The Florida Senate

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Committee on Judiciary Senator Daniel Webster, Chair

EMINENT DOMAIN

SUMMARY

The U.S. Supreme Court held in *Kelo v. City of New London*[1] (Connecticut) that improving the local economy meets the public purpose requirement of the Takings Clause of the U.S. Constitution. The decision has caused a firestorm of concern that states may take private property that is not in a substandard condition and transfer it to another private party solely because the second party can put the property to a higher economic use. As a result, virtually every state is scrutinizing its eminent domain law. In Florida, the scrutiny is focused on the potential for economic development-type takings and the safeguards around takings to remedy slum or blight under the Community Redevelopment Act. Having found that safeguards sometimes may be inadequate because the statutory definition of blight is broad and that there is a risk of inadequate safeguards under the general statutory power of eminent domain, this report provides policy options if the Legislature wishes to enhance the safeguards.

BACKGROUND

On June 23, 2005, the U.S. Supreme Court, in a five to four decision, held in *Kelo* that the exercise of eminent domain in furtherance of an economic development plan satisfied the U.S. Constitution's public use requirement. In response to public concerns about legal safeguards for Florida property owners and potential adverse implications of *Kelo*, the Committee on Judiciary undertook this interim research project on the eminent domain power. This report (1) highlights the concerns raised by *Kelo*, (2) identifies the potential risks to property owners because of *Kelo*, and (3) presents potential policy responses available to the Florida Legislature if it wishes to provide additional safeguards concerning the exercise of eminent domain.

The Eminent Domain Power

Eminent domain is the power of the state to take private property and convert it for public use subject to reasonable compensation. That power is limited by the federal and state constitutions. The Fifth Amendment to the U.S. Constitution provides that private property shall not be taken for public use without just compensation. The Florida Constitution similarly limits the eminent domain power; however, it substitutes "public purpose" for "public use" and "full compensation" for "just compensation."

The Florida Constitution provides that charter counties and municipalities have powers to conduct local government functions—which arguably include the use of eminent domain for pubic purposes. Counties and municipalities also have been granted the general power of eminent domain for county and municipal purposes under chapters 127 and 166, F.S., respectively. However, as the Florida Supreme Court has held, municipalities do not need this statutory authority to exercise eminent domain for a valid municipal purpose.[2] Accordingly, under its constitutional home rule powers, a municipality may take property for a public purpose as long as it is not expressly prohibited. By analogy, the same reasoning would seem to apply to charter counties, but there do not appear to be any cases specifically holding the same. Thus, except for noncharter counties, the authority to exercise eminent domain under chapters 127 and 166 appears to be superfluous. Nevertheless, these statutes effectively permit the use of eminent domain for any local government purpose, although they do not expressly authorize the use of eminent domain for economic development. Furthermore, the Florida Supreme Court has not considered a case involving the use of eminent domain with the express public purpose of economic development.

The power of eminent domain plays an important role in the operations of the state as is evident by references to eminent domain in more than 150 sections of the Florida

[1] *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

[2] *City of Ocala v. O.J. Nye*, 608 So. 2d 15, 17 (Fla. 1992).

Statutes, across almost 70 chapters. Takings that meet the public use or purpose requirement are generally grouped into three categories. Most takings under Florida Statutes fit within the first two categories that include takings generally considered straightforward and uncontroversial. The first category is private to public transfers, e.g., for a road, a school, or a park. The second category is private to private transfers where the property is available for the public's use, e.g., as with a railroad, a public utility, or a stadium. The third category involves private to private transfers where the existing property use inflicts an affirmative harm.[3] In light of *Kelo*, the takings causing the most concern in Florida are private to private transfers under the Community Redevelopment Act (the Act), part III of chapter 163, which most closely fit the third category of takings.

