

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: SPB 7102

INTRODUCER: For consideration by Judiciary Committee

SUBJECT: Eminent Domain

DATE: February 14, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Luczynski</u>	<u>Maclure</u>	_____	Pre-meeting
2.	_____	_____	_____	_____
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 by municipalities and counties. The existing eminent domain provisions of chapters 127 and 166 provide counties and municipalities with broad authority to use eminent domain for county and municipal purposes. The bill limits the use of eminent domain, by counties and municipalities, to traditional uses by modifying the general eminent domain provisions of chapters 127 and 166, F.S. Traditional uses are those 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.

The bill also substantially affects the power of eminent domain under the Community Redevelopment Act (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 would limit the power of eminent domain under the Act to those purposes permitted under the proposed modifications to chapters 127 and 166, F.S. The transfer of property acquired by the power of eminent domain to private ownership would be prohibited except as permitted under the conditions authorized in the proposed modifications to s. 127.01(2) or s. 166.411, F.S.

Sections 127.01 and 166.401, F.S., are modified to preempt to the state the power of eminent domain except as otherwise provided for by law. This modification is necessary in light of Florida case law holding that municipalities do not need statutory authority to exercise eminent domain because they already have such authority under their constitutional home rule powers.¹ Arguably, without a limitation on home rule powers, the other eminent domain statutory safeguards would be noncompulsory, at least for municipalities and possibly for charter counties.

This bill substantially amends the following sections of the Florida Statutes: 127.01, 127.02, 163.335, 163.345, 163.370, 163.375, 163.380, 166.401, and 166.411.

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.² Accordingly, under its constitutional home rule powers, a municipality may take property for a public purpose as long as it is not expressly prohibited. By analogy, the same reasoning would seem to apply to charter counties, but there do not appear to be any cases specifically holding the same. Thus, except for noncharter counties, the authority to exercise eminent domain under chapters 127 and 166, 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.³ 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

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

² *Id.*

³ Section 163.335(3), F.S.

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 factors⁴—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.⁵

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*.⁶ 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 by municipalities and counties. 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. This limitation on the power of eminent domain is accomplished by adding language, to the statutes providing general eminent domain power to counties and municipalities in ss. 127.01 and 166.401, F.S., providing that property acquired by eminent domain may not be transferred to private ownership except as necessary to accomplish a purpose specifically authorized by law.

Constitutional Home Rule Powers

⁴ Economic-related blight factors arguably would include: lack of appreciation of aggregate assessed values of real property, s. 163.340(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.

⁵ See *Kelo v. City of New London*, 125 S. Ct. 2655, 2673-74 (2005) (O'Connor, J., dissenting).

⁶ See http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-151ju.pdf.

Additionally, ss. 127.01 and 166.401, F.S., are modified to preempt to the state the power of eminent domain except as otherwise provided for by law. 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.⁷ 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.”⁸ 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.⁹ 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.¹⁰

Limited Delegation of Power of Eminent Domain to Counties

Under s. 127.01, F.S., counties have authority to exercise eminent domain for any county purpose. Because the bill would reserve the power of eminent domain to the state except for uses or purposes authorized, the bill modifies s. 127.01, F.S., to provide a list of uses or purposes for which a county may exercise 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.

Limited Delegation of Power of Eminent Domain to Municipalities

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.”¹¹ 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

⁷ *Nye*, 608 So. 2d at 17.

⁸ Art. VIII, Sect. 2, FLA. CONST.

⁹ *Nye*, 608 So. 2d at 17.

¹⁰ Art. VIII, Sect. 1, FLA. CONST.

¹¹ Section 166.411(10), F.S.

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 would limit the power of eminent domain under the Act to those purposes permitted under the proposed modifications to chapters 127 and 166, F.S. The effect of this limitation would be to remove the remedy of slum and blight as valid public purposes for the exercise of eminent domain. Counties and municipalities would be authorized to use eminent domain for those uses and purposes enumerated in chapters 127 and 166 to the extent that the use was in connection with community redevelopment. Because eminent domain would only be used as provided for under chapters 127 and 166, the bill removes the procedural provisions related to the admissibility of evidence in proceedings related to the use of eminent domain for the purpose of eliminating slum and blight. Furthermore, the transfer of property acquired by the power of eminent domain to private ownership would be prohibited except as permitted under the conditions authorized in the proposed modifications to s. 127.01(2) or s. 166.411, F.S.

In conjunction with the restrictions on the power of eminent domain, the bill removes the broad authority to enter into any building or property in a community redevelopment area for various purposes.

The bill provides that it shall apply to all pending eminent domain proceedings and all pending appeals of eminent domain proceedings.

The bill provides that it shall take effect upon becoming a law.

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 slum 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.

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.
