

2008 “CPR” 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 2008-001 (See Exhibit A, *infra*)

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 a 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.¹
 - Moreover the necessity of “*a public use*” (rather than public *purpose*), may preclude any application of the foregoing types of police power regulation; e.g., limitations on **adult entertainment uses, agricultural feed lots, junkyards and salvage yards**, etc. as well as the authority to abate **dangerous buildings, noxious weeds and abandoned automobiles**. (Although, arguably, proposed language in art. VI, §21 addressing

¹ Notably, similar provisions of so-called “Tuohey Amendments “pay to govern” approach proposed in 2006 expressly exempted from their scope health and safety laws, e.g., building and fire codes, and “recognized” criminal laws as well as common law nuisances. Proposed amendments provide no exception for health and safety laws, e.g., building and fire codes, or even for local criminal laws.

common law nuisance protects citizens from the most egregious health and land use conditions (at least those recognized by the common law), 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.
- Even if courts determine that regulatory activity constitutes “a public use,” municipalities remain subject to demands for “just compensation” which could be calculated under any number of “creative” valuation methods now expressly permitted.² (*See infra.*)
- (*) 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 right 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 restricts the ability to assemble land for economic development or redevelopment.
 - Limitations on transfers of (including “making available”) “rights in property” obtained by eminent domain would also eliminate municipal

² Claims filed in the wake of under Oregon’s Measure 37 which similarly requires payment of “just compensation” for regulations which diminish the fair market value of property chillingly illustrate the potential cost of these provisions to municipalities. In northwest Oregon, for example, landowners seeking to develop fifty 2-3 acre lots on 80 acres demanded nearly \$850,000 in “lost value from laws and regulations passed after the land was purchased.”

authority to grant or license rights-of-way so acquired (along with associated license and franchise fee revenues) to private utilities such as water companies, telecommunications companies, etc., unless the original owner was offered the right to repurchase the property taken.

- 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 2008-002 (See *Exhibit B, infra*)

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, abandoned vehicles, 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.

NOTICE

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Exhibit A

Constitutional Amendment to Article I – Eminent Domain, 2008-001

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Petition sample form approved for circulation on February 14, 2007. Official ballot title certified by Secretary of State on March 7, 2007.

OFFICIAL BALLOT TITLE AS CERTIFIED BY SECRETARY OF STATE

Shall the Missouri Constitution be amended to restrict the use of eminent domain by:

- Allowing only government entities to use eminent domain;
- Prohibiting its use for private purposes, with certain exceptions for utilities;
- Requiring that any taking of property be necessary for a public use and that landowners receive just compensation;
- Requiring that the intended public use be declared at the time of the taking and permitting the original owners to repurchase the property if it is not so used within five years or if the property is offered for sale within 20 years?

The total cost or savings to state or local governmental entities cannot be known. Some state governmental entities estimate no related costs, however, certain state governmental entities may have unknown or indirect costs that may exceed \$100,000. Estimated costs to local governmental entities will vary, but could be significant.

2008 Initiative Petitions Approved for Circulation in Missouri

Constitutional Amendment to Article I – Eminent Domain, 2008-001

THE PROPOSED AMENDMENT

Be it resolved by the people of the state of Missouri that the Constitution be amended:

Section 26 and 28 of Article I of the Constitution of Missouri are amended by modifying Section 26 and 28. The existing Section 26 and 28 are set forth hereinafter with the new matter underlined and deleted matter in brackets, .[thus].

Article I – Bill of Rights

Section 26. [That private property shall not be taken or damaged for public use without just compensation.] That the power of eminent domain shall be vested in no other than the state, or political subdivisions of the state whose officials are directly responsible to elected officials, and that private property, or the right to the use, sale or enjoyment of private property, shall not be directly or indirectly taken or damaged unless such taking is necessary for a public use and just compensation is rendered. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law[;] . The value of the property may be determined by, but is not limited to, appraisal methods typical to the ordinary course of business and any evidence which would be considered by an appraiser in the ordinary course of business shall be relevant and admissible. [and until the same] Until a final legal determination of the legitimacy of the taking is established and until compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

Section 28. (1) That private property [shall not be]taken for private use or private ownership or other private rights shall not be considered a public use and no such takings shall occur with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

(2) The use for property, or rights in property, shall be declared at the time that such property, or rights in property is taken by eminent domain. If that use is not earnestly or substantially pursued, the original owner, his heirs or assigns shall, after five years but prior to any substantial accomplishment of the declared purpose, be allowed to claim the property back at a price no greater than was paid at the time of taking.

(3) Subject to the conditions set forth in Section 26 of this article, property may be taken for transportation or utility facilities or transmission systems used by a railroad, regulated utility or rural electric cooperative, however the fee of property taken for such purposes without consent of the owner thereof shall remain in such owner, his heirs or assigns subject to the use for which it is taken.

(4) Except as provided for in subsection (1) and subsection (3) of this section and notwithstanding Section 27 of this article, property, a portion thereof, or rights in property taken by eminent domain can not be sold, transferred, leased or otherwise made available for use by a private entity within 20 years of such taking, unless the original owner, his

heirs or assigns, have at the time of sale, been afforded the first opportunity to purchase such property back at a price no greater than was paid at the time of taking, however interests less than fee title may be conveyed to a privately owned business for the purpose of providing products or services incidental to the function of a publicly owned facility.

(5) The effective date of this amendment shall be November 5, 2008 and the provisions of Article I, sections 26 and 28 apply notwithstanding any application to the contrary of Article VI, Section 21 of this constitution.

EXHIBIT B

Constitutional Amendment to Article VI - Eminent Domain, 2008-002

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OFFICIAL BALLOT TITLE AS CERTIFIED BY SECRETARY OF STATE

Shall the Missouri Constitution be amended to change the power of the General Assembly and constitutionally chartered cities or counties to:

- Prohibit the use of eminent domain to acquire and resell property found to be blighted, substandard or unsanitary for the purpose of clearance, redevelopment or rehabilitation; and
- Allow them to require owners of property found to be a public nuisance to abate or clean up the nuisance and, if the property owner fails to do so in a reasonable time, allow the local government to pay for the abatement and impose a lien to recover the cost?

The total cost or savings to state or local governmental entities cannot be known. Some state governmental entities estimate no related costs, however, certain state governmental entities may have unknown or indirect costs. Estimated costs to local governmental entities will vary, but could be significant.

Constitutional Amendment to Article VI - Eminent Domain, 2008-002

THE PROPOSED AMENDMENT

Be it resolved by the people of the state of Missouri that the Constitution be amended:

Section 21 of Article VI of the Constitution of Missouri is amended by modifying Section 21. The existing Section 21 is set forth hereinafter with the new matter underlined and deleted matter in brackets, .[thus].

Article VI – Local Government

Section 21. Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances **which protect property owners from public nuisances, as defined by the Common Law. In the event that an owner of property is found by a court of competent jurisdiction to be harboring such nuisance and has not fully abated the nuisance within a reasonable time after final judgment, any political subdivision of the state in which the nuisance exists may expend public funds to abate the nuisance and impose a lien on the offending property limited to an amount equal to the costs of the abatement and reasonable interest on such costs. Enforcement of the lien may be accomplished in the same manner as tax liens are enforced.** [, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.]