The *Kelo* Decision

The background to *Kelo* is that in 2000, after decades of economic decline—evidenced by the 1990 designation as a distressed municipality and a 1998 unemployment rate nearly twice that of the state—the City of New London approved an economic development plan to revitalize the economy. The goal of the plan was to create a development that would complement the facility that pharmaceutical company Pfizer was planning to build, create jobs, increase tax and other revenues, and spur revitalization of the rest of the city. The development corporation negotiated the purchase of the property of many of the landowners in the development area. However, Ms. Kelo and several other lot owners refused to sell their parcels, prompting the filing of condemnation proceedings by the development corporation. The holdout properties were not blighted but were simply targeted for acquisition in the plan to be used for an unspecified purpose.

The Court's takings analysis proceeded like this: (1) it has been a long time since the Court required "public use" to mean literally put into use for the general public; (2) more than 100 years ago, the Court embraced the broader and more natural interpretation of public use as public purpose; (3) thus, the constitutionality of a taking turns on whether a public purpose is served; and (4) the question of public purpose is influenced by the Court's broad concept of public purpose and deference to legislative determinations of public purpose. The Court notes that *Kelo* is not about whether it is constitutional for a city to take citizen A's property and transfer it to citizen B because B will put the property to a use generating greater tax revenues.[4] A taking for the purpose of conferring a private benefit on a particular individual would not be constitutional. Further, a taking with only a mere pretext of public purpose would not be allowed. Thus, this case turns on "whether the City's development plan serves a 'public purpose[,]'"[5] not on whether Ms. Kelo's home is taken and ownership transferred to another private entity.

Then the Court looked to the facts of *Kelo* to determine if the economic development plan served a public purpose. First, the Court noted that the governing body determined that the distressed condition of the city justified creation of an economic development program. Second, the Court noted that the city, after thorough deliberation, formulated a comprehensive economic development plan that could provide appreciable economic benefits to the community to remedy the economic decline. Furthermore, the development plan was not adopted for the purpose of conferring a private benefit on a particular person. Third, the city exercised eminent domain pursuant to a state statute that specifically authorizes the use of eminent domain to promote economic development after the required approval of a development plan. The bottom line is that precedent seems to have dictated the outcome of the case as the Court could find no principled way of distinguishing economic development from the other public purposes that it has recognized.[6] Thus, the Court concluded that because the plan serves a public purpose, the takings satisfy the public use requirement of the Fifth Amendment.

In her dissent, Justice O'Connor argues that *Kelo* does not fit into any of the three standard categories of takings. She describes *Kelo* as a private to private transfer where the existing property use does not inflict an affirmative harm, but the new use is predicted to generate a secondary benefit for the public, such as increased tax revenue or more jobs.

The Community Redevelopment Act

In Florida, *Kelo* has focused attention on the breadth of the eminent domain power and the adequacy of private property rights safeguards. There is a concern that *Kelo*-type takings, that is, the transfer of property from one private owner to another private owner solely for economic development, can occur in Florida. This concern is concentrated on the Community

[3] *See Kelo*, 125 S. Ct. at 2673-74 (O'Connor, J., dissenting).

[4] *See id*. at 2666-67.

[5] *Id*. at 2663.

[6] *See id*. at 2665.

Redevelopment Act (the Act), where the Legislature has granted powers to municipalities and counties that facilitate the prevention and elimination of conditions of slum and blight. The Legislature has determined that the exercise of those powers is for a public purpose.[7]

After a municipality or county makes a finding that slum or blight exists, it may create a community redevelopment agency (CRA) to carry out redevelopment activities within the community redevelopment area. The tools provided to facilitate the redevelopment process and the elimination and prevention of slum and blight include: the power to authorize the issuance of revenue bonds; the power to acquire (by eminent domain if necessary), demolish, remove, or dispose of property; and the power of tax increment financing.[8] However, property rights advocates argue that the definition of blight is so vague and broad that private to private transfers can and do occur solely for economic development purposes.[9] Moreover, many valid redevelopment activities to cure blight—especially blight based on economic-related factors[10]—inherently have an economic development-type character, which adds to the debate whether eminent domain is exercised for economic development purposes under the Act.

