Select Committee to Protect Private Property Rights

Wednesday September 14, 2005
4:30 p.m.—6:00 p.m.
Morris Hall

Meeting Packet

Allan G. Bense
Speaker

Marco Rubio
Chair

The Florida House of Representatives

Select Committee to Protect Private Property Rights
Representative Marco Rubio, Chair

MEMORANDUM

To: Members of the Select Committee to Protect Private Property Rights
From: Tom Hamby, Staff Director
Date: September 6, 2005
Re: September 14th Meeting Packet

Chair Rubio asked that I send you the attached materials to assist you in your preparation for the September 14th meeting of the Select Committee to Protect Private Property Rights. The materials include a variety of documents that are listed in the table of contents on the following page.

Included under Tab 8 is a copy of an electronic survey Select Committee staff sent to several individuals with whom we have discussed the U.S. Supreme Court's opinion in Kelo v. City of New London and its implications for Florida Law. Also included under Tab 8 are the responses to the survey received by noon, September 6. The purpose of the survey was to assist staff and the Members of the Select Committee in understanding current law in Florida as it relates to the use of eminent domain for the purposes of economic development and redevelopment and the effects of the Kelo decision on Florida Law.

Please call me at (850) 487-1342 if you have any questions regarding the attached materials.

1101 The Capitol, 402 South Monroe Street, Tallahassee, Florida 32399-1300

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15. Letter from Attorney General Charlie Crist

16. Memorandum from NCSL addressing eminent domain legislation in other states

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KELO ET AL. *v.* CITY OF NEW LONDON ET AL.

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 04–108. Argued February 22, 2005—Decided June 23, 2005

After approving an integrated development plan designed to revitalize its ailing economy, respondent city, through its development agent, purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings when petitioners, the owners of the rest of the property, refused to sell. Petitioners brought this state-court action claiming, *inter alia,* that the taking of their properties would violate the "public use" restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of the some of the properties, but denying relief as to others. Relying on cases such as *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, and *Berman* v. *Parker*, 348 U. S. 26, the Connecticut Supreme Court affirmed in part and reversed in part, upholding all of the proposed takings.

Held: The city's proposed disposition of petitioners' property qualifies as a "public use" within the meaning of the Takings Clause. Pp. 6–20.

(a) Though the city could not take petitioners' land simply to confer a private benefit on a particular private party, see, *e.g., Midkiff,* 467 U. S., at 245, the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted "to benefit a particular class of identifiable individuals," *ibid.* Moreover, while the city is not planning to open the condemned land—at least not in its entirety—to use by the general public, this "Court long ago rejected any literal requirement that condemned property be put into use for the . . . public." *Id.,* at 244. Rather, it has embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g.*, *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 158–164. Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings

power. *Berman*, 348 U. S. 26; *Midkiff*, 467 U. S. 229; *Ruckelshaus* v. *Monsanto Co.,* 467 U. S. 986. Pp. 6–13.

(b) The city's determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation is entitled to deference. The city has 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 other exercises in urban planning and development, the city is trying to coordinate a variety of commercial, residential, and recreational land uses, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the city has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the plan's comprehensive character, the thorough deliberation that preceded its adoption, and the limited scope of this Court's review in such cases, it is appropriate here, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment. P. 13.

(c) Petitioners' proposal that the Court adopt a new bright-line rule that economic development does not qualify as a public use is supported by neither precedent nor logic. Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized. See, *e.g., Berman,* 348 U. S., at 24. Also rejected is petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule would represent an even greater departure from the Court's precedent. *E.g., Midkiff*, 467 U. S., at 242. The disadvantages of a heightened form of review are especially pronounced in this type of case, where orderly implementation of a comprehensive plan requires all interested parties' legal rights to be established before new construction can commence. The Court declines to second-guess the wisdom of the means the city has selected to effectuate its plan. *Berman*, 348 U. S., at 26. Pp. 13–20.

268 Conn. 1, 843 A. 2d 500, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed a dissenting opinion.

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Briefs and Other Related Documents

Supreme Court of the United States
Susette **KELO,** et al., Petitioners,
v.
CITY OF NEW LONDON, CONNECTICUT, et al.
No. 04-108.

Argued Feb. 22, 2005.
Decided June 23, 2005.

Background: Owners of condemned property challenged city's exercise of eminent domain power on ground takings were not for public use. The Superior Court, Judicial District of New London, Corradino, J., granted partial relief for owners, and cross-appeals were taken. The Supreme Court, Norcott, J., 268 Conn. 1, 843 A.2d 500, upheld takings. Certiorari was granted.

Holding: The Supreme Court, Justice Stevens, held that city's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement.
Affirmed.

Justice Kennedy concurred and filed opinion.

Justice O'Connor dissented and filed opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined.

Justice Thomas dissented and filed opinion.

West Headnotes

[1] Eminent Domain 61
148k61 Most Cited Cases
Sovereign may not use its eminent domain power to take property of one private party for sole purpose of transferring it to another private party, even if first party is paid just compensation. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain 13
148k13 Most Cited Cases
State may use its eminent domain power to transfer property from one private party to another if purpose of taking is future use by public. U.S.C.A. Const.Amend. 5.

[3] Eminent Domain 18.5
148k18.5 Most Cited Cases
City's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement, even though city was not planning to open condemned land to use by general public, where plan served public purpose. U.S.C.A. Const.Amend. 5.

[4] Eminent Domain 13
148k13 Most Cited Cases

[4] Eminent Domain 67
148k67 Most Cited Cases
Court defines "public purpose," needed to justify exercise of eminent domain power, broadly, reflecting longstanding policy of judicial deference to legislative judgments in this field. U.S.C.A. Const.Amend. 5.

[5] Eminent Domain 18.5
148k18.5 Most Cited Cases
Economic development can qualify as "public use," for eminent domain purposes. U.S.C.A. Const. Amend. 5.

[6] Eminent Domain 65.1
148k65.1 Most Cited Cases
No heightened standard of review is warranted when public purpose allegedly justifying use of eminent domain power is economic development.

[7] Eminent Domain 67
148k67 Most Cited Cases
Once court decides question of whether exercise of eminent domain power is for public purpose, amount and character of land to be taken for project and need for particular tract to complete integrated plan rests in discretion of legislative branch.

***2656** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United*

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States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

After approving an integrated development plan designed to revitalize its ailing economy, respondent city, through its development agent, purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings when petitioners, the owners of the rest of the property, refused to sell. Petitioners brought this state-court action claiming, *inter alia,* that the taking of their properties would violate the "public use" restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of the some of the properties, ***2657** but denying relief as to others. Relying on cases such as *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186, and *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, the Connecticut Supreme Court affirmed in part and reversed in part, upholding all of the proposed takings.

Held: The city's proposed disposition of petitioners' property qualifies as a "public use" within the meaning of the Takings Clause. Pp. 2661-2669.

(a) Though the city could not take petitioners' land simply to confer a private benefit on a particular private party, see, *e.g., Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321, the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted "to benefit a particular class of identifiable individuals," *ibid.* Moreover, while the city is not planning to open the condemned land--at least not in its entirety-- to use by the general public, this "Court long ago rejected any literal requirement that condemned property be put into use for the ... public." *Id.,* at 244, 104 S.Ct. 2321. Rather, it has embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g., Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 158-164, 17 S.Ct. 56, 41 L.Ed. 369. Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power. *Berman,* 348 U.S. 26, 75 S.Ct. 98; *Midkiff,* 467 U.S. 229, 104 S.Ct. 2321; *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815. Pp. 2661-2664.

(b) The city's determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation is entitled to deference. The city has 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 other exercises in urban planning and development, the city is trying to coordinate a variety of commercial, residential, and recreational land uses, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the city has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the plan's comprehensive character, the thorough deliberation that preceded its adoption, and the limited scope of this Court's review in such cases, it is appropriate here, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment. P. 2665.

(c) Petitioners' proposal that the Court adopt a new bright-line rule that economic development does not qualify as a public use is supported by neither precedent nor logic. Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized. See, *e.g., Berman,* 348 U.S., at 34, 75 S.Ct. 98. Also rejected is petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule would represent an even greater departure from the Court's precedent. *E.g., Midkiff,* 467 U.S., at 242, 104 S.Ct. 2321. The disadvantages of a heightened form of review are especially pronounced in this type of case, where orderly implementation of a comprehensive plan requires all interested parties' legal rights to be established before ***2658** new construction can commence. The Court declines to second-guess the wisdom of the means the city has selected to effectuate its plan. *Berman,* 348 U.S., at 26, 75 S.Ct. 98. Pp. 2665-2669.

268 Conn. 1, 843 A.2d 500, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed a dissenting opinion.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Institute for Justice, William H. Mellor, Scott G. Bullock, Counsel of Record, Dana Berliner, Steven Simpson, Washington, DC, Sawyer Law Firm, LLC, Scott W. Sawyer, New London, CT, Counsel for Petitioners.

Wesley W. Horton, Counsel of Record, Daniel J. Krisch, Horton, Shields & Knox, P.C., Hartford, CT, Thomas J. Londregan, Jeffrey T. Londregan, Conway & Londregan, P.C., New London, CT, Edward B. O'Connell, David P. Condon, Waller, Smith & Palmer, P.C., New London, CT, Counsel for the Respondents.

Justice STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution. [FN1]

FN1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and ***2659** particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review. [FN2] Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

FN2. Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the area, which varied in extensiveness and emphasis. The Office of Planning and Management, one of the primary state agencies undertaking the review, made findings that the project was consistent with relevant state and municipal development policies. See 1 App. 89-95.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a

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"small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. 1 App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.,* at 92, the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See ***2660**Conn. Gen.Stat. § 8- 188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. § 8-193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case. [FN3]

FN3. In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull--4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7- day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). 2 App. to Pet. for Cert. 343-350. [FN4]

FN4. While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A.2d 500, 509-510, 540 (2004).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen.Stat. § 8-186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A.2d, at 515- 521. Next, relying on cases such as *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186

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(1984), and *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A.2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.,* at 82, 843 A.2d, at 552-553, and, second, whether the takings were for "reasonably ***2661** foreseeable needs," *id.,* at 93, 843 A.2d, at 558-559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.,* at 120-121, 843 A.2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.,* at 144, 146, 843 A.2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U.S. ----, 125 S.Ct. 27, 159 L.Ed.2d 857 (2004).

III

[1][2] Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

[3] As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co. v. Nebraska,* 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896). [FN5] Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. 268 Conn., at 54, 843 A.2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. [FN6] Therefore, as was true of the statute ***2662** challenged in *Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321, the City's development plan was not adopted "to benefit a particular class of identifiable individuals."

FN5. See also *Calder v. Bull,* 3 Dall. 386, 388, 1 L.Ed. 648 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority .... A few instances will suffice to explain what I mean ... [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them" (emphasis deleted)).

FN6. See 268 Conn., at 159, 843 A.2d, at 595 (Zarella, J., concurring in part and dissenting in part) ("The record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront"). And while the City intends to transfer certain of the parcels to a private developer in a long-term lease--which

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> developer, in turn, is expected to lease the office space and so forth to other private tenants--the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown.

On the other hand, this is not a case in which the City is planning to open the condemned land--at least not in its entirety--to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." *Id.,* at 244, 104 S.Ct. 2321. Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.,* what proportion of the public need have access to the property? at what price?), [FN7] but it proved to be impractical given the diverse and always evolving needs of society. [FN8] Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g., Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 158-164, 17 S.Ct. 56, 41 L.Ed. 369 (1896). Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." ***2663** *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906). [FN9] We have repeatedly and consistently rejected that narrow test ever since. [FN10]

> FN7. See, *e.g., Dayton Gold & Silver Mining Co. v. Seawell,* 11 Nev. 394, 410, 1876 WL 4573, *11 (1876) ("If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad").

> FN8. From upholding the Mill Acts (which authorized manufacturers dependent on power-producing dams to flood upstream lands in exchange for just compensation), to approving takings necessary for the economic development of the West through mining and irrigation, many state courts either circumvented the "use by the public" test when necessary or abandoned it completely. See Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U.L.Rev. 615, 619-624 (1940) (tracing this development and collecting cases). For example, in rejecting the "use by the public" test as overly restrictive, the Nevada Supreme Court stressed that "[m]ining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valleys could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. ... The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals." *Dayton Gold & Silver Mining Co.,* 11 Nev., at 409-410, 1876 WL, at *11.

> FN9. See also *Clark v. Nash,* 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (upholding a statute that authorized the owner of arid land to widen a ditch on his neighbor's property so as to permit a nearby stream to irrigate his land).

> FN10. See, *e.g., Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.,* 240 U.S. 30, 32, 36 S.Ct. 234,

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60 L.Ed. 507 (1916) ("The inadequacy of use by the general public as a universal test is established"); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1014-1015, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public").

[4] The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. *Id.,* at 31, 75 S.Ct. 98. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. *Id.,* at 34, 75 S.Ct. 98. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis--lot by lot, building by building." *Id.,* at 35, 75 S.Ct. 98. The public use underlying the taking was unequivocally affirmed:

> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive .... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.,* at 33, 75 S.Ct. 98.

In *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A and ***2664** transfer it to B solely for B's private use and benefit." *Id.,* at 235, 104 S.Ct. 2321 (internal quotation marks omitted). Reaffirming *Berman's* deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. 467 U.S., at 241-242, 104 S.Ct. 2321. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "[I]t is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use. *Id.,* at 244, 104 S.Ct. 2321.

In that same Term we decided another public use case that arose in a purely economic context. In *Ruckelshaus v. Monsanto, Co.,* 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), the Court dealt with provisions of the Federal Insecticide, Fungicide, and Rodenticide Act under which the Environmental Protection Agency could consider the data (including trade secrets) submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data. We acknowledged that the "most direct beneficiaries" of these provisions were the subsequent applicants, *id.,* at 1014, 104 S.Ct. 2862, but we nevertheless upheld the statute under *Berman* and *Midkiff.* We found sufficient Congress' belief that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition. 467 U.S., at 1015, 104 S.Ct. 2862.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between

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different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606- 607, 28 S.Ct. 331, 52 L.Ed. 637 (1908) (noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people"). [FN11] For more than a century, our 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.

FN11. See also *Clark*, 198 U.S., at 367-368, 25 S.Ct. 676; *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906) ("In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong"); *O'Neill v. Leamer*, 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915) ("States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect").

IV

Those who govern the City were not confronted with the need to remove blight ***2665** in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including--but by no means limited to--new jobs and increased tax revenue. As with other exercises in urban planning and development, [FN12] the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

FN12. Cf. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[5] To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, see, *e.g.*, *Strickley*, 200 U.S. 527, 26 S.Ct. 301; in *Berman*, we endorsed the purpose of transforming a blighted area into a "well-balanced" community through redevelopment, 348 U.S., at 33, 75 S.Ct. 98; [FN13] in *Midkiff*, we upheld the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the State's residential land market," 467 U.S., at 242, 104 S.Ct. 2321; and in *Monsanto*, we accepted Congress' purpose of eliminating a "significant barrier to entry in the pesticide market," 467 U.S., at 1014-1015, 104 S.Ct. 2862. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting

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economic ***2666** development from our traditionally broad understanding of public purpose.

FN13. It is a misreading of *Berman* to suggest that the only public use upheld in that case was the initial removal of blight. See Reply Brief for Petitioners 8. The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future. See 348 U.S., at 34-35, 75 S.Ct. 98 ("It was not enough, [the experts] believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums.... The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented"). Had the public use in *Berman* been defined more narrowly, it would have been difficult to justify the taking of the plaintiff's nonblighted department store.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff,* the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. In *Monsanto,* we recognized that the "most direct beneficiaries" of the data-sharing provisions were the subsequent pesticide applicants, but benefiting them in this way was necessary to promoting competition in the pesticide market. 467 U.S., at 1014, 104 S.Ct. 2862. [FN14] The owner of the department store in *Berman* objected to "taking from one businessman for the benefit of another businessman," 348 U.S., at 33, 75 S.Ct. 98, referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. [FN15] Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government--or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.,* at 34, 75 S.Ct. 98. [FN16]

FN14. Any number of cases illustrate that the achievement of a public good often coincides with the immediate benefiting of private parties. See, *e.g., National Railroad Passenger Corporation v. Boston & Maine Corp.,* 503 U.S. 407, 422, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (public purpose of "facilitating Amtrak's rail service" served by taking rail track from one private company and transferring it to another private company); *Brown v. Legal Foundation of Wash.,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (provision of legal services to the poor is a valid public purpose). It is worth noting that in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), *Monsanto,* and *Boston & Maine Corp.,* the property in question retained the same use even after the change of ownership.

FN15. Notably, as in the instant case, the private developers in *Berman* were required by contract to use the property to carry out the redevelopment plan. See 348 U.S., at 30, 75 S.Ct. 98.

FN16. Nor do our cases support Justice O'CONNOR's novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some "harmful property use." *Post,* at 2675 (dissenting opinion). There was nothing "harmful" about the nonblighted department store at issue in *Berman,* 348 U.S. 26, 75 S.Ct. 98; see also n. 13, *supra;* nothing "harmful" about the lands at issue in the mining and agriculture cases, see, *e.g., Strickley,* 200 U.S. 527, 26 S.Ct. 301; see also nn. 9, 11, *supra;* and certainly nothing "harmful" about the trade secrets owned by the pesticide manufacturers in *Monsanto,* 467 U.S. 986, 104 S.Ct. 2862. In each case, the public purpose we upheld depended on a private party's *future* use of the concededly nonharmful property that was taken. By focusing on a property's future use, as opposed to its past use, our cases are faithful

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to the text of the Takings Clause. See U.S. Const., Amdt. 5. ("[N]or shall private property be taken for public use, without just compensation"). Justice O'CONNOR's intimation that a "public purpose" may not be achieved by the action of private parties, see *post,* at 2675, confuses the *purpose* of a taking with its *mechanics,* a mistake we warned of in *Midkiff,* 467 U.S., at 244, 104 S.Ct. 2321. See also *Berman,* 348 U.S., at 33-34, 75 S.Ct. 98 ("The public end may be as well or better served through an agency of private enterprise than through a department of government").

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive ***2667** use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, [FN17] the hypothetical cases posited by petitioners can be confronted if and when they arise. [FN18] They do not warrant the crafting of an artificial restriction on the concept of public use. [FN19]

FN17. Courts have viewed such aberrations with a skeptical eye. See, *e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F.Supp.2d 1123 (C.D.Cal.2001); cf. *Cincinnati v. Vester,* 281 U.S. 439, 448, 50 S.Ct. 360, 74 L.Ed. 950 (1930) (taking invalid under state eminent domain statute for lack of a reasoned explanation). These types of takings may also implicate other constitutional guarantees. See *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) *(per curiam).*

FN18. Cf. *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 223, 48 S.Ct. 451, 72 L.Ed. 857 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits").

FN19. A parade of horribles is especially unpersuasive in this context, since the Takings Clause largely "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises v. Apfel,* 524 U.S. 498, 545, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). Speaking of the takings power, Justice Iredell observed that "[i]t is not sufficient to urge, that the power may be abused, for, such is the nature of all power--such is the tendency of every human institution: and, it might as fairly be said, that the power of taxation, which is only circumscribed by the discretion of the Body, in which it is vested, ought not to be granted, because the Legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutory confidence." *Calder,* 3 Dall., at 400, 1 L.Ed. 648 (opinion concurring in result).

[6] Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings--no less than debates over the wisdom of other kinds of socioeconomic legislation--are not to be carried out in the federal courts." *Midkiff,* 467 U.S., at 242, 104 S.Ct. 2321. [FN20] Indeed, earlier this Term we explained why similar practical concerns (among others) undermined the use of the "substantially advances" formula in our regulatory takings doctrine. See *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. ----, ----, 125 S.Ct. 2074, 2085, 161 L.Ed.2d 876 (2005) (noting that this formula "would empower--and might often require--courts to substitute their predictive judgments for those of elected legislatures and expert agencies"). ***2668** The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial

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approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

FN20. See also *Boston & Maine Corp.*, 503 U.S., at 422-423, 112 S.Ct. 1394 ("[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives"); *Monsanto*, 467 U.S., at 1015, n. 18, 104 S.Ct. 2862 ("Monsanto argues that EPA and, by implication, Congress, misapprehended the true 'barriers to entry' in the pesticide industry and that the challenged provisions of the law create, rather than reduce, barriers to entry .... Such economic arguments are better directed to Congress. The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective").

[7] Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman*, 348 U.S., at 35-36, 75 S.Ct. 98.

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. [FN21] We emphasize 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. Some of these requirements have been established as a matter of state constitutional law, [FN22] while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. [FN23] As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. [FN24] This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

FN21. The *amici* raise questions about the fairness of the measure of just compensation. See, *e.g.*, Brief for American Planning Association et al. as *Amici Curiae* 26-30. While important, these questions are not before us in this litigation.

FN22. See, *e.g.*, *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

FN23. Under California law, for instance, a city may only take land for economic development purposes in blighted areas. Cal. Health & Safety Code Ann. § § 33030-33037 (West 1997). See, *e.g.*, *Redevelopment Agency of Chula Vista v. Rados Bros.*, 95 Cal.App.4th 309, 115 Cal.Rptr.2d 234 (2002).

FN24. For example, some argue that the need for eminent domain has been greatly exaggerated because private developers can use numerous techniques, including secret negotiations or precommitment strategies, to overcome holdout problems and assemble lands for genuinely profitable projects. See Brief for Jane Jacobs as *Amicus Curiae* 13-15; see also Brief for John Norquist as *Amicus Curiae*. Others argue to the contrary, urging that the need for eminent domain is especially great with regard to older, small cities like New London, where centuries of development have created an extreme overdivision of land and thus a real market impediment to land assembly. See Brief for Connecticut Conference for Municipalities et al. as *Amici Curiae* 13, 21; see also Brief for National League of Cities et al. as *Amici Curiae*.

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***2669** The judgment of the Supreme Court of Connecticut is affirmed.

It is so ordered.

Justice KENNEDY, concurring.

I join the opinion for the Court and add these further observations.

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5., as long as it is "rationally related to a conceivable public purpose." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); see also *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses, see, *e.g., FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313-314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 446-447, 450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Department of Agriculture v. Moreno,* 413 U.S. 528, 533-536, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). As the trial court in this case was correct to observe, "Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose--economic advantage to a city sorely in need of it--is only incidental to the benefits that will be confined on private parties of a development plan." 2 App. to Pet. for Cert. 263. See also *ante,* at 2661.

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to ... the developer [*i.e.,* Corcoran Jennison], and private businesses which may eventually locate in the plan area [*e.g.,* Pfizer], and in that regard, only of incidental benefit to the city." 2 App. to Pet. for Cert. 261. The trial court considered testimony from government officials and corporate officers; *id.,* at 266-271; documentary evidence of communications between these parties, *ibid.;* respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern, *id.,* at 272-273, 278- 279; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known, *id.,* at 276; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, *id.,* at 273, 278; ***2670** and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented, *id.,* at 278.

The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." *Id.,* at 276. Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that ... [respondents] were motivated by a desire to aid [other] particular private entities." *Id.,* at 278. See also *ante,* at 2661-2662. Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. 268 Conn. 1, 159, 843 A.2d 500, 595 (2004) (Zarella, J., concurring in part and dissenting in part). This case, then, survives the meaningful rational basis review that in my view is required under the Public Use Clause.

Petitioners and their *amici* argue that any taking justified by the promotion of economic development

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must be treated by the courts as *per se* invalid, or at least presumptively invalid. Petitioners overstate the need for such a rule, however, by making the incorrect assumption that review under *Berman* and *Midkiff* imposes no meaningful judicial limits on the government's power to condemn any property it likes. A broad *per se* rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. Cf. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549-550, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me no departure from *Berman* and *Midkiff* is appropriate here. This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimus*. The identity of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes. In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private ***2671** purpose, no such circumstances are present in this case.

* * *

For the foregoing reasons, I join in the Court's opinion.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

> "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority .... A few instances will suffice to explain what I mean ....[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) (emphasis deleted).

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded--*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public--in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property--and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

I

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull

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neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." App. to Pet. for Cert. 5.

Petitioners own properties in two of the plan's seven parcels--Parcel 3 and Parcel 4A. Under the plan, Parcel 3 is slated for the construction of research and office space as a market develops for such space. It will also retain the existing Italian Dramatic Club (a private cultural organization) ***2672** though the homes of three plaintiffs in that parcel are to be demolished. Parcel 4A is slated, mysteriously, for " 'park support.' " *Id.,* at 345-346. At oral argument, counsel for respondents conceded the vagueness of this proposed use, and offered that the parcel might eventually be used for parking. Tr. of Oral Arg. 36.

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power. Petitioners maintain that the Fifth Amendment prohibits the NLDC from condemning their properties for the sake of an economic development plan. Petitioners are not hold-outs; they do not seek increased compensation, and none is opposed to new development in the area. Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment. While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright v. United States,* 302 U.S. 583, 588, 58 S.Ct. 395, 82 L.Ed. 439 (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Wash.,* 538 U.S. 216, 231-232, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed.1934). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power--particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 325, 13 S.Ct. 622, 37 L.Ed. 463 (1893); see also *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security. Cf. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 336, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) ("The concepts of 'fairness and justice' ... underlie the Takings Clause").

***2673** Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the

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public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. See *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 74 L.Ed. 950 (1930) ("It is well established that ... the question [of] what is a public use is a judicial one").

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership--such as for a road, a hospital, or a military base. See, *e.g.*, *Old Dominion Land Co. v. United States*, 269 U.S. 55, 46 S.Ct. 39, 70 L.Ed. 162 (1925); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923). Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use--such as with a railroad, a public utility, or a stadium. See, *e.g.*, *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916). But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, *e.g.*, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman*, we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. 348 U.S., at 30, 75 S.Ct. 98. It had become burdened with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air." *Id.*, at 34, 75 S.Ct. 98. Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain. *Id.*, at 28, 75 S.Ct. 98. Mr. Berman's department store was not itself blighted. Having approved of Congress' decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot. *Id.*, at 34-35, 75 S.Ct. 98; see also *Midkiff*, 467 U.S., at 244, 104 S.Ct. 2321 ("it is only the taking's purpose, and not its mechanics, that must pass scrutiny").

***2674** In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 232, 104 S.Ct. 2321. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title. *Ibid.*

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill-equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts' " 'deciding on what is and is not a governmental function and ... invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' " *Id.*, at 240-241, 104 S.Ct. 2321 (quoting *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946)); see *Berman, supra*, at 32, 75 S.Ct. 98 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. ----, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature's ends. *Midkiff, supra*, at 242, 104 S.Ct.

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2321; *Berman, supra,* at 103, 75 S.Ct. 98.

Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321; *id.,* at 241, 104 S.Ct. 2321 ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid' " (quoting *Thompson v. Consolidated Gas Util. Corp.,* 300 U.S. 55, 80, 57 S.Ct. 364, 81 L.Ed. 510 (1937))); see also *Missouri Pacific R. Co. v. Nebraska,* 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 489 (1896). To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use ... [though] the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff, supra,* at 240, 104 S.Ct. 2321 (quoting *Berman, supra,* at 32, 75 S.Ct. 98).

The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society--in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. *Berman, supra,* at 28-29, 75 S.Ct. 98; *Midkiff, supra,* at 232, 104 S.Ct. 2321. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in ***2675** contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public--such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff.* In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U.S., at 32, 75 S.Ct. 98. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.,* at 33, 75 S.Ct. 98. Following up, we said in *Midkiff* that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U.S., at 240, 104 S.Ct. 2321. This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and "public use" cannot always be equated.

The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee--without detailing how courts are to conduct that complicated inquiry. *Ante,* at 2661. For his part, Justice KENNEDY suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take--without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. *Ante,* at 2669-2670 (concurring opinion). Whatever the details of

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Justice KENNEDY's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1025-1026, n. 12, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised ***2676** public gains in taxes and jobs. See App. to Pet. for Cert. 275-277.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective-- private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade-- not downgrade--property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. See *Lingle,* 544 U.S. ----, 125 S.Ct. 2074. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. Cf. *Bugryn v. Bristol,* 63 Conn.App. 98, 774 A.2d 1042 (2001) (taking the homes and farm of four owners in their 70's and 80's and giving it to an "industrial park"); *99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F.Supp.2d 1123 (C.D.Cal.2001) (attempted taking of 99 Cents store to replace with a Costco); *Poletown Neighborhood Council v. Detroit,* 410 Mich. 616, 304 N.W.2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by *County of Wayne v. Hathcock,* 471 Mich. 445, 684 N.W.2d 765 (2004); Brief for the Becket Fund for Religious Liberty as *Amicus Curiae* 4-11 (describing takings of religious institutions' properties); Institute for Justice, D. Berliner, Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003) (collecting accounts of economic development takings).

The Court also puts special emphasis on facts peculiar to this case: The NLDC's plan is the product of a relatively careful deliberative process; it proposes to use eminent domain for a multipart, integrated plan rather than for isolated property transfer; it promises an array of incidental benefits (even aesthetic ones), not just increased tax revenue; it comes on the heels of a legislative determination that New London is a depressed municipality. See, *e.g., ante,* at 2666 ("[A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case"). Justice KENNEDY, too, takes great comfort in these facts. *Ante,* at 2670 (concurring opinion). But none has legal significance to blunt the force of today's holding. If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice KENNEDY's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected ***2677** advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Finally, in a coda, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. *Ante,* at 2668. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

* * *

It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme

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that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory. In the prescient words of a dissenter from the infamous decision in *Poletown,* "[n]ow that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." 410 Mich., at 644-645, 304 N.W.2d, at 464 (opinion of Fitzgerald, J.). This is why economic development takings "seriously jeopardiz[e] the security of all private property ownership." *Id.,* at 645, 304 N.W.2d, at 465 (Ryan, J., dissenting).

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own.*" For the National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds.1983).

I would hold that the takings in both Parcel 3 and Parcel 4A are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that "the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134-135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Amdt. 5. Defying this understanding, the Court replaces the Public Use Clause with a " '[P]ublic [P]urpose' " Clause, *ante,* at 2662- 2663 (or perhaps the "Diverse and Always Evolving Needs of Society" Clause, *ante,* at 2662 (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational," *ante,* at 2667 (internal quotation marks omitted). This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague ***2678** promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'CONNOR powerfully argues in dissent. *Ante,* at 2671, 2674-2677. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

I

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process, of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added.)

It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is "imperative that the Court maintain absolute fidelity to" the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally. *Shepard v. United States,* 544 U.S. ----, ----, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

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Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides "just compensation" for the taking, the Takings Clause also prohibits the government from taking property except "for public use." Were it otherwise, the Takings Clause would either be meaningless or empty. If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power--for public or private uses--then it would be surplusage. See *ante,* at 2672 (O'CONNOR, J., dissenting); see also *Marbury v. Madison,* 1 Cranch 137, 174, 2 L.Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Myers v. United States,* 272 U.S. 52, 151, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Alternatively, the Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." *Cole v. La Grange,* 113 U.S. 1, 8, 5 S.Ct. 416, 28 L.Ed. 896 (1885) (interpreting same language in the Missouri Public Use Clause). In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of ***2679** compensation. This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827) (hereinafter Kent); J. Madison, for the National Property Gazette, (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds.1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner"). [FN1] The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain.

FN1. Some state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1056-1057, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (Blackmun, J., dissenting). The Framers of the Fifth Amendment apparently disagreed, for they expressly prohibited uncompensated takings, and the Fifth Amendment was not incorporated against the States until much later. See *id.,* at 1028, n. 15, 112 S.Ct. 2886.

The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter Johnson). The term "use," moreover, "is from the Latin *utor,* which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc." J. Lewis, Law of Eminent Domain § 165, p. 224, n. 4 (1888) (hereinafter Lewis). When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually "employ" the taken property. See *id.,* at 223 (reviewing founding-era dictionaries).

Granted, another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." 2 Johnson 2194. Nevertheless, read in context, the term "public use" possesses the narrower meaning. Elsewhere, the Constitution twice employs the word "use," both times in its narrower sense. Claeys, Public-Use Limitations and Natural Property Rights, 2004 Mich. St. L.Rev. 877, 897 (hereinafter Public Use Limitations). Article 1, § 10 provides that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States," meaning the Treasury itself will control the taxes, not use it to any beneficial end. And Article I, § 8 grants Congress power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Here again, "use" means "employed to raise and support Armies," not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See *ibid.* ("Congress shall have Power To ... provide for the common

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Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). ***2680** The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, Classical Republicanism and the Fifth Amendment's "Public Use" Requirement, 49 Duke L.J. 339, 368 (2000) (hereinafter Sales) (noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other, the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with compensation), with 3 *id.,* at 216 (noting action to remedy "*public* ...nuisances, which affect the public and are an annoyance to *all* the king's subjects"); see also 2 Kent 274-276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great ... is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. He continued: "If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." *Ibid.* Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." *Ibid.* When the public took property, in other words, it took it as an individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] *property* from A. and giv[ing] it to B." Calder v. Bull, 3 Dall. 386, 388, 1 L.Ed. 648 (1798); see also Wilkinson v. Leland, 2 Pet. 627, 658, 7 L.Ed. 542 (1829); Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 311, 1 L.Ed. 391 (C.C.D.Pa.1795).

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See Kohl v. United States, 91 U.S. 367, 371-372, 23 L.Ed. 449 (1876) (noting Federal Government's power under the Necessary and Proper Clause to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise ***2681** of Congress' enumerated powers, Sabri v. United States, 541 U.S. 600, 613, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (THOMAS, J., concurring in judgment), and it must not "subvert basic principles of" constitutional design, Gonzales v. Raich, --- U.S. ----, 125 S.Ct. 2195, --- L.Ed.2d ---- (2005) (THOMAS, J., dissenting). In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. See *supra,* at 2678. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.

II

Early American eminent domain practice largely bears out this understanding of the Public Use Clause. This practice concerns state limits on eminent domain power, not the Fifth Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the Takings Clause did not even arguably limit state power until after the passage of the Fourteenth Amendment. See Note, The Public Use Limitation on Eminent Domain: An

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Advance Requiem, 58 Yale L.J. 599, 599- 600, and nn. 3-4 (1949); *Barron ex rel. Tiernan v. Mayor of Baltimore,* 7 Pet. 243, 250-251, 8 L.Ed. 672 (1833) (holding the Takings Clause inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." See Sales 367-369, and n. 137 (emphasis deleted). Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Lewis § § 166, 168-171, 175, at 227-228, 234-241, 243. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. See, *e.g., id.,* § 178, at 245-246; *Head v. Amoskeag Mfg. Co.,* 113 U.S. 9, 16-19, and n. 2, 5 S.Ct. 441, 28 L.Ed. 889 (1885). Those early grist mills "were regulated by law and compelled to serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. Lewis § 178, at 246, and n. 3; see also *Head, supra,* at 18-19, 5 S.Ct. 441. They were common carriers--quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally. See Public Use Limitations 903 (common-carrier status traditionally afforded to "private beneficiaries of a state franchise or another form of state monopoly, or to companies that operated in conditions of natural monopoly").

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. See Lewis § 167, at 230. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. See *id.,* § 167, at 230-234. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-***2682** carrier duties. See, *e.g.,* M. Horwitz, The Transformation of American Law 1780-1860, pp. 51-52 (1977).

These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the Public Use Clause, see, *e.g., ante,* at 2662, n. 8 (majority opinion); Brief for Respondents 30; Brief for American Planning Assn. et al. as *Amici Curiae* at 6-7, but in fact the constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use." [FN2] As noted above, the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that subsequent practice is consistent with the original meaning of the Public Use Clause. See *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 370, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (THOMAS, J., concurring in judgment). At the time of the founding, "[b]usiness corporations were only beginning to upset the old corporate model, in which the raison d'être of chartered associations was their service to the public," Horwitz, *supra,* at 49-50, so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

FN2. Compare *ante,* at 2662, and n. 8 (majority opinion) (noting that some state courts upheld the validity of applying the Mill Acts to private purposes and arguing that the " 'use by the public' test" "eroded over time"), with, *e.g., Ryerson v. Brown,* 35 Mich. 333, 338-339 (1877) (holding it "essential" to the constitutionality of a Mill Act "that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations"); *Gaylord v. Sanitary Dist. of Chicago,* 204 Ill. 576, 581-584, 68 N.E. 522, 524 (1903) (same); *Tyler v. Beacher,* 44 Vt. 648, 652-656 (1871) (same); *Sadler v. Langham,* 34 Ala. 311, 332-334 (1859) (striking down taking for purely private road and grist mill); *Varner v. Martin,* 21 W.Va. 534, 546-548, 556-557, 566-567 (1883) (grist mill and private road had to be open to public for them to

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constitute public use); *Harding v. Goodlett*, 11 Tenn. 41, 3 Yerg. 41, 53 (1832); *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 393-395, 69 A. 870, 872 (1908) (endorsing actual public use standard); *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 449-451, 107 N.W. 405, 413 (1906) (same); *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 663-667, 104 S.W. 762, 765 (1907) (same); Note, Public Use in Eminent Domain, 21 N.Y.U.L.Q. Rev. 285, 286, and n. 11 (1946) (calling the actual public use standard the "majority view" and citing other cases).

III

Our current Public Use Clause jurisprudence, as the Court notes, has rejected this natural reading of the Clause. *Ante,* at 2662-2663. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential conception of "public use" adopted by this Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and ***2683***Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), cases that take center stage in the Court's opinion. See *ante,* 2663-2664. The weakness of those two lines of cases, and consequently *Berman* and *Midkiff,* fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

A

As the Court notes, the "public purpose" interpretation of the Public Use Clause stems from *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-162, 17 S.Ct. 56, 41 L.Ed. 369 (1896). *Ante,* at 2663. The issue in *Bradley* was whether a condemnation for purposes of constructing an irrigation ditch was for a public use. 164 U.S., at 161, 17 S.Ct. 56. This was a public use, Justice Peckham declared for the Court, because "[t]o irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." *Ibid.* That broad statement was dictum, for the law under review also provided that "[a]ll landowners in the district have the right to a proportionate share of the water." *Id.,* at 162, 17 S.Ct. 56. Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public--those who owned lands irrigated by the ditch-had a right to use it. The Court cited no authority for its dictum, and did not discuss either the Public Use Clause's original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts, see *id.,* at 158, 17 S.Ct. 56; *supra,* at 2682, and n. 2). Instead, the Court reasoned that "[t]he use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect." *Bradley, supra,* at 160-161, 17 S.Ct. 56. This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," *ante,* at 2662, the Constitution does not embody those policy preferences any more than it "enact [s] Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting); but see *id.,* at 58-62, 25 S.Ct. 539 (Peckham, J., for the Court).

This Court's cases followed *Bradley's* test with little analysis. In *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (Peckham, J., for the Court), this Court relied on little more than a citation to *Bradley* in upholding another condemnation for the purpose of laying an irrigation ditch. 198 U.S., at 369-370, 25 S.Ct. 676. As in *Bradley,* use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "[o]ther land owners adjoining the defendant in error ... might share," 198 U.S., at 370, 25 S.Ct. 676, and therefore *Clark* also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than *Clark,* see ***2684***Strickley, supra,* at 531, 26 S.Ct. 301. This case, too, could have been disposed of on the

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narrower ground that "the plaintiff [was] a carrier for itself and others," 200 U.S., at 531-532, 26 S.Ct. 301, and therefore that the bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." *Id.*, at 531, 26 S.Ct. 301. This Court's cases quickly incorporated the public purpose standard set forth in *Clark* and *Strickley* by barren citation. See, *e.g.*, *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Block v. Hirsh*, 256 U.S. 135, 155, 41 S.Ct. 458, 65 L.Ed. 865 (1921); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *O'Neill v. Leamer*, 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

B

A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. *Id.*, at 679-680, 16 S.Ct. 427. Since the Federal Government was to use the lands in question, *id.*, at 682, 16 S.Ct. 427, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.*, at 680, 16 S.Ct. 427. As it had with the "public purpose" dictum in *Bradley, supra,* the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, *e.g.*, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946); *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 70 L.Ed. 162 (1925).

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, see, *e.g.*, *Payton v. New York*, 445 U.S. 573, 589-590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see *Deck v. Missouri*, 544 U.S. ----, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), or when state law creates a property interest protected by the Due Process Clause, see, *e.g.*, *Castle Rock v. Gonzales*, --- U.S. ----, 125 S.Ct. 2796, --- L.Ed.2d ----, 2005 WL 1499788 (2005); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, *e.g.*, *Goldberg, supra,* ***2685** while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton, supra,* at 601, 100 S.Ct. 1371, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," *ante,* at 2668, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, *ante,* at ----6, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

C

These two misguided lines of precedent converged in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Relying on those lines of cases, the Court in *Berman* and *Midkiff* upheld condemnations for the

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purposes of slum clearance and land redistribution, respectively. "Subject to specific constitutional limitations," *Berman* proclaimed, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." 348 U.S., at 32, 75 S.Ct. 98. That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the Public Use Clause prevented the taking of the appellant's (concededly "nonblighted") department store. *Id.*, at 31, 34, 75 S.Ct. 98. *Berman* also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was *per se* a "public use" under the Fifth Amendment. *Id.*, at 33, 75 S.Ct. 98. But the very point of the Public Use Clause is to limit that power. See *supra,* at 2679.

More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. See *Midkiff,* 467 U.S., at 240, 104 S.Ct. 2321 ("The 'public use' requirement is ... coterminous with the scope of a sovereign's police powers"); *Berman,* 348 U.S., at 32, 75 S.Ct. 98. Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, see *Mugler v. Kansas,* 123 U.S. 623, 668-669, 8 S.Ct. 273, 31 L.Ed. 205 (1887), in sharp contrast to the takings power, which has always required compensation, see *supra,* at 2679, and n. 1. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. See, *e.g., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Mugler, supra,* at 668-669, 8 S.Ct. 273. In *Berman,* for example, if the slums at issue were truly "blighted," then state nuisance law, see, *e.g., supra,* at 2680; *Lucas, supra,* at 1029, 112 S.Ct. 2886, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use ***2686** Clause to overlap with the States' police power conflates these two categories. [FN3]

FN3. Some States also promoted the alienability of property by abolishing the feudal "quit rent" system, *i.e.,* long-term leases under which the proprietor reserved to himself the right to perpetual payment of rents from his tenant. See Vance, The Quest for Tenure in the United States, 33 Yale L.J. 248, 256-257, 260-263 (1923). In *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court cited those state policies favoring the alienability of land as evidence that the government's eminent domain power was similarly expansive, see *id.,* at 241-242, and n. 5, 104 S.Ct. 2321. But they were uses of the States' regulatory power, not the takings power, and therefore were irrelevant to the issue in *Midkiff.* This mismatch underscores the error of conflating a State's regulatory power with its taking power.

The "public purpose" test applied by *Berman* and *Midkiff* also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience ... we are afloat without any certain principle to guide us." *Bloodgood v. Mohawk & Hudson R. Co.,* 18 Wend. 9, 60-61 (N.Y.1837) (opinion of Tracy, Sen.). Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use-at least, none beyond Justice O'CONNOR's (entirely proper) appeal to the text of the Constitution itself. See *ante,* at 2671, 2675-2677 (dissenting opinion). I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. *Ante,* at 2666-2668. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking. *Ante,* at 2661-2662. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. Cf. *ante,* at 2675 (O'CONNOR, J., dissenting) (noting the complicated inquiry the Court's test requires). The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." *Ante,* at 2662. It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"--unless the Court means to eliminate public use scrutiny of takings entirely. *Ante,* at 2661-2662, 2666-2667. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

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For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

IV

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor ***2687** communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," *United States v. Carolene Products Co.,* 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak. *Ante,* at 2676 (O'CONNOR, J., dissenting).

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman,* cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalayn, Downtown, Inc. How America Rebuilds Cities 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." *Id.,* at 28, 75 S.Ct. 98. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.,* at 28-29, 75 S.Ct. 98. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.' " Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. 348 U.S., at 30, 75 S.Ct. 98. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

* * *

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. See *ante,* at 2662- 2664. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws, see *supra,* at 2663. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in Justice O'CONNOR's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

125 S.Ct. 2655, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

Briefs and Other Related Documents **(Back to top)**

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• 2005 WL 529436, 73 USLW 3528 (Oral Argument) Oral Argument (Feb. 22, 2005)

• 2005 WL 353691 (Appellate Brief) Reply Brief of Petitioners%tc (Feb. 11, 2005)

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• 2005 WL 166929 (Appellate Brief) Brief of the American Planning Association, the Connecticut Chapter of the American Planning Association, and the National Congress for Community Economic Development as Amici Curiae in Support of Respondents%tc (Jan. 21, 2005)

• 2005 WL 166931 (Appellate Brief) Brief of the National League of Cities, National Conference of State Legislatures, U.S. Conference of Mayors, Council of State Governments, National Association of Counties, International Municipal Lawyers Association, and International City/County M anagement Association as Amici Curiae Supporting Respondents%tc (Jan. 21, 2005)

• 2005 WL 166938 (Appellate Brief) Brief of the State of Connecticut, through its Attorney General Richard Blumenthal, as Amicus Curiae in Support of the Respondents%tc (Jan. 21, 2005)

• 2005 WL 166940 (Appellate Brief) Brief of Amicus Curiae Mayor and City Council of Baltimore in Support of Respondents%tc (Jan. 21, 2005)

• 2005 WL 166942 (Appellate Brief) Brief Amicus Curiae of California Redevelopment Association in Support of Respondents%tc (Jan. 21, 2005)

• 2005 WL 166943 (Appellate Brief) Brief Amicus Curiae of the City of New York in Support of Respondents%tc (Jan. 21, 2005)

• 2005 WL 166945 (Appellate Brief) Brief of the States of Vermont, Delaware, Hawaii, Illinois, Maryland, Montana, New York, Oklahoma, Oregon, Rhode Island, South Dakota and Tennessee, and the District of Columbia, As Amici Curiae in Support of Respondents%tc (Jan. 21, 2005)

• 2005 WL 176426 (Appellate Brief) Brief Of Amici Curiae Connecticut Conference Of Municipalities And The State Municipal Leagues Of Alabama; Arkansas; California; Colorado; Florida; Georgia; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maryland; Massachusetts; Michigan; Minn esota; Missouri; New Hampshire; New Jersey; New Mexico; New York; North Carolina; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Texas; West Virginia and Wisconsin In Support of Respondents%tc (Jan. 21, 2005)

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• 2005 WL 429976 (Appellate Brief) Brief of the Respondents%tc (Jan. 21, 2005)

• 2005 WL 154142 (Appellate Brief) Brief Amicus Curiae of New York State Urban Development Corporation d/b/a Empire State Development Corporation in Opposition to Petition%tc (Jan. 19, 2005)

• 2004 WL 2787137 (Appellate Brief) Brief Amicus Curiae of the Property Rights Foundation of America, Inc. in Support of Petitioners%tc (Dec. 03, 2004)

• 2004 WL 2787139 (Appellate Brief) Brief of Amici Curiae the National Association of Home Builders and the National Association of Realtors(R) in Support of the Petitioners%tc (Dec. 03, 2004)

• 2004 WL 2787140 (Appellate Brief) Brief for Reason Foundation as Amicus Curiae in Support of Petitioners%tc (Dec. 03, 2004)

• 2004 WL 2787141 (Appellate Brief) Brief of Amicus Curiae the Becket Fund for Religious Liberty in Support of Petitioners%tc (Dec. 03, 2004)

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• 2004 WL 2802968 (Appellate Brief) Amicus Curiae Brief on the Merits of Mountain States Legal Foundation and Defenders of Property Rights in Support of Petitioners%tc (Dec. 03, 2004)

• 2004 WL 2802969 (Appellate Brief) Brief of Cascade Policy Institute, American Association of Small Property Owners, Grassroot Institute of Hawaii, James Madison Institute, John Locke Foundation, Illinois Policy Institute, Indiana Policy Review Foundation, Oregonians in Action Legal C

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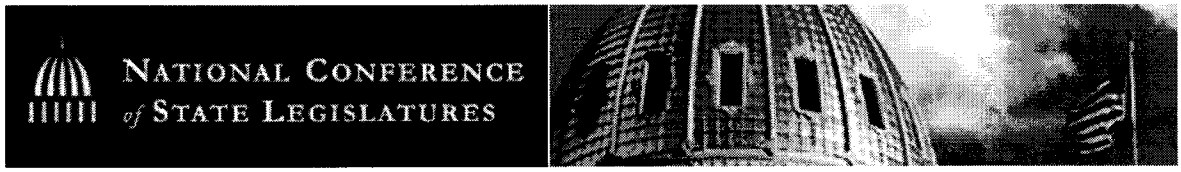

Natural Resources

Supreme Court Upholds Eminent Domain for Economic Development

July 21, 2005

The U.S. Supreme Court ruled on June 23 in *Kelo v. New London* that the "public use" provision of the "takings clause" of the 5th Amendment of the U.S. Constitution permits the use of eminent domain for economic development purposes that provide a public benefit under a Connecticut statute.

Background

The case involved an economic development plan for the City of New London, Connecticut, which has been in economic decline for many decades. In 1996, the U.S. Navy closed its Undersea Warfare Center, causing the loss of over 1,500 jobs. In 1998, Pfizer, Inc., a large pharmaceutical company, announced plans to build a large research facility in New London on a site adjacent to the Fort Trumbull neighborhood. This neighborhood has been characterized as one with a high vacancy rate for nonresidential buildings, old buildings in poor shape, and with fewer than half of the residential properties in average or better condition (although the homes of the petitioners in this case did not fall into these categories).

The nonprofit New London Development Corporation (NLDC) was formed to help the city plan for economic development. After the Pfizer announcement, the city council authorized NLDC to formulate an economic development plan for 90 acres in Fort Trumbull. The plan's stated goals were to "create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually to build momentum for the revitalization of the rest of the city, including its downtown area."

Most people in Fort Trumbull sold their property to NLDC, but seven did not (the voluntary sales comprised 100 of the 115 properties in the neighborhood). These landowners held 15 properties in two parcels of land being considered for development. They filed suit claiming that the use of eminent domain as contemplated by the plan violated the state and federal constitutions.

The state trial court ruled in favor of the property owners as to one parcel and in favor of NLDC with respect to the other parcel. Both sides appealed to the Connecticut Supreme Court, which ruled in favor of the NLDC on both parcels. The court held that the economic development projects created and implemented pursuant to the state's eminent domain statute possess the "public" economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, thereby satisfying the public use clauses of the state and federal constitutions. The property owners appealed to the U.S. Supreme Court.

U.S. Supreme Court Decision

The 5-4 decision recognized at the outset that the U.S. Constitution prohibits a "taking" whose "sole purpose" is to transfer one person's private property to another private person, even if just compensation is paid. It emphasized, however, that this was not the issue before the court. Rather, "The disposition of this case therefore turns on the question whether the City's development plan serves a "'public purpose.'" The decision went on to stipulate that "Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." In writing for the majority, Justice Stevens noted, in fact, that "To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development." http://www.cga.ct.gov/2005/pub/Chap132.htm

The court determined that New London's economic development plan served a "public purpose" under the "public use" provision of the constitution. Justice Stevens noted that "Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including–but by no means limited to–new jobs and increased tax revenue." Justice Stevens went on to write that "Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman* [*v. Parker*, 348 U.S. 26 (1954)], to resolve the challenges of the individual owners,

not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."

In response to the contention of the petitioners that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings," the court stated that "Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties."

In closing, the court did not preempt additional state action. "We emphasize 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. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised."

Natural Resources

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FEDERALISM IN THE SUPREME COURT
2004 - 05 Term

Richard Ruda
State and Local Legal Center
Washington, D.C.

National Conference of State Legislatures
Annual Meeting
Seattle, Washington
August 16, 2005

Excerpt from presentation addressing Kelo v. New London.

III. TAKINGS

A. Kelo v. City of New London, 125 S.Ct. 2655 (June 23, 2005)

1. Issue – Whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Takings Clause of the Fifth Amendment.

    a. The "Takings" Clause provides that "private property" shall not be "taken" for "public use" without just compensation.

    b. The City of New London and the New London Development Corporation ("NLDC") adopted an economic

development plan to revitalize a distressed (but NOT "blighted") neighborhood.

1) The primary purposes of the plan are to

a) Create large numbers of jobs in a declining city with high unemployment.

b) Increase the City's tax base by revitalizing a neighborhood with many vacant or deteriorated properties.

c. The City's development plan includes the following proposed uses:

1) A waterfront hotel and conference center

2) 80 new residences organized into an urban neighborhood

3) Marinas for recreational and commercial vessels

4) A public walkway along the riverfront

5) A new U.S. Coast Guard museum

6) Extensive office space with parking and retail space

7) Park support areas for the adjacent Fort Trumbull State Park, including parking and retail space

d. Many property owners in Fort Trumbull, the neighborhood to be redeveloped, voluntarily sold their properties to NLDC, but seven property owners declined to sell voluntarily.

1) One of these "hold out" property owners is a limited partnership; the others are private individuals.

2) The seven property owners own a total of 15 homes or other properties in the area slated for redevelopment.

2. The seven property owners brought a challenge to the use of eminent domain by the City with respect to their properties,

claiming that its use was unconstitutional because economic development without a determination of "blight" is not a valid "public use."

3. The Connecticut Supreme Court ruled in favor of the City and NLDC, holding **by a vote of 4-3** that the use of eminent domain by New London in furtherance of the proposed economic development project was constitutional:

"economic development projects . . . that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clause" even in the absence of a prior determination of "blight."

a. **The three dissenting Justices on the Connecticut Supreme Court "agreed that the plan was intended to serve a valid public purpose."**

b. The dissenters believed that New London's use of eminent domain was unconstitutional because "the City had failed to adduce `clear and convincing evidence' that the economic benefits of the plan would in fact come to pass."

4. Holding – New London's "proposed disposition" of the land as to which it seeks to exercise eminent domain "qualifies as a .`public use' within the meaning of the Takings Clause."

a. The Court first sets out two "polar propositions" (neither of which resolves the question presented in this case) that are "perfectly clear:"

1) First, "**the sovereign may not take the property of A for <u>the sole purpose</u> of transferring it to another private party B, even though A is paid just compensation.**"

a) Thus, "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."

b) "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."

2) Second, "it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking;" e.g., the condemnation of land for a railroad with common-carrier duties.

a) Even though a "common carrier" use – i.e., one open to the general public is clearly a "public use" under the Takings Clause, it is indisputable that it is not necessary " that the condemned, property be put into use for the general public." (quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 244 (1984)).

b. "The disposition of this case therefore turns on whether the City's development plan serves a `public purpose.'"

1) **"Without exception, our cases have defined that. concept. broadly, reflecting our longstanding policy of deference to legislative judgments in the field."**

a) Berman v. Parker, 348 U.S. 26 (1954); upheld the use of eminent domain as part of a redevelopment plan for a "blighted" area of Washington, D.C.

(1) 'The Berman Court held that creating a "better balanced; more attractive community" was a valid "public use" under the Fifth Amendment.

b) In Hawaii Housing Auth. v. Midkiff, supra, the Court unanimously upheld a Hawaii statute that employed eminent domain to take fee title from lessors and transfer it to lessees "in order to reduce the concentration of land ownership."

(1) In Midkiff the Court unanimously held that "eliminating the 'social and economic evils of a land oligopoly' qualified as a public use."

(2) Hawaii's use of eminent domain was valid even though all of the condemned properties were immediately transferred from one group of private owners to another.

2) "Viewed as a whole, our jurisprudence has recognized that **the needs of society have varied between different parts of the Nation**, just as they have evolved over time in response to changed circumstances."

a) **"Our earliest cases in particular embodied a strong them of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs."**

Slip op. at 12

b) **"For more than a century, <u>our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor in affording legislatures broad latitude in determining what public needs justify the use of the takings power.</u>"**

c. Applying these standards to this case, New London's economic redevelopment plan for the Fort Trumbull neighborhood is a valid "public use" under the Fifth Amendment and employment of eminent domain in furtherance of the plan is permissible under the U.S. Constitution.

1) A determination by municipal officials, acting pursuant to state authorization, that city-planned economic redevelopment is necessary "is entitled to [the Court's] deference."

2) "The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including – but by no means limited to – new jobs and increased tax revenue."

3) "The City is endeavoring to coordinate a variety of commercials, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts."

4) **"To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development."**

5) **Because the City's development plan "unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."**

6) The Court specifically rejects the petitioners' request that the Court "adopt a new bright-line rule that economic development does not qualify as a public use."

7) "Promoting economic development is a traditional and long accepted function of government."

8) **"There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized"** in cases such as Berman (redevelopment), Midkiff (breaking up land oligopolies in Hawaii), and Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (making "trade secrets" re pesticide formulas available to subsequent entrants into the pesticide market).

9) "It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests."

d. The Court also rejects petitioners' argument that eminent domain for economic development is impermissible in cases in which private parties will benefit, citing Midkiff, Monsanto, and Berman, all cases in which the ultimate beneficiaries of the exercise of eminent domain included private parties.

a) "The public end" that supports the use of eminent domain "may be as well or better served through an agency of private enterprise than through a department of government – or so [the federal, state, or local government] might conclude."

b) "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

e. The Court also addresses the objection of the dissenting Justices and petitioners that "without a bright-line rule nothing would stop a city from transferring citizen *A's* property to citizen *B* for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes."

a) The Court first notes that "such a one-to-one transfer, executed outside the confines of an integrated development plan, is not presented in this case."

b) The Court further notes that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot" and cites eases striking down problematic exercises of eminent domain that have no public benefit.

c) The Court adds that the hypothetical abuses of eminent domain posited by petitioners "can be confronted if and when they arise."

d) Hypothetical examples of "abuse" of eminent domain "do not warrant the crafting of an artificial restriction on the concept of public use."

(1) "A parade of horribles is especially unpersuasive in this context, since the Takings Clause largely operates as a conditional limitation, **permitting the government to do what it wants so long as it pays the charge.**"

f. The Court rejects the theory of the dissenting Justices in the Connecticut Supreme Court and petitioners that courts

should require "a `reasonable certainty' that the expected public benefits will actually accrue."

1) Such a condition on the use of eminent domain is totally unsupported by the Court's precedents.

2) "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts."

3) "Indeed, earlier this Term we **[IN A MAJORITY OPINION WRITTEN BY JUSTICE O'CONNOR]** explained that the "substantially advances" formula in previous takings causes was invalid in part because it **"would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies." <u>Lingle v. Chevron</u>, No. 04-163 (5/23/05), Slip op. at 14-15.**

4) "A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans."

g. The Court concludes with several important caveats:

l) "We do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation."

(a) "While important," the fairness of the measure of just compensation is "not before us in this litigation."

2) **" We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." Slip op. at 19.**

(a) "Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."

(1) Some of these requirements have been established as a matter of state constitutional law, while **<u>others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised</u>**.

3) "This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a `public use' within the meaning of the Fifth Amendment of the Federal Constitution."

5. **Justice O'Connor, joined by the Chief Justice, Justice Scalia, and Justice Thomas dissenting.**

a. "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private property owner; so long as it might be upgraded – i.e.; given to an owner who will use it in a way that the legislature deems more beneficial to the public – in the process."

b. "To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings `for public use' 'is to wash out any distinction between private and public use of property – and thereby effectively to delete the words `for public use' from the Takings Clause."

c. **"The specter of condemnation hangs over all property. <u>Nothing</u> is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."**

d. **"In a coda [sic!!!!!] the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development."**

1) **"This is an abdication of our responsibility".**

2) **"States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action; no less) is not among them."**

EMINENT DOMAIN PROVISIONS IN THE FLORIDA CONSTITUTION
CONSTITUTION OF 1838 – PRESENT CONSTITUTION

1968 CONSTITUTION (AS SUBSEQUENTLY AMENDED)
ARTICLE X. MISCELLANEOUS
SECTION 6. EMINENT DOMAIN.—

(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.

CONSTITUTION OF 1885
DECLARATION OF RIGHTS.

Section 12. No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken without just compensation.

ARTICLE XVI.
MISCELLANEOUS PROVISIONS.

Section 28. The Legislature may provide for the drainage of the land of one person over or through that of another, upon just compensation therefor to the owner of the land over which such drainage is had.

Section 29. No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law.

CONSTITUTION OF 1868
DECLARATION OF RIGHTS

Section 8. No person shall be tried for a capital or otherwise infamous crime, except in cases of impeachment, and in cases of the militia when in active service in time of war, or which the State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the Legislature, unless on presentment and indictment by a grand jury; and in any trial, by any court, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation.

CONSTITUTION OF 1865
ARTICLE I. Declaration of Rights.

Section 14. That private property shall not be taken or applied to public use, unless just compensation be first made therefor.

CONSTITUTION OF 1861
ARTICLE I. Declaration of Rights.

Section 14. That private property shall not be taken or applied to public use, unless just compensation be made therefor.

CONSTITUTION OF 1838
ARTICLE I. Declaration of Rights.

Section 14. That private property shall not be taken or applied to public use, unless just compensation be made therefor.

COUNTY AND MUNICIPAL CONSTITUTIONAL HOME RULE POWER
1968 CONSTITUTION
(AS SUBSEQUENTLY AMENDED IN 2004)

ARTICLE VIII, LOCAL GOVERNMENT

SECTION 1. Counties.—

(f) NON-CHARTER GOVERNMENT. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

(g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government *not inconsistent* with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

SECTION 2. Municipalities.--

(b) POWERS. Municipalities shall 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. Each municipal legislative body shall be elective.

West's Florida Statutes Annotated Currentness
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)
➡ Chapter 73. Eminent Domain (Refs & Annos)

73.01. Renumbered as 73.012 in Fla.St. 1965

See, now, F.S.A. § 73.012

73.011. Repealed by Laws 1965, c. 65-369, § 2

73.012. Procedure

Actions in eminent domain shall be governed by the rules of civil procedure and the appellate rules unless otherwise provided by this chapter.

