

## 2008 INITIATIVE PETITIONS – EMINENT DOMAIN ANALYSIS AND SUMMARY OF IMPACTS

***Summaries below are in order of occurrence in the Propositions and no priority of importance is implied by this order. Items of particular interest to local governments are additionally marked with an asterisk (\*).***

### **PROPOSITION I**

#### **MO. CONST. ART I, §26**

- Provision that eminent domain authority shall be limited to state and local government officials who are directly responsible to elected officials requires that non-governmental entities such as private utilities and railroads who currently enjoy statutory eminent domain authority must ask state or local governments to undertake condemnations to acquire rights of way, easements, facility locations, etc.
  - This difficulty is compounded where required territory spans multiple jurisdictions, thus necessitating multiple requests and intergovernmental cooperation. (Although proposed provisions in art. I, §28 permit property acquisition by eminent domain for use by railroads and utilities, this authority remains expressly subject to art. I, §26.)
  - Depending upon judicial construction of the phrase “*directly responsible*,” similar limitations may apply to entities such as Metropolitan St. Louis Sewer District, Land Clearance for Redevelopment Authorities, Housing Authorities, etc.
- (\*) Provision that the right to use or enjoy private property shall not be directly or indirectly taken or damaged unless for public use and after just compensation would require payment of compensation for any diminution in property use or enjoyment resulting from zoning and land use regulation, environmental controls, subdivision regulations, health regulations, etc.
  - Moreover the necessity of “*public use*” (rather than public *purpose*), may preclude any application of the foregoing types of police power regulation. (Although, arguably, proposed language in art. VI, §21 addressing common law nuisance protects citizens from the most egregious health and land use conditions, limitations and delays which would attend any public action under proposed provisions renders even these minimal protections meaningless. See *infra*.)
  - Similarly, the proposed public use requirement may undercut the ability of governmental entities under Mo. Const. art. I, §27 to acquire property in

excess of that actually to be publicly occupied or used to effectuate the "purposes" intended.

- (\*) Proposed expansion of valuation methods to include, without limitation, any evidence that would be considered by an appraiser in the ordinary course of business invites "creative" valuation methods and is likely to significantly increase the amounts of condemnation awards. (This latitude may similarly apply to determination and award of "pre-condemnation damages" under the recently decided *Clay County Realty v. City of Gladstone, SC88924, (June 10, 2008).*)
- Limitation on disturbance of property until "*final determination of the legitimacy of the taking,*" invites attempts to defeat local efforts to acquire property through delay by vexatious litigation and, at minimum, would likely significantly extend construction schedules for installation of public improvements.

### **MO. CONST. ART I, §28**

- Declaration that private use, private ownership or other private rights shall not be considered a public use, together with the requirement that no property rights acquired by eminent domain may be transferred or otherwise made available for use by a private entity within 20 years of acquisition unless the original owner or heirs are afforded the opportunity to buy back the land at the original acquisition price, severely restrict the ability to assemble land for economic development or redevelopment.
- Similarly, the provision that unless the specific public use which is declared at the time of eminent domain is exercised is "earnestly and substantially" pursued, the original owner after five years may reclaim the property at the original acquisition price penalizes governmental entities for unforeseen delays in project implementation and may chill local redevelopment efforts.
  - Arguably, this provision, together with the *City of Gladstone* decision which penalizes governmental entities for unforeseen delays prior to condemnation would so shift the risk of delay to public entities as to make redevelopment unattractive, if not impossible.

### **PROPOSITION II**

#### **MO. CONST. ART VI, §21**

- (\*) Elimination of authority to provide for "clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas," judicially construed, could eliminate all future redevelopment projects in Missouri as well as current and future redevelopment authority granted by the General Assembly to local governments . See *City of Arnold v. Tourkakis, 249 S.W.3d 202 (Mo. 2008) (en banc) (construing art. VI, §21 and determining that local non-*

*charter city authority to undertake redevelopment projects was derived from Missouri statutes.)*

- Because art. VI, §21 is often read together with Mo. Const. art. X, §7 to provide broad authority for redevelopment incentives such as tax abatement and tax increment financing, elimination of the foregoing authority also calls into question the continuing authority of local governments to offer tax incentives for economic development.
- (\*) Substitution of court determined common law nuisance law for redevelopment authority, together with the severe limitations imposed on local regulatory authority by proposed revisions to art. I, §26 could also mean the end of all local land use and environmental regulations. Moreover, the pre-requisites for public action, e.g. court determination of nuisance followed tolling of a "reasonable" abatement period after final judgment, would effectively eliminate local government ability to address safety and health issues such as dangerous buildings, accumulations of trash, weeds and debris, etc.

### **SUGGESTED LOCAL GOVERNMENT RESPONSE**

- Proponents of the CPR Amendments incorrectly suggest that property owners can rely exclusively on nuisance law and subdivision covenants to protect their investment in land and improvements, that local economic development and redevelopment initiatives are unnecessary, and that local government activities and actions should be limited to "traditional" governmental functions.
  - Nevertheless, in light of so-called "property rights mini-revolution" that has followed in the wake of *Kelo v. City of New London*, property-rights advocates who have failed to convince state and local legislatures have apparently determined that constitutional reform can now turn back the clock.
  - In gathering popular support, proponents have characterized as "eminent domain" reform, sweeping amendments the effects of which are to eliminate local economic development and redevelopment; land use, zoning and subdivision controls; health and safety regulations; and local police power authority.
- Moreover, this indiscriminate and far-reaching approach flies in the face of the wisdom that amending the constitution is a significant step, which should not be undertaken in haste or in the heat of controversy.
  - Local officials whose tenure and memory include the period following enactment of the Hancock Amendment can provide cautionary tales of unintended consequences of "sledgehammer" approaches.
  - Recognition that we have gone "too far" in this area often reaches us "too late" and is "too soon" forgotten.

- Advocates of local government bear a responsibility to help the local government community appreciate the potential harm such "sledgehammer" approaches can have on local development, as well as on individual property values.
- In the media drumbeat over eminent domain, many landowners may have been deafened to the fact that local land use, environmental and health regulations exist to protect, not impair, property values and that local "best practice" responses tailored to local to eminent domain concerns offer the best and most effective solutions.
  - Instead, the CPR Amendments and their progeny would relegate local government to the sidelines in protection of community property values and render economic development and use planning all but impossible.

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