There is a long history and nearly ubiquitous presence of CRAs in Florida. The redevelopment activities of the more than 140 CRAs are substantial. For the fiscal year 2003-2004, data compiled by the Florida Department of Financial Services, Bureau of Accounting, showed that CRAs held more than $344 million in bonds, took in more than $87 million in incremental ad valorem taxes, and had more than $185 million in redevelopment-related expenditures.

The remainder of this report focuses on how Florida case law and the Act relate to the current firestorm around the adequacy of safeguards for private property rights.

METHODOLOGY

Research for this interim project included: identifying and reviewing existing statutory provisions conferring eminent domain authority and prescribing eminent domain procedures; analyzing the *Kelo* decision, as well as other relevant Florida and non-Florida judicial opinions; communicating with local governments, economic development/community development professionals, property rights organizations, and other interested parties regarding eminent domain practices; sampling eminent domain laws in other states; and surveying CRAs concerning their use of eminent domain and input on potential policy responses.

FINDINGS

Does *Kelo* Change the Law?

Early eminent domain jurisprudence supported the concept of "public use" to mean that the property is used by the public or the government, not that the taking served a public purpose.[11] By late in the nineteenth century, based on cases involving condemnation for the purpose of laying irrigation ditches to ensure access to water by landowners adjoining the landowner of the condemned parcel, the U.S. Supreme Court had adopted the broader interpretation of "public use" as "public purpose"[12] as well as a policy of deference to legislative determination of what serves a public purpose.[13]

The Court further expanded the meaning of public use in *Berman v. Parker*[14] and *Hawaii Housing Authority v. Midkiff*.[15] In *Berman*, the Court upheld the constitutionality of a redevelopment act as it applied to a taking under a plan to redevelop a blighted area of Washington, D.C. *Berman* is significant because it involved the condemnation of a nonblighted property and the transfer of ownership from one private party to another private party. The Court emphasized that once the public purpose of the development plan has been established, the amount of land and the need for specific

[7] Section 163.335(3), F.S.

[8] Tax Increment Financing (TIF): under the Act, after approval of a redevelopment plan, there shall be established by ordinance a redevelopment trust fund. The trust fund receives 95% of the difference between the ad valorem taxes levied each year by each taxing authority (with some exceptions) and the amount of ad valorem taxes prior to the effective date of the ordinance providing for the trust fund.

[9] *See, e.g.*, Valerie A. Fernandez, *If Only Attorney General Crist Were Correct About Private Property Rights in Florida*, Submission to Florida House Select Committee to Protect Private Property Rights, Sept. 14, 2005.

[10] Economic-related blight factors arguably would include: lack of appreciation of aggregate assessed values of real property, s. 163.340(8)(b); falling lease rates, s. 163.340(8)(g); and higher vacancy rates, s. 163.340(8)(i), F.S..

[11] *Kelo*, 125 S. Ct. at 2681 (Thomas, J., dissenting).

[12] *See, e.g.*, *Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 158-64 (1896).

[13] *See Kelo*, 125 S. Ct. at 2684 (Thomas, J., dissenting).

[14] 348 U.S. 26 (1954).

[15] 467 U.S. 229 (1984).

properties to complete the plan rests in the discretion of the legislative branch. That is, there is no constitutional requirement to establish public purpose on a parcel-by-parcel basis. In *Midkiff*, the Court upheld a state statute designed to break up the oligopoly of land ownership in Hawaii. The statute used the power of eminent domain to transfer land from a small number of large landowners to the individuals who were leasing the land. The Court reaffirmed *Berman*'s broad standard of public use, stating that public use requirement is coterminous with the police powers.[16] The analysis for a challenged exercise of eminent domain is whether the legislature's stated purpose is legitimate, that is, within the condemning authority's police power. *Midkiff* emphasizes the high level of deference that courts will give to legislative definitions of a permissible public use. The Court stated that it "has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[17] Furthermore, as long as the exercise of the eminent domain power is rationally related to a conceivable public purpose, a taking is not prohibited by the Public Use Clause.[18]

