

MISSOURI STATE AUDITOR'S OFFICE
FISCAL NOTE (06-14)

Subject

Initiative petition from Bruce Hillis regarding a proposed constitutional amendment for Article I, Sections 26 and 28, relating to eminent domain, version 2. (Received February 14, 2006)

Date

March 6, 2006

Description

This initiative petition would amend Article I of the Missouri Constitution by modifying Sections 26 and 28. Section 26 would be amended to vest the power of eminent domain 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.

The value of the property may be determined by 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. Until compensation is paid to the owner, and unless a final legal determination of any legal challenges to the taking is rendered, the property shall not be disturbed or the proprietary rights of the owner therein divested.

Section 28 would be amended so that private property 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.

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.

Subject to Section 26, 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 shall remain in such owner subject to the use for which it is taken.

The amendment is to be voted on in November, 2006. The effective date of this amendment shall be November 8, 2006 and the provisions of Article I, sections 26 and 28

apply notwithstanding any application to the contrary of Article VI, Section 21 of the constitution.

Public comments and other input

The State Auditor's Office received input from the Department of Economic Development, the Office of Administration, the Department of Conservation, the Department of Natural Resources, the Governor's Office, the State Tax Commission, the Missouri Highway and Transportation Commission, Cole County, Greene County, Jackson County, St. Louis County, the City of Kirkwood, and the City of Columbia.

Assumptions

According to officials from the Department of Economic Development, the petition will have no fiscal impact.

According to officials with the Office of Administration, responding on behalf of the Governor's Office, Section 26 of this amendment will restrict powers of eminent domain to elected officials of the State of Missouri or elected officials of any political subdivision of the State of Missouri. Furthermore, this amendment provides that property value can be determined by appraisal methods and the property taken cannot be disturbed or property rights divested until compensation has been paid to the owner or to the courts on behalf of the owner. This amendment should have no fiscal impact to the state of Missouri or to any political subdivision of the state.

Section 28 limits the taking of private property for private use, gives exceptions, and makes public use a judicial question. It also refines the term public use. Furthermore this amendment stipulates that for any property taken by eminent domain that is not pursued, the original owners shall have the right to reclaim that property at a price no greater than what was paid at the time of its taking. In addition this amendment prohibits the sale, transfer, or lease of this property to a private entity within 20 years of such taking, unless the original owner, his/her heirs or assigns, have been given the opportunity to repurchase said property at the price it was taken for. It appears this amendment will not have a fiscal impact on the state or any political subdivisions within the state. However, it appears that if any property taken by eminent domain is developed over the 20 year period and said development was accomplished with public funds by the state or any political subdivision within the state that neither government entity would be allowed to recover any of those funds.

This version permits the taking of property 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 remains with owner or his heirs or assigns. This initiative petition does not use gender neutral language.

According to officials at the Missouri Department of Conservation, there is a potential fiscal impact to the Conservation Department in Section 26. As proposed, this language could be considered in conflict with Article IV, Section 41, which grants eminent domain powers to the Conservation Commission. The proposed section limits the use of eminent domain to "...political subdivisions of the state whose officials are directly responsible to elected officials..." Should one conclude that a Conservation Commission whose members are nominated by the Governor and confirmed by the Senate are not "directly responsible to elected officials," then Section 26, as a later enacted provision, could impact the Commission's ability to exercise eminent domain. This could affect the price of future hypothetical land transactions. The caveat is that the Commission does not utilize this power in the course of business.

The Department of Natural Resources does not anticipate a significant fiscal impact as a result of this proposal.

The State Tax Commission indicated the petition will not impact the Commission or the County Assessor's Offices.

According to Officials from the Missouri Highway and Transportation Commission (MHTC), Section 26 prohibits the direct or indirect taking or damage of private property without payment of just compensation. By adding the word "indirectly" to the concept of a taking of property, the initiative petition would allow the concepts of loss of traffic and loss of visibility from a public highway, for example, to be viewed as separately compensable items for damage claims in inverse condemnation against MHTC. This language is likely to have a significant unknown negative fiscal impact on MHTC/MoDOT.

