

## **RED ALERT!! — SWEEPING STATE CONSTITUTIONAL AMENDMENTS WOULD END LOCAL ZONING AUTHORITY, HEALTH & SAFETY POLICE POWERS, AND REDEVELOPMENT**

*Proposed Ballot Initiatives Limit Local Regulatory Authority to “Public Use” Activity, Affect Any Measure Which Reduces Use or Enjoyment of Private Property.*

by Thomas A. Cunningham, Esq.

What would your community be like if tomorrow you eliminated zoning and subdivision regulations along with local authority to police dangerous buildings, noxious weeds, trash and abandoned vehicles? How about eliminating building and fire codes and inspections and local limits on adult businesses, junkyards, and feed lots? Unthinkable? Think again.

Two ballot initiative petitions, already certified and gathering signatures, propose radical amendments to the State constitution that would effectively eliminate Missouri cities’ authority to protect local property values through zoning controls, building codes and health regulations. If approved, these amendments would limit municipal police powers which affect any “right to the use, sale or enjoyment of private property” to those “necessary for a public use” and, even then, only after payment of “just compensation.”<sup>1</sup> Unlike prior similar efforts, these sweeping amendments provide no exceptions for health and safety laws, e.g., building and fire codes, or even for local criminal laws.<sup>2</sup>

Instead, the amendments would confine local government authority to “public nuisances, as defined by the Common Law.” As a result, a court would have to agree initially that items such as weeds, trash, noise or other potentially injurious activities constitute an actionable nuisance. Even if court approved, however, specific city efforts would be so limited as to be useless in protecting adjoining property values. Recognition of the “nuisance” would first require a determination “by a court of competent jurisdiction.” This determination, of course, would be subject to appeal. Even after “final judgment,” the offending owner would still have a “reasonable time” to act. Only after expiration of this period could the local government take abatement action. One observer sagely commented that such a regime would require that cities replace code enforcement personnel with lawyers. More importantly, effective action on dangerous buildings or other life threatening conditions could be delayed for a year or more.

### *How Did They Get Here?*

The U.S. Supreme Court 2005 decision in *Kelo v. City of New London* may have provided the initial impetus for such initiatives. Observers cite emergence of similar measures in multiple states as “evidence that the whole land-rights, property-use issue is catching fire.” *Kelo* arguably expanded local ability to use eminent domain and certainly focused national attention on its use. Notably, the current amendments proposed in Missouri (as well as previous unsuccessful efforts

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<sup>1</sup> Claims filed in the wake of Oregon’s Measure 37, which similarly requires payment of “just compensation” for regulations which diminish the fair market value of property, chillingly illustrate potential costs 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.”

<sup>2</sup> Similar provisions of the 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.

in 2006 known collectively as the “Tuohey Amendments”) have each been characterized by proponents as “Eminent Domain” measures.

In Missouri, these efforts may have gathered strength from more recent state court decisions such as *Centene Plaza Redevelopment Corp. v. Mint Properties* (which actually limited condemnation and redevelopment authority), and *City of Arnold v. Tourkakis* (which, construing art. VI, §21, confirmed that non-charter city authority to undertake redevelopment projects and to exercise eminent domain derives from Missouri statutes). Notably, David Danforth, a property owner in *Centene*<sup>3</sup>, and Dr. Homer Tourkakis, named defendant in *City of Arnold*, each serve on the Executive Board of Missouri Citizens for Property Rights (“CPR”), proponents of the current amendments. Moreover, negative publicity associated with redevelopment experiences in the cities of Sunset Hills, Branson and others continues to resonate with Missouri voters.

The “defeat” of the 2006 “Tuohey Amendments” may have given local governments some comfort, but clearly has not deterred “property rights” advocates such as CPR.<sup>4</sup> Indeed, many of the organizations backing CPR appear to be those who were involved in the Tuohey Amendments as well as other national efforts to curb local authority. These groups suggest that the current amendments are only about eminent domain. Notably, ballot title language prepared by

## HIGHLIGHTS OF PROPOSED AMENDMENTS

### ARTICLE I, SECTION 26 – BILL OF RIGHTS

#### ■ Proposed Amendments to Article I Limit Police Power Authority to “Public Use”:

- Prohibits the taking or damaging of any use or enjoyment of private property (Police power regulations inherently diminish (damage) individual private property rights to accomplish the *public purpose* of protecting collective property values);
  - “Taking” or “damaging” may be direct (as by acquisition) or indirect (as by regulatory or administrative action)
  - Any such action can only be accomplished expressly for public use rather than public purpose. Because local police power involves public purpose, not public use, any police power which affects property is prohibited.
- Even if determined to be for public use, regulatory action diminishing the enjoyment of private property requires payment of “just compensation;”
  - Imposes a “pay to govern” regime similar to the discredited Oregon Measure 37
  - Freezes any local action (“the property shall not be disturbed”) until compensation paid or until judgment and exhaustion of all appeals.