"In the strictest sense, *Kelo* did *not* change the law, in that the 5-4 majority of the divided Court was able to point to *Berman* and *Midkiff* and portray *Kelo* as fitting well within their sphere."[19] In his dissent, albeit in stronger terms, Justice Thomas agrees that *Kelo* does not change the law, stating that *Kelo* "is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity."[20] He discusses *Berman* and reasons that the deferential standard adopted by the Court begs the question of whether the constitutional limitation of the Public Use Clause prevents the taking. Furthermore, he agrees with Justice O'Connor that the deferential standard "encourages 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms' to victimize the weak."[21] Thomas advocates consideration of a return to the original meaning of the Public Use Clause: "that the government may take property only if it actually uses or gives the public a legal right to use the property."[22] At least one property rights group seems to agree with Thomas. It maintains that property rights provide the foundation for individual freedom and economic opportunity. Moreover, it argues that the *Kelo* decision all but eliminates the U.S. Constitution's public use requirement, thereby threatening the nation's future economic potential.[23] By comparison, the majority expresses the limit of public purpose by noting that a purely private taking, that is, for the sole benefit of a private party, would not meet the "public use" requirement.

History of Public Purpose & Eminent Domain in Florida

Florida case law has long held that property may be taken for a public use or purpose. In 1938, the Florida Supreme Court held in a case of first impression concerning slum clearance that "when private property is sought to be taken it must be taken for a public use or purpose and not a private use or purpose."[24] Looking to other jurisdictions, the Court found that it is customary for the Legislature to declare the necessity and public purpose for a taking and for the judiciary to give deference to this determination. In 1952, the Court held that a city may condemn homes in a blighted area, but not for subsequent redevelopment by private enterprise.[25] The incidental public benefit from such private development is not sufficient to make the redevelopment a public purpose. However, in 1959, the Court began to move away from its earlier holdings by permitting a role for private enterprise in the redevelopment of slum areas,[26] which is now encouraged under the Act.[27]

Prior to the 1968 revision to the Florida Constitution, the provision concerning takings did not require a showing of public use or public purpose.[28] The eminent domain provision added to the constitution in 1968 (as in the current version of the constitution) utilized the broad concept of public purpose not public use, perhaps

[16] *Id*. at 240.
[17] *Id*. at 241 (citation omitted).
[18] *Id*.
[19] J.B. Ruhl, *Property Rights at Risk?*, 2005 James Madison Inst. **Backgrounder** 46, at 7.
[20] *Kelo*, 125 S. Ct. at 2678 (Thomas, J., dissenting).
[21] *Id.* at 2687 (citation omitted).
[22] *Id.* at 2686.
[23] Carol Saviak, *Why Property Rights Matter*, Coalition for Property Rights (e-mail newsletter), Jan 10, 2006, *at* http://www.proprights.com/newsviews/display_newsletter.cfm?ID=177.
[24] *Marvin v. Hous. Auth. of Jacksonville*, 183 So. 145, 149 (Fla. 1938).
[25] *Adams v. Hous. Auth. of City of Daytona Beach*, 60 So. 2d 663, 668-70 (Fla. 1952).
[26] *See Grubstein v. Urban Renewal Agency of City of Tampa,* 115 So. 2d 745 (Fla. 1959).
[27] Section 163.345, F.S.
[28] However, prior to the 1968 constitution—as stated in *Marvin*—the constitutional provision concerning takings was read in conjunction with statutory law to require that when private property was taken it had to be taken for a public use or purpose and with full compensation.

