HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1569 CS Eminent Domain
SPONSOR(S): Rubio
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Government Council	8 Y, 0 N, w/CS	Camechis	Hamby
2) Justice Council	11 Y, 0 N	Camechis	De La Paz
3)			
4)			
5)			

SUMMARY ANALYSIS

This House Joint Resolution proposes an amendment to the State Constitution to prohibit the transfer of ownership or control of private real property taken by eminent domain pursuant to a petition filed on or after January 2, 2007, to any natural person or private entity, except that:

(a) Ownership or control of such property may be conveyed to:
(1) A natural person or private entity for use in providing common carrier services or systems;
(2) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;
(3) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;
(4) A natural person or private entity for use in providing public infrastructure;
(5) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;
(6) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or
(7) A natural person or private entity in accordance with subsection (b).
(b) If ownership of property is conveyed to a natural person or private entity pursuant to paragraph (a)(1), (2), (3), (4), or (5), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred to another natural person or private entity without restriction.

Pursuant to Article XI, section 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment must then be submitted to the electors at the next general election held more than ninety days after the joint resolution is filed with the custodian of state records, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: This joint resolution provides for limited government by limiting the circumstances under which a condemning authority may transfer taken property to another private entity, thereby limiting the circumstances under which government may exercise the power of eminent domain.

B. EFFECT OF PROPOSED CHANGES:

The following Introduction and Current Situation are repeated in the Staff Analysis of HB 1567.

INTRODUCTION

On June 23, 2005, the United States Supreme Court issued its decision in the case of *Kelo v. City of New London*[1], concluding that the U.S. Constitution does not prohibit the City of New London from taking private property by eminent domain for the public purpose of economic development. Even though the Court's decision approved *Kelo*-type takings under the U.S. Constitution, the decision does not restrict the State of Florida from prohibiting takings for economic development or prohibiting transfers of property taken by eminent domain to private parties.

On June 24, 2005, House Speaker Allen Bense announced the creation of the Select Committee to Protect Private Property Rights chaired by Representative Marco Rubio. The Select Committee was tasked with reviewing Florida law in an effort to identify areas of ambiguity and recommend changes to ensure appropriate protections of property rights.

The fundamental issue raised by the *Kelo* decision may be summarized as follows: Under Florida law, is economic development -- which may include, but is not limited to, creating jobs and enhancing the tax base -- a valid public purpose for which private property may be taken and transferred to another private entity? In short, the Florida Constitution, Florida Statutes, and Florida Supreme Court decisions do not explicitly prohibit takings of private property for the purpose of economic development. Therefore, unless the Florida Constitution or statutes are amended, the question of whether a city or a county may take property for purposes of economic development will remain unanswered until directly addressed by the Florida Supreme Court.

While the case law and statutes do not expressly authorize takings for economic development purposes, private property rights advocates assert that current statutes authorizing the taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions within a geographical area are being used to take property that is not genuinely blighted for economic development purposes. Much of the concern expressed by property rights advocates centers around the application of the statutory definition of "blighted area" and what many perceive as vague and inappropriate criteria in the definition. On the other hand, representatives of local government assert that the statutory criteria for slum and blight are sufficiently narrow and that the power of eminent domain is rarely exercised in the community redevelopment context.

This joint resolution addresses takings of private property outside the redevelopment context for economic development purposes by prohibiting the transfer of taken property to private parties unless the transfer qualifies as one of the listed exceptions to the prohibition.

CURRENT SITUATION

[1] 125 S.Ct. 2655 (2005).

General Principles of Eminent Domain Law

"Eminent domain" may be described as the fundamental power of the sovereign to take private property for a public use without the owner's consent. The power of eminent domain is absolute, except as limited by the Federal and State Constitutions, and all private property is subject to the superior power of the government to take private property by eminent domain.

The U.S. Constitution places two general constraints on the use of eminent domain: The taking must be for a "public use" and government must pay the owner "just compensation" for the taken property.[2] Even though the U.S. Constitution requires private property to be taken for a "public use", the U.S. Supreme Court long ago rejected any requirement that condemned property be put into use for the general public. Instead, the Court embraced what the Court characterizes as a broader and more natural interpretation of public use as "public purpose".

As long ago as 1905, the Court upheld state statutes that resulted in the transfer of taken property from one private owner to another for a legislatively declared public purpose. Prior to *Kelo*, the two most significant cases regarding this type of taking were *Berman v. Parker*[3] and *Hawaii Housing Authority v. Midkiff*[4].