### ARTICLE VI, SECTION 21

#### ■ Proposed Amendment to Article VI Confines Local Abatement Authority to “Common Law” Nuisance Actions:

- May eliminate all authority to pass laws dealing with remediation and abatement of blighted, substandard or insanitary areas;
- Substitutes “common law” nuisance protections, but permits local enforcement only after final court judgment and passage of “reasonable time” for private remediation;
  - Initiation of local abatement of individual nuisances could take a year or more to go through courts.

<sup>3</sup> Reportedly, Mr. Danforth, one of three named owners of the *Centene* properties, ultimately shared an \$18.8 million purchase price, the “highest price per square foot ever paid for real estate in St. Louis.”

<sup>4</sup> For example, the currently proposed language to amend Article VI, section 21 is virtually identical to that in the failed 2006 Tuohey Amendments.

CPR says nothing about the scope and sweeping effect of these amendments on local government police power.

This significant omission can only be a smokescreen. Review of the rhetoric of these “property rights advocates” reveals a bias against local government action, and a goal of confining cities to “proper application of nuisance laws.” Although CPR’s own literature suggests that property rights protections should be accomplished “by code enforcement, not eminent domain,” they pointedly fail to mention that the amendments would effectively end code enforcement, along with other local police power authority and the ability to protect property values.

So far, however, many city officials, as well as residents and potential voters, appear unaware that these renewed and well-financed efforts to sweepingly amend the State constitution are proceeding. The scope of potential damage has not been completely lost, however, on advocates for developers, utilities and, in a classic “strange bedfellows” example, some environmental advocates. As noted below, the Missouri Municipal League will join with home builders, commercial development interests and utilities to provide support for contemplated procedural challenges to the proposed initiatives. Given national experience, however, exclusive reliance on legal challenges represents a risky strategy for Missouri local governments.

#### *What Can You Do About It?*

Proponents of these initiatives suggest that property owners can rely exclusively on nuisance law and subdivision covenants to protect their investment. This is nineteenth century, not twenty-first century thinking, which a conversation with any experienced subdivision trustee should quickly disabuse. Nevertheless, in light of *Kelo* nationally, and the so-called “property rights mini-revolution” that has followed in its wake, “property rights advocates” who have failed to convince state and local legislatures have apparently determined that sweeping constitutional reform can now turn back the clock. This 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 the unintended consequences of such “sledgehammer” approaches. Recognition that we have gone “too far” in this area often reaches us “too late” and is forgotten “too soon.”)

More alarming, however, than the sweep of these amendments and their ramifications for local government has been the absence of public awareness of and debate on these issues, even after the defeat of the Tuohey Amendments. As advocates of local government, then, each of us bears a responsibility to help our clients and constituents appreciate the potential harm such “sledgehammer” approaches can have on individual property values as well as local development efforts. In the media drumbeat over eminent domain, many landowners may have been deafened to the fact that local police power regulations exist to protect, not impair, property values.

In light of this most recent challenge, the Municipal League is marshalling support for a two-pronged defense consisting of: (i) legal challenge to the adoption and certification of the ballot initiatives; and (ii) a public information campaign identifying the potential results of the amendments, if adopted. Help is needed. Cities may support a legal challenge based on actual damages resulting from inability to proceed with (or chilling effect on) various pending enforcement actions. Moreover, although cities cannot directly contribute to support or oppose any ballot measure, cities may fund public informational campaigns. The City of Springfield has

already committed \$5,000 to this effort. Other cities are following suit. City contributions should generally reflect the size and financial capacity of the participating city. The League will also continue to coordinate these efforts with private sector “partner organizations” such as the Missouri Chamber of Commerce.

Any review of recent media coverage teaches that these most recent initiatives are still riding a statewide and, indeed, a national backlash against local government actions in the areas of property regulation and redevelopment. If the real benefits of local code enforcement and land use authority are to survive this wave, the time for vigorous local action and public education in this matter is now and the fate of local property values may lie in your hands.

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