reflecting the U.S. Supreme Court's precedent that by 1968 equated public use with public purpose. The Florida Constitution Revision Commission that proposed the 1968 constitutional revisions heavily debated the issue of eminent domain.[29] Much of the debate concerned the potential impact of proposals about the state's ability to effectively address slum and blighted areas. Some members argued unsuccessfully for an amendment stating that properties taken to cure slum or blight could not be used for private purposes. They were concerned that public funds might be used to take private property because someone could decide that there was a higher and better use for the property, even though it was not economically feasible under the free enterprise system. The opponents of the amendment were concerned that prohibiting the use of condemned property for private purposes would hinder or prevent the clearance of slums and blighted areas. Perhaps as a safeguard for property owners, the initial version of both the House and Senate eminent domain constitutional provisions included language that it would be a matter of judicial determination whether the showing of necessity for a taking has been met.

Despite the move from a true public use requirement to a broad interpretation of public purpose and a role for private enterprise, Florida case law still provides some safeguards for property owners. *Baycol, Inc. v. Downtown Development Authority of the City of Ft. Lauderdale* is cited frequently for the proposition that "eminent domain cannot be employed to take private property for a predominantly *private* use."[30] However, this proposition may not provide comfort for a property owner arguing that a condemnation is for a predominantly private use where, as under the Act, the Legislature has determined that a taking to remedy blight serves a public purpose. In such a case, the legislative determination is presumed valid and should be upheld unless it is arbitrary or unfounded or so clearly erroneous as to be beyond the power of the legislature.[31] The judicial deference to legislative declarations of public purpose means that property owners are in an almost no-win position to show that the state has not met the public purpose requirement of the Takings Clause.

Although no Florida Supreme Court case is directly on point concerning the constitutionality of a private to private transfer solely for economic development, two decisions suggest that the Court will continue to take a very deferential approach to deciding what satisfies public purpose. First, in *Deseret Ranches*, a private landowner was allowed to exercise eminent domain, as authorized by a state law for such purposes, to obtain an easement of necessity across another person's land.[32] The Court stated that sensible utilization of land continues to be one of our most important goals. Thus, although all the direct benefits of the taking were private and any public benefits were incidental, the Court found that the sensible utilization of land was a dominant public purpose. Second, in *Department of Transportation v. Fortune Federal Savings & Loan*, the Court upheld the taking of more land than needed for a road, finding the reduction in the cost of property acquisition to be a valid public purpose in the context of eminent domain.[33] Perhaps as a harbinger of how the Court might decide a *Kelo*-type case, the Court stated that "the concept of public purpose must be read more broadly to include projects which benefit the state in a tangible, foreseeable way."[34]

Key Concerns Raised by *Kelo*

Concerns about the exercise of eminent domain in Florida and the adequacy of the safeguards that are in place to protect private property rights, as expressed by private property rights advocates, primarily fit into two categories. The first is the concern that eminent domain may be exercised solely for economic development. The second is the concern that under the Community Redevelopment Act eminent domain may be used for private to private transfers of property where the individual property is not blighted.

There are three risks associated with the first concern that the power of eminent domain could be exercised solely for economic development purposes. First, there is the risk that counties and municipalities could exercise eminent domain for economic development purposes under their general statutory powers of eminent domain pursuant to chapters 127 and 166, F.S., respectively. This risk ultimately depends upon how the Florida Supreme Court would rule in a case on point. Second, there is the risk that *Kelo*'s holding that economic development satisfies the public use requirement of the Federal Takings Clause will provide the basis to justify

[29] *See* Fla. Const. Revision Comm'n, edited transcript of debate on art. X (1966, vol. 69) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).
[30] 315 So. 2d 451, 455 (Fla. 1975).
[31] *See State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 886 (Fla. 1980).
[32] *Deseret Ranches of Florida, Inc. v. Bowman*, 349 So. 2d 155, 156 (Fla. 1977).
[33] 532 So. 2d 1267, 1270 (Fla. 1988).
[34] *Id*.

economic development as a valid public purpose under the constitutional home rule powers of charter counties and municipalities. The extent of this risk is not clear, but is probably minimal because most nontraditional-type takings appear to occur under the Act. The third risk is that the definition of blight under the Act is so broad and includes economic-type indicators that eminent domain is or will be exercised for what is effectively economic development purposes.

