



ADVANCING LIBERTY
WITH RESPONSIBILITY
BY PROMOTING
MARKET SOLUTIONS
FOR MISSOURI
PUBLIC POLICY

POLICY

BRIEFING

NUMBER 20

SEPTEMBER 15, 2009

GRADUAL AND SILENT ENCROACHMENTS: HOW THE MISSOURI SUPREME COURT EXPANDED THE POWER OF EMINENT DOMAIN

In 1988, dentist Homer Tourkakis and his wife purchased property in the city of Arnold, Mo., a city 20 miles south of Saint Louis with a population of some 20,000 people. The Tourkakises' property overlooked Interstate 55, making it a prime location, and the business flourished, enabling Tourkakis to employ five office workers and assistants, including his wife, Julie. Almost 20 years later, city officials began the process of condemning Tourkakis' property as part of an economic development project called the Arnold Triangle. The project called for the construction of a 325,000-square-foot shopping center that would include a Lowe's Hardware Store, an Office Depot supply store, and other retailers. In 2005, the city enacted an agreement with THF Realty promising to condemn land for the

project, and to this end declared a region of the city to be blighted.

On June 16, 2006, the city initiated an action to condemn the dentist's office, claiming the TIF Act as the source of its authority to do so. The Tourkakises responded by denying that the city of Arnold had either the constitutional or statutory authority to take their property, and arguing that the property was not blighted.

CONSTITUTIONAL PROTECTIONS

The Tourkakises' first argument in defense of their land was based on the unusually strong protections for property rights long ago incorporated into Missouri's Constitution as a result

By the mid-1940s, the Progressive movement and the New Deal had dramatically changed the status of property rights in American law.

of citizens' concerns about abuses of the eminent domain power. Well over a century before the U.S. Supreme Court's decision in *Kelo v. New London* brought the subject to its current national prominence, the taking of property from one private party for the benefit of another had been a highly controversial practice. The 1820 Constitution had declared that private property could be taken only "for public use." However, during the mid-19th century, governments often used eminent domain to take land from farmers, homeowners, and business owners and give it to railroads, even though those railroads were privately owned, for-profit enterprises rather than government entities.

Responding to these sorts of takings, in 1875 Missourians added a new clause forbidding government from damaging property except for public use, as well as a separate provision, found today in Article I, section 28, declaring that "no private property can be taken for private use, with or without compensation." The new clause declared 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."

Additionally, the 1875 convention added a section — also unique in American state constitutions — declaring that Missourians' "enjoyment of the gains of their own industry" is a "natural right" that government must secure, "and that when government does not confer this security, it fails in its chief design." Given all these new constitutional declarations against the abuse of eminent domain, it is not surprising that Missouri's courts provided strong

protections against such abuses shortly after the 1875 Constitution was ratified.

THE PROGRESSIVE MOVEMENT

Over time, however, commitment to these strict limitations waned. By the mid-1940s, the Progressive movement and the New Deal had dramatically changed the status of property rights in American law. Whereas earlier generations of Americans had believed that the purpose of government was to "restrain men from injuring one another, [and] leave them otherwise free," the Progressive revolution in political philosophy promulgated the notion that government should also take an active role in controlling the growth and direction of American society.

Progressives held that government should have power to dictate the physical, psychological, social, moral, intellectual, and economic lives of all citizens, as part of a program to transform persons and society radically, into an allegedly more scientific, centrally planned machine of progressive improvement. Thus, when the Missouri constitutional convention of 1944–45 convened, the consensus among political and legal elites was that property rights had a lower constitutional status and that a legitimate — indeed, essential — task of government was to manage, control, and redistribute wealth so as to eliminate perceived social ills.

As early as the 1920s, Progressive reformers began using eminent domain as a tool to "clean up" neighborhoods that, due to crime or unsanitary conditions, they considered to offer an unsatisfactory standard of living. This trend, frequently called "urban renewal," increased during



the next decades as reformers attempted to replace “blighted” neighborhoods with newer development, which frequently included public housing projects. Missouri had adopted the Housing Act of 1939 for just such a purpose, in hopes that the state’s larger cities might eliminate neighborhoods posing a threat to the health or safety of the community.

To settle questions that had been raised about the constitutionality of such a use of eminent domain, officials in Kansas City proposed what would become Article VI, section 21, of the 1945 Constitution, which states that “laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances” that permit the use of eminent domain “for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas[.]”