73.015. Presuit negotiation

(1) Effective July 1, 2000, before an eminent domain proceeding is brought under this chapter or chapter 74, the condemning authority must attempt to negotiate in good faith with the fee owner of the parcel to be acquired, must provide the fee owner with a written offer and, if requested, a copy of the appraisal upon which the offer is based, and must attempt to reach an agreement regarding the amount of compensation to be paid for the parcel.

(a) No later than the time the initial written or oral offer of compensation for acquisition is made to the fee owner, the condemning authority must notify the fee owner of the following:

1. That all or a portion of his or her property is necessary for a project.

2. The nature of the project for which the parcel is considered necessary, and the parcel designation of the property to be acquired.

3. That, within 15 business days after receipt of a request by the fee owner, the condemning authority will provide a copy of the appraisal report upon which the offer to the fee owner is based; copies, to the extent prepared, of the right-of-way maps or other documents that depict the proposed taking; and copies, to the extent prepared, of the construction plans that depict project improvements to be constructed on the property taken and improvements to be constructed adjacent to the remaining property, including, but not limited to, plan, profile, cross-section, drainage, and pavement marking sheets, and driveway connection detail. The condemning authority shall provide any additional plan sheets within 15 days of request.

4. The fee owner's statutory rights under ss. 73.091 and 73.092, or alternatively provide copies of these provisions of law.

5. The fee owner's rights and responsibilities under paragraphs (b) and (c) and subsection (4), or alternatively provide copies of these provisions of law.

(b) The condemning authority must provide a written offer of compensation to the fee owner as to the value of the property sought to be appropriated and, where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking. The owner must be given at least 30 days after either receipt of the notice or the date the notice is returned as undeliverable by the postal authorities to respond to the offer, before the

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condemning authority files a condemnation proceeding for the parcel identified in the offer.

(c) The notice and written offer must be sent by certified mail, return receipt requested, to the fee owner's last known address listed on the county ad valorem tax roll. Alternatively, the notice and written offer may be personally delivered to the fee owner of the property. If there is more than one owner of a property, notice to one owner constitutes notice to all owners of the property. The return of the notice as undeliverable by the postal authorities constitutes compliance with this provision. The condemning authority is not required to give notice or a written offer to a person who acquires title to the property after the notice required by this section has been given.

(d) Notwithstanding this subsection, with respect to lands acquired under s. 259.041, the condemning authority is not required to give the fee owner the current appraisal before executing an option contract.

(2) Effective July 1, 2000, before an eminent domain proceeding is brought under this chapter or chapter 74 by the Department of Transportation or by a county, municipality, board, district, or other public body for the condemnation of right-of-way, the condemning authority must make a good faith effort to notify the business owners, including lessees, who operate a business located on the property to be acquired.

(a) The condemning authority must notify the business owner of the following:

1. That all or a portion of his or her property is necessary for a project.

2. The nature of the project for which the parcel is considered necessary, and the parcel designation of the property to be acquired.

3. That, within 15 business days after receipt of a request by the business owner, the condemning authority will provide a copy of the appraisal report upon which the offer to the fee owner is based; copies, to the extent prepared, of the right-of-way maps or other documents that depict the proposed taking; and copies, to the extent prepared, of the construction plans that depict project improvements to be constructed on the property taken and improvements to be constructed adjacent to the remaining property, including, but not limited to, plan, profile, cross-section, drainage, pavement marking sheets, and driveway connection detail. The condemning authority shall provide any additional plan sheets within 15 days of request.

4. The business owner's statutory rights under ss. 73.071, 73.091, and 73.092.

5. The business owner's rights and responsibilities under paragraphs (b) and (c) and subsection (4).

(b) The notice must be made subsequent to or concurrent with the condemning authority's making the written offer of compensation to the fee owner pursuant to subsection (1). The notice must be sent by certified mail, return receipt requested, to the address of the registered agent for the business located on the property to be acquired, or if no agent is registered, by certified mail or personal delivery to the address of the business located on the property to be acquired. Notice to one owner of a multiple ownership business constitutes notice to all business owners of that business. The return of the notice as undeliverable by the postal authorities constitutes compliance with these provisions. The condemning authority is not required to give notice to a person who acquires an interest in the business after the notice required by this section has been given. Once notice has been made to business owners under this subsection, the condemning authority may file a condemnation proceeding pursuant to chapter 73 or chapter 74 for the property identified in the notice.

(c) If the business qualifies for business damages pursuant to s. 73.071(3)(b) and the business intends to claim business damages, the business owner must, within 180 days after either receipt of the notice or the date the notice is returned as undeliverable by the postal authorities, or at a later time mutually agreed to by the condemning authority and the business owner, submit to the condemning authority a good faith written offer to settle any claims of business damage. The written offer must be sent to the condemning authority by certified mail, return receipt requested. Absent a showing of a good faith justification for the failure to submit a business damage offer within 180 days, the court must strike the business owner's claim for business damages in any condemnation proceeding. If the court finds that the business owner has made a showing of a good faith justification for the failure to timely submit a business damage offer, the court shall grant the business owner up to 180 days within which to submit a

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business damage offer, which the condemning authority must respond to within 120 days.

1. The business damage offer must include an explanation of the nature, extent, and monetary amount of such damage and must be prepared by the owner, a certified public accountant, or a business damage expert familiar with the nature of the operations of the owner's business. The business owner shall also provide to the condemning authority copies of the owner's business records that substantiate the good faith offer to settle the business damage claim. If additional information is needed beyond data that may be obtained from business records existing at the time of the offer, the business owner and condemning authority may agree on a schedule for the submission of such information.

2. As used in this paragraph, the term "business records" includes, but is not limited to, copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for the 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim.

(d) Within 120 days after receipt of the good faith business damage offer and accompanying business records, the condemning authority must, by certified mail, accept or reject the business owner's offer or make a counteroffer. Failure of the condemning authority to respond to the business damage offer, or rejection thereof pursuant to this section, must be deemed to be a counteroffer of zero dollars for purposes of subsequent application of s. 73.092(1).

(3) At any time in the presuit negotiation process, the parties may agree to submit the compensation or business damage claims to nonbinding mediation. The parties shall agree upon a mediator certified under s. 44.102. In the event that there is a settlement reached as a result of mediation or other mutually acceptable dispute resolution procedure, the agreement reached shall be in writing. The written agreement provided for in this section shall incorporate by reference the right-of-way maps, construction plans, or other documents related to the taking upon which the settlement is based. In the event of a settlement, both parties shall have the same legal rights that would have been available under law if the matter had been resolved through eminent domain proceedings in circuit court with the maps, plans, or other documents having been made a part of the record.

(4) If a settlement is reached between the condemning authority and a property or business owner prior to a lawsuit being filed, the property or business owner who settles compensation claims in lieu of condemnation shall be entitled to recover costs in the same manner as provided in s. 73.091 and attorney's fees in the same manner as provided in s. 73.092, more specifically as follows:

(a) Attorney's fees for presuit negotiations under this section regarding the amount of compensation to be paid for the land, severance damages, and improvements must be calculated in the same manner as provided in s. 73.092(1) unless the parties otherwise agree.

(b) If business damages are recovered by the business owner based on the condemning authority accepting the business owner's initial offer or the business owner accepting the condemning authority's initial counteroffer, attorney's fees must be calculated in accordance with s. 73.092(2), (3), (4), and (5) for the attorney's time incurred in presentation of the business owner's good faith offer under paragraph (2)(c). Otherwise, attorney's fees for the award of business damages must be calculated as provided in s. 73.092(1), based on the difference between the final judgment or settlement of business damages and the counteroffer to the business owner's offer by the condemning authority.

(c) Presuit costs must be presented, calculated, and awarded in the same manner as provided in s. 73.091, after submission by the business or property owner to the condemning authority of all appraisal reports, business damage reports, or other work products for which recovery is sought, and upon transfer of title of the real property by closing, upon payment of any amounts due for business damages, or upon final judgment.

(d) If the parties cannot agree on the amount of costs and attorney's fees to be paid by the condemning authority, the business or property owner may file a complaint in the circuit court in the county in which the property is located to recover attorney's fees and costs.

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This shall only apply when the action is by the Department of Transportation, county, municipality, board, district, or other public body for the condemnation of a road right-of-way.

(5) Evidence of negotiations or of any written or oral statements used in mediation or negotiations between the parties under this section is inadmissible in any condemnation proceeding, except in a proceeding to determine reasonable costs and attorney's fees.

73.0155. Confidentiality; business information provided to a governmental condemning authority

(1) The following business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015 is confidential and exempt from s. 24(a), Art. I of the State Constitution and s. 119.07(1) if the owner requests in writing that the information be held exempt:

(a) Federal tax returns or tax information confidential under 26 U.S.C. s. 6103.

(b) State tax returns or tax information confidential under s. 213.053.

(c) Balance sheets, profit-and-loss statements, cash-flow statements, inventory records, or customer lists or number of customers for a business operating on the parcel to be acquired.

(d) A franchise, distributorship, or lease agreement of which the business operating on the parcel to be acquired is the subject.

(e) Materials that relate to methods of manufacture or production, potential trade secrets, patentable material, or actual trade secrets as defined in s. 688.002.

(f) Other sensitive or proprietary information related to the business operating on the parcel to be acquired, if the owner attests in writing to the governmental condemning authority that:

1. The information is being relied upon to substantiate a claim for business damages under s. 73.015;

2. The information has not otherwise been publicly disclosed;

3. The information cannot be readily obtained by the public using alternative means;

4. The information is used by the business to protect or further a business advantage over those who do not know or use the information; and

5. The disclosure of the information would injure the business in the marketplace.

(2) At the time that any information made confidential and exempt from disclosure under subsection (1) is legally available or subject to public disclosure for any reason, that information is no longer confidential and exempt and shall be made available for inspection and copying.

(3) An agency as defined in s. 119.011 may inspect and copy records or information made confidential and exempt from disclosure under subsection (1) exclusively for the transaction of official business by, or on behalf of, an agency. An agency receiving this confidential and exempt information must maintain the confidentiality of that information. Any employee or agent of the agency receiving this confidential and exempt information who willfully and knowingly violates this subsection commits a misdemeanor of the first degree, punishable as provided by s. 775.082 or s. 775.083.

(4) This section does not prevent an agency from offering information made confidential and exempt from disclosure under subsection (1) as evidence in a legal proceeding and does not prevent a court from determining whether to close a portion of a court record from subsequent public disclosure after trial in order to maintain the confidentiality of that information.

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(5) Subsection (1) is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and expires on October 2, 2009, unless reviewed and reenacted by the Legislature.

73.02. Renumbered as 73.021 in Fla.St. 1965

See, now, F.S.A. § 73.021

73.021. Petition; contents

Those having the right to exercise the power of eminent domain may file a petition therefor in the circuit court of the county wherein the property lies, which petition shall set forth:

(1) The authority under which and the use for which the property is to be acquired, and that the property is necessary for that use;

(2) A description identifying the property sought to be acquired. The petitioners may join in the same action all properties involved in a planned project whether in the same or different ownership, or whether or not the property is sought for the same use;

(3) The estate or interest in the property which the petitioner intends to acquire;

(4) The names, places of residence, legal disabilities, if any, and interests in the property of all owners, lessees, mortgagees, judgment creditors, and lienholders, so far as ascertainable by diligent search, and all unknown persons having an interest in the property when the petitioner has been unable to ascertain the identity of such persons by diligent search and inquiry. If any interest in the property, or lien thereon, belongs to the unsettled estate of a decedent, the executor or administrator shall be made a defendant without joining the devisee or heir; if a trust estate, the trustee shall be made a defendant without joining the cestui que trust. The court may appoint an administrator ad litem to represent the estate of a deceased person whose estate is not being administered, and a guardian ad litem for all defendants who are infants or are under other legal disabilities; and for defendants whose names or addresses are unknown. A copy of the order of appointment shall be served on the guardian ad litem at least 10 days before trial unless he or she has entered an appearance;

(5) Whether any mobile home is located on the property sought to be acquired and, if so, whether the removal of that mobile home will be required. If such removal shall be required, the petition shall name the owners of each such mobile home as defendants. This subsection shall not apply to any governmental authority exercising its power of eminent domain when reasonable relocation or removal expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power.

(6) A statement that the petitioner has surveyed and located its line or area of construction, and intends in good faith to construct the project on or over the described property;

(7) A demand for relief that the property be condemned and taken for the uses and purposes set forth in the petition, and that the interest sought be vested in the petitioner.

73.03. Renumbered as 73.021 in Fla.St. 1965

See, now, F.S.A. § 73.021

73.031. Process; service and publication

(1) Upon the filing of the petition, the clerk of the court shall issue a summons to show cause why the property

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should not be taken, directed "to all whom it may concern," containing the names of all the defendants named in the petition, commanding them and any other persons claiming any interest in the property described to serve written defenses to the petition on a day specified in the summons not less than 28 nor more than 60 days from the date of the summons. A copy of the summons and the petition shall be served upon all resident defendants in the manner provided by law and not less than 20 days before the return day.

(2) If any defendant is alleged to be a nonresident of the state, or if the name or residence of any defendant is alleged to be unknown, or if personal service cannot be had upon any defendant for any other reason, the clerk shall cause a notice to be published at least once each week for 2 consecutive weeks prior to the return day in some newspaper published in the county; provided, however, that if the petitioner be a municipality and a newspaper is published therein, the notice shall be published in such a newspaper. This notice shall contain the names of the defendants to whom it is directed, a description of the property sought to be appropriated, the nature of the action, and the name of the court in which it is pending. The clerk shall mail a copy of the summons and the petition to each out-of-state defendant at the address as set forth in the petition. The clerk shall file a certificate of mailing which, together with proof of publication, shall constitute effective service as though the defendant had been personally served with process within this state.

(3) The failure of any party to receive notice by mail shall not invalidate the proceedings of the court or any order made pursuant to this chapter.

73.032. Offer of judgment

(1) This section shall provide the exclusive offer of judgment provisions for eminent domain actions.

(2) The petitioner may serve a defendant with an offer of judgment no sooner than 120 days after the defendant has filed an answer and no later than 20 days prior to trial.

(3) A defendant may make an offer to have judgment entered against defendant for payment of compensation by petitioner only for an amount that is under $100,000, and such offer may be served on petitioner no sooner than 120 days after the defendant has filed an answer and no later than 20 days prior to trial.

(4)(a) The offer of judgment must:

1. Be in writing;

2. Settle all pending claims with that party or parties exclusive of attorney's fees and costs;

3. State that the offer is made pursuant to this section;

4. Name the parties to whom the offer is made;

5. Briefly summarize any relevant conditions;

6. State the total amount of the offer; and

7. Include a certificate of service.

(b) The offer of judgment must be served in the same manner as other pleadings upon the parties to whom it is made, but may not be filed with the court unless it is accepted or unless filing is necessary to enforce this section.

(c) The offer of judgment shall be deemed rejected unless accepted by filing both a written acceptance and the written offer with the court within 30 days after service of the offer, or before the trial begins if less than 30 days. Upon proper filing of both the offer and acceptance, the court shall enter judgment thereon. A rejection of an offer terminates the offer.

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(d) The party making the offer may withdraw the offer in a writing served on the opposing party before a written acceptance is filed with the court. Once withdrawn in this manner, an offer is void.

(e) An offer of judgment which is rejected or which is withdrawn does not preclude the making of a subsequent offer of judgment; however, any such subsequent offer of judgment shall automatically void the prior offer of judgment as if the same had never been made.

(5) If a defendant does not accept the offer of judgment made by the petitioner and the judgment obtained by the defendant, exclusive of any interest accumulated after the offer of judgment was initially made, is equal to or less than such offer, then the court shall not award any costs incurred by the defendant after the date the offer of judgment was rejected.

(6) If the petitioner rejects the offer of judgment made by defendant and the judgment obtained by defendant, exclusive of any interest accumulated after the offer of judgment was initially made, is equal to or is more than such offer, then the court shall award a reasonable attorney's fee to the defendant based on the factors set forth in s. 73.092(2) and (3).

(7) At the time an offer of judgment is made by the petitioner, the petitioner shall identify and make available to the defendant the construction plans, if any, for the project on which the offer is based.

(8) Evidence of an offer of judgment is admissible only in proceedings to enforce an accepted offer or to determine the costs to be awarded a defendant pursuant to subsection (5) or a reasonable attorney's fee pursuant to subsection (6).

73.04. Renumbered as 73.031 in Fla.St. 1965

See, now, F.S.A. § 73.031

73.041. Acquiring or perfecting title after appropriation

In any instance, where the petitioner has not acquired the title to or a necessary interest in any lands which it is using, or if at any time after an attempt to acquire such title or interest, it is found to be defective, the petitioner may proceed under this chapter to acquire or perfect such title or interest; provided, however, that the compensation to be allowed the defendants shall be determined as of the date of appropriation.

73.05. Renumbered as 73.051 in Fla.St. 1965

See, now, F.S.A. § 73.051

73.051. Returns; defaults

Any person interested in or having a lien upon the property, whether named as a defendant or not, may file his or her written defenses to the petition, as a matter of right, on or before the return date set in the notice or thereafter by leave of court. If a defendant does not file his or her defenses on or before the return date, defaults may be entered against the defendant, but nothing shall prevent any person who is shown by the record to be interested in the property from appearing before the jury to claim the amount of compensation that he or she conceives to be due for the property.

73.0511. Prelitigation notice

Prior to instituting litigation, the condemning authority shall notify the fee owners of statutory rights under s.

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73.091.

73.06. Renumbered as 73.061 in Fla.St. 1965

See, now, F.S.A. § 73.061

73.061. Pretrial hearing

(1) Prior to the date of trial, the court may hold a hearing, in limine, to settle all disputed matters properly before it which must be determined prior to trial. Should it appear that the causes of action joined cannot be conveniently disposed of together, the court may order separate trials; provided, however, that any such actions shall be tried in the county in which the lands are located.

(2) The court in which an action in eminent domain is pending shall have jurisdiction and authority over any and all taxes and assessments encumbering the lands involved in such actions, and may stay or defer the enforcement of such taxes and assessments, including all applications for tax deeds, foreclosures and other enforcement proceedings, until final termination of such eminent domain actions. The said court may make such orders concerning such taxes and assessments as may be equitable and proper; provided, however, that ad valorem taxes levied upon any such lands shall be prorated against the owner to the date of taking.

73.07. Omitted in Fla.St. 1965

73.071. Jury trial; compensation; severance damages; business damages

(1) When the action is at issue, and only upon notice and hearing to set the cause for trial, the court shall impanel a jury of 12 persons as soon as practical considering the reasonable necessities of the court and of the parties, and giving preference to the trial of eminent domain cases over other civil actions, and submit the issue of compensation to them for determination, which issue shall be tried in the same manner as other issues of fact are tried in the circuit courts.

(2) The amount of such compensation shall be determined as of the date of trial, or the date upon which title passes, whichever shall occur first.

(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

(a) The value of the property sought to be appropriated;

(b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 4 years' standing before January 1, 2005, or the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing on or after January 1, 2005, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recover such special damages shall set forth in his or her written defenses the nature and extent of such damages; and

(c) Where the appropriation is of property upon which a mobile home, other than a travel trailer as defined in s. 320.01, is located, whether or not the owner of the mobile home is an owner or lessee of the property involved, and the effect of the taking of the property involved requires the relocation of such mobile home, the reasonable removal or relocation expenses incurred by such mobile home owner, not to exceed the replacement value of such mobile home. The compensation paid to a mobile home owner under this paragraph shall preclude an award to a mobile

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home park owner for such expenses of removal or relocation. Any mobile home owner claiming the right to such removal or relocation expenses shall set forth in his or her written defenses the nature and extent of such expenses. This paragraph shall not apply to any governmental authority exercising its power of eminent domain when reasonable removal or relocation expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power.

(4) When the action is by the Department of Transportation, county, municipality, board, district, or other public body for the condemnation of a road, canal, levee, or water control facility right-of-way, the enhancement, if any, in value of the remaining adjoining property of the defendant property owner by reason of the construction or improvement made or contemplated by the petitioner shall be offset against the damage, if any, resulting to such remaining adjoining property of the defendant property owner by reason of the construction or improvement. However, such enhancement in the value shall not be offset against the value of the property appropriated, and if such enhancement in value shall exceed the damage, if any, to the remaining adjoining property, there shall be no recovery over against such property owner for such excess.

(5) Any increase or decrease in the value of any property to be acquired which occurs after the scope of the project for which the property is being acquired is known in the market, and which is solely a result of the knowledge of the project location, shall not be considered in arriving at the value of the property acquired. For the purpose of this section, the scope of the project for which the property is being acquired shall be presumed to be known in the market on or after the condemnor executes a resolution which depicts the location of the project.

(6) The jury shall view the subject property upon demand by any party or by order of the court.

(7) If the jury cannot agree on a verdict the court shall discharge them, impanel a new jury, and proceed with the trial.

73.0715. Valuation of electric utility property

When any person having the right to exercise the power of eminent domain seeks the appropriation of property used for the generation, transmission, or distribution of electric energy, the jury shall determine solely the amount of compensation to be paid. Such compensation shall include the reproduction cost of the property sought to be appropriated less depreciation, together with going concern value, and, when less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking.

73.072. Mobile home parks; compensation for permanent improvements by mobile home owners

(1) When all or a portion of a mobile home park as defined in s. 723.003(6) is appropriated under this chapter, the condemning authority shall separately determine the compensation for any permanent improvements made to each site. This compensation shall be awarded to the mobile home owner leasing the site if:

(a) The effect of the taking includes a requirement that the mobile home owner remove or relocate his or her mobile home from the site;

(b) The mobile home owner currently leasing the site has paid for the permanent improvements to the site; and

(c) The value of the permanent improvements on the site exceeds $1,000 as of the date of taking.

(2) "Permanent improvement" means any addition or improvement to the site upon which a mobile home is located, which addition or improvement cannot be detached and removed from the site without destroying its practical utility at another site. If capable of removal to another site, compensation for the expense of removal and relocation shall be as provided by law.

(3) A mobile home owner who is the lessee of the site and is required to remove his or her mobile home as the result of a taking of all or a part of a mobile home park may petition to intervene as a party defendant in proceedings under

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this chapter, for purposes of asserting his or her right to the separate compensation to be determined and awarded under this section. Failure to intervene shall not constitute a waiver of the right of a mobile home owner to institute a separate action to recover from a mobile home park owner the compensation awarded to such park owner for the permanent improvements made by the mobile home owner to the site on which his or her mobile home is located.

73.073. Eminent domain procedure with respect to condominium common elements

(1) Any other provision of this chapter or any other provision of the Florida Statutes to the contrary notwithstanding, the procedure for the exercise of eminent domain with respect to the taking of a portion of the common elements of a condominium shall comply with the provisions of this section.

(2) With respect to the exercise of eminent domain or a negotiated sale for the purchase or taking of a portion of the common elements of a condominium, the condemning authority shall have the responsibility of contacting the condominium association and acquiring the most recent rolls indicating the names of the unit owners or contacting the appropriate taxing authority to obtain the names of the owners of record on the tax rolls. Notification shall thereupon be sent by certified mail, return receipt requested, to the unit owners of record of the condominium units by the condemning authority indicating the intent to purchase or take the required property and requesting a response from the unit owner. The condemning authority shall be responsible for the expense of sending notification pursuant to this section. Such notice shall, at a minimum, include:

(a) The name and address of the condemning authority.

(b) A written or visual description of the property.

(c) The public purpose for which the property is needed.

(d) The appraisal value of the property.

(e) A clear, concise statement relating to the unit owner's right to object to the taking or appraisal value and the procedures and effects of exercising that right.

(f) A clear, concise statement relating to the power of the association to convey the property on behalf of the unit owners if no objection to the taking or appraisal value is raised, and the effects of this alternative on the unit owner.

The Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation may adopt, by rule, a standard form for such notice and may require the notice to include any additional relevant information.

(3) In the absence of a response by the unit owner within 30 days, the unit owner shall be deemed to have acquiesced to the association acting as the unit owner's representative in any subsequent proceeding relating to the parcel at issue. Unit owners who object to the purchase or taking or the appraisal of value within 30 days after the date the notice is received shall have all of their legal rights preserved with regard to the taking, the appraisal of value, and all other rights which appertain to unit ownership. Failure to raise an objection within the 30-day period shall only constitute an acquiescence by the unit owner to the association acting as the unit owner's representative in any subsequent proceeding relating to the parcel at issue and shall not affect any other rights of the unit owner. In the event that no unit owners shall so object, the condemning authority may rely upon a power of sale vested in the condominium association. The condemning authority shall only be required to name as defendants, should eminent domain proceedings be necessitated, the association and those owners of units which shall have objected to the taking or appraisal value within the 30-day period.

(4) It is the intent of the Legislature, through the adoption of this section, to provide a mechanism to either eliminate or minimize the necessity for naming individual unit owners in eminent domain proceedings for the acquisition of a portion of the common elements of a condominium and the necessity of incidental title searches and legal actions necessitated by naming multiple unit owners as defendants.

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73.08. Renumbered as 73.021 in Fla.St. 1965

See, now, F.S.A. § 73.021

73.081. Form of verdict

The verdict of the jury shall state an accurate description of each parcel of the property sought to be appropriated and the amount to be paid therefor, together with any damage to the remainder caused by the taking and including business damages when allowable by statute. When severance damages, business damages, moving costs, separate compensation for permanent improvements made by a mobile home owner under s. 73.072, or other special damages are sought, the verdict shall state the amount of such damages separately from the amounts of other damages awarded.

73.09. Renumbered as 73.041 in Fla.St. 1965

See, now, F.S.A. § 73.041

73.091. Costs of the proceedings

(1) The petitioner shall pay attorney's fees as provided in s. 73.092 as well as all reasonable costs incurred in the defense of the proceedings in the circuit court, including, but not limited to, reasonable appraisal fees and, when business damages are compensable, a reasonable accountant's fee, to be assessed by that court. No prejudgment interest shall be paid on costs or attorney's fees.

(2) At least 30 days prior to a hearing to assess costs under this section, the condemnee's attorney shall submit to the condemning authority for each expert witness complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred, and a copy of any fee agreement which may exist between the expert and the condemnee or the condemnee's attorney.

(3) In assessing costs, the court shall consider all factors relevant to the reasonableness of the costs, including, but not limited to, the fees paid to similar experts retained in the case by the condemning authority or other parties and the reasonable costs of similar services by similarly qualified persons.

(4) In assessing costs to be paid by the petitioner, the court shall be guided by the amount the defendant would ordinarily have been expected to pay for the services rendered if the petitioner were not responsible for the costs.

(5) The court shall make specific findings that justify each sum awarded as an expert witness fee.

73.092. Attorney's fees

(1) Except as otherwise provided in this section and s. 73.015, the court, in eminent domain proceedings, shall award attorney's fees based solely on the benefits achieved for the client.

(a) As used in this section, the term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.

1. In determining attorney's fees, if business records as defined in s. 73.015(2)(c)2. and kept by the owner in the ordinary course of business were provided to the condemning authority to substantiate the business damage offer in s. 73.015(2)(c), benefits for amounts awarded for business damages must be based on the difference between the

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final judgment or settlement and the written counteroffer made by the condemning authority provided in s. 73.015(2)(d).

2. In determining attorney's fees, if existing business records as defined in s. 73.015(2)(c)2. and kept by the owner in the ordinary course of business were not provided to the condemning authority to substantiate the business damage offer in s. 73.015(2)(c) and those records which were not provided are later deemed material to the determination of business damages, benefits for amounts awarded for business damages must be based upon the difference between the final judgment or settlement and the first written counteroffer made by the condemning authority within 90 days from the condemning authority's receipt of the business records previously not provided.

(b) The court may also consider nonmonetary benefits obtained for the client through the efforts of the attorney, to the extent such nonmonetary benefits are specifically identified by the court and can, within a reasonable degree of certainty, be quantified.

(c) Attorney's fees based on benefits achieved shall be awarded in accordance with the following schedule:

1. Thirty-three percent of any benefit up to $250,000; plus

2. Twenty-five percent of any portion of the benefit between $250,000 and $1 million; plus

3. Twenty percent of any portion of the benefit exceeding $1 million.

(2) In assessing attorney's fees incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings, when not otherwise provided for, the court shall consider:

(a) The novelty, difficulty, and importance of the questions involved.

(b) The skill employed by the attorney in conducting the cause.

(c) The amount of money involved.

(d) The responsibility incurred and fulfilled by the attorney.

(e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

(f) The fee, or rate of fee, customarily charged for legal services of a comparable or similar nature.

(g) Any attorney's fee award made under subsection (1).

(3) In determining the amount of attorney's fees to be paid by the petitioner under subsection (2), the court shall be guided by the fees the defendant would ordinarily be expected to pay for these services if the petitioner were not responsible for the payment of those fees.

(4) At least 30 days prior to a hearing to assess attorney's fees under subsection (2), the condemnee's attorney shall submit to the condemning authority and to the court complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred.

(5) The defendant shall provide to the court a copy of any fee agreement that may exist between the defendant and his or her attorney, and the court must reduce the amount of attorney's fees to be paid by the defendant by the amount of any attorney's fees awarded by the court.

73.10. Renumbered as 73.071 in Fla.St. 1965

See, now, F.S.A. § 73.071

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73.101. Form of judgment

The judgment shall recite the verdict in full and shall state that the estate or interest in the property described in the petition and sought to be appropriated by the petitioner shall vest in the petitioner upon the payment of, or securing by deposit of money, the amount found by the verdict of the jury. Where there are conflicting claims to the amount awarded for any parcel, the court, upon appropriate motion, shall determine the rights of the interested parties with respect to the amount awarded for each parcel and the method of apportionment, together with the disposition of any other matters arising from the taking.

73.11. Renumbered as 73.111 and amended by Laws 1965, c. 65-369, § 1

See, now, F.S.A. § 73.111

73.111. Deposit and possession

Within 20 days after the rendition of the judgment, the petitioner shall deposit the amount set forth therein into the registry of the court for the use of the defendants, or the proceeding shall be null and void, unless for good cause further time, not exceeding 60 days, is allowed by the court. Upon such deposit and the entry in the proper records in the clerk's office of the judgment and the clerk's certificate that the compensation has been paid into the court, the estate or interest sought shall vest in the petitioner. The court may fix the time within which, and the terms upon which, the defendants shall be required to surrender possession to the petitioner.

73.12. Renumbered as 73.101 in Fla.St. 1965

See, now, F.S.A. § 73.101

73.121. Writs of assistance and possession

Whenever the judge is satisfied that any person, whether holding under the defendant or not, is preventing or obstructing the petitioner from entering upon or taking possession of the property after the petitioner is entitled to do so, the judge may grant such writs as he or she may think necessary, or the judge may proceed for contempt of court.

73.13. Renumbered as 73.111 and 73.141 in Fla.St. 1965

See, now, F.S.A. § § 73.111 and 73.141

73.131. Appeals; costs

(1) Appeals in eminent domain actions shall be taken in the manner prescribed by law and in accordance with the appellate rules, except that an appeal shall not prevent appropriation of the property by the petitioner where the amount awarded by the judgment has been deposited with the court as aforesaid. If, at any time after entry of the judgment, a defendant shall take out of the court the amount due him or her, any pending appeal taken by the defendant shall be dismissed by the appellate court upon the filing of a certificate by the clerk of the circuit court stating that the defendant taking the appeal has withdrawn the amount due him or her.

(2) The petitioner shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorney's fee to be assessed by that court, except upon an appeal taken by a defendant in which the judgment of the lower court shall be affirmed.

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73.14. Renumbered as 73.131 in Fla.St. 1965

See, now, F.S.A. § 73.131

73.141. Payment

(1) In the event that no appeal has been taken within the time and in the manner provided by the Florida Rules of Appellate Procedure, the clerk shall pay each judgment creditor the sum necessary to satisfy the judgment from the funds on deposit, and upon order of the court shall refund to the petitioner all the funds not necessary for the satisfaction of the judgment, costs and attorney fees.

(2) In the event that a timely appeal is taken and the judgment of the trial court is affirmed, the clerk of the court shall pay each judgment creditor as hereinabove provided.

73.15. Renumbered as 73.121 in Fla.St. 1965

See, now, F.S.A. § 73.121

73.151. Railroads and canal companies

(1) Whenever land sought to be condemned to the use of a railroad or canal company is in the possession, under any law of this state, of another railroad or canal company which is using the same in the construction or operation of its railroad or canal, the use of no more land than is necessary to furnish to the petitioner a right-of-way 105 feet in width across such railroad or canal shall be condemned for such use.

(2) If it shall be necessary for any railroad company organized under any law of this state to use, for the purpose of its road, any lands over which any other railroad company shall have previously acquired the right-of-way for its road, the right to use such lands may be acquired as in other cases. Such lands shall not be taken in a manner to interfere with the main track of the railroad first established except for crossing, as provided by law.

73.16. Renumbered as 73.091 in Fla.St. 1965

See, now, F.S.A. § 73.091

73.161. Right-of-way for telephone and telegraph over railroad right-of-way

(1) If any telegraph or telephone company fails to secure the consent of any railroad or railway company for the construction of its lines along and upon the right-of-way of any railroad in this state, the same may be acquired by eminent domain. If the defendant railroad or railway company has a principal office or place of business in this state, and any portion of the right-of-way sought to be condemned extends into the county wherein such principal office or place of business is located, then the eminent domain action shall be had in such county. No map need be filed with the petition, but it shall state about how many poles per mile will be erected on such right-of-way, and about how far from each other, and from the centers of the main track of the railroad, their length and size, the depth they will be planted in the ground, and the amount of land that will be occupied by them. No pole shall be set at a greater distance than 10 feet from the outer edge of the right-of-way. In such action, the petitioner shall give bond for costs in the penalty of $200, payable to the defendant, with surety to be approved by the clerk.

(2) The judgment shall authorize the petitioner to enter upon the right-of-way of the defendant and construct its lines thereon. Said judgment shall further provide that such lines shall be constructed so as not to interfere with the

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operation of the trains of said defendant or any telephone or telegraph line already upon such right-of-way; and, furthermore, that if, at any time, the railroad or railway company shall desire, for railway purposes, the immediate use of any land occupied by said petitioner, then the petitioner shall, upon reasonable notice in writing, at its own expense, remove its line to some other place adjacent thereto on such right-of-way so as not to interfere with the track or use of said railway or any telephone or telegraph line already on said right-of-way, and that the said line shall not be erected on any embankment or slope of any cut of such right-of-way, and if at any time the said railroad or railway company shall require for railroad purposes its entire right-of-way at any point occupied by said line, the said petitioner shall, at such point, remove said line entirely off such right-of-way.

(3) The telegraph or telephone company by such action shall acquire only an easement in and to said railroad right-of-way for the purpose of constructing, maintaining, and operating its telegraph or telephone line thereon, and only the interests of such parties as are brought before the court shall be condemned in such action. If the easement or right-of-way claimed extends in or through more counties than one, the whole right and controversy may be heard and determined in any county into or through which such right-of-way extends, except as herein otherwise provided.

73.17. Renumbered as 73.171 and amended by Laws 1965, c. 65-369, § 1

See, now, F.S.A. § 73.171

73.171. Repealed by Laws 1981, c. 81-259, § 39

73.18. Repealed by Laws 1965, c. 65-369, § 2

73.19. Repealed by Laws 1965, c. 65-369, § 2

73.20. Repealed by Laws 1965, c. 65-369, § 2

73.21. Repealed by Laws 1965, c. 65-369, § 2

73.22. Renumbered as 965.061 by Laws 1965, c. 65-369, § 3

See, now, F.S.A. § 965.061

73.23. Repealed by Laws 1965, c. 65-369, § 2

73.24. Repealed by Laws 1965, c. 65-369, § 2

73.25. Repealed by Laws 1965, c. 65-369, § 2

Current through Chapter 352 and H.J.R. No. 1723, H.J.R. 1177 and S.J.R. No. 2144 (End) of the 2005 First Regular Session of the Nineteenth Legislature
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West's Florida Statutes Annotated Currentness
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)
➡ Chapter 74. Proceedings Supplemental to Eminent Domain (Refs & Annos)

74.01. Renumbered as 74.031 in Fla.St. 1965

See, now, F.S.A. § 74.031

74.011. Scope

In any eminent domain action, properly instituted by and in the name of the state; the Department of Transportation; any county, school board, municipality, expressway authority, regional water supply authority, transportation authority, flood control district, or drainage or subdrainage district; the ship canal authority; any lawfully constituted housing, port, or aviation authority; the Florida Space Authority; or any rural electric cooperative, telephone cooperative corporation, or public utility corporation, the petitioner may avail itself of the provisions of this chapter to take possession and title in advance of the entry of final judgment.

74.02. Renumbered as 74.041 in Fla.St. 1965

See, now, F.S.A. § 74.041

74.021. Rights under this chapter; additional

The right to take possession and title in advance of final judgment in eminent domain actions, as provided by this law, shall be in addition to any right, power or authority conferred by laws of the state under which proceedings may be conducted and shall not be construed as abrogating, limiting or modifying any such right, power or authority.

74.03. Omitted in Fla.St. 1965

74.031. Declaration of taking; contents

Those having the right to take possession and title in advance of the entry of final judgment in eminent domain actions, as provided by law, may file, either with the petition or at any time prior to the entry of final judgment, a declaration of taking signed by the petitioner, or its duly authorized agent or attorney, stating that the property sought to be appropriated is thereby taken for the use set forth in the petition. The petitioner shall make a good faith estimate of value, based upon a valid appraisal of each parcel in the proceeding, which shall be made a part of the declaration of taking.

74.04. Renumbered as 74.051 in Fla.St. 1965

See, now, F.S.A. § 74.051

74.041. Process; service and publication

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(1) Upon the filing of the declaration of taking, the clerk of the court shall issue a summons to show cause to the defendants, containing the names of all defendants named in the petition, notifying them that the petitioner will petition for an order of taking on a specified date. A copy of the summons to show cause and the declaration of taking shall be served upon all resident defendants in the manner provided by law for service of original process in eminent domain actions, and not less than 20 days prior to the date specified.

(2) If any defendant is alleged to be a nonresident of the state, or if the name or address of any defendant is alleged to be unknown, or if personal service cannot be had upon any defendant for any other reason, the clerk of the court shall cause the summons to show cause to be published one time, not less than 20 days prior to the date specified in the petition, in some newspaper published in the county; however, if the petitioner is a municipality and a newspaper is published therein, the summons shall be published in such a newspaper. The clerk shall mail a copy of the summons to show cause and the declaration of taking to each out-of-state defendant at the address set forth in the petition. The clerk shall file a certificate of mailing, which, together with proof of publication, shall constitute effective service as to these defendants. The failure of any party to receive the summons by mail shall not invalidate the proceedings of the court or any order made pursuant to this chapter.

(3) The petition date provided in this section may be combined with the summons to show cause and the published summons provided in s. 73.031, but in no event shall the petition date provided in this section be noticed for a date earlier than 1 day following the date specified in the summons to show cause and the published summons provided in s. 73.031 for the defendants to serve written defenses to the petition in eminent domain proceedings and, if a defendant requests, a hearing on the petition for order of taking.

74.05. Renumbered as 74.051 in Fla.St. 1965

See, now, F.S.A. § 74.051

74.051. Hearing on order of taking

(1) If a defendant requests a hearing pursuant to s. 74.041(3), said defendant may appear and be heard on all matters properly before the court which may be determined prior to the entry of the order of taking, including the jurisdiction of the court, the sufficiency of pleadings, whether the petitioner is properly exercising its delegated authority, and the amount to be deposited for the property sought to be appropriated. Any defendant failing to file a request for hearing shall waive any right to object to the order of taking, and title shall be vested in the petitioner, upon deposit as hereinafter provided, which date shall be the date of valuation.

(2) If a hearing is requested, the court shall make such order as it deems proper, securing to all parties the rights to which they may be entitled, not inconsistent with the provisions of this section. The court may make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, amount of the good faith deposit, and other charges, if any, as shall be just and equitable. If the court finds that the petitioner is entitled to possession of the property prior to final judgment, it shall enter an order requiring the petitioner to deposit in the registry of the court such sum of money as will fully secure and fully compensate the persons entitled to compensation as ultimately determined by the final judgment. Said deposit shall not be less than the amount of the petitioner's estimate of value, if the petitioner be the state or any agency thereof, any county, the city, or other public body; otherwise, double the amount of petitioner's estimate of value.

(3) The court may fix the time within which and the terms upon which the defendants shall be required to surrender possession to the petitioner, which time of possession shall be upon deposit for those defendants failing to file a request for hearing as provided herein. The order of taking shall not become effective unless the deposit of the required sum is made in the registry of the court. If the deposit is not made within 20 days from the date of the order of taking, the order shall be void and of no further effect. The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. Ninety percent of the interest earned shall be paid to the petitioner.

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74.06. Renumbered as 76.061 in Fla.St. 1965

See, now, F.S.A. § 76.061

74.061. Vesting of title or interest sought

Immediately upon the making of the deposit, the title or interest specified in the petition shall vest in the petitioner, and the said lands shall be deemed to be condemned and taken for the use of the petitioner, and the right to compensation for the same shall vest in the persons entitled thereto. Compensation shall be determined in accordance with the provisions of chapter 73, except that interest shall be allowed at the same rate as provided in all circuit court judgments from the date of surrender of possession to the date of payment on the amount that the verdict exceeds the estimate of value set forth in the declaration of taking.

74.07. Renumbered as 74.071 in Fla.St. 1965

See, now, F.S.A. § 74.071

74.071. Paying over funds in court

At any time, prior to the entry of final judgment, and upon motion by the proper defendants, the court may direct that the sum of money set forth in the declaration of taking be paid forthwith to such defendants from the money deposited in the registry of the court. If the compensation awarded for the property by the final judgment shall exceed the amount withdrawn by the defendant, the court shall enter judgment against the petitioner for the deficiency. If the amount withdrawn exceeds the compensation awarded for the property by the final judgment, the court shall enter a judgment against such defendant for the excess, and such judgment shall be a lien against any of the defendant's property except his or her homestead.

74.08. Omitted in Fla.St. 1965

74.081. Proceedings as evidence

Neither the declaration of taking, nor the amount of the deposit, shall be admissible in evidence in any action.

74.09. Renumbered as 74.081 in Fla.St. 1965

See, now, F.S.A. § 74.081

74.091. Effect of failure to pay final judgment

Where an order of taking has been entered and deposit made, the failure of the petitioner to pay into the court the compensation ascertained by the jury shall not invalidate said judgment or the title of the petitioner, and such failure shall not authorize any person to molest, interfere with, enter or trespass upon said property; provided, however, persons lawfully entitled to compensation may sue out execution, in the event a timely appeal has not been filed, and such execution may be levied upon the property so condemned and any other property of the petitioner in the same manner as executions are levied in common-law actions.

74.10. Omitted in Fla.St. 1965

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74.101. Rights of housing authority after taking

In any action in which any housing authority created under the laws of Florida has taken or may take possession of any real property in advance of final judgment therein, and the said petitioner has become irrevocably committed to pay the amount ultimately to be awarded as compensation, then it is lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land, and in erecting buildings or public works thereon, or in improving said land or erecting and constructing buildings or works thereon, authorized by law to be constructed by any petitioner.

74.11. Omitted in Fla.St. 1965

74.111. Drainage districts and housing authorities

In any action instituted by a drainage or subdrainage district, or housing authority wherein the petitioner seeks to avail itself of the provisions of this chapter:

(1) Action under this chapter shall not be taken unless the chair or other legally constituted head of the petitioning authority empowered to acquire the land shall be of the opinion that the ultimate award probably will be within the limits of the authority's ability to pay.

(2) It shall be lawful for the petitioner to expend moneys duly appropriated for the purpose of availing itself of the provisions of this chapter in going forward with the project for which the land was taken; provided that, in the opinion of the attorney representing the taking authority, the title has been vested in the authority taking, or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

(3) No money shall be paid nor contracts made for payment for any construction or maintenance proposed by the petitioner under this chapter in excess of the amount specifically appropriated therefor by the Legislature of the state, or procured by and secured to the petitioner under contracts with private persons, firms, or corporations in accordance with the laws authorizing such taking authority to negotiate contracts with private persons, firms, or corporations, or by the issuance of bonds and other debentures pursuant to tax levies duly made, all in accordance with the law in such cases made and provided.

(4) The attorney representing the petitioner is authorized to stipulate or agree in behalf of the taking authority to exclude any property, or any part thereof, or any interest therein, that may have been, or may be taken by or on behalf of the authority taking by the declaration of taking, or otherwise.

74.12. Renumbered as 74.021 in Fla.St. 1965

See, now, F.S.A. § 74.021

74.121. Repealed by Laws 2000, c. 2000-325, § 2, eff. June 19, 2000; Laws 2000, c. 2000-335, § 2, eff. June 20, 2000

74.13. Repealed by Laws 1965, c. 65-369, § 5

74.14. Repealed by Laws 1965, c. 65-369, § 5

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74.141. Repealed by Laws 1965, c. 65-369, § 5

74.15. Repealed by Laws 1965, c. 65-369, § 5

74.16. Repealed by Laws 1961, c. 61-203, § 2

Current through Chapter 352 and H.J.R. No. 1723, H.J.R. 1177 and S.J.R. No. 2144 (End) of the 2005 First Regular Session of the Nineteenth Legislature
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GENERAL COUNTY POWERS AND STATUTORY POWERS OF EMINENT DOMAIN

COUNTIES

125.01 Powers and duties.—
(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:

* * *

(j) Establish and administer programs of housing, slum clearance, community redevelopment, conservation, flood and beach erosion control, air pollution control, and navigation and drainage and cooperate with governmental agencies and private enterprises in the development and operation of such programs.

* * *

(w) Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

* * *

(3)(a) The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated, including, specifically, authority to employ personnel, expend funds, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property.

(b) The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.

125.045 County economic development powers.--
[This provision became effective June 15, 1995]

(1) The Legislature finds and declares that this state faces increasing competition from other states and other countries for the location and retention of private enterprises within its borders. Furthermore, the Legislature finds that there is a need to enhance and expand economic activity in the counties of this state by attracting and retaining manufacturing development, business enterprise management, and other activities conducive to economic promotion, in order to provide a stronger, more balanced, and stable economy in the state; to enhance and preserve purchasing power and employment opportunities for the residents of this state; and to improve the welfare and competitive position of the state. ***The Legislature declares that it is necessary and in the public interest to facilitate the growth and creation of business enterprises in the counties of the state.***

(2) The governing body of a county may expend public funds to attract and retain business enterprises, and the use of public funds toward the achievement of such economic development goals constitutes a public purpose. The provisions of this chapter which confer powers and duties on the governing body of a county, including any powers not specifically prohibited by law which can be exercised by the governing body of a county, must be liberally construed in order to effectively carry out the purposes of this section.

(3) For the purposes of this section, it constitutes a public purpose to expend public funds for economic development activities, including, but not limited to, developing or improving local infrastructure, issuing bonds to finance or refinance the cost of capital projects for industrial or

manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community.

127.01 Counties delegated power of eminent domain; recreational purposes, issue of necessity of taking.—

(1)(a) Each county of the state is delegated authority to exercise the right and power of eminent domain; that is, the right to appropriate property, except state or federal, ***for any county purpose***. The absolute fee simple title to all property so taken and acquired shall vest in such county unless the county seeks to condemn a particular right or estate in such property.

(b) Each county is further authorized to exercise the eminent domain power granted to the Department of Transportation by s. 337.27(1), the transportation corridor protection provisions of s. 337.273, and the right of entry onto property pursuant to s. 337.274.

(2) However, no county has the right to condemn any lands outside its own county boundaries for parks, playgrounds, recreational centers, or other recreational purposes. In eminent domain proceedings, a county's burden of showing reasonable necessity for parks, playgrounds, recreational centers, or other types of recreational purposes shall be the same as the burden in other types of eminent domain proceedings.

127.02 County commissioners may authorize acquirement of property by eminent domain.--The board of county commissioners may, by resolution, authorize the acquirement by eminent domain of property, real or personal, ***for any county use or purpose*** designated in such resolution.

[Note: The statutes do not define "county purpose" or "county use".]

<u>Intergovernmental Relations</u>
163.01 Florida Interlocal Cooperation Act of 1969.--
(1) This section shall be known and may be cited as the "Florida Interlocal Cooperation Act of 1969."
* * *
(7)(a) An interlocal agreement may provide for a separate legal or administrative entity to administer or execute the agreement, which may be a commission, board, or council constituted pursuant to the agreement.
* * *
(f) Notwithstanding anything to the contrary, any separate legal entity, created pursuant to the provisions of this section, wholly owned by the municipalities or counties of this state, the membership of which consists or is to consist only of municipalities or counties of this state, may exercise the right and power of ***eminent domain***, including the procedural powers under chapters 73 and 74, if such right and power is granted to such entity by the interlocal agreement creating the entity.

GENERAL MUNICIPAL POWERS AND STATUTORY POWERS OF EMINENT DOMAIN

166.021 Powers.--

(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the 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 when expressly prohibited by law.

(2) ***"Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.***

(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, ***except***:

(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;

(b) Any subject expressly prohibited by the constitution;

(c) Any subject expressly preempted to state or county government by the constitution or by general law; and

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. ***It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.*** However, nothing in this act shall be construed to permit any changes in a special law or municipal charter which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality or any changes in a special law or municipal charter which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election except for the selection of election dates and qualifying periods for candidates and for changes in terms of office necessitated by such changes in election dates, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, any change in the form of government, or any rights of municipal employees, without approval by referendum of the electors as provided in s. 166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.

(5) All existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality except as otherwise provided in subsection (4) shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances.

(6) The governing body of a municipality may require that any person within the municipality demonstrate the existence of some arrangement or contract by which such person will dispose of solid waste in a manner consistent with the ordinances of the county or municipality or state or federal law. For any person who will produce special wastes or biomedical waste, as the same may be defined by state or federal law or county or city ordinance, the municipality may require satisfactory proof of a contract or similar arrangement by which special or biomedical wastes will

be collected by a qualified and duly licensed collector and disposed of in accordance with the laws of Florida or the Federal Government.

(7) Notwithstanding the prohibition against extra compensation set forth in s. 215.425, the governing body of a municipality may provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years.

(8) Entities that are funded wholly or in part by the municipality, at the discretion of the municipality, may be required by the municipality to conduct a performance audit paid for by the municipality. An entity shall not be considered as funded by the municipality by virtue of the fact that such entity utilizes the municipality to collect taxes, assessments, fees, or other revenue. If an independent special district receives municipal funds pursuant to a contract or interlocal agreement for the purposes of funding, in whole or in part, a discrete program of the district, only that program may be required by the municipality to undergo a performance audit.

(9)(a) The Legislature finds and declares that this state faces increasing competition from other states and other countries for the location and retention of private enterprises within its borders. Furthermore, the Legislature finds that there is a need to enhance and expand economic activity in the municipalities of this state by attracting and retaining manufacturing development, business enterprise management, and other activities conducive to economic promotion, in order to provide a stronger, more balanced, and stable economy in the state, to enhance and preserve purchasing power and employment opportunities for the residents of this state, and to improve the welfare and competitive position of the state. ***The Legislature declares that it is necessary and in the public interest to facilitate the growth and creation of business enterprises in the municipalities of the state.***

(b) The governing body of a municipality may expend public funds to attract and retain business enterprises, and the use of public funds toward the achievement of such economic development goals constitutes a public purpose. ***The provisions of this chapter which confer powers and duties on the governing body of a municipality, including any powers not specifically prohibited by law which can be exercised by the governing body of a municipality, shall be liberally construed in order to effectively carry out the purposes of this subsection.***

(c) For the purposes of this subsection, it constitutes a public purpose to expend public funds for economic development activities, including, but not limited to, developing or improving local infrastructure, issuing bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community.

(d) Nothing contained in this subsection shall be construed as a limitation on the home rule powers granted by the State Constitution for municipalities.

[Note: Subsection (9) became effective on April 30, 1998.]

166.401 Right of eminent domain.—

(1) All municipalities in the state may exercise the right and power of eminent domain; that is, the right to appropriate property within the state, except state or federal property, for the uses or purposes authorized pursuant to this part. The absolute fee simple title to all property so taken and acquired shall vest in such municipal corporation unless the municipality seeks to condemn a particular right or estate in such property.

(2) Each municipality is further authorized to exercise the eminent domain power granted to the Department of Transportation in s. 337.27(1) and the transportation corridor protection provisions of s. 337.273.

166.411 Eminent domain; uses or purposes.—

Municipalities are authorized to exercise the power of eminent domain for the following uses or purposes:

(1) For the proper and efficient carrying into effect of any proposed scheme or plan of drainage, ditching, grading, filling, or other public improvement deemed necessary or expedient for the preservation of the public health, ***or for other good reason connected in anywise with the public welfare or the interests of the municipality and the people thereof***;

(2) Over railroads, traction and streetcar lines, telephone and telegraph lines, all public and private streets and highways, drainage districts, bridge districts, school districts, or any other public or private lands whatsoever necessary to enable the accomplishment of purposes listed in s. 180.06;

(3) For streets, lanes, alleys, and ways;

(4) For public parks, squares, and grounds;

(5) For drainage, for raising or filling in land in order to promote sanitation and healthfulness, and for the taking of easements for the drainage of the land of one person over and through the land of another;

(6) For reclaiming and filling when lands are low and wet, or overflowed altogether or at times, or entirely or partly;

(7) For the abatement of any nuisance;

(8) For the use of water pipes and for sewerage and drainage purposes;

(9) For laying wires and conduits underground;

(10) For city buildings, waterworks, ponds, ***and other municipal purposes which shall be coextensive with the powers of the municipality exercising the right of eminent domain***; and

(11) For obtaining lands to be conveyed by the municipality to the school board of the school district for the county within which the municipality is located, if the school board requests in writing that the municipality obtain such lands for conveyance to the school board and promises to use the land to establish a public school thereon. Fulfilling the purpose of this subsection is recognized as constituting a valid municipal public purpose.

<u>Municipal Public Works</u>
180.22 Power of eminent domain.--

(1) Any municipality *or private company or corporation* authorized to carry into effect any or all of the purposes defined in this chapter may exercise the power of eminent domain over railroads, traction and streetcar lines, telephone and telegraph lines, all public and private streets and highways, drainage districts, bridge districts, school districts, and any other public or private lands or property whatsoever necessary to enable the accomplishment of the purposes of this chapter.

(2) Any municipality which exercises its power under this section outside of its corporate boundaries for the accomplishment of the purposes of this chapter may finance such extraterritorial project in any manner in which it is presently authorized by law to finance a like project within its corporate boundaries.

Intergovernmental Relations

163.01 Florida Interlocal Cooperation Act of 1969.--

(1) This section shall be known and may be cited as the "Florida Interlocal Cooperation Act of 1969."

* * *

(7)(a) An interlocal agreement may provide for a separate legal or administrative entity to administer or execute the agreement, which may be a commission, board, or council constituted pursuant to the agreement.

* * *

(f) Notwithstanding anything to the contrary, any separate legal entity, created pursuant to the provisions of this section, wholly owned by the municipalities or counties of this state, the membership of which consists or is to consist only of municipalities or counties of this state, may exercise the right and power of ***eminent domain***, including the procedural powers under chapters 73 and 74, if such right and power is granted to such entity by the interlocal agreement creating the entity.

SPECIAL NEIGHBORHOOD IMPROVEMENT DISTRICTS

163.511 Special neighborhood improvement districts; creation; referendum; board of directors; duration; extension.--
(1) After a local planning ordinance has been adopted authorizing the creation of special neighborhood improvement districts, the governing body of a municipality or county may declare the need for and create special residential or business neighborhood improvement districts by the enactment of a separate ordinance for each district, which ordinance:

* * *

(g) May authorize a special neighborhood improvement district to exercise the power of eminent domain pursuant to chapters 73 and 74. Any property identified for eminent domain by the district shall be subject to the approval of the local governing body before eminent domain procedures are exercised.

163.514 Powers of neighborhood improvement districts.--Unless prohibited by ordinance, the board of any district shall be empowered to:

* * *

(3) Acquire, own, convey, or otherwise dispose of, lease as lessor or lessee, construct, maintain, improve, enlarge, raze, relocate, operate, and manage property and facilities of whatever type to which it holds title and grant and acquire licenses, easements, and options with respect thereto.

* * *

(9) Promote and advertise the commercial advantages of the district so as to attract new businesses and encourage the expansion of existing businesses.

(10) Promote and advertise the district to the public and engage in cooperative advertising programs with businesses located in the district.

(11) Improve street lighting, parks, streets, drainage, utilities, swales, and open areas, and provide safe access to mass transportation facilities in the district.

(12) Undertake innovative approaches to securing neighborhoods from crime, such as crime prevention through community policing innovations, environmental design, environmental security, and defensible space.

(13) Privatize, close, vacate, plan, or replan streets, roads, sidewalks, and alleys, subject to the concurrence of the local governing body and, if required, the state Department of Transportation.

(14) Prepare, adopt, implement, and modify a safe neighborhood improvement plan for the district.

(15) Identify areas with blighted influences, including, but not limited to, areas where unlawful urban dumping or graffiti are prevalent, and develop programs for eradication thereof.

163.516 Safe neighborhood improvement plans.--

(1) A safe neighborhood improvement plan is mandated for all neighborhood improvement districts. The plan shall contain at least the following elements:

(a) Demographics of the district.

(b) Crime activity data and analysis.

(c) Land use, zoning, housing, and traffic analysis.

(d) Determination of the problems of the crime-to-environment relationship and the stability of the neighborhood improvement district.

(e) Statement of the district's goal and objectives.

(f) Assessment of crime prevention through community policing innovations, environmental design, environmental security, and defensible space strategies and tactics that will be applied to the crime-to-environment relationship problems.

(g) Cost estimates and the methods of financing.

(h) Outline of program participants and their functions and responsibilities.

(i) Schedule for executing program activities.

(j) Evaluation guidelines.

(2) Every safe neighborhood improvement plan shall show, by diagram and by general explanation:

(a) Such property as is intended for use as public parks, recreation areas, streets, public utilities, and public improvements of any nature.

(b) Specific identification of any publicly funded capital improvement projects to be undertaken within the district.

(c) Adequate assurances that the improvements will be carried out pursuant to the plan.

(d) Provision for the retention of controls and the establishment of any restrictions or covenants running with land sold or leased for private use for such periods of time and under such conditions as the governing body of the municipality in which the district is located, or the county if the district is located in the unincorporated portion of the county, deems necessary to effectuate the purposes of this part.

(e) Projected costs of improvements, including the amount to be expended on publicly funded capital improvement projects in the district and any indebtedness of the district, the county, or the municipality proposed to be incurred if such indebtedness is to be repaid with district revenues.

(f) Promotion of advertising programs to be undertaken by the district or in conjunction with businesses in the district.

(g) Suggested physical improvements necessary for the safety of residents in or visitors to the district.

(h) Law enforcement and security plans for the district.

(3) The safe neighborhood improvement plan shall:

(a) Be consistent with the adopted comprehensive plan for the county or municipality pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act. No district plan shall be implemented unless the local governing body has determined said plan is consistent.

(b) Be sufficiently complete to indicate such land acquisition, demolition and removal of structures, street modifications, redevelopment, and rehabilitation as may be proposed to be carried out in the district.

(c) Provide some method for and measurement of the reduction of crime within the district.

(4) The county, municipality, or district may prepare or cause to be prepared a safe neighborhood improvement plan, or any person or agency, public or private, may submit such a plan to a district. Prior to its consideration of a safe neighborhood improvement plan, the district shall submit such plan to the local governing body for review and written approval as to its consistency with the local government comprehensive plan. The district must be notified of approval or disapproval within 60 days after receipt of the plan for review, and a revised version of the plan may be submitted to satisfy any inconsistencies. The district may not proceed with the safe neighborhood improvement plan until final approval is given by the local governing body.

(5) Prior to adoption of the safe neighborhood improvement plan, the board shall hold a public hearing on the plan after public notice thereof by publication in a newspaper of general circulation in the county or municipality in which the district is located. The notice shall describe the time, date, place, and purpose of the hearing; identify the boundaries of the district; and outline the general scope of the plan.

(6) The board, after the public hearing, may approve the safe neighborhood improvement plan if it finds:

(a) The plan has been approved as consistent with the local comprehensive plan by the local governing body; and

(b) The plan will improve the promotion, appearance, safety, security, and public amenities of the neighborhood improvement district as stipulated in s. 163.502.

(7) If, at any time after approval of the safe neighborhood improvement plan, it becomes desirable to amend or modify the plan, the board may do so. Prior to any such amendment or modification, the board shall obtain written approval of the local governing body concerning conformity to the local government comprehensive plan and hold a public hearing on the proposed amendment or modification after public notice thereof by publication in a newspaper of general circulation in the county or municipality in which the district is located. The notice shall describe the time, place, and purpose of the hearing and generally describe the proposed amendment or modification.

(8) Pursuant to ss. 163.3184, 163.3187, and 163.3189, the governing body of a municipality or county shall hold two public hearings to consider the board-adopted safe neighborhood improvement plan as an amendment or modification to the municipality's or county's adopted local comprehensive plan.

(9) A safe neighborhood improvement plan for each district shall be prepared and adopted by the municipality or county prior to the levy and expenditure of any of the proceeds of any tax assessment or fee authorized to such districts other than for the preparation of the safe community or business improvement plan.

REVENUE BOND ACT OF 1953

159.03 General powers.--The governing body of any *unit* in the state is hereby authorized and empowered:

1) To acquire by purchase or to construct, or partly acquire and partly construct, and to improve, repair, reconstruct, own, operate and maintain any self-liquidating project, or any combination of one or more projects as a single project, either inside or outside or partly inside and partly outside of the boundaries of the corporate limits of such unit; provided, however, that the consent of the adjoining governmental authority must be first obtained before a project may be effected outside the boundaries of the corporate limits of such unit.

