

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: Judiciary Committee

BILL: CS/SB 2168

INTRODUCER: Judiciary Committee and Judiciary Committee

SUBJECT: Eminent Domain

DATE: April 6, 2006

REVISED: _____

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

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 bill would amend several statutes related to the exercise of the power of eminent domain.

This bill 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 bill 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 bill 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 bill 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 bill 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 bill creates section 73.013, Florida Statutes. This bill 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 bill 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.¹ 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.² 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 financing. Many valid redevelopment activities to cure blight—especially blight based on economic-related factors³—inherently have an economic development-type character.

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

² Section 163.335(3), F.S.

³ 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.

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.⁴

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*.⁵ In response to these concerns, this bill provides additional safeguards for private property rights.

III. Effect of Proposed Changes:

This bill heightens the safeguards of private property rights by restricting the use of eminent domain. The bill limits the use of eminent domain to traditional uses where the property taken is held in public ownership, such as with a road or park, or where the property is transferred to private ownership, but is available for the public's use, such as with a railroad or a utility. These limitations on the power of eminent domain are accomplished by preempting the counties' and municipalities' power of eminent domain to the state, removing the broad statutory grants of eminent domain power to the counties and municipalities, delegating eminent domain power to the counties and municipalities for certain enumerated purposes and as otherwise provided by general law or special act, removing the authority to use eminent domain to prevent or eliminate slums and blight, and limiting the conveyance of property acquired by eminent domain.

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

⁵ See http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-151ju.pdf.

Constitutional Home Rule Powers

The bill preempts to the state the constitutional home rule powers that municipalities and arguably charter counties have to exercise the power of eminent domain. This is provided for by modifying the statutes that currently grant general eminent domain power to counties and municipalities. The bill modifies ss. 127.01 and 166.401, F.S., preempting to the state the power of eminent domain and delegating limited eminent domain power back to counties and municipalities. This modification is necessary in light of Florida case law holding that municipalities do not need statutory authority to exercise eminent domain for a public purpose because they already have such authority under their constitutional home rule powers.⁶ Under constitutional home rule power, municipalities “have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.”⁷ In *City of Ocala v. O.J. Nye*, the Florida Supreme Court stated that constitutional home rule power grants municipalities the authority to exercise the power of eminent domain for a public purpose unless it is expressly prohibited.⁸ Therefore, without an express, general restriction on the exercise of eminent domain, laws authorizing municipalities to exercise eminent domain for a particular purpose or prescribing how eminent domain may be exercised could be held by the courts to be unnecessary and without effect. By analogy, the same reasoning might apply to charter counties, which “have all powers of local self-government not inconsistent with general law”; however, there do not appear to be any cases specifically holding the same for charter counties.⁹

Limited Delegation of Power of Eminent Domain to Counties

The bill preempts 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 in a new section under ch. 73, F.S. (discussed below). Under s. 127.01, F.S., counties have broad authority to exercise eminent domain for any county purpose. To provide greater property rights protection, the bill 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 bill modifies s. 127.01, F.S., to provide 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. Prior to exercising the power of eminent domain, the board of county commissioners must 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.

⁶ *Nye*, 608 So. 2d at 17.

⁷ Art. VIII, Sect. 2, FLA. CONST.

⁸ *Nye*, 608 So. 2d at 17.

⁹ Art. VIII, Sect. 1, FLA. CONST.

Limited Delegation of Power of Eminent Domain to Municipalities

The bill preempts the power of eminent domain to the state and delegates limited authority to exercise eminent domain back to the municipalities, subject to the limitations provided in a new section under ch. 73, F.S. (discussed below). Similar to the changes to s. 127.01, F.S., for counties, the bill modifies s. 166.401, F.S., for municipalities. However, because the current law provides a list of the authorized uses and purposes of eminent domain for municipalities, the bill only modifies that list to increase safeguards for private property rights. The bill 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.”¹⁰ The bill 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.

Limitations on the Exercise of Eminent Domain Under the Community Redevelopment Act

The bill also substantially limits the power of eminent domain under the Community Redevelopment Act. The legislative presumption that the exercise of the power of eminent domain in furtherance of a community redevelopment plan serves public uses and purposes is removed. The bill 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. Consistent with this finding, the bill repeals s. 163.375, F.S., that grants the power of eminent domain in connection with community redevelopment. The bill 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. Furthermore, 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. (discussed below).

Limitations on the Conveyance of Property Acquired by Eminent Domain

The bill creates s. 73.013, to limit the conveyance of property taken by eminent domain to private parties. This section is created to help ensure that property taken by eminent domain is held for the public purpose for which it was taken. The bill 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:

¹⁰ Section 166.411(10), F.S.

- (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 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 the following provision:

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.

Other Enhanced Protections

The bill 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. The bill clarifies 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 bill 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.

The bill provides that it shall 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 the following conditions are met:

- (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.

The bill provides that except as otherwise provided, it shall take effect July 1, 2006, and applies to all property for which a petition of condemnation is filed pursuant to ch. 73, F.S., on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill 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.

C. Government Sector Impact:

The bill 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.

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

VIII. Summary of Amendments:

None.

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