The risk associated with the concern that under the Act eminent domain may be used for private to private transfers of property where the individual property is not blighted is also related to the broad definition of blight under the Act. It is argued that because the definition of blight is so broad, there is a risk that a community redevelopment area may include nonblighted properties that are not in the immediate area of truly blighted properties and not essential to remedy the blighted conditions.

The Community Redevelopment Act: Concerns Raised by *Kelo*

In s. 163.335, F.S., the Legislature found that there are areas in the state where slum and blight exist "which constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state."[35] Some or all of these areas "may require acquisition, clearance, and disposition subject to use restrictions."[36] Before a county or municipality can create a CRA, the governing body must adopt a resolution[37] that makes a legislative finding that conditions of slum[38] or blight exist in the area.

The evolution of the definition of blight in the Act helps to explain the concerns raised by *Kelo* (1) that eminent domain may be exercised for economic development purposes and (2) that the Act permits the exercise of eminent domain for a private to private transfer of a property that is not blighted.

As originally enacted, for an area to be designated as blighted, there had to presently exist (1) conditions that endangered life or property or (2) one or more factors (from a list of six) that substantially impaired or arrested sound growth and were a menace to the public health, safety, morals, or welfare. The legislative findings, in both the original and current versions, state that slum and blight conditions constitute "an economic and social liability imposing onerous burdens which decrease the tax base and reduce tax revenues."[39] Consistent with these findings, prior to 1998 the Act only characterized deteriorating economic conditions as a result of blight, not blight in and of itself. However, after a 1998 amendment, an area could be designated as blighted by showing "blight" (as in the original definition of blighted area) or by showing that there existed a substantial number of deteriorating structures and conditions that lead to economic distress. This was a significant change because it now permits the creation of CRAs prior to the actual existence of blight, i.e., with only a showing of the existence of conditions that lead to economic distress. Based on the premise that the "leading to economic distress" criterion does not require the actual physical manifestation of blight, the use of eminent domain under this criterion is arguably for economic development purposes. Essentially the same definition is included in the current version with the addition that two or more of 14 factors must be present. In summary, the current definition of blighted area permits creation of a CRA based on a finding that there are a substantial number of deteriorated or deteriorating structures with (1) conditions leading to economic distress with two or more of the 14 factors or (2) traditional blighted conditions with two or more of the 14 factors. There is also a catch-all provision that defines a blighted area (without reference to deteriorating or deteriorated structures) as an area with any one of the 14 factors and the relevant taxing authorities agree that the area is blighted.

Much of the concern that the Act permits a taking for a private to private transfer of a nonblighted property is on the 14 blight factors. Private property rights advocates argue that the factors are broad, vague, or not an indicator of blight. An analysis of the factors indicates that (1) they either specify imprecise thresholds, e.g., predominance, appreciable, falling, higher, greater, or no thresholds for a factor to be found; (2) some factors are indicators of potential economic decline, not necessarily blight, e.g., assessed values of real property, falling lease rates, and residential and commercial vacancy rates; (3) some factors could indicate a nonblight-related condition, e.g., higher fire and emergency medical service calls could be an indicator of an older demographic; (4) the "deterioration of site or other improvements" factor is arguably redundant with the

[35] Section 163.335(1), F.S.
[36] Section 163.335(2), F.S.
[37] The resolution is called a finding of necessity under s. 163.355, F.S.
[38] Because it is generally agreed that the definition of slum is not vague or overly broad, the focus in this report is on the definition of blight as it relates to the operation of the Act and the exercise of the power of eminent domain.
[39] Section 163.335(1), F.S.

separate requirement that there are a "substantial number of deteriorated, or deteriorating structures"; and (5) some factors could be due to the failure of the governing body to provide services or enforce codes.