(2) To issue revenue bonds of such unit, payable from earnings and any other special funds pledged herefore as provided herein, to pay the cost of a project or improvement thereof.

(3) To fix and collect rates, fees, tolls, rentals or other charges for the services and facilities furnished by such project.

(4) To acquire in the name of the unit, either by purchase or the exercise of the right of ***eminent domain***, such lands and rights and interests therein, including lands under water and riparian rights, and to acquire such personal property, as it may deem necessary in connection with the construction, reconstruction, improvement, extension, enlargement or operation of any project.

* * *

159.02 Definitions.--As used in this part, the following words and terms shall have the following meanings, unless some other meaning is plainly intended:

(2) The word "unit" shall mean any county or municipality in the state, now or hereafter created or established.

(4) The word "project" shall include all property, rights, easements, and franchises relating thereto and deemed necessary or convenient for the construction or acquisition or the operation thereof, and shall embrace waterworks systems, sewer systems, gas systems, bridges, causeways, tunnels, incinerator and solid waste disposal systems, harbor and port facilities, mass transportation systems, expressways, marinas, civic auditoriums, sports arenas, parking facilities, and theme and amusement parks.

West's Florida Statutes Annotated Currentness
Title XI. County Organization and Intergovernmental Relations (Chapters 124- 164)
Chapter 163. Intergovernmental Programs (Refs & Annos)
➡ Part III. Community Redevelopment (Refs & Annos)

163.330. Short title

This part shall be known and may be cited as the "Community Redevelopment Act of 1969."

163.335. Findings and declarations of necessity

(1) It is hereby found and declared that there exist in counties and municipalities of the state slum and blighted areas which constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, constitutes an economic and social liability imposing onerous burdens which decrease the tax base and reduce tax revenues, substantially impairs or arrests sound growth, retards the provision of housing accommodations, aggravates traffic problems, and substantially hampers the elimination of traffic hazards and the improvement of traffic facilities; and that the prevention and elimination of slums and blight is a matter of state policy and state concern in order that the state and its counties and municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, and consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services, and facilities.

(2) It is further found and declared that certain slum or blighted areas, or portions thereof, may require acquisition, clearance, and disposition subject to use restrictions, as provided in this part, since the prevailing condition of decay may make impracticable the reclamation of the area by conservation or rehabilitation; that other areas or portions thereof may, through the means provided in this part, be susceptible of conservation or rehabilitation in such a manner that the conditions and evils enumerated may be eliminated, remedied, or prevented; and that salvageable slum and blighted areas can be conserved and rehabilitated through appropriate public action as herein authorized and the cooperation and voluntary action of the owners and tenants of property in such areas.

(3) It is further found and declared that the powers conferred by this part are for public uses and purposes for which public money may be expended and the power of eminent domain and police power exercised, and the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.

(4) It is further found that coastal resort and tourist areas or portions thereof which are deteriorating and economically distressed due to building density patterns, inadequate transportation and parking facilities, faulty lot layout, or inadequate street layout, could, through the means provided in this part, be revitalized and redeveloped in a manner that will vastly improve the economic and social conditions of the community.

(5) It is further found and declared that the preservation or enhancement of the tax base from which a taxing authority realizes tax revenues is essential to its existence and financial health; that the preservation and enhancement of such tax base is implicit in the purposes for which a taxing authority is established; that tax increment financing is an effective method of achieving such preservation and enhancement in areas in which such tax base is declining; that community redevelopment in such areas, when complete, will enhance such tax base and provide increased tax revenues to all affected taxing authorities, increasing their ability to accomplish their other respective purposes; and that the preservation and enhancement of the tax base in such areas through tax increment financing and the levying of taxes by such taxing authorities therefor and the appropriation of funds to a redevelopment trust fund bears a substantial relation to the purposes of such taxing authorities and is for their respective purposes and concerns. This subsection does not apply in any jurisdiction where the community

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redevelopment agency validated bonds as of April 30, 1984.

(6) It is further found and declared that there exists in counties and municipalities of the state a severe shortage of housing affordable to residents of low or moderate income, including the elderly; that the existence of such condition affects the health, safety, and welfare of the residents of such counties and municipalities and retards their growth and economic and social development; and that the elimination or improvement of such condition is a proper matter of state policy and state concern and is for a valid and desirable public purpose.

163.336. Coastal resort area redevelopment pilot project

(1) Legislative intent.--

(a) The Legislature recognizes that some coastal resort and tourist areas are deteriorating and declining as recreation and tourist centers. It is appropriate to undertake a pilot project to determine the feasibility of encouraging redevelopment of economically distressed coastal properties to allow full utilization of existing urban infrastructure such as roads and utility lines. Such activities can have a beneficial impact on local and state economies and provide job opportunities and revitalization of urban areas.

(b) The Department of Environmental Protection shall administer a pilot project for redevelopment of economically distressed coastal resort and tourist areas. Such a pilot project shall be administered in the coastal areas of Florida's Atlantic Coast between the St. Johns River entrance and Ponce de Leon Inlet.

(2) Pilot project administration.--

(a) To be eligible to participate in this pilot project, all or a portion of the area must be within:

1. The coastal building zone as defined in s. 161.54; and

2. A community redevelopment area, enterprise zone, brownfield area, empowerment zone, or other such economically deprived areas as designated by the county or municipality with jurisdiction over the area.

(b) Local governments are encouraged to use the full range of economic and tax incentives available to facilitate and promote redevelopment and revitalization within the pilot project areas.

(c) The Office of the Governor, Department of Environmental Protection, and the Department of Community Affairs are directed to provide technical assistance to expedite permitting for redevelopment projects and construction activities within the pilot project areas consistent with the principles, processes, and timeframes provided in s. 403.973.

(d) The Department of Environmental Protection shall exempt construction activities within the pilot project area in locations seaward of a coastal construction control line and landward of existing armoring from certain siting and design criteria pursuant to s. 161.053. However, such exemption shall not be deemed to exempt property within the pilot project area from applicable local land development regulations, including but not limited to, setback, side lot line, and lot coverage requirements. Such exemption shall apply to construction and redevelopment of structures involving the coverage, excavation, and impervious surface criteria of s. 161.053, and related adopted rules, as follows:

1. This review by the department of applications for permits for coastal construction within the pilot project area must apply to construction and redevelopment of structures subject to the coverage, excavation, and impervious surface criteria of s. 161.053, and related adopted rules. It is the intent of these provisions that the pilot project area be enabled to redevelop in a manner which meets the economic needs of the area while preserving public safety and existing resources, including natural resources.

2. The criteria for review under s. 161.053 are applicable within the pilot project area, except that the structures within the pilot project area shall not be subject to specific shore parallel coverage requirements and are allowed to

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exceed the 50 percent impervious surface requirement. In no case shall stormwater discharge be allowed onto, or seaward of, the frontal dune. Structures are also not bound by the restrictions on excavation unless the construction will adversely affect the integrity of the existing seawall or rigid coastal armoring structure or stability of the existing beach and dune system. It is specifically contemplated that underground structures, including garages, will be permitted. All beach-compatible material excavated under this subparagraph must be maintained on site seaward of the coastal construction control line.

3. The review criteria in subparagraph 2. will apply to all construction within the pilot project area lying seaward of the coastal construction control line and landward of an existing viable seawall or rigid coastal armoring structure, if such construction is fronted by a seawall or rigid coastal armoring structure extending at least 1,000 feet without any interruptions other than beach access points. For purposes of this section, a viable seawall or rigid coastal armoring structure is a structure that has not deteriorated, dilapidated, or been damaged to such a degree that it no longer provides adequate protection to the upland property when considering the following criteria, including, but not limited to:

a. The top must be at or above the still water level, including setup, for the design storm of 30-year return storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination, and must be high enough to preclude runup overtopping;

b. The armoring must be stable under the design storm of 30-year return storm including maximum localized scour, with adequate penetration; and

c. The armoring must have sufficient continuity or return walls to prevent flooding under the design storm of 30-year return storm from impacting the proposed construction.

4. Where there exists a continuous line of rigid coastal armoring structure on either side of unarmored property and the adjacent line of rigid coastal armoring structures are having an adverse effect on or threaten the unarmored property, and the gap does not exceed 100 feet, the department may grant the necessary permits under s. 161.085 to close the gap.

5. Structures approved pursuant to this section shall not cause flooding of or result in adverse impacts to existing upland structures or properties and shall comply with all other requirements of s. 161.053 and its implementing rules.

6. Where there exists a continuous line of viable rigid coastal armoring structure on either side of a nonviable rigid coastal armoring structure, the department shall grant the necessary permits under s. 161.085 to replace such nonviable rigid coastal armoring structure with a viable rigid coastal armoring structure as defined in this section. This shall not apply to rigid coastal armoring structures constructed after May 1, 1998, unless such structures have been permitted pursuant to s. 161.085(2).

(3) Pilot project expiration.--The authorization for the pilot project and the provisions of this section expire December 31, 2006. The Legislature shall review these requirements before their scheduled expiration.

163.340. Definitions

The following terms, wherever used or referred to in this part, have the following meanings:

(1) "Agency" or "community redevelopment agency" means a public agency created by, or designated pursuant to, s. 163.356 or s. 163.357.

(2) "Public body" or "taxing authority" means the state or any county, municipality, authority, special district as defined in s. 165.031(5), or other public body of the state, except a school district.

(3) "Governing body" means the council, commission, or other legislative body charged with governing the county or municipality.

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(4) "Mayor" means the mayor of a municipality or, for a county, the chair of the board of county commissioners or such other officer as may be constituted by law to act as the executive head of such municipality or county.

(5) "Clerk" means the clerk or other official of the county or municipality who is the custodian of the official records of such county or municipality.

(6) "Federal Government" includes the United States or any agency or instrumentality, corporate or otherwise, of the United States.

(7) "Slum area" means an area having physical or economic conditions conducive to disease, infant mortality, juvenile delinquency, poverty, or crime because there is a predominance of buildings or improvements, whether residential or nonresidential, which are impaired by reason of dilapidation, deterioration, age, or obsolescence, and exhibiting one or more of the following factors:

(a) Inadequate provision for ventilation, light, air, sanitation, or open spaces;

(b) High density of population, compared to the population density of adjacent areas within the county or municipality; and overcrowding, as indicated by government-maintained statistics or other studies and the requirements of the Florida Building Code; or

(c) The existence of conditions that endanger life or property by fire or other causes.

(8) "Blighted area" means an area in which there are a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property, and in which two or more of the following factors are present:

(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;

(b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;

(c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;

(d) Unsanitary or unsafe conditions;

(e) Deterioration of site or other improvements;

(f) Inadequate and outdated building density patterns;

(g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;

(h) Tax or special assessment delinquency exceeding the fair value of the land;

(i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;

(j) Incidence of crime in the area higher than in the remainder of the county or municipality;

(k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;

(l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;

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(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or

(n) Governmentally owned property with adverse environmental conditions caused by a public or private entity.

However, the term "blighted area" also means any area in which at least one of the factors identified in paragraphs (a) through (n) are present and all taxing authorities subject to s. 163.387(2)(a) agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted. Such agreement or resolution shall only determine that the area is blighted. For purposes of qualifying for the tax credits authorized in chapter 220, "blighted area" means an area as defined in this subsection.

(9) "Community redevelopment" or "redevelopment" means undertakings, activities, or projects of a county, municipality, or community redevelopment agency in a community redevelopment area for the elimination and prevention of the development or spread of slums and blight, or for the reduction or prevention of crime, or for the provision of affordable housing, whether for rent or for sale, to residents of low or moderate income, including the elderly, and may include slum clearance and redevelopment in a community redevelopment area or rehabilitation and revitalization of coastal resort and tourist areas that are deteriorating and economically distressed, or rehabilitation or conservation in a community redevelopment area, or any combination or part thereof, in accordance with a community redevelopment plan and may include the preparation of such a plan.

(10) "Community redevelopment area" means a slum area, a blighted area, or an area in which there is a shortage of housing that is affordable to residents of low or moderate income, including the elderly, or a coastal and tourist area that is deteriorating and economically distressed due to outdated building density patterns, inadequate transportation and parking facilities, faulty lot layout or inadequate street layout, or a combination thereof which the governing body designates as appropriate for community redevelopment.

(11) "Community redevelopment plan" means a plan, as it exists from time to time, for a community redevelopment area.

(12) "Related activities" means:

(a) Planning work for the preparation of a general neighborhood redevelopment plan or for the preparation or completion of a communitywide plan or program pursuant to s. 163.365.

(b) The functions related to the acquisition and disposal of real property pursuant to s. 163.370(3).

(c) The development of affordable housing for residents of the area.

(d) The development of community policing innovations.

(13) "Real property" means all lands, including improvements and fixtures thereon, and property of any nature appurtenant thereto or used in connection therewith and every estate, interest, right, and use, legal or equitable, therein, including but not limited to terms for years and liens by way of judgment, mortgage, or otherwise.

(14) "Bonds" means any bonds (including refunding bonds), notes, interim certificates, certificates of indebtedness, debentures, or other obligations.

(15) "Obligee" means and includes any bondholder, agents or trustees for any bondholders, or lessor demising to the county or municipality property used in connection with community redevelopment, or any assignee or assignees of such lessor's interest or any part thereof, and the Federal Government when it is a party to any contract with the county or municipality.

(16) "Person" means any individual, firm, partnership, corporation, company, association, joint stock association, or body politic and includes any trustee, receiver, assignee, or other person acting in a similar representative capacity.

(17) "Area of operation" means, for a county, the area within the boundaries of the county, and for a municipality,

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the area within the corporate limits of the municipality.

(18) "Housing authority" means a housing authority created by and established pursuant to chapter 421.

(19) "Board" or "commission" means a board, commission, department, division, office, body or other unit of the county or municipality.

(20) "Public officer" means any officer who is in charge of any department or branch of the government of the county or municipality relating to health, fire, building regulations, or other activities concerning dwellings in the county or municipality.

(21) "Debt service millage" means any millage levied pursuant to s. 12, Art. VII of the State Constitution.

(22) "Increment revenue" means the amount calculated pursuant to s. 163.387(1).

(23) "Community policing innovation" means a policing technique or strategy designed to reduce crime by reducing opportunities for, and increasing the perceived risks of engaging in, criminal activity through visible presence of police in the community, including, but not limited to, community mobilization, neighborhood block watch, citizen patrol, citizen contact patrol, foot patrol, neighborhood storefront police stations, field interrogation, or intensified motorized patrol.

163.345. Encouragement of private enterprise

(1) Any county or municipality, to the greatest extent it determines to be feasible in carrying out the provisions of this part, shall afford maximum opportunity, consistent with the sound needs of the county or municipality as a whole, to the rehabilitation or redevelopment of the community redevelopment area by private enterprise. Any county or municipality shall give consideration to this objective in exercising its powers under this part, including the formulation of a workable program; the approval of community redevelopment plans, communitywide plans or programs for community redevelopment, and general neighborhood redevelopment plans (consistent with the general plan of the county or municipality); the development and implementation of community policing innovations; the exercise of its zoning powers; the enforcement of other laws, codes, and regulations relating to the use of land and the use and occupancy of buildings and improvements; the development of affordable housing; the disposition of any property acquired; and the provision of necessary public improvements.

(2) In giving consideration to the objectives outlined in subsection (1), the county or municipality shall consider making available the incentives provided under the Florida Enterprise Zone Act and chapter 420.

163.346. Notice to taxing authorities

Before the governing body adopts any resolution or enacts any ordinance required under s. 163.355, s. 163.356, s. 163.357, or s. 163.387; creates a community redevelopment agency; approves, adopts, or amends a community redevelopment plan; or issues redevelopment revenue bonds under s. 163.385, the governing body must provide public notice of such proposed action pursuant to s. 125.66(2) or s. 166.041(3)(a) and, at least 15 days before such proposed action, mail by registered mail a notice to each taxing authority which levies ad valorem taxes on taxable real property contained within the geographic boundaries of the redevelopment area.

163.350. Workable program

Any county or municipality for the purposes of this part may formulate for the county or municipality a workable program for utilizing appropriate private and public resources to eliminate and prevent the development or spread of slums and urban blight, to encourage needed community rehabilitation, to provide for the redevelopment of slum and blighted areas, to provide housing affordable to residents of low or moderate income, including the elderly, or to undertake such of the aforesaid activities or other feasible county or municipal activities as may be suitably

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employed to achieve the objectives of such workable program. Such workable program may include provision for the prevention of the spread of blight into areas of the county or municipality which are free from blight through diligent enforcement of housing, zoning, and occupancy controls and standards; the rehabilitation or conservation of slum and blighted areas or portions thereof by replanning, removing congestion, providing parks, playgrounds, and other public improvements, encouraging voluntary rehabilitation, and compelling the repair and rehabilitation of deteriorated or deteriorating structures; the development of affordable housing; the implementation of community policing innovations; and the clearance and redevelopment of slum and blighted areas or portions thereof.

163.353. Power of taxing authority to tax or appropriate funds to a redevelopment trust fund in order to preserve and enhance the tax base of the authority

Notwithstanding any other provision of general or special law, the purposes for which a taxing authority may levy taxes or appropriate funds to a redevelopment trust fund include the preservation and enhancement of the tax base of such taxing authority and the furthering of the purposes of such taxing authority as provided by law.

163.355. Finding of necessity by county or municipality

No county or municipality shall exercise the community redevelopment authority conferred by this part until after the governing body has adopted a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria described in s. 163.340(7) or (8). The resolution must state that:

(1) One or more slum or blighted areas, or one or more areas in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, exist in such county or municipality; and

(2) The rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas, including, if appropriate, the development of housing which residents of low or moderate income, including the elderly, can afford, is necessary in the interest of the public health, safety, morals, or welfare of the residents of such county or municipality.

163.356. Creation of community redevelopment agency

(1) Upon a finding of necessity as set forth in s. 163.355, and upon a further finding that there is a need for a community redevelopment agency to function in the county or municipality to carry out the community redevelopment purposes of this part, any county or municipality may create a public body corporate and politic to be known as a "community redevelopment agency." A charter county having a population less than or equal to 1.6 million may create, by a vote of at least a majority plus one of the entire governing body of the charter county, more than one community redevelopment agency. Each such agency shall be constituted as a public instrumentality, and the exercise by a community redevelopment agency of the powers conferred by this part shall be deemed and held to be the performance of an essential public function. Community redevelopment agencies of a county have the power to function within the corporate limits of a municipality only as, if, and when the governing body of the municipality has by resolution concurred in the community redevelopment plan or plans proposed by the governing body of the county.

(2) When the governing body adopts a resolution declaring the need for a community redevelopment agency, that body shall, by ordinance, appoint a board of commissioners of the community redevelopment agency, which shall consist of not fewer than five or more than nine commissioners. The terms of office of the commissioners shall be for 4 years, except that three of the members first appointed shall be designated to serve terms of 1, 2, and 3 years, respectively, from the date of their appointments, and all other members shall be designated to serve for terms of 4 years from the date of their appointments. A vacancy occurring during a term shall be filled for the unexpired term.

(3)(a) A commissioner shall receive no compensation for services, but is entitled to the necessary expenses, including travel expenses, incurred in the discharge of duties. Each commissioner shall hold office until his or her successor has been appointed and has qualified. A certificate of the appointment or reappointment of any

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commissioner shall be filed with the clerk of the county or municipality, and such certificate is conclusive evidence of the due and proper appointment of such commissioner.

(b) The powers of a community redevelopment agency shall be exercised by the commissioners thereof. A majority of the commissioners constitutes a quorum for the purpose of conducting business and exercising the powers of the agency and for all other purposes. Action may be taken by the agency upon a vote of a majority of the commissioners present, unless in any case the bylaws require a larger number. Any person may be appointed as commissioner if he or she resides or is engaged in business, which means owning a business, practicing a profession, or performing a service for compensation, or serving as an officer or director of a corporation or other business entity so engaged, within the area of operation of the agency, which shall be coterminous with the area of operation of the county or municipality, and is otherwise eligible for such appointment under this part.

(c) The governing body of the county or municipality shall designate a chair and vice chair from among the commissioners. An agency may employ an executive director, technical experts, and such other agents and employees, permanent and temporary, as it requires, and determine their qualifications, duties, and compensation. For such legal service as it requires, an agency may employ or retain its own counsel and legal staff. An agency authorized to transact business and exercise powers under this part shall file with the governing body, on or before March 31 of each year, a report of its activities for the preceding fiscal year, which report shall include a complete financial statement setting forth its assets, liabilities, income, and operating expenses as of the end of such fiscal year. At the time of filing the report, the agency shall publish in a newspaper of general circulation in the community a notice to the effect that such report has been filed with the county or municipality and that the report is available for inspection during business hours in the office of the clerk of the city or county commission and in the office of the agency.

(d) At any time after the creation of a community redevelopment agency, the governing body of the county or municipality may appropriate to the agency such amounts as the governing body deems necessary for the administrative expenses and overhead of the agency, including the development and implementation of community policing innovations.

(4) The governing body may remove a commissioner for inefficiency, neglect of duty, or misconduct in office only after a hearing and only if he or she has been given a copy of the charges at least 10 days prior to such hearing and has had an opportunity to be heard in person or by counsel.

163.357. Governing body as the community redevelopment agency

(1)(a) As an alternative to the appointment of not fewer than five or more than seven members of the agency, the governing body may, at the time of the adoption of a resolution under s. 163.355, or at any time thereafter by adoption of a resolution, declare itself to be an agency, in which case all the rights, powers, duties, privileges, and immunities vested by this part in an agency will be vested in the governing body of the county or municipality, subject to all responsibilities and liabilities imposed or incurred.

(b) The members of the governing body shall be the members of the agency, but such members constitute the head of a legal entity, separate, distinct, and independent from the governing body of the county or municipality. If the governing body declares itself to be an agency which already exists, the new agency is subject to all of the responsibilities and liabilities imposed or incurred by the existing agency.

(c) A governing body which consists of five members may appoint two additional persons to act as members of the community redevelopment agency. The terms of office of the additional members shall be for 4 years, except that the first person appointed shall initially serve a term of 2 years. Persons appointed under this section are subject to all provisions of this part relating to appointed members of a community redevelopment agency.

(2) Nothing in this part prevents the governing body from conferring the rights, powers, privileges, duties, and immunities of a community redevelopment agency upon any entity in existence on July 1, 1977, which has been authorized by law to function as a downtown development board or authority or as any other body the purpose of which is to prevent and eliminate slums and blight through community redevelopment plans. Any entity in

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existence on July 1, 1977, which has been vested with the rights, powers, privileges, duties, and immunities of a community redevelopment agency is subject to all provisions and responsibilities imposed by this part, notwithstanding any provisions to the contrary in any law or amendment thereto which established the entity. Nothing in this act shall be construed to impair or diminish any powers of any redevelopment agency or other entity as referred to herein in existence on the effective date of this act or to repeal, modify, or amend any law establishing such entity, except as specifically set forth herein.

163.358. Exercise of powers in carrying out community redevelopment and related activities

The community redevelopment powers assigned to a community redevelopment agency created under s. 163.356 include all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, except the following, which continue to vest in the governing body of the county or municipality:

(1) The power to determine an area to be a slum or blighted area, or combination thereof; to designate such area as appropriate for community redevelopment; and to hold any public hearings required with respect thereto.

(2) The power to grant final approval to community redevelopment plans and modifications thereof.

(3) The power to authorize the issuance of revenue bonds as set forth in s. 163.385.

(4) The power to approve the acquisition, demolition, removal, or disposal of property as provided in s. 163.370(3) and the power to assume the responsibility to bear loss as provided in s. 163.370(3).

(5) The power to approve the development of community policing innovations.

163.360. Community redevelopment plans

(1) Community redevelopment in a community redevelopment area shall not be planned or initiated unless the governing body has, by resolution, determined such area to be a slum area, a blighted area, or an area in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, or a combination thereof, and designated such area as appropriate for community redevelopment.

(2) The community redevelopment plan shall:

(a) Conform to the comprehensive plan for the county or municipality as prepared by the local planning agency under the Local Government Comprehensive Planning and Land Development Regulation Act.

(b) Be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the community redevelopment area; zoning and planning changes, if any; land uses; maximum densities; and building requirements.

(c) Provide for the development of affordable housing in the area, or state the reasons for not addressing in the plan the development of affordable housing in the area. The county, municipality, or community redevelopment agency shall coordinate with each housing authority or other affordable housing entities functioning within the geographic boundaries of the redevelopment area, concerning the development of affordable housing in the area.

(3) The community redevelopment plan may provide for the development and implementation of community policing innovations.

(4) The county, municipality, or community redevelopment agency may itself prepare or cause to be prepared a community redevelopment plan, or any person or agency, public or private, may submit such a plan to a community redevelopment agency. Prior to its consideration of a community redevelopment plan, the community redevelopment agency shall submit such plan to the local planning agency of the county or municipality for review and recommendations as to its conformity with the comprehensive plan for the development of the county or

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municipality as a whole. The local planning agency shall submit its written recommendations with respect to the conformity of the proposed community redevelopment plan to the community redevelopment agency within 60 days after receipt of the plan for review. Upon receipt of the recommendations of the local planning agency, or, if no recommendations are received within such 60 days, then without such recommendations, the community redevelopment agency may proceed with its consideration of the proposed community redevelopment plan.

(5) The community redevelopment agency shall submit any community redevelopment plan it recommends for approval, together with its written recommendations, to the governing body and to each taxing authority that levies ad valorem taxes on taxable real property contained within the geographic boundaries of the redevelopment area. The governing body shall then proceed with the hearing on the proposed community redevelopment plan as prescribed by subsection (6).

(6) The governing body shall hold a public hearing on a community redevelopment plan after public notice thereof by publication in a newspaper having a general circulation in the area of operation of the county or municipality. The notice shall describe the time, date, place, and purpose of the hearing, identify generally the community redevelopment area covered by the plan, and outline the general scope of the community redevelopment plan under consideration.

(7) Following such hearing, the governing body may approve the community redevelopment and the plan therefor if it finds that:

(a) A feasible method exists for the location of families who will be displaced from the community redevelopment area in decent, safe, and sanitary dwelling accommodations within their means and without undue hardship to such families;

(b) The community redevelopment plan conforms to the general plan of the county or municipality as a whole;

(c) The community redevelopment plan gives due consideration to the utilization of community policing innovations, and to the provision of adequate park and recreational areas and facilities that may be desirable for neighborhood improvement, with special consideration for the health, safety, and welfare of children residing in the general vicinity of the site covered by the plans;

(d) The community redevelopment plan will afford maximum opportunity, consistent with the sound needs of the county or municipality as a whole, for the rehabilitation or redevelopment of the community redevelopment area by private enterprise; and

(e) The community redevelopment plan and resulting revitalization and redevelopment for a coastal tourist area that is deteriorating and economically distressed will reduce or maintain evacuation time, as appropriate, and ensure protection for property against exposure to natural disasters.

(8) If the community redevelopment area consists of an area of open land to be acquired by the county or the municipality, such area may not be so acquired unless:

(a) In the event the area is to be developed in whole or in part for residential uses, the governing body determines:

1. That a shortage of housing of sound standards and design which is decent, safe, affordable to residents of low or moderate income, including the elderly, and sanitary exists in the county or municipality;

2. That the need for housing accommodations has increased in the area;

3. That the conditions of blight in the area or the shortage of decent, safe, affordable, and sanitary housing cause or contribute to an increase in and spread of disease and crime or constitute a menace to the public health, safety, morals, or welfare; and

4. That the acquisition of the area for residential uses is an integral part of and is essential to the program of the county or municipality.

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(b) In the event the area is to be developed in whole or in part for nonresidential uses, the governing body determines that:

1. Such nonresidential uses are necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives.

2. Acquisition may require the exercise of governmental action, as provided in this part, because of:

a. Defective, or unusual conditions of, title or diversity of ownership which prevents the free alienability of such land;

b. Tax delinquency;

c. Improper subdivisions;

d. Outmoded street patterns;

e. Deterioration of site;

f. Economic disuse;

g. Unsuitable topography or faulty lot layouts;

h. Lack of correlation of the area with other areas of a county or municipality by streets and modern traffic requirements; or

i. Any combination of such factors or other conditions which retard development of the area.

3. Conditions of blight in the area contribute to an increase in and spread of disease and crime or constitute a menace to public health, safety, morals, or welfare.

(9) Upon the approval by the governing body of a community redevelopment plan or of any modification thereof, such plan or modification shall be deemed to be in full force and effect for the respective community redevelopment area, and the county or municipality may then cause the community redevelopment agency to carry out such plan or modification in accordance with its terms.

(10) Notwithstanding any other provisions of this part, when the governing body certifies that an area is in need of redevelopment or rehabilitation as a result of an emergency under s. 252.34(3), with respect to which the Governor has certified the need for emergency assistance under federal law, that area may be certified as a "blighted area," and the governing body may approve a community redevelopment plan and community redevelopment with respect to such area without regard to the provisions of this section requiring a general plan for the county or municipality and a public hearing on the community redevelopment.

163.361. Modification of community redevelopment plans

(1) If at any time after the approval of a community redevelopment plan by the governing body it becomes necessary or desirable to amend or modify such plan, the governing body may amend such plan upon the recommendation of the agency. The agency recommendation to amend or modify a redevelopment plan may include a change in the boundaries of the redevelopment area to add land to or exclude land from the redevelopment area, or may include the development and implementation of community policing innovations.

(2) The governing body shall hold a public hearing on a proposed modification of any community redevelopment plan after public notice thereof by publication in a newspaper having a general circulation in the area of operation of the agency.

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(3) In addition to the requirements of s. 163.346, and prior to the adoption of any modification to a community redevelopment plan that expands the boundaries of the community redevelopment area or extends the time certain set forth in the redevelopment plan as required by s. 163.362(10), the agency shall report such proposed modification to each taxing authority in writing or by an oral presentation, or both, regarding such proposed modification.

(4) A modification to a community redevelopment plan that includes a change in the boundaries of the redevelopment area to add land must be supported by a resolution as provided in s. 163.355.

(5) If a community redevelopment plan is modified by the county or municipality after the lease or sale of real property in the community redevelopment area, such modification may be conditioned upon such approval of the owner, lessee, or successor in interest as the county or municipality may deem advisable and, in any event, shall be subject to such rights at law or in equity as a lessee or purchaser, or his or her successor or successors in interest, may be entitled to assert.

163.362. Contents of community redevelopment plan

Every community redevelopment plan shall:

(1) Contain a legal description of the boundaries of the community redevelopment area and the reasons for establishing such boundaries shown in the plan.

(2) Show by diagram and in general terms:

(a) The approximate amount of open space to be provided and the street layout.

(b) Limitations on the type, size, height, number, and proposed use of buildings.

(c) The approximate number of dwelling units.

(d) Such property as is intended for use as public parks, recreation areas, streets, public utilities, and public improvements of any nature.

(3) If the redevelopment area contains low or moderate income housing, contain a neighborhood impact element which describes in detail the impact of the redevelopment upon the residents of the redevelopment area and the surrounding areas in terms of relocation, traffic circulation, environmental quality, availability of community facilities and services, effect on school population, and other matters affecting the physical and social quality of the neighborhood.

(4) Identify specifically any publicly funded capital projects to be undertaken within the community redevelopment area.

(5) Contain adequate safeguards that the work of redevelopment will be carried out pursuant to the plan.

(6) Provide for the retention of controls and the establishment of any restrictions or covenants running with land sold or leased for private use for such periods of time and under such conditions as the governing body deems necessary to effectuate the purposes of this part.

(7) Provide assurances that there will be replacement housing for the relocation of persons temporarily or permanently displaced from housing facilities within the community redevelopment area.

(8) Provide an element of residential use in the redevelopment area if such use exists in the area prior to the adoption of the plan or if the plan is intended to remedy a shortage of housing affordable to residents of low or moderate income, including the elderly, or if the plan is not intended to remedy such shortage, the reasons therefor.

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(9) Contain a detailed statement of the projected costs of the redevelopment, including the amount to be expended on publicly funded capital projects in the community redevelopment area and any indebtedness of the community redevelopment agency, the county, or the municipality proposed to be incurred for such redevelopment if such indebtedness is to be repaid with increment revenues.

(10) Provide a time certain for completing all redevelopment financed by increment revenues. Such time certain shall occur no later than 30 years after the fiscal year in which the plan is approved, adopted, or amended pursuant to s. 163.361(1). However, for any agency created after July 1, 2002, the time certain for completing all redevelopment financed by increment revenues must occur within 40 years after the fiscal year in which the plan is approved or adopted.

(11) Subsections (1), (3), (4), and (8), as amended by s. 10, chapter 84- 356, Laws of Florida, and subsections (9) and (10) do not apply to any governing body of a county or municipality or to a community redevelopment agency if such governing body has approved and adopted a community redevelopment plan pursuant to s. 163.360 before chapter 84-356 became a law; nor do they apply to any governing body of a county or municipality or to a community redevelopment agency if such governing body or agency has adopted an ordinance or resolution authorizing the issuance of any bonds, notes, or other forms of indebtedness to which is pledged increment revenues pursuant only to a community redevelopment plan as approved and adopted before chapter 84-356 became a law.

163.365. Neighborhood and communitywide plans

(1) Any municipality or county or any public body authorized to perform planning work may prepare a general neighborhood redevelopment plan for a community redevelopment area or areas, together with any adjoining areas having specially related problems, which may be of such scope that redevelopment activities may have to be carried out in stages. Such plans may include, but not be limited to, a preliminary plan which:

(a) Outlines the community redevelopment activities proposed for the area involved;

(b) Provides a framework for the preparation of community redevelopment plans; and

(c) Indicates generally the land uses, population density, building coverage, prospective requirements for rehabilitation and improvement of property and portions of the area contemplated for clearance and redevelopment.

A general neighborhood redevelopment plan shall, in the determination of the governing body, conform to the general plan of the locality as a whole and the workable program of the county or municipality.

(2) Any county or municipality or any public body authorized to perform planning work may prepare or complete a communitywide plan or program for community redevelopment which shall conform to the general plan for the development of the county or municipality as a whole and may include, but not be limited to, identification of slum or blighted areas, measurement of blight, determination of resources needed and available to renew such areas, identification of potential project areas and types of action contemplated, including the development of affordable housing if needed and appropriate for the area, and scheduling of community redevelopment activities.

(3) Authority is hereby vested in every county and municipality to prepare, adopt, and revise from time to time a general plan for the physical development of the county or municipality as a whole (giving due regard to the environs and metropolitan surroundings), to establish and maintain a planning commission for such purpose and related county or municipal planning activities, and to make available and to appropriate necessary funds therefor.

163.367. Public officials, commissioners, and employees subject to code of ethics

(1) The officers, commissioners, and employees of a community redevelopment agency created by, or designated pursuant to, s. 163.356 or s. 163.357 shall be subject to the provisions and requirements of part III of chapter 112.

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(2) If any such official, commissioner, or employee presently owns or controls, or owned or controlled within the preceding 2 years, any interest, direct or indirect, in any property which he or she knows is included or planned to be included in a community redevelopment area, he or she shall immediately disclose this fact in the manner provided in part III of chapter 112. Any disclosure required to be made by this section shall be made prior to taking any official action pursuant to this section.

(3) No commissioner or other officer of any community redevelopment agency, board, or commission exercising powers pursuant to this part shall hold any other public office under the county or municipality other than his or her commissionership or office with respect to such community redevelopment agency, board, or commission.

163.370. Powers; counties and municipalities; community redevelopment agencies

(1) Every county and municipality shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers in addition to others herein granted:

(a) To make and execute contracts and other instruments necessary or convenient to the exercise of its powers under this part;

(b) To disseminate slum clearance and community redevelopment information;

(c) To undertake and carry out community redevelopment and related activities within the community redevelopment area, which redevelopment may include:

1. Acquisition of a slum area or a blighted area or portion thereof.

2. Demolition and removal of buildings and improvements.

3. Installation, construction, or reconstruction of streets, utilities, parks, playgrounds, public areas of major hotels that are constructed in support of convention centers, including meeting rooms, banquet facilities, parking garages, lobbies, and passageways, and other improvements necessary for carrying out in the community redevelopment area the community redevelopment objectives of this part in accordance with the community redevelopment plan.

4. Disposition of any property acquired in the community redevelopment area at its fair value for uses in accordance with the community redevelopment plan.

5. Carrying out plans for a program of voluntary or compulsory repair and rehabilitation of buildings or other improvements in accordance with the community redevelopment plan.

6. Acquisition of real property in the community redevelopment area which, under the community redevelopment plan, is to be repaired or rehabilitated for dwelling use or related facilities, repair or rehabilitation of the structures for guidance purposes, and resale of the property.

7. Acquisition of any other real property in the community redevelopment area when necessary to eliminate unhealthful, unsanitary, or unsafe conditions; lessen density; eliminate obsolete or other uses detrimental to the public welfare; or otherwise to remove or prevent the spread of blight or deterioration or to provide land for needed public facilities.

8. Acquisition, without regard to any requirement that the area be a slum or blighted area, of air rights in an area consisting principally of land in highways, railway or subway tracks, bridge or tunnel entrances, or other similar facilities which have a blighting influence on the surrounding area and over which air rights sites are to be developed for the elimination of such blighting influences and for the provision of housing (and related facilities and uses) designed specifically for, and limited to, families and individuals of low or moderate income.

9. Construction of foundations and platforms necessary for the provision of air rights sites of housing (and related facilities and uses) designed specifically for, and limited to, families and individuals of low or moderate income.

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(d) To provide, or to arrange or contract for, the furnishing or repair by any person or agency, public or private, of services, privileges, works, streets, roads, public utilities, or other facilities for or in connection with a community redevelopment; to install, construct, and reconstruct streets, utilities, parks, playgrounds, and other public improvements; and to agree to any conditions that it deems reasonable and appropriate which are attached to federal financial assistance and imposed pursuant to federal law relating to the determination of prevailing salaries or wages or compliance with labor standards, in the undertaking or carrying out of a community redevelopment and related activities, and to include in any contract let in connection with such redevelopment and related activities provisions to fulfill such of the conditions as it deems reasonable and appropriate.

(e) Within the community redevelopment area:

1. To enter into any building or property in any community redevelopment area in order to make inspections, surveys, appraisals, soundings, or test borings and to obtain an order for this purpose from a court of competent jurisdiction in the event entry is denied or resisted.

2. To acquire by purchase, lease, option, gift, grant, bequest, devise, eminent domain, or otherwise any real property (or personal property for its administrative purposes), together with any improvements thereon; except that a community redevelopment agency may not exercise any power of eminent domain unless the exercise has been specifically approved by the governing body of the county or municipality which established the agency.

3. To hold, improve, clear, or prepare for redevelopment any such property.

4. To mortgage, pledge, hypothecate, or otherwise encumber or dispose of any real property.

5. To insure or provide for the insurance of any real or personal property or operations of the county or municipality against any risks or hazards, including the power to pay premiums on any such insurance.

6. To enter into any contracts necessary to effectuate the purposes of this part.

7. To solicit requests for proposals for redevelopment of parcels of real property contemplated by a community redevelopment plan to be acquired for redevelopment purposes by a community redevelopment agency and, as a result of such requests for proposals, to advertise for the disposition of such real property to private persons pursuant to s. 163.380 prior to acquisition of such real property by the community redevelopment agency.

(f) To invest any community redevelopment funds held in reserves or sinking funds or any such funds not required for immediate disbursement in property or securities in which savings banks may legally invest funds subject to their control and to redeem such bonds as have been issued pursuant to s. 163.385 at the redemption price established therein or to purchase such bonds at less than redemption price, all such bonds so redeemed or purchased to be canceled.

(g) To borrow money and to apply for and accept advances, loans, grants, contributions, and any other form of financial assistance from the Federal Government or the state, county, or other public body or from any sources, public or private, for the purposes of this part and to give such security as may be required and to enter into and carry out contracts or agreements in connection therewith; and to include in any contract for financial assistance with the Federal Government for or with respect to community redevelopment and related activities such conditions imposed pursuant to federal laws as the county or municipality deems reasonable and appropriate which are not inconsistent with the purposes of this part.

(h) Within its area of operation, to make or have made all surveys and plans necessary to the carrying out of the purposes of this part; to contract with any person, public or private, in making and carrying out such plans; and to adopt or approve, modify, and amend such plans, which plans may include, but are not limited to:

1. Plans for carrying out a program of voluntary or compulsory repair and rehabilitation of buildings and improvements.

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2. Plans for the enforcement of state and local laws, codes, and regulations relating to the use of land and the use and occupancy of buildings and improvements and to the compulsory repair, rehabilitation, demolition, or removal of buildings and improvements.

3. Appraisals, title searches, surveys, studies, and other plans and work necessary to prepare for the undertaking of community redevelopment and related activities.

(i) To develop, test, and report methods and techniques, and carry out demonstrations and other activities, for the prevention and the elimination of slums and urban blight and developing and demonstrating new or improved means of providing housing for families and persons of low income.

(j) To apply for, accept, and utilize grants of funds from the Federal Government for such purposes.

(k) To prepare plans for and assist in the relocation of persons (including individuals, families, business concerns, nonprofit organizations, and others) displaced from a community redevelopment area and to make relocation payments to or with respect to such persons for moving expenses and losses of property for which reimbursement or compensation is not otherwise made, including the making of such payments financed by the Federal Government.

(l) To appropriate such funds and make such expenditures as are necessary to carry out the purposes of this part; to zone or rezone any part of the county or municipality or make exceptions from building regulations; and to enter into agreements with a housing authority, which agreements may extend over any period, notwithstanding any provision or rule of law to the contrary, respecting action to be taken by such county or municipality pursuant to any of the powers granted by this part.

(m) To close, vacate, plan, or replan streets, roads, sidewalks, ways, or other places and to plan or replan any part of the county or municipality.

(n) Within its area of operation, to organize, coordinate, and direct the administration of the provisions of this part, as they may apply to such county or municipality, in order that the objective of remedying slum and blighted areas and preventing the causes thereof within such county or municipality may be most effectively promoted and achieved and to establish such new office or offices of the county or municipality or to reorganize existing offices in order to carry out such purpose most effectively.

(o) To exercise all or any part or combination of powers herein granted or to elect to have such powers exercised by a community redevelopment agency.

(p) To develop and implement community policing innovations.

(2) The following projects may not be paid for or financed by increment revenues:

(a) Construction or expansion of administrative buildings for public bodies or police and fire buildings, unless each taxing authority agrees to such method of financing for the construction or expansion, or unless the construction or expansion is contemplated as part of a community policing innovation.

(b) Installation, construction, reconstruction, repair, or alteration of any publicly owned capital improvements or projects which are not an integral part of or necessary for carrying out the community redevelopment plan if such projects or improvements are normally financed by the governing body with user fees or if such projects or improvements would be installed, constructed, reconstructed, repaired, or altered within 3 years of the approval of the community redevelopment plan by the governing body pursuant to a previously approved public capital improvement or project schedule or plan of the governing body which approved the community redevelopment plan.

(c) General government operating expenses unrelated to the planning and carrying out of a community redevelopment plan.

(3) With the approval of the governing body, a community redevelopment agency may:

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(a) Prior to approval of a community redevelopment plan or approval of any modifications of the plan, acquire real property in a community redevelopment area, demolish and remove any structures on the property, and pay all costs related to the acquisition, demolition, or removal, including any administrative or relocation expenses.

(b) Assume the responsibility to bear any loss that may arise as the result of the exercise of authority under this subsection, in the event that the real property is not made part of the community redevelopment area.

163.375. Eminent domain

(1) Any county or municipality, or any community redevelopment agency pursuant to specific approval of the governing body of the county or municipality which established the agency, as provided by any county or municipal ordinance has the right to acquire by condemnation any interest in real property, including a fee simple title thereto, which it deems necessary for, or in connection with, community redevelopment and related activities under this part. Any county or municipality, or any community redevelopment agency pursuant to specific approval by the governing body of the county or municipality which established the agency, as provided by any county or municipal ordinance may exercise the power of eminent domain in the manner provided in chapters 73 and 74 and acts amendatory thereof or supplementary thereto, or it may exercise the power of eminent domain in the manner now or which may be hereafter provided by any other statutory provision for the exercise of the power of eminent domain. Property in unincorporated enclaves surrounded by the boundaries of a community redevelopment area may be acquired when it is determined necessary by the agency to accomplish the community redevelopment plan. Property already devoted to a public use may be acquired in like manner. However, no real property belonging to the United States, the state, or any political subdivision of the state may be acquired without its consent.

(2) In any proceeding to fix or assess compensation for damages for the taking of property, or any interest therein, through the exercise of the power of eminent domain or condemnation, evidence or testimony bearing upon the following matters shall be admissible and shall be considered in fixing such compensation or damages in addition to evidence or testimony otherwise admissible:

(a) Any use, condition, occupancy, or operation of such property, which is unlawful or violative of, or subject to elimination, abatement, prohibition, or correction under, any law, ordinance, or regulatory measure of the state, county, municipality, or other political subdivision, or any agency thereof, in which such property is located, as being unsafe, substandard, unsanitary, or otherwise contrary to the public health, safety, morals, or welfare.

(b) The effect on the value of such property of any such use, condition, occupancy, or operation or of the elimination, abatement, prohibition, or correction of any such use, condition, occupancy, or operation.

(3) The foregoing testimony and evidence shall be admissible notwithstanding that no action has been taken by any public body or public officer toward the abatement, prohibition, elimination, or correction of any such use, condition, occupancy, or operation. Testimony or evidence that any public body or public officer charged with the duty or authority so to do has rendered, made, or issued any judgment, decree, determination, or order for the abatement, prohibition, elimination, or correction of any such use, condition, occupancy, or operation shall be admissible and shall be prima facie evidence of the existence and character of such use, condition, or operation.

163.380. Disposal of property in community redevelopment area

(1) Any county, municipality, or community redevelopment agency may sell, lease, dispose of, or otherwise transfer real property or any interest therein acquired by it for community redevelopment in a community redevelopment area to any private person, or may retain such property for public use, and may enter into contracts with respect thereto for residential, recreational, commercial, industrial, educational, or other uses, in accordance with the community redevelopment plan, subject to such covenants, conditions, and restrictions, including covenants running with the land, as it deems necessary or desirable to assist in preventing the development or spread of future slums or blighted areas or to otherwise carry out the purposes of this part. However, such sale, lease, other transfer, or retention, and any agreement relating thereto, may be made only after the approval of the community redevelopment plan by the governing body. The purchasers or lessees and their successors and assigns shall be obligated to devote

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such real property only to the uses specified in the community redevelopment plan and may be obligated to comply with such other requirements as the county, municipality, or community redevelopment agency may determine to be in the public interest, including the obligation to begin any improvements on such real property required by the community redevelopment plan within a reasonable time.

(2) Such real property or interest shall be sold, leased, otherwise transferred, or retained at a value determined to be in the public interest for uses in accordance with the community redevelopment plan and in accordance with such reasonable disposal procedures as any county, municipality, or community redevelopment agency may prescribe. In determining the value of real property as being in the public interest for uses in accordance with the community redevelopment plan, the county, municipality, or community redevelopment agency shall take into account and give consideration to the long-term benefits to be achieved by the county, municipality, or community redevelopment agency resulting from incurring short-term losses or costs in the disposal of such real property; the uses provided in such plan; the restrictions upon, and the covenants, conditions, and obligations assumed by, the purchaser or lessee or by the county, municipality, or community redevelopment agency retaining the property; and the objectives of such plan for the prevention of the recurrence of slum or blighted areas. In the event the value of such real property being disposed of is for less than the fair value, such disposition shall require the approval of the governing body, which approval may only be given following a duly noticed public hearing. The county, municipality, or community redevelopment agency may provide in any instrument of conveyance to a private purchaser or lessee that such purchaser or lessee is without power to sell, lease, or otherwise transfer the real property without the prior written consent of the county, municipality, or community redevelopment agency until the purchaser or lessee has completed the construction of any or all improvements which he or she has obligated himself or herself to construct thereon. Real property acquired by the county, municipality, or community redevelopment agency which, in accordance with the provisions of the community redevelopment plan, is to be transferred shall be transferred as rapidly as feasible in the public interest, consistent with the carrying out of the provisions of the community redevelopment plan. Any contract for such transfer and the community redevelopment plan, or such part or parts of such contract or plan as the county, municipality, or community redevelopment agency may determine, may be recorded in the land records of the clerk of the circuit court in such manner as to afford actual or constructive notice thereof.

(3)(a) Prior to disposition of any real property or interest therein in a community redevelopment area, any county, municipality, or community redevelopment agency shall give public notice of such disposition by publication in a newspaper having a general circulation in the community, at least 30 days prior to the execution of any contract to sell, lease, or otherwise transfer real property and, prior to the delivery of any instrument of conveyance with respect thereto under the provisions of this section, invite proposals from, and make all pertinent information available to, private redevelopers or any persons interested in undertaking to redevelop or rehabilitate a community redevelopment area or any part thereof. Such notice shall identify the area or portion thereof and shall state that proposals must be made by those interested within 30 days after the date of publication of the notice and that such further information as is available may be obtained at such office as is designated in the notice. The county, municipality, or community redevelopment agency shall consider all such redevelopment or rehabilitation proposals and the financial and legal ability of the persons making such proposals to carry them out; and the county, municipality, or community redevelopment agency may negotiate with any persons for proposals for the purchase, lease, or other transfer of any real property acquired by it in the community redevelopment area. The county, municipality, or community redevelopment agency may accept such proposal as it deems to be in the public interest and in furtherance of the purposes of this part. Except in the case of a governing body acting as the agency, as provided in s. 163.357, a notification of intention to accept such proposal must be filed with the governing body not less than 30 days prior to any such acceptance. Thereafter, the county, municipality, or community redevelopment agency may execute such contract in accordance with the provisions of subsection (1) and deliver deeds, leases, and other instruments and take all steps necessary to effectuate such contract.

(b) Any county, municipality, or community redevelopment agency that, pursuant to the provisions of this section, has disposed of a real property project with a land area in excess of 20 acres may acquire an expanded area that is immediately adjacent to the original project and less than 35 percent of the land area of the original project, by purchase or eminent domain as provided in this chapter, and negotiate a disposition of such expanded area directly with the person who acquired the original project without complying with the disposition procedures established in paragraph (a), provided the county, municipality, or community redevelopment agency adopts a resolution making the following findings:

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1. It is in the public interest to expand such real property project to an immediately adjacent area.

2. The expanded area is less than 35 percent of the land area of the original project.

3. The expanded area is entirely within the boundary of the community redevelopment area.

(4) Any county, municipality, or community redevelopment agency may temporarily operate and maintain real property acquired by it in a community redevelopment area for or in connection with a community redevelopment plan pending the disposition of the property as authorized in this part, without regard to the provisions of subsection (1), for such uses and purposes as may be deemed desirable, even though not in conformity with the community redevelopment plan.

(5) If any conflict exists between the provisions of this section and s. 159.61, the provisions of this section govern and supersede those of s. 159.61.

(6) Notwithstanding any provision of this section, if a community redevelopment area is established by the governing body for the redevelopment of property located on a closed military base within the governing body's boundaries, the procedures for disposition of real property within that community redevelopment area shall be prescribed by the governing body, and compliance with the other provisions of this section shall not be required prior to the disposal of real property.

163.385. Issuance of revenue bonds

(1)(a) When authorized or approved by resolution or ordinance of the governing body, a county, municipality, or community redevelopment agency has power in its corporate capacity, in its discretion, to issue redevelopment revenue bonds from time to time to finance the undertaking of any community redevelopment under this part, including, without limiting the generality thereof, the payment of principal and interest upon any advances for surveys and plans or preliminary loans, and has power to issue refunding bonds for the payment or retirement of bonds or other obligations previously issued. For any agency created before July 1, 2002, any redevelopment revenue bonds or other obligations issued to finance the undertaking of any community redevelopment under this part shall mature within 60 years after the end of the fiscal year in which the initial community redevelopment plan was approved or adopted. For any agency created on or after July 1, 2002, any redevelopment revenue bonds or other obligations issued to finance the undertaking of any community redevelopment under this part shall mature within 40 years after the end of the fiscal year in which the initial community redevelopment plan is approved or adopted. However, in no event shall any redevelopment revenue bonds or other obligations issued to finance the undertaking of any community redevelopment under this part mature later than the expiration of the plan in effect at the time such bonds or obligations were issued. The security for such bonds may be based upon the anticipated assessed valuation of the completed community redevelopment and such other revenues as are legally available. Any bond, note, or other form of indebtedness pledging increment revenues to the repayment thereof shall mature no later than the end of the 30th fiscal year after the fiscal year in which increment revenues are first deposited into the redevelopment trust fund or the fiscal year in which the plan is subsequently amended. However, for any agency created on or after July 1, 2002, any form of indebtedness pledging increment revenues to the repayment thereof shall mature by the 40th year after the fiscal year in which the initial community redevelopment plan is approved or adopted. However, any refunding bonds issued pursuant to this paragraph may not mature later than the final maturity date of any bonds or other obligations issued pursuant to this paragraph being paid or retired with the proceeds of such refunding bonds.

(b) In anticipation of the sale of revenue bonds pursuant to paragraph (a), the county, municipality, or community redevelopment agency may issue bond anticipation notes and may renew such notes from time to time, but the maximum maturity of any such note, including renewals thereof, may not exceed 5 years from the date of issue of the original note. Such notes shall be paid from any revenues of the county, municipality, or community redevelopment agency available therefor and not otherwise pledged or from the proceeds of sale of the revenue bonds in anticipation of which they were issued.

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(2) Bonds issued under this section do not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction, and are not subject to the provisions of any other law or charter relating to the authorization, issuance, or sale of bonds. Bonds issued under the provisions of this part are declared to be issued for an essential public and governmental purpose and, together with interest thereon and income therefrom, are exempted from all taxes, except those taxes imposed by chapter 220 on interest, income, or profits on debt obligations owned by corporations.

(3) Bonds issued under this section shall be authorized by resolution or ordinance of the governing body; may be issued in one or more series; and shall bear such date or dates, be payable upon demand or mature at such time or times, bear interest at such rate or rates, be in such denomination or denominations, be in such form either with or without coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium of payment at such place or places, be subject to such terms of redemption (with or without premium), be secured in such manner, and have such other characteristics as may be provided by such resolution or ordinance or by a trust indenture or mortgage issued pursuant thereto. Bonds issued under this section may be sold in such manner, either at public or private sale, and for such price as the governing body may determine will effectuate the purpose of this part.

(4) In case any of the public officials of the county, municipality, or community redevelopment agency whose signatures appear on any bonds or coupons issued under this part cease to be such officials before the delivery of such bonds, such signatures are, nevertheless, valid and sufficient for all purposes, the same as if such officials had remained in office until such delivery.

(5) In any suit, action, or proceeding involving the validity or enforceability of any bond issued under this part, or the security therefor, any such bond reciting in substance that it has been issued by the county, municipality, or community redevelopment agency in connection with community redevelopment, as herein defined, shall be conclusively deemed to have been issued for such purpose, and such project shall be conclusively deemed to have been planned, located, and carried out in accordance with the provisions of this part.

(6) Subsections (1), (4), and (5), as amended by s. 14, chapter 84-356, Laws of Florida, do not apply to any governing body of a county or municipality or to a community redevelopment agency if such governing body or agency has adopted an ordinance or resolution authorizing the issuance of any bonds, notes, or other forms of indebtedness to which is pledged increment revenues pursuant only to a community redevelopment plan as approved and adopted before chapter 84-356 became a law.

163.387. Redevelopment trust fund

(1) After approval of a community redevelopment plan, there shall be established for each community redevelopment agency created under s. 163.356 a redevelopment trust fund. Funds allocated to and deposited into this fund shall be used by the agency to finance or refinance any community redevelopment it undertakes pursuant to the approved community redevelopment plan. No community redevelopment agency may receive or spend any increment revenues pursuant to this section unless and until the governing body has, by ordinance, provided for the funding of the redevelopment trust fund for the duration of a community redevelopment plan. Such ordinance may be adopted only after the governing body has approved a community redevelopment plan. The annual funding of the redevelopment trust fund shall be in an amount not less than that increment in the income, proceeds, revenues, and funds of each taxing authority derived from or held in connection with the undertaking and carrying out of community redevelopment under this part. Such increment shall be determined annually and shall be that amount equal to 95 percent of the difference between:

(a) The amount of ad valorem taxes levied each year by each taxing authority, exclusive of any amount from any debt service millage, on taxable real property contained within the geographic boundaries of a community redevelopment area; and

(b) The amount of ad valorem taxes which would have been produced by the rate upon which the tax is levied each year by or for each taxing authority, exclusive of any debt service millage, upon the total of the assessed value of the taxable real property in the community redevelopment area as shown upon the most recent assessment roll used in

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connection with the taxation of such property by each taxing authority prior to the effective date of the ordinance providing for the funding of the trust fund.

However, the governing body of any county as defined in s. 125.011(1) may, in the ordinance providing for the funding of a trust fund established with respect to any community redevelopment area created on or after July 1, 1994, determine that the amount to be funded by each taxing authority annually shall be less than 95 percent of the difference between paragraphs (a) and (b) , but in no event shall such amount be less than 50 percent of such difference.

(2)(a) Except for the purpose of funding the trust fund pursuant to subsection (3), upon the adoption of an ordinance providing for funding of the redevelopment trust fund as provided in this section, each taxing authority shall, by January 1 of each year, appropriate to the trust fund for so long as any indebtedness pledging increment revenues to the payment thereof is outstanding (but not to exceed 30 years) a sum that is no less than the increment as defined and determined in subsection (1) accruing to such taxing authority. If the community redevelopment plan is amended or modified pursuant to s. 163.361(1), each such taxing authority shall make the annual appropriation for a period not to exceed 30 years after the date the governing body amends the plan. However, for any agency created on or after July 1, 2002, each taxing authority shall make the annual appropriation for a period not to exceed 40 years after the fiscal year in which the initial community redevelopment plan is approved or adopted.

(b) Any taxing authority that does not pay the increment to the trust fund by January 1 shall pay to the trust fund an amount equal to 5 percent of the amount of the increment and shall pay interest on the amount of the increment equal to 1 percent for each month the increment is outstanding.

(c) The following public bodies or taxing authorities are exempt from paragraph (a):

1. A special district that levies ad valorem taxes on taxable real property in more than one county.

2. A special district for which the sole available source of revenue the district has the authority to levy is ad valorem taxes at the time an ordinance is adopted under this section. However, revenues or aid that may be dispensed or appropriated to a district as defined in s. 388.011 at the discretion of an entity other than such district shall not be deemed available.

3. A library district, except a library district in a jurisdiction where the community redevelopment agency had validated bonds as of April 30, 1984.

4. A neighborhood improvement district created under the Safe Neighborhoods Act.

5. A metropolitan transportation authority.

6. A water management district created under s. 373.069.

(d) 1. A local governing body that creates a community redevelopment agency under s. 163.356 may exempt from paragraph (a) a special district that levies ad valorem taxes within that community redevelopment area. The local governing body may grant the exemption either in its sole discretion or in response to the request of the special district. The local governing body must establish procedures by which a special district may submit a written request to be exempted from paragraph (a).

2. In deciding whether to deny or grant a special district's request for exemption from paragraph (a), the local governing body must consider:

a. Any additional revenue sources of the community redevelopment agency which could be used in lieu of the special district's tax increment.

b. The fiscal and operational impact on the community redevelopment agency.

c. The fiscal and operational impact on the special district.

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d. The benefit to the specific purpose for which the special district was created. The benefit to the special district must be based on specific projects contained in the approved community redevelopment plan for the designated community redevelopment area.

e. The impact of the exemption on incurred debt and whether such exemption will impair any outstanding bonds that have pledged tax increment revenues to the repayment of the bonds.

f. The benefit of the activities of the special district to the approved community redevelopment plan.

g. The benefit of the activities of the special district to the area of operation of the local governing body that created the community redevelopment agency.

3. The local governing body must hold a public hearing on a special district's request for exemption after public notice of the hearing is published in a newspaper having a general circulation in the county or municipality that created the community redevelopment area. The notice must describe the time, date, place, and purpose of the hearing and must identify generally the community redevelopment area covered by the plan and the impact of the plan on the special district that requested the exemption.

4. If a local governing body grants an exemption to a special district under this paragraph, the local governing body and the special district must enter into an interlocal agreement that establishes the conditions of the exemption, including, but not limited to, the period of time for which the exemption is granted.

5. If a local governing body denies a request for exemption by a special district, the local governing body shall provide the special district with a written analysis specifying the rationale for such denial. This written analysis must include, but is not limited to, the following information:

a. A separate, detailed examination of each consideration listed in subparagraph 2.

b. Specific examples of how the approved community redevelopment plan will benefit, and has already benefited, the purpose for which the special district was created.

6. The decision to either deny or grant an exemption must be made by the local governing body within 120 days after the date the written request was submitted to the local governing body pursuant to the procedures established by such local governing body.

(3) Notwithstanding the provisions of subsection (2), the obligation of the governing body which established the community redevelopment agency to fund the redevelopment trust fund annually shall continue until all loans, advances, and indebtedness, if any, and interest thereon, of a community redevelopment agency incurred as a result of redevelopment in a community redevelopment area have been paid.

(4) The revenue bonds and notes of every issue under this part are payable solely out of revenues pledged to and received by a community redevelopment agency and deposited to its redevelopment trust fund. The lien created by such bonds or notes shall not attach until the revenues referred to herein are deposited in the redevelopment trust fund at the times, and to the extent that, such revenues accrue. The holders of such bonds or notes have no right to require the imposition of any tax or the establishment of any rate of taxation in order to obtain the amounts necessary to pay and retire such bonds or notes.

