PACIFIC LEGAL FOUNDATION

Rescuing Liberty from The Grasp of Government

Litigation Backgrounder

Eminent Domain Abuse in Missouri: Does The Constitution Mean What It Says?

[Tourkakis v. City of Arnold]

"It is highly probable that inconveniences will follow from following the constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office on themselves, or if under the color of construction...depart from what is plainly declared, the people may well despair of ever being able to set the boundary to the powers of the government. Written constitutions will be more than useless...."
—Greene C. Bronson, Chief Justice of New York[1]

INTRODUCTION

Dr. Homer Tourkakis has owned his dental clinic for almost 20 years. But officials in the city of Arnold, Missouri, think the property would be more productive if it were made into a retail store, and they have condemned his property through eminent domain. This abuse of eminent domain is unfortunately common across the United States, and in the 2005 case of *Kelo v. New London*, the United States Supreme Court refused to intervene. Since that decision, the battle for private property rights has shifted to the states, and it now rests with the Missouri Supreme Court to determine whether that state's constitution allows a non-charter city to abuse its eminent domain power in this way.

THE CITY OF ARNOLD HAS BIG PLANS... FOR HOMER TOURKAKIS'S LAND

Homer Tourkakis has served his patients in the St. Louis suburb of Arnold since 1988, from a building that overlooks Interstate 55. Homer and his wife Julie bought the land expecting that it would enable them to make a good living for themselves and their two daughters, and the business did thrive. "We have about 7,600 patients," notes Dr. Tourkakis, "and five employees, all with health care insurance provided. One has been with me 18 years, another has been with me 13 years." And one key to the business' success is its location. "This location is very

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important to me and I cannot reproduce that someplace else."

But in 2005, the city of Arnold contracted with a developer called THF Realty to construct a shopping area called "Arnold Commons," which will include a Lowe's hardware store, a Dierbergs, an Office Depot, and other stores.[2] The shopping center will cover some 54 acres and cost about $78 million, $30 million of which will be provided by taxpayers through government subsidies.[3] But even that was not enough—the city also pledged to use its power to take the land under eminent domain and give it to THF Realty. In 2006 it condemned a self-storage business, an auto-repair shop, a day-care center, and other businesses.[4] The city then offered Tourkakis $343,750 for the land, a low-ball figure that trial judge M. Edward Williams later called "pretty inadequate" for replacing a dental office.[5] More important than the money, however, is the right to private property. "If my property is exposed to a taking of this nature," explains Dr. Tourkakis, "there's nothing anyone else can do to avoid a taking in a similar fashion."

THE MISSOURI CONSTITUTION AND EMINENT DOMAIN

Most state constitutions allow the use of eminent domain "for public use," which until recently was understood as allowing the state only to take land to provide public highways, schools, and other general public goods. But Missouri's Constitution is even more explicit: it directly prohibits the taking of private property "for private use."[6] This extra prohibition was added by the state's 1875 Constitutional Convention, in response to the abuse of eminent domain by legislatures. "[T]hat has been the difficulty heretofore," noted one convention delegate when debating this constitutional provision. "Property has been taken for purposes which many times was not really public."[7] Another delegate explained that the prohibition on private takings was important because "if some one covets the vineyard of his neighbor," he should not be able to persuade the legislature "to declare that that vineyard may be taken and used as the vineyard of the trespasser and 'that it is hereby devoted to public use.'"[8] Missouri's courts recognized that the prohibition on condemnation for "private use" meant that the government could not take property from some people and give it to others simply in order to provide economic benefits to preferred businesses.[9]

In 1943-44, however, Missouri held another constitutional convention, which added a new section to the Constitution. Although it retained the earlier prohibition on private takings from the 1875 Constitution, the new section allows the condemnation of private property for redevelopment of "blighted" areas. During the 1940s and '50s, the idea that government should redistribute property for such purposes was becoming increasingly popular, although most states accomplished this by simply redefining the term "public use" in a broad manner, rather than by explicitly altering their constitutions.[10] The section specifically states,

> Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, 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.[11]

This provision was proposed at the 1943 convention by the "Committee on Local Government (City of St. Louis, St. Louis County and Jackson County)," and one member of that committee explained that it was "of great importance" to "Kansas City and St. Louis and Springfield, and perhaps...St. Joseph," and that it had been drafted by officials from Kansas City. The problems of slums and dilapidated areas were "essentially the problems of the city concerned," explained the delegate, "and those cities should have the responsibility to restore those areas.... And the city administration and the Chamber of Commerce in Kansas City are asking that this provision be adopted as it is [to] give them the power and the authority to proceed to do those things which they think will restore" the blighted areas.[12]

Because the 1943 convention reiterated the earlier ban on takings "for private use," while also enacting the new provision, courts have found that they must "if possible, give effect to both,"[13] meaning that while eminent domain may not be used for private purposes, the more recent provision creates a particular exception allowing constitutional charter cities to condemn "blighted" property for redevelopment.[14]

The first portion of the new provision is important however: "*Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances*, providing for the clearance...of blighted...areas." This provision only allows cities acting under a constitutional charter to condemn property for redevelopment. Arnold, Missouri, is not a constitutional charter city.