In 1954, the Court issued a decision in the *Berman* case upholding a redevelopment plan targeting a blighted area. Under the Plan, part of the taken property would be leased or sold to private parties for redevelopment. A property owner challenged the taking, arguing that his property was not blighted and that the creation of a "better balanced, more attractive community" was not a valid public use. The Court held that eliminating slum or blight conditions in a geographic area is a public purpose and that it is permissible for government to take a parcel of private property in the area even if that particular parcel is not slum or blighted. Perhaps the most important aspect of the decision is the Court's conclusion that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."

In 1984, the Court decided the *Midkiff* case in which private property owners challenged a Hawaii statute under which private properties were taken and transferred to lessees of those properties for the public purpose of reducing concentration of land ownership. Reaffirming the *Berman* decision's deferential approach to legislative judgments, the court unanimously upheld the statute. The Court concluded that a taking should be upheld as long as it is "rationally related to a conceivable public purpose."

Kelo v. City of New London

In 1990, a state agency designated the City of New London a "distressed municipality." The City was not, however, designated as a blighted or slum area. Thereafter, state and local officials targeted the area for economic revitalization, and a development plan was drafted. In addition to creating a large number of jobs and increasing the City's tax base, the plan was designed to make the City more attractive and to create leisure and recreational opportunities. While most of the property owners in the development area negotiated the sale of their property, negotiations with 7 property owners were unsuccessful. The property owners who did not wish to negotiate challenged the taking arguing that the use of eminent domain was unconstitutional because economic development without a determination of blight is not a valid public purpose.

In a 4-3 decision, the Supreme Court of Connecticut ruled that the takings were authorized by Connecticut's municipal development statute, which declares that the taking of land as part of an economic development project is a "public use" and in the "public interest". The case was appealed to

[2] U.S. Const. amend. V.
[3] 348 U.S. 326 (1954).
[4] 467 U.S. 229 (1984).

the U.S. Supreme Court. The specific question before the Court was whether the City's taking of non-blighted private property for the purpose of economic development, in compliance with a state statute, satisfied the "public use" requirement of the U.S. Constitution even though the property would be transferred to other private entities for seemingly private uses.

The Court concluded that because the City's development plan "unquestionably" serves a public purpose, the takings satisfy the public use requirement of the U.S. Constitution. The Court immediately acknowledged, however, that a governmental entity may not take the private property of party A for the sole purpose of transferring the property to another private party B, even though A is paid just compensation. The court also noted that a one-to-one transfer of private property for the purpose of putting the property to more productive use, executed outside the confines of an integrated development plan, was not at issue in this case. The court concluded that, while such an unusual exercise of government power "would certainly raise a suspicion that a private purpose was afoot" the issue was not presented in the *Kelo* case and would not be addressed by the Court until directly presented in a future case.

The Court explicitly stated that the City could not take property simply to confer a private benefit to a "particular" private party. The Court also acknowledged that a governmental entity may not take property under the mere "pretext" of a public purpose, when its actual purpose was to bestow a private benefit. In *Kelo*, the Court noted that the takings would be executed pursuant to a "carefully considered" development plan; therefore, the property was not being taken under a mere pretext of public purpose.

Unlike more traditional public use takings, i.e., roads, schools, public parks, the Court recognized that the private lessees of the condemned property in New London would not be required to make the property or their services available to all comers. However, the Court noted that over the last hundred years, it has repeatedly rejected a literal requirement that condemned property be put into use for the general public and embraced the broader and more natural interpretation of public use as public purpose. The Court explained the erosion of "use by the public" as the definition of "public use" by pointing to the difficulty in administering the test and the impracticality of the test "given the diverse and always evolving needs of society."

The Court noted that, without exception, its decisions have "defined [the concept of public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field." The Court pointed out that its earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" the Court "owe[s] state legislatures and state courts in discerning local public needs." For more than a century, the Court said, its public use jurisprudence has "wisely eschewed" rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Moreover, citing the *Berman* redevelopment case, the Court reasoned that promoting economic development is a traditional function of government and that "[t]here is… no principled way of distinguishing economic development from the other public purposes that we have recognized."

The Court also noted that a determination by municipal officials, acting pursuant to state authorization, that city-planned economic redevelopment is necessary "is entitled to [the Court's] deference." The city had, the Court recognized, carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue.

