

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Community Affairs Committee

BILL: CS/SB 2168

INTRODUCER: Judiciary Committee and Judiciary Committee

SUBJECT: Eminent Domain

DATE: April 20, 2006

REVISED: 04/24/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Luczynski</u>	<u>Maclure</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Herrin</u>	<u>Yeatman</u>	<u>CA</u>	<b>Fav/2 amendments</b>
3.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

### I. Summary:

In *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), the U.S. Supreme Court held that improving the local economy meets the public purpose requirement of the Takings Clause of the U.S. Constitution. In response to *Kelo* and in recognition that the safeguards of private property rights of Floridians are sometime inadequate, this committee substitute (CS) would amend several statutes related to the exercise of the power of eminent domain.

This CS heightens the safeguards of private property rights by restricting the use of eminent domain. The use of the eminent domain power is restricted in the following ways:

- For counties and municipalities, the CS preempts the power of eminent domain to the state. The eminent domain power is then delegated to the counties and municipalities for specific purposes as enumerated in the general eminent domain statutes for counties and municipalities and as otherwise provided for by general law or special act.
- The CS provides in a general eminent domain statute that the prevention and elimination of slums and blight does not satisfy the public purpose requirement of the Takings Clause of the State Constitution.
- The power of eminent domain to prevent and eliminate slums and blight is removed from the Community Redevelopment Act.

- The CS provides that the use of eminent domain, for those public purposes authorized by law, within a community redevelopment area may not be delegated to a community redevelopment agency.
- The CS limits the conveyance of property acquired by eminent domain to another private entity with certain exceptions. This limitation applies to all eminent domain takings regardless of the authority pursuant to which the taking is authorized.

This CS creates section 73.013, Florida Statutes. This CS substantially amends the following sections of the Florida Statutes: 73.021, 127.01, 127.02, 163.335, 163.340, 163.345, 163.358, 163.370, 163.380, 166.401, and 166.411. This CS repeals section 163.375, Florida Statutes.

## II. Present Situation:

**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 public 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. However, as the Florida Supreme Court has held, municipalities do not need this statutory authority to exercise eminent domain for a valid municipal purpose.<sup>1</sup> 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, F.S., 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 under home rule powers with the express public purpose of economic development.

Counties and municipalities also have the power of eminent domain to remedy slum and blight under the Community Redevelopment Act. The Legislature has determined that the exercise of the powers granted under the Act are for a public purpose.<sup>2</sup> After a municipality or county makes a finding that slum or blight exists, it may create a community redevelopment agency 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

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<sup>1</sup> *City of Ocala v. O.J. Nye*, 608 So. 2d 15, 17 (Fla. 1992).

<sup>2</sup> Section 163.335(3), F.S.

financing. Many valid redevelopment activities to cure blight—especially blight based on economic-related factors<sup>3</sup>—inherently have an economic development-type character.

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 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.<sup>4</sup>

**Concerns Raised by *Kelo*** - In June 2005, the U.S. Supreme Court held in *Kelo* that improving the local economy meets the public purpose requirement of the Takings Clause of the U.S. Constitution. *Kelo* has raised concerns regarding the adequacy of safeguards for private property rights. In Florida, concerns are focused on the Community Redevelopment Act because takings to remedy slum and blight under the Act may have an economic development-type character and frequently involve private to private transfers.

**Senate Interim Project** - In response to public concerns about legal safeguards for Florida property owners and potential adverse implications of *Kelo*, the Committee on Judiciary undertook Senate Interim Project 2006-151, entitled *Eminent Domain*.<sup>5</sup> In response to these concerns, this CS provides additional safeguards for private property rights.

### III. Effect of Proposed Changes:

**Section 1** creates s. 73.013, F.S., to limit the conveyance of property taken by eminent domain to private parties. The CS prohibits transfers of property taken by eminent domain to private parties unless the transfer qualifies as one of the exceptions listed in this section. This section provides that if the state, any political subdivision as defined by statute, or any other entity to which the power of eminent domain is delegated files a petition of taking on or after July 1, 2006, regarding a parcel of real property, ownership, lease, or control of property acquired pursuant to the petition may not be conveyed by the condemning authority or any other entity to a natural person or private entity, except that ownership, lease, or control of property acquired pursuant to the petition may be conveyed to a natural person or private entity:

- (1) For use in providing common-carrier services or systems;
- (2) For use as a road or other right-of-way or means that is open to the public for transportation, whether at no charge or by toll;
- (3) 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

<sup>3</sup> Economic-related blight factors arguably would include: lack of appreciation of aggregate assessed values of real property, s. 63.340(8)(b), F.S., falling lease rates, s. 163.340(8)(g), F.S., and higher vacancy rates, s. 163.340(8)(i), F.S.