In June, 2006, when Arnold officials sought to condemn Dr. Tourkakis' land, he objected, arguing that since the city was not operating under a constitutional charter, it had no authority to use eminent domain for redevelopment. The City claimed that even cities without constitutional charters could use eminent domain for redevelopment because the legislature had enacted a law allowing even non-charter cities to use this power. The more recent constitutional provision allows "laws [to] be enacted" for redevelopment, claimed the city, and under state statutes, any "municipality," including a non-charter city, may condemn private property "to achieve the objectives of the redevelopment plan."[15] But Tourkakis pointed out that this argument would mean that the statute had essentially trumped the Constitution's language, and the trial court agreed. "If it was intended that **all** cities and counties have authority to take property for this purpose by eminent domain," wrote Judge M. Edward Williams, "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."[16]

The City of Arnold has appealed the case directly to the Missouri Supreme Court.

THE "*KELO* BACKLASH"

Although the term "eminent domain" were probably not know by many Americans before 2005, it seems everyone knows it now, thanks to the United States Supreme Court's decision in

Kelo v. New London.[17] That decision held that, although the Fifth Amendment only allows government to take private property "for public use," the government could still take property from one owner and give it to another owner to build a minimall, a restaurant, a hotel, or some other private project. The Court's rationale was that the "public use" requirement really means "public benefit," and because public officials believe that redevelopment projects will benefit the public, they satisfy the Constitution's requirements.

Kelo set off a nationwide backlash against the abuse of property owners by government. In the two years since the case was decided, almost every state has enacted some form of legislation or constitutional amendment to protect the owners of private property. In the November, 2006, elections, voters in ten states adopted ballot initiatives to protect their property against expropriation. The Missouri legislature also adopted a bill, HB 1944, which it claimed would protect landowners against takings that benefit private individuals. Unfortunately, the bill actually does almost nothing to rein in the abuse of eminent domain.[18]

This is distressing because Missouri has "one of the worst records on eminent domain abuse in the country."[19] In just the years 1998-2003, the state condemned at least 13 properties for transfer to private owners, and more than 400 properties were threatened with the use of eminent domain for private projects. And although the state Constitution explicitly prohibits courts from deferring to the legislature's claim that a condemnation is a "public use," courts nevertheless do so in almost every case.[20]

Eminent domain is frequently used to eliminate so-called "blighted" property, but the legal definition of "blight" is so vague, and city officials are given such broad powers to determine the existence of blight, that virtually any property can be declared blighted and taken. In Missouri, "blight" is defined as property which "by reason of age, obsolescence, inadequate or outmoded design or physical deterioration" is "conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes," and has become an "economic and social liabilit[y]."[21] And not only is this definition very broad, but government officials are given broad leeway to define these terms as they want.[22] Moreover, even non-blighted property may be condemned if it is near blighted property and is "deemed necessary for redevelopment."[23] HB 1944, Missouri's recently enacted eminent domain reform law, did not fix these problems. Nor did a June, 2007, decision by the Missouri Supreme Court which struck down a particularly egregious example of the vague definitions of "blight," but which took "no position" on whether the project involved in that case "complie[d] with...constitutional requirements."[24]

WHY IS THIS LAWSUIT IMPORTANT?

Missouri law divides cities into charter and non-charter cities. Charter cities have greater independent power under the "home rule" provisions of the state Constitution.[25] Non-charter cities are more closely governed by the laws passed by the state legislature. Of Missouri's 1,235 cities, only about 36 have charters. But in the wake of the *Kelo* ruling, it appears that many cities have ramped up their efforts to use eminent domain for economic development. In the one year after that decision, cities in Missouri authorized another 92 condemnations for private benefit, and another 609 landowners were threatened with eminent domain in projects benefiting private developers.[26] In particular, mayor Mark Powell of Arnold cheered the Supreme Court's *Kelo*

decision, seeing it as an opportunity for redevelopment in the city.[27] The city has targeted Tourkakis's land in large part because it overlooks the busy Interstate 70. Meanwhile, a nearby store that sells fireplace equipment, was allowed to remain in the area. Its owner sits on the Arnold City Board of Adjustments.

If the Missouri Supreme Court holds that even non-charter cities may use eminent domain for private development, the path will be open to even greater abuses of property owners.