As with many eminent domain cases, the holding of the *Kelo* case is not absolutely clear. However, the Court explicitly concluded that the City's plan unquestionably serves a public purpose and that taking private property under the facts presented in the case is permissible under the public use requirement of the U.S. Constitution.

It should be emphasized that the *Kelo* decision does not in any way restrict the State of Florida from prohibiting takings for purposes similar to those in *Kelo*, or for any other purpose for that matter. The Court emphasized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." Every state is entitled to interpret the public purpose provisions of its own state constitution in a manner that more narrowly interprets the public purpose requirement. In short, Florida may prohibit takings that are allowed under the U.S. Constitution, but may not allow takings that are prohibited.

Florida Eminent Domain Law

The Florida Constitution addresses eminent domain in section 6, Article X, as follows:

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

The Florida Constitution prohibits takings of private property unless the taking is for a "public purpose" and the property owner is paid "full compensation." The Florida Supreme Court recognized long ago that the taking of private property is one of the most harsh proceedings known to the law, that "private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law."[5]

Generally speaking, in order for a taking to be valid in Florida, the condemning authority must:

1. Possess authority to exercise the power of eminent domain;
2. Demonstrate that a taking of private property is pursued for a valid public purpose and that all statutory requirements have been fulfilled;
3. Offer evidence showing that the taking is reasonably, not absolutely, necessary to accomplish the public purpose of the taking; and
4. Pay the property owner full compensation as determined by a 12-member jury.

Each of these four requirements is more fully discussed below.

1. The condemning authority must be authorized to exercise the power of eminent domain.

In order to take private property by eminent domain, an entity must possess statutory or constitutional authority to exercise the power of eminent domain. With the exception of cities and possibly charter counties, an entity does not have authority to exercise the power of eminent domain unless authorized to do so by the Legislature. If the Legislature delegates authority to exercise the power of eminent domain, procedures and requirements imposed by statute are mandatory.

[5] *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (Fla. 1947).
Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale, 315 So.2d 451 (Fla. 1975).

a. Constitutional Delegation of Home Rule Powers to Cities and Counties

The municipal home rule provision in Florida's Constitution authorizes cities to "exercise any power for municipal purposes except as otherwise provided by law".[6] In 1992, the Florida Supreme Court concluded that a statutory grant of authority is not necessary in order for a city to exercise the power of eminent domain.[7] However, because cities have all powers "except as otherwise provided by law", the Legislature may expressly prohibit cities from exercising the power of eminent domain for particular purposes. Rather than prohibiting municipal exercise of the power of eminent domain, the Legislature has granted municipalities broad statutory powers of eminent domain, including the power to take private property for "good reason connected in anywise with the public welfare of the interests of the municipality and the people thereof" and for "municipal purposes".[8]

The Florida Constitution grants charter counties "all powers of local self government not inconsistent with general law" and grants noncharter counties "such power of self-government as is provided by general law."[9] Based upon the broad constitutional grant of authority, it appears that charter counties possess the power of eminent domain except as expressly prohibited by general law. However, the Florida Supreme Court has stated, in what appears to be dicta, that counties may not have the power of eminent domain unless specifically authorized by the Legislature.[10] Even if charter counties do not possess constitutional home rule power to take property, the Legislature has granted broad statutory powers to all counties, including the power to take property for "any county purpose".[11]

It should be noted there is no evidence indicating that a city or county in Florida has exercised the power of eminent domain under constitutional home rule powers for the declared purpose of economic development.

2. A condemning authority must demonstrate that a taking is pursued for a valid public purpose and that any statutory requirements have been fulfilled.

a. What is a valid public purpose for which property may be taken by eminent domain under Florida law?

The second requirement for a valid taking is that the property must be taken for a public purpose. The fundamental question is this: what qualifies as a public purpose in Florida? There is not a definitive answer to the question for at least three reasons. First, the determination of whether a taking serves a valid public purpose depends upon the facts of each case. Second, the concept of public purpose has evolved in Florida case law over the past century from a narrowly defined and applied concept to broadly defined and applied concept. Third, the Florida Supreme Court has equated the public purpose necessary to support the issuance of public bonds with the public purpose necessary to support a taking of private property by eminent domain. However, as with eminent domain cases, recent bond validation cases appear to apply a broad interpretation of the public purpose doctrine while early cases apply a more narrow interpretation of the doctrine.