(5) Revenue bonds issued under the provisions of this part shall not be deemed to constitute a debt, liability, or obligation of the local governing body or the state or any political subdivision thereof, or a pledge of the faith and credit of the local governing body or the state or any political subdivision thereof, but shall be payable solely from the revenues provided therefor. All such revenue bonds shall contain on the face thereof a statement to the effect that the agency shall not be obligated to pay the same or the interest thereon except from the revenues of the community redevelopment agency held for that purpose and that neither the faith and credit nor the taxing power of the local governing body or of the state or of any political subdivision thereof is pledged to the payment of the principal of, or the interest on, such bonds.

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(6) Moneys in the redevelopment trust fund may be expended from time to time for undertakings of a community redevelopment agency which are directly related to financing or refinancing of redevelopment in a community redevelopment area pursuant to an approved community redevelopment plan for the following purposes, including, but not limited to:

(a) Administrative and overhead expenses necessary or incidental to the implementation of a community redevelopment plan adopted by the agency.

(b) Expenses of redevelopment planning, surveys, and financial analysis, including the reimbursement of the governing body or the community redevelopment agency for such expenses incurred before the redevelopment plan was approved and adopted.

(c) The acquisition of real property in the redevelopment area.

(d) The clearance and preparation of any redevelopment area for redevelopment and relocation of site occupants as provided in s. 163.370.

(e) The repayment of principal and interest or any redemption premium for loans, advances, bonds, bond anticipation notes, and any other form of indebtedness.

(f) All expenses incidental to or connected with the issuance, sale, redemption, retirement, or purchase of agency bonds, bond anticipation notes, or other form of indebtedness, including funding of any reserve, redemption, or other fund or account provided for in the ordinance or resolution authorizing such bonds, notes, or other form of indebtedness.

(g) The development of affordable housing within the area.

(h) The development of community policing innovations.

(7) On the last day of the fiscal year of the community redevelopment agency, any money which remains in the trust fund after the payment of expenses pursuant to subsection (6) for such year shall be:

(a) Returned to each taxing authority which paid the increment in the proportion that the amount of the payment of such taxing authority bears to the total amount paid into the trust fund by all taxing authorities within the redevelopment area for that year;

(b) Used to reduce the amount of any indebtedness to which increment revenues are pledged;

(c) Deposited into an escrow account for the purpose of later reducing any indebtedness to which increment revenues are pledged; or

(d) Appropriated to a specific redevelopment project pursuant to an approved community redevelopment plan which project will be completed within 3 years from the date of such appropriation.

(8) Each community redevelopment agency shall provide for an independent financial audit of the trust fund each fiscal year and a report of such audit. Such report shall describe the amount and source of deposits into, and the amount and purpose of withdrawals from, the trust fund during such fiscal year and the amount of principal and interest paid during such year on any indebtedness to which is pledged increment revenues and the remaining amount of such indebtedness. The agency shall provide a copy of the report to each taxing authority.

163.390. Bonds as legal investments

All banks, trust companies, bankers, savings banks and institutions, building and loan associations, savings and loan associations, investment companies, and other persons carrying on a banking or investment business; all insurance

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companies, insurance associations, and other persons carrying on an insurance business; and all executors, administrators, curators, trustees, and other fiduciaries may legally invest any sinking funds, moneys, or other funds belonging to them or within their control in any bonds or other obligations issued by a county or municipality pursuant to this part or by any community redevelopment agency vested with community redevelopment powers. Such bonds and other obligations shall be authorized security for all public deposits. It is the purpose of this section to authorize all persons, political subdivisions, and officers, public or private, to use any funds owned or controlled by them for the purchase of any such bonds or other obligations. Nothing contained in this section with regard to legal investments shall be construed as relieving any person of any duty of exercising reasonable care in selecting securities.

163.395. Property exempt from taxes and from levy and sale by virtue of an execution

(1) All property of any county, municipality, or community redevelopment agency, including funds, owned or held by it for the purposes of this part are exempt from levy and sale by virtue of an execution; and no execution or other judicial process may issue against the same, nor shall judgment against the county, municipality, or community redevelopment agency be a charge or lien upon such property. However, the provisions of this section do not apply to or limit the right of obligees to pursue any remedies for the enforcement of any pledge or lien given pursuant to this part by the county or municipality on its rents, fees, grants, or revenues from community redevelopment.

(2) The property of the county, municipality, or community redevelopment agency acquired or held for the purposes of this part is declared to be public property used for essential public and governmental purposes, and such property is exempt from all taxes of the municipality, the county, or the state or any political subdivision thereof. However, such tax exemption will terminate when the county, municipality, or community redevelopment agency sells, leases, or otherwise disposes of such property in a community redevelopment area to a purchaser or lessee which is not a public body entitled to tax exemption with respect to such property.

163.400. Cooperation by public bodies

(1) For the purpose of aiding in the planning, undertaking, or carrying out of community redevelopment and related activities authorized by this part, any public body may, upon such terms, with or without consideration, as it may determine:

(a) Dedicate, sell, convey, or lease any of its interest in any property or grant easements, licenses, or other rights or privileges therein to a county or municipality.

(b) Incur the entire expense of any public improvements made by such public body in exercising the powers granted in this section.

(c) Do any and all things necessary to aid or cooperate in the planning or carrying out of a community redevelopment plan and related activities.

(d) Lend, grant, or contribute funds to a county or municipality; borrow money; and apply for and accept advances, loans, grants, contributions, or any other form of financial assistance from the Federal Government, the state, the county, another public body, or any other source.

(e) Enter into agreements, which may extend over any period, notwithstanding any provision or rule of law to the contrary, with the Federal Government, a county, a municipality, or another public body respecting action to be taken pursuant to any of the powers granted by this part, including the furnishing of funds or other assistance in connection with community redevelopment and related activities.

(f) Cause public buildings and public facilities, including parks, playgrounds, recreational, community, educational, water, sewer, or drainage facilities, or any other works which it is otherwise empowered to undertake to be furnished; furnish, dedicate, close, vacate, pave, install, grade, regrade, plan, or replan streets, roads, sidewalks, ways, or other places; plan or replan or zone or rezone any part of the public body or make exceptions from

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building regulations; and cause administrative and other services to be furnished to the county or municipality.

If at any time title to or possession of any property in a community redevelopment area is held by any public body or governmental agency, other than the county or municipality, but including any agency or instrumentality of the United States, which is authorized by law to engage in the undertaking, carrying out, or administration of community redevelopment and related activities, the provisions of the agreements referred to in this section shall inure to the benefit of and may be enforced by such public body or governmental agency. As used in this subsection, the term "county or municipality" also includes a community redevelopment agency.

(2) Any sale, conveyance, lease, or agreement provided for in this section may be made by a public body without appraisal, public notice, advertisement, or public bidding.

(3) For the purpose of aiding in the planning, undertaking, or carrying out of any community redevelopment and related activities of a community redevelopment agency or a housing authority hereunder, any county or municipality may, in addition to its other powers and upon such terms, with or without consideration, as it determines, do and perform any or all of the actions or things which, by the provisions of subsection (1), a public body is authorized to do or perform, including the furnishing of financial and other assistance.

(4) For the purposes of this section, or for the purpose of aiding in the planning, undertaking, or carrying out of community redevelopment and related activities of a county or municipality, such county or municipality may, in addition to any authority to issue bonds pursuant to s. 163.385, issue and sell its general obligation bonds. Any bonds issued by the county or municipality pursuant to this section shall be issued in the manner and within the limitations prescribed by the applicable laws of this state for the issuance and authorization of general obligation bonds by such county or municipality. Nothing in this section shall limit or otherwise adversely affect any other section of this part.

163.405. Title of purchaser

Any instrument executed by any county, municipality, or community redevelopment agency and purporting to convey any right, title, or interest in any property under this part shall be conclusively presumed to have been executed in compliance with the provisions of this part insofar as title or other interest of any bona fide purchasers, lessees, or transferees of such property is concerned.

163.410. Exercise of powers in counties with home rule charters

In any county which has adopted a home rule charter, the powers conferred by this part shall be exercised exclusively by the governing body of such county. However, the governing body of any such county which has adopted a home rule charter may, in its discretion, by resolution delegate the exercise of the powers conferred upon the county by this part within the boundaries of a municipality to the governing body of such a municipality. Such a delegation to a municipality shall confer only such powers upon a municipality as shall be specifically enumerated in the delegating resolution. Any power not specifically delegated shall be reserved exclusively to the governing body of the county. This section does not affect any community redevelopment agency created by a municipality prior to the adoption of a county home rule charter. Unless otherwise provided by an existing ordinance, resolution, or interlocal agreement between any such county and a municipality, the governing body of the county that has adopted a home rule charter shall act on any request from a municipality for a delegation of powers or a change in an existing delegation of powers within 120 days after the receipt of all required documentation or such request shall be immediately sent to the governing body for consideration.

163.415. Exercise of powers in counties without home rule charters

The powers conferred by this part upon counties not having adopted a home rule charter shall not be exercised within the boundaries of a municipality within said county unless the governing body of the municipality expresses its consent by resolution. Such a resolution consenting to the exercise of the powers conferred upon counties by this

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part shall specifically enumerate the powers to be exercised by the county within the boundaries of the municipality. Any power not specifically enumerated in such a resolution of consent shall be exercised exclusively by the municipality within its boundaries.

163.420. Repealed by Laws 1977, c. 77-391, § 17, eff. July 1, 1977

163.425. Repealed by Laws 1977, c. 77-391, § 17, eff. July 1, 1977

163.430. Powers supplemental to existing community redevelopment powers

The powers conferred upon counties or municipalities by this part shall be supplemental to any community redevelopment powers now being exercised by any county or municipality in accordance with the provisions of any population act, special act, or under the provisions of the home rule charter for Dade County, or under the provision of the charter of the consolidated City of Jacksonville.

163.435. Repealed by Laws 1977, c. 77-391, § 17, eff. July 1, 1977

163.440. Repealed by Laws 1971, c. 71-14, § 3, eff. May 5, 1971

163.445. Assistance to community redevelopment by state agencies

State agencies may provide technical and advisory assistance, upon request, to municipalities, counties, and community redevelopment agencies for community redevelopment as defined in this part. Such assistance may include, but need not be limited to, preparation of workable programs, relocation planning, special statistical and other studies and compilations, technical evaluations and information, training activities, professional services, surveys, reports, documents, and any other similar service functions. If sufficient funds and personnel are available, these services shall be provided without charge.

163.450. Municipal and county participation in neighborhood development programs under Pub. L. No. 90-448

Nothing contained herein shall be construed to prevent a county or municipality which is engaging in community redevelopment activities hereunder from participating in the neighborhood development program under the Housing and Urban Development Act of 1968 (Pub. L. No. 90-448) or in any amendments subsequent thereto.

163.455. Community-Based Development Organization Assistance Act; short title

Chapter 2000-351, Laws of Florida, may be cited as the "Community-Based Development Organization Assistance Act."

163.456. Legislative findings and intent

(1) The Legislature finds that:

(a) Significant declines and consistently depressed appraised values make it impossible for business enterprises, including community-based development organizations, to generate sufficient revenues from business or real estate ventures in low-income neighborhoods to fund the redevelopment costs and other administrative expenses needed to

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foster new developments in these hard-to-develop areas.

(b) This deterioration contributes to the decline of neighborhoods in both rural and urban areas, causes a reduction of the value of property comprising the tax base of local communities, and eventually requires the expenditure of disproportionate amounts of public funds for health, social services, and police protection to prevent the development of slums and the social and economic disruption found in slum communities.

(c) The available means of eliminating or reducing these deteriorating economic conditions and encouraging local resident participation and support is to provide support assistance and resource investment to community-based development organizations. The Legislature also finds that community-based development organizations can contribute to the creation of jobs in response to federal welfare reform and state WAGES Program legislation, and economic development activities related to urban and rural economic initiatives.

(2) The intent of this legislation is to provide community-based development organizations with the necessary administrative and operating funds to retain project staff to plan, implement, and manage job-generating and community revitalization developments in distressed neighborhoods. This assistance will strengthen the community-based development organizations, assist local governments to enhance and expand revitalization efforts, and contribute to expanding the base of commerce, business, and affordable housing that will serve persons with very low incomes or low incomes, or WAGES recipients, using a bottom-up approach.

163.457. Eligibility for assistance

Community-based development organizations that meet the following requirements shall be eligible for assistance.

(1) The community-based development organization must be a nonprofit corporation under state law and s. 501(c)(3) of the United States Internal Revenue Code.

(2) A majority of the board members of the community-based development organization must be elected by those members of the corporation who are stakeholders, comprising a mix of service area residents, area business property owners, area employees, and low-income residents. The board of a community-based development organization shall include low-income residents.

(3) The community-based development organization must maintain a service area in which economic and housing development projects are located and must further meet one or more of the following criteria:

(a) The area has been designated pursuant to s. 163.355 as a slum area or a blighted area, as defined in s. 163.340, or is located completely within the boundaries of a slum area or a blighted area.

(b) The area is a community development block grant program area in which community development block grant funds are currently being spent or have been spent during the last 3 years as certified by the local government in which the service area is located.

(c) The area is a neighborhood housing service district.

(d) The area is contained within a state enterprise zone designated on or after July 1, 1995, in accordance with s. 290.0065.

(e) The area is contained in federal empowerment zones and enterprise communities.

163.458. Three-tiered plan

The Department of Community Affairs is authorized to award core administrative and operating grants. Administrative and operating grants shall be used for staff salaries and administrative expenses for eligible community-based development organizations selected through a competitive three-tiered process for the purpose of

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housing and economic development projects. The department shall adopt by rule a set of criteria for three- tiered funding that shall ensure equitable geographic distribution of the funding throughout the state. This three-tiered plan shall include emerging, intermediate, and mature community-based development organizations recognizing the varying needs of the three tiers. Funding shall be provided for core administrative and operating grants for all levels of community- based development organizations. Priority shall be given to those organizations that demonstrate community-based productivity and high performance as evidenced by past projects developed with stakeholder input that have responded to neighborhood needs, and have current projects located in high-poverty neighborhoods, and to emerging community-based development corporations that demonstrate a positive need identified by stakeholders. Persons, equipment, supplies, and other resources funded in whole or in part by grant funds shall be utilized to further the purposes of this act, and may be utilized to further the goals and objectives of the Front Porch Florida Initiative. Each community-based development organization shall be eligible to apply for a grant of up to $50,000 per year for a period of 5 years.

163.459. Eligible activities

Activities eligible for assistance pursuant to this act include, but are not limited to:

(1) Preparing grant and loan applications, proposals, fundraising letters, and other documents essential to securing additional administrative or project funds to further the purposes of this act.

(2) Monitoring and administering grants and loans, providing technical assistance to businesses, and any other administrative tasks essential to maintaining funding eligibility or meeting contractual obligations.

(3) Developing local programs and home ownership housing projects to encourage the participation of financial institutions, insurance companies, attorneys, architects, engineers, planners, law enforcement officers, developers, and other professional firms and individuals providing services beneficial to redevelopment efforts.

(4) Providing technical, accounting, and financial assistance and information to businesses and entrepreneurs interested in locating, expanding, or operating in the service area.

(5) Coordinating with state, federal, and local governments and other nonprofit organizations to ensure that activities meet local plans and ordinances and to avoid duplication of tasks.

(6) Assisting service area residents in identifying and determining eligibility for state, federal, and local housing programs, including rehabilitation, weatherization, home ownership, rental assistance, or public housing programs.

(7) Developing, selling, owning, and managing subsidized affordable housing designed for persons with very low incomes or low incomes, or for WAGES recipients, or developing, selling, owning, and managing subsidized affordable industrial parks providing jobs to such persons.

(8) Obtaining technical assistance to build capacity to support community-based development organization projects.

163.460. Application requirements

A community-based development organization applying for a core administrative and operating grant pursuant to this act must submit a proposal to the Department of Community Affairs that includes:

(1) A map and narrative description of the service areas for the community-based development organization.

(2) A copy of the documents creating the community-based development organization.

(3) A listing of the membership of the board of the community-based development organization, including individual members' terms of office and the number of low-income residents on the board.

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(4) The organization's annual revitalization plan that describes the expenditure of the funds, including goals, objectives, and expected results, and has a clear relationship to the local municipality's comprehensive plan.

(5) Other supporting information that may be required by the Department of Community Affairs to determine the organization's capacity and productivity.

(6) A description of the location, financing plan, and potential impact of the business enterprises on residential, commercial, or industrial development, that shows a clear relationship to the organization's annual revitalization plan and demonstrates how the proposed expenditures are directly related to the scope of work for the proposed projects in the annual revitalization plan.

163.461. Reporting and evaluation requirements

Community-based development organizations that receive funds under this act shall provide the following information to the Department of Community Affairs annually:

(1) A listing of business firms and individuals assisted by the community-based development organization during the reporting period.

(2) A listing of the type, source, purpose, and amount of each individual grant, loan, or donation received by the community-based development organization during the reporting period.

(3) The number of paid and voluntary positions within the community-based development organization.

(4) A listing of the salaries and administrative and operating expenses of the community-based development organization.

(5) An identification and explanation of changes in the boundaries of the target area.

(6) The amount of earned income from projects, programs, and development activities.

(7) The number and description of projects in predevelopment phase, projects under construction, ongoing service programs, construction projects completed, and projects at sell-out or lease-up and property management phase, and a written explanation of the reasons that caused any projects not to be completed for the projected development phase.

(8) The impact of the projects, as a result of receiving funding under this act, on residents in the target area, and the relationship of this impact to expected outcomes listed in the organization's annual revitalization plan.

(9) The number of housing units rehabilitated or constructed at various stages of development, predevelopment phase, construction phase, completion and sell-out or lease-up phase, and condominium or property management phase by the community-based development organization within the service area during the reporting period.

(10) The number of housing units, number of projects, and number of persons served by prior projects developed by the organization, the amounts of project financing leverage with state funds for each prior and current project, and the incremental amounts of local and state real estate tax and sales tax revenue generated directly by the projects and programs annually.

(11) The number of jobs, both permanent and temporary, received by individuals who were directly assisted by the community-based development organization through assistance to the business such as a loan or other credit assistance.

(12) An identification and explanation of changes in the boundaries of the service area.

(13) The impact of completed projects on residents in the target area and the relationship of this impact to expected

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outcomes listed in the organization's annual revitalization plan.

(14) Such other information as the Department of Community Affairs requires.

163.462. Rulemaking authority

The Department of Community Affairs shall adopt rules for the administration of this act.

163.463 Applicability of ch. 2002-294

(1) Amendments to this part, as provided by this act, do not apply to any ordinance or resolution authorizing the issuance of any bond, note, or other form of indebtedness to which are pledged increment revenues pursuant to a community development plan, or amendment or modification thereto, as approved or adopted before July 1, 2002.

(2) Amendments to this part, as provided by this act, shall not apply to any ordinance, resolution, interlocal agreement, or written agreement effective before July 1, 2002, that provides for the delegation of community redevelopment powers.

(3) The amendments to ss. 163.340, 163.355, 163.361, and 163.362 by this act do not apply to or affect, directly or indirectly, any community development agency created before July 1, 2002, unless the community redevelopment area is expanded on or after July 1, 2002, in which case only the amendments to ss. 163.340 and 163.355 by this act shall apply only to such expanded area.

(4) The amendments to ss. 163.340, 163.355, 163.361, and 163.362 by this act do not apply to or affect, directly or indirectly, any municipality that has authorized a finding of necessity study by May 1, 2002, or has adopted its finding of necessity on or before August 1, 2002, and has adopted its community redevelopment plan on or before December 31, 2002.

(5) The amendments to ss. 163.340, 163.355, 163.361, and 163.362 by this act do not apply to or affect, directly or indirectly, any municipality that has submitted before August 1, 2002, its finding of necessity, or application for approval of a community redevelopment plan, or an application to amend an existing community redevelopment plan to a county that has adopted a home rule charter.

(6) The amendments to ss. 163.355, 163.362, 163.385, and 163.387 by this act do not apply to or affect, directly or indirectly, any county as defined in s. 125.011(1) or any municipality located therein.

Current through Chapter 352 and H.J.R. No. 1723, H.J.R. 1177 and S.J.R. No. 2144 (End) of the 2005 First Regular Session of the Nineteenth Legislature
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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO. 2004-31846-CICI
DIVISION "31"

THE CITY OF DAYTONA BEACH,
a Florida municipal corporation,

Petitioner,

v.

JAMES L. MATHAS, as Trustee of the James L. Mathas Revocable Trust created March 14, 1996; BOARDWALK AT DAYTONA BEACH, INC., a Florida corporation; JIMMY JOANOS; PAUL JOANOS; KALLIOPE JOANOS; THEODORE S. KYPREOS, as Successor Trustee of the Family Trust under the Last Will and Testament of Eva J. Kypreos; MARION PAUL; DARRELL P. HUNTER; TIMOTHY D.P. HUNTER; THOMAS A. HUNTER; UNKNOWN TENANT ONE OF PARCEL 2000; UNKNOWN TENANT ONE OF PARCEL 3000; UNKNOWN TENANT ONE OF PARCEL 4000; and COUNTY OF VOLUSIA,

Defendants.
_____/

ORDER OF TAKING

THIS CAUSE came before the Court for hearing on June 20, 21, 22, 23, 27 and 28, 2005, upon proper notice to all Defendants and there being no other persons having or claiming any equity, lien, title, or other interest in or to the real property described in the Complaint wherein the THE CITY OF DAYTONA BEACH ("City") applies to this Court for an Order of Taking as to Parcels Nos. 2000, 3000 and 4000. The Court has considered the pleadings and papers on file in this cause, the sworn testimony of witnesses, the documentary evidence presented, the legal argument of counsel, the submissions of authority, and the applicable law. Being fully advised in the premises and based on the greater weight of the more credible evidence and the reasonable inferences to be drawn there from, the Court makes the following findings of fact and conclusions of law.

REFERENCES

References to exhibits shall be shown by (EP- #) for the City's exhibits, (EM - #) for Mathas's exhibits, (EJ - #) for Joanos' exhibits, (EH - #) for Hunters' exhibits, and (ED - #) for the defendants' joint exhibits.

References to the page of the trial transcript shall be shown by (T- #).

TRIAL ISSUES STILL PENDING

During the trial the Court took certain matters under advisement. More specifically, after the Petitioner rested its case the Defendants moved to dismiss the Petition. Additionally, the Defendants renewed their motion at the conclusion of trial. The court took the Motions under advisement. The court herein denies the Defendants' Motion to Dismiss.

FINDINGS OF FACT

"In the late 1970's, Daytona Beach was denominated the 'City of Sleaze'." *Function Junction, Inc. v. City of Daytona Beach*, 705 F. Supp. 544 (M.D. Fla. 1988). The poor reputation of the City was due to the crime and decay in what is now known as the Main Street Redevelopment Area. (T-65) The area was infested with runaways, flophouses and adult businesses. (T-66).

In 1981, the City completed a blight study in regard to the Main Street area of the city, and concluded that the area was blighted and in need of rehabilitation. (EP- 1-3) The conditions that led to the conclusion of blight are contained in the Blight Study performed under the direction of Gerald Langston, a certified planner, by using a team engineers, fire department, license inspection, building permit and planners, an economist and researcher, law enforcement, and others intimately familiar with the conditions within the area. (T-64, 65) The conditions were discussed in advance with the City Commissioners and presented to the City Commission meeting by the City Manager and his designees including Langston. (Ordinance 81-415, section 1; T-84, 85). These conditions included:

1. A significant percentage of deteriorating structures. The City Commissioners determined, based on the standards established by the city, that 23% were deteriorating, 4% deteriorated. 61% of the structures were built pre-1940. (EP - 1-3, with attached Blight Study pages 47-52; EP-14) The building condition

evaluation was performed by a retired building official who was familiar with internal issues with the properties. (T-75)

2. A large number of small, 1940 and 1950-sized lots that did not allow parking of cars. 34% of the lots were 500 sq. ft. or less with only 5% over ½ acre. A parking problem was noted (EP - 1-3, with attached Blight Study pages 52-55; T-76, 77). The properties being taken here do not have their own parking, do not meet set back requirements, and do not have open space, landscaping, or storm water retention. (T-77, 78)

3. A disproportionate amount of crime (20% of the City's crime in only 2% of the City's area). (EP-15; EP - 1-3, with attached Blight Study pages 56 -58; T-144, 148-150, 159, 160) City personnel were fearful of working in the area on City projects. (T-17).

4. A large percent of antiquated, underground utility systems, such as storm water drainage, water and sewer systems. (T-255) The storm drainage could not manage the amount of downpour from a three-year storm. The inadequate storm drainage resulted in spot flooding posing a safety threat to driving and flooding of homes. (T-68, 253) The sewer system, constructed in the 1930's or 40's, was inadequate. (T-13). The sewer system was the oldest in the City and was in the worst condition. (T-13) The existing water pipes were too small and resulted in a lack of water pressure. Residents had attached ground water pipes to increase the pressure, which caused a threat of contamination due to back flow into the system. (T-19, 20) The water system was built in the 1920's or 30's. (T-20) The lines were corroded due to age and added to the water pressure problems. (T-36) The sanitary sewers were suffering from ground water leaks that overtaxed the system and contaminated it with solids. Raw sewage could be found in the street two or three times a week requiring treatment with chlorine to prevent disease. (T-14, 15) The lift station for the sewage system could not handle the existing capacity. (T-18) See generally (EP - 1-3, with attached Blight Study pages 59-69; EP-12).

5. A large number of antiquated fire hydrants. The fire hydrants failed to meet National Fire Protection Guidelines as they were over 40 years old and were not present every 500 feet. The city had great concern in regard to its firefighting

capability. (T-19, 21) See generally (EP-12, EP - 1-3, with attached Blight Study pages 66, 68, 69)

6. Lack of tax based growth when compared to the rest of the City. While not a specific criterion under the definition of blight, lack of tax-based growth is a recognized symptom of blight. Section 163.335(1), Florida Statutes (1981); *Holloway v. Lakeland Development Authority*, 417 So.2d 963 (Fla. 1982)(recognizing the decline in value of the tax base as evidence of a blighted area.). (EP - 1-3, with attached Blight Study pages 70-73; T-70-71)

In accordance with Section 163.355, Florida Statutes (1981), on December 16, 1981, the City considered oral and written evidence in regard to the condition of the Main Street area. One of the City Manager's designees, Langston, presented the Blight Study to the City, and by Resolution No. 81-415, the City accepted the study and determined that the Main Street area was blighted and that redevelopment of that area was necessary in the interests of the public health, safety, morals and welfare of the residents of the City. (EP - 1-3; ED-17; T-79, 80, 85, 86, 87, 88) The blighted area was thereby designated as the "Main Street Redevelopment Area" and its boundaries were determined to be: International Speedway Blvd. to the South, Oakridge Blvd. to the North, the Atlantic Ocean to the East, and the Halifax River to the West. (EP - 1-3; T-70)

On August 18, 1982, in accordance with Section 163.360, Florida Statutes, a Community Redevelopment Plan was adopted for the Main Street Redevelopment Area by Ordinance No. 82-254 which was subsequently amended by Ordinance No. 87-255 and Ordinance 00-453. (EP - 1-5, 1-18; T-86) On February 15, 1984, a Special Area Plan for the Main Street Redevelopment Area was adopted by Ordinance 84-38, which was subsequently amended by Ordinance 87-260. (EP - 1-7, 1-12) On July 1, 1987 an Implementation Plan for Community Redevelopment Plan was adopted by Ordinance 87-261, which was subsequently amended by Ordinance 96-87. (EP 1-13, 1-15). In May of 2003, Ordinance 03-220 approved the agreement with Carlsberg and therein the City Commission reiterated its continuing knowledge that the blighted conditions in the area originally documented in 1981 were not yet fully eliminated. (EP-19)

Since initially establishing the Community Redevelopment Plan in 1982 the City has worked continuously to eliminate blight in the "Main Street Redevelopment Area." Gerald Langston testified that since 1981 the following changes have been made to the "Main Street Redevelopment Area" (T 90-120):

1. The drainage, sewer, and water lines were replaced in the respective area in the mid 1980s.
2. Roads were reconfigured, 5th Street was constructed, and Main Street was reconstructed.
3. In 2002, the City allotted $10 million for Main Street/Boardwalk Development.
4. $3-4 million was spent for the beautification and streetscaping of Main Street.
5. Beautification projects in regard to the Boardwalk and A1A were established, with $6.1 million being allotted by the City to streetscape A1A in 2002.
6. In the 1990s the 306 room Marriott/Adam's Mark/Hilton was built and continues to operate. Additionally, a 436 room North tower expansion is set to open fall 2005.
7. Seaside Village was established and antique light poles were installed.
8. In the 1980s the 225,000 sq. ft. Ocean Center was built as a large convention/theater/concert venue. Additionally, a 130,000 sq. ft. expansion has been or is being added.
9. Façade grants were established to assist residents and business owners to comply with the mandatory ordinance requiring the repair and maintenance of buildings within the "Main Street Redevelopment Area."
10. Multilevel public parking lots were built North and South of Main Street in the 1990s.
11. Adventure Landing/Daytona Lagoon was built and continues to operate.
12. In the 1990s the Ocean Walk Shoppes a large movie, retail, and restaurant venue was built and continues to operate.
13. The City in conjunction with the Marriott contributed to refurbishing Oceanfront Park.
14. A walkover from the parking garage to the Ocean Walk Shoppes has been completed.
15. The park South of the Bandshell has been dramatically improved and beautified.
16. The two tower Ocean Walk Resort hotel/condo complex was built and continues to operate.

Additionally, since 1981 the City and various developers have made attempts to rid the "Main Street Redevelopment Area" of blight that were unsuccessful. In 1996, the Commission adopted Resolution 96-73, a revised implementation plan for redevelopment in the area, which included an ill-fated "Table Top Plan." (T-407) The 1996 resolution stated, among other things, "The project will require significant private investment and create a major upgrade of the entertainment activities in the Boardwalk. The project will redevelop vacant land currently being used for (temporary) parking which is a blighting factor for the adjacent properties." As the testimony of Geary showed, this plan (which would have created a hotel on the property west of the eastern edge of Ocean Avenue and would leave the existing Boardwalk structures in place with hotel amenities built over them) failed, not the least for lack of participation by owners of property along the Boardwalk. Mr. Geary testified that the "Table Top Plan" was very complicated because it required the agreement of everyone (including the defendants of the instant case) on the Boardwalk from Main Street to Auditorium, which consisted of approximately 25 different storekeepers and landowners. Carlsberg entered into a letter of intent, but within hours it was voided because various shopkeepers came and told Mr. Geary that they would never agree to it. After years of trying Carlsberg found that the "Table Top Plan" would be impossible to accomplish. (T 434)

Additionally, in approximately 2001, an RFP was put out by the City and the developer Trammel Crow responded by proposing the construction of two major hotels in the "Main Street Redevelopment Area." Trammel Crow's proposal included that it would be a joint venturer with Carlsberg in this project. The City accepted Trammel Crow's and Carlsberg's proposal. However, Trammel Crow and Carlsberg had a "falling out" and the City had to issue another RFP. (T 733-736) Carlsberg was the only developer that responded to that RFP with the proposal that the instant taking is in regard to.

The court finds that it requires a significant period of time for the City to eliminate blight in an area as large as the "Main Street Redevelopment Area." The City has a limited amount of resources available to it for purchasing properties to eliminate blight in this area and it must acquire properties on a gradual basis. Additionally, it requires extra time to seek out developers interested in beginning new projects in Daytona Beach, acquiring properties, approving projects, and rezoning, if it is necessary. Therefore, the fact that the original blight study in the instant case is 24 years old does not convince the court that its findings are outdated. The court's view is supported by the fact that the City in all its Amending Ordinances reference and adopt the

1981 blight study and its findings, make new and continued findings of blight, and/or state the purpose of the amendments are to remedy the blighted conditions that continue to exist in the "Main Street Redevelopment Area." The City must be allowed a significant period of time to eliminate the blighted conditions on a gradual, systematic basis.

The current Redevelopment Plan and the Implementation Plan, as amended by the above Ordinances, provide for the construction of a mixed-use convention hotel/condo and park in the area north of Main Street, south of Auditorium, east of Atlantic and west of the Atlantic Ocean, and includes the properties sought in this taking. The mixed-use convention hotel/condo project is the linchpin to spur other redevelopment in the Main Street Redevelopment Area and eliminate blight. (T-89-90) Due to the nature of the area and the project, it could not be located in another area. (T-93, 354) The project spurred an initial investment of $750,000 from the Developer to assemble land and construct a public park south of Main Street adjacent to the ocean. (T-99, 358) On May 21, 2003, pursuant to Ordinance 03-220, the City approved the Development Agreement with Carlsberg Management Co. for the construction of a mixed-use convention hotel/condo, restaurant and retail stores in this area and to use the power of eminent domain, if necessary, to acquire the properties. (EP-1-19) Carlsberg Management Company was the only company to respond to the City's request for proposal for this project. (T-737) The majority of the construction area has already been acquired through negotiations with the landowners and been cleared for construction. (T-346, 350, 351) Specifically, by October 30, 2003, the Developer had acquired the Pizza King, Boardwalk Amusement Center, Joyland, and an adjacent vacant lot for the proposed construction, which is approximately 2 acres of Boardwalk property. The Development Agreement requires the City to use its powers of condemnation to acquire the necessary subject properties and then sell them to Carlsberg Management Co. for its acquisition costs. (EP-1-19)

The Carlsberg Project is estimated to cost $120 million dollars to construct. It consists of a 691,500 sq. ft. two tower hotel/condominium complex consisting of 496 condominium units. Additionally, the project includes 40,000 sq. ft. for restaurants, 9,000 sq. ft. of **new** retail space, 377, 300 sq. ft. of parking space, a 120,000 sq. ft. public park, and a new pier of 81,000 sq. ft.

On November 5, 2003 by Resolution No. 03-514, the City found that the taking of the fee simple absolute title to the subject properties by the power of eminent domain was for a public purpose and was reasonably necessary to accomplish said purpose, namely, the elimination of blight. (EP-1-20)

The City obtained a survey of the proposed construction area. (EP-16) The survey designates the area of construction as the "Hotel Site". (T-207) The Developer confirmed the survey was that of the construction area as known as "Hotel Site." (T-353-354) The surveyor, David McMillan, testified that the properties sought to be taken are within the construction area. (T-208) He further clarified that the description of the properties in Resolution 03-514 are the same properties described in the Petition and Declaration of Taking. (T-210) The only difference is that the City is taking a little less property than is authorized and described in the Resolution. (T- 210-211)

Both the Developer and Robert Brown, the City's attorney, testified that the City intends to construct the hotel-condo/retail/park project in the surveyed construction area. (T-196, 368)

CONCLUSIONS OF LAW AND LEGAL REASONING

A. Taking Effectuated in Compliance with the Community Redevelopment Act is for a Public Purpose and Necessary for that Purpose

"No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner." Fla. Const., Art. X, § 6. By comparison, the Fifth Amendment of the United States Constitution provides "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5 (e.s.). In *Kelo v. City of New London Connecticut*, ___ U.S. ___, 2005 WL 1469529 (June 23, 2005), *affirming Kelo v. City of New London Connecticut*, 843 A.2d 500 (Conn. 2004) ("*Kelo*"), the Court traced the evolution of the interpretation of the Public Use Clause from one requiring actual public use of the taken property to "the broader and more natural interpretation of public use as 'public purpose.'"*Kelo*, 2005 WL 1469529 at *5. In Kelo, the question presented to the United States Supreme Court was "whether [New London's] proposed disposition of this property [to a private developer for economic redevelopment purposes] qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth amendment to the Constitution." *Kelo*, 2005 WL 1469529 at *6. The Court sustained the constitutionality of the taking as consistent with its jurisprudence concerning takings that result in transfer of the taken property to private owners. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); and *Berman v. Parker*, 348 U.S. 26, 32-34 (1954). The Court held that a taking for the purpose of

economic development does not, as a matter of law, violate the "public use" requirement of the Fifth Amendment, *Kelo*, 2005 WL 1469529 at *5, and it held, also as a matter of law, that a condemning authority is not required to show "a 'reasonable certainty' that the expected public benefits will actually accrue."*Kelo*, 2005 WL 1469529 at *9.

Rejecting the argument that the "public use" clause can be satisfied only if the taken property will be used by the public, the Court held that the fact that the property was to be conveyed to private persons for the purpose of carrying out the redevelopment plan did not violate the public use clause. Since the turn of the 19th Century, it said it has "embraced the broader and more natural interpretation of public use as 'public purpose.'" *Kelo*, 2005 WL 1469529 at *5.

When a taking serves a public purpose, the fact that the property ultimately is transferred to a private owner and that it confers private benefits on others does not render the taking unconstitutional. The public use clause would be violated only if the taking were for a purely private purpose or if the alleged public purpose were merely pretextual. *Kelo*, 2005 WL 1469529 at *5. Explaining why it agreed the New London plan was not a forbidden private purpose taking, the Court said:

> The takings before us, however, would be executed pursuant to a "carefully considered" development plan. (citation omitted). The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.(citation omitted). Therefore, as was true of the statute challenged in *Midkiff*, 467 U.S., at 245, the City's development plan was not adopted "to benefit a particular class of identifiable individuals."

Concurring in the opinion and judgment, Justice Kennedy explained, "This Court has declared that a taking should be upheld as consistent with the Public Use Clause. . .as long as it is "'rationally related to a conceivable public purpose.'" *Kelo*, 2005 WL 1469529 at *10 (Kennedy, J., concurring) (*quoting Midkiff*, 467 U.S. at 241). A court should strike a taking only if it were:

> by a clear showing, . . . intended to favor a particular private party, with only incidental or pretextual public benefits . . . A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and

> review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose.

Id. at * 10-11.

Kelo reaffirms that: a taking meets the "public use" requirement if it serves a public purpose; legislative determinations of public purpose are presumptively correct; and the mere fact that the power of eminent domain is exercised for the purpose of assembling property for transfer to a private developer does not defeat its public purpose. A taking that serves a purely private purpose or whose stated public purpose is only pretextual is not valid, but one who challenges a taking on this ground bears the burden of overcoming the presumption of correctness attached to legislative findings.

In all these respects, Florida law is consistent with *Kelo*, and the exercise of eminent domain in the present case is valid. Section 163.335, Florida Statutes, finds and declares that redevelopment as contemplated by the Act is a public purpose and public funds may be expended and the power of eminent domain is necessary for that purpose. Additionally, a legislative determination that a taking serves a public purpose is presumptively correct and may not be overturned by the court unless it is shown to be clearly erroneous. *Department of Transportation v. Fortune Federal Savings and Loan Association,* 532 So. 2d 1267 (Fla. 1988) (holding in an eminent domain case that "the legislature's statement [of a] public purpose . . . must be upheld unless that purpose is beyond the power of the legislature and is clearly erroneous"). This standard is not unique to bond validation cases but has always been the standard in eminent domain cases. *See Wilton v. St. Johns County*, 12 So. 527, 533(Fla. 1929) (quoting Nichols on Eminent Domain) ("'[T]he real question for the courts to decide is not whether the proposed use is a public one, but whether the legislature might reasonably consider it a public one.' This is but another way of saying that all reasonable presumptions will be indulged by the courts in favor of the validity and constitutionality of the legislative determination, but the courts must in the end determine").

Questions of "public purpose" and "necessity" are for the ultimate decision of the court, as is enunciated in cases from *Wilton* to *Fortune Federal.* However, the courts review of the legislative actions in a taking under the Act fall under the "fairly debatable," i.e. "clearly erroneous," standard.

"[T]he question of whether or not it is *necessary* to exercise the power of eminent domain to the property for the accomplishment of such purpose is generally held to be a *legislative question*; especially so in those instances where the Legislature itself takes direct action." *Wilton*, 12 So. at 534-35. Only if the statute were silent on the subject of necessity would the constitution imply a standard of necessity. *Id.* The statutes are not silent on this subject. The statute requires that a condemnor plead and prove the "[t]he authority under which and the use for which the property is to be acquired, and that the property is necessary for that use." Fla. Stat., § 73.021(1). *See Canal Authority v. Miller*, 243 So.2d 131, 134 (Fla. 1970) (holding that "proof of necessity is a condition precedent to the valid exercise of the [eminent domain] power. It is not an affirmative defense to allege a lack of necessity"). The Community Redevelopment Act (Chapter 163, Part III, Florida Statutes (1981)) (the "Act") establishes a comprehensive process for the redevelopment of slums and blighted areas. The Act provides that takings for elimination of blight effected in compliance with its provisions satisfy both the constitutional public purpose <u>and</u> statutory necessity requirements. *See* § 163.335(3) (finding and determining that "the powers conferred by this part are for <u>public purposes</u> and uses for which . . . the power of eminent domain [may] be exercised [,]. . . and the <u>necessity in the public interest</u> for the provisions herein enacted is hereby declared as a matter of legislative determination") (e.s.). Thus statutory law both requires a showing of necessity (§ 73.021) and prescribes the elements of that necessity under the Act (§ 163.335(3)). When the condemning authority shows that its proposed taking has been authorized by compliance with the Act, it has shown both the public purpose and necessity for the taking. *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1981) ("*Miami Beach*"). Only if the Act were unconstitutional would the court be free to disregard the presumptive validity of its legislative findings of public purpose and necessity.

The clearly erroneous standard of review applies to both the initial determination that an area is blighted and also to the decision to exercise the power of eminent domain to take a particular property within that area for redevelopment purposes. *Berman, Miami Beach, Fortune Federal, Rukab, Delray Beach, Batmasian, Post.* These cases hold that the decision that a general area is "blighted" is a legislative decision that renders all property within the area subject to taking. The cases further hold that when a city enters into redevelopment agreement concerning property within an area already found to be blighted, it is not applying a general policy to a specific parcel. Rather, it is taking a step in the execution of its legislative policy, and

its decision to take one step versus another step continues to be a legislative decision. The cited cases hold that the valid determination of blight as to an area determines both the purpose and necessity for the taking of all property throughout the area. Whether and when to take all of the property, some of the property, and which of the property continue to be legislative decisions reviewable under the clearly erroneous or fairly debatable standard.

In *Batmasian*, the court rejected an argument that the petitioner should establish the existence of blight at the time of the taking as opposed to the earlier time of the determination of blight. *Id.* at 201. *Batmasian* said the petitioner could not be expected to "demonstrate the existence of the same level of blight in 1989 that was present when the redevelopment plan was initially adopted in 1982." *Id.* *Batmasian* explained its holding that the time of the determination of blight– as opposed to the later time of taking the property–is the relevant time for testing the city's finding of blight:

> The intent of [the Act] is to allow a redevelopment plan for an area. A logical consequence of the implementation of a redevelopment plan in any particular area is that some conditions of blight which once existed will be eliminated. Therefore, it is unreasonable to expect that the CRA demonstrate the existence of the same level of blight in 1989 that was present when the redevelopment plan was initially adopted in 1982.

Id. at 201.

The City's continued efforts to eliminate blight in the "Main Street Redevelopment Area" is evident through those improvements enumerated earlier in this decision. Additionally, the court finds compelling the fact that there have been substantial efforts made by the City to eliminate blight in the "Main Street Redevelopment Area" which were unsuccessful. While the court notes that many improvements have been made in the subject area since the 1981 blight study was conducted, the law supports allowing a city to continue with its Redevelopment plans as long as the initial finding of blight was not clearly erroneous. The City's efforts to remove blight have been constant, continuous, and systematically accomplished through the years, even though some the City's efforts have been thwarted by unforeseen circumstances that have arisen. As earlier discussed on pages 5 and 6, in 1996, the Commission adopted Resolution 96-73, the "Table Top Plan," which stated: "The project will require significant private investment and create a major upgrade of the entertainment activities in the Boardwalk. The project will redevelop vacant land

currently being used for (temporary) parking which is a blighting factor for the adjacent properties." As the testimony of Geary showed, the storekeepers and landowners would not agree to this plan and it was impossible to accomplish. (T 434)

In 2000, the CITY adopted a revised version of the Redevelopment Plan, Ordinance 00-453. (EP-1-18) In this document, the CITY reiterated its 1981 finding of blight and repeated its finding that "[t]oday the Main Street Area has become a blighted area." *Id.* at 2. The Amended Main Street Community Redevelopment Plan of 2000 states:

> "More recently, the Main Street Area has experienced a pattern of decline...Today, the Main Street Area has become a blighted area. Most of the structures on Main Street itself are old and show signs of deterioration and visual blight. Many contain marginal businesses, are only partially used, or are vacant altogether...There are also problems such as a large number of small or otherwise inappropriate lots, inadequate parking, street conditions, and drainage problems...Redevelopment is further hampered by social problems created by the high incidence of personal and property crimes, drugs, prostitution, and the concentration of transients...This overall blighted condition cannot be expected to be corrected through private enterprise acting alone." (EP-1-18)

This plan contemplated the improvement of RDB-4 properties in the district and the use of the power of eminent domain to achieve redevelopment and cure continuing problems, including faulty lot layout.

Additionally, in approximately 2001, an RFP was put out by the City and the developer Trammel Crow responded by proposing the construction of two major hotels in the "Main Street Redevelopment Area." Trammel Crow's proposal included that it would be a joint venturer with Carlsberg in this project. The City accepted Trammel Crow's and Carlsberg's proposal. However, Trammel Crow and Carlsberg had a "falling out" and the City had to issue another RFP. (T 733-736)

As the CITY continued to pursue redevelopment of the area, it issued the series of RFP's that ultimately led to the present agreement with Carlsberg. (EP-19) In the ordinance approving this agreement, Ordinance 03-220, the City Commission reiterated its continuing knowledge that the blighted conditions in the area originally documented in 1981 were not yet fully eliminated[1].

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[1] The obvious validity of the longstanding and universal presumption that the Commissioners are knowledgeable of conditions in the city is illustrated by the minutes of the meeting of the Daytona Beach City Commission on November 6, 1996, where the Commission resolved to seek proposals to redevelop the blocks north of the present Hilton. Commissioner Travis stated, without contradiction from other Commissioners, that "[S]he was over on Main

There is no dispute that the CITY has made progress in its efforts to redevelop the Main Street area, as enumerated earlier. At each step in the continuing redevelopment process, the CITY has noted these improvements even as it continued the redevelopment process. In pointing to these improvements, the Respondents have certainly shown (without dispute) that the "same level of blight" which existed in 1981 does not exist today, *Batmasian* at 201, but the Respondents have not shown that the Main Street Redevelopment Area is no longer blighted. Under *Batmasian*, obviously, the fact that matters have improved does not undermine the validity of the present taking.

In *Charleston Urban Renewal Authority v. Courtland Co.,* 509 SE 2d 569 (W. V. 1998), Courtland did not challenge the validity of the initial determination of blight by the Charleston City Council. Rather, it argued that the circuit court should have considered its claim that there are no longer blight conditions in the Project Area and therefore the 1984 findings of blight to support condemnation are outdated. Upon such findings the eminent domain proceedings are unconstitutional because condemnation does not now serve a "public purpose".

Holding that the circuit court did not err in denying Courtland's challenge to the condemnation petition based on Courtland's contention that there were no longer blight conditions in the Project Area, the court relied on the Supreme Court's decision in *Berman v. Parker*, 348 US 26 (1954).

> Additionally, as the Supreme Court held in *Berman, supra,* the viability of an incremental, multi-year, integrated plan for the overall redevelopment of a slum or blighted area would be fatally compromised if challenges to the continued need for and legitimacy of the plan based on allegedly changed circumstances were allowed as defenses to a condemnation petition--each time an urban renewal authority seeks to acquire property to accomplish the purposes of the plan. We are not directed to nor have we found any cases or statutes suggesting that such challenges are, have been, or should be allowed.
>
> Urban renewal plans and their long-term goals would be crippled in their intended purpose of economic revitalization, if they could be interrupted and short-circuited just when the conditions that gave rise to the plan have arguably begun to be abated.

Street and the Boardwalk last week. If they were a tourist and come to this City and just walked around to see the sites (sic) they probably wouldn't come back again with all of the stuff they would see." (EP-31) at page 2034. Later in that meeting, Commissioner Hunter said of the proposal to issue the RFP, "They have to start somewhere. He thinks if they start here and do a good project, next to it will be another project. It builds one on another." Id at 2035

> Again, we are not directed to any cases or statutory language suggesting that such interruption or short-circuiting has been or should be permitted.
> As the Supreme Court stated in *Berman, supra:* "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to *complete the integrated plan* rests in the discretion of the legislative branch." 348 U.S. at 35-36, 75 S. Ct. at 104, 99 L.Ed. at 39. (Emphasis added.)
> Our approach to this question is further shaped by our understanding of the deference that our case law has stated must be afforded to legislative determinations of the need by a public body to exercise eminent domain for a public use, and the limited role of courts in reviewing such determinations.

Id. at 576.

There is no provision in the Act for the automatic expiration of the efficacy of a finding of blight, and there is no authority in the statutes or cases for a court to supply such a termination. Once the legislative body has found that blight exists, the presumptive validity of the finding continues to be operative, *E..g Panama City Redevelopment Agency,* until the City makes a finding to the contrary. In this case, the City obviously has not made such a finding because in approving the present redevelopment agreement, it reiterated and continued to rely on its 1981 finding of blight. Additionally, as stated previously, the City in its amending ordinances continued to find ongoing blight within the "Main Street Redevelopment Area" and sought redevelopment to remedy the blighted conditions.

As a matter of law, there is no requirement that a specific parcel be "blighted" as a condition to its taking, rather the area is viewed as a whole. The broad remedial purpose of the Community Redevelopment Act is to view the area as a whole, rather than focusing on specific parcels. See *Grubenstein v. Urban Renewal Agency*, 115 So. 2d 745 (Fla. 1959) (interpreting prior version of Community Redevelopment Act, the Florida Supreme Court observed that it is the condition of the area as a whole which controls the determination of whether the site is blighted, notwithstanding the good condition of particular pieces or parcels of property). This notion of broad purpose is consistent with the numerous cases from other jurisdictions, in which courts have held that the underlying policy of community redevelopment legislation is to address conditions in an area-wide rather than piecemeal fashion. See *Berman v. Parker*, 348 U.S. 26; 99 L.Ed. 27 (1954) (observing that a requirement that every property be blighted, would be an ineffective, piecemeal approach to eliminating blight and avoiding slum, and a palliative only); see generally 45 ALR 3d 1096 (2002), "Annotation: What Constitutes 'Blighted Area' Within Urban Renewal

and Redevelopment Statutes," and cases cited therein. See also *Babcock v. Community Redevelopment Agency*, 306 P. 2d 513 (Cal. Ct. App. 1957) (redevelopment of blighted area may include lands, or buildings not detrimental to public health, safety or welfare so long as inclusion is necessary for the effective redevelopment of the area of which they are a part); *Forbes v. Board of Trustees*, 712 A. 2d 255 (N.J. Super. Ct. App. Div. 1998) (not every property within the redevelopment area must be shown to be itself substandard); *Lyons v. City of Camden*, 243 A.2d 817 (N.J. 1968) (prohibiting municipality from including properties which are not blighted defeats the legislative purpose of area redevelopment; issue is whether the area as a whole qualifies for a designation of blight); *Miller v. City of Tacoma*, 378 P. 2d 464 (Wash. 1963) (fact that some lands in blighted area were vacant does not invalidate redevelopment statute). The problems of the blighted parts of a community are attacked on an area, rather than on a structure-by-structure basis. *Berman v. Parker*, 348 U.S. 26 (1954); *State v. Miami Beach Redevelopment Agency*, 392 So. 2d at 889-91 (Fla. 1980); *Post v. Dade County*, 467 So. 2d 758, 760 (Fla. 3d DCA 1985). It is universally held that an area as a whole is subject to clearance and rehabilitation, the condition of any single structure therein is immaterial. *Grubenstein v. Urban Renewal Agency of Tampa*, 115 So. 2d 745, 748 (Fla. 1959). The fact that a particular building does not imperil health or safety nor contribute to the making of a slum or blighted area does not prevent it from being a part of a redevelopment area subject to condemnation. The area must be planned as a whole. It is not enough just to remove buildings that are believed to be unsanitary or unsightly. It is important to redesign the whole area so as to eliminate the conditions that cause slums and blight. *Berman*, 348 U.S. at 26. Property may be taken for redevelopment which, standing by itself, is innocuous and unoffending. *Id.* at 35.

The public body's "wisdom of authorizing the cataclysmic demolition and redesign of neighborhoods or even whole districts is not for the Court to determine." *Miami Beach Redevelopment Agency*, 392 So. 2d at 891. A governmental body has wide discretion to select the amount, location and interest of the property to be condemned. *School Board of Broward County v. Viele*, 459 So. 2d 354 (Fla. 4th DCA 1984). A "landowner cannot object merely because some other location might have been made or some other property obtained which would have been suitable for the purpose." *Pasco County v. Franzel*, 569 So. 2d 877, 879 (Fla. 2d DCA 1990) (quoting *Wilton v. St. Johns County*, 12 So. 527, 535 (Fla. 1929)).

Therefore, given the facts and evidence presented at trial the court cannot find that the City of Daytona's finding of blight in 1981 was clearly erroneous, therefore the court must uphold the

determination of the City's legislative blight finding. As the purpose of the instant taking is to remedy blight in the Mainstreet Redevelopment Area the court finds that the elements of public purpose and necessity are met.

B. <u>The Respondents have not shown that this Taking is Vitiated by Illegality, Bad Faith, or Abuse of Discretion.</u>

Under the legal structure that controls this case, the CITY has adduced sufficient evidence to show that it had sufficient evidence to declare the area blighted and to determine the necessity for the present taking, and so the burden shifts to the Respondents to defeat the taking by establishing that the taking is vitiated by illegality, bad faith, or gross abuse of discretion. As each of these defenses assail a legislative decision, the standard of proof is stringent.

In *City of Miami Beach v. Broida*, , 362 So. 2d 19, 20 (Fla. 1978) *cert. den.* 372 So. 2d 466 (Fla. 1979), the court surveyed extensive authority and held:

> As a general rule, the matter of necessity for the taking of private property in order to serve a public purpose rests within the discretion of the appropriate county or municipal authority, in this case the Miami Beach City Council. *See City of Miami Beach v. Hogan*, 63 So.2d 493 (Fla.1953); *Jones v. City of Tallahassee*, 266 So.2d 382 (Fla. 1st DCA 1972), *overruled on other grounds*, [*Ball v. City of Tallahassee*] 281 So.2d 333 (Fla.1973), *modified* 281 So.2d 341 (Fla.1973). In *Jones v. City of Tallahassee, supra*, the First District Court of Appeal, citing *Rott v. City of Miami Beach*, 94 So.2d 168, 173 (Fla.1957), held that the findings by a city on the question of necessity in eminent domain proceedings cannot be easily upset by the courts"); *Rott v. City of Miami Beach*, 94 So. 2d 168, 173 (Fla. 1957) (holding "The finding of the City Council on the question of necessity is one which may not be easily or casually overthrown by the courts. It requires strong and convincing evidence of the most conclusive character to upset the findings of the elected officials charged with the responsibility of operating the city government in matters of this kind").

This deferential standard traces to early roots. In *Wilton*, 12 So. at 533, the Court explained that decisions of legislative bodies, including local bodies:

> as to matters committed by law to their discretion, are entitled to great weight, and, as we have seen, will usually be accepted and upheld by the courts unless fraud or abuse of discretion be clearly shown or unless it be made to appear that the action taken by such board was without lawful authority, or was beyond the authority conferred upon them by law, or taken without compliance with the

> conditions precedent which are prescribed by law to be complied with before their power to act comes into legal existence.

The Respondents have not shown clear error in the CITY's finding that the Main Street Redevelopment Area was blighted in 1981. The Blight Study is sufficient evidence of blight in the MSRA. In addition to the Blight Study, there was other sufficient evidence for the finding of blight consisting of the testimony presented to the Commission at the meeting where the finding was made; the personal knowledge of the Commissioners and their familiarity with the conditions of the area; and the experience of the City government in dealing with problems in the MSRA over the years immediately preceding the finding. See Resolution 81-415 at 2 (reciting "In open meeting the City Commission has received a report from the City Manager as to the blighted conditions that exist in the . . . Main Street Area" and finding "The written and oral presentation of the City Manager and his designees concerning blighted conditions in the . . . are hereby accepted"). (PE-1-3).

First, the Respondents have not cited any authority to support their claim that bad faith vitiates the public purpose and necessity of this taking. Indeed, there is no Florida case explaining where the question of bad faith enters into the analysis of the legality of the taking. Though not stated specifically, the Respondents implicitly argue from the premise that the taking itself will be defeated if the condemnor engages in any particular act that might be characterized as bad faith. There is no support for that notion. This court will not adopt such a standard. Only if the alleged act of bad faith goes to the legislative decision to effectuate the taking itself should bad faith be held to defeat the taking.

There is no showing that the CITY's finding of blight or its decision to engage in the present project was motivated by any corrupt motive. On the contrary, the evidence shows that several successive City Commissions have worked long toward the objective of redeveloping this area out of genuine concern for the public health, safety, and welfare. There is no evidence that this taking is inspired by a corrupt purpose.

Finally, the argument that the Mediated Settlement Agreement between Paspalakis and the developer constitutes an act of bad faith is mistaken on two levels. It is mistaken because even if this were an act of bad faith (which it is not), it would not vitiate the legality of the taking. The dealings between a developer attempting to assemble the parcel and a would-be holdout are peripheral to the central question of public purpose and necessity. The agreement between Carlsberg and the City requires Carlsberg to make strong efforts to acquire property amicably. The

energetic steps to reach an amicable settlement with Paspalakis are good faith efforts to comply with the agreement. Such strategic moments in the effectuation of the overall development plan cannot be held to taint the entire project with bad faith.

Second, the action of the developer and Paspalakis to subject the settlement to a nondisclosure agreement has been explained as the good faith effort to protect the developer's honest belief that it has a right not to have this sale used against it in the negotiation or court-evaluation of later acquisitions. Geary testified that he paid a premium for this property in order to avoid the delay and expense of litigation. (T-432) Additionally, Geary testified that the Paspalakis property was the cornerstone of the proposed project and if said property was not acquired the proposed project could not go forward. Geary's desire to keep the sales price and agreement confidential cannot be characterized as "bad faith." Only by showing that Geary intended to act wrongfully and conceal it could this discrete act be characterized as "bad faith." Therefore, there is no evidence of "bad faith" here but only evidence that an agreement existed. *Cf. Crown Bank v. U.S. Mortgage Network Corporation*, 705 So. 2d 100, 102 (Fla. 5th DCA 1998)("lack of good faith must be the result of actual, not constructive, knowledge of the wrongdoing tantamount to dishonesty or bad faith").

For the same reason, the claim that bad faith lies in the agreement to grant Paspalakis an option to acquire the Hunter cite is not supported by evidence. There is no evidence that the developer made this agreement for any reason other than its considered business judgment that the arrangement with Paspalakis would be in the interest of his project. In the course of carrying out the development project, the developer may make many such decisions. It is not material that title to the parcel may be conveyed in fee and that it will not be part of the "hotel." Geary's testimony shows that he considers the proposed transaction with Paspalakis to be integral with his "project." (T-431-432) The Respondents have no evidence to show bad faith in this decision.

C. Statutory Construction.

The 1981 blight study applied the definition of blight found in Section 163.340 (8), Florida Statutes (1979), as amended by Chapter 81-44, Laws of Florida, which reads:

> (8) "Blighted area" means either:
> (a) An area in which there are a substantial number of slum, deteriorated, or deteriorating structures and conditions which endanger life or property by fire or other causes or one of more of the following factors which substantially impairs or arrests the sound growth of a county or municipality and is a menace to the

public health, safety, morals, or welfare in its present condition and use:

1. Predominance of defective or inadequate street layout;
2. Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
3. Unsanitary or unsafe conditions;
4. Deterioration of site or other improvements;
5. Tax or special assessment delinquency exceeding the fair value of the land; and
6. Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or

(b) An area in which there exists faulty or inadequate street layout; inadequate parking facilities; or roadways, bridges, or public transportation facilities incapable of handling the volume of traffic flow into or through the area, either at present or following proposed construction.

The Petitioner and the Defendants have eloquently argued the ambiguity of this statute in regard to whether a finding of "blighted area" requires that one or two criterion be met under subsection (a). The Petitioner argues that subsection (a) should be read in the following manner, which requires that only one criterion be met:

> (a) An area in which there are a substantial number of slum, deteriorated, or deteriorating structures and conditions which endanger life or property by fire or other causes
> **or**
> one of more of the following factors which substantially impairs or arrests the sound growth of a county or municipality and is a menace to the public health, safety, morals, or welfare in its present condition and use:...(factors supra p. 19)

The Defendants argue that subsection (a) should be read in the following manner, which requires that two criterion must be met:

> (a) An area in which there are a substantial number of slum, deteriorated, or deteriorating structures
> **and**
> conditions which endanger life or property by fire or other causes or one of more of the following factors which substantially impairs or arrests the sound growth of a county or municipality and is a menace to the public health, safety, morals, or welfare in its present condition and use:...(factors supra p. 19)

The Defendants argue this construction because it is their contention that the City's definition of what constituted a slum, deteriorated, or deteriorating structure was overbroad and encompassed structures that simply needed paint or touching up. Thus, they argue that the first criteria; "an

area in which there are a substantial number of slum, deteriorated, or deteriorating structures" has not been supported by the overbroad findings by the City and that the "Main Street Redevelopment Area" did not meet the statutory definition of a "blighted area" under the existing statute.