TRIAL COURT RULES FOR TOURKAKIS

The Tourkakises argued that this provision did not negate the preexisting constitutional protections for property rights and that, instead, Article VI, section 21, must be read as a very narrow exception that permitted only charter cities and counties to use eminent domain for the articulated purposes. Additionally, they pointed out that the TIF Act, from which the city claimed the authority to condemn the dentist’s property, was a financing law not intended to give non-charter cities any eminent domain authority not already provided by other statutes.

As support for this claim, the Tourkakises pointed out that, although the TIF Act did mention possible use of eminent

domain, it failed to provide a procedural framework for doing so (suggesting that any condemnation must be authorized by another statute) and the legislature also specified that its use was “subject to any constitutional limitations.” This phrase is unique in Missouri law and, Tourkakis argued, indicated that the legislature did not intend to push the constitutional envelope. These factors, combined with the Constitution’s requirement that property rights be respected, required the courts to reject the city’s attempt to take the Tourkakis property.

In a short written opinion, the trial court agreed that the city could not take the property — but the city brought the question to the Missouri Supreme Court for consideration.

The parties disagreed as to the precise grounds for the trial court’s decision and, thus, upon the issues that the Supreme Court was supposed to decide. In its brief, the city claimed that the judge had based his opinion on constitutional interpretation, and that the judge had incorrectly concluded that Article VI, section 21, of the Missouri Constitution functions as a limitation on the use of eminent domain, rather than an authorization. The Tourkakises, on the other hand, argued that the trial court’s decision was really rooted on the limited extent to which the TIF Act empowered municipalities to utilize eminent domain.

SUPREME COURT REVERSES DECISION

After it heard arguments in the case, the Missouri Supreme Court reversed the trial court in a short 5-1 decision, with one justice not participating, holding that the

In the years since the Missouri Constitution of 1875 first provided property owners some of the strongest constitutional protections in the nation, the state’s courts have steadily diluted those protections until there remain very few meaningful limits on the government’s ability to take what belongs to one private party and give it to another private party.



Missouri Constitution did, in fact, permit non-charter cities to use eminent domain to eliminate blight. In its written opinion, the court all but ignored the Tourkakises' argument that the TIF Act was not intended to authorize non-charter cities to use eminent domain. As a result, the TIF act is now understood to permit any municipality in the state to condemn private property and hand it over to private developers.

In the years since the Missouri Constitution of 1875 first provided property owners some of the strongest constitutional protections in the nation, the state's courts have steadily diluted those protections until there remain very few meaningful limits on the government's ability to take what belongs to one private party and give it to another private party. Missouri's courts have held that:

- Private property may be condemned even if it is soundly constructed and not unsanitary, blighted, unsafe, obsolete, dilapidated, or dangerous to the health, safety, or morals of the community. *See, e.g.: State on Inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 270 S.W.2d 44 (Mo. banc 1954).*
- Instead of requiring government actors to prove why citizens should be forced out of their homes or businesses, courts require citizens to meet an extraordinary burden of proof as to why they should be allowed to keep what belongs to them. *See, e.g.: Annbar Assoc. v. West Side Redevelopment Corp., 397 S.W.2d 635 (Mo. banc 1965).*
- While Article I, section 28, instructs courts to judge the constitutionality of condemnations without regard to legislative statements that they are

necessary for a public use, a legislative statement that a condemnation is necessary to alleviate blight is entitled to near-total deference. *See, e.g.: Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11 (Mo. 1974).*

- Even land that has never been developed may be considered "blighted," and therefore subject to eminent domain. *See: State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36 (Mo. banc 1975).*
- A municipality may take a profitable piece of property from one private person and give it to a second private entity to operate in precisely the same manner, despite the explicit prohibition on using eminent domain for private uses found in Article I, section 28. *See: State ex rel. United States Steel v. Koehr, 811 S.W.2d 385 (Mo. banc 1991).*

CONCLUSION

Combined with the above cases and the deference that Missouri courts routinely give to cities that label private properties "blighted," the Missouri Supreme Court's decision in *City of Arnold v. Tourkakis* means that now nearly every non-agricultural piece of property in the state could be taken on behalf of an influential commercial developer. Missouri has gone from being one of the states most protective of its citizens' property rights to one of the states most willing to barter them away.

For more details, please see Show-Me Policy Study no. 20, which is available at www.showmeinstitute.org.



7777 BONHOMME AVENUE
SUITE 2150
SAINT LOUIS, MO 63105

WWW.SHOWMEINSTITUTE.ORG