The Florida Courts have long held that the public purpose requirement in the Florida Constitution does not require private property taken by eminent domain to be "used by the public" if the court determines that the taking accomplishes a valid public purpose. However, Florida law does <u>not</u> allow government to take property from private owner A and transfer it to private owner B for "the <u>sole</u> purpose of making such property available to private enterprises for private use."[12]

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[6] Art. VIII, § 2, Fla. Const.
[7] *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992).
[8] § 166.411, F.S.
[9] Art. VIII, § 1, Fla. Const.
[10] *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992).
[11] § 127.01, F.S.
[12] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980); *State ex rel. Ervin v. Cotney,* 104 So.2d 346 (Fla. 1958).

In order to demonstrate that public purpose is not a clearly defined concept, the following Florida Supreme Court decisions illustrate the fact that some decisions apply the public purpose concept narrowly, while other cases apply the concept broadly.

The first case illustrating the narrow view is the 1947 case of *Peavy-Wilson Lumber Co. v. Brevard County*.[13] In the *Peavy* case, the Court concluded that the power of eminent domain should be limited to taking property for "something basically essential" such as roads, schools, drainage projects, parks, and playgrounds. However, even the *Peavy* Court recognized that the concept is not static and advances with caution to meet society's needs in conformity with the constitution.

In 1975, the court considered the case of *Baycol v. Downtown Development Authority of City of Ft. Lauderdale*[14], in which a downtown development authority attempted to condemn private property for a parking garage. The Supreme Court concluded that there was not a public need for extra parking facilities, which was cited as the sole basis for the taking, without the shopping center that would be constructed atop the parking garage. The development authority did not assert that economic development -- job creation or tax base enhancement -- was the public purpose for condemning the property. Therefore, the *Baycol* court did not explicitly rule on whether a taking for the declared public purpose of economic development is permissible under the Florida Constitution. The *Baycol* court declared, however, that private property may not be taken by eminent domain for a predominantly private use. To date, the Court has not established a "test" for determining when a public purpose predominates over the private interest. Each case is viewed on the individual facts presented to the court and based upon the public purpose asserted by the condemning authority. Therefore, it is unknown whether the Florida courts would consider a *Kelo*-type taking as serving a predominately public or private use.

In 1977, the court considered the case of *Deseret Ranches of Florida v. Bowman,*[15] and upheld a state statute that permitted one private property owner to exercise the power of eminent domain for the purpose of obtaining an easement of necessity over the property of another private landowner. The court reasoned that the "the statute's purpose is predominantly public and the benefit to the landowner is incidental to the public purpose….Useful land becomes more scarce in proportion to the population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stock raising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they may be utilized in the enumerated ways." It has been asserted that the court's decision in *Deseret* "utterly complicates what some thought might have otherwise been a straightforward argument that *Baycol* prohibits *Kelo*-style economic development takings. In *Deseret Ranches*, it was clear that all the direct benefits of the taking were private, and any public benefits were purely incidental. Yet the 'sensible utilization of land' was, for the Court, of such a dominant public purpose as to allow that rather lopsided outcome to be characterized as consistent with *Baycol*. One does not have to possess much imagination to think of how economic development takings could be portrayed as also serving the predominant public purpose of 'sensible utilization of land.'"[16]

In 1988, the court continued to broaden the application of the public purpose doctrine in *Fl. Dep't of Transp. v Fortune Federal Savings and Loan Ass'n,*[17] concluding that "[t]he term 'public purpose' does not mean simply that the land is used for a specific public function, i.e. a road or other right of way. Rather, the concept of public purpose must be read more broadly to include projects which benefit the state in a tangible, foreseeable way."

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[13] *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (Fla. 1947).
[14] *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975).
[15] 349 So.2d 155 (Fla. 1977).
[16] Professor J. B. Ruhl, *Property Rights at Risk? Eminent Domain Law in Florida After The U.S. Supreme Court Decision In Kelo v. City of New London*, p. 11 (James Madison Institute Backgrounder, Number 46, Sept. 2005).
[17] *Dep't of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).

