports and to require the payment of the fee in advance of recording. If this is the proper construction of the section, then there is a conflict between the provisions of the section and those of Sec. 523.040, supra. Said latter section requires the clerk to tax the recording fee as costs of the proceeding, and that the certified copy of the report shall be forwarded to the recorder of deeds "who shall record the same in his office". The implication is, the fee shall not be paid in advance, even though the liability of the applicant for condemnation is fixed, but is to be paid at a date subsequent to the recording.

In this connection, we call attention to a primary rule of statutory construction, believed to be applicable here, which is, that when two statutes are in conflict they should be harmonized, if possible, so that both may be given effect according to the apparent legislative intent. In the event such statutes are so repugnant to each other they cannot be harmonized, and it appears that one deals with a given subject in a general way, while the

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other deals with a part of the same subject in a more minute and definite way, the latter is a specific statute and its provisions will prevail over those of the general statute. These principles of statutory construction were discussed and followed in the case of Dalton v. Fabius River Drainage District, 219 SW2d 289. The main issue of the case was whether the county collector was entitled to receive a one and three-fourths per cent commission for collecting drainage district taxes under Sec. 11,072, a general statute, or whether the collector was limited to a commission of one per cent under Sec. 12,344 RSMo 1939, a special statute. In discussing the issue, the court said at l.c. 291:

"The one and three-fourths per centum for services under Section 11072 is for collecting the general state, county, school and road taxes, and the fact that that law was enacted in 1915, after the enactment of Section 12344 does not repeal, alter or supersede Section 12344. It has long been the law that 'Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' State v. Richman, 347 Mo. 595, 148 S.W.2d 796, loc. cit. 799; State ex rel, Buchanan County v. Fulks et al., 296 Mo. 614, 626, 247 S.W. 129."

In applying the doctrine enunciated in the Drainage District case, it is found that Sec. 59.320 is a general statute and requires the recorder's fee to be first tendered or paid before any instrument is recorded by him. From this section it would appear the fee for recording the commissioner's report should be tendered or paid in advance. Such a construction is in conflict with Sec. 523.040, which requires the recorder's fee to be ~~based~~ as court costs, and implies no such fee shall be tendered or paid in advance. It is believed that the provisions of Sec. 523.040, a special statute, shall govern with reference to the payment of the fee for recording the commissioner's report, over the provisions of Sec. 59.320, a general statute.

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Therefore, in view of the foregoing, and in answer to the third inquiry, it is our thought that the recorder is unauthorized to require his fee for recording the report of commissioners in a condemnation proceeding to be tendered or paid in advance.

CONCLUSION

Therefore, it is the opinion of this department that the provisions of Sec. 523.040 RSMo 1949, require the report of commissioners in a condemnation proceeding to be recorded, and each tract described in said report to be separately indexed in the deed records of the county in which such lands are located, and that the fee for recording such report shall be taxed as a part of the costs of the proceeding.

It is the further opinion of this department that it is the duty of the recorder to record the report of the commissioners without the tender or payment of the recording fee in advance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton  
Attorney General

PNC/ld