According to the 1981 Blight Study, there were a substantial number of deteriorating (22.8%), deteriorated (3.8%) or dilapidated (.7%) structures in the MSRA, for a total of 27.3 % of the structures in the "Main Street Redevelopment Area." (Pet. Exhibit # 1-3, p. 49, 50). The results were based on a field survey performed by the City of Daytona Beach in July, 1981 ("1981 Building Survey"). *Id.* at 48. The Defendants argued through their expert witness that less than 2% of the structures in 1981 were actually deteriorating, deteriorated, and/or dilapidated. However, the Defendants have not pointed to any legal authority that defines the terms "slum", "deteriorated", and/or "deteriorating" nor do they point to any legal authority to show that the City's definitions of those terms were/are clearly erroneous. Additionally, the Defendants do not provide legal authority to indicate whether 27.3% of the existing structures would be a "substantial" number of slum, deteriorated, or deteriorating structures in the "Main Street Redevelopment Area." The City's seventy-five page blight study indicates that more significant problems existed with the structures in the "Main Street Redevelopment Area" than needing simple maintenance or repairs. The City found that 75% of the homes in the area were built prior to 1940, on small lots, and were of minimum structural quality. (Blight Study p. 44) The City also found that the quality of structures/homes in an area is directly related to the socio-economic status of the residents and that concentrated areas of low quality housing are inevitably associated with social and economic problems. (Blight Study p. 50) Additionally, the City found that old, poorly constructed buildings generate other problems for the community, including: decreased property/tax values, increased fire hazard potential, increased code enforcement demands, increased concentrations of low income owners lacking the financial ability to improve the structural conditions in the area, creating a haven for transients and others prone to criminal activity, and creation of a poor business environment. (Blight Study p. 51-52) Additionally, the "Main Street Redevelopment Area" was found to have problems with parking, street conditions, drainage, lack of open space, high levels of personal and property crimes, prostitution, drugs, and the area was becoming a burden through increase of public costs while contributing a decreasing tax revenue. (Blight Study p. 45) Therefore, whether the 1981 statute requires one or two criteria to meet the statutory definition of blight is irrelevant, as the court

finds that given the 1981 blight study the City has shown that there was sufficient evidence of the fact that the "Main Street Redevelopment Area" was an area in which there were a substantial number of slum, deteriorated, or deteriorating structures and that one or more of the additional enumerated criteria on pages 2-3 of this opinion. Therefore, the court cannot find the City's determinations to be clearly erroneous. Accordingly, given the evidence presented as to the findings of blight and the basis therefore, the court finds that the "Main Street Redevelopment Area" met the 1981 statutory definition of a "blighted area."

D. Constitutionality of the Community Redevelopment Act.

The Florida Supreme Court held that the elimination and prevention of blight is a public purpose in *State v. Miami Beach Redevelopment Agency*, 392 So. 875 (Fla. 1981).

> We hold that chapter 163, Florida Statutes (1977), authorizing redevelopment projects involving expenditure of public funds, sale of public bonds, the use of eminent domain for acquisition and clearance, and substantial private and commercial uses after redevelopment, is in furtherance of a public purpose and is constitutional. The wisdom of authorizing the cataclysmic demolition and redesign of neighborhoods or even whole districts is not for the Court to determine.

Id. at 891.

The Defendants have argued that the Community Redevelopment Act is unconstitutional. They complain that the act fails to provide sufficient standards for the determination of such terms as "substantial," "deteriorated," and "deteriorating" and that it permits the taking of property for a private purpose. These facial attacks are addressed clearly by the Court in *Miami Beach Redevelopment Agency*. The Court in *Miami Beach* found the Community Redevelopment Act constitutional even though similar attacks had been made in regard to its vagueness. Additionally, the allegation that the statute is unconstitutional as applied to the Defendants falls far short of carrying the burden that falls on one who challenges the constitutionality of an act. "The burden rests on the party challenging the law to show that it is invalid." *Florida Dept. Of Educ. v. Glasser*, 622 So. 2d 944, 946 (Fla. 1993). *See Village of North Palm Beach v. Mason*, 167 So. 2d 721, 726 (Fla. 1964) ("Initially it should be observed and thereafter constantly kept in mind that one who asserts the unconstitutionality of an act of the legislature has the burden of demonstrating clearly that such act is indeed invalid"); *Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388, 392 (Fla. 5th DCA 2002) (same). For the

foregoing reasons the court finds that the Community Redevelopment Act is constitutional on its face.

E. **Deposit in the Registry of the Court.**

Florida Statutes section 74.051(2) in part provides:

> "... it [the court] shall enter an order requiring the petitioner to deposit in the registry of the court such sum of money as ***will fully secure and fully compensate the persons entitled to compensation*** as ultimately determined by final judgment. Said deposit shall not be less than the amount of the petitioner's estimate of value if the petitioner be the state or any agency thereof, any county, the city, or other public body;..."

The City provided updated appraisals performed by Randall L. Rex, a State-Certified General Appraiser. The updated appraisals are dated May 17, 2005. Mr. Rex determined in these updated appraisals that parcel 2000 has a value of $2,470,000.00; parcel 3000 has a value of $1,680,000.00; and that parcel 4000 has a value of $1,750,000.00. In the cost approach model, Mr. Rex determined that "sale 3" at an adjusted value of $135.38 per square foot was most similar to the value of the land subject to this taking, and the appraiser final estimate of the subject land value was $140.00 per square foot. However, "sale 3" is property located on the southwest quadrant of Oakridge Boulevard and the Atlantic Ocean Beach, it is not "Boardwalk" property. The court finds that the Daytona Beach "Boardwalk" property is a particularly unique and rare property as boardwalks are rare to find in the United States of America. The court recognizes that there are issues of "comparable" Boardwalk sales to later be determined. However, at this time the court is under a statutory obligation to ensure that a deposit is made into the registry of the court that ***will fully secure and fully compensate the persons entitled to compensation***. Therefore, to adequately secure and compensate the Defendants for the taking of their "Boardwalk" properties the court finds that deposits greater than the City's current appraisal are necessary. To adequately compensate the Defendants for their rare property the court is requiring an additional 50% deposit over and above the City's current appraisal values. Therefore, a deposit of $3,705,000.00 is required for parcel 2000; a deposit of $2,520,000.00 is required for parcel 3000; and a deposit of $2,625,000.00 is required for parcel 4000.

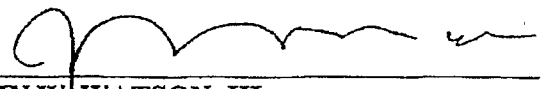
Accordingly, it is:

ORDERED AND ADJUDGED as follows:

1. That this Court has jurisdiction of the subject matter and the parties to this cause.
2. That the pleadings in this cause are sufficient, the City is properly exercising its delegated authority, and the City has demonstrated compliance with all applicable requirements of Chapters 73, 74, and 163, Part III, Fla. Stat.
3. That the property sought to be condemned is necessary for a valid public purpose.
4. That the City has surveyed the area of construction and intend in good faith to have constructed projects in furtherance of City's community redevelopment plan on the subject properties.
5. That all conditions precedent to the bringing of this action, including, without limitation, the giving of the Pre-Litigation Notice required by Florida Statutes, Chapter 73.051, have been complied with or have occurred.
6. That upon the payment of the deposit hereinafter specified, and without further notice or order of this Court, title to the fee simple absolute interest in the subject properties specified in the Complaint as Parcels Nos. 2000, 3000, and 4000 shall vest in the City in accordance with Section 74.061, Fla. Stat.
7. That the deposit of money will secure the persons lawfully entitled to the compensation that will be ultimately determined by final judgment of this Court.
8. That the sum of money to be deposited into the Registry of this Court, within twenty (20) days of the entry of this Order, shall be in the amount of $3,705,000.00 for Parcel No. 2000, $2,520,000.00 for Parcel No. 3000, and $2,625,000.00 for Parcel No. 4000.
9. That following deposit, as set forth above and following a Final Judgment, the City shall be entitled to possession of the properties described herein as Parcel Nos. 2000, 3000 and 4000.
10. That the court retains jurisdiction to determine the issue of extended possession the Defendants requested orally at the conclusion of trial, and to determine related issues, including but not limited to the release of deposited

funds to the Defendants, interest, and property insurance concerns in regard to parcels 2000, 3000, and 4000, upon written motion to the court.

DONE AND ORDERED in Daytona Beach, Volusia County, Florida this 19th day of August, 2005.



JOHN W. WATSON, III
Circuit Court Judge

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Larson, Lisa

From: Hamby, Tom

Sent: Monday, August 22, 2005 4:55 PM

Cc: Nocco, Chris; Camechis, Karen; Thomas, Tom; Larson, Lisa

Subject: House Select Committee to Protect Private Property Rights Questionnaire

As you may know, House Speaker Allan Bense recently created the Select Committee to Protect Private Property Rights for the purpose of reviewing Florida law to determine if revisions are appropriate in light of the recent United States Supreme Court decision issued in the case of Kelo v. City of New London.

The Select Committee staff is in the process of collecting information from various sources in an effort to determine the scope of any issues the Select Committee may wish to consider during its review of Florida's eminent domain law. To that end, Chair Marco Rubio asked that I solicit written comments from parties who may have an interest in the issues before the Select Committee. These written comments will be provided to members of the Select Committee prior to the first Committee meeting. It would be extremely helpful if you would provide comments on the following issues:

1. The adequacy of current protections of private property rights under Florida law.

2. The current status of Florida law with respect to government takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

3. The impact, if any, of the Kelo decision on the application or exercise of eminent domain law in Florida with respect to takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

4. The home rule power of cities and charter counties to exercise the power of eminent domain generally.

5. Whether Florida's Community Redevelopment Act is sufficiently narrow in scope as it relates to the exercise of eminent domain.

In addition, please provide a summary of the facts regarding any pending eminent domain action of which you are aware that you believe would be of interest to the Select Committee.

I need to receive your responses by Wednesday, August 31, in order to provide them to the Members of the Select Committee in advance of the first Committee meeting. Thank you in advance for your assistance in this matter. Please do not hesitate to contact me if you have any questions.

Tom Hamby, Staff Director
House Select Committee to Protect Private Property Rights
(850) 487-1342
1101 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300

Panama City Beach
Panama City Beach Community Redevelopment Agency

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August 31, 2005

Tom Hamby, Staff Director
House Select Committee to
Protect Private Propety Rights
1101 The Capital
402 South Monroe Street
Tallahassee FL 32399-1300

Dear Mr. Hamby:

We represent three cities and three CRA's, including the City of Panama City Beach and the Panama City Beach Community Redevelopment Agency. I have seen a copy of your August 22nd questionnaire and respectfully respond with three points: (1) increased compensation; (2) where to apply a higher legal standard to condemn, if there is to be one; and (3) a simple suggestion.

Panama City Beach has filed one condemnation case for purely redevelopment purposes. The only issue in that case was value and it settled amicably. We are in the process of preparing a number of condemnation cases for strip takes, corner cuts and stormwater ponds which are part of the Panama City Beach Redevelopment Plan, but also are all traditional public works projects related to generalized roadway expansions and improvements, and not associated with any individual, private project.

Increased Compensation.

Initially, a clear distinction must be drawn between takings for public works projects such as roads, utilities, stormwater systems and airports, and takings for redevelopment projects which will ultimately be returned to the private sector. Over the years, private property rights in public works cases have been carefully balanced against public necessity and financial feasibility. There is no need to rush headlong into the public works arena in response to a homestead / economic development case from Connecticut.

However, certain time honored limitations on valuation passed over from public works condemnations to redevelopment exercises may need to be relaxed. Examples include paying business damages for a total taking, not just a partial taking; finding some way in clearance cases to pay the owner an assembly premium or permitting the owner to claim an increase in value due to the project; and perhaps paying extraordinary compensation for the taking of an active homestead based upon a percentage of fair value. By condemning AFTER the adoption of the redevelopment plan, as discussed in the third section of this letter, values in the redevelopment area will show a natural enhancement and the owner could be given the economic advantage associated with the redevelopment plan. In effect, the condemned property owner could become a "partner" in redevelopments which require land assembly to address slum or blight and be compensated accordingly. This is a significant departure from current compensation law.

Also, quick takes may not be appropriate in redevelopment cases, and may not be desired if new, higher compensation rules are in place.

Where to apply a higher standard to condemn.

Current law in Florida requires slum or blighted area conditions, not merely economic development benefits, and neither local government nor property rights activists should confuse the two. The Select Committee faces the difficult task of deciding whether the current condemnation standard is appropriate, and if not how to articulate a higher one. I write first to suggest that any higher standard should apply to the power to condemn, not to the power to create and implement a redevelopment plan.

The Community Redevelopment Act is a powerful and effective tool. It accelerates the natural economic forces that should ultimately rehabilitate a depressed, urban core area without waiting until the properties become so distressed, and dangerous, that acquisition for demolition becomes economically feasible. It is also available to remedy the ill-conceived and poorly executed boom projects from earlier eras which languish around the state, and to provide an extra kick for main street projects and efforts to attract permanent residents downtown. The Redevelopment Act explicitly recognizes both the importance of the urban center as a public good and the inherent economic obstacles of revitalizing these cores when compared with less difficult greenfield locations. Nonetheless, not every community redevelopment project requires condemnation for purely redevelopment purposes. Sometimes condemnation is not needed, or basic condemnation for traditional public works projects which will be publicly owned and operated is sufficient.

The Select Committee should not permit property rights concerns to make it more difficult for a community to get into the redevelopment business. If property rights concerns must be addressed beyond the protections that now exist, a higher standard to condemn property for purely redevelopment purposes (to be returned to the private sector)

could be considered. Such a higher standard would apply to each individual owner's challenge of necessity under current law. Protecting property owners from *Kelo* style condemnations does not require tightening the definition of "slum" and "blight" which is the threshold of every redevelopment plan. Those who might suggest that it does probably have a separate reason to oppose CRA's.

A simple suggestion.

Whether to raise the standard to condemn for purely redevelopment purposes and, if so, how to express a higher standard, appear to be the crucial questions. The hysteria over the government taking one person's property to give it to another misses the point. Without that power we wouldn't have canals, railroads and transmission lines. Clearly the power has to exist. The policy question is whether its use is justified to clear and assemble property for redevelopment purposes. Or simply put, whether one or two hold-outs should be permitted to abort a redevelopment project requiring land assembly to clear slum or blighted conditions. If the answer is "yes," there will be many things a CRA can still do without condemnation or through the city or county exercising eminent domain for traditional public works. However, there will be much it cannot do. It may take decades to see the results of further limiting such powers in Florida.

Raising the condemnation standard to a finding that the parcel is critical to an adopted redevelopment plan (as distinguished from merely "related" on the one hand or "indispensable" on the other) might be a start. Under current law property can be acquired for redevelopment purposes prior to the adoption of the redevelopment plan. That higher standard to condemn, coupled with increased compensation as described in the first section of this letter, would require the government have a clear redevelopment plan which identifies and addresses a very significant problem before it offers to pay not only the fair value of the property, but also an assembly premium, full business damages and, in the case of a homestead, extraordinary compensation, all for the right to include the parcel in a land assembly that will be returned to the private sector to permit private sector forces to address the slum or blighted conditions. This will, of course, increase the cost of redevelopment to address legitimate community issues.

Thank you and the Committee members for your attention and effort on this important issue. The fact that the issue should be carefully examined and perhaps something changed does not belie the fact that doing too much could cause a great deal of harm by frustrating truly worthwhile projects. Best wishes as you examine this delicate balance between private property rights, public purpose and community-wide interests.

Very truly yours,

Douglas J. Sale

DJS/sm

Property Rights Coalition
Association of Community Developers

Hopping Green & Sams

Attorneys and Counselors

August 31, 2005

Mr. Tom Hamby
House Select Committee to Protect Private Property Rights

Re: Your Select Committee Questionnaire

Dear Mr. Hamby:

On behalf of the Property Rights Coalition at the request of their Chairman, Butch Calhoun, and Bill Hunter, President of the Association of Community Developers, we have reviewed your questionnaire and are attaching our answers to the specific questions you posed.

However, before we get to your questionnaire, we would like to point out a few simple facts. First, it is early in the process to completely commit ourselves to one solution or another. We are still analyzing the complexities of the *Kelo* case and the 2002 amendments to the Florida Community Redevelopment Act (see sections 163.33, et seq.). Our preliminary analysis shows that over the years there has been a definite expansion of the definition of what is a "public purpose" and what is a "public use". At times the Florida Supreme Court has equated these two definitions to be the same, as has the Supreme Court of the United States. At other times, the court has had a more narrow pro-private property rights view.

I think the best place to start any analysis is with the Florida constitution. Florida's constitutional eminent domain provision is found in Article X, Section 6(a) of the Florida Constitution where it is provided:

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

These simple words have engendered much debate over what is a "public purpose". Although the courts have been relatively uniform in finding that the taking of property for specific public functions such as public roads, railroads, transmission lines, and pipelines are in fact "public purposes". The debate has largely centered on how far government can go in taking private property from one individual to give to another individual for economic development or redevelopment purposes.

Post Office Box 6526 Tallahassee, Florida 32314 123 South Calhoun Street (32301) 850.222.7500 850.224.8551 fax www.hgslaw.com

I would suggest that the issues to be confronted by your committee include:

1. How is the constitutional term "public purpose" to be defined?
    - With the exception of its traditional use for public roads, railroads, pipelines and transmission lines, is it limited to facilities to be owned and operated by a governmental entity?
    - Is it limited to dangerous and unsafe slum properties and so-called blighted properties?

2. For purposes of the Community Redevelopment Act, what is the appropriate definition of a "blighted area"? Currently 163.340(8), F.S., defines "Blighted area" to mean "an area in which there are a substantial number of deteriorated or deteriorating structures which conditions, as indicated by government maintained statistics or other studies are leading to economic distress or endanger life or property and in which <u>two or more</u> of the following <u>factors</u> are present".

   The statutory definition goes on to list 14 specific factors and a 15th "catch-all" factor. When one carefully examines these factors it leads to the distinct impression that, like pornography, "blight" is in the eye of the beholder. In this case, the beholder is a local government or the Community Redevelopment Authority. For this reason, we believe the first step should be to reexamine and redefine what a "blighted area" is to make it clear when a CRA or local government can exercise its eminent domain powers to eliminate blight.

3. When should the power of eminent domain be available to be used for economic development or redevelopment purposes? Some argue, never. Others argue only under the most extraordinary circumstances. Finally, some go so far to argue that if it is for a "public benefit" then the power of eminent domain may be used even when it involves transferring private property to another private owner.

The Select Committee could perform a great public service by working its way through these issues and clarifying, either constitutionally or in a statutory manner, when eminent domain may be used.

Should we have a simple straightforward process for truly blighted slums, rundown and unsafe areas where there is a lesser scrutiny than what we would have for economic development or redevelopment takings?

Should economic development or redevelopment takings be authorized at all? If so, under what circumstances?

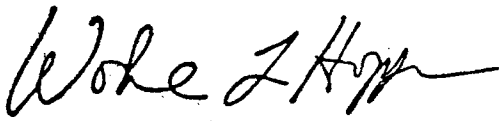
Should there be additional criteria for economic development or redevelopment cases related to how many jobs are being created and what kind of jobs are being created.

Is increasing a local government's tax base sufficient justification for a taking?

These are all difficult questions which the Property Rights Coalition and AFCD stands ready to help you answer.

Attached is a paper which specifically answers the questions you posed. I hope that this document is of help to you. Again, let me emphasize that we are just now in the formulating stages trying to determine what our position will be on the various aspects of this subject. Nevertheless, we are unified in our belief that Kelo presents a unique opportunity for legislative and/or constitutional clarification that will better protect Florida's private property owners.

Sincerely,



Wade L. Hopping

A Quick Summary of *Kelo v. City of New London*

Kelo v. City of New London raises the question of what the Takings Clause of the Fifth Amendment to the Constitution means by "public use."[1] The purpose of the Takings Clause is to limit the government's power to take private property. The government may only exercise this power when it is for a "public use" and "just compensation" is paid to the landowner. The central question is whether or not economic development qualifies as "public use" and justifies the exercise of eminent domain.

As a result of decades of economic decline, the Connecticut city of New London was designated a "distressed municipality." According to the facts of the case, by 1998, the unemployment rate was nearly double that of the rest of the state and its population was at its lowest since 1920. In 2000, the city approved a development plan in an attempt to revitalize the city. The plan was projected to create over a thousand jobs, increase tax and other revenues, and revitalize the downtown and waterfront areas. The only problem was that some of the people living within the area designated for redevelopment didn't want to leave their homes. Ms. Kelo had lived in her home since 1997 and had made extensive improvements on it. Mrs. Dery was born in her home in 1918 and had been living there her entire life. They, along with seven other property owners, refused to give up their property.

The Connecticut Supreme Court ruled that the city's proposed takings were valid. The court relied on a Connecticut statute that says that taking land for economic development is a "public use" and in the "public interest." The case was appealed to the United States Supreme Court which affirmed the lower court's ruling. The Court relied on precedent cases in which the government took land from private property owners to benefit the "public interest." In *Berman v. Parker* (1954), the Court upheld a redevelopment plan targeting a blighted area of Washington, D.C., in which most of the housing for the neighborhood's 5,000 inhabitants was beyond repair. Although the land was taken from private landowners and then handed over to private developers, the Court held that the end result – that of economic development – was in the public interest and that, therefore, the taking was constitutional.

Justice Thomas in his dissent argued that the original intent of the Takings Clause did not justify taking private property and giving it to other private individuals or corporations. He insisted that the original intent behind the Takings Clause was to strictly limit the government's power to take away private property to instances where the land would be transferred directly to the public or at least accessible by all members of the public.

Justice O'Connor, also dissenting, argued that condemning property that actually causes harm to society – a neighborhood that is overcrowded, crime-ridden and unsanitary – directly achieved a public benefit and is therefore constitutional. However, condemning well-maintained homes that are not the source of any social harm goes against the meaning of the Takings Clause, even if it does result in some "incidental" benefit to society.

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[1] The Fifth Amendment of the United States Constitution and the Connecticut Constitution use the term "public use" (see Article I, section 11 of the Connecticut constitution). The Florida constitution uses the term "public purpose" (see Article X, section 6(a) of the Florida constitution).

Response to House Select Committee to Protect Private Property Rights Questionnaire

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

--Art. X, § 6(a), Fla. Const. (emphasis added).

How adequate are protections of private property rights under current Florida Law?

In the wake of the Supreme Court's ruling in the *Kelo* case, state legislatures all over the country are taking another look at the adequacy of their own legislation regarding the use of eminent domain. While some politicians and commentators argue that Florida Law provides greater protection than Connecticut law or the U.S. Constitution, the truth is that current Florida law equally paves the way for eminent domain abuses.

Prior to July 1, 2002, Florida's Community Redevelopment Act (CRA) did offer some protection to landowners against condemnation for purely economic reasons. Under the CRA, "blight" was defined by one or more statutory factors, such as small lots or narrow streets,[1] but the statute also specifically indicated that blighted designations were intended for slum-ridden areas.[2] The statute put the condemning authority under restrictive guidelines and the factors prompting a blight designation had to be those that "substantially impair or arrest sound growth"[3] and were "a menace to the public health, safety, morals and welfare."[4] While many argue that these protections were merely lip service to private property protections and that local governments freely interpreted the statute and used it as a tool for eminent domain abuse,[5] today even these arguably weak protections have been eliminated.

In 2002, Governor Jeb Bush signed into law a bill that significantly diluted the qualifications required for designation of a blight area. The legislature struck the "menace to society" language and expanded the government's eminent domain power by adding language allowing for declarations of blight due to "falling commercial lease rates," "residential and commercial vacancy rates higher in the area than in the remainder of the county," and an absence of increased tax appreciation.[6] The effect was essentially to broaden the designation of blight to include non-slum areas if two or more statutory factors exist. It is now just as easy to condemn private property for economic development under Florida law as it is under the U.S. Constitution and Connecticut Law.

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[1] Dana Berliner, *Public Power, Private* Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003), http:castlecoalition.org/report/pdf/ED_report.pdf (viewed Aug. 26, 2005).

[2] Tiffiny Anne Douglas, *Florida's Take on Takings: An Appeal to Re-Balance the Individual's Rights and the State's Needs*, 4 Fla. Coastal L.J. 207, 221 (2003).

[3] Community Redevelopment Act of 1969, Fla. Stat. ch. 163.340(8)(a) (2001).

[4] Id. at § 163.360(8)(b)(3).

[5] Brief Amicus Curiae of Pacific Legal Foundation, filed on February 7, 2005, in Fulmore v. Murdock Village Community Redevelopment Agency, Case No. 2D04-3179, District Court of Appeal of Florida Second District

[6] Douglas, supra, note 2, at 222.

Unfortunately, the Florida judiciary offers no further protection. In 1952, the Florida Supreme Court in *Adams v. Housing Authority of Daytona Beach* set a strong precedent supporting the private landowner's inalienable right to property in Florida.[7] The court held that the police power was sufficient to combat blight and slum and declared unconstitutional statutes allowing the taking of private property for private redevelopment.[8] Since that time however, case law has slowly evolved to reach its current deference to the condemning authority, chipping away at private property rights along the way. In *Department of Transportation v. Fortune Federal Savings and Loan Association*, the court finally reached its very *Kelo*-like current stance. The court ruled that public purpose was not limited to "a specific public function" like a road or railroad, but instead it was anything that was of general benefit to the state in some "tangible, foreseeable way."[9]

Clearly, private property right protections in Florida are very much in danger of being eroded under the current Florida law. The legislature and the courts have not specifically authorized takings for purely economic reasons, but they have left the door wide open for abuse. The Florida legislature should use as its model states like Hawaii, Arizona and Washington that have provisions in their constitutions explicitly prohibiting governments from taking property for private benefit.[10] The legislature should recognize the prospective misuse of power and revise statutes to limit the power of eminent domain to its original constitutional meaning. The security of private property rights depends on it.

Florida Law and Government Takings for Economic Development Purposes

Historically Florida courts have interpreted the state constitution with a strict adherence to its original intent. The language in the section of the Florida Constitution clearly allows the government to take private property only for "a public purpose."[11] The Supreme Court in 1952 held that taking private property and giving it to a private party for subsequent redevelopment was unconstitutional.[12] Over twenty years later, the court restated this holding by ruling that "eminent domain cannot be employed to take private property for a predominantly Private use."[13]

If the private benefit was merely incidental to the overall public benefit, it would be allowed, but "the tail cannot wag the dog" – a taking is unconstitutional where the public purpose is merely incidental to the predominantly private one.[14] "The public interest must dominate the private gain."[15] The court reasoned that it was the public nature of the need that justified the taking of private property.[16] Without the public need and subsequent public benefit, a taking went entirely against the original intent of the framers of the constitution in protecting private property rights.

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[7] Adams v. Housing Auth., 60 So. 2d 663 (Fla. 1952).
[8] Id. at 670-71
[9] D.O.T. v. Fortune Fed. Sav. & Loan Ass'n, 532 So. 2d 1267, 1270 (Fla. 1988).
[10] Peter Geoffrey Gieseler, Storming Our Castles: Property Rights in the Wake of Kelo v. New London 4, (Op-ed on file with Hopping, Green, and Sams).
[11] Fla. Const. art. X, § 6(a)
[12] See Adams v. Housing Authority of Daytona Beach, 60 So. 2d 663 (Fla. 1952).
[13] Baycol, Inc. v. Downtown Development Authority, 315 So. 2d 451, 455 (Fla. 1975).
[14] Id. at 456.
[15] Id.
[16] Id. at 455.

Over the following years, the Florida Law has drifted away from its original purpose of protecting an individual's fundamental right to own property. The courts started backing off in 1977 when the Supreme Court decided that public policy considerations encouraging redevelopment efforts required courts to give great deference to legislative decisions regarding the "public use" of taken property.[17] But the real blow to private property protections came in 1988 when the court attempted to clarify the difference between "public use" and "public purpose." Public purpose was not limited to "a specific public function, i.e. a road or other right of way," but instead was defined as a general benefit to the state in some "tangible, foreseeable way."[18] The court thus far has not come out and condoned the taking of private property solely for economic development purposes, but it has made it very easy for it to occur.

Similarly, the earlier version of Florida's Community Development Act did offer some protections to private property owners, but the 2002 changes to the Act added applicable blight factors that are vague (see above); the vagueness allows the government to find blight conditions almost anywhere it wishes to find them. The Florida legislature has not specifically delegated authority to allow for the use of eminent domain in the taking of private property for economic development. But policy and practice, along with the erosion of private property rights under both case law and statutory law has allowed for departures from traditional norms protecting landowners.

Kelo's Impact on Florida's Eminent Domain Law

Arguably, the *Kelo* decision has no direct impact on Florida's eminent domain law. The decision in *Kelo* was based on a Connecticut statute which specifically said that economic development is in the public interest and therefore justifies the taking of private property for "public use." Florida has no such statute. However, while Florida Law does not specifically authorize the taking of private property for economic development, governments are interpreting existing law to allow for it. Probably the biggest impact the *Kelo* decision will have on Florida Law is sparking the outrage among Florida citizens and providing an impetus encouraging the legislature to address this important issue.

The U.S. Supreme Court essentially issued an invitation to all states to revise their takings laws as part of the *Kelo* decision:

> We emphasize 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. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.[19]

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[17] See Douglas, supra, note 2 at 214.
[18] D.O.T, 532 So. 2d at 1270.
[19] Kelo v. City of New London, 125 S.Ct. 2655, 2668 (2005)

The Supreme Court has essentially passed the buck to the states to protect private property rights. Many states are heeding the call. Alabama became the first state to prohibit eminent domain purely for economic development in response to *Kelo*.[20] More than thirty states and the U.S. Congress are taking action toward curbing eminent domain abuse.[21]

The Home Rule Power of Cities and Charter Counties to Exercise Eminent Domain

The legislature should adopt a consistent, well thought-out policy on what is a "public purpose" that justifies the use of eminent domain. That policy should be applicable to cities and counties as well as Community Redevelopment entities.

Florida's Community Redevelopment Act is Currently Too Broad

Originally, Florida's Community Redevelopment Act of 1969 offered at least minimal protection to private property owners. Its definition of blight required not only the presence of one or more statutory factors, but it also specifically stipulated that those factors "substantially impair[ed] or arrest[ed] sound growth" and constituted "a menace to the public health, safety, morals, and welfare."[22] The Act restricted the condemning authority to designating as a "blighted area" only truly slum-ridden areas. "Slum area" is defined by the same statute to mean "an area having physical or economic conditions conducive to disease, infant mortality, juvenile delinquency, poverty or crime."

However, in 2002, Governor Jeb Bush signed an amendment that opened up the statute and made it even broader. The statute not only eliminated the language restricting blighted areas to true slums, it also added some very vague factors to the list.[23] Now, the list is expanded to include factors such as "falling commercial lease rates, "residential and commercial vacancy rates higher in the area than in the remainder of the county," and the absence of increased tax appreciation within five years on the property in question.[24]

Furthermore, the statute has a "catch all" proviso that goes on to say that a blighted area "also means any area in which at least <u>one</u> of the factors identified…are present and all taxing authorities…agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted"[25] (emphasis added).

In light of the policy decisions flowing out of the *Kelo* decision, a more balanced test is needed. Finding just one of fourteen factors and an agreement by local government an taxing

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[20] Lisa Knepper, "U.S. Supreme Court Denies Homeowners' Request to Rehear Kelo"(2005), http://www.ij.org/private_property/connecticut/8_22_05pr.html (viewed Aug. 26, 2005).
[21] Id.
[22] Fla. Stat. ch. 163.360(8)(b)(3) (2001).
[23] 2002 Fla. Laws 294 (codified at Fla. Stat. ch. 163.340)
[24] Id.
[25] Id.

authorities is not sufficient in deciding that an area is blighted. *Kelo* signals an opportunity to revisit important public policy issues.[26]

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[26] *The research for and drafting of this document was conducted by Julie A. Lemmer, law clerk at Hopping, Green & Sams, Tallahassee, Florida.*

Institute for Justice

Testimony of Dana Berliner
Senior Attorney, Institute for Justice
Florida House Select Committee to Protect Private Property Rights
September 1, 2005

Thank you for the opportunity to testify regarding eminent domain abuse, an issue that's finally getting significant national attention as a result of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*.

My name is Dana Berliner, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Washington D.C. that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by government through the power of eminent domain and transferred to another private party. I have represented property owners across the country fighting eminent domain for private use, and I am one of the lawyers at the Institute who represents the homeowners in the *Kelo v. City of New London* case, in which the U.S. Supreme Court decided that eminent domain could be used to transfer property simply to generate higher taxes, as long as the project is pursuant to a plan. In addition, I authored a friend of the court brief in *Rukab v. City of Jacksonville Beach* in the Florida Court of Appeals. Finally, I authored a report about the use of eminent domain for private development throughout the United States (available at www.castlecoalition.org/report).

In the *Kelo* decision, a narrow majority of the Court decided that, under the U.S. Constitution, property could indeed be taken for another use that would generate more taxes and more jobs, as long as the project was pursuant to a development plan. The *Kelo* case was the final signal that the Federal Constitution provides no protection for the private property rights of Americans. Indeed, the Court ruled that it's okay to use the power of eminent when there's the mere *possibility* that a home or small business can make more money as something else. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

In response to the decision, there has been an overwhelming public outcry against this closely divided decision; at least thirty state legislatures, including Florida's, have already introduced or will introduce legislation that would counteract the Court's determination that eminent domain can be used for economic development. This legislature is to be commended for taking the issue seriously and seeking to protect Floridians from eminent domain abuse.

<u>Florida does not have adequate protections for home and business owners under current law</u>

Can a *Kelo* type of condemnation happen in Florida? Unfortunately, yes. Protection for private property in Florida comes from the Florida Constitution. The main

constitutional protection resides in Florida's takings clause: "No private property shall be taken *except for a public purpose*..." Art. X, § 6. The meaning of "public purpose" then comes from legislation stating that a particular activity is a "public purpose" and from judicial decisions about the meaning of "public purpose." Neither gives much comfort to property owners.

Florida's statutes permit the use of eminent domain for economic development

Both the eminent domain power granted to municipalities and the Florida Redevelopment Act grant broad power to condemn property for transfer to another private party. There is no Florida statute that actually limits the use of the power of eminent domain for private development.

The Florida statutes provide a general authorization to municipalities to use eminent domain for "good reason connected in anywise with the public welfare or the interests of the municipality and the people thereof". F.S.A. 166.401. It is hard to imagine a broader grant of power, and, according to the U.S. Supreme Court's recent pronouncement, economic development is connected with the public welfare if a governing body says it is.

In addition, the Florida Redevelopment Act authorizes counties, municipalities, and community redevelopment agencies to take property for any purposes enumerated in the Act. "Any county or municipality, or any community redevelopment agency ... has the right to acquire by condemnation any interest in real property ... which it deems necessary for, or in connection with, community redevelopment and related activities under this party. F.S.A. 163.375; see also F.S.A. 163.370 (grant of powers, including eminent domain). The legislative findings emphasize that a major purpose of the Act is to give local governments powers to enhance the tax base. See F.S.A. 163.335(4) (declaring importance of revitalizing and redeveloping "coastal resort and tourist areas" in a way that "will vastly improve the economic and social conditions;" 163.335(5) (declaring importance of enhancing tax base through tax increment financing and community redevelopment).

Condemnations under the Florida Redevelopment Act are supposed to be limited to so-called "blighted" areas, but the standard used to designate such areas is vague enough to encompass practically any area in the State. It may make sense to allow condemnation of property that poses an actual threat to public health or safety, but Florida allows property to be taken just because the local government entity thinks it could be better used as something else.

- The definition requires only that a "substantial" number of structures be deteriorated. It does not even require a majority. §163.340(8).
- One supposedly blighting factor is "predominance of defective or inadequate street layout, parking facilities..." In several communities, we have seen development agencies argue that dead end streets in residential neighborhoods

constitute "defective street layout." Nor is it proper to use eminent domain to acquire a busy commercial area because of lack of parking.

- "Faulty lot layout in relation to size, adequacy, accessibility, or usefulness." This can mean, for example, that the parking in a shopping center is located in the front instead of behind the center or that the minimum lot size under the current zoning is larger, even slightly larger, than the lots as originally laid out.
- "Inadequate or outdated building density patterns." If a city has decided that it wants to see high density development in a particular area, then lower density development will be inadequate and outdated. Conversely, if a city wants lower density, then higher density development can be considered inadequate.
- A greater incidence of crime higher than in the remainder of the county or municipality. This factor does not take into account population density; there is always more crime in areas with more people.
- Fire and emergency medical service calls to the area proportionately higher than the remainder of the county or municipality. Areas with many elderly people will have more emergency medical service calls, but that does not mean they are blighted.
- "Diversity of ownership or defective or unusual conditions of title." Diversity of ownership can simply mean that different people own the different buildings in an area. Each family owning its own house is certainly no threat to public safety.

<u>In recent years, Florida courts have not stopped local government from using eminent domain for private development</u>

While earlier Florida caselaw appears to prohibit condemnations for economic development, the Florida Supreme Court has not looked at the issue of eminent domain for private use in more than 30 years. In *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451 (Fla. 1975), the Court held that condemnation for a parking lot serving a new shopping mall was not a public purpose. The Court reasoned that the public purpose, the parking, only existed because of the private development. The public purpose was thus incidental to the private one, and, the Court explained, unconstitutional because "the tail cannot wag the dog." *Baycol*, 315 So.2d at 456; *see also Grubstein v. Urban Renewal Agency*, 115 So.2d 745 (Fla. 1959) (allowing condemnation of severely blighted property).

Baycol is the most recent Florida Supreme Court decision exploring the boundaries of public purpose in the context of eminent domain. The Court has found that, in the context of bonds and financing, tax revenue enhancement and economic development are public purposes. *See State of Florida v. Miami Beach Redevelopment Association (MBRA)*, 392 So2d. 875, 885 (Fla. 1981) ("redevelopment projects involving expenditure of public funds, sale of public bonds, the use of eminent domain for acquisition and clearance, and substantial private and commercial uses after development, is in furtherance of public purpose and is constitutional."). If the Court applies this same reasoning to eminent domain, then private development will become a public purpose justifying taking homes and businesses by eminent domain.

A few lower courts have done just that and applied a lax standard to claims that property could be condemned as blighted and subsequently be used for private development. *See, e.g., Panama City Beach Community Redevelopment Agency v. State of Florida,* 831 So.2d 662 (Fla. 2002) (upholding blight designation that included undeveloped, open land because city council found that the area in question had "fragmented ownership, poor circulation, parking constraints, and physical and economic degradation"); *JFR Investment v. Delray Beach Community Redevelopment Agency*, 652 So.2d 1261 (Fla. Dist. Ct. App. 1995) (affirming taking for parking as reasonably necessary to public use even though much of the anticipated need for parking is for private development).

It is difficult to predict how the Florida Supreme Court will rule when it faces this issue, but until the Court chooses to do so, home and business owners will continue to lose their property to private development. Regardless of how a court might rule, Florida municipalities already regularly use eminent domain to take property for private development or to intimidate the rightful owners into selling "voluntarily." Boynton Beach, Charlotte County, Daytona Beach, Fort Lauderdale, Hollywood, Jacksonville Beach, Jacksonville, Jupiter, Riviera Beach, Temple Terrace and West Palm Beach all have used or threatened eminent domain for private development in the past five years.

The *Kelo* decision already has emboldened the use of eminent domain for private development, and its impact will increase over time

Unfortunately, the Kelo decision is already having a significant impact in Florida and will continue to do so. Thus far, the impact has been a practical one—local officials now feel that they are entitled to use eminent domain for economic development, and some home and business owners are too discouraged to fight.

Thus, Hollywood, Florida, has recently filed two different condemnation actions where the condemned property will be transferred to a private party. When asked what the public purpose of the taking was, City Attorney Dan Abbott didn't hesitate before answering, "Economic development, which is a legitimate public purpose according to the United States Supreme Court." In Boynton Beach, Guarn Sims, the owner of a 50-year-old barbershop, gave up his hopes of fighting the condemnation of his property to make way for new private businesses. The Kelo decision was "the nail in the coffin" for him.

Most worrisome, a circuit court on August 19, 2005 decided that businesses in Daytona Beach could be condemned for private development based on a 24-year-old blight designation. The decision cites extensively to *Kelo* and finds that Florida law is consistent with *Kelo*. *See City of Daytona Beach v. Mathas*, Case No. 2004-31846-CICI (7th Cir. Aug. 19, 2005).

In short, the *Kelo* decision has emboldened local government, discouraged home and business owners, and confirmed to judges that they should find in favor of the

government when owners challenging the condemnation of their property for private development.

Conclusion

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes or businesses they love and watch as they are replaced with the condos and shopping malls that many localities find preferable to modest homes and small businesses. Florida's laws currently allow, and even encourage, cities, counties and agencies to take Floridian's homes and businesses and replace them with more expensive homes and businesses. This kind of eminent domain tells Floridians that their hopes, dreams and hard work do not matter as much as money and political influence. In a state that values independence and self-sufficiency, individual people should be encouraged, not punished, for buying and maintaining their own homes and businesses.

To remedy these problems, Florida needs to take three legislative steps: (1) modify the current statutory authorizations for municipalities and counties to exclude the use of eminent domain for economic development; (2) amend its definition of blight to remove factors that are too vague and forbid condemnation simply for what local planners think is a better use; and (3) pass a constitutional amendment prohibiting the use of eminent domain for private commercial development.

Again, thank you for the opportunity to testify before this committee.

Florida League of Cities

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August 31, 2005

Mr. Tom Hamby, Staff Director
House Select Committee to Protect Private Property Rights
1101 The Capitol
402 S. Monroe St.
Tallahassee, Florida 32399-1300

Dear Tom:

On August 22nd, you requested the Florida League of Cities to respond to a series of questions regarding private property rights, eminent domain, and the impact of the United States Supreme Court's decision in *City of New London v. Kelo*. This letter comprises the League's response to your request. We thank you for the opportunity to weigh in on the important work of this Select Committee, and we hope that you and the Select Committee will continue to involve us in these deliberations.

1. The adequacy of current protections of private property rights under Florida law.

Like the Federal Constitution, the Florida Constitution prohibits the government from taking private property for public use without just compensation. There are two types of governmental "takings" that may impact private property: regulatory takings and physical takings. Regulatory takings may occur if a government regulation burdens private property to a degree that renders the property essentially without value. For example, a wetlands regulation that prohibits all economically viable use of someone's property will constitute a regulatory taking and require compensation from the government. The other type of taking is a physical taking, which can occur when the government physically intrudes on private property or takes title to the property through the exercise of eminent domain. Most of the debate over regulatory takings concerns whether a taking has occurred at all, e.g., the "extent" of the regulatory burden on the property in terms of its effect on the property's value. The central question before a court is figuring out just how far a regulation can burden private property before just compensation is required. With an eminent domain action, there is no question or uncertainty that a taking has occurred. Most the controversy centers on what constitutes "just compensation," and, to a lesser extent, whether the eminent domain action is undertaken for a public purpose. The State of Florida has protections for both types of takings that transcend what the U.S. Constitution requires.

President **Julio Robaina,** Council President, Hialeah
First Vice President **René Flowers,** Councilwoman, St. Petersburg ♦ *Second Vice President* **Frank Ortis,** Mayor, Pembroke Pines
Executive Director **Michael Sittig** ♦ *General Counsel* **Harry Morrison, Jr.**

a. Regulatory Takings

For regulatory takings, the Florida Legislature enacted the Bert J. Harris Private Property Rights Protection Act, section 70.001, Florida Statutes. The Harris Act was intended to make it easier for a property owner to obtain relief from burdensome governmental regulations that fell short of a taking under the legal standards of the U.S. or Florida constitutions. Because the *Kelo* decision that spurred the creation of the Select Committee to Protect Private Property Rights considered the use of eminent domain and did not involve a regulatory taking, this letter will focus on eminent domain rather than the Harris Act or regulatory takings.[1] Suffice it to say that unlike other states, Florida is successfully protecting the interests of private property from "inordinate burdens" caused by governmental regulation.

b. Eminent Domain

In recognition of the inalienable rights associated with private property ownership in this country, eminent domain proceedings are the "harshest" proceedings known to law, and strict construction is given against the government entity asserting the power. *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483 (Fla. 1947); *Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale*, 315 So. 2d 451 (Fla. 1975). A governmental entity exercising eminent domain must prove a reasonable necessity for the taking, and that a valid public purpose will be served. *Baycol,* 315 So. 2d at 455.

Florida eminent domain proceedings provide greater protection to private property owners than is offered under federal law and by many states. In Florida, a 12-person jury is required for only two types of cases: capital murder and eminent domain. Under federal law is it not uncommon for major eminent domain proceedings to be decided by a 3-person commission of the court. *See* Fed. R. Civ. P. 71(A)(h). Unlike the U.S. Constitution, Florida's constitution also requires full compensation to the property owner *before* the taking may occur. *Compare* **Fla. Const. Art. X s. 6(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.*") (emphasis added) *with* **U.S. Const. Amend. V** ("nor shall private property be taken for public use, without just compensation"). Moreover, in Florida "full compensation" includes payment by the government of the property owner's attorneys' fees and costs, which may also include accountant fees and other expert witness fees. *See* Fla. Stat. ss. 73.091 – 73.092. In addition, Florida law requires notice to property owners of their statutory rights to attorneys' fees before initiating litigation. Fla. Stat. s. 73.0511. Further, Florida law specifically allows for business damages, whereas federal law authorizes business damages in limited circumstances. Fla. Stat. s. 73.071(3)(b); *Kimball Laundry Co. v. United States*, 69 S. Ct. 1434.

2. The home rule powers of cities to exercise the power of eminent domain generally

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[1] There is a voluminous body of law and scholarly discourse on the subject of regulatory takings. If the Committee's focus should turn away from eminent domain to regulatory takings or the Harris Act, the League will be happy to provide additional information at that juncture.

A municipality is authorized by law to exercise any governmental, corporate, or proprietary power for a municipal purpose that may be exercised by the state legislature except when expressly prohibited by law. Fla. Const. Art. VIII, § 2(b). The Municipal Home Rule Powers Act reaffirms the Constitution's broad grant of municipal home rule authority, and provides in part:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the 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 when expressly prohibited by law.
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. . . .

Fla. Stat. § 166.021 (emphasis added). The Florida Supreme Court has described the vast breadth of municipal home rule power as follows:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, or perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.

State v. City of Sunrise, 354 So. 2d 1206, 1209 (Fla. 1978).

Municipalities possess the power of eminent domain by virtue of their home rule powers, except to the extent that power is limited by either constitution or statute. *See Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483 (Fla. 1947) ("the power of eminent domain is an attribute of the sovereign that is circumscribed by, rather than conferred by, constitution or statute"). A legislative statute purporting to grant the power of eminent domain to municipalities is unnecessary in light of municipalities' constitutional home rule powers to exercise that power. *See City of Ocala v. Nye*, 608 So. 2d 15, 17 (Fla. 1992). As explained by the Florida Supreme Court, for purposes of municipal home rule, "legislative statutes are relevant only to determine limitations of authority." *City of Sunrise*, 354 So. 2d at 1209. Thus, while sections 166.401 and 166.411, Florida Statutes, describe certain municipal eminent domain powers, these statutory "grants of authority" are largely unnecessary.

There are two relevant limitations on a municipality's exercise of eminent domain. First, it must be exercised for a valid municipal or public purpose. *See Nye*, 608 So. 2d at 17-18. Second, it must not be expressly prohibited by either the federal or state constitutions or by general or special law.[2] *See id.* Sometimes the public purpose requirement will be specified in a statute. For example, section 166.411, Florida Statutes, sets forth a variety of municipal or public purposes for which a municipality may exercise its power of eminent domain. Section 163.335(3), Florida Statutes, declares it a public purpose to exercise eminent domain for purposes of community redevelopment. Even so, legislative efforts to statutorily create a "public purpose" may not circumvent the public purpose requirement of the Florida Constitution, and courts will disregard legislative efforts to create a public purpose that does not pass constitutional muster. *See State v. Town of North Miami*, 59 So. 2d 779, 785 (Fla. 1952).

3. The impact, if any, of the *Kelo* decision on the application or exercise of eminent domain law in Florida with respect to takings for the purpose of "economic development" which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

Foremost, the *Kelo* decision should be recognized as a clear affirmation of state's rights and separation of powers. While surely tempted to interfere and rectify a horrible set of facts, the Court instead refrained from intruding into matters reserved for the legislative branch and for state government. The Court explained:

> For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intense scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005). Moreover, the Court emphasized that states could provide greater rights with respect to eminent domain than are provided in the federal constitution:

> We emphasize 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.

Id. at 2667.

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[2] In addition to Article X, section 6, for eminent domain, a municipality must also adhere to Article VII, section 10 of the Florida Constitution, which prohibits it from spending funds for or participating in a project that primarily benefits a private entity. The "public purpose" standard for both Article X and Article VII is the same. *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 885-86 (Fla. 1980).

Another thing to understand about *Kelo* is that it is limited to its factual context. The decision will not result in the parade of horribles described in many newspaper articles. In the words of one law professor:

> We teach first-year law students during orientation week that the decisions of courts are confined to their factual contexts. In Kelo, the Supreme Court determined that it is constitutional for New London to condemn title to 15 parcels of land needed to enable it to revitalize a significant waterfront area to create jobs, increase tax revenues and bring new life back to a distressed city. The court did not decide whether it was constitutional for a local government to condemn a brake shop in order to relocate a hardware store, to take title to private parcels to allow Donald Trump to expand his casino, or acquire a 99 Cents Only Store to enable Costco to expand, nor did it need to. These condemnations have been reviewed by state courts under existing law and found to violate the constitution because they primarily benefit private, as opposed to public, interests.

John R. Nolon, "*Undue Alarm Greets Kelo Decision*," Journal News (July 24, 2005) (http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20050724/OPINION03/507240363/-1/spider). Unfortunately, the public has been led to believe their homes are fair game for greedy local governments who are salivating at the prospect of turning a house into a WalMart. This perception belies the limited application of *Kelo* to its own unique set of facts, it belies the current state of the law in Florida relating to eminent domain, and it belies the practical realities associated with local government exercises of eminent domain.

Can Kelo happen in Florida? The League believes that *Kelo* has limited, if any, application in the State of Florida, but there are really two aspects to this question. The first is what impact *Kelo* has upon community redevelopment activities undertaken pursuant to Chapter 163, Part III, the Community Redevelopment Act. This issue is addressed in section 5, below. The second aspect is whether, outside of the context of community redevelopment, Florida law allows a municipality or charter county to use eminent domain to transfer property from one private entity to another for the sole purpose of economic development. This issue is explored in sections 2, 3, and 4 of this letter.

In addition to the legal principles discussed in the subsequent sections, the practical realities associated with the exercise of eminent domain also support a conclusion that *Kelo* will have little consequence for Floridians. The political consequence associated with controversial land acquisitions are such that elected officials will go to great lengths to avoid them. No elected official wants to be known for seizing someone's home. In addition to the political consequences, the monetary costs associated with eminent domain often far outweigh the benefits. Governments are often advised that acquisition of property through eminent domain will cost several times over what it would cost through voluntary sale. As one commentator explains:

> In a normal market situation, the costs of exercising eminent domain, including the costs of service of process on the landowner, appraisal of the property, and the possibility of challenge, make the acquisition of land through purchase cheaper and thus preferable. The government will only seek to use eminent domain when market costs are artificially high due to a breakdown in the market, such as a holdout situation. Thus, the costs of exercising eminent domain compared to the costs of a normal purchase of property ensure that the risks of abuse of power of eminent domain are low.

Elizabeth F. Gallagher, 17 Fordham L. Rev. 1837, 1865 (March 2005). In short, eminent domain is an eminently unpopular tool of last resort.

4. The current status of Florida law with respect to government takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

While the exact question of whether a municipality in Florida may exercise eminent domain for "economic development" purposes has never been before the courts, it is generally accepted that a Florida municipality may not exercise eminent domain exclusively for this purpose. *See Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (citing Florida *Baycol* decision for assertion that Florida courts have a narrow view of its public use clause and have ruled that economic development by itself is not a valid public purpose). This is not because there is any statutory prohibition on doing so; rather, the limitation comes from the Florida Constitution itself. Most likely such an action would fail to meet the public purpose requirement of Florida's Constitution as that requirement has been interpreted by the courts, based on the degree of private benefit that would result from the action. Simply put, eminent domain exercised purely for the purpose of economic development may tip the balance from a project that substantially benefits the public to one that substantially benefits a private entity.

Since at least the 1950's, it has been abundantly clear under Florida law that a municipality cannot exercise eminent domain (for economic development or any other reason) where the action would primarily benefit private interests and provide only incidental public benefit. *See State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 886 (Fla. 1980) ("This Court has declared many times that a public body may not use its governmental authority and its public funds to acquire lands whether by purchase or eminent domain where the only purpose of the acquisition is to make the properties available for private uses"); *see also Baycol, Inc. v. Downtown Development Authority*, 315 So. 2d 451 (Fla. 1975) *Grubstein v. Urban Renewal Agency*, 115 So. 2d 745 (Fla. 1959); *Adams v. Housing Authority*, 60 So. 2d 663 (Fla. 1952); *State v. Town of North Miami*, 59 So. 2d 779 (Fla. 1952). The Florida Supreme Court left no room for doubt when it explained in 1952 that:

> Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter that [sic] such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.

State v. Town of North Miami, 59 So. 2d 779, 785 (Fla. 1952) (holding that exercise of eminent domain and public expenditure for primary benefit of private corporation was unconstitutional). An incidental private use is permissible, however, where the purpose of the taking is "clearly and predominantly a public use." *Baycol*, 315 So. 2d at 455; *see also Demeter Land Co. v. Florida Public Service Co.*, 128 So. 402 (Fla. 1930) ("the public interest must dominate the private gain"). Eminent domain that benefits primarily a private entity will fail the public purpose requirement regardless of the government's stated purpose for the action (such as redevelopment, improving traffic circulation, creating jobs, economic development, housing, etc.).[3]

Dicta in the *North Miami* case suggests that eminent domain for purely "economic development" would not satisfy the public purpose requirement. In that case, the court remarked that every new business in a municipality will be of some benefit to the municipality in terms of growth, development and prosperity, but it recognized these considerations in themselves do not make the acquisition of land for a private entity a

[3] The difficulty with the public use or public purpose requirement is determining at what point an exercise of eminent domain goes beyond serving a primary public benefit and provides more than incidental benefits to a private entity. This is a determination that is properly made on an ad hoc basis in a judicial forum. Florida courts have considered this question numerous times in a variety of factual circumstances. *See, e.g., Gate City Garage, Inc. v. City of Jacksonville*, 66 So. 2d 653 (Fla. 1953) (finding public purpose met for exercise of eminent domain to acquire property for off-street parking even where portion of property would be occupied by privately-owned filling station); *State v. Daytona Beach Racing & Recreational Facilities District*, 89 So. 2d 34, 37 (Fla. 1956) (finding public purpose for construction of racetrack and stadium that would be controlled substantially by private entity because public interests predominated over private interests based on entertainment value and the promotion of tourism, as well as the provision of substantial public recreational use). *Panama City v. State*, 93 So. 2d 608, 610, 614 (Fla. 1957) (finding public purpose for waterfront development project that included private concession buildings in conjunction with city buildings and a marina where private operations were deemed a "necessary adjunct to the successful operation of the main enterprise, namely the marina"); *City of West Palm Beach v. State*, 113 So. 2d 374 (Fla. 1959) (finding no public purpose for project involving construction of civic center and marina where project included private servicing shops as well as lease of civic center to private entity); *Baycol, Inc. v. Downtown Development Authority*, 315 So. 2d 451 (Fla. 1975) (finding no public purpose for project involving eminent domain for construction of shopping mall and parking garage).

valid public purpose. *Town of North Miami,* 59 So. 2d at 785. In addition, one district court has held that eminent domain for the purpose of creating jobs and increasing utility revenues was not a valid public purpose. *Basic Energy Corp. v. Hamilton County*, 652 So. 2d 1237 (Fla. 1st DCA 1995) (finding city's stated justification "no more particular to residents of the city . . . than to any other inhabitants of the state"). The *Hamilton County* case is remarkable because it involved a city's exercise of eminent domain for purposes of constructing a state prison (on property that would be transferred to and owned by the State of Florida). The holding in this case suggests that not only are Florida courts unwilling to sanction eminent domain for purely economic development, but they are unwilling to create an exception even in circumstances where the property is transferred to another public entity.[4]

On a final note, it should be understood the term "economic development" could encompass many things. While Florida courts have never grappled with this exact phrase, it's obvious that the exercise of eminent domain by governments and private industry for uses that arguably fall within the ambit of "economic development" have occurred for years. For example, eminent domain used for roads, utility and railroad rights-of-way, stadiums and arenas, marinas, and even the destruction of diseased or canker-ridden citrus, all generate or benefit economic development (create jobs, enhance tax base, improve the state's economy, etc.). Florida has long authorized private utility providers to condemn property in furtherance of providing electricity. *See Demeter Land Co. v. Florida Public Service Co.*, 128 So. 402 (Fla. 1930). Obviously a public purpose is served by the provision of electricity, but it cannot be reasonably asserted that the private benefits accruing to the power company are merely incidental. Likewise, the seizure and destruction of suspected canker infested citrus trees provides more than an incidental benefit to the private citrus industry. That is probably why many would make a distinction between eminent domain actions that may result in some economic development and eminent domain actions used for the sole purpose of economic development.

5. Whether Florida's Community Redevelopment Act is sufficiently narrow in scope as it relates to the exercise of eminent domain.

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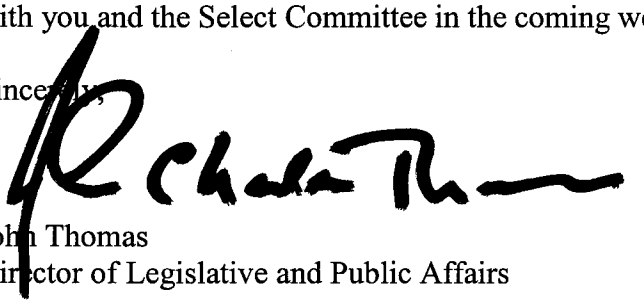
[4] While not abundantly clear, the *Baycol* case implies that it doesn't really matter whether the property at issue remains in public ownership or is transferred to a private entity, so long as a public purpose is served. *Baycol*, 315 So. 2d at 456-58. On these grounds, *Baycol* recedes from a previous opinion where the court held that eminent domain to acquire property for low-cost housing did not satisfy the public purpose requirement because the entire property would be transferred to a private entity. *Id.* (receding from *Adams v. Housing Authority of City of Daytona Beach*, 60 So. 2d 663 (Fla. 1952)); *but see Gate City Garage, Inc. v. City of Jacksonville*, 66 So. 2d 653, 658 (Fla. 1953) (stating that *Adams* found eminent domain unlawful because the city was attempting to acquire "private property in order to promote commercial and industrial enterprises and that the primary purposes shown by the proposals or plans was not a public or municipal purpose"). The public purpose to be served is identical (low-cost housing), irrespective of who owns the property. This reasoning is consistent with the court's later analysis in *City of Miami Beach Redevelopment Agency*, where it concludes that a public purpose is not "destroyed merely because there will be private commercial uses in the redeveloped area." *City of Miami Beach Redevelopment Agency*, 392 So. 2d at 889 – 91.

The League of Cities is completing its response to this question in conjunction with the Florida Redevelopment Association. We will provide this response to you under separate cover.

Again, thank you for the opportunity to comment on these issues. Please do not hesitate to contact us for additional information. We look forward to working with you and the Select Committee in the coming weeks.

Sincerely,



John Thomas
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September 1, 2005

Tom Hamby, Staff Director
House Select Committee to
Protect Private Property Rights
1101 The Capitol
402 South Monroe Street
Tallahassee, Florida 32399-1300

Dear Tom:

As noted in the letter to you of August 31, 2005, this letter comprises the Florida League of Cities' and Florida Redevelopment Association's joint response to question 5 of your request.

5. Whether Florida's Community Redevelopment Act is sufficiently narrow in scope as it relates to the exercise of eminent domain.

Florida authorized the use of eminent domain for redevelopment of slum or blighted areas when the Legislature enacted the Community Redevelopment Act of 1969. The impetus for the 1969 legislation was the desire of the City of Miami Beach to redevelop that area of the City known as South Beach.[1] This power had also been provided in various special acts creating downtown development authorities during the 1960s.[2]

A historical role of a Community Redevelopment Agency ("CRA") in Florida has often been to acquire land for sale or lease to the private sector to remove or prevent slum or blight. Most often the land is acquired through negotiated purchase with a willing seller. If negotiated purchase is unsuccessful, CRAs may acquire the property through the exercise of the power of eminent domain. The use of eminent domain is typically a last resort to complete the land assembly process.[3] Even then, a CRA may not use the eminent domain power unless and until the elected

[1] Under the 1968 Constitution special acts could not be enacted for just Dade County. Several cities had created downtown development authorities in the 60s and 70s through special acts (e.g., Orlando, Lakeland, Tampa, Fort Lauderdale, Clearwater, Bradenton), but Miami Beach could not. Then Representative Murray Dubbin, now City Attorney of Miami Beach, sponsored the 1969 bill to give Miami Beach and all other cities and counties the legislative authorization to do what other cities in Florida had done through special acts.

[2] For example, see Chapter 65-1541, Laws of Florida, creating the Fort Lauderdale Downtown Development Authority

[3] Most condemnation proceedings for redevelopment have been uncontested. The contested actions have been in Delray Beach, Jacksonville Beach, downtown St. Petersburg, and Charlotte County.