There is also a large body of case law addressing the "public purpose" necessary to support the issuance of public bonds or the spending of public funds. When the Florida Supreme Court upheld the Community Redevelopment Act in 1980[18], it equated the public purpose necessary to support the issuance of public bonds with the public purpose necessary to support a taking of private property by eminent domain. At least since 1968, the Court has broadly applied the public purpose concept in bond validation cases. However, there are early bond validation cases that appear to apply a narrow view of the public purpose doctrine.

b. Determinations of public purpose

The Legislature may authorize an entity to take property and, at the same time, declare that the taking serves a particular public purpose. However, the ultimate question of the validity of a legislatively declared public purpose is resolved by the courts.[19] Nonetheless, the courts' role in determining whether the power of eminent domain is exercised in furtherance of a legislatively declared public purpose is narrow.[20] In order to invalidate a statute that has a stated public purpose, the party challenging the statute must show that the stated purpose is arbitrary and capricious and so clearly erroneous as to be beyond the power of the legislature.[21] The threshold question for the courts is not whether the proposed use is a public one, but whether the Legislature might reasonably consider it a public one.[22]

While the question of whether the use for which private property is taken is a public use is ultimately a judicial question, where the Legislature declares a particular use to be a public use, the presumption is in favor of its declaration, and the courts will not interfere unless the use is clearly and manifestly of a private character.[23]

Similarly, when a local government's governing body determines that a taking of private property serves a statutory public purpose, the determination is entitled to judicial deference and is presumed valid and correct unless patently erroneous. Unless a condemning authority acts illegally, in bad faith, or abuses its discretion, its selection of land for condemnation will not be overruled by a court; a court is not authorized to substitute its judgment for that of a governmental body acting within the scope of its lawful authority.[24] The court will sustain the local government's determination that a taking serves the statutory public purpose as long as it is "fairly debatable".[25]

3. A condemning authority must offer evidence showing that the taking is reasonably, not absolutely, necessary to accomplish the public purpose of the taking.

If a governmental entity is authorized to take property for a valid public purpose, the entity must show that taking the property is reasonably, not absolutely, necessary in order to accomplish the declared public purpose. First, the condemning authority must show some evidence of a reasonable necessity for the taking. Once a reasonable necessity is shown, the exercise of the condemning authority's discretion will not be disturbed in the absence of illegality, bad faith, or gross abuse of discretion.[26]

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[18] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980).
[19] *Dep't of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).
[20] *Id.*
[21] *Id.*
[22] *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (Fla. 1929).
[23] *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (Fla. 1926).
[24] *Canal Authority v. Miller*, 243 So.2d 131 (Fla. 1970).
[25] *Panama City Beach Community Redevelopment Agency v. State*, 831 So.2d 662 (Fla. 2002); *JFR Inv. v. Delray Beach Community Redevelopment Agency*, 652 So.2d 1261 (Fla. 4th DCA 1995).
[26] *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977).

4. A condemning authority must pay the property owner full compensation as determined by a 12-member jury.

If a court finds that a governmental entity is authorized to take private property for a valid public purpose, and that the entity has presented evidence showing that the property is reasonably necessary to accomplish the declared public purpose, the property owner must be paid full compensation for the taken property. Key aspects of the constitutional requirement for payment of full compensation may be summarized as follows:

- A property owner is entitled to full and just compensation.
- A twelve-member jury determines the amount of compensation.
- Determining the amount of just compensation is a judicial function that cannot be performed by the Legislature directly or indirectly.
- The Legislature may create an obligation to pay more than what the courts might consider full compensation.
- Generally, the just and full compensation due is the fair market value of the property at the time of the taking.
- A condemning authority must pay reasonable attorney's fees and costs.
- A landowner is entitled to compensation for the reasonable cost of moving personal property, including impact fees.
- Business damages are available only in the case of partial takings, not takings of a full parcel.

Impact of the *Kelo* Decision on Florida Law

The question of whether the *Kelo* decision impacts takings in Florida continues to be the subject of debate. Arguably, the *Kelo* decision has no direct impact on Florida's eminent domain law. Although the decision applies in Florida to the extent that a *Kelo*-type taking may not violate the U.S. Constitution, the decision does not mean that a *Kelo*-type taking is allowed under the Florida Constitution. Whether the Florida Constitution allows a *Kelo*-type taking must be decided by the Florida Supreme Court, not the U.S. Supreme Court. What remains uncertain is whether the *Kelo* decision will have an indirect impact on the Florida courts' interpretation and application of eminent domain law in any future attempts by cities or counties to take private property for economic development purposes.