Section 26 also changes the way property is to be valued for just compensation arising from a condemnation proceeding. Under this initiative petition, the value of the property to be taken by eminent domain shall be determined by appraisal methods typical to acquiring a property through business acquisitions and any evidence that would be considered by an appraiser in the ordinary course of business is relevant and admissible.

Under existing condemnation law, when a condemning entity condemns property, it is only purchasing the land itself, not any appurtenances on the land. This is because the business owners may move their business to a new location and continue in business.

This language will also have a significant, negative unknown fiscal impact on MHTC and MoDOT.

Section 26 is amended to provide that no property shall be divested from the landowner until a final determination of any legal challenges is made. Appellate courts have typically recognized a very limited number of legal challenges against a condemnation petition: (1) fraud; (2) bad faith; or (3) arbitrary and unwarranted abuse of discretion. By allowing any legal challenge to the condemnation petition, this significantly alters the number and types of challenges to a condemnor's petition to condemn, which will

significantly delay the acquisition of property for MHTC's state highway system construction program. Delay of the projects results in a negative fiscal impact, loss of safety benefits from constructing such projects on time, as well as the additional inflation costs for the construction project that arise through such delays.

Section 28 of this initiative petition establishes the general principle that a condemning authority cannot take private property for use by a private party because such a taking is not considered to be a public use. This would eliminate the innovative transportation financing solutions such as Transportation Corporations and public private partnerships.

There is no exception to the private use prohibition for transportation projects, except as it relates to railroads and regulated utilities. Therefore, private property could not be acquired by MHTC and later transferred, even by lease, to a private person for a public use. This provision would result in a negative unknown fiscal impact on MoDOT.

Section 28 also allows the private property owner to reclaim the property acquired by eminent domain five years after the taking for the amount paid by the condemnor if the purpose for which the property was acquired is not substantially accomplished in that time. This language would repeal existing Section 226.955, RSMo, which authorizes a ten-year construction initiation time limit on MHTC corridor acquisitions. This provision would significantly undermine MHTC's authority to do long-range planning and acquire property within a designated highway corridor in advance of design and construction because of the five year time frame to substantially accomplish the project. This language will also have a significant, negative unknown fiscal impact on MHTC and MoDOT.

All of the above provisions would have a negative fiscal impact. MoDOT is unable to provide an estimate, therefore the negative fiscal impact due to this initiative petition is unknown greater than \$100,000.

The City of Kirkwood indicated they were unable to provide a fiscal impact because it would depend upon what was being proposed. The impact could range from zero to significant.

Officials from the City of Columbia indicated the potential for considerable fiscal impact given possible legal interpretations of the proposed constitutional language as written. Depending upon the meaning of "taking" and if the interpretation means that any taking, either "directly or indirectly," will require just compensation, the impact could be great for Columbia. Information as follows and concerns the last five years of data:

Columbia Water & Light has acquired 285 property parcels during this time and most have been acquired without compensation to the property owners. Assuming the City would have to pay for the property owner's appraisals, an average property acquisition of 1,500 sq. ft. (average size of a lot @\$1.00 per sq. ft.) per acquisition and the City's added administrative cost of 20% for not being able to take control of the property pending any

legal determination of legal challenges, approximate and estimated impact would be \$513,000 or greater.

Columbia Public Works has acquired 402 property parcels during this time. Assuming the City would have to pay for the property owner's appraisals, 50 % of the property acquisitions, and the City's added administrative cost of 20% for not being able to take control of the property pending any legal determination of legal challenges, approximate and estimated impact would be \$1,014,900 or greater.

Impact from retaining property in excess of five years without having "earnestly or substantially been pursued" could be great. City purchases property, potentially through eminent domain, that may be set aside for future fire stations, trails or other major public use projects such as a power generation plant. While the original use will not have changed it may not be scheduled out until five years or longer pending funding and prioritization.

The State Auditor's Office did not receive a response from Cole County, Greene County, Jackson County, or St. Louis County.

Fiscal Note Summary

The total fiscal impact to state government is unknown, but estimated to exceed \$100,000. The fiscal impact to local government is unknown.