President **Julio Robaina,** Council President, Hialeah
First Vice President **René Flowers,** Councilwoman, St. Petersburg ♦ *Second Vice President* **Frank Ortis,** Mayor, Pembroke Pines
Executive Director **Michael Sittig** ♦ *General Counsel* **Harry Morrison, Jr.**

governing body that created the CRA has authorized the use of the power for a specified property.[4]

Land assembly is one of the greatest obstacles to successful redevelopment efforts. It is important because the market for larger, consolidated properties is much preferred than that for small, fragmented properties. Developers are reluctant to undertake the costly, time-consuming land assembly process, particularly when they are unsure of the ultimate outcome. By assembling properties, CRAs can attract private investment. Land assembly supports smart growth initiatives to recycle older, urban areas and avoid suburban sprawl. Without the power of eminent domain, CRAs will have much difficulty in assembling land, especially where many landowners are involved.

The United States Supreme Court in the *Kelo* case recently addressed the use of eminent domain in an economic development context and the application of the 5th Amendment's "public use" provision. The Court found that based on long-standing precedent, the City of New London had the authority to take private real property for the purpose of economic development and conveyance to a private developer. The *Kelo* case did not involve the use of eminent domain to take real property in an area found to be slum or blighted. The United States Supreme Court found that such a taking of slum or blighted property was permissible under the 5th Amendment in 1954.[5]

In 1980 the Florida Supreme Court found the use of eminent domain by a community redevelopment agency to acquire property from one person to convey it to another for redevelopment of slum or blighted areas was permissible as serving a public purpose. *State v. Miami Beach Community Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980). Subsequent court decisions have upheld the acquisition of property by a CRA for conveyance to a private party for a redevelopment project.[6]

Many advocates of property rights have argued in numerous news articles and columns that Florida law is really no different from Connecticut's and that Florida home owners should be fearful of government takings of their property. *See* "Kelo Can Happen Here, too" by Valerie A. Fernandez in South Florida Sun-Sentinel (July 18, 2005). Unlike Connecticut, Florida requires a finding of "slum" or "blight" before the condemnation authorization of s. 163.375, Florida Statues (2005) is triggered. Florida does not allow condemnation solely for "economic development" as was the case in *Kelo*. But some have contended that the definition of "blight" in s. 163.340(8), Florida Statutes (2005) is so broad that it provides little protection to a

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[4] §163.346 and 163.375, Florida Statutes (2005).
[5] Berman vs. Parker, 348 U.S. 28 (1954)
[6] See Holloway vs. Lakeland Downtown Development Authority, 417 So. 2nd 963 (Fla. 1982); State vs. Panama City Beach Redevelopment Agency, 831 So. 2nd 662 (Fla. 2002).

homeowner. *See* "Blight Defined Too Broadly" by Frank Schnidman, South Florida Sun-Sentinel (July 18, 2005).

But such is not the case. In fact, in 2002, notwithstanding the statements of some, the definition of "blight" was tightened through legislation that was negotiated and agreed upon between the Florida Redevelopment Association, the Florida League of Cities and the Florida Association of Counties. *See* Chapter 2002-294, Laws of Florida. Prior to that legislation a finding of blight only required a city or county to find that one of the factors listed in s. 163.340(8), Florida Statues (2001) existed. Following this legislation, a city or county could find "blight" exists only if:

(1) there is a "substantial number of deteriorated or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property;" *and*
(2) at least two or more of the following conditions are present at the time of the finding:

(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;
(b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;
(c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
(d) Unsanitary or unsafe conditions;
(e) Deterioration of site or other improvements;
(f) Inadequate and outdated building density patterns;
(g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;
(h) Tax or special assessment delinquency exceeding the fair value of the land;
(i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;
(j) Incidence of crime in the area higher than in the remainder of the county or municipality;
(k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;
(l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;

(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
(n) Governmentally owned property with adverse environmental conditions caused by a pubic or private entity.

Section 163.340(8), Florida Statutes (2005). In addition to the above standard, the law allows a determination of "blight" if one of the factors in (a) – (n) is present and the affected taxing authorities agree to the determination. *Id.*

The Connecticut law at issue in the *Kelo* decision did not require the government to meet any of these conditions for a blight determination before using eminent domain. Moreover, unlike Connecticut, before a Florida community redevelopment agency can take a person's property through eminent domain the following must have occurred:

- The elected governing body (city or county) must have found the existence of "slum" or "blight" as defined in the Community Redevelopment Act.
- The finding can only be made at a public meeting after notice has been published in a newspaper of general circulation in the area at least 10 days in advance of the vote.
- Before a condemnation proceeding can be commenced in circuit court, the CRA or local government condemning the property must make a good faith offer to the property owner for the property based upon an appraisal of the fair market value of the property and allow a 30 day period for the owner to consider the offer. (Most good faith offers are at least 150% of the appraised value).
- A condemnation proceeding may not be filed in circuit court until the elected governing body that created the CRA authorizes the use of eminent domain for the specific property.

Under Florida eminent domain law, the property owner is not only paid full and fair compensation for the property, but is also reimbursed for any and all reasonable attorneys' fees and other costs incurred in the course of the condemnation proceeding. In addition, Florida's Community Redevelopment Act requires the redevelopment plan to provide a process and guidelines for relocation of residents displaced from a community redevelopment area.

Since the enactment of the Community Redevelopment Act in 1969, the power of eminent domain for redevelopment has been used very sparingly by Florida local governments and CRAs. Notwithstanding the media comments about the abuse of eminent domain for redevelopment, Florida cities, counties and community redevelopment agencies have exercised great restraint in using this awesome power. Florida has a long history of respecting private property rights (e.g., see Bert Harris Private Property Rights Act) and local officials are cognizant not to abuse the power of eminent domain.

Most condemnations for redevelopment in Florida are not noticed because they are not contested. In many cases, the property owner wants to sell the property under threat of condemnation so the owner can take advantage of Section 1033 of the Internal Revenue Code that allows an extended period for reinvestment of the proceeds of the sale before the capital gains tax applies. In the absence of condemnation, property owners have one (1) year to reinvest the proceeds from the sale of their property before the capital gains tax is applied. But a property owner has two (2) years to reinvest the proceeds from a sale of property sold under eminent domain before the capital gains tax applies. Thus, eminent domain is often used to take advantage of the federal tax benefit rather than as an involuntary taking of property.

While some local governments and CRAs have threatened to use eminent domain for large-scale controversial projects (e.g., Riviera Beach), most of those have not led to condemnation actions being filed. Recently much attention has been given to condemnation actions brought by Charlotte County for the Murdock Village project. While the County, through its CRA, intends to ultimately convey much of the acquired property to a private developer, the eminent domain actions were necessary to clear title to antiquated platted lands and the County has offered not only to pay a premium above full fair market value to the property owners but also to move their houses to a new location.

Florida has many hurdles that must be overcome before local governments and CRAs can take private property through eminent domain. Also, Florida provides more protection to private property owners than many other states in the country. *Kelo* was in Connecticut. It will not happen and has not happened in Florida.

Again, thank you for the opportunity to comment on these issues. Please do not hesitate to contact us for additional information. We look forward to working with you and the Select Committee in the coming weeks.

Sincerely,

John Thomas
Director of Legislative and Public Affairs

Charlotte County

Ruden McClosky

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August 31, 2005

Via Telefax (850-414-5048) and U.S. Mail
Mr. Thomas Hamby
Staff Director
Florida House Select Committee
1101 The Capitol
402 South Monroe Street
Tallahassee, FL 32399-1300

Dear Mr. Hamby:

This is in response to your August 22, 2005 e-mail soliciting comments for the Select Committee to Protect Private Property Rights which is reviewing Florida eminent domain law in light of the United States Supreme Court decision in *Kelo v. City of New London*. This letter is a response on behalf of Charlotte County. I have been eminent domain counsel to Charlotte County since 1988 and have represented numerous other local governments and property owners throughout Southwest Florida in eminent domain proceedings for more than two decades.

I will address the five points raised in your email in the sequence you presented.

I. PRIVATE PROPERTY RIGHTS PROTECTIONS UNDER FLORIDA LAW

It should be first pointed out that the United States Supreme Court decision in *Kelo v. City of New London* was decided under a Connecticut Redevelopment Statute that specifically authorized the seizure of private property solely for the purpose of creating economic development. No such statutory provision exists in Florida. Florida's Redevelopment Act, Chapter 163, Part III, authorizes the acquisition of private property only after a finding that the property to be acquired contains slum or blight conditions as specifically defined by Fla. Stat. 163.340. Typically, a local government will begin the process by retaining a consultant who examines and investigates a potential redevelopment area to determine whether slum or blight conditions exist as defined by Fla. Stat. 163.340. If such findings are determined, the matter is brought before the local government board or council following a series of public hearings. If the local government board concludes that the area contains slum or blight conditions, resolutions or ordinances are adopted which authorize the acquisition of those properties. After all attempts at voluntary acquisition are exhausted, the power of eminent domain is then considered.

In an instance where the property must be involuntarily acquired, all property owners have the protections as set forth in Chapters 73 and 74, which are the traditional eminent domain substantive law statutes for the acquisition of private property for any public project. The statutory scheme in Chapter 73 requires the local government to appraise the property to be acquired, make a written offer to voluntarily acquire the affected property and provide a copy of the appraisal report upon request to any affected property owner. Property owners are permitted to seek out the services of their own appraisers or other consultants at the expense of local government. Property owners are also entitled to the assistance and representation of an attorney of their choice, for which the local government is required under the statutory scheme to pay those attorney's fees. Only after this process has taken its full course can local government commence a condemnation action in the local circuit court. All of the costs of defense of the condemnation proceedings incurred by the property owner are reimbursed by the local governmental agency. In the event the parties are unable to negotiate an amicable settlement as to full compensation for the taking, the statutory scheme allows the parties to proceed to trial before a twelve person jury which determines the fair market value of the condemned property following the presentation of evidence by both sides and, generally, a visit to the subject property. Once again, all reasonable litigation costs incurred by the property owner to defend the taking are reimbursed by the local government. If the local government and the property owner's consultants cannot agree on the appropriate cost of reimbursement, a circuit court judge presides over a hearing on that issue and determines the reasonable costs of defense. Thus, the protections afforded the property owner whose property may be taken for redevelopment have the same constitutional protections as in any eminent domain proceeding.

II. CURRENT STATUS OF GOVERNMENT TAKINGS FOR ECONOMIC DEVELOPMENT WITHIN FLORIDA

As stated above, there is no Florida statutory provision which allows local government to acquire private property solely for the purpose of enhancing the tax base, the creation of jobs or maximizing the efficient use of property, or any combination thereof. A project currently underway in Charlotte County is the Murdock Village Community Redevelopment Project in which I have personally represented Charlotte County in several condemnation proceedings. The redevelopment area in this project was originally platted by General Development Corporation in the 1950s. As platted, there are approximately 3,000 lots; however, by 2004, seventy-seven homes were constructed within the redevelopment area and approximately sixteen commercial lots were developed on the perimeter of the project. As platted, the redevelopment area failed to comply with growth management regulations adopted in the early 1980s including but not limited to the absence of public water and sewer, storm water drainage, green space, a street grid that was antiquated and faulty lot layout inconsistent with growth management regulations and contemporary marketing needs. I have enclosed photocopies of the redevelopment area with the hard copy of this letter which illustrate the condition of the

redevelopment area. I have also enclosed a copy of the Finding of Necessity Report which outlines in significant detail each component of blight found by Charlotte County's consultant.

If the Murdock Village Redevelopment Area was allowed to be fully developed as originally platted, the interior and arterial roads would be gridlocked, and significant environmental hazards would result from the construction of private wells and septic systems in close proximity to each other. All of these findings and conclusions are detailed in the Finding of Necessary Report enclosed with the original of this letter. Ironically, to date only about five (5) homeowners have contested the involuntary acquisition of their homes.

III. IMPACT OF THE KELO DECISION UNDER FLORIDA EMINENT DOMAIN LAW

As previously stated, the *Kelo* decision upheld a Connecticut statute that specifically allowed the acquisition of private property solely for the purpose of economic development, unlike the Florida statutory scheme. Therefore, the *Kelo* decision will have no impact on Florida eminent domain takings.

IV. THE HOME RULE POWER OF LOCAL GOVERNMENT TO EXERCISE THE POWER OF EMINENT DOMAIN

If local government was stripped of its eminent domain power, public projects, including redevelopment projects, would likely come to a halt in Florida. Additionally, local government would not be in a position to comply with the legislatively mandated growth management statutes and regulations. One or a small group of property owners could stymie any public project simply for personal or political gain, even though they would receive fair market value for their property as a result of an involuntary acquisition.

V. THE SCOPE OF FLORIDA'S COMMUNITY REDEVELOPMENT ACT

I am aware of the proposal to amend the definition of blight and slum in the Florida Redevelopment Act and to narrow the scope of opportunities for local governments to exercise the power of eminent domain for redevelopment purposes. I will highlight some local government positions with respect to the proposed amendments.

A proposed amendment to prohibit the acquisition of private property for solely economic development is not generally opposed by local government; however, there are certain ancillary benefits that result from redevelopment activities which include an enhanced ad valorem tax base that naturally occurs following the redevelopment. In fact, this is how many redevelopment projects are financed through tax increment financing. Therefore, any

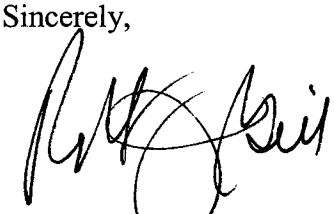
redevelopment project will experience some enhancement simply because the redevelopment activities bring new properties and contemporary development on line which have enhanced values.

There is a proposal for more judicial intervention in determining the presence of slum or blight conditions. Traditionally, under the separation of powers doctrine, a finding of slum or blight is a quasi-legislative function to which the judiciary is required to give deference. When a local government must commence a condemnation proceeding, it has the burden to prove in the circuit court that there was substantial competent evidence before the local government agency when it adopted a slum or blight resolution. Those who propose a modification of this procedure seek a statute that would allow a single circuit court judge to usurp the findings of slum or blight as determined by duly elected government officials. Such a statute will thwart the will of the electors and enhance the payment of the property owners' attorneys' fees simply by finding a sympathetic circuit court judge. Not only is this a departure from Florida statutory and case law regarding the separation of powers, it also permits one jurist to make local government policy decisions, possibly contrary to the outcome of a series of hotly contested elections involving the redevelopment project as a key campaign issue.

The proposed legislation seeks to abandon the concept of a private property owner being compensated for the fair market value of his property and replace it with some nebulous measure of full compensation which accounts for all losses caused by the taking. This would include several expenses which are not now compensated for under Florida's traditional eminent domain statute, such as relocation expenses, all business damages and any enhanced value of the property as a result of the implementation of the redevelopment plan. Local governments in Florida are not now required to pay relocation expenses unless the project is funded partly by federal funds. Business damages are limited to those provisions as set forth in Section 73.071 and only where there is a partial taking of the affected property. Traditionally, business damages are not constitutionally protected property rights but are created by legislative mandate and therefore the parameters for the recovery of business damages can be defined by the legislature. There is also a specific prohibition under the traditional condemnation statute which provides that fair market value for the property acquired does not include any enhanced value the property may experience as a result of the construction of the public project that precipitated the acquisition. The rationale for this provision is that a property owner should be compensated for the fair market value of the property at the time of acquisition and any future increase or reduction in value caused solely by the project is too speculative to quantify on the date of taking.

There are many other details, nuances and subtleties to the Murdock Village Community Redevelopment Project that I would like to discuss with you, your staff or the Select Committee. If hearings on this proposed legislation are scheduled, I would appreciate an invitation to appear before the Committee and present in more detail the impacts of this legislation on local government officials.

Sincerely,



Robert J. Gill, Esquire

RJG/ldl
Enclosures
c/ Janette S. Knowlton, Esq., Charlotte County Attorney

port charlotte, fl
Charlotte County
Murdock Village
N
W
E
S
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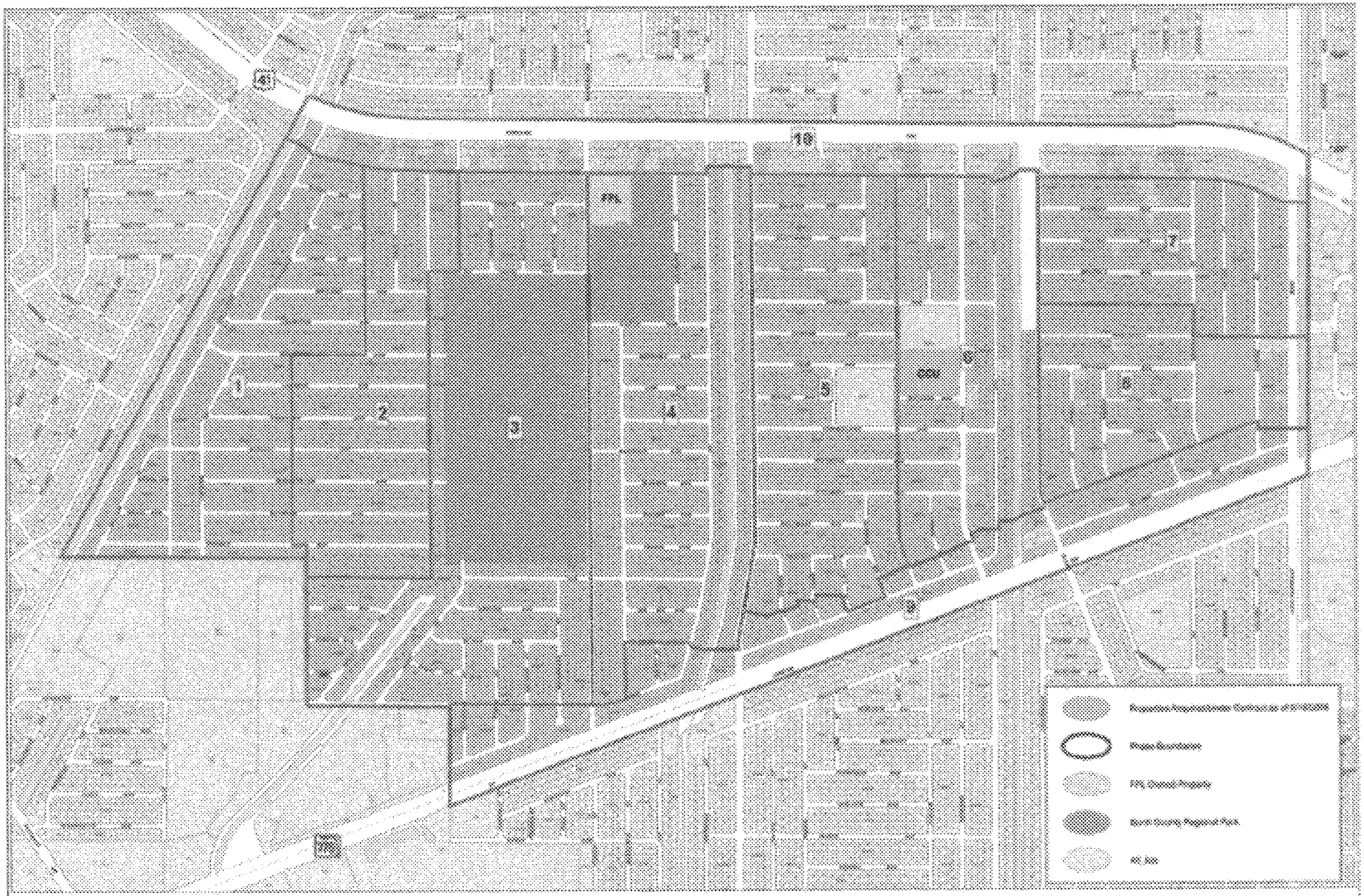
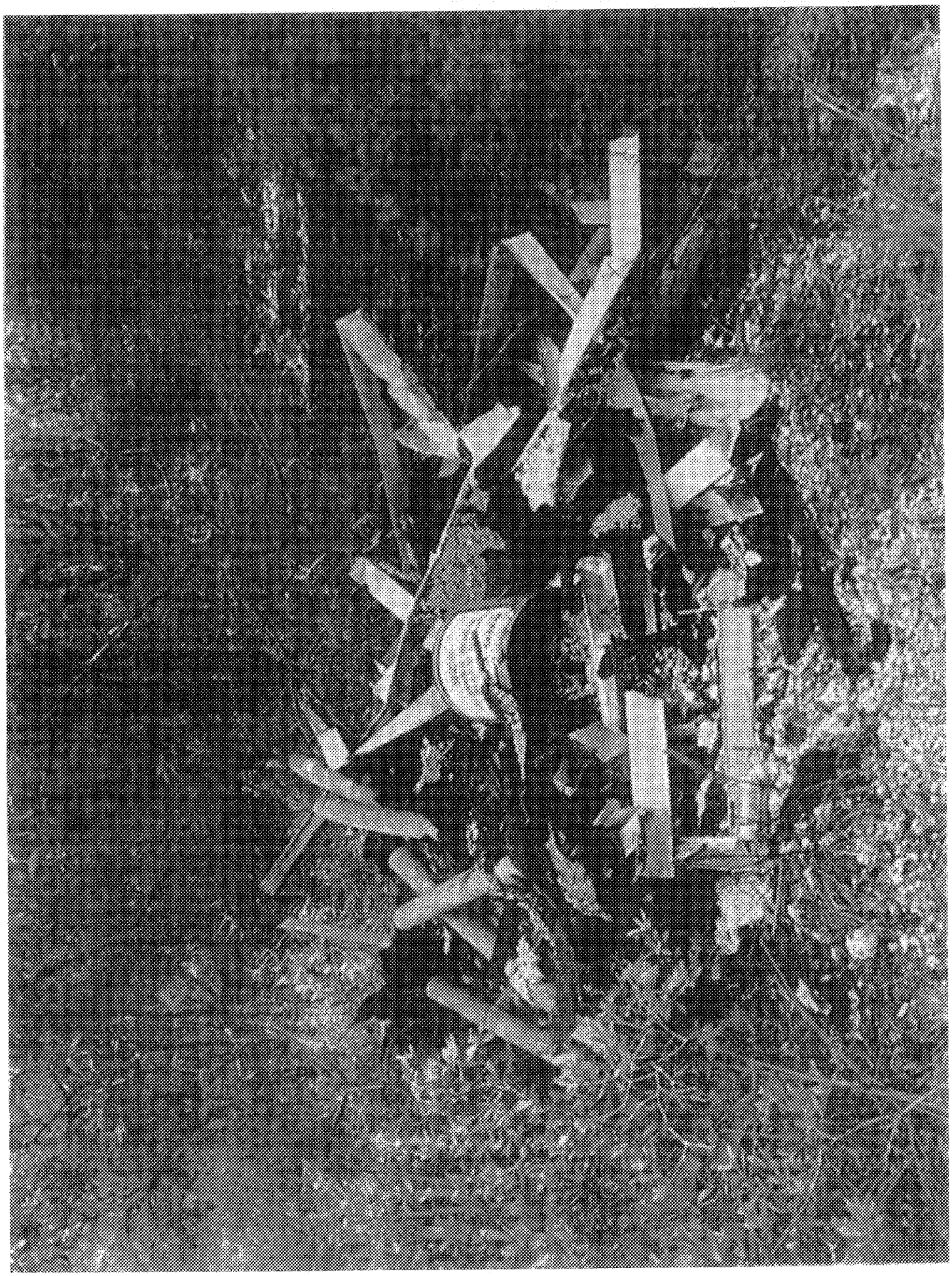


MURDOCK VILLAGE
Property Acquisition

08/11/2005

08/11/2005



Stafford
08/11/2005

WEST MURDOCK
Redevelopment Study Area

Finding of Necessity Report

May 2003

Real Estate RESEARCH
CONSULTANTS

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1. Overview and Purpose

The purpose of this analysis is to provide data that documents blight, as defined in Section 163, Part III, Florida Statutes (F.S.) (the "Redevelopment Act") within the West Murdock redevelopment study area in Charlotte County, Florida (the "Redevelopment Study Area") as defined herein.

1.1. Introduction

This analysis will focus on the land-based resources of the Redevelopment Study Area and its ability to generate economic return and local tax revenues. As a general matter, resources that are in a state of physical decline, are underutilized, or are improperly deployed, limit a local jurisdiction's ability to remain competitive in a larger economic context, ultimately affecting its financial condition and its level of services. Local governments highly dependent upon ad valorem revenues are the most vulnerable in these situations. Real property assets that are physically or functionally deteriorated or that do not meet contemporary or competitive development requirements are constrained in their ability to generate these kinds of taxes. As such, their physical character and utility, along with the services required to sustain them, are key factors in determining a community's economic health.

This analysis relies substantially on tax roll data acquired from Charlotte County officials, interpretations of County or staff supplied data, visual inspections of properties and County prepared maps. While the County's tax roll data is assumed to be reliable, we cannot fully opine on its accuracy. Because of the data's purpose and official application, we believe that any errors that may exist are relatively inconsequential.

1.2. Objectives and Purposes of the Redevelopment Act

The purpose of the Redevelopment Act is to assist local governments in preventing and/or eliminating blighted conditions detrimental to the sustainability of economically and socially vibrant communities or areas. The following paragraphs describe those blighting conditions, their specific effects, and the intentions of the community redevelopment regime as a tool for implementing policy and programs.

- *Section 163.335(1), F.S. ...[blighted areas] constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, constitutes an economic and social liability imposing onerous burdens which decrease the tax base and reduce tax revenues, substantially impairs or arrests sound growth, retards the provision of housing accommodations, aggravates traffic problems, and substantially hampers the elimination of traffic hazards and the improvement of traffic facilities; and that the prevention and elimination of slums and blight is a matter of state policy and state concern in order that the state and its counties and municipalities shall not continue to be endangered by areas which are focal centers*

of disease, promote juvenile delinquency, and consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services, and facilities.

- *Section 163.335(2), F.S. ...certain slum or blighted areas, or portions thereof, may require acquisition, clearance, and disposition subject to use restrictions, as provided in this part, since the prevailing condition of decay may make impracticable the reclamation of the area by conservation or rehabilitation; that other areas or portions thereof may, through the means provided in this part, be susceptible of conservation or rehabilitation in such a manner that the conditions and evils enumerated may be eliminated, remedied, or prevented; and that salvageable slum and blighted areas can be conserved and rehabilitated through appropriate public action as herein authorized and the cooperation and voluntary action of the owners and tenants of the property in such areas.*

- *Section 163.335(3), F.S. ...powers conferred by this part are for public uses and purposes which public money may be expended and the power of eminent domain and police power exercised, and the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.*

- *Section 163.335(5), F.S. ...the preservation or enhancement of the tax base from which a taxing authority realizes tax revenues is essential to its existence and financial health; that the preservation and enhancement of such tax base is implicit in the purposes for which a taxing authority is established; that tax increment financing is an effective method of achieving such preservation and enhancement in areas in which such tax base is declining; that community redevelopment in such areas, when complete, will enhance such tax base and provide increased tax revenues to all affected taxing authorities, increasing their ability to accomplish their other respective purposes; and that the preservation and enhancement of the tax base in such areas through tax increment financing and the levying of taxes by such taxing authorities therefor and the appropriation of funds to a redevelopment trust fund bears a substantial relation to the purposes of such taxing authorities and is for their respective purposes and concerns.*

- *Section 163.335(6,) F.S. ...there exists in counties and municipalities of the state a severe shortage of housing affordable to residents of low or moderate income, including the elderly; that the existence of such condition affects the health, safety, and welfare of the residents of such counties and municipalities and retards their growth and economic and social development; and that the elimination or improvement of such conditions is a proper matter of state policy and state concern is for a valid and desirable purpose.*

Under the Redevelopment Act, if an area is found to be blighted, a resolution must be adopted by the local governing body finding that there are blighted conditions within the defined study area, and that the repair, rehabilitation, and/or redevelopment of such areas is in the interest of public health, safety, and welfare. If an area is found to have blighted conditions, the next step is to establish a Community Redevelopment Agency (CRA) or use an existing CRA of the County. The CRA, as the legal unit acting for Charlotte County, would direct the preparation of the community redevelopment plan for that area described in the "Finding of Necessity Resolution". The community redevelopment plan must provide physical information on the redevelopment area and identify potential project types that can diminish or eradicate the specified blighted conditions.

Under the Redevelopment Act, a redevelopment plan is subjected to a compliance review conducted by the local planning agency (LPA) before it can be submitted to the County Commission for approval. The LPA has up to 60 days to review the redevelopment plan as to its conformity with the County's comprehensive plan for the development of the County as a whole and provide comments to the CRA. After receiving recommendations from the LPA, the local governing body shall hold a public hearing on the approval of a community redevelopment plan after public notice in a newspaper having a general circulation in the area of operation of the community redevelopment area.

The next step under the Redevelopment Act is the creation of a redevelopment trust fund, established by ordinance and adopted by the County Commission, the governing body that created the CRA. The most recent certified real property tax roll prior to the effective date of the ordinance will be used to establish the tax base (the "Base Year") within the redevelopment area in order to calculate the tax increment. In the present case, the assumed timetable to move forward suggests that the calculation of the tax increment will rely upon the 2002 certified rolls.

After putting in place the redevelopment architecture described above, the CRA will become funded upon the availability of tax increment revenues. Tax increment revenues become available as the result of increased property assessments associated with new development and redevelopment within the redevelopment area beyond those of the Base Year. Funds allocated to and deposited into the trust account are used by the CRA to finance or refinance any community redevelopment it undertakes pursuant to the approved community redevelopment plan.

Before the governing body can adopt any resolution or enact any ordinance to create a community redevelopment agency, approve a community redevelopment plan or establish a redevelopment trust fund, the governing body must provide public notice of proposed actions to each taxing authority which has the power to levy ad valorem taxes within the redevelopment area boundaries. Such notice alerts these taxing authorities to any possible changes in their budgets as a result of a redevelopment action. As a policy matter, it is assumed that the following entities with ties to the activities of Charlotte County government will receive notice of any actions stemming from either this analysis or subsequent initiatives should they be authorized under the terms of the Redevelopment Act.

Charlotte County Public Schools
1445 Education Way
Port Charlotte, FL 33948

Southwest Florida Water Management District
2379 Broad St.
Brooksville, FL 34604

West Coast Inland Navigation District
P.O. Box 1845
Venice, FL 34284

Charlotte County Public Works
Lighting District
7000 Florida St.
Punta Gorda, FL 33950

Public Safety
Finance Department
18500 Murdock Circle
Port Charlotte, FL 33948

Peace River
Southwest Florida Water Management District
Sonja Grant
P.O. Box 1166
Brooksville, FL. 34605-1166

In the case of the Redevelopment Study Area, the County is the *only* taxing authority with some financial interest in the implementation of a formalized redevelopment process. Other entities, including at least those listed above, that also may exercise certain jurisdiction or control within the same legal boundaries defined for this study will not, as a matter of law or policy of the County, experience any diminution in their ad valorem revenues stemming from a resolution that defines or finds blight as described herein. These entities are, in fact, likely to experience an increase in their revenues over time as the result of such action.

1.3. Declarations and Process

Determining if blight conditions exist within the study area is an initial step in ascertaining an area's appropriateness as a community redevelopment area. This analysis documenting the extent of blight conditions and analysis in support of that documentation is referred to herein as the "Report"

This Report describes the physical, economic, and regulatory conditions within the community redevelopment study area that are associated with blight or its causes and discusses the need for a community redevelopment area. RERC staff, working

with County staff, inspected the redevelopment study area and prepared this Report and the analysis contained

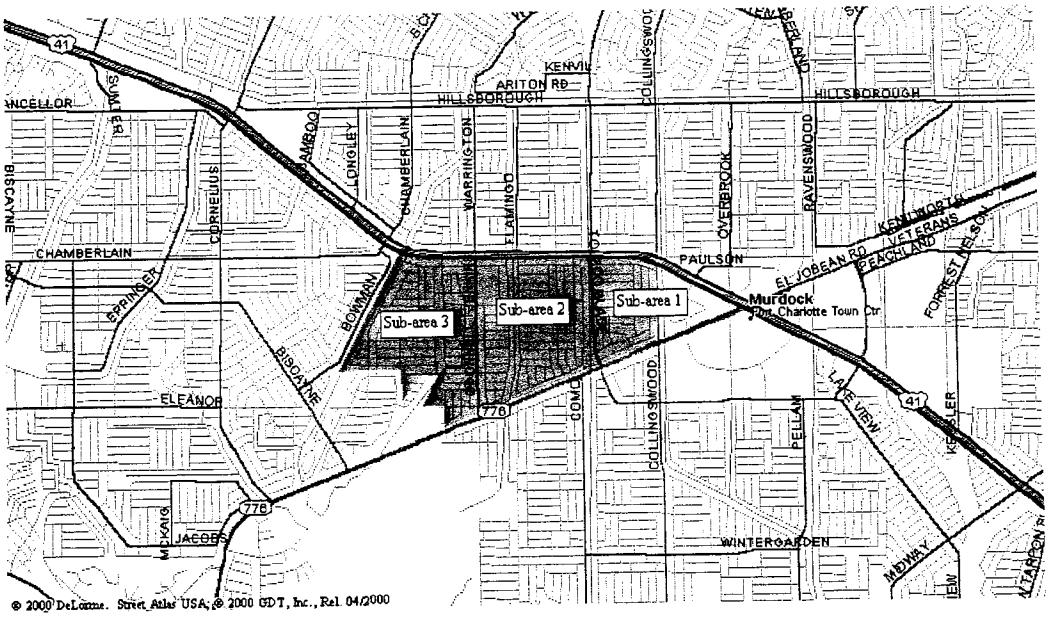
1.4. Integrity of the Redevelopment Study Area

The analysis in this Report is confined to a specific geographic area of approximately 1,100 acres, defined primarily by its relationship to Tamiami Trail (US 41) and El Jobean Road (SR 776) (the "Redevelopment Study Area"). The Redevelopment Study Area is effectively comprised of three smaller areas or neighborhoods. These three areas identified as sub-area 1, sub-area 2, and sub-area 3. Although adjacent, these sub-areas are not physically connected and rely upon US 41 and SR 776 for both regional access and intra-neighborhood access. Together, these three sub-areas are characterized by their small plats, diversity of ownership, largely deteriorated or non-existent infrastructure, and relatively low land value. Since the plats were recorded several decades ago, these properties have remained almost totally undeveloped.

The Redevelopment Study Area is located entirely within the jurisdiction and control of unincorporated Charlotte County and is generally contained within the boundaries created by SR 776 on the south; Stratford Drive on the west; US 41 on the north; and Collingswood Boulevard on the east. The main roads that service the study area are Toledo Blade Boulevard, Flamingo Boulevard, and O'Donnell Boulevard, which are all north south roads. Because the 1,100 acres are divided by two major canals, there are no local roads within the study area itself that physically allow an east-west connection. The physical configuration of the larger neighborhood actually suggests three smaller areas or enclaves that are both adjacent but separated at the same time.

Presently, zoning within the West Murdock study area allows a mix of general land uses that include commercial, office, medical or institutional, single family residential and multi-family residential. The latter classification allows for intensities as high as 10 units per acre while the single-family classification calls for 3.5 units per acre. Future land uses are expected to be less intensely developed, and the official map describes the portions of the study area now identified as high density residential as medium density residential. For the most part, more intense residential uses are confined to Sub-area 3. Without regard to current or expected land use, the area is uniformly platted in extremely small lots, with some 800 acres remaining unimproved at this time. As the property is now configured, the higher density designations lie exclusively in the eastern one-third of the study area, called for purposes of this analysis Sub-area 1.

Map 1.0 Redevelopment Study Area



Note: Study Area boundary is for illustrative purposes only.

Having identified the Redevelopment Study Area as a relatively unified and homogenous area, we considered the specific conditions that constitute blight as listed in the Redevelopment Act. The following conditions are identified by the Florida Legislature in the Redevelopment Act as being indicative of blight:

(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;
(b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;
(c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
(d) Unsanitary or unsafe conditions;
(e) Deterioration of site or other improvements;
(f) Inadequate and outdated building density patterns;
(g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;
(h) Tax or special assessment delinquency exceeding the fair value of the land;
(i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;
(j) Incidence of crime in the area higher than in the remainder of the county or municipality;
(k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;

(l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;
(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
(n) Governmentally owned property with adverse environmental conditions caused by a public or private entity. *See* Section 163.340(8), F.S.

As this Report documents, at least seven of these conditions of blight exist in the West Murdock study area and are a detriment to its longer-term vitality and sustainability.

1.5. Historical Perspective

Although Charlotte County has a rich historical heritage that connects it to the travels of Ponce de Leon, its recent past identifies the area as among the state's largest concentrations of platted but undeveloped or unimproved lots. These are typically substandard properties without adequate infrastructure or access to many public services. To the degree the deficiencies appear only aesthetic in the short term, they are likely to preclude orderly development over time and are incapable of accommodating the intensity of development activity for which they were originally platted.

The character of these lots reflects Florida's boom and bust real estate cycles that encouraged financially irresponsible land speculation, usually in conjunction with habitat destruction, poor design, and inadequate infrastructure. Aggressive sales techniques and occasionally malfeasant, if not overtly fraudulent, practices opened Florida real estate and the prospect of increasing land values to virtually everybody in the United States. Such land development and sales practices continued almost unabated throughout the middle part of this century when court and legislative action injected some control and oversight.

The remnants of relatively unrestricted development remain behind for Florida's contemporary local and county jurisdictions to monitor and to correct. Even today, almost 40 years after the Redevelopment Study Area was developed and initially sold, fewer than 40 acres support residential or commercial structures. An additional 28 acres have been used by churches and utilities. Public lands and parks consume another 117 acres, leaving almost 800 acres of land undeveloped and underutilized. The virtual absence of development activity in the Redevelopment Study Area, given its proximity to one of the region's largest concentrations of commercial activity, points to the materially unsatisfactory conditions within the study area. In the five years ending in 2002, the population of Charlotte County grew by some 15,000 people. During this period, there were an average of some 2,000 housing units produced each year. As this pace of development has occurred throughout the County, fewer than 80 homes have been built in the Redevelopment Study Area. For the five-year period, 1996 to 2000, there were almost 2,000,000 square feet of commercial buildings placed in service in Charlotte County. To date, there have been about 20-25 commercial structures built in the Redevelopment Study Area.

2. Physical Environment Inventory

This section of the report documents the area's natural features, existing land uses, transportation systems, utilities infrastructure, and visual character of buildings and sites that could influence development or utilization of land based assets.

2.1. Natural Environment and Features

The Redevelopment Study Area watershed can be characterized as flat, piney woods/palmetto, with poorly drained soils according to the Soil Survey of Charlotte County, Florida prepared by the United States Department of Agriculture. These soil conditions give rise to ponding and other drainage difficulties. An open system of canals and spillways was designed to mitigate these problems but instead serve primarily to divide the larger property into the aforementioned three smaller and separate neighborhood sub-areas.

Photographs of existing natural environment

County staff reports there are no significant wetland systems within the Redevelopment Study Area but the pattern of platting and development evident here are known in other settings to have disturbed lands that might ordinarily be determined to be wet and jurisdictional. It is important to observe that a detailed environmental assessment will likely be necessary to completely inventory the area's physical conditions and make a determination in sufficient detail whether disturbed systems exist. Such a determination will be needed to secure any entitlements that might normally be associated with these holdings as they are redeveloped, and the effort to document these conditions will be a material undertaking.

Finding:

Without regard to the possibility that jurisdictional wetlands may have been damaged or destroyed, suggesting material cost to arrest or correct, the area's soil conditions create ponding conditions that are no longer acceptable in contemporary residential communities. Such ponding would be addressed in today's design standards by designating specific catchment areas and through a more sophisticated treatment of spillways and land design features. Clearly, these more aggressive solutions are not in place in the present 1,100 acre development scheme.

2.2. Existing Land Use

The existing land use inventory provides more perspective regarding the pattern of development activity within the Redevelopment study area, the inventory of existing land uses under current zoning regulations, compatibility of nearby uses, and the impact of uses that may assist or deter development activity.

Although poorly developed, the West Murdock study area is not an area of open land. The intensity of plats and the character of existing structures impart a distinct pattern of development that would only be reinforced over time without aggressive intervention.

Generally, the County has viewed the West Murdock Study Area as principally a residential area. Although some lands in the West Murdock study area are publicly owned, the current zoning could accommodate some 4,900 housing units on a total of about 1,100 acres. These residential uses and densities are complemented by various commercial, office and institutional uses that are largely sited around the perimeter of the property along major arterials.

To date, there are approximately 80 single-family homes that exist in the study area along with a modest inventory of allowable non-residential activities.

Photographs of existing residential properties

Many of the individual non-residential properties are located directly proximate to the residential uses with no attempt to establish buffer or transitional zones. For the residential properties located immediately adjacent to non-residential properties, this kind of placement and configuration heightens the need for regulatory controls to assure that commercial uses do not infringe on residential character. Typically, the placement of non-neighborhood commercial activities in such close proximity to residential neighborhoods results in increased complaints of noise, traffic, trespass, and code enforcement.

Evaluated strictly in physical terms, the practice of siting a series of disconnected commercial activities on relatively small lots is no longer an acceptable approach to development. Further, the concentration of moderate and high-density residential development across the eastern one-third of the property is also undesirable, given the typical lot size and configuration.

The commercial sites are generally of marginal quality. While some owners of these commercial properties have done well to mitigate the visual effects of a parking lot with landscaping and other buffering, others have not attempted to buffer their parking lots and commercial buildings from the residential areas.

Photographs of typical commercial properties

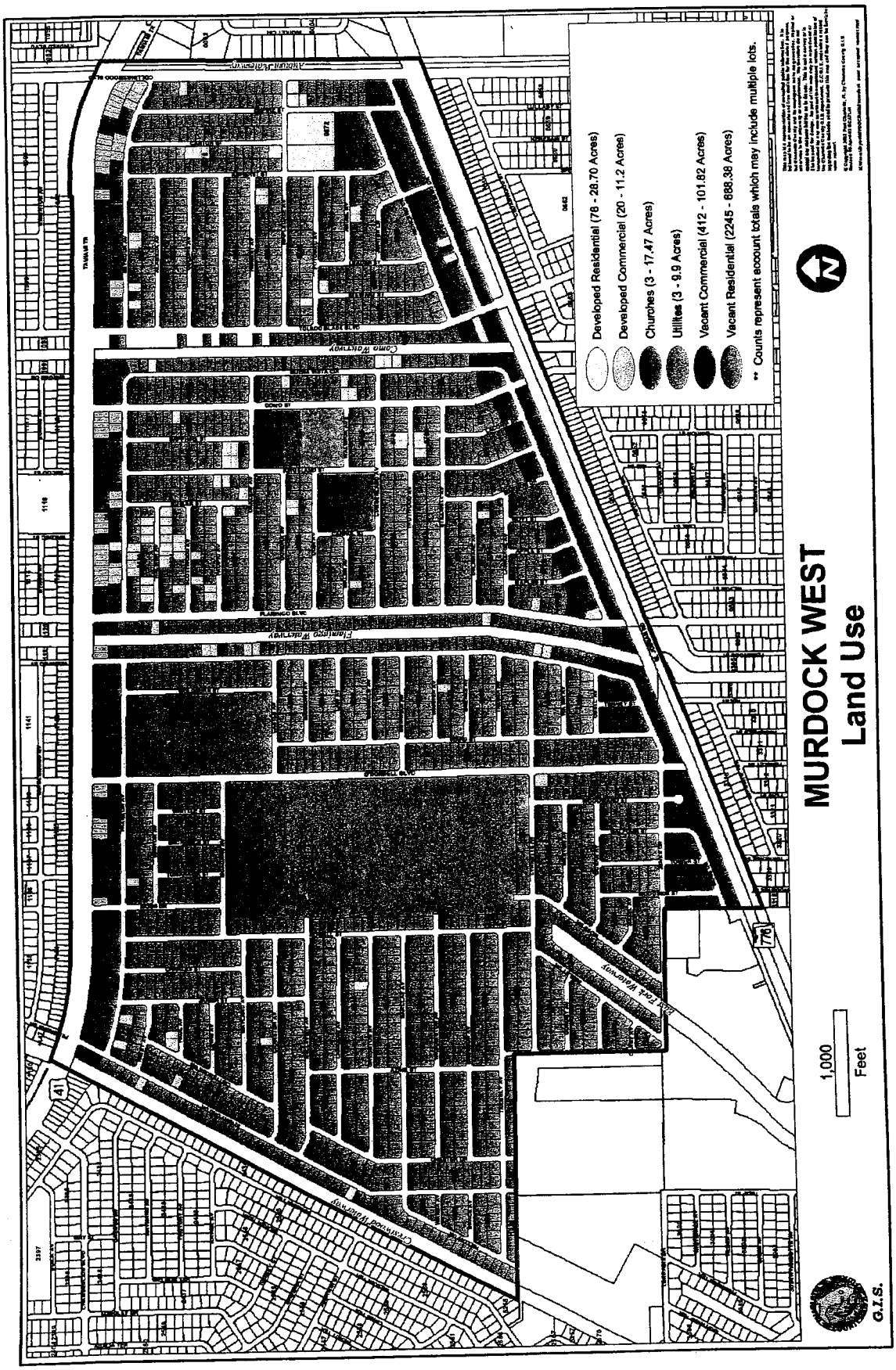
Finding:

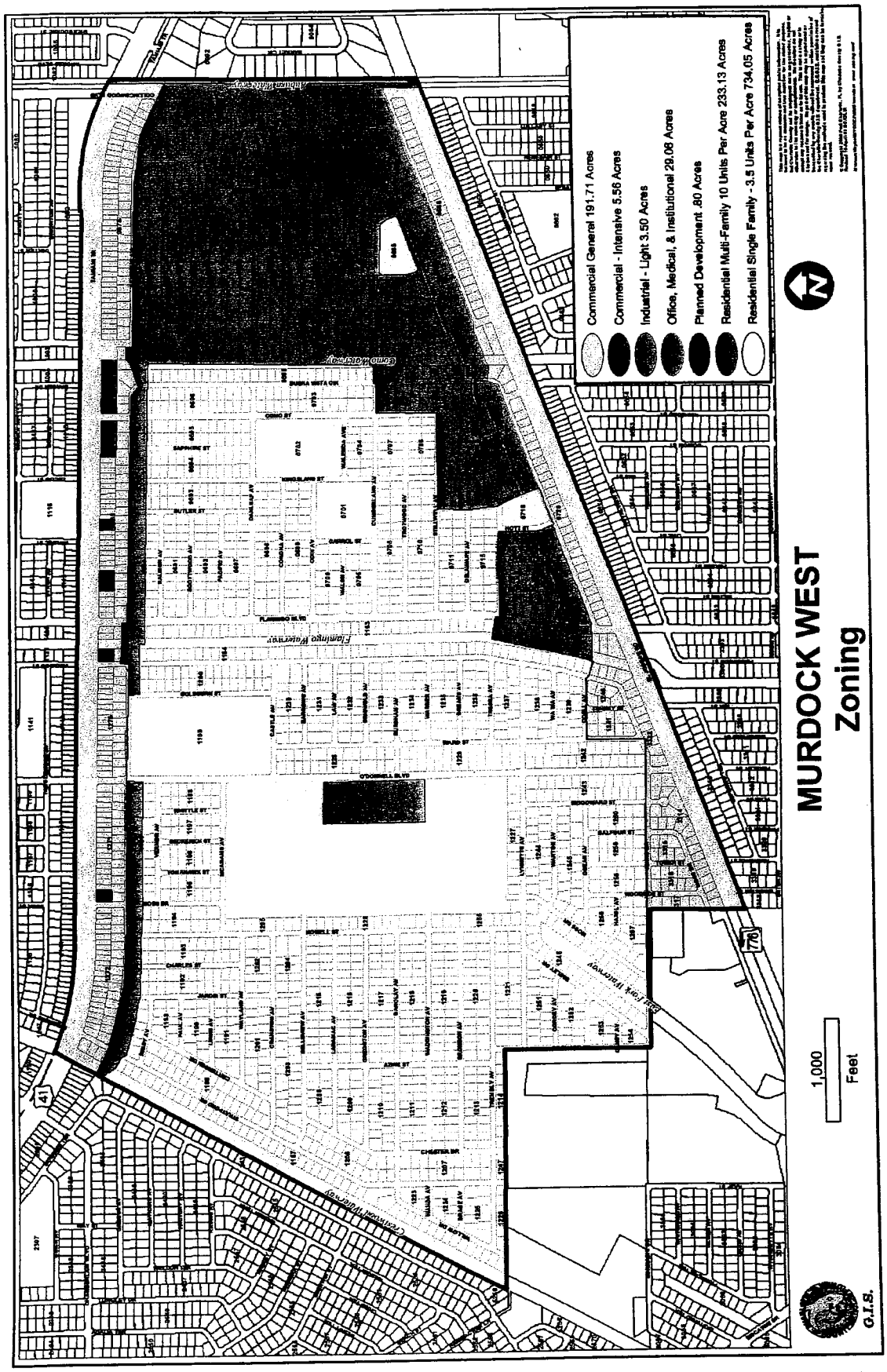
The absence of buffering, lack of commercial access control, small lot configuration, and concentrations of incompatible land use activities collectively function to suggest an environment totally unsuited to contemporary development activity. The fact that the area remains relatively devoid of any residential or commercial development activity speaks to the generally poor environment in which development might otherwise be expected to occur. The faulty layout and configurations of lots in relation to size, adequacy, accessibility and usefulness are suggestive of a functionally obsolete or deteriorated residential and commercial land use plan.

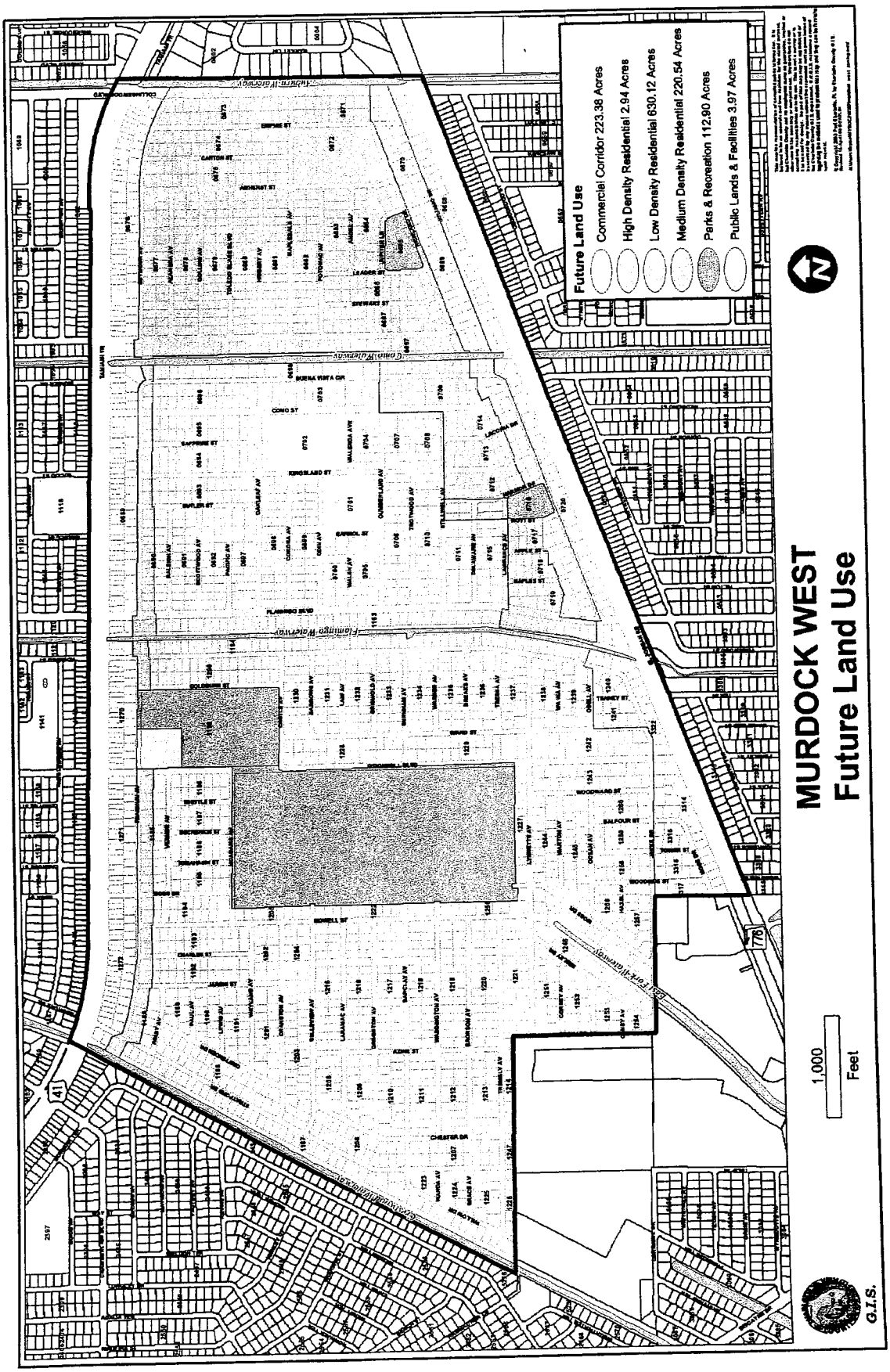
The West Murdock study area is not an area of open land easily reconfigured to other purposes or activities. The intensity of plats, their size and the character of existing structures impart a distinctly deficient pattern of development that precludes sound standards, design, and overall sanitary and safe conditions. These development patterns and conditions will only be reinforced over time if not aggressively altered.

The following maps are included in the next three pages:

Figure 1 is the Existing Land Use Map
Figure 2 is the Zoning Map
Figure 3 is the Future Land Use Map


MURDOCK WEST
Land Use
Developed Residential (78 - 28.70 Acres)
Developed Commercial (20 - 11.2 Acres)
Churches (3 - 17.47 Acres)
Utilities (3 - 9.9 Acres)
Vacant Commercial (412 - 101.82 Acres)
Vacant Residential (2245 - 688.38 Acres)
** Counts represent account totals which may include multiple lots.
1,000
Feet
G.I.S.


MURDOCK WEST
Zoning
Commercial General 191.71 Acres
Commercial - Intensive 5.56 Acres
Industrial - Light 3.50 Acres
Office, Medical, & Institutional 29.08 Acres
Planned Development .80 Acres
Residential Multi-Family 10 Units Per Acre 233.13 Acres
Residential Single Family - 3.5 Units Per Acre 734.05 Acres
1,000
Feet
G.I.S.


MURDOCK WEST
Future Land Use
Future Land Use
Commercial Corridor 223.38 Acres
High Density Residential 2.94 Acres
Low Density Residential 630.12 Acres
Medium Density Residential 220.54 Acres
Parks & Recreation 112.90 Acres
Public Lands & Facilities 3.97 Acres
1,000
Feet
G.I.S.

2.3. Traffic Data and Road Characteristics

Traffic capacity is not currently an issue in the Redevelopment Study Area because of its lack of development. The major thoroughfares, US 41 and SR 776, appear to have capacity adequate for the existing level of development in the area, but additional studies might have to be performed to ascertain longer term road capacity, given the prospects of future redevelopment within the study area. Already County staff have identified some sections of US 41 as operating at level of service (LOS) D, indicating a major arterial approaching its capacity prior to any development occurring within the study area. Further, segments of U.S. 41 and SR 776, identified as requiring upgrades or improvements by County staff, have yet to be placed in the Capital Improvements (County or State) Plans.

The road conditions within the Redevelopment Study Area are problematic. The Redevelopment Study Area lacks cross streets and access points that could provide connectivity among the three discrete neighborhoods or areas that comprise the larger study area. Currently there are only four north/south roadways that serve and connect the Redevelopment Study Area between US 41 and SR 776 – Collingswood Boulevard, Toledo Blade Boulevard, Flamingo Boulevard, and O'Donnell Boulevard. Accessing these north/south roads from US 41 and SR 776 can be difficult because of the periodically high level of vehicular traffic on these major thoroughfares. Moreover, Flamingo and O'Donnell Boulevards link to US 41 at non-lighted intersections. Making a left turn to these two roads can be slowed by stacking, but it is also a dangerous and unnecessary movement that could be avoided with alternate internal routing.

To illustrate local conditions, a motorist in the vicinity of Corona Avenue cannot directly access the adjacent neighborhood without traveling to US 41 from Flamingo Boulevard, then down O'Donnell Boulevard. Since US 41 and Flamingo Boulevard and US 41 and O'Donnell Boulevard do not have traffic lights, the absence of connections causes unnecessary traffic safety risks while loading local trips on these major thoroughfares. At current traffic volumes, accidents are at expected levels for this surface transportation network. It is not unreasonable to forecast an increase in accidents as conditions degrade or capacity declines as the result of increased development.

Given the current grid pattern and the existing canals which limit mobility among the three undeveloped neighborhoods, any deteriorating traffic capacity as suggested by either downgrades in LOS or by the need to widen certain segments, will only be exacerbated by the complete build out across the Redevelopment Study Area. Current emphasis on connectivity and mobility would place a distinct value on physically linking the separate sub-areas to discourage traffic loading onto US 41 or SR 776 to permit travel within the Redevelopment Study Area itself. Further, the multitude of small commercial properties fronting SR 776 and US 41 will impact longer term capacity by upping the movements necessary to complete ingress and ingress. High volume commercial activities will accelerate the rate at which capacity is lost.

The existing road grid that dominates the study area poses its own set of physical and regulatory problems. Although constructed to the standards in place at the time of the Redevelopment Study Area's development, the road grid is materially and functionally below the standards acceptable today from the perspective of both regulators and those active in the development community. The current standards have allowed rapid deterioration that would be unacceptable by current design standards, the typical standards practiced by major community builders, or the scrutiny of the market place which unofficially exercises regulation through its decision to purchase or not to purchase homes in a specific location.

From almost any perspective, the roadway standards in place fall below those of contemporary requirements. Aside from their observable deteriorated condition, they do not satisfy width, depth or materials standards now imposed, resulting in the need for ongoing repairs and maintenance well above the commitment considered tolerable or acceptable in today's environment. County staff reports that the budgets necessary for roadway resurfacing and repairs will increase with the further aging of the grid now in place. Further, County staff report that funds, which may be adequate for some limited resurfacing activities, are not sufficient to accommodate the substantial rebuilding of these roads as appears may be necessary.

Finding:

While there may be adequate traffic capacity for the existing limited level of development within the study area, the status of that capacity suggests, at a minimum, that further studies will be required to ascertain the impacts of any major redevelopment efforts occurring in the Redevelopment Study Area.

The street layout is defective and inadequate because of the lack of cross streets (both east/west and north/south) contributes to the lack of connectivity among the area's neighborhoods and promotes unnecessary traffic risks and loads onto major arterials. Further, the many small commercial parcels fronting the area's major arterials impact current movements associated with ingress and egress. These conditions will only degrade as the area matures. Both the absence of connections and the profusion of commercial curb cuts would be aggressively managed in today's regulatory environment.

Additionally, notwithstanding the actual condition of the arterials that form the larger study area's boundaries, the internal grid is materially below contemporary standards. This road grid has, in fact, deteriorated to the point that it is no longer viable as a system of local neighborhood roads. While the current complement of streets can accommodate emergency traffic, it is well below the design and material standards that would be imposed to support a community marketed today. The costs of maintaining and improving this badly deteriorated road grid can only be expected to grow, and there are currently no palatable budgetary mechanisms to deal with the conditions described.

2.4. Public Transportation and Sidewalks

Because of its lack of development there are no apparent issues in the Redevelopment Study Area related to adequate provision of parking, bridges or other

public transportation facilities save the aforementioned canals and spillways that might be spanned by small bridges to facilitate connectivity among the three separate neighborhoods. While other solutions might resolve internal connectivity, there are no sidewalks to support pedestrian mobility internally or to promote safe conduct along US 41 and SR 776. At a mature stage of development, these conditions will be unacceptable in the context of contemporary design standards as they impede alternative means of mobility and pose a safety risk to community residents.

Photographs of typical areas showing absence of sidewalks

Finding:

Sidewalks and bicycle paths have emerged in contemporary planning practice as an important component in community "place making". These amenities combine to create neighborhoods that would be considered safe and desirable for residents of all ages. The Redevelopment Study Area is absolutely devoid of such facilities.

Other public facilities are not obviously deficient but need to be considered to improve the composition of the existing internal road system. While bridges may be one of many possible solutions to enhance neighborhood connectivity, their absence is an indication of the area's overall blighted condition and evidence of the mounting costs necessary to correct these conditions.

2.5. Storm Water

The Redevelopment Study Area watershed can be characterized as flat, piney woods/palmetto, with poorly drained soils. According to the Soil Survey of Charlotte County, Florida prepared by the United States Department of Agriculture, estimated seasonal highwater elevations are approximately one (1) foot in depth below existing grades. Stormwater runoff from existing residential streets and adjacent properties is conveyed via shallow roadside swales to existing canals bisecting the watershed. Although the stormwater swale system is generally believed to be designed to convey runoff resulting form a five (5) year, twenty-four (24) hour storm event (6 inches of rainfall in 24 hours), some generalized ponding in the area can be expected. Current design standards for residential stormwater collection/conveyance systems in Charlotte County is the five (5) year storm event.

Finding:

Although certain design features are in place to handle stormwater, there is evidence that localized flooding or ponding occurs. These incidents are exacerbated by the poor soil conditions of the area which tend to retard drainage and promote runoff even though the community now supports virtually no development. The platted density of the Redevelopment Study Area is likely to worsen these conditions.

2.6 Wastewater

Existing wastewater service in and around the study area is limited, leading to unsanitary conditions. Virtually all homes within the study area are connected to individual septic systems. Given the soil and hydrologic conditions of the larger area, the cumulative effect of septic disposal of wastewater is considered extremely undesirable. The average size of the area's many plats are particularly unsuited to septic systems. Although there is no minimum lot size mandated, as a practical matter, it is likely that the extensive use of septic systems utilized on such small home sites today will result in the expensive need to retrofit the area with central wastewater in the future.