Determining whether a *Kelo*-type taking may occur in Florida must be considered in two contexts:

1. First, whether a city or county taking of private property in a non-blighted or non-slum area for the purpose of economic development is permitted outside the context of Florida's Community Redevelopment Act; and

2. Second, whether *Kelo*-type takings are now occurring under the Community Redevelopment Act.

Kelo-type takings outside the Community Redevelopment Act context

Unlike Connecticut, the Florida Legislature has not enacted a statute that expressly authorizes takings of private property in non-blighted or non-slum areas for the purpose of economic development. Therefore, state agencies are prohibited from taking property for economic development purposes. Based on the absence of a statutory delegation of authority, it may appear that a *Kelo*-type taking cannot occur under any circumstances. As previously discussed, however, cities have and charter counties may have constitutional home rule power to take property by eminent domain for economic development purposes without an explicit authorization from the Legislature. In addition, current statutes grant broad home rule authority to cities and counties, including the authority to exercise the power of eminent domain for any municipal or county purpose, and declare that economic development is a public purpose for which cities and counties may expend public funds. It could be argued that,

since the Legislature has declared economic development a public purpose for spending public funds[27], economic development may be considered a public purpose for which cities and counties may exercise the power of eminent domain.

Based upon the uncertainty created by the current case law and the lack of case law directly on point, it is not possible to determine how the Florida courts will view takings of private property for economic development purposes in Florida if directly presented with the issue. What is certain is that there is not an explicit statutory or constitutional provision that prohibits cities or counties from taking private property in non-blighted or non-slum areas for purposes of increasing jobs, increasing the tax base, maximizing efficient use of property, or other general economic development purposes. Further, the Florida Supreme Court has never considered a case involving a taking of private property in non-blighted or non-slum areas by a city or county asserting home rule powers for the declared public purpose of economic development.

Therefore, the decision as to whether *Kelo*-type takings are permissible in Florida lies squarely in the judiciary, and will remain so unless the constitution or statutes are amended to restrict takings for economic development purposes or restrict transfers of taken property to private entities.

Takings in the context of the Community Redevelopment Act

After the *Kelo* decision was issued, the media and other interested parties focused primarily on Florida's Community Redevelopment Act (Act), alleging that abuses of the Act are occurring throughout Florida. However, the *Kelo* decision does not have a direct impact on takings in the redevelopment context due to the fact that the property at issue in *Kelo* was not blighted or taken under a "redevelopment" statute.

In 1980, the Florida Supreme Court upheld Florida's Community Redevelopment Act in its entirety. The Act authorizes the use of eminent domain for acquisition and clearance of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions in a geographic area. The Act also authorizes "substantial private and commercial uses of the property after redevelopment."[28]

The Act imposes requirements that must be satisfied by a county or city that wishes to create a redevelopment agency, declare redevelopment areas, or issue revenue bonds to finance projects within these areas. Under the Act, a county or city may not exercise community redevelopment authority, including the power of eminent domain, until the county or city satisfies the statutory requirements. Those requirements include adoption of a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria of a "slum area" or "blighted area" as defined in statute,[29] and that the rehabilitation, conservation, or redevelopment of the area is necessary in the interest of the public health, safety, morals, or welfare of the residents of the county or city.[30]

The Community Redevelopment Act does not specifically authorize takings for "economic development" purposes; rather, the Act authorizes the taking of property within a blighted or slum area for the public purpose of eliminating and preventing slum and blight conditions, and permits the transfer of taken property to private entities for redevelopment in order to accomplish that public purpose. Private property rights advocates assert that the Act is being used to take areas of property that are not genuinely blighted for purely economic development purposes. Much of the concern expressed by property rights advocates centers around the application of the statutory definition of "blighted area," and what many perceive as the vague and inappropriate criteria in the definition.

Soon after the *Kelo* decision was issued, an Order of Taking was entered by the Circuit Court in Volusia County in a case involving takings of private property on the Daytona Beach Boardwalk, which is

[27] ss. 125.045 and 166.021, F.S.
[28] *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980).
[29] § 163.355, F.S.
[30] § 163.355, F.S.

located within a community redevelopment area. The Order of Taking cites extensively to the *Kelo* decision, as well as to Florida judicial decisions, to uphold the takings in the case. Citing the *Kelo* decision, the circuit court opined that "[w]hen a taking serves a public purpose, the fact that the property ultimately is transferred to a private owner and that it confers a private benefits on others does not render the taking unconstitutional. The public use clause would be violated only if the taking were for purely private purposes or if the alleged public purpose were merely pretextual."[31]

Community Redevelopment Act issues addressed in case law

A large body of case law exists regarding the exercise of eminent domain under the Community Redevelopment Act, which includes the following significant judicial conclusions:

- A community redevelopment agency is not required to prove that the same level of blight exists when it seeks to condemn property as was present when the redevelopment plan was initially adopted.[32]
- Designations of blight or slum do not expire after a given period of time; therefore, property located within a redevelopment area is subject to taking for an indefinite period of time.[33]
- If a public purpose and reasonable necessity exists for the taking of property for slum or blight clearance, the fact that a landowner has begun to develop the property in accordance with the redevelopment plan does not give the owner an option to retain and develop the property unless approved by the redevelopment agency.[34]
- The general characteristics of a slum or blighted geographic area control whether property within the entire area is subject to taking, not the condition of an individual parcel.[35] Therefore, a parcel of property may be subject to taking by eminent domain if the parcel is located in an area designated as slum or blighted even if the parcel itself is not in a slum or blighted condition.

Summary of Key Points

The following may be considered a summary of the key aspects of the preceding discussion of the law:

- The decision as to whether a taking for economic development purposes is permissible in Florida lies squarely in the judiciary, and will remain so unless the constitution or statutes are amended to restrict such takings.
- The *Kelo* decision did not directly affect the fundamental principles of Florida's eminent domain law; however, for the first time, the U.S. Supreme Court approved, under the U.S. Constitution, a taking of private property in a non-blighted or non-slum area and subsequent transfer to private parties for the purpose of economic development.
- Whether the *Kelo* decision will have an indirect impact on the Florida courts' interpretation and application of the law in a future attempt by cities or counties to take private property for economic development purposes is unknown.
- There is not a Florida statute that explicitly prohibits the taking of private property for economic development purposes; therefore, cities and counties appear to have the underlying authority to initiate a taking for economic development purposes under their constitutional and statutory home rule power.

[31] *City of Daytona Beach v. Mathas*, 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005).
[32] *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So.2d 199 (Fla. 4th DCA 1991); *City of Daytona Beach v. Mathas*, 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005).
[33] *Rukab v. City of Jacksonville Beach*, 866 So.2d 773 (Fla. 1st DCA 2004); *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So.2d 199 (Fla. 4th DCA 1991); *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977).
[34] *Post v. Dade County*, 467 So.2d 758 (Fla. 3rd DCA 1985); rev. den. *Post v. Dade County*, 479 So.2d 118 (Fla. 1985).
[35] *Berman v. Parker*, 348 U.S. 26 (1954); *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980); *Post v. Dade County*, 467 So.2d 758 (Fla. 3rd DCA 1985); rev. den. *Post v. Dade County*, 479 So.2d 118 (Fla. 1985); *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So.2d 745 (Fla. 1959).

- The Florida Supreme Court has not considered a case involving a taking for the declared public purpose of economic development. Therefore, whether the Court will uphold or prohibit such takings in the future is unknown.
- The Florida Supreme Court has upheld the Community Redevelopment Act, concluding that the elimination and prevention of slum and blight serves a public purpose and that the public purpose is not invalidated by the substantial involvement of private interests in redevelopment.
- The Community Redevelopment Act includes a broad definition of "blighted area," which may permit the taking of an individual parcel of property that does not appear to be blighted. Private property rights advocates claim that under the current definition of "blight," *Kelo*-type takings are occurring in Florida.
- The League of Cities and the Community Redevelopment Association assert that eminent domain is typically a last resort to complete the land assembly process. However, they predict that, without the power of eminent domain, "CRAs will have much difficulty in assembling land especially where many landowners are involved".

Effect of Proposed Changes

This House Joint Resolution proposes an amendment to the State Constitution to prohibit the transfer of ownership or control of private real property taken by eminent domain pursuant to a petition filed on or after January 2, 2007, to any natural person or private entity, except that:

> (a) Ownership or control of such property may be conveyed to:
> (1) A natural person or private entity for use in providing common carrier services or systems;
> (2) A natural person or private entity for use as a road or other right-of-way or means open to the public for transportation, whether at no charge or by toll;
> (3) A natural person or private entity that is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;
> (4) A natural person or private entity for use in providing public infrastructure;
> (5) A natural person or private entity that occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;
> (6) A natural person or private entity if the property was owned and controlled by the condemning authority or a governmental entity for at least 5 years after the condemning authority acquired title to the property; or
> (7) A natural person or private entity in accordance with subsection (b).
> (b) If ownership of property is conveyed to a natural person or private entity pursuant to paragraph (a)(1), (2), (3), (4), or (5), and that natural person or private entity retains ownership and control of the property for at least 5 years after acquiring title, the property may subsequently be transferred to another natural person or private entity without restriction.