Blight studies conducted in support of findings of necessity (finding that slum or blight exists) demonstrate how the broad definition of blight enables local governments to incorporate large nonblighted areas within a community redevelopment area. The statistics from two studies are illustrative. The statutory requirement that a substantial number of deteriorated or deteriorating structures[40] are present was based on 17.8% and 29.7% of the structures meeting this criterion in the first and second studies respectively. Conversely 82.2% and 70.3% of the structures included in the area in the first and second studies respectively were in sound or excellent condition and, under the Act, at risk of being condemned. The operation of the Act is in sharp contrast to the facts in *Berman*—the U.S. Supreme Court case that arguably fostered state CRA-type statutes—where the risk of condemnation of a nonblighted property was very low because 82.7% of the properties were beyond repair or needed major repairs.

An additional example demonstrating the risk of a taking for a private to private transfer of a nonblighted property comes from the Riviera Beach CRA. The Riviera Beach CRA includes 858 acres, about 5,100 residents (more than 17% of the population), and 317 businesses. The Riviera Beach city manager testified, at the October 18, 2005, House Select Committee to Protect Private Property Rights, that the city council "designated an area within the CRA where no changes are to occur, they will not take any of those homes because they believe that neighborhood is a stable neighborhood and capable of meeting all those requirements in the Act." Nevertheless, these arguably nonblighted properties are subject to condemnation at anytime during the existence of the CRA because they are within its boundaries. Furthermore, because the courts give deference to the quasi-legislative determination of public purpose, a challenge to a condemnation for a private to private transfer in that neighborhood would almost certainly fail.

RECOMMENDATIONS

Kelo has touched off a national firestorm of concern about the level of protection for private property rights. In response, states are considering a range of policy options from prohibiting eminent domain for transfer to private ownership or control;[41] to limiting or prohibiting eminent domain for economic development;[42] to preventing the acquisition of residential property under redevelopment laws;[43] to tightening the definition of blight.[44] In Florida, the focus has been on the general power of local governments to use eminent domain and on the use of eminent domain under the existing Community Redevelopment Act. These recommendations focus on policy options that the Legislature may wish to consider to enhance the safeguards for private property owners in Florida.[45]

County & Municipal Home Rule Powers, Chapters 127 & 166

If the Legislature wishes to prohibit the use of eminent domain solely for economic development purposes, it could add such a restriction to chapters 127 and 166, F.S. The risk of adding such a restriction is that the definition of "solely for economic development purposes" is subject to interpretation and thus could have the unintended consequences of permitting or prohibiting the exercise of eminent domain in situations not intended by the Legislature. Furthermore, this restriction or any other policy option that limits the statutory use of eminent domain could precipitate a shift where charter counties and municipalities attempt to exercise eminent domain based solely on the authority of their constitutional home rule powers. Thus, the Legislature may wish to make a broader modification to chapters 127 and 166 to ensure that charter counties and municipalities do not use their home rule powers contrary to the intent of the Legislature. This approach would require removing the power to exercise eminent domain from the ambit of home rule powers by modifying chapters 127 and 166 to provide that the exercise of eminent domain is reserved to the state except where counties and municipalities are so authorized by law. It would also require an

[40] Section 163.340(8), F.S.

[41] *See, e.g.*, B.R. 253, 2006 Leg., Reg. Sess. (Ky. 2006); H.F. 117A, 2005 Leg., Spec. Sess. (Minn. 2005); H.B. 3505, 2005 Leg., 73rd Leg. Assem. (Or. 2005).

[42] *See* H.B. 2426, 104 Gen. Assem., 2nd Reg. Sess. (Tenn. 2005); S.B. 7B, 2005 Leg., 79th Sess. (Tex. 2005).

[43] *See*, *e.g.*, A.B. 4392, 2004 Leg., 211th Sess. (N.J. 2004).

[44] *See*, *e.g.*, S.B. 881, Gen. Assem., Reg. Sess. (Pa. 2005).