LITIGATION TEAM

Pacific Legal Foundation (www.pacificlegal.org) is the largest and oldest public interest law firm dedicated to individual liberty, private property rights, and limited government. Established in 1973, PLF is headquartered in Sacramento, California, and maintains offices in Hawaii, Washington State, and Florida. Through its Property Rights Project, led by PLF Principal Attorney James S. Burling, the Foundation defends the fundamental right of all Americans to keep, use, and enjoy the property they earn. Homer and Julie Tourkakis are represented by PLF attorneys James S. Burling and Timothy Sandefur, with assistance from local counsel Michael Wolff. This backgrounder was prepared by Timothy Sandefur. Special thanks to Ron Calzone for research assistance.

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Notes

1. Oakley v. Aspinwall, 3 N.Y. 547, 568 (1850) (Bronson, C.J., dissenting).

2. THF Realty, Brochure, "Arnold Commons," available at http://www.thfrealty.com/properties/docs/ArnoldCVR.pdf (visited Sept. 19, 2007).

3. Cathy Lenny, *Properties in Arnold Face Chopping Block*, ST. LOUIS POST-DISPATCH, Aug. 11, 2006 at C5; Robert Kelly, *Holdout Sues over Arnold Commons Project,* ST. LOUIS POST-DISPATCH, Jan. 24, 2007 at C4.

4. Cathy Lenny, *Three Properties Get Condemnation Notices,* ST. LOUIS POST-DISPATCH, June 2, 2006 at C6.

5. Kelly, *Holdout Sues*.

6. Mo. Const. Art I sec. 28: "That private property shall not be taken for private use 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. "

7. 1 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 at 194 (I. Loeb and F. Shoemaker eds., 1938) (speech of Mr. Black).

8. *Id.* at 440 (speech of Mr. Gantt).

9. *See, e.g.*, Glaessner v. Anheuser-Busch Brewing Ass'n 13 S.W. 707, 708 (Mo. 1890) (government may not take property to construct railroad spur for private business); St. Louis, K. & N.W. Ry. Co. v. Clark, 25 S.W. 192, 196 (Mo. 1893) ("the city, under its general power to regulate the use of streets, had not the power to legalize the construction and operation of railroads thereon for private purposes only. Much less could it empower a railroad corporation to cross the track of another railroad for such purposes. Private property cannot be taken for such private uses without the consent of the owner."); State ex rel. St. Louis Underground Service Co. v. Murphy, 34 S.W. 51, 52 (Mo. 1896) (government may not take property and transfer it to an owner to use without government control or management.)

10. Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 Sw. U. L. Rev. 569, 653 -67 (2003).

11. Mo. Const. Art. VI sec. 21.

12. DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1945 at 2090 (1944).

13. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 270 S.W.2d 44, 52 (Mo.1954).

14. *See, e.g.*, Land Clearance for Redevelopment Authority of City of St. Louis v. City of St. Louis, 270 S.W.2d 58, 65 (Mo.1954) ("the acquisition of property, either by purchase or by eminent domain, and the subsequent resale thereof to a private redeveloper upon such restrictions as the Authority (plaintiff herein) deemed in the public interest constituted a public as distinguished from a private use."); Schweig v. Maryland Plaza Redevelopment Corp., 676 S.W.2d 249, 253 (Mo.App. E.D. 1984) ("a constitutional charter city, has the right of eminent domain...[and may] acquire property within the development plan...[for] rehabilitation of a blighted area.").

15. Mo. Stat. section 99.820.1(3).

16. City of Arnold v. Homer R. Tourkakis, et al., Cause No. 06JE-CC00142 (May 21, 2007) at 2-3 (emphasis original).

17. 545 U.S. 469 (2005).

18. Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?* 2006 MICH. ST. L. REV. 709, 746-48 (Fall2006); Stanley A. Leasure, *Eminent Domain: Missouri's Response to Kelo*, 63 J. MO. B. 178 (2007); Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Menoir*, 71 MO. L. REV. 721 (2006).

19. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 117 (2003).

20. *See, e.g., Dalton*, 270 S.W.2d at 52 ("whether the contemplated use...is public rests upon the courts, but...a legislative finding under said law that a blighted or insanitary area exists and that the legislative agency proposes to take the property therein...for the purpose of clearance...will be accepted by the courts as conclusive evidence that the contemplated use thereof is public, unless it further appears upon allegation and clear proof that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith.")

21. Mo. Stat. section 353.020(2).

22. Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc., 812 S.W.2d 903, 910 (Mo.App. E.D. 1991) ("Judicial review [of blight determinations] is limited to whether the legislative determination was arbitrary or was induced by fraud, collusion or bad faith or whether the City exceeded its powers.")

23. Centene Plaza Redevelopment Corp. v. Mint Properties, 225 S.W.3d 431, 435 (Mo. 2007).

24. *Id.* at 435 n. 3.

25. Mo. Const. Art VI sec 19-22..

26. DANA BERLINER, OPENING THE FLOODGATES 57 (2006)
http://castlecoalition.org/pdf/publications/floodgates-missouri.pdf.

27. Jake Wagman, *High Court Rebuffs Homeowners*, ST. LOUIS POST-DISPATCH, June 24, 2005 at A1.