<sup>4</sup> See *Kelo v. City of New London*, 125 S. Ct. 2655, 2673-74 (2005) (O'Connor, J., dissenting).

<sup>5</sup> See [http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-151ju.pdf](http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-151ju.pdf).

- systems, stormwater or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;
- (4) For use in providing public infrastructure;
  - (5) 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) After public notice and competitive bidding unless otherwise provided by general law or special act, if the property was owned and controlled by the condemning authority or a governmental entity for less than 10 years after the condemning authority acquired title to the property, the condemning authority has shown that the property is no longer needed for the use or purpose for which it was acquired, and the owner from whom the property was taken by eminent domain was given the opportunity to repurchase the property at the price he or she received from the condemning authority;
  - (7) After public notice and competitive bidding unless otherwise provided by general law or special act, if the property was owned and controlled by the condemning authority or a governmental entity for at least 10 years after the condemning authority acquired title to the property; or
  - (8) In accordance with subsection (2).

Subsection (2) provides that if ownership of property is conveyed to a natural person or private entity pursuant to one of the first five reasons enumerated above, and that natural person or private entity retains ownership and control of the property for at least 10 years after acquiring title, the property may subsequently be transferred, after public notice and competitive bidding unless otherwise provided by general law, to another natural person or private entity without restriction.

**Section 2** amends s. 73.021, F.S., to clarify that the condemning authority has the burden of showing reasonable necessity and a public purpose or use. Moreover, the public interest must dominate any private gain. The CS also provides in a general eminent domain statute that the prevention and elimination of slums and blight does not satisfy the public purpose requirement of the Takings Clause of the State Constitution.

**Section 3** amends s. 127.01, F.S., to preempt the power of eminent domain to the state and delegates limited authority to exercise eminent domain back to the counties, subject to the limitations provided section 1 of this CS. Under s. 127.01, F.S., counties have broad authority to exercise eminent domain for any county purpose. The CS replaces this broad grant of eminent domain power with the authority to exercise eminent domain for any of an enumerated list of public uses or purposes or as otherwise provided by general law or special act.

The section provides a list of uses or purposes similar to the list of enumerated uses or purposes for which a municipality may exercise the power of eminent domain. Some of the authorized purposes include: streets, public parks, drainage, county buildings, and public utilities. Provisions prescribing procedural requirements related to the exercise of eminent domain are removed from s. 127.01, F.S., and replaced by the prescription that all uses of eminent domain must be done in the manner provided for in chapters 73 and 74, F.S.

**Section 4** amends s. 127.02, F.S., to require a board of county commissioners, prior to exercising the power of eminent domain, to adopt a resolution authorizing the acquisition of a specific

parcel of property. Counties are also authorized to exercise the power of eminent domain as provided by general law or special act.

**Section 5** amends s. 163.335, F.S., to remove the legislative presumption that the exercise of the power of eminent domain in furtherance of a community redevelopment plan serves public uses and purposes. The CS adds the legislative finding that the prevention and elimination of slums and blight do not satisfy the public-purpose requirement of the Takings Clause of the State Constitution, s. 6(a), Art. X, Fla. Const.

**Section 6** amends s. 163.340(12), F.S., to correct a cross-reference.

**Section 7** amends s. 163.345, F.S., to subject a county or municipality that acquired property for purposes of the Community Redevelopment Act to the limitations in section 1 of this CS when considering the disposition of the property.

**Section 8** amends s. 163.358, F.S., to remove the power of a county or city to delegate the power of eminent domain to a community redevelopment agency. It corrects cross-references.

**Section 9** amends s. 163.370, F.S., to substantially limit the power of eminent domain under the Community Redevelopment Act. The CS provides that eminent domain may be used for those purposes authorized in chapters 127 and 166, F.S., or as otherwise provide by general law or special act within a community redevelopment area; however, this limited eminent domain power may not be delegated to a community redevelopment agency. The conveyance of property acquired by the power of eminent domain is subject to the limitations provided in a new section under ch. 73, F.S.

