

IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT
 JEFFERSON COUNTY, MISSOURI
 DIVISION THREE

CITY OF ARNOLD)	
)	
Plaintiff,)	
)	
vs.)	Cause No. 06JE-CC00142
)	
HOMER R. TOURKAKIS, <i>et al.</i> ,)	
)	
Defendant)	

ORDER AND JUDGMENT

This case involves an attempt by the City of Arnold to take property owned by Dr. Tourkakis and his wife in connection with the development of a shopping center under Section 99.800 RSMo, *et seq.* The property in question, once a residence, has housed Dr. Tourkakis' dental practice for many years. Defendants seeks dismissal with prejudice on grounds that plaintiff lacks constitutional authority to take this property by eminent domain. The motion to dismiss also raises many other arguments, some of which may well have merit, but which are not germane to this ruling.

An evidentiary hearing was held seeking an order of condemnation followed by extensive memoranda of law, legal arguments, and conferences with the Court. During one of these conferences, the Court indicated responsiveness to the constitutional challenge. The parties negotiated further but without success. At a subsequent conference plaintiff filed a motion to dismiss with leave of court under Rule 67.02. The Court's first reaction was that the dismissal did not require leave as the ultimate issue is a jury matter. However, counsel for both plaintiff and defendants agree that because of the unique nature of condemnation cases, the rule applicable to non-jury cases applies. Defendants oppose plaintiff's motion to dismiss and ask that

the Court rule on defendants' motion instead. Plaintiff has indicated that it will negotiate in good faith in an attempt to resolve the matter if its motion is granted and will re-file only if no reasonable agreement can be reached. The Court believes that this is true. Defendants argue persuasively that allowing the voluntary dismissal would be prejudicial to them, as while they too wish to continue good faith negotiation, the re-filing of the case would cause the duplication of much of the massive legal expenses they have already incurred. The Court lacks authority to order payment of attorneys' fees under Rule 67.02, and believes that significant prejudice to defendants is likely to result if plaintiff is granted leave to dismiss. Accordingly, plaintiff's motion to dismiss without prejudice by leave of court is denied.

It is the Court's opinion that government has the inherent power to take private property by eminent domain for true public uses. These uses would include the construction of roads, sewer systems, water lines and many others, but most emphatically would not include the construction of a shopping center by a private developer as is the case here. The Court recognizes the economic benefit of projects that increase property and sales taxes, but does not believe that the Missouri Constitution allows a taking for that purpose by the City of Arnold.

There is much room for philosophical debate about what takings of private property *ought* to be permitted by law and the standards that should apply to the takings that are permitted. Should determinations of blight be subject to *de novo* review by the courts in all cases? Should developers be required to pay a premium for property taken by eminent domain? The list of issues is extensive, but this debate should take place in the legislature, not in the courtroom. The Court will limit its discussion to what the law appears to authorize.

Article 6, Section 21 of the Missouri Constitution of 1945 authorizes the enactment of laws or ordinances for reclamation of blighted areas by constitutionally chartered cities and counties. It also permits taking of private property for such purposes by eminent domain. The City of Arnold is not a charter city. If it was

intended that **all** cities and counties have authority to take property for this purpose by eminent domain, what do the words “operating under a constitutional charter” mean? They can only mean that the delegates who wrote the Constitution of 1945 and the voters who approved it intended to limit the awesome power of eminent domain in such cases to charter counties and cities.

Section 99.820.1(3) RSMo provides that the acquisition of property is “subject to any constitutional limitations.” It cannot be assumed that the legislature intended that this language be meaningless. The Court would question whether the legislature *could* have conferred the power of eminent domain on all cities in light of Article 6, Section 21, but that question need not be answered as the reference to “constitutional limitations” is a clear indication that there was no such intent.

It is the judgment of the Court that the City of Arnold lacks constitutional authority to take the property of defendants under Chapter 99 and that to the extent Chapter 99 is inconsistent with Article 6, Section 21 of the Constitution of 1945, it is declared unconstitutional. Defendants’ motion to dismiss is sustained and this cause is dismissed with prejudice at plaintiff’s cost.

IT IS SO ORDERED THIS 21ST DAY OF MAY 2007

Original signed by:
M. Edward Williams, Judge

**M. EDWARD WILLIAMS
CIRCUIT JUDGE, DIVISION 3**

cc: Gerard T. Carmody
Robert K. Sweeney
Tracy Gilroy
Michael A. Wolff