Common Carriers

Subsection (a)(1) allows transfers of taken property to a natural person or private entity for use in providing common carrier services or systems. A common carrier is generally defined as "one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally….The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently and hence he is regarded, in some respects, as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out, by words or by a course of conduct, as to the service offered or performed…. To constitute a public conveyance a

common carrier, it is not necessary that it come within the definition of a public utility so as to be subjected to the rules and regulations of a public utility commission."

Public Infrastructure

Subsection (a)(4) allows the transfer of taken property to a private person or entity if the property will be used for purposes of public infrastructure. Although the new statutory section does not define "public infrastructure", the term is defined in The American Heritage Dictionary as "[t]he basic facilities, services, and installations needed for the functioning of a community or society, such as transportation and communications systems, water and power lines, and public institutions including schools, post offices, and prisons."

Infrastructure has come to connote a diverse collection of constructed facilities and associated services, ranging from airports to energy supply to landfills to wastewater treatment. Many of the facilities are built and operated by governments, and thus fall easily into the category of public works, but others are built or operated, in whole or in part, by private enterprise or joint public-private partnership. What is today considered infrastructure has traditionally been viewed as separate systems of constructed facilities, supporting such functions as supplying water, enabling travel, and controlling floods.

A 1987 committee of the National Research Council, reporting on Infrastructure for the 21st Century adopted the term "public works infrastructure" including both specific functional modes—highways, streets, roads, and bridges; mass transit; airports and airways; water supply and water resources; wastewater management; solidwaste treatment and disposal; electric power generation and transmission; telecommunications; and hazardous waste management—and the combined system these modal elements comprise. Parkland, open space, urban forests, drainage channels and aquifers, and other hydrologic features also qualify as infrastructure, not only for their aesthetic and recreational value, but because they play important roles in supplying clean air and water.

C. SECTION DIRECTORY: Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: Please see Fiscal Comments.

2. Expenditures: Publication costs incurred by the Department of State in informing the public of this proposed committee amendment would be an estimated $50,000, assuming the ballot summary contains 75 or less words. Please see Fiscal Comments for additional information.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: Please see Fiscal Comments.

2. Expenditures: Please see Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: Private entities who may, today, acquire taken property for "non-traditional" economic uses will no longer be permitted to acquire ownership or control of taken property from a condemning authority unless the transfer qualifies as an exception to the general prohibition. On the other hand, less private property may be taken given the prohibition on transfers to private entities except under limited circumstances.

D. FISCAL COMMENTS:

Impact of Local Governments: The amendment proposed by this joint resolution allows the transfer of taken property to a private entity for any use if the property is retained by the condemning authority, or a private party to whom property was transferred under one of the exceptions, for 5 years after acquiring title to the property. Requiring taken property to be retained for five years before the property may be transferred to a private entity for any use may result in some costs to the condemning authority, including costs of maintenance.

Impact on State Government: The amendment proposed by this joint resolution allows the transfer of taken property to a private entity for any use if the property is retained by the condemning authority, or a private party to whom property was transferred under one of the exceptions, for 5 years after acquiring title to the property. This provision applies to state agencies as well as any other condemning authority in the state. Requiring taken property to be retained for five years before the property may be transferred to a private entity for any use may result in some costs to a state agency condemning authority, including costs of maintenance.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The mandates provisions of Article VII, section 18 of the Florida Constitution do not apply to joint resolutions.

2. Other: Article XI, Section 1 of the State Constitution provides the Legislature with the authority to propose amendments to the State Constitution by joint resolution approved by three-fifths of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or may be placed at a special election held for that purpose.

B. RULE-MAKING AUTHORITY: Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS: Amendments or revisions to the Florida Constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[36] Passage in a committee requires a simple majority vote. If the joint resolution is passed in this session, the proposed amendment would be placed before the electorate at the 2006 general election, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.[37] Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published.[38]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 22, 2006, the Local Government Council adopted an amendment to the resolution to eliminate exception (a)(6), which allows the transfer of taken property to a natural person or private entity if the property was taken to eliminate an existing threat to public health or public safety as provided by general law. This amendment was recommended by the Select Committee to Protect Private Property Rights at its March 13, 2006 meeting.

[36] *See* Art. XI, Sec. 1, Fla. Const.
[37] *See* Art. XI, Sec. 5(a), Fla. Const. The 2006 general election is on November 7, 2006.
[38] *See* Art. XI, Sec. 5(c), Fla. Const.