**Section 10** repeals s. 163.375, F.S., which grants the power of eminent domain in connection with community redevelopment.

**Section 11** amends s. 163.380, F.S., to subject property that is acquired in a community redevelopment area using eminent domain to the limitations in section 1 of this CS.

**Section 12** amends s. 166.401, F.S., to make changes for municipalities that are similar to those changes made for counties in section 3 of this CS. It preempts the power of eminent domain to the state except as otherwise provided by general law or special act. The CS provides that when a municipality exercises the power of eminent domain it must do so in the manner provided for in chapters 73 and 74, F.S. Prior to exercising the power of eminent domain, the governing body of a municipality must adopt a resolution authorizing the acquisition of a specific parcel of property.

**Section 13** amends s. 166.411, F.S., to modify the list of authorized uses and purposes of eminent domain for municipalities. The CS removes the provision providing that the exercise of eminent domain for the abatement of any nuisance serves a public use or purpose and removes the language that provided the broad catch-all of “other municipal purposes which shall be coextensive with the powers of the municipality exercising the right of eminent domain.”<sup>6</sup> The

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<sup>6</sup> Section 166.411(10), F.S.

CS clarifies that when a county or municipality exercises the power of eminent domain for an authorized use or purpose, it must do so in the manner provided for in chapters 73 and 74, F.S.

**Section 14** provides that the provisions of the CS do not apply to property for which a petition of condemnation is filed under the authority of the Community Redevelopment Act of 1969 on or before September 30, 2006, if:

- (1) The parcel to be acquired is located within the boundaries of a community redevelopment area, created pursuant to s. 163.356, F.S., which exists as of March 7, 2006; and
- (2) The notice and written offer, as evidenced by the return receipt required pursuant to s. 73.015(1)(c), F.S., were given to the fee owner of the parcel to be acquired after September 7, 2005, and before March 7, 2006.

**Section 15** provides effective dates. The provisions of the CS are applicable to all property for which a petition of condemnation is filed pursuant to ch. 73, F.S., on or after July 1, 2006.

#### **IV. Constitutional Issues:**

1. Municipality/County Mandates Restrictions:

None.

2. Public Records/Open Meetings Issues:

None.

3. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

1. Tax/Fee Issues:

None.

2. Private Sector Impact:

The CS may have an indeterminate impact on the cost of completing existing redevelopment projects where parcels for redevelopment have not been completely assembled. Without the threat of eminent domain and the power of eminent domain to eliminate slums and blight, the cost to assemble parcels for redevelopment may increase as counties, municipalities, and developers are forced to offer holdout property owners a greater portion of the property's anticipated redevelopment increase in value. In some cases, the existing redevelopment plans may have to be modified to accommodate holdout property owners who refuse to negotiate the sale of their property.

3. **Government Sector Impact:**

The CS may have an indeterminate impact on counties and municipalities who may experience increased costs of fulfilling redevelopment contracts or may not be able to fulfill the terms of redevelopment contracts. Contracts may cost more to fulfill due to the increased costs of assembling redevelopment parcels without the threat of eminent domain or the power of eminent domain. Contract terms may not be met due to the inability to complete the assembly of a parcel due to holdout property owners who refuse to negotiate the sale of their property.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## VIII. Summary of Amendments:

### **Barcode 683906 by Community Affairs:**

The amendment provides an exception to the restrictions on the power of eminent domain when a property owner relinquishes the property to the governmental entity in order to preserve the tax benefits under s. 1033 of the Internal Revenue Code.

### **Barcode 954132 by Community Affairs:**

The amendment changes the effective date of the CS to October 1, 2006, and provides that the provisions of the CS shall apply when a taking of petition under ch. 73, F.S., is filed on or after that date. It provides an exception from the applicability of the provisions of the CS for those community redevelopment agencies that adopted a resolution of necessity since January 1, 2001, and that have entered into an agreement with a master developer. It also provides that until January 1, 2010, the power of eminent domain may be used by the community redevelopment agency or a local government for property within the redevelopment area that has recently adopted a resolution of necessity and has an agreement with a master developer if the property has not been designated before October 1, 2006, as homestead property.