[45] Concerns regarding general perceived deficiencies of the Act, e.g., duration of the CRA; affordable housing issues; the adequacy of compensation for owner's of acquired properties; defectively platted, underdeveloped land; agricultural land; and the relationship between the county and the municipality in managing redevelopment, which were identified during this research project are beyond the scope of this report and not addressed in the recommendations.

enumeration of the county and municipal authorized uses of eminent domain. This solution could have the unintended consequence of precluding the use of eminent domain for a valid county or municipal purpose that was not specifically authorized by statute.

Community Redevelopment Act

If the Legislature chooses to retain the policies underlying the existing Act, which authorizes the use of eminent domain to transfer property to a private entity in order to cure genuine blight, there are revisions it could make to address potentially inadequate safeguards of private property rights under the Act and to ensure that condemned property is blighted or in a blighted area and critical to curing the blight.

The first response calls for a two-phase process for the finding of necessity. In the first phase, the finding of necessity could remain largely as it is in the current version of the Act for purposes of creating the CRA and all other related powers—except for the power of eminent domain for private to private transfers. The first phase finding would be limited to determining the need for redevelopment and defining the redevelopment area. In the second phase, blighted areas could be established based on a resolution finding blight and defining the blighted area or areas. A blighted area, which would become strictly a phase-two concept, would encompass a subset of the redevelopment area based on a higher standard for blight. The phase-two definition of blighted area would require the actual presence of blight in substantially all properties within the blighted area and would not be based on conditions leading to economic distress. A resolution finding blight and defining a blighted area would be valid for a limited period, e.g., one or two years. While such a resolution is valid, a private to private transfer would require an individual finding of necessity for a property (1) located in a blighted area, (2) individually exhibiting blight, and (3) necessary for the completion of the redevelopment project in accordance with an adopted redevelopment plan. A property within a blighted area that does not individually exhibit blight may not be condemned unless it is shown to be essential to the successful completion of the redevelopment project in accordance with an adopted redevelopment plan after the property owner failed to show that it was reasonably feasible to integrate the subject property into the redevelopment plan. The second-phase finding of necessity would be made at a quasi-judicial hearing supported by the preponderance of the evidence. Because this hearing would be a quasi-judicial hearing (versus the current quasi-legislative hearing), the doctrine of separation of powers would not compel the judiciary to afford these individual findings of necessity the high level of deference that is presently given to the current quasi-legislative determination. This would provide property owners with the opportunity to demonstrate that the taking does not meet the requirements of the Takings Clause because it serves a predominantly private use. A potential weakness of this approach is that the original finding of necessity would still permit properties that are not truly blighted to be included in a community redevelopment area. Consequently, those property owners would face the potential threat of condemnation for 30 or more years. Interest groups, who are concerned with maintaining the effectiveness of the existing CRA for eliminating slum and blight, and maintaining the health of the tax base, argue that this approach creates uncertainty regarding the county or municipality's ability to assemble a parcel for redevelopment, and thus undermines the success of redevelopment. An advantage of this response is that the added safeguards of the second-phase finding of necessity could be imposed on existing CRAs.

A second response is a slight modification to the first response if the Legislature does not wish to permit a private to private transfer of property that does not itself exhibit blight. The modification to the first response would be that in the second-phase finding of necessity the individual property to be condemned would have to be located in this phase-two blighted area, individually exhibit blight, and be necessary for the completion of the redevelopment project in accordance with an adopted redevelopment plan.

Alternatively, the Legislature may as a policy matter, in the wake of the *Kelo* decision, wish to more fundamentally limit the use of eminent domain. Options include, for example, prohibiting the exercise of eminent domain, in the redevelopment context, where the property is an owner-occupied residence, or restricting the use of eminent domain to situations where the taking serves a public use consistent with the original meaning of the Public Use Clause of the U.S. Constitution as described in Justice Thomas' *Kelo* dissent. Either of these alternatives would likely need to include reevaluating and substantially revising the purpose and operation of the Community Redevelopment Act.