While the few homes in the area are not known to have system failures, the possibility of that risk is markedly increased if developed to capacity. At the County level, there are now an estimated 40,000 septic fields, and it is a policy of the County's Comprehensive Plan that these individual systems ultimately be replaced with central sewer systems. From a longer-term policy perspective, septic systems are now viewed as strictly temporary devices for wastewater treatment.

The concerns for septic systems extend beyond the local level. At least one reason the County has opted to intervene in the elimination of septic systems is State regulatory pressure. Clearly, the concerns about the problems associated with septic fields are well known and understood and are not isolated to this area.

The approach to waste water service used in the West Murdock study area falls well below currently accepted standards for development. Any community of this size would now be required to provide central service, and it is not unreasonable to speculate that individual users have a preference for centralized systems. Should an area generate more than 1,000 gallons of disposal needs, it would be required under current regulations to install a central system. This flow represents the equivalent of 4-5 homes. Of course, the platting of the West Murdock study area could include as many as 4,900 homes according to current zoning as already described.

As a practical matter, individual septic systems, while undesirable for single family homes, are especially unsuitable for servicing commercial properties. The need for individual systems is at least one explanation for the proliferation of individual commercial lots along US 41 and SR 776 that would normally be discouraged

Any sewer service that might be linked to development activity within the Redevelopment Study Area extends from a 12" force main on SR 776 that runs the full extent of the southerly limits of the study area. As suggested by the discussion above, there are currently no local force mains, lift stations or sewer collection mains

within the redevelopment area itself. A force main is currently being extended from SR 776, north along O'Donnell Boulevard, west along Lynette Avenue and north on Howell Street to a lift station that will service the O'Donnell Park.

The existing force main on SR 776 is of adequate capacity to serve the broader area with no immediate upsizing required. For the provision of sanitary sewer service specifically to the neighborhoods of the Redevelopment Study Area, 7 to 10 new lift stations would be anticipated within the redevelopment area. All new force mains would be routed south to connect on SR 776. Sewer collection systems would be newly constructed along all roadways to service each individual parcel.

The treatment plant that would service the broader area if wastewater service was to be extended generally is located on the east side of Port Charlotte. Accordingly, all flows generated from within the study area must be conveyed easterly across all of Port Charlotte. The conveyance of this flow will impact one existing master pump station and an existing force main between the master lift station and the treatment plant. It is anticipated that the master lift station will require an immediate upgrade estimated to cost $500,000 to assure conveyance of the additional flow. The force main will either have to be upsized or supplemented with an additional force main much earlier than originally anticipated. Depending on the sizing and method chosen, this cost could easily exceed $2,000,000. Connection fees generated from the neighborhoods and commercial activities within the Redevelopment Study Area would be required to underwrite the costs of these improvements.

With expansion of the treatment plant scheduled for 2007, there are no anticipated problems in supplying treatment capacity necessary to service the redevelopment area. However, the provision of wastewater collection facilities could cost several thousand dollars per lot.

Finding:

Capacity for wastewater treatment exists in the community generally and can be easily negotiated and linked to the Redevelopment Study Area properties. Related actions to make these improvements are extremely costly, and there are no plans to lay the lines required for service. The failure to extend sewer into the Redevelopment Study Area neighborhoods is a material deterrent to reuse and redevelopment and contributes to the patterns of observed deterioration or obsolescence of the Redevelopment Study Area.

Although septic systems are not precluded in County regulations, they are strongly discouraged and viewed only as a temporary measure because of their potential for failure and the implied public health risks. It is not uncommon for a single household to construct an individual septic system, possibly using it for years. Any communities developed at the scale anticipated in the Redevelopment Study Area, however, would be required under today's development regulations to provide a central wastewater system and the current County Comprehensive Plan clearly advises of that strategy.

The minimum standard for evaluating the need for a central collection system begins at an average flow of 1000 gallons per day, roughly the equivalent of 4-5 homes.

Even at the lower end of densities that might be permitted within the study area, the need for central sewer is evident.

Centralized wastewater service is especially important for encouraging a broad mix of commercial uses. The current arrangement has effectively forced commercial properties to develop individually with their own septic system, adding to the litany of other problems associated with small commercial lots. Contemporary commercial development would not support this approach or practice. In effect, the absence of central wastewater service creates physical conditions that render the majority of the area's commercial properties functionally deteriorated.

2.7 Potable Water

Like central wastewater systems, central water systems are preferred in areas with major development because of the implied heath risks. Although capacity and distribution lines exist and could serve the study area, the current pattern of development relies upon well water. Because of concerns about contamination, well supplied water is no longer deemed acceptable except as a temporary measure. Where available, distributed water must be used.

Charlotte County Utilities (CCU) owns and operates a major pressure booster and tank storage facility central to the study area. It is located on Block 0702. Water is supplied to the booster and tank facility through a 16" water main that runs the complete length of Como Street between US 41 and SR 776. Water is supplied to the 16" water main from a 16" water main that is routed along Seymour Avenue and a 12" water main that occupies the south side of SR 776. Water exits the booster facility through a 24" main that travels north along Kingsland Street and west along both, Buena Vista Circle and Franklin Avenue. CCU is currently constructing a 16" water main that will exit the facility on Kingsland Street, travel west along Cumberland Avenue, south on Jenks Drive, West on Burnham Avenue, South on O'Donnell Boulevard, West on Lynette Avenue, South on Moss Drive and through the Charlotte County Fair Grounds to SR 776.

Functionally all of the existing water mains in the Redevelopment study area are intended to be used only as transmission water mains. CCU, however, has been allowing independent connection to the mains for water service. Such policy speaks to the concern and compelling public interest in promoting access to central water systems.

The provision of water service would require the construction of water distribution mains along all proposed roadways. Mains would predominantly be 6" diameter in residential areas and 8" diameter in commercial areas. The anticipated cost for water mains would be difficult to approximate until proposed plats are determined.

Existing water pressures and supply would be adequate to provide both potable supply and fire suppression for all development within the study area. However, no immediate major capital improvements are anticipated to provide distribution and fire hydrant facilities to the area. Minor work required immediately may include the addition of an additional pump within the booster facility to convey additional water supply.

From a design and implementation perspective, it may be attractive to modify the appearance of the existing water tank and booster facility to complement any proposed architectural standards. As a practical matter, properties located immediately proximate these kinds of facilities have certain limitations in their preferred use. While water facilities of this type are benign neighbors, typical development would avoid their encroachment at the community level. At the very least, these facilities would be substantially improved architecturally and/or buffered with vegetation. The relocation of the facility would require expenditure between $3,000,000 and $6,000,000 with the cost being heavily impacted by alternative site selection. Elimination of the booster facility is not an option, as it is crucial to supplying water needs to the Cape Haze Peninsula.

Finding:

Potable water is available although it is not distributed throughout the study area. Controlled water supplies are a major concern in the development of public policy, and the use of wells as a source of potable water are strongly discouraged because of the implied health hazards. When treated water is accessible from a public utility, it must be used.

As with septic systems, the current regulations would not permit the widespread use of wells as a means of providing water. Given the current number of residential units and the relatively small number of commercial structures, wells have not yet been a source of problems. The past experience with these types of water supplies, however, should not be confused with a heightened interest in removing the area's dependence on well water. In no case would a development of this size even be considered were wells offered as the means of supplying water. The prospect of numerous wells located near numerous septic systems at potential buildout of the area, as currently, platted is a major potential health concern.

2.8 Overall Site and Plat Conditions

It would be uncommon, if not unacceptable, for a proposed residential community, given today's market and regulatory context, to pursue the intensive platting now found in the Redevelopment Study Area without adequate supportive public infrastructure. This pattern of development, with the deficient and deteriorated infrastructure now present, has been all but abandoned in favor of a more aesthetic design with a hierarchy of streets, densities and neighborhoods. In effect, the proliferation of small lots virtually assures a character and intensity of development that is no longer sustainable.

The divergence between current zoning and the future land use map officially registers the County's concern about the physical composition of land use patterns and their underlying plats. The County discourages the intensities that might otherwise be allowed were the Redevelopment Study Area capable of supporting the land use program consistent with its recorded plats.

From a practical perspective, the residential lots are too small for the intensity of use given their dependence on the combination of wells and septic systems. Similarly,

the size of the commercial lots makes it impractical to pursue anything other than low value, single purpose activities.

Finding:

Lots generally are too small to support anything other than residential or commercial activity of marginal value. The intensity of platting and the absence of necessary infrastructure preclude long-term sustainability and encourage only fractured patterns of development that are representative of the worst sprawl conditions. These are a direct contributor to the functional deterioration observed in field inspections.

2.9 Visual Character, Existing Building and Site Conditions Analysis

The photographs below and on the next several pages are reflective of the overall conditions pertinent to the study area. Generally, the residential structures that exist are not dilapidated or even poorly maintained. The non-residential inventory, however, is functionally deteriorated, rendered obsolete by the constraints of site, structure placement, access, and residential platting adapted to commercial use.

The infrastructure upon which the long term sustainability of the neighborhood and area depends is deficient, absent, or literally deteriorated beyond a level that justifies repair. The *overall* conditions within the larger setting and within each respective neighborhood are such that they combine to create a physical, social and economic context that are not viable for long term stability.

The several conditions documented in this analysis act together to undermine any economic values perceived to exist in the area because they retard a normally functioning market for transactional activity. It is this normally functioning market that acts as the floor for economic value. If that floor cannot be maintained through a continuing exchange between buyer and sellers, economic values will eventually erode. Once that pattern is established, it becomes increasingly difficult to arrest the decline.

Photographs of existing site deterioration

It is almost axiomatic that neighborhoods exhibiting the many deficiencies, inadequacies or deteriorated infrastructure documented in the Redevelopment Study Area have a greater likelihood of slipping into irreversible economic and physical obsolesce.

3. Real Estate Development and Investment Activity

3.1. Reported Investment and Disinvestment Activity

In its 40-year development history, the Redevelopment Study Area has effectively remained poorly deployed and utilized even as surrounding areas have matured and expanded. The area is not open land. Rather, at a gross level, the area represents something of a major infill development opportunity, largely ignored because of its relative undesirability from social, economic, and physical perspectives.

There are an estimated 70- 80 residential and 20-25 commercial structures in the study area. As described in the Historical Perspective section of this Report, the County population has added some 15,000 persons to its population in the last five years. Since it was constructed in 1989, the Port Charlotte Town Center has functioned as one of the County's major retail trading centers, but the Redevelopment Study Area has experienced limited economic benefit from activity nearby. Of the many various commercial facilities constructed in the County from 1996 to 2000, only a small number have been erected in the Redevelopment Study Area. Using almost any benchmark, the economic potential of this area has lagged behind the remainder of the County.

According to current tax records, approximately 2,800 records comprise the Redevelopment Study Area. In tax year 2002, the total taxable values for privately owned land and structures there totaled about $18,000,000. At least 760 of these records, about 27% of the total records, indicate that for the five years (1998, 1999, 2000, 2001, 2002) ending in 2002, the most current tax year, taxable values were flat or declining. These 760 records dominate the entirety of Sub-area 2 and almost all of the commercial lots along US 41 where there has actually been commercial construction. In the entire study area, 1,900 of the 2,800 parcels had a taxable value of less than $3,000 in 2002.

For the five years ending in 2002, the County's total *taxable values* showed approximately a 46% increase. For this same five years ending in 2002, the *taxable values* in the Redevelopment Study Area increased at less than 39%. Total *assessed valuations* in the County increased 41% during the same period but in the study area they increased less than 35%.

The County's taxable valuations and its assessed valuations reflect not only appreciation, but steady capital investment across a much larger base. From 2001 to 2002, construction represented about 2.55% of total taxable values in the County. In the study area, the corresponding activity represents only 1.52% of valuations.

<u>Finding</u>:

Although the County has remained attractive as a location for both residential and non-residential investment, the Redevelopment Study Area has been all but overlooked. Given the study area's almost central location, its poor performance relative to other areas of the urbanized county is all the more remarkable.

The study area suffers not only physical deterioration and dysfunction but also economic deterioration and dysfunction. Even though there were valuation increases in the aggregate, they are diminished by the appreciation experienced in the County over the same period. The gross changes in the study area ignore the flat or declining values experienced on about 760 of the approximately 2,800 records that comprise the entire area and the fact that two-thirds of the tax parcels within the Redevelopment Study Area have taxable valuations less than $3,000.

In effect, the Redevelopment Study Area is grossly and inappropriately underutilized. At a time when the County, like many local governments, faces severe budget constraints and pressures to contain growth within a manageable area, the Redevelopment Study area offers the prospect of efficient, economically worthwhile, and orderly development if the documented conditions can be corrected or controlled through a redevelopment regime.

3.2. Diversified Ownership

Of the estimated 2,800 records, at least 1,700 are owned by various individuals or principals. Thus, it is difficult or impossible for private interests to mobilize the area for an assemblage that might counteract many of the physical or economic conditions that have been described in this Report. Absent major intervention, an assemblage seems highly unlikely in the context of current ownership and dysfunctional platting.

A sort of the tax records reveals that some 1,600 parcels are owned by out of state interests. Of the estimated 80 homes, that have been built in the area, about 45 have homestead exemptions.

Finding:

The Redevelopment Study Area is not comprised of open land easily adapted to new expectations or specifications. Private interests will find it difficult, if not impossible, to assemble holdings of sufficient size and usefulness to introduce alternative development patterns, schemes, or products. The diversity of ownership is a major constraint to any redevelopment activities in the area that will likely be exacerbated by tax delinquencies, a multitude of ownership and title histories, and battery of physical and legal impediments that typically preclude redevelopment beyond a small scale. Given the magnitude of the legal and physical circumstances in the present case, the challenges to stabilize or redirect the form of development are almost insurmountable.

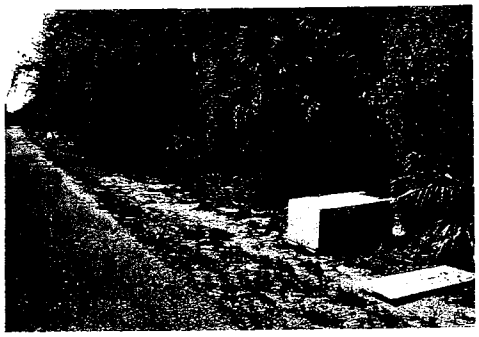
3.3. Crime and Illegal Acts

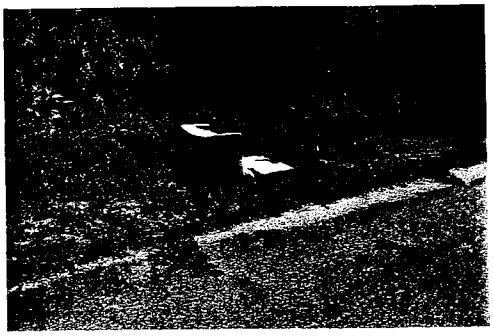
A visual inspection shows that the area suffers from illegal trash disposal and dumping. The number of vacant lots, many covered with trees and other heavy vegetation, encourage the unloading or deposing of refuse.

Large items, including stoves, refrigerators, and other household goods, comprise a source of litter that can be dangerous to children and a breeding ground for vermin in some cases. While obviously visually displeasing, the accumulation of such refuse

also identifies the Redevelopment Study Area as an area virtually incapable of reclaiming itself. Code officials are disturbed by the patterns of illegal dumping which they informally report as affecting as many as 25% of the undeveloped or vacant parcels.

Photographs of illegally dumped items





Finding:

Trash has accumulated on many of the empty or undeveloped lots in the Redevelopment Study Area. The presence of such trash is illegal and constitutes both criminal activity and a visual blight strongly associated with social, economic, and health risks.

4. Criteria for Determining Blight

In effect, the Redevelopment Act establishes two similar, but discrete, pathways to determine if a study area is a "blighted area", sufficient to warrant the full application redevelopment powers conveyed by such a designation.

- The first alternative ("Alternative One") involves the layering of two tests. The first test is broadly conditional and the second test is criteria specific. Both tests must conclude that the described conditions exist affirmatively.

- The second alternative ("Alternative Two") involves a specific agreement among parties subject to a prospective trust fund agreement. Where such agreement exists, then the jurisdiction seeking to designate a redevelopment area need pass a less rigorous test. As in the first alternative, this test relates to specific criteria and it must conclude affirmatively.

4.1. Alternative One

The *first prong* of Alternative One's tests requires that a study area identified as a blighted area contain a "substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property ".

The *second prong* of Alternative One's test is that the area must be one in "which two or more of the following factors are present".

a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;
b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;
c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
d) Unsanitary or unsafe conditions;
e) Deterioration of site or other improvements;
f) Inadequate and outdated building density patterns;
g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;
h) Tax or special assessment delinquency exceeding the fair value of the land;
i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;
j) Incidence of crime in the area higher than in the remainder of the county or municipality;
k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;
l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;
m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
n) Governmentally owned property with adverse environmental conditions caused by a public or private entity.

These are identical to the fourteen criteria introduced on pages 7-8 in this Report.

4.2. Alternative Two

The Redevelopment Act also allows that a blighted area may be "any area in which at least one of the factors identified in paragraphs (a) through (n) of Section 163.40(8), F.S. are present and all taxing authorities (as such term is defined in the Redevelopment Act) subject to Section 163.387(2)(a), F.S. agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted. *See* Section 163.340(8), F.S.

4.3. Assessment of "Substantial Deterioration"

The Redevelopment Act provides little specific criteria or guidance in Section 163.340(8), F.S. regarding the definition or attributes of deteriorating structures other than that implied in the Redevelopment Act which focuses on a series of indicators that in the aggregate are assumed to lead to economic, physical or social distress. In the present case, only a few buildings exist on over 2,800 parcels. The few residential buildings are largely of acceptable physical condition, but many of the commercial buildings are functionally deteriorated and rendered functionally and physically obsolete by the constraints of site, structure placement, access and residential platting adapted to commercial use. Whatever their apparent physical condition, such condition should not be construed as a measure of their useful life.

Further, the infrastructure upon which the long-term sustainability of the sub-areas depends is deficient, absent, or literally deteriorated beyond a level that justifies repair or maintenance. The *overall* conditions in the Redevelopment Study Area and within each respective neighborhood sub-area are such that they combine to create a context of functional and physical deterioration which is conducive to economic, physical and social distress.

In the context of assessing substantial deterioration under the Redevelopment Act, we believe the term "structures" reasonably includes not only the few buildings in the area but the infrastructure built or constructed decades ago and now incapable of supporting substantial development in the future. The conditions and circumstances documented in this Report and readily observable in the Redevelopment Study Area evidence a "substantial number of deteriorated, or deteriorating structures" leading to economic distress that, in their current condition, are certainly capable of endangering life and property if not substantially modified, retrofitted, repaired, rebuilt, or redeveloped entirely.

4.4. Blight Factors Present in the Redevelopment Study Area

Of the fourteen conditions indicative of blight listed in the Redevelopment Act, our analysis indicates that at least seven such conditions exist in the Redevelopment Study Area and are retarding its immediate and longer term social, economic, and physical development. Alternative One requires that at least *two* criteria be satisfied. Alternative Two requires that only *one* criterion be satisfied. Below is a summary of the criteria that apply to the Redevelopment Study Area.

Predominance of defective or inadequate street layout. (Section 163.340(8)a, F.S.). The totality of the Redevelopment Study Area is comprised of a road grid that falls well below current standards and requires substantial budgetary commitment to maintain and/or upgrade over time. Indeed, the road grid has deteriorated beyond a level that justifies its repair.

Width, depth of bed, and composition of materials no longer satisfy road design standards. The deteriorated conditions of the road grid are visibly evident. Their current state of disrepair and deterioration discourage investment in the neighborhood because the context is not favorable to long-term ownership of property.

The absence of satisfactory internal connections forces local traffic onto the perimeter roads, which adds unnecessary and potentially dangerous trips to these road segments. The perimeter arterials are not yet at capacity but the level of service does not consider how conditions might change should the area be developed to its allowable intensity. At least one major arterial already functions at LOS D. Though improvements are contemplated for these arterials, the funds have not been committed to budgets or plans.

Localized ponding is known to occur in certain neighborhoods within the study area. It remains unclear if the poor drainage occurs as the result of inadequate controls or poor execution of the canals and spillways that would otherwise be allowed. Regardless of its origin, periodic ponding is in need of correction and such intervention is frequently through some kind of public action or vehicle. Such drainage solutions are expensive and usually occur in conjunction with road (re)construction.

The absence of sidewalks is not only a safety issue but further evidence of inadequate transportation. The condition of the existing road grid precludes the provision of sidewalks without costly reconstruction. The lack of sidewalks raises serious safety issues for pedestrians.

Aggregate assessed values. (Section 163.340(8), F.S.). The Redevelopment Study Area remains virtually undeveloped or unimproved after 40 years despite its proximity to major shopping and commercial centers that are highly dependent upon nearby residential development. In effect, the Redevelopment Study Area is something of an infill development location that has been overlooked because of its stressful social, economic, and physical deterioration.

The economic deterioration is reflected in the property's observable underutilization and the relatively stagnant property values estimated for the area. Even as Charlotte County has increased its assessed valuations by 41% in the five year period (1998, 1999, 2000, 2000, 2002) ending in 2002, a substantial number of the properties in the Redevelopment Study Area have failed to show any appreciable increase, resulting in an overall increase in assessed valuations materially below the rate achieved at the County level. At the County's rate of growth, there is a reasonable expectation that rates of growth should be similar, on the average, across all unincorporated areas capable of supporting development.

Approximately 760 parcels have remained stable or declined in value over the period examined in this analysis. The loss of value, while primarily in a single neighborhood sub-area, extends across the entire Redevelopment Study Area and includes both residential and commercial parcels. The aggregate assessed values have failed to show any appreciative increase over the past five years. The absence of appreciable increases in property values places some financial stress on the remainder of the county to absorb the burdens of serving or improving the area.

Faulty layout in relation to size, adequacy, accessibility and usefulness. (Chapter 163.340(8)c F.S.). The Redevelopment Study Area is not an area of open land easily reconfigured to other purposes or activities. The intensity of plats, their size and the character or condition of existing structures impart a distinctly deficient pattern of development that precludes sound standards, design, and overall sanitary and safe conditions. These development patterns and conditions will only be reinforced over time if not aggressively altered.

As now planned, the area's zoning and platting could potentially yield as many as 4,900 units of single and multi-family housing with a minimum density of 3.5 units to the acre. The future land use map, however, calls for fewer units and lower densities overall as the result of some 100 acres that have been consigned to parks and

recreation. The divergence of current zoning and future planning requirements attests to the inadequacy of the existing plats to accommodate preferred design and service demands.

The commercial lots also suffer from inadequacies as a result of their size. In their case, they have depth and width limitations that force an increased number of ingress and ingress points on major roads. While newer structures appear to have conformed with design standards, the typical lot dimensions, in conjunction with immediate proximity to residential areas, preclude adequate space for landscaping or other treatments that might buffer these residential zones. The gross number of lots is likely disproportionate to the number of users that would consider acquiring such lots for their intended purposes. In today's competitive environment, contemporary development practices favor larger sites to vary and mix uses and activities. Although each non-residential site may be buildable, in the aggregate the commercial lots are largely economically dysfunctional or deteriorated because they simply do not meet contemporary design and investor requirements.

Unsanitary or unsafe conditions. (Section 163.340(8)d, F.S.). Septic systems, however well they are regulated, are not viewed favorably by regulators, health officials or users. Recognized as a matter of compelling public interest because of their health hazards, staff reports that the State of Florida encouraged Charlotte County in 1998 to take affirmative action in the *Comprehensive Plan* to outline a course of action that would ultimately rid the County of all septic systems.

Left to be monitored and maintained by each user, septic systems frequently fail bringing the risks of infiltration to water supplied by wells and posing difficulties for mosquito control. In areas such as the Redevelopment Study Area that are known to be flood prone or suffer from periodic ponding, septic systems under perform increasing the known health risks. All or most of the existing homes are on septic systems now. There are no plans to extend sewer services into the Redevelopment Study Area at present so future development will also depend on antiquated septic systems for sanitation. In any case, at the allowed densities identified in the future land use map, the prospect of a major community served by septic systems would be considered unacceptable by today's stringent development standards. The impact of septic systems has been particularly noticeable on the siting of the area's commercial properties. The need for adequate sized septic fields has at least contributed to the pattern of small and divided lots intended to accommodate individual systems.

Central water could be made available to the properties that comprise the study area by a series of main lines that serve the region. Nonetheless, there are no distribution lines to carry that water to individual residential and commercial sites necessitating, for the most part, that water be supplied by well. Not unlike individual septic systems, wells are dependent upon individual maintenance procedures. Centralized public water supplies are the preferred means of providing potable water because these systems can be continuously monitored for quality by trained operators and technicians. Again, like septic systems, given the scale of development anticipated the in Redevelopment Study Area individual wells absolutely would be an unaccepted solution in the context of current codes.

The sum of these concerns is that avoidance of concentrated use of wells and septic systems is highly desirable from a public policy standpoint based on objective criteria associated with health, safety and welfare considerations. The replacement and removal of individual wells and septic systems is a matter of paramount public concern regarding public health, safety and welfare.

Insufficient sidewalks pose an immediately identifiable problem within both the neighborhoods that comprise the study area and along the perimeter arterials. While accidents will occur, whatever safeguards are put in place, clearly having sidewalks for pedestrians on which to walk and a visible pedestrian-designated space wherein motorists are alert and vigilant, would diminish the number of accidents that might involve pedestrians. Left unchecked, the frequency of accidents will most likely continue to escalate.

Because the three neighborhood sub-areas are not connected, the existing grid forces local traffic onto the perimeter arterials. Not only is capacity diminished, the unnecessary loading for local travel subjects more cars to the potential of accidents. Today's contemporary planning approaches recognize the need to capture internal trips as a means of achieving neighborhood safety.

Finally, while not a major criminal offense, officials have expressed concern about the repeated dumping and disposal of trash and household goods throughout the study area. The accumulation of trash, by estimates of County officials, could affect as many as 25% of the undeveloped and vacant parcels. Dumping is more than criminal mischief. Such illegal activity creates not only visual blight but it suggests health and safety risks for children or others exposed to the discarded items as well as vermin that might breed in the area itself.

Deterioration off site or other improvements. (Section 163.340(8)e, F.S.). As noted in the analysis section of this Report, most *buildings* within the study area are *physically* sound overall. The primary concern is deterioration in context and setting which will discourage long-term sustainability and lead to a reduction in useful life more rapidly than would be the case in a stable residential and commercial environment.

The context and setting is defined in large part by the quality of the road grid. Among the most visible structural improvements within the Redevelopment Study Area, the road grid has deteriorated to a level that no longer justifies simple repairs but rather requires complete reconstruction to meet contemporary standards for comparable local roads.

As for many of the commercial improvements, many simply do not meet current demands of the marketplace. Although they may not be deteriorated from a physical standpoint, many are nearing, or have reached, the end of their useful economic life and are functionally deteriorated. Parking and access conditions are clearly deficient.

Inadequate and outdated building patterns. (Section 163.340(8)f, F.S.). Conditions of inadequate and outdated building patterns are literally self-evident based on the most casual inspection of the study area. The dichotomy between current zoning and furure anticpated land uses directly speaks to the community's concerns with the

intensity of potential development conceptually possible within the dimensions of the existing plats.

Virtually every contemporary deisgn or regulatory practice is violated by conditions in the Redevelopment Study Area. Among the deficiencies that speak to inadequate and outdated building patterns are the following:

- Planned density relative to the size and adequacy of platted lots
- Absence or deterioration of most infrastructure
- Sub standard materials or specfications related to that infrastructure which is in servcie
- Poor connectivity among neghborhoods prompting the use of regional arterials for local travel
- No sidewalks
- No designated public spaces save those that have been contributed recently by the County
- No provisions for schools
- Unrestricted and divided ingress and egress among numerous commercial properties
- Commercial intrusion into residential areas stemming from inadequate lot depth, poor design contols, and the asbence of transtional zones that preclude opportunities to insert buffering.

Diversity of Ownership. (Section 163.340(8)m, F.S.). Arguably, the study area's diverse ownership is among its most onerous and fractious problems. Given the number of owners, the non-resident status of these owners, the pattern of small lots, and the demands of contemporary market or building requirements, it will be difficult for private interests to acquire sufficient property to alter the established patterns of development and use. Aggressive intervention will be needed to assemble parcels or holdings adequate in size such that the larger community is evidently committed to changing the study area's social, physical and economic character.

5. Conclusion and Satisfaction of Alternative Tests

The Redevelopment Study Area is one in which a substantial number of deteriorated structures exist and these are materially injurious to the both the area's and community's overall sustainability. These deteriorated structures and conditions are such they *"are leading to economic distress or endanger life or property...."* as described in the Redevelopment Act.

Such evidence of deteriorated conditions, together with cited and inferred data that identifies at least seven dimensions of social, physical and economic hardship associated with deteriorated conditions and broad decline, demonstrate a substantial record of blight existing throughout the Redevelopment Study Area. Because Charlotte County alone is the single government to be affected by the establishment of a CRA and the future commitment of tax increment revenue that results from the creation of such a CRA, it is our conclusion that the County need satisfy only one of the multiple criteria that would otherwise stipulate an area to be a blighted area. Our review indicates that conditions are so poor in the Redevelopment Study Area that

either alternative method of finding of blight is demonstrated several times over, with many of the earmarks of blight readily apparent in the Redevelopment Study Area.

The information summarized in this Report is adequate for Charlotte County to acknowledge the described conditions and to adopt a resolution that declares the rehabilitation, redevelopment, and conservation of the Redevelopment Study Area is in the interest of public health, safety, morals, and welfare.

6. Next Steps: Community Redevelopment Plan and Trust Fund

Identifying a specific community redevelopment area, determining that such area is a blighted area as required by the Redevelopment Act and establishing a community redevelopment agency are the next logical steps Charlotte County faces. Assuming these actions take place, creating a community redevelopment plan for the West Murdock Study Area is the next step in the redevelopment implementation protocol. A community redevelopment plan cannot be initiated until the County Commission has formally acknowledged the conditions of blight described herein.

The community redevelopment plan must conform to a variety of criteria established in Section 163.360, F.S. Further, the community redevelopment plan must contain certain elements articulated in Section 163.362, F.S. Collectively, it is the purpose of such elements to serve as a legal framework for activating strategies which would contain these blighted conditions, remove such conditions and promote development and or redevelopment that facilitates sound, sustainable growth in the West Murdock area of Charlotte County.

Because of the relatively large area, the diversity of ownership and the obvious necessity for the County or the community redevelopment agency to acquire the lands within the West Murdock Study Area, any future community redevelopment plan needs to be flexible and capable of facilitating an evolving redevelopment vision. The community redevelopment plan need not be a capital improvement plan in the typical sense, but rather can be a framework for creating and implementing a redevelopment strategy that complies with the dictates of the Redevelopment Act. The development of a community redevelopment plan must not only meet the legal requirements of the Redevelopment Act, but foster and facilitate the attraction of capable and cooperative redevelopment partners. Accordingly, a community redevelopment plan that contemplates the attraction of redevelopment partners and recognizes the practical challenges of redevelopment (e.g. the business risks of ownership consolidation, negotiations with multiple qualified redevelopment partners which will demand flexibility, and the need to leverage available tax increment financing capabilities) can be a particularly powerful tool for the County.

The process for considering and adopting a community redevelopment plan also requires extraordinary mailed notice to all taxing authorities as well as published notice. As well, prior to consideration of a community redevelopment plan, the community redevelopment agency must submit the plan to the local planning agency of the County for review and recommendations as to its conformity with the comprehensive plan for the development of the County as a whole. This analysis by the local planning agency is a relatively narrow analysis, but is a required intermediate step. Upon submission of the community redevelopment plan to the

County and each taxing authority, a public hearing concerning the redevelopment plan is also required. Following such public hearing and a determination by the County approving the plan and confirming various statutorily required findings, the community redevelopment plan may then be adopted.

Following the adoption of the community redevelopment plan, a community redevelopment trust fund is required to be established by County ordinance. Funds allocated to and deposited into this fund shall be used by the community redevelopment agency to finance community redevelopment identified in the community redevelopment plan.

Steven G. Lindorff

Larson, Lisa

From: Hamby, Tom
Sent: Wednesday, August 31, 2005 9:28 AM
To: Camechis, Karen; Larson, Lisa
Subject: Fw: House Select Committee to Protect Private Property Rights

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This message was sent remotely.

-----Original Message-----
From: Steve Lindorff <SLindorff@jaxbchfl.net>
To: Hamby, Tom <Tom.Hamby@myfloridahouse.gov>
CC: Sheri Coven (fapa@floridaplanning.org) <fapa@floridaplanning.org>
Sent: Wed Aug 31 09:12:37 2005
Subject: House Select Committee to Protect Private Property Rights

Mr. Hamby,

Thank you for allowing the members of the Florida Chapter of the American Planning Association to provide input to the deliberations of the House Select Committee to Protect Private Property Rights. These are my own thoughts and opinions, and are not necessarily those of my employer, the City of Jacksonville Beach.

I am responding from the perspective of a local government official who has been actively engaged in using Florida's community redevelopment and eminent domain statutes to address major redevelopment issues in Jacksonville Beach's two community redevelopment districts. In our Downtown district, the concerns have been primarily related to infrastructure. We have been quite successful in using tax increment financing to address those problems. In point of fact, 10-12 years ago, our City Council voted specifically to not use its power of eminent domain in the Downtown redevelopment district.

On the other hand, the City of Jacksonville Beach has used eminent domain on four occasions to assemble platted, but unimproved lots as one of the tools to implement our South Beach Community Redevelopment Plan. Jacksonville Beach elected some 20 years ago to utilize the provisions of Chapter 163, Part III to address the diversity of ownership and blighting conditions attendant to an area of our City with seven antiquated subdivision plats.

This area was originally developed into residential lots in the 1920's and 1930's before there were any standards for installing roads and utilities. Instead of waiting for these nonconforming lots of record to be developed in a piecemeal fashion and then be called upon to "fix" the problems of caused by a substandard road system, utilities, and poor drainage after the fact; the City decided to conduct a blight study to see if the area met the statutory

criteria to be declared a Chapter 163 community redevelopment district. This was done; and now 20 years later, we have essentially completed the implementation of our plan for the redevelopment of the area.

Our "public purpose" for assembling the land via eminent domain has been reviewed and upheld by the district and appellate courts on numerous occasions since the adoption of the redevelopment plan in 1987. In each case, the City and its Community Redevelopment Agency had entered into agreements with private entities to develop a project in accordance with the approved redevelopment plan once the land was assembled. In every case, we were able to show that the reason for assembling the land was to cure of the blight and blighting influences that were present as a result of the development of the land into small lot residential plats without providing any of the now-expected, modern infrastructure improvements. There is no doubt that the projects have yielded a significant economic benefit to the City of Jacksonville Beach, but as we were able to show the courts, this benefit was a "product" of the redevelopment process; not the reason for it. I believe that this is in keeping with Florida Legislature's intent in adopting Chapter 163, Part III so many years ago.

With this background, I offer the following thoughts directly relating to your five questions:

1. Between the provisions of Chapter 163, Part III (community redevelopment), Chapter 70 (Bert Harris), and Chapters 73 and 74 (eminent domain) -- not to mention the provisions of the U.S. and Florida Constitution governing the taking of private property for public use -- I believe that private property rights are extremely well protected in our state. As I read the majority opinion in Kelo, it is apparent that the U.S. Supreme Court was basically reaffirming many years of jurisprudence in this area.

2. I do not believe that there are any provisions in Florida law that would allow the use of eminent domain solely for the purpose of "economic development." As many communities have shown, the process of redevelopment can result in significant economic benefits through the kinds of public-private partnerships that the laws do allow governmental bodies to enter into to help carry out its adopted plans. I do not find any basis in any of the laws listed in #1 above that would authorize the taking of property from one person to simply sell or give to another solely for the purpose of "economic development."

3. Under existing Florida law, all of the different benefits listed (jobs, expanded tax base, efficient use of property, etc) would have to be attained as a by-product of accomplishing a statutory purpose.

4. The elected leaders of the City of Jacksonville Beach voted to remove eminent domain from the toolkit of methods to carry out its redevelopment program in the Downtown district. At the same time, they supported the use of eminent domain as one of the primary tools for implementing its plan for the South Beach district. I think this clearly shows that local officials can and will be extremely very cautious in invoking of this enormous power.

In our Downtown district, removing the threat of condemnation from property created an atmosphere where the landowners and leaseholders felt comfortable in improving their property without fear of having it taken for a redevelopment project. In the South Beach district, where the City was dealing with 1,100 platted, but unimproved lots (some of which are 25' x 133' in size) with over 300 different owners; the use of eminent domain was the only practical way that the City could have realized its plan for the area.

It should be noted that the approved plan for the South Beach district carefully recognized and preserved the two areas that were partially developed with homes. The implementation of the plan has also enabled many upgrades to the infrastructure serving those homes. Not one home was taken by eminent domain. A single existing home was acquired through negotiation to relocate a road, but that owner bought a new lot and built a home in the same block.

As we focus on better "managing" of our Growth Management responsibilities, I think we need to very cautious about making local government's job harder by reducing or restricting our ability to use any of the tools that are available under the law or through our home rule authority.

5. Although I think that the law already does so, I would not have a problem if the Legislature felt it were necessary to specifically limit the use of eminent domain for the sole purpose of economic development as long as it does not prohibit or limit the possibility of obtaining economic benefits for the public at large that might occur as a result of or as a by-product of the use of eminent domain to assemble land in an approved community redevelopment area under the provisions of Ch. 163, Part III.

Again, thank you for the opportunity to provide these thoughts for consideration by the Select Committee.

Steven G. Lindorff, AICP

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Vince Cautero, Executive Committee Member, Florida Chapter of the American Planning Association

Hamby, Tom

From: Vince Cautero [vcautero@cityofmarcoisland.com]
Sent: Thursday, August 25, 2005 2:08 PM
To: Hamby, Tom
Cc: fapa@floridaplanning.org
Subject: House Select Committee on private property rights

Mr. Hamby,

Sheri Coven asked that our Executive Committee members of FAPA address our comments to you directly. My answers to your questions are found below.

1. Adequacy - I believe the laws governing the protection of private property rights are adequate.

2. status of law regarding takings for economic development - I believe it is too early to tell if there will be fallout from the Kelo case. I have heard at least one elected official in St. Petersburg state that her city is experiencing difficulty already due to the case.

3. Kelo case - it is too early to tell if this case will impact Florida communities. However, I believe there are a number of communities that are reacting by having staff draft ordinances that prohibit their local government from working with developers or not for profits to develop properties for economic development purposes.

4. home rule power - I believe the powers are adequate.

5. CRA act - I have no comment on this issue since I haven't worked on a CRA in over five years.

Regards,

Vince Cautero
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S. William Moore
Brigham Moore Law Firm

From: S. William Moore, Esquire

To: James F. Garner, Esquire

Date: August 26, 2005

1. Adequacy of Property Rights Protection Currently

Florida laws generally reflect our State's traditional request for private property. There are a few glaring gaps in that protection. For example, businesses may be destroyed by whole takings with no compensation for the damages created (§ 73.071 (3)(b)); some quasi-governmental authorities with eminent domain power have unwarranted insulations against owner's business damage claims in condemnations (§ 73.071 (3)(b)); not every condemnee is entitled to relocation/moving expenses he or she suffers from a condemnation; the Bert Harris Act needs clarifying and strengthening; the ability of a governmental agency to target an area for condemnation, but then delay (sometimes for decades) while the targeted properties are picked off by "voluntary" acquisitions may be the most unfair situation of all in the State. Finally, I am concerned about the ability of local Community Redevelopment Agencies to authorize condemnation of private property under the guise of "slum or blight" but in reality for economic development. That is wrong. Kelo or no Kelo

2. Current Status of Takings for Economic Development

Please see last point above. My view is that our private enterprise system works just fine without the heavy hand of government tipping the scales with the power of condemnation. If the taking is to rid real blight, fine; but not simply to bring in new business or upscale housing.

3. Impact of Kelo

I am worried about the misuse of Chapter 163, particularly in light of possible unwarranted expansions of Kelo by over-eager local government-developer partners. See attached article re: Daytona Beach.

4. Home Rule Powers

Cities and Counties should not be allowed to do what CRA's can't, namely condemn just for economic development. Artificial declaration of public purpose supported by phony blight studies, should not be a vehicle for the abuse of local home rule powers.

5. The CRA's (Fla. Stat. 163) Scope

The scope and protections in 163 are too fuzzy and open to abuse. Particularly the definition of slum/blight need tightening. See for example the Murdock debacle in Charlotte County, currently on appeal. It's wrong.

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Daytona businesses must sell property

Ludmilla Lelis
Sentinel Staff Writer

August 20, 2005

DAYTONA BEACH -- City leaders can finally realize a decades-long dream of replacing the beachside Boardwalk's aging arcades, restaurants and gift shops with a new retail complex to lure more upscale tourism.

A court ruling Friday allows Daytona Beach to force the sale of three Boardwalk businesses to make way for a $120 million redevelopment project that would be the last major piece in the city's remake of its historic oceanside.

Circuit Judge John W. Watson III gave the city approval to seize the three businesses in a ruling that echoes a landmark U.S. Supreme Court decision that gave cities the right to condemn private property in favor of other private development.

Watson ruled that Daytona Beach can force the sale of the holdout businesses because the redevelopment serves a public purpose by getting rid of crime and deteriorating buildings in a blighted neighborhood.

Scott Cichon, the attorney representing the city, said the ruling will help make Daytona Beach a better place.

"The progress of the city can move forward," he said.

But one Boardwalk businessman is upset about the ruling, saying that having government taking private land and giving it to a private developer is un-American.

"You don't own anything any more," said Darrell Hunter, whose business, Capt. Darrell's Oyster Bar and Restaurant, has been condemned. "The government owns it and can do whatever they want with it.

"I feel very damn bitter. I don't think it's right."

According to the judge's order, Daytona Beach can officially take title to the properties with an $8.85 million down payment. Cichon said that transfer would happen within the next 20 days.

It will be up to a 12-person jury at a future trial to decide the final sale price for Capt. Darrell's bar, the Midway Fun Center and the Fun Fair go-cart track. H. Adams Weaver, Alex Ford and Mark Natirboff, attorneys for those Boardwalk businesses, said they are considering an appeal.

Daytona Beach isn't the only place in Central Florida where such battles are being fought. In the small Orange County enclave of Home Acres west of Winter Park, homeowners have held out against a

developer's efforts to build a town center with retail stores, residences, offices and parks. The developer has lobbied for Winter Park to annex the area and for Orange County to create a community-redevelopment agency, which could have the power to condemn holdout properties for a redevelopment.

The three Daytona Beach businesses in Friday's condemnation order are the last parcels needed for the massive redevelopment planned by California developer Bill Geary of Carlsberg Management Co.

Geary plans to build a pair of 23-story hotel-condominium towers, new retail stores and restaurants to replace the 60-year-old Boardwalk and its line of outdated arcades and fast-food joints.

The developer has already bought, or has long-term leases, for the other land needed for the project. To help him complete the redevelopment, city officials agreed to use Daytona Beach's condemnation power to force the sale of the three holdouts.

At a six-day trial in June, those businesses tried to argue against a 24-year-old blight study that Daytona Beach used to justify the condemnation.

That 1981 study found that the Main Street area has deteriorating buildings, high crime, antiquated utilities, outdated fire hydrants and property tax values that lag behind the rest of the city. Armed with that study, the City Commission agreed to redevelop the Main Street district, which stretches from International Speedway Boulevard to Oakridge Boulevard and includes the Boardwalk.

Since then, that area has seen the construction and expansion of what is now a Hilton resort, numerous beautification projects, and construction of the Ocean Center convention arena and the Ocean Walk Shoppes and condominium complex.

The judge wrote that the city can still rely on the blight study for the current Boardwalk condemnation. "The fact that the original blight study in the instant case is 24 years old does not convince the court that its findings are outdated," Watson wrote. "The City must be allowed a significant period of time to eliminate the blighted conditions on a gradual, systematic basis."

The judge also noted, as the high court did in its landmark decision, that government has already used its power of eminent domain beyond the traditional uses of condemning private land for roads, schools or other public uses.

Cichon said the Supreme Court ruling did affect the Daytona Beach case by reaffirming that what the city wants to do is constitutional.

"The public has to trust that government entities will make the right decision for the overall city," Cichon said. "Government entities don't make these decisions easily."

Ludmilla Lelis can be reached at llelis@orlandosentinel.com or 386-253-0964.

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Florida Association of Counties

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HOUSE SELECT COMMITTEE ON PRIVATE PROPERTY RIGHTS INITIAL COMMENTS FROM THE FLORIDA ASSOCIATION OF COUNTIES, INC. AS SOLICITED FROM COMMITTEE STAFF

September 2, 2005

INTRODUCTION

After the United States Supreme Court issued its opinion in Kelo v. City of New London, the Speaker of the Florida House of Representatives created a select committee on private property rights. The staff of that committee has asked the Florida Association of Counties to comment on the following issues:

1. The adequacy of current protections of private property rights under Florida law.

2. The current status of Florida law with respect to government takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

3. The impact, if any, of the Kelo decision on the application or exercise of eminent domain law in Florida with respect to takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

4. The home rule power of cities and charter counties to exercise the power of eminent domain generally.

5. Whether Florida's Community Redevelopment Act is sufficiently narrow in scope as it relates to the exercise of eminent domain.

The Florida Association of Counties is providing these written responses on the above - articulated issues, as requested by committee staff. The Florida Association of Counties will be analyzing its policy positions on the issues that have been raised by the committee staff and on the Kelo decision itself during early October and early December of this year. The Florida Association of Counties is committed to upholding the protections for private property rights that are granted to Floridians

through the United States and Florida Constitutions. Those protections have been enhanced with many legislative enactments through the years and those protections have been strictly construed by the courts in Florida. The Florida Association of Counties is committed to following and preserving these procedural and substantive legislative and judicial protections as well. At the same time, the counties are committed to preserving their capacity to govern at the local level – for charter counties, through the home rule powers that they derive directly from the Florida Constitution, and for non-charter counties, through the home rule powers that they have been granted by the Legislature. See Art. VIII, sec. 1 (f), (g); see also, sec. 125.01(1), Fla. Stat. These two goals – local county governance and preservation of private property rights – are not in conflict under current Florida law.

The Florida Association of Counties will seek the opportunity, if needed, to supplement these written comments with any further analysis that may be required to articulate the specific policy positions of the Association. It is already known that additional comments will be brought forward on the fifth issue raised by the committee staff. In addition, the Association is willing to provide additional information, if needed, to the membership and staff as the committee's work continues.

ANALYSIS AND COMMENT ON ISSUES

(1) The adequacy of current protections of private property rights under Florida law.

For purposes of the written comments to this first issue, the Florida Association of Counties will address the protections that exist for private property rights in Florida in the context of eminent domain. The protections from other governmental actions, including but not limited to, the regulation of property, inverse condemnations and Bert Harris Act proceedings, are beyond the scope of the response for now. If comment is desired on those issues, the Florida Association of Counties can provide additional and supplemental analysis.

The state of Florida provides broad and significant protections for private property rights. Even attorneys who practice in the area of eminent domain, most of whom represent private property owners, have commented that Florida's strong commitment to private property rights and the compensation that is paid when property is taken pre-date the 20th century. See Florida Eminent Domain Practice and Procedure, 1-3 (2003 ed.). In fact, the Supreme Court in Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950), stated that a Florida property owner has not received "full compensation" if he must pay, out of his own pocket, the expenses of proving the fair market value of his property. See id. at 604-05. No neighboring southern state recognizes this truth and neither does the federal government. See Florida Eminent Domain Practice and Procedure, 1-3 (2003 ed.).

Eminent domain is the fundamental power of the sovereign to take private property for a public use without the property owner's consent. The power is one of the

most onerous proceedings known to the law. See Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483 (Fla. 1947)(prohibiting the taking of private land in a remote area for hunting, fishing, and other recreational pursuits). Therefore, the United States and Florida Constitutions contain express and direct provisions that safeguard private property rights. Additionally, the Florida courts have long-recognized that their duty is to strictly construe the power of eminent domain. See Baycol v. Downtown Development Authority, 315 So. 2d 451, 455 (Fla. 1975)(refusing to find public purpose in the condemnation of private property to be used to provide a parking facility for private retail businesses yet to be constructed). And the duty is on the governmental authority to establish a public purpose and reasonable necessity for the taking. See id.

Constitutional Protections

The Fifth Amendment to the United States Constitution prohibits government from taking private property for public use without just compensation. Furthermore, the Fourteenth Amendment prohibits governments from taking private property without due process of law.

Similarly, the Florida Constitution mandates that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, sec. 9, Fla. Const. The Florida Constitution further mandates that "[n]o 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." Art. X, sec. 6(a), Fla. Const. In addition, the law requires the county to prove that the property being taken is reasonably necessary for the stated purpose. See sec. 73.021(1), Fla. Stat. The burden is on the governmental authority to show both elements. See Baycol, 315 So. 2d at 455.

The general belief is that the Florida Constitution, the statutory implementation and the judicial interpretation are more restrictive on condemning authorities than the federal constitution. See Florida Eminent Domain Practice and Procedure, 16-3 (2003 ed.). For example, the United States Constitution requires that only "just compensation" be paid to the property owner for the taking; the Florida Constitution guarantees that a broader "full compensation" be paid. Florida law also requires that the condemning authority notify property owners, before litigation, that they have certain statutory rights to attorneys' fees and costs; no such requirement exists in the federal law. See sec. 73.0511, Fla. Stat.

- **Public Purpose Requirement**

No public body in Florida may use its governmental authority and its public funds to acquire lands, whether by negotiated purchase or by the power of eminent domain when the only purpose of the acquisition is to make the properties available for private uses. See State v. Miami Beach Redevelopment Agency, 392 So. 2d 875, 886 (Fla. 1980). Even when the proposed project would be of benefit to the growth, progress, development, and prosperity of the community, if the power of eminent

domain is used for a private purpose, the constitution is violated. For example, in State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952), the Supreme Court stated quite clearly the following:

> Every new business, manufacturing plant, or industrial plant, . . . or other establishments which could be named without end, may be of material benefit to the growth, progress, development and prosperity of a municipality. But these considerations do not make the acquisition of land and the erection of buildings for such purposes, a municipal purpose. . . . If private property may be purchased by the municipality for the use and benefit of a private corporation, then it may be acquired by the great power of eminent domain for such a purpose.

Id. at 784-85; see also, Baycol, Inc. v. Downtown Development Authority, 315 So. 2d 451 (Fla.1975)(prohibiting the development authority from taking private property for the purpose of allowing private retail development in air space above a parking garage yet to be constructed). The public purpose requirement is

> the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and dies; it must be jealously preserved within the reasonable limits prescribed by law.

Baycol, 315 So. 2d at 455. The Supreme Court later declared that the term "public purpose" is not the same as "public use." See Dept. of Transportation v. Fortune Federal Savings & Loan Assoc., 532 So. 2d 1267, 1270 (Fla. 1988). "Public purpose" does not mean just that the land is used for a specific public function like a road or a right-of-way but that the concept of public purpose must be read to include purposes that benefit the public in a "tangible, foreseeable way." See id.

However, an private benefit that is incidental to the public purpose does not eliminate an otherwise predominate public purpose. "The mere fact that some one engaged in private business for private gain will be benefited by every public improvement undertaken by the government or a governmental agency, should not and does not deprive such improvement of its public character or detract from the fact that it primarily serves a public purpose." State v. Board of Control, 66 So. 2d 209, 210-11 (Fla. 1953).

The Florida Legislature has delegated the general power of eminent domain to counties through the enactment of Chapter 127, Florida Statutes. Section 127.01(1)(a), Florida Statutes, states, in pertinent part, "Each county of the state is delegated authority to exercise the right and power of eminent domain; that is, the right to appropriate property, except state or federal, for any county purpose." Id. If an assertion by county commissioners of right of eminent domain is admitted or proven to be in fact for a private purpose and not for a county purpose, there is no right to exercise the authority, and the action taken therein may be enjoined in appropriate proceedings by a proper complainant. See Isleworth Grove Co. v. Orange County, 84 So. 83 (Fla. 1920).

There are no legislative statutes and no reported appellate decisions in Florida that address the issue of whether a county can take property for the purpose of economic development. Accordingly, the issue of a county being able to take private property for the purpose of economic development -- outside the context of the Community Redevelopment Act which is discussed below -- hinges on two inquiries: (1) whether "economic development" is a public purpose and then (2) whether "economic development" is a county purpose.

Neither the Florida Legislature nor a local government can declare a private purpose to be a public one and by that declaration circumvent the constitution. "There are certain limits beyond which the Legislature cannot go. It cannot authorize a municipality [or a county] to spend public money or [condemn property]. . ., directly or indirectly, . . . for a purpose which is not public. A legislative determination may be persuasive, but it is not conclusive." State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

- **Reasonable Necessity Requirement**

In addition to showing public purpose (and potentially county purpose), a condemning authority must also show that the property being taken is reasonably necessary for the use for which it is to be acquired. Proof of necessity is of a condition precedent to the valid exercise of the power of eminent domain. See Canal Authority v. Miller, 243 So. 2d 131, 134 (Fla. 1970). The Florida courts have developed a two-tier model to be observed when determining whether a condemning authority has met its burden of proving reasonable necessity for the taking. The condemnor must present, to the court, proof of the necessity. See City of Jacksonville v. Griffin, 346 So. 2d 988, 990 (Fla. 1977).

The condemning authority must consider several factors in establishing necessity: (1) availability of an alternate route; (2) cost; (3) environmental factors; (4) long-range planning; and (5) safety considerations. See Florida Power Corp. v. Gulf Ridge Council, 385 So. 2d 1155 (Fla. 2d DCA 1980). A property owner challenging the reasonable necessity of the property can generally raise three issues: that the condemnor is acting without authority or in an incorrect manner; that the condemnor is acting in bad faith; or that the condemnor is abusing its discretion. These are alternative grounds; any one is sufficient to prevail. See City of Miami Beach v. Broida, 362 So. 2d 19 (Fla. 3d DCA 1978).

- **Full Compensation Requirement**

Not only have the Florida courts strictly construed the public purpose and reasonable necessity requirements before property can be taken by eminent domain but the courts have broadly interpreted the constitutional requirement that "full compensation" be paid to the property owner. "Full compensation" is determined assuming that the condemnation did not occur and the owners of the property voluntarily sold the property to a willing buyer. Generally, the value measure of the property is fair market value. The spirit of this constitutional guarantee is that the property owner be made whole. In addition to the value of the property being compensated to the owner (plus severance damages), the law in Florida requires that moving costs be paid, interest be paid, attorneys' fees be paid, and the costs of expert witnesses be paid. In fact, the Florida Supreme Court has declared that the concept of full compensation, as declared by the courts, may not be diminished by the Legislature. See Daniels v. State Road Dept., 170 So. 2d 846 (Fla. 1964).

Additional Statutory and Procedural Protections

- **12 Member Jury Trial**

A unique protection for private property owners also exists in Florida. The law in Florida allows a full 12 member jury in only two circumstances: (1) death penalty cases and (2) eminent domain trials. See sec. 73.071, Fla. Stat. This right bestowed to private property owners speaks to the value Florida law has historically placed on protecting the rights of those owners from the undesired taking of their property by a governmental entity. In addition to the right to a 12 member jury, the courts give preference to eminent domain cases over other civil cases on the court's docket. See sec. 73.071, Fla. Stat. Finally, where in a federal taking a request for the jury to view the property at issue is discretionary for the court; such a request, if made in Florida, must be respected. See sec. 73.071(6), Fla. Stat.

- **Other Statutory Protections for Private Property**

In Florida, the exercise of the power of eminent domain is a power that is exercised only in last resort. Not only are the realities of the constitutional protections of full compensation, public purpose, and reasonable necessity enough to encourage voluntary transfers of property – or, other plans -- but a specific statutory process has been designed to protect the property owner as well.

The procedure is technical, specific, long, and expensive. A cursory examination of the section headings for Chapters 73 and 74, Florida Statutes, which outline the procedural elements for eminent domain proceedings leads to this conclusion. Before eminent domain can be exercised, public meetings must be held at which resolutions must be adopted. Those resolutions must be adopted by the governing board of the

agency exercising the power – no attorney and no employee can make the determination to condemn private property. See sec. 73.021, Fla. Stat. The Florida Legislature has also enacted a mandatory, good faith pre-condemnation negotiation process to encourage the consensual transfer of property and to reduce litigation costs. See sec. 73.015, Fla. Stat.

(2) The current status of Florida law with respect to government takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

Florida law contains no specific constitutional or statutory section that either authorizes or prohibits the use of eminent domain for "economic development". In addition, there is no reported appellate decision in Florida that has analyzed the issue of using the power of eminent domain for "economic development" purposes. However, the general status of the law in Florida is quite clear. Eminent domain could only be validly exercised for "economic development" if (1) the "economic development" were a public purpose; if (2) the property land is reasonably necessary for the public purpose; and if (3) full compensation is paid to the property owner. These concepts have been discussed in response to issue #1. Accordingly, the focus of the comments for this issue will be more on the Community Redevelopment Act because that Act is the closest that articulated Florida law gets to specific "economic development" and "eminent domain" purposes.

When eminent domain is to further the purposes of community redevelopment under Chapter 163, Part III, Florida Statutes, the Florida Legislature has already declared that the

> prevention and elimination of slum and blight is a matter of state policy and state concern in order that the state and its counties and municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, and consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services and facilities.

Sec. 163.335(1), Fla. Stat. Furthermore, the Florida Legislature has declared that the powers, including the power of eminent domain, conferred by Chapter 163, Part III are

> for public uses and purposes for which public money may be expended and the power of eminent domain and police power exercised, and the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.

Sec. 163.335(3), Fla. Stat.

Within the context of the Community Redevelopment Act, the Supreme Court has concluded that the exercise of eminent domain in furtherance of the purposes of that Act can be constitutional. The Supreme Court in State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), concluded that the Florida Legislature's determination that projects using eminent domain to clear blighted areas and providing for ultimate disposition of substantial portions of acquired properties for use of private concerns in profit-making activities served a public purpose, while not conclusive, was presumed valid and should be upheld unless it was arbitrary or unfounded or so clearly erroneous as to be beyond power of the Legislature.

> We hold that chapter 163, Florida Statutes (1977), authorizing redevelopment projects involving expenditure of public funds, sale of public bonds, the use of eminent domain for acquisition and clearance, and substantial private and commercial uses after redevelopment, is in furtherance of a public purpose and is constitutional.

Id. at 891.

However, "the power of eminent domain cannot be used arbitrarily and unreasonably and . . . although a city 'may designate an area as a slum . . . such designation does not make it a slum.'" Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 731 (Fla. 1st DCA 2003)(quoting City of Jacksonville v. Moman, 290 So. 2d 105, 107 (Fla. 1st DCA 1974)). In fact, in Rukab, the First District Court concluded that there was no legal support for the argument that the property owner were precluded from asserting their constitutional rights within the eminent domain proceeding because they bought their property subject to the previous determination of blight. "A property owner must . . . be afforded the opportunity for a full hearing in the eminent domain action . . . and the [governmental entity] must meet the burden of showing public purpose and necessity." Id. at 733.

(3) The impact, if any, of the Kelo decision on the application or exercise of eminent domain law in Florida with respect to takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.

The Kelo v. City of New London decision concerned a City's authority to acquire private property, with the payment of full compensation, in carrying out a development plan to revitalize its economy. The Supreme Court found that the condemnation was for a public use and that is was not unconstitutional under the Fifth Amendment of the United States Constitution. The decision, however, was based on Connecticut law which authorizes the use of eminent domain for economic development purposes without a showing of additional requirements, such as "slum" and "blight."

That law (which does not exist in Florida) was judged against the standards of the United States Constitution, not the Florida Constitution. Unlike the State of Connecticut,

the Florida Constitution, as interpreted by the courts and Florida Legislature, provides greater protection of private property rights. The State of Florida authorizes the use of eminent domain for redevelopment purposes, under the Community Redevelopment Act, Ch. 163, Part III, Fla. Stat., only where there exists a substantial number of deteriorated structures, economic distress, or danger to life or property, among other requirements. For example, a local government desiring to acquire private property through the extraordinary power of eminent domain for community redevelopment must prove that the area falls within the legislative definition of slum and blight, and then only if it would serve a public purpose. Also, Florida law provides each property owner with the opportunity to challenge the designation of slum and blight in all eminent domain redevelopment lawsuits before the actual "taking" of property. The area must be proven to be "blighted" prior to a governmental entity commencing the process of taking private property for private redevelopment.

Some concern has been raised as to the fact that the United States Supreme Court deferred to the state legislative finding that economic development was a public purpose for purposes of eminent domain. This deference to legislative findings also exists in Florida and has for many, many decades. However, such deference is not a blank check and in Florida no legislative body can make by fiat that which it is not. In other words, in Florida, actual evidence would be needed to show that if a declaration were made that economic development was a public purpose before the courts would defer to the finding. (See the discussion on issue #1 related to public purpose). "[T]he legislative statement of public purpose deserves some degree of deference, [but] the ultimate question of the validity of that public purpose is a judicial question to be decided by a court of competent jurisdiction. See Dept. of Transportation v. Fortune Federal Savings & Loan Assoc., 532 so. 2d 1267, 1269 (Fla. 1988)(upholding sec. 337.27(3), Fla. Stat. (1985) which allows state agencies to condemn more property than is necessary when the state agency saves money by doing so).

(4) The home rule power of cities and charter counties to exercise the power of eminent domain generally.

The broad power of eminent domain has been given to municipalities and counties, whether charter or non-charter. In addition, whether that power originates from the 1968 changes to the Florida Constitution (i.e., "home rule") or whether that power is statutorily prescribed, the power has been granted. have and that non-charter counties with respect to eminent domain.

The Florida Constitution includes only one provision relating to the power of eminent domain, Article X, section 6, which reads as follows:

> **SECTION 6. Eminent domain.–**
>
> (a) No private property shall be taken except for a public purpose and with full compensation therefore 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 is silent as to which entities of government possess the power. However, the general belief is that the power of eminent domain is sovereign in its origins and that the power is vested in the Legislature. The Constitution does not grant the authority to use the power of eminent domain; rather, the Constitution protects private property from the exercise of eminent domain. It is also generally believed that counties, both charter and non-charter, are delegated the power of eminent domain by the Legislature. When that power is delegated, the condemning authority will be required to exercise its power in accordance with the limitations and conditions set forth in the delegation. The Supreme Court has most recently explained this analysis in City of Ocala v. Nye, 603 So. 2d 15 (Fla. 1992). The Court in Nye held that:

> The power of eminent domain is an attribute of the sovereign which is circumscribed by, rather than conferred by, constitution or statute. Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So. 2d 483 (1947). This power can only be exercised by counties and state agencies if the state delegates that power to those political subdivisions. Furthermore, "when the sovereign delegates the power [of eminent domain] to a political unit or agency a strict construction will be given against the agency asserting the power." 159 Fla. at 314, 31 So. 2d at 485. Thus, it is only through another specific legislative grant that the DOT and the counties are authorized to acquire land in its entirety in order to reduce acquisition costs.

Although the Supreme Court has clearly stated that counties exercise the power of eminent domain only because it has been statutorily delegated by the State, there is no real analysis of the issue in the existing cases and they all date back to before the 1968 home rule constitutional changes.

Regardless of the derivation of the counties' authority to condemn private property in Florida, the fact remains that the Legislature has the clear power to limit and condition that authority. In addition, the Legislature has granted counties broad powers of eminent domain through Chapter 127, Florida Statutes. The broad limitation under Chapter 127 is that no county can condemn property absent a county purpose. See sec. 127.01(1), Fla. Stat.

(5) Whether Florida's Community Redevelopment Act is sufficiently narrow in scope as it relates to the exercise of eminent domain.

Florida's Community Redevelopment Act, Ch. 163, Part III, Florida Statutes, allows municipalities and counties to exercise the powers of eminent domain to further the purposes of the Act and community redevelopment. Section 163.375(1), Florida Statutes, states:

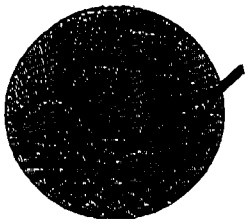
> Any county or municipality, or any community redevelopment agency pursuant to specific approval of the governing body of the county or municipality which established the agency, as provided by any county or municipal ordinance has the right to acquire by condemnation any interest in real property, . . . , which it deems necessary for, or in connection with, community redevelopment and related activities under this part.

Id. This power cannot be exercised, however, until a resolution, that is supported by data and analysis, has been adopted by the governing body. That resolution must make a legislative finding that the conditions in the proposed redevelopment area meet the statutory criteria for slum area or blighted area. See sec. 163.355, Fla. Stat. The Community Redevelopment Act contains public purpose findings and the courts in Florida have concluded that those findings can, with supporting evidence, meet the constitutional requirements of public purpose and reasonable necessity. (See the discussion above in Issues #1 and #2).

The Florida Association of Counties will be offering more specific comments and potential suggestions on whether the Community Redevelopment Act should be changed to allow for additional procedural protections for private property rights within the context of the community redevelopment agencies. For example, the courts have already declared that private property owners cannot be prevented from asserting their constitutional rights within an eminent domain proceeding simply because they purchased the property after the legislative determination of blight has been made. See Rukab v. City of Jacksonville Beach, 811 So. 2d 727 (Fla. 1st DCA 2002).

In addition, it may be appropriate to broaden the ability of affected property owners -- before the area is created and the plan is adopted -- to meaningfully participate and be heard during the time that slum or blight is being debated and studied. Accordingly, stronger notice and hearing requirements could be enacted. It may also be appropriate to tighten the criteria for a determination of blight. The criteria for blight determinations have changed several times since 1969 and because of those changes, the time may have come to reexamine the strength of the criteria.

Manatee County



MANATEE COUNTY

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August 31, 2005

VIA FACSIMILE AND U.S. MAIL

The Honorable Marco Rubio, Chairman
Select Committee to Protect Private Property Rights
Florida House of Representatives
The Capitol, Suite 317
402 South Monroe Street
Tallahassee, Florida 32399-1300

Re: **House Select Committee to Protect Private Property Rights Questionnaire Response**

Dear Chairman Rubio:

I have been asked to provide written comments on issues that the House Select Committee to Protect Private Property Rights will consider in the near future. My comments have not been submitted to the Board of County Commissioners for approval and thus, should be regarded as my own and not the official position of Manatee County. Nevertheless, I can say with all confidence that Manatee County is committed to protecting the private property rights of its citizens while at the same time functioning efficiently in a fiscally conservative manner on behalf of their interests.

It is my hope that these comments will prove helpful to the members of the Select Committee in understanding the issues raised by the recent United States Supreme Court decision, *Kelo v. City of New London*. In that decision, the Supreme Court ruled that the United States Constitution did not prevent government from exercising its power of eminent domain in such a way as to displace homeowners and small business owners for the purpose of making way for private economic development to increase the tax base of the community. The ruling raised serious concerns as to the protections afforded individual property owners. Here in the state of Florida, this issue is of less concern because the Florida Constitution and Florida statutory case law provide a greater protection to private property rights than either the U.S. Constitution or the Connecticut law as described in the *Kelo* case. The ruling in the *Kelo* case,

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however, is of such great and widespread importance that every state should re-examine its laws to see if there are adequate protections in place for private property owners.

To facilitate the work of the Select Committee, a questionnaire was sent to my office asking for input into five issues. My response to the questionnaire is as follows:

1. **Discuss the adequacy of current protections of private property rights under Florida law.**

The Florida Supreme Court has held that the State has the absolute power to acquire private property and that the power exists without any grant by the Constitution or the Legislature. It is a right the State holds over all the property within its jurisdiction. *Daniels v. State Road Dept.*, 170 So. 2d 846 (Fla. 1964). The power of eminent domain is an attribute of the sovereignty of the State and is absolute except as restrained by the Constitution. *City of Miami Beach v. Cummings*, 266 So. 2d 122 (Fla. 3d DCA 1972). It is, like the police power, an inherit attribute of sovereignty to be exercised in the case of public exigency or for the public good. *Daniels v. State Road Dept.*, 170 So. 2d 846 (Fla. 1964).

As to some specifics, Article X, Section 6(a) of the Florida Constitution states, "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." It was stated in *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483 (Fla. 1947) "It [the power of eminent domain] is circumscribed by the Constitution and statute in order that cherished rights of the individual may be safeguarded. It is one of the most harsh proceedings known to the law . . . ."

Generally, the statutory scheme for the exercise of the power of eminent domain is found in Chapter 73 and Chapter 74 of the Florida Statutes. These statutes require that the condemning authority negotiate in good faith with the land owner prior to the institution of suit, that a pre-litigation notice be given, and that the condemning authority find that the property is to be taken for a public purpose and for public necessity. The court's role has been to assure that the condemning authority act in good faith and does not exceed its authority nor abuse its discretion. *Wilton v. St. Johns County*, 123 So. 527 (Fla. 1929). The condemning authority must consider alternate routes, costs, environment, long-range planning, and safety prior to deciding to condemn property for a public purpose. *Hillsborough County v. Sapp*, 280 So. 2d 443 (Fla. 1973).

Florida Statutes § 127.01 delegates to the counties the power of eminent domain and provides that the board of county commissioners may, by resolution, authorize the acquisition by eminent domain of property, real or personal, for any county use or purpose designated in such resolution.

Of special interest to the Committee is the Florida Redevelopment Act codified in Florida Statutes § 163.330, et seq.; cited as the "Community Redevelopment Act of 1969" (the "CRA"). It establishes the power of eminent domain for public uses and purposes and declares as a matter of the legislative determination that these powers are necessary in the public interest. It is the purpose of the CRA to eliminate "slums and blight" and the power of eminent domain thereunder is to be used solely for that purpose.

In summary, the current protections afforded private property rights under the Florida Constitution and the Florida Statutes and case law are adequate. However, certain modifications to the CRA statutes can be made to strengthen private property rights protection. The changes suggested by Attorney General Charlie Crist in his letter of August 17, 2005, to Chairman Marco Rubio are sound suggestions in light of the current law and deserve careful consideration.

2. **Discuss the current status of Florida law with respect to government takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.**

A reading of the statutory language as interpreted by case law, such as *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So. 2d 451 (1975), makes it clear that it is the burden of the government to show that the exercise of eminent domain is the least intrusive means necessary to achieve an articulated public purpose. Under Florida law, property may not be taken for the purpose of generating economic development. The CRA makes it clear that economic development is not the reason for takings under the statute but rather it is for the elimination of slum and blight. Once a slum or blighted area is taken under the CRA, slum or blight is to be eliminated, and the property eventually may be returned to the tax base with subsequent development of the site.

3. **Discuss the impact, if any, of the *Kelo* decision on the application or exercise of eminent domain law in Florida with respect to takings for the purpose of "economic development," which may include creating jobs, enhancing the tax base, maximizing the efficient use of property, or any combination of these factors.**

As a result of the protections built into Florida law, the *Kelo* decision should have little impact, if any, on the application or exercise of eminent domain law in the state of Florida. With respect to takings for the purpose of economic development, as Florida law is currently written, a condemning authority may not take private property for the purpose of economic development. While the enhancement of the economy may be the by-product of the elimination of slum or blight in communities, it is clear that a condemning authority may only act for the public purpose of eliminating slum or blight within its community. Fla. Stat. § 163.375 (2004).

4. **Discuss the adequacy of the home rule power of cities and charter counties to exercise the power of eminent domain generally.**

Cities and counties are delegated the power of eminent domain by statute. Counties are authorized to exercise the eminent domain powers granted to the Department of Transportation by Florida Statutes § 337.27(1) through Florida Statutes § 127.01; municipalities may exercise the power of eminent domain through Florida Statutes § 166.401. In response to the question, the home rule power of cities and counties to exercise the power of eminent domain within the state of Florida is adequate and is not being abused.

5. **Is the Florida Community Redevelopment Act sufficiently narrow in scope as it relates to the exercise of eminent domain?**

As stated above, the Florida Community Redevelopment Act is sufficiently narrow in scope as it relates to the exercise of eminent domain in that the purpose of the Redevelopment Act is to eliminate slums and blight within the community. The exercise of eminent domain under the CRA must be for that public purpose. It may not be for the purpose of creating jobs, enhancing the tax base, maximizing the efficient use of property, or other factors which constitute "economic development." Attorney General Charlie Crist offers several good suggestions, specifically three, in his letter of August 17, 2005, to narrow the scope of the Community Redevelopment Act of 1969. His suggestions are as follows: (1) Codify the standards articulated by the Florida Supreme Court in the case of *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, *supra*, which would shift the burden to the government to show that the exercise of eminent domain is the least intrusive means necessary to achieve an articulated public purpose; (2) tighten the criteria for determining blight as stated in Florida Statutes § 163.340(7) and (8); and (3) add a clause to Florida Statutes § 163.375 stating "the power of eminent domain shall only be used to condemn dilapidated and

deteriorated buildings and improvements on real property for community redevelopment purposes."

Finally, you have asked to provide a summary of the facts regarding any pending eminent domain actions of which we are aware that we believe of interest to the Select Committee. I am not aware of any pending eminent domain actions which would be of interest to the Select Committee.

I appreciate the opportunity to provide input to the House Select Committee to Protect Private Property Rights. In preparing this response, I have obtained the assistance of Rodney C. Wade, Esq., one of the attorneys in my office. If he or I may be of any additional assistance to you, please do not hesitate to contact us.

Sincerely,

TEDD N. WILLIAMS, JR.
County Attorney

TNW/RCW/slm
cc: Thomas Hamby, Staff Director ✓
House Select Committee to Protect Private Property Rights
Board of County Commissioners
Ernie Padgett, County Administrator
Rodney C. Wade, Assistant County Attorney
Amy Merrill, Intergovernmental Coordinator
Cari Roth, Esq.
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EMINENT DOMAIN IN FLORIDA AFTER *KELO V. CITY OF NEW LONDON*

J. B. Ruhl

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Florida State University College of Law

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Introduction

We Americans are well known for our love affair with private property rights, but the fact of the matter is that the most of us would be stumped to explain exactly what those rights entail. Surely, very few of us would argue that a landowner can do *anything* he or she pleases with the property, subject to absolutely no restraint through government regulation acting on behalf of the public welfare. On the other hand, few would maintain that the government's power to regulate land use is boundless, leaving property owners completely at the mercy of the public will. The field between these two extremes, however, has proven over time to be fertile ground for debate, controversy, and litigation, leaving the line between property rights and government authority blurred in many settings.

Nevertheless, as fuzzy as the contours of our property rights may be, until recently the vast majority of Americans seemed certain of one thing: the government could not take land from one private citizen, even for fair compensation, and simply give it to another private citizen in the hope that the latter would use it in ways that produce more tax revenues for government coffers or jobs for the local economy. To be sure, with just compensation and adequate due process the government ought to be able to take private land for uses such as roads, reservoirs, and other public infrastructure. But to take land from one person and give it to another just because the latter is richer or has a better business plan? No way. Can't happen. Not allowed.

Alas, after a 2005 decision of the United States Supreme Court, those of us who believed this are now much less sure. In *Kelo v. City of New London*,[1] the Court decided that a city could condemn parcels of residential land owned by different private individuals in the Fort Trumbull area of New London, Connecticut, add those parcels to other parcels the city had purchased through "voluntary" transactions, and devote the resulting 90-acre area to an economic development plan designed to include private hotels, restaurants, retail shopping, office space, new residences, a marina, and other land uses contributing to a "small urban village" setting.

According to the city, the Fort Trumbull area was "distressed," and the development project would help turn things around by providing new jobs and increased tax revenues to the larger community. Although they would be displaced by this

transformation of land uses, many owners of the targeted properties "voluntarily" sold their land to the city without forcing the city to exercise its power of eminent domain to take the parcels. As holdouts, however, Susette Kelo, who had lived in her water view home since 1997, Wilhelmena Dery, who had lived in her house *her entire life*, including 60 years with her husband, and several other lot owners in the area refused to sell. Their properties were not blighted or in poor condition—they just happened to be located in the path of the city's development project. The owners did not contest the amount of compensation the city offered, but rather challenged the very power of the city to accomplish the condemnation under the United States Constitution. After litigating their claims in the Connecticut state courts and losing,[2] the property owners sought a ruling from the United States Supreme Court.

The basis of their challenge was straightforward. Most states authorize state and local entities to condemn private land through the power of eminent domain, subject to whatever limitations the state law provides. A background constraint on all states in the use of eminent domain exists, however, in the Takings Clause of the Fifth Amendment to the United States Constitution, which applies to states through the Fourteenth Amendment. That clause provides that "private property [shall not] be taken for public use, without just compensation."[3] The implication, of course, is that private property may be taken for public use v,bjustwith pensation. Ms. Kelo and her fellow property owners, however, were not arguing over compensation, but rather over the "public use" character of the city's development plan. In short, they argued that because the development involved the transfer of land from them to other private entities, after which it was contemplated that the latter would use the land purely for private purposes and exclusive of general access by the public, the taking of the parcels was not for a public use. The Court disagreed.

As is true of many Supreme Court decisions, the legal holding of the case is not crystal clear. A number of factors appear to have been important to the Court's ruling that the city could displace Ms. Kelo and the others.[4] First, the Court noted that the city carried out the condemnations pursuant to a carefully formulated, comprehensive development plan. Second, the plan was adopted only after thorough deliberation by the city. Third, there was no evidence that the plan was designed simply to confer private benefits to a particular class of identifiable individuals. Fourth, the city determined that the area was "distressed" and that the development plan would improve conditions by providing appreciable benefits to the community, including the new jobs and increased tax revenues. Under those circumstances, the Court ruled, state and local governments can have at it—pay the holdout private landowners their just compensation, move them out, and bring in the new private interests. If there is to be any prohibition or other control of such "economic development takings" by state and local governments, the Court informed us it will have to come in the form of state or local law, not the United States Constitution.

To be clear, the Court did *not* hold that government may transfer property from citizen A to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. But neither did the Court rule out such actions. Rather, the Court merely noted that such a one-to-one transfer, outside the confines of an integrated development plan, would be unusual and raise judicial suspicion.[5] Exactly what the suspicious judge is supposed to do, the Court did not say. Apparently, though,

even such a one-to-one transfer should not raise suspicion if it is part of an integrated development plan.

Kelo was a media sensation even before the Court issued its ruling, but afterwards it went into the stratosphere of media coverage. Even months after the ruling, national and local newspapers continue to carry editorials about the decision, cover stories about similar development projects in states around the nation, and keep tabs on state legislative initiatives to wrestle control of local government action.[6] Unfortunately, some commentators misreported the Court's holding, which helped fuel public hysteria over the rampant prospect of any person's home being turned into a gas station overnight.[7] On the other hand, many commentators sought to underplay the impact of the ruling, portraying it as an insignificant legal ruling or suggesting that the practice of economic development takings is not common.[8] In fact, neither extreme view of *Kelo* is correct, but it would be difficult for anyone untrained in land use law to decipher the real impact of the case from the media coverage and commentary, much less from the text of the opinion itself.

This Backgrounder is intended to cut through the fog surrounding *Kelo* to provide a sober account of what the case means, particularly what it means for economic development takings in Florida. Because the Court essentially removed the United States Constitution from having any role in constraining such takings, all eyes suddenly have turned to the states. What constraints, if any, will states place on themselves and their local governments in the pursuit of economic development takings?

This is a particularly appropriate question to ask in Florida, where state land use law already requires that cities and counties act consistent with their locally adopted comprehensive plans and only after significant deliberation. In other words, local governments in Florida that pursue economic development takings are unlikely ever to be tripped up by the requirement of a plan and deliberation, so the real question is how Florida law would treat a city that uses its planning and deliberation to accomplish what the City of New London accomplished. In short, *can private land in Florida be transferred through eminent domain to other private entities on the premise that the latter will use the land in ways that will produce more jobs, tax revenues, and other public economic benefits?*

Notwithstanding claims reported in the media that Florida law clearly does or does not allow such practices, in fact the answer is not so clear. Local governments have extensive powers of eminent domain, which appear to be broader than the statutory authority to condemn "blighted" land. The Florida Supreme Court has on the one hand emphasized that eminent domain cannot be employed to take property for a "predominantly private use,"[9] but on the other hand has approved the transfer of property interests from one private landowner to another when doing so fulfilled the public policy of "sensible utilization of land."[10] The Florida court has never confronted the issue of economic development takings in the context of an elaborate local development plan like the one in *Kelo*, so the question remains open whether the court would consider that form of eminent domain a "predominantly private use" or a "sensible utilization of land."

The Florida Supreme Court may indeed have the chance to rule on that question, local governments in Florida may attempt to engage in *Kelo*-style takings. But the question could be addressed sooner and more directly through other means as well, such as constitutional amendment or state legislation. Yet what would any such initiative say

about the matter? Should economic development takings *never* be allowed? If allowed only under certain conditions, what conditions? Why stop *any* such actions, if indeed they lead to greater public welfare?

By raising these questions, *Kelo* is an important development in American law and Florida land use policy. Anyone who says it is not is being either naive or disingenuous. Regardless of whether one agrees with the decision, it presents a moment for Floridians to reflect on what our property rights mean within the larger context of public policy in a state that is fast growing in population and commerce and in which land thus becomes ever more important to our future.

Discussion

The purpose of this Backgrounder is to inform the reader about how and why economic development takings have been put in the forefront of Florida public policy and how best to sort through the issues they present. Part I frames the background of the "public use" provision of the United States Constitution's Takings Clause, showing that *Kelo* arose inevitably from a long line of cases reaching as far back as the age of grist mills in the colonial era. Part II examines the impact of *Kelo* on the law, noting that, while it did not change the law in the strictest legal sense, in that it overruled no prior decision of the Court, it does have a dramatic evolutionary effect on the law of eminent domain. Part III then provides the background on Florida law necessary to appreciate what *Kelo* means for Floridians and Florida public policy. To demonstrate that the status of economic development takings remains unclear in Florida, Part IV presents a devil's advocate argument outlining the case that they are not precluded by our Constitution, statutes, or judicial precedents. Finally, Part V examines some of the options Florida might explore in responding to *Kelo*. While making no specific recommendations, this discussion of options is intended to stimulate informed debate.

I. Background: Public Uses From Grist Mills to Condos

The United States Constitution places only two direct constraints on the government's use of eminent domain powers: the taking of private property must be for a "public use" and the owner must be given "just compensation."[11] Because eminent domain usually is exercised to facilitate public infrastructure having an obvious public purpose, such as roads, utility lines, and reservoirs, most of the friction between government and landowner entities in takings cases arises over the adequacy of compensation.

Whereas market value serves as an objective reference point for determining compensation in takings cases, pinning down the public use side of the equation has proven more elusive. The Supreme Court pointed out over a century ago that public use could not sensibly be interpreted literally—i.e., to require that the land taken must be occupied, enjoyed, and otherwise directly used by the general public—for that would raise numerous difficult questions of administration involving timing of access, price of access, and other restrictions.[12] But even if a governmental unit exercising eminent domain need not open the land it takes to general public access, this does not settle the question whether the land, whoever has access to it, must remain in the public domain.

On that score the Supreme Court's jurisprudence has taken a long evolutionary path leading to *Kelo*.

The Mill Acts and Other Early Settlement Cases

Even as far back as colonial times, the practice of eminent domain accommodated some component of *private* ownership or interest in the taken land. The Mill Acts, for example, were colonial and early state statutes that permitted a landowner on one side of a river or stream to institute a condemnation proceeding against the owner of land on the opposite bank in order to allow damming of the river, and consequently inundation of the latter's land, for construction of a mill. Although not directly addressing the public use clause, the Court upheld such statutes as consistent with the states' police powers.[13] Similar practices, such as takings for private irrigation, mining, and railroads, were not uncommon, particularly in connection with development of the Western states, and also were upheld as within the scope of state authority.[14] The justification in all such cases was that the public *purpose* of the exercise of eminent domain was clear and the public *benefits* were significant.[15]

Expanding Interpretations of the Police Power

By the mid-1900s, therefore, public use, public purpose, and public benefit had become conflated into one in the Court's takings jurisprudence, with purpose being the decisive factor. So long as the exercise of eminent domain fit within the government's police powers by furthering the health, safety, or general welfare of the public, it was neither necessary that the land taken through eminent domain be available for general public access nor fatal if there was some private hand in the ownership of the land. At the same time, the Court was steadily expanding the scope of "public purpose" in a variety of contexts, declaring that courts must defer to legislatures in their decisions about what constitutes a public purpose and whether particular acts of government serve the stated purpose. In the land use context, for example, the Court opened the public purpose door wide open when it upheld the validity of zoning regulation.[16] With cities around the nation adopting zoning ordinances by the late 1920s, which in turn were predicated on cities engaging in active land use planning initiatives, one could easily have foreseen more frequent use of eminent domain to serve local planning objectives.

By the middle of the century, however, the Court had not yet clearly established whether there were any limits to the exclusion of public access and the extent of private ownership. As Justice Thomas points out in his dissent in *Kelo*, eminent domain statutes authorizing takings for mills, irrigation ditches, and railroads usually treated the private recipient of the land as a common carrier, requiring it to provide the benefits of the undertaking—e.g., access to the mill, the irrigation water, or the railroad transportation—to some defined segment of the public.[17] The Court's jurisprudence, in other words, may have laid the seeds for *Kelo*, but it was still a long way from endorsing *Kelo*-style economic development takings.

Using Eminent Domain to Correct Land Use Ills

Two subsequent landmark decisions then suggested the constraints imposed by the public use clause, if any, would not pose much of a barrier to government's exercise of the eminent domain power. The first was the Court's 1954 decision in *Berman v. Parker*,[18] in which it upheld condemnation for purposes of facilitating redevelopment of blighted areas, even when the redevelopment plan involved transfer of the land to private ownership. Later, in the Court's unanimous 1984 decision in *Hawaii Housing Authority v. Midkiff*,[19] the Court approved of Hawaii's statewide transfer of land from what amounted to an oligopoly of owners—a vestige of the islands' historical land tenure regime—to their multitude of tenants. In *Berman* the Court stressed that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[20] And *Midkiff* in particular cinched the equation of public use and public purpose in the unequivocal passage that "the 'public use' requirement is...coterminous with the scope of a sovereign's police powers."[21]

Cities Discover Economic Development Takings

Armed with *Berman* and *Midkiff*, it was not long before local governments began engaging in economic development takings. Indeed, the genesis of the practice preceded *Midkiff* by several years, when in the infamous *Poletown* case the Michigan Supreme Court approved Detroit's condemnation of a non-blighted residential area and transfer of the land to General Motors as the site of a new automobile manufacturing facility.[22] The Michigan court held that the project did not violate the "public use" clause of either the United States Constitution or the Michigan Constitution because "the power of eminent domain is to be used in this instance primarily to accomplish the essential public purpose of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental."

Since *Poletown*, courts from other states have used similar reasoning to uphold takings to facilitate everything from private parking lots to Manhattan skyscrapers. To be sure, courts in some states have condemned the practice, including, ironically, in Michigan, where the Michigan Supreme Court recently overturned *Poletown* and declared the practice of economic development takings a violation of the state's constitution.[23] But while the state courts became increasingly split on the public use issue, the United States Supreme Court was mum since *Midkiff*, meaning *Kelo* would be the case to decide which view would prevail insofar as the United States Constitution is concerned.

II. Did *Kelo* Change the Law?

The previous section explains how the law of "public use" in eminent domain practice evolved up to the point of *Kelo*, suggesting that it was inevitable that the Court would someday have to confront the economic development takings issue. But was the holding in *Kelo* the inevitable result of the Court's prior rulings? Did *Kelo* change the law, or simply confirm that *Midkiff* meant what it said?

In the strictest sense, *Kelo* did *not* change the law, in that the majority of the 5-4 divided Court was able to point to *Berman* and *Midkiff* and portray *Kelo* as fitting well within their sphere. The majority did not have to overrule those opinions, or add any gloss to them, or inject new criteria to the mix. Rather, the majority ruling boils down mainly to a recitation of *Berman* and *Parker* and the pronouncement that, just as public use equated with public purpose in those cases, so too would it in the circumstances presented in *Kelo*. From there, with the public purpose of economic development squarely within the realm of government police powers, *Kelo* was an easy case to decide. It would have been "incongruous," in the majority's view, not to hold as it did—there would have been "no basis for exempting economic development from our traditionally broad understanding of public purpose."[24]

But that version of *Kelo* makes the case look too easy. There is in fact a well-reasoned basis for distinguishing between *Berman* and *Midkiff* on the one hand and *Kelo* on the other. Indeed, the Justice who authored the unanimous opinion in *Midkiff*, Justice Sandra Day O'Connor, did just that! It was she who penned the line in *Midkiff* that "the 'public use' requirement is…coterminous with the scope of a sovereign's police powers," and it was she, in her dissent in *Kelo*, who declared that the majority's ruling represents a "moving away from our decisions" in *Berman* and *Midkiff* and "significantly expands the meaning of public use."[25]

Her reasoning was straightforward and not built on nice distinctions. In *Berman* and *Midkiff*, she explained, "extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman*, through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth."[26] These exigencies warranted the use of eminent domain outside its normal public infrastructure and common carrier settings because "eliminating the existing property use was necessary to remedy the harm."[27] In other words, blight and land oligopolies are bad for society, and if the only way to be rid them is to take the property, it matters little whether the taken property is kept in the public domain or turned over to private interests, so long as the new land use pattern remedies the problem.

Kelo presented no such circumstances. The City of New London never alleged that Ms. Kelo's use of land "inflicted affirmative harm on society." Rather, she stood in the way of what the city thought would be an even better use of the land. Moreover, the city never alleged that the only way to revitalize the local economy was to take Ms. Kelo's land. Certainly that was a convenient means, but was it the *only* means? In short, Ms. Kelo's house wasn't bad for society, nor was taking it necessary for a better society.

Economic development takings thus are a different creature altogether from those involved in *Berman* and *Midkiff*. Justice O'Conner noted that "errant language" in those opinions—i.e., her own line equating public use with the police power—opened the door to the majority ruling in *Kelo*, but as she explained, those cases "did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use."[28] *Kelo*, therefore, was a new case, and the Court's prior opinions did not compel upholding economic development takings.

So why, when the language in those opinions was put to the constitutional test, would Justice O'Connor have found the taking in *Kelo* unconstitutional. She had two reasons, one jurisprudential and the other practical. First, she observed that the majority ruling would render a passage of the Constitution meaningless, which is something the

Court is normally loathe to do. Since virtually any lawful use of property generates incidental public benefits, almost any economic development taking will satisfy the majority's conception of public use. In that case, she explained, "the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power."[29] What, then, are they doing in the Constitution?

Second, Justice O'Connor voiced a practical concern that many have with economic development takings, namely that "the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."[30] The Founders were aware of the Mill Acts, but in Justice O'Connor's view they "cannot have intended this perverse result."[31]

Justice O'Connor also pointed out what is perhaps the most disturbing feature of *Kelo* to the average American—that is, could this really mean land can be taken from citizen A and given to citizen B just to reap higher taxes? As noted previously, the *Kelo* majority did not explicitly hold that such could be accomplished and suggested that courts should be skeptical of these one-to-one transfer takings. But when one considers what little effort a city would have to exert to satisfy the majority's criteria—a plan, some deliberation, a finding of purpose, and a finding of incidental public benefit—Justice O'Connor pointed out what anyone experienced in local land use practice knows, namely that only a "stupid staffer" could fail the test.[32] This is particularly true in Florida. Simply put, after over 20 years of comprehensive planning and zoning, there is virtually no "smart staffer" in a Florida city or county planning department without the expertise to fit any economic development taking—even a one-to-one transfer of property—into the majority's "test" for constitutional compliance. This reality forces the question of what *Kelo* means for Florida.

III. Florida's Experience

Like the United States Constitution's Takings Clause, the Florida Constitution constrains the exercise of eminent domain through its provision that "no private property shall be taken except for a public purpose and with full compensation."[33] After *Kelo*, however, many Floridians are asking of this provision what was asked of the United States Constitution's Takings Cause—what does it mean? More specifically, does Florida's "public purpose" requirement prohibit *Kelo*-style economic development takings? This is a particularly pertinent question since the *Kelo* Court, by removing the United States Constitution from having any constraining effect on eminent domain other than requiring just compensation, essentially left it to the states to decide whether economic development takings go too far.

History seldom comes in as tidy packages as historians suggest, but the evolution of Florida case law on the public use issue does sort reasonably well into several phases: (1) cases from the early 1950s suggested a very limited role for private interests in eminent domain and appeared to rule out economic development takings; (2) cases from the end of that decade then relaxed that strict interpretation to make room for blight redevelopment; (3) cases from the 1970s articulated competing themes of requiring predominantly public use to justify eminent domain versus accommodating

predominantly private use if it served the objective of efficient use of land; and (4) modern cases suggesting that the public purpose standard is broad and confusing. To understand what impact *Kelo* may have on Florida, it is useful to review the evolution of these four periods of Florida law.

The Era of Strict Interpretation

The Florida Supreme Court has long recognized the "common carrier" principle—i.e., that private land taken through eminent domain can be transferred to a private entity which, like railroads, irrigation districts, and power compani hgperates as a regulated common carrier obligated to provide some form of access or benefit to an identified segment of the public.[34] The Court's first direct foray into the property redevelopment question, however, indicated a strong aversion to any use of eminent domain that involved transferring the land to private ownership. In *Adams v. Housing Authority of Daytona Beach*,[35] the Court held that although a city may condemn houses in blighted areas, it could not transfer the land to private redevelopment interests. Rather, the city would have to use its other police powers, such as zoning and regulation, if it wished to rectify the conditions causing blight. In particular, the private component of the redevelopment effort offended the court's sense of propriety:

> The whole development plan as set forth in this record, together with the plats and maps attached, is the usual prospectus put forth by a real estate developer of a new subdivision, for private enterprise and for industrial and commercial purposes to be conducted by private individuals, associations or corporations for private gain and profit. It is inconceivable that any one would seriously contend that the acquisition of real estate for the declared purposes set forth in the proposed Redevelopment Plan is for a public use or purpose. [36]

Adams was consistent with other decisions the Court had issued around this time acknowledging that private enterprise will often produce public benefits, but that such benefits do not equate with a public purpose. For example, in words Justice O'Connor might have used in her *Kelo* dissent, the Florida Supreme Court rejected a city's plan to use public debt to support private redevelopment, observing that

> every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new super market, a new department store, a new meat market, a new department store...or other establishments which could be named without end, may be of some material benefit to the growth, progress, development and prosperity of a municipality. But those considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose.[37]

If these were the Florida Supreme Court's last words on the public use question, it would be difficult to conceive of economic development takings being permitted. But the narrow view expressed in *Adams* and other cases of this era did not persist.

1960s: Accommodating the War Against Blight

Adams did not preclude the government's use of condemnation in blighted areas, it just precluded the use of private redevelopment plans as part of the solution. The problem was that private redevelopment is often critical to the success of efforts to rid cities of blight, so the pressure to accommodate some private component in this public purpose continued. The Court opened the door in the landmark case of *Grubstein v. Urban Renewal Agency of City of Tampa*,[38] in which the Court allowed some private hand in slum redevelopment programs. The *Grubstein* opinion pointed to the basis for allowing cities to clear slums and provide public housing in return—i.e., "removing breeding places for crime and disease, and promoting the health, safety, morals, peace and general welfare of the people"[39]—and found the same purpose behind such programs that rely in part on private redevelopment interests. The Court concluded that "in the one case the redevelopment is in the form of low-cost housing for low-income groups; in the other, it is in the form of private development. But the public purpose sought to be achieved is, in principle, identical."[40] Although *Grubstein* related only to slum clearance, it is considered the case that "set the precedent subsequently recognized and followed nationally for condemnation of blighted or slum areas,"[41] and that it was the "point of departure from earlier *Adams*."[42]

Grubstein thereby set the stage for Florida cities to integrate private redevelopment into their blight removal programs, and they have been active in doing so ever since. Indeed, Florida's Community Redevelopment Act (CRA)[43] provides legislative endorsement of using eminent domain for eliminating blight, and it is routine for cities to lean heavily on private interests to support such efforts. Recently, for example, the City of Daytona Beach prevailed in litigation challenging its extensive use of private redevelopment as part of its comprehensive effort to transform itself under the CRA authority.[44]

Of course, *Kelo* does not change anything about the use of eminent domain in blight cases—it specifically was about using private redevelopment to prevent "decline," not to rid "blight." The problem is that the line between decline and blight is not always so clear. Florida's CRA process requires cities to designate blighted areas according to a statutory set of criteria[45] which many claim are too open-ended and subject to manipulation, such that what a city may designate as blight may actually be an area in decline, if even that bad off.[46] In other words, cities may be using CRA blight designations as cover for what are in fact *Kelo*-style economic development takings. Courts generally defer to cities in their designations of blight, however, so there has not been careful policing of the decline-blight line.[47] After *Kelo*, that line is irrelevant for purposes of the United States Constitution, so criticism of CRA takings has intensified and, beyond that, the question of what Florida cities can do with eminent domain outside of the blight context has been raised front and center.

1970s: A Growing Population Presents Conflicting Policy Goals

A number of scenarios could lead a Florida city to make the move from blight takings to economic development takings—that is, to act without the cover of CRA authority. For example, the CRA could be amended to tighten the criteria, or the courts

might become less tolerant of questionable blight designations, or a city may simply decide that a blight designation is unjustified but that an economic development taking is appropriate in any event. Such cases would present two distinct questions about the scope of eminent domain authority under Florida law. One is whether cities can accomplish an economic development taking at all, that is, even without transferring the property to private interests. The other question is, if cities may generally accomplish economic development takings, what level of private involvement, if any, is permitted?

Some commentators have suggested that the CRA is the sole authority for using eminent domain in redevelopment contexts, and thus a finding of blight (or slum) is necessary in all cases.[48] Under this view, no form of *Kelo*-style economic development taking, even one without private involvement, is permitted. But neither the CRA nor any other state statute explicitly prohibits non-blight economic development takings.[49] Moreover, the Florida Supreme Court has made it clear that political subdivisions with "home rule" status under the Florida Constitution, such as municipalities,[50] do not require a statutory "grant" of authority to exercise eminent domain, but rather may be subjected by the state legislature only to constraints of authority. As the Court recently explained with respect to a different eminent domain statute:

> Municipalities are not dependent upon the legislature for further authorization, and legislative statutes are relevant only to determine limitations of authority....Although section 166.401...purports to authorize municipalities to exercise eminent domain powers, municipalities could exercise those powers for a valid municipal purpose without any such "grant" of authority. If the state has the power to take particular land for public purposes, then a municipality may also exercise that power unless it is "expressly prohibited."[51]

As no Florida statute expressly prohibits *Kelo*-style economic development takings, it appears cities may accomplish them *unless* their private character runs afoul of the public purpose requirement. On the question of using eminent domain to transfer interests in land from one private entity to another, the Florida Supreme Court has since the 1970s steadfastly held to two principles the effects of which, in the *Kelo* context, are irreconcilable. Because the Court has never had before it a *Kelo*-style economic development taking, we do not know which principle will trump the other.

The first principle is represented by the Court's 1975 decision in *Baycol v. Downtown Development Authority of the City of Fort Lauderdale*.[52] The city proposed to take a parcel of property so as to allow development of a private retail shopping center, arguing that the public purpose requirement was met because the shopping center would require parking and the city would include a public parking component in the final development. Notably, the shopping center was a latecomer to the city's "plan," which was described as an overall effort through bonded capital infrastructure improvements to improve traffic in the identified district. With respect to the actual taking, the city advanced no public purpose other than to provide parking—it never mentioned economic development as the purpose of the taking.

The *Baycol* Court saw through the obvious bootstrapping involved in the city's position:

> Our decisions...have consistently allowed an *incidental* private use where the purpose of the taking was clearly and predominantly a public purpose....On the other hand, "the tail cannot wag the dog" and allow the *public* purpose to be only incidental to a predominantly private one, which appears to be the case here."[53]

The bottom line principle from *Baycol* is that "the public interest must dominate the private interest."[54] But that simply begs the question of how one defines the public and private interests, and the Court in other decisions has forged the principle that tangible, foreseeable benefits to the state define a predominant public purpose. After *Baycol*, for example, the Court in *Deseret Ranches of Florida v. Bowman*[55] allowed one private landowner to exercise eminent domain, as authorized by a state law for such purposes, to obtain an easement of necessity across another person's land. No doubt relying on *Baycol*, the landowner across whose land the easement was claimed argued that although the statute "provides a public benefit...the benefit is incidental to a purpose which is predominantly private, that purpose being to provide a private land owner with conventional access to the outside world."[56] Using language that surely rings of *Kelo*, the Court disagreed:

> The inverse of appellant's contention is true: the statute's purpose is predominantly public and the benefit to the landowner is incidental to the public purpose....Although state public policy may have altered with respect to the methods of land use since 1961, sensible utilization of land continues to be one of our most important goals. We take notice that Florida grows in population at one of the fastest rates of any state in the nation. 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.

Deseret Ranches thus 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."

1980s – Present: The Public Purpose Analysis Grows Ever More Confused

Nothing about the Court's jurisprudence since *Baycol* and *Deseret Ranches* has resolved their potential conflict in the economic development takings setting. When the Court, in *State v. Miami Beach Redevelopment Agency*,[57] upheld the use of private interests in blight redevelopment under a predecessor version of the CRA, *Baycol* played little role in the Court's reasoning. The Court described *Baycol* as follows:

> [In *Baycol*] the local downtown development authority planned to issue bonds to finance construction of a parking garage and shopping mall as one project. The bond resolution stated the purpose as improvement of traffic and parking facilities. After the validation of the bonds, the authority brought eminent domain proceedings. The landowners challenged the taking on the ground that there was no public purpose....[T]he Court held that the private uses were more than incidental and deprived the project of a public purpose. The Court concluded from the record that without the private commercial activities, there was no demonstrated need for the parking garage. Parking was the purported public use underlying the project. But parking was incidental to the predominant private use of the retail shops. The tail was wagging the dog.[58]

One would be hard-pressed from that account of *Baycol* to argue that the Court thought of *Baycol* as coming anywhere near involving the kind of economic development taking accomplished in *Kelo*, much less having issued a sweeping condemnation of such actions. Moreover, the rationale the *Miami Beach* Court used to uphold the use of private interests in CRA blight redevelopment programs, clearly does not close the door on *Kelo*-style economic development takings, but rather suggests that they may simply be the next step. Borrowing the language from *Berman* that led directly to the majority opinion in *Kelo*, the *Miami Beach* Court observed that :

> the experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole...The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. (citations omitted)
>
> We find this reasoning to be persuasive both on the question of whether redevelopment of merely "blighted" areas serves a public purpose and the question of whether the public purpose is destroyed merely because there will be private commercial uses in the redeveloped area.[59]

Beyond that, the Florida Supreme Court for the most part has simply acknowledged the confusion surrounding the precise parameters of the public purpose standard. For example, in *Department of Transportation v. Fortune Federal S&L*,[60] the Court approved the highway department taking more land than was necessary for immediate purposes for a road, the purpose of which was to save the state money by avoiding damages for business losses. The Court's reasoning illustrates the tension surrounding the public purpose analysis:

> The 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....The *Baycol* decision does present us with one standard which we must employ. "[E]minent domain cannot be employed to

> take property for a predominantly private use...." (citation omitted) Thus, if the condemning authority uses the property for an essentially nonpublic use, the condemnation is invalid."[61]

Moreover, adding to the confusion is that fact that the "public purpose" standard is used in other municipal powers contexts, such as bond validations and tax exemptions, in which the Court has increasingly let cities wrap the public purpose around private development. The Court recently bemoaned that "it is perhaps both confusing and unfortunate...that the same term—public purpose—has traditionally been used in both of these analytical contexts,"[62] adding that "this 'confusion' is also evident in other areas—such as eminent domain—where judicial scrutiny of a claimed 'public purpose' is required."[63] In a page right out of *Kelo*, for example, the Court has found that public bonding for a private convention center

> serves a paramount public purpose...[T]he convention center would, among other things, promote gainful employment, promote outside business interests and tourism, and provide a forum for educational, recreational and entertainment activities. Such interests have been found to serve a public purpose.[64]

If it were to be held that these are public purposes for bond validation, but not for eminent domain, that would be confusing indeed. In fact, the Florida Supreme Court has emphasized that the "public purpose" standard in the Florida Constitution's bond validation and eminent domain provisions are "the same."[65] As the Court has put it, "if a project serves a public purpose sufficient to allow the expenditure of public funds and the sale of bonds under article VII, section 10, then the use of eminent domain in furtherance of the project is also proper."[66] Those who allege *Kelo* can't happen in Florida, therefore, are suggesting just the opposite.

IV. Devil's Advocacy: Can Economic Development Takings Happen in Florida?

Commentators who suggest *Kelo* presents no concern in Florida rely heavily on *Baycol*'s open-ended "predominant public interest" test. To suggest that *Baycol* or any other opinion of the Court slams shut the door to economic development takings, however, not only requires blinders when reading the cases, but grossly underestimates the will of local governments, the influence of private development interests, and the ingenuity of planners and lawyers. Indeed, the setting is ripe for Florida's version of *Kelo*. After all, *Baycol* is now over 25 years old, and since then:

- Florida has developed a well-established regime of local planning;
- The pressing need for "sensible utilization of land" as identified in *Deseret Ranches* has continued to challenge public policy;
- The Florida Supreme Court has expanded the scope of "public purpose" in other municipal powers contexts; and
- The United States Supreme Court has given the green light to economic development takings in the eminent domain context.

Moreover, armed with the case law described in the previous section, any creative law student could put together the argument for adopting the rationale of *Kelo* as Florida law as well. If a Florida city were to recreate the *Kelo* taking, its lawyers would defend the action in court by arguing:

- The private interest involved in *Baycol* was a retail shopping facility that the city never described as necessary to facilitate either economic development or even the purported public purpose of improving traffic flow in the district, and thus was appropriately prohibited under the public purpose requirement;
- By contrast, as the Court has held many times in public bonding cases, halting the debilitating effects of economic and social decline is an important public purpose which frequently will require more sensible utilization of land;
- As the Court has also held many times in public bonding cases, private redevelopment facilitates that public purpose by generating gainful employment, outside business interests and tourism, and educational, recreational, and entertainment activities;
- The private character of the redevelopment is necessary to allow the market to direct the sensible utilization of land, but is merely the incidental vehicle through which the dominant public purpose of halting decline is served;
- The city's allowance for private interests has only been made after the development of a comprehensive land use plan which the city has adopted through careful and thorough public deliberation processes; and
- Therefore, the city's economic development taking does not violate *Baycol*'s requirement of a predominant public interest, but rather falls cleanly within the Court's public purpose jurisprudence.

To be sure, one could just as reasonably argue the opposite—i.e., that economic development takings seek merely to improve conditions, not fight the evils of blight, and therefore do not meet *Baycol*'s standard of predominant public interest. But that's the point—neither argument is compelled by Florida law and precedent; each passes the so-called "straight face" test. It is difficult even to say which holds closer to the spirit of the Court's jurisprudence.

Indeed, nobody could be assured that, even if the Court were to consider *Baycol* as having ruled out non-blight economic development takings, it wouldn't simply depart from *Baycol*. After all, the Court did so in *Grubstein*, where it departed from *Adams* in order to allow the use of private redevelopment interests. In other words, the Florida Supreme Court could decide that the majority in *Kelo* got it right and that any suggestion to the contrary in *Baycol* or other Florida decisions is no longer good law. It is, therefore, entirely appropriate for Florida to consider options for managing the impact of *Kelo* on its law of eminent domain.

V. Options for Florida

Emotions run high over the issue of economic development takings, and many who object to *Kelo* call for decisive countermeasures. After all, the *Kelo* majority took an extreme position on the question, essentially knocking the public use requirement out

of the United States Constitution. The majority clearly did not want the federal courts to become the arbiters of local redevelopment plans, so it adopted a clean and efficient test that will require little policing by the federal courts: armed with a plan and some deliberation, any city can use eminent domain to engage in the public purpose of economic redevelopment.

The problem for anyone wishing to rein in this result through state law, as the majority invited states to consider, is that it is excruciatingly difficult to articulate an alternative test that relies on so bright a line for knowing what is and is not permitted. Justice O'Connor's line between using eminent domain to combat affirmative public harms, which she says justified *Berman* and *Midkiff*, versus pro-development takings of the sort employed in *Kelo*, invites endless debate over on which side of the line the next case falls. Her formula would have made for easy application in *Kelo*, but shortly some case between *Berman* and *Kelo* would come along, and what then?

No doubt this is why Justice Thomas resorted to a formula for public use that produces as sharp a line as the majority's ruling, but in favor of property owners rather than government. In his separate dissent in *Kelo*, Justice Thomas suggested that the problem did not begin with *Kelo*, but rather with *Berman* and *Midkiff*. His view, which he based on a thorough historical analysis, is that "the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking."[67] Justice Thomas, therefore, would have overruled *Berman* and *Midkiff* and held against the city in *Kelo*.

Of course, whether the majority, Justice O'Connor, or Justice Thomas has the better view of what the Fifth Amendment's public use requirement means is, for the time being at least, an academic question. The majority won. But it is not an academic exercise to ask what Florida might do in response to *Kelo*. Assuming one is convinced that the result in *Kelo* is not something Florida should allow, but is *not* convinced that Florida law already prohibits such uses of eminent domain, what makes sense for Florida to do?

One option, of course, is to simply wait and see what the Florida Supreme Court decides in its first test case. Perhaps *Baycol* does mean what some suggest, and the problem is not a real one in Florida. But this presents two concerns. The first is the time and, to be candid, the pain that some would have to endure before such a case could be decided. The second concern is that *Baycol* and *Miami Beach* specifically endorsed *Grubstein* and the use of eminent domain to combat blight, even when private redevelopment is part of the plan. As concern has been expressed that the CRA has been abused by many cities—i.e., using blight designations to insulate from attack what are in truth economic development takings—a decision rejecting *Kelo* would not necessarily resolve that issue.

It is therefore appropriate for Florida, as have several other states, to consider a constitutional or statutory amendment addressing *Kelo*. If the sense were that Justice Thomas has the best view of the matter, it would be easy to implement his test through a relatively short constitutional amendment providing that "no private property shall be taken except for a public purpose, *for a use which the public shall have the right to employ,* and with full compensation." The consequence, of course, is that this would wipe out the use of private redevelopment interests in eminent domain programs designed to combat slums and blight. All that would be left for eminent domain would be takings

for public infrastructure and for the "common carrier" uses. Justice Thomas apparently was comfortable with that, and it would be important that Floridians as well understand that would be the consequence were such a constitutional amendment seriously entertained.

If the sense is that this "nuclear" option goes too far, the challenge becomes defining lines or standards capable of clear interpretation and easy administration. On the other hand, the range of options is broad, lending itself well to testing different approaches through legislative deliberation. Some options that seem well-suited for consideration are:

- Expressly prohibit the involvement of private development interests in any property redevelopment initiative relying on eminent domain, except in CRA slum and blight designations. This would be a necessary first step to ensure that cities do not have the power to accomplish *Kelo*-style economic development takings that use private interests. Indeed, if the sense is that economic development takings are undesirable even *without* private involvement, the CRA could be amended to state it is the sole authority for use of eminent domain in all property redevelopment contexts.
- Tighten the CRA blight designation standards with substantive limits and procedural safeguards. For example, a study of past and ongoing CRA initiatives could empirically identify the criteria cities rely on in cases that raise concern and the manner and extent to which private redevelopment interests are involved. The CRA could be amended to make the more troublesome criteria less available and to require that cities undergo additional procedures, such as fact-based hearings or public referenda, before relying on them and before using private interests.
- More broadly, amend the CRA to require that cities in all cases bear a much higher burden to justify use of eminent domain. For example, require cities to demonstrate that the CRA initiative furthers a "critical public need," that without use of eminent domain the city would have been "incapable of achieving the public purpose" of the initiative, and that any involvement of private development interests in the initiative is justified only by the city proving a "lack of practicable alternatives."

All of these approaches focus on the public use side of the equation, either by giving life to the public use requirement or making it more difficult to employ eminent domain. At oral argument in the Supreme Court, however, Justice Kennedy in particular expressed some thought that the real issue may be compensation. As he exclaimed, "it does seem ironic that 100 percent of the premium for the new development goes to the… developer and to the taxpayers and not to the property owner."[68] In other words, if the point of the taking in *Kelo* was that the city could reap higher tax revenue and more jobs, why shouldn't Ms. Kelo have shared in some of the gain? Perhaps those displaced by economic development takings should receive an increment of tax revenue gains and private profits that flow from the redevelopment. Of course, as Justice Scalia pointed out later in the argument, Ms. Kelo didn't want more money; she just wanted to keep her

house. One is probably on safe ground thinking that many Floridians, probably most, want only the same.

Conclusion

One hears of few people who hope to find themselves someday in Suzette Kelo's shoes. Even the most civic-minded of people have expressed dismay over the possibility that her fate may be theirs. After *Kelo*, however, all hope that the United States Constitution may have protected any of us from such a turn of events is dead.

It is now up to states to decide whether to restrain themselves and their local subdivisions from engaging in economic development takings. One conclusion of this Backgrounder is that it is ill-advised, if not wishful thinking, to think that Florida has already done so and decided against allowing such uses of eminent domain. The Florida Supreme Court has not spoken directly on the question of whether the Florida Constitution prohibits *Kelo*-style takings, and no existing statutory provision expressly constrains local governments from engaging in economic development takings with substantial private involvement.

It is, therefore, an opportune time, albeit borne of inopportune circumstances, for Floridians to take this moment to consider making the line between government authority and private property interests a little less fuzzy. The difficulty is that, unless one draws the line at the *Kelo* majority's "anything goes" extreme or at the opposite "nothing goes" approach Justice Thomas suggested, drawing the line is a delicate and demanding exercise. It is hoped that this Backgrounder has at least informed and stimulated the dialogue that Floridians must have if we hope to arrive at a line that makes sense for Florida.

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

[2] Kelo v. City of New London, 268 Conn. 1, 843 A.2d 500 (2004).

[3] U.S. Const. amend. V.

[4] *Kelo*, 125 S.Ct. at 2664-65.

[5] *Id.* at 2666-67.

[6] *See, e.g.*, Emily Bazar, *States Move to Protect Property: Ruling Prompts Bills on Eminent Domain*, USA TODAY, Aug. 3, 2005, at A1.

[7] George Will, for example, incorrectly described the Court as holding that "government [can] profit by seizing the property of people of modest means and giving it to wealthy people who can pay more taxes than can be extracted from the original owners." George Will, *Supreme Court Ruling Leaves the Little Guy Even More Vulnerable*, TALLAHASSEE DEMOCRAT, June 26, 2005, at 5E.

[8] For example, shortly after the *Kelo* decision was issued Florida Attorney General Charlie Crist declared that *Kelo*-style takings "cannot" happen in Florida because of greater property rights protection under Florida law. *See* Attorney General Charlie Crist News Releases, *Crist: Court Decision Doesn't Threaten Florida Property Owners* (June 28, 2005).

[9] Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975).

[10] Deseret Ranches of Florida, Inc. v. Bowman, 349 So.2d 155 (1977).

[11] These limits are provided in the Fifth Amendment's prohibition that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V. This prohibition is made applicable to the States by the Fourteenth Amendment. *See* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

[12] *See* Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527, 531 (1906) (stressing "the inadequacy of use by the general public as a universal test").

[13] *See* Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885).

[14] These uses of eminent domain are surveyed in Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 619-24 (1940).

[15] *See* Fallbrook Irrigation Dist. V. Bradley, 164 U.S. 112, 158-64 (1896); Clark v. Nash, 198 U.S. 361 (1905).
[16] *See* Village of Euclid v. Ambler Realty Co, 272 U.S. 365 (1926).
[17] *See Kelo*, 125 S.Ct. at 2683-84 (Thomas, J., dissenting).
[18] 348 U.S. 26 (1954).
[19] 467 U.S. 229 (1984).
[20] 348 U.S. at 32.
[21] 467 U.S. at 240.
[22] *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).
[23] *See* County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004). Many cases on both sides of the issue are surveyed in an amicus brief a group of law professors filed in the *Kelo* Supreme Court litigation. *See* Kelo v. City of New London, No. 04-108, Brief Amicus Curiae of Professors David Callies et al. (U.S.)
[24] *Kelo*, 125 S.Ct. at 2665-66.
[25] *Id.* at 2675 (O'Connor, J., dissenting).
[26] *Id.* at 2674.
[27] *Id.*
[28] *Id.* at 2675.
[29] *Id.*
[30] *Id.* at 2677.
[31] *Id.*
[32] *Id.* at 2675.
[33] Fla. Const. Art. X, § 6.
[34] See Demeter Land Co. v. Florida Public Service Co., 128 So. 402 (1930).
[35] 60 So.2d 663 (Fla. 1952).
[36] *Id.* at 668.
[37] State v. Town of North Miami, 59 So.2d 779, 785 (Fla. 1952).
[38] 115 So.2d 745 (Fla. 1959).
[39] *Id.* at 748.
[40] *Id.*
[41] *Baycol*, 315 So. 2d at 457.
[42] *Id.* Although the *Baycol* Court describes *Grubstein* in this manner, it was actually not until after *Baycol* that the Court explicitly endorsed the use of private interests in *blight* redevelopment programs. *See* State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980) (bond validation case).
[43] Fla. Stat. Ch. 163, Part III.
[44] City of Daytona Beach v. Mathas, No. 2004-31836-CICI (Fla. Cir. Ct, 7th Jud. Cir., Aug. 2005) (Order of Taking).
[45] Fla. Stat. § 163.340.
[46] *See, e.g.*, Dana J. Berliner, *Eminent Domain Abuse Should Worry Floridians*, TALLAHASSEE DEMOCRAT, July 27, 2005, at 5E.
[47] The court in the recent Daytona Beach litigation thoroughly reviewed the principles of judicial deference to cities' designations of blight. *See* City of Daytona Beach v. Mathas, No. 2004-31836-CICI (Fla. Cir. Ct, 7th Jud. Cir., Aug. 2005) (Order of Taking).
[48] Florida Attorney General Charlie Crist initially declared that "[u]nder Florida law, <u>only</u> if property is designated as a blighted area can it be taken through the extraordinary power of eminent domain for redevelopment." Attorney General Charlie Crist News Releases, *Crist: Court Decision Doesn't Threaten Florida Property Owners* (June 28, 2005) (emphasis in original).
[49] Nothing in the CRA expressly provides that "an area must be proven to be 'blighted' before government can begin the process of taking private property for private redevelopment." Attorney General Charlie Crist News Releases, *Crist: Court Decision Doesn't Threaten Florida Property Owners* (June 28, 2005). Although a blight designation is necessary to use the CRA as the authority for using eminent domain, the CRA does not purport to provide the sole authority for using eminent domain for private redevelopment.
[50] *See* Fla. Const. Art VIII, § 2.
[51] City of Ocala v. Nye, 608 So.2d 15, 17 (Fla. 1992).
[52] 315 So.2d 451 (Fla. 1975).

[53] *Id.* at 455-56.
[54] *Id.* at 456.
[55] 349 So.2d 155 (Fla. 1977).
[56] *Id.* at 156
[57] 392 So.2d 875 (Fla. 1980)
[58] *Id.* at 887-88.
[59] *Id.* at 890-91.
[60] 532 So.2d 1267 (Fla. 1988)
[61] *Id.* at 1270.
[62] Sebring Airport Authority v. McIntyre, 783 So.2d 238, (Fla. 2001).
[63] *Id.* at
[64] State v. Osceola County, 752 So.2d 530, 539 (Fla. 1999).
[65] State v. Miami Beach Redevelopment Agency, 392 So.2d at 885.
[66] *Id.*
[67] *Kelo*, 125 S.Ct. at 2680 (Thomas, J., dissenting).
[68] Kelo v. City of New London, No. 04-108, Transcript of Oral Argument at 44 (U.S. Feb. 22, 2005).

SUBMISSION OF THE PROPERTY RIGHTS COMMITTEE OF THE REAL PROPERTY PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR IN RESPONSE TO THE REQUEST FOR BACKGROUND INFORMATION AND RECOMMENDATIONS

I. INTRODUCTION

The Real Property Probate & Trust Law ("RPPTL") Section of the Florida Bar is comprised of lawyers who principally practice in the areas of real estate and trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. Among other things, the RPPTL Section produces educational materials and seminars, assists the public pro bono, drafts rules of procedure and legislation and files amicus briefs on important issues of law. The RPPTL Section is the largest section of the Florida Bar, with over 9600 members.

The staff of the Select Committee to Protect Private Property Rights has invited input and suggestions from interested groups, including the RPPTL Section, as the Select Committee prepares to meet next month. The issues to be addressed by the Select Committee are fundamentally public policy issues which are best decided by our elected Legislature. Recognizing that fact, the Property Rights Committee of the RPPTL Section provides the following background, analyses and suggestions of areas for consideration to assist the Select Committee in its work.

II. *KELO V. NEW LONDON*

Kelo v. New London[1] prompted a hailstorm of criticism from all sides of the political spectrum. [2] In *Kelo*, the Supreme Court held that the City of New London's taking of private property for the purpose of economic development satisfied the "public use" requirement of the Fifth Amendment of the U.S. Constitution.[3] Unlike Florida, Connecticut has a statute which authorizes the taking of private property solely for economic development. The Connecticut statute which the City of New London utilized, authorized taking of land, even developed land, as part of an economic development project, and expressly stated that such a taking is a public

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

[2] The United States House of Representatives passed a resolution entitled "Expressing the grave disapproval of the House of Representatives regarding the majority opinion of the Supreme Court in the case of *Kelo et al. v. City of New London* et al. that nullifies the protections afforded private property owners in the Takings Clause of the Fifth Amendment." H.R. Res. 340, 109th Cong., 1st Sess. (2005). The resolution passed 365 votes to 33, with only 17 representatives abstaining.

[3] *Kelo*, at 2668.

use and in the public interest.[4]

The majority decision of the Court was based upon the reasoning that public purpose for a taking has been defined broadly by Court precedent in cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), where the Court upheld the constitutionality of a Hawaii statute which authorized the forcible transfer of fee title from property owners to leaseholders for the purpose of reducing the concentration of land ownership in that state.[5] The *Kelo* majority also found that even though the City of New London was not attempting to eliminate blight, the City's determination that the area was sufficiently distressed to justify a program of economic rejuvenation was entitled to deference by the Court.[6] *Kelo* was a five to four decision, and the dissenting opinion of justices O'Connor, Thomas, Scalia, and the Chief Justice, found that economic development takings are not constitutional on the basis that they are purely private takings that do not withstand the scrutiny of the public use requirement of the Fifth Amendment.[7]

The majority and dissent did agree, however, on one point. The majority opinion specifically provides that nothing in the decision precludes states from placing further restrictions on the exercise of the takings power in these situations.[8] In fact, the Court mentioned that many states already impose "public use" requirements that are stricter than the federal baseline, and further that some of the requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that limit the grounds upon which takings may be exercised.[9]

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[4] *Id.*, at 2660

[5] *Id.,* at 2664

[6] *Id.* at 2665.

[7] *Id.* at 2673, 2674

[8] *Id.* at 2668.

[9] *Id.*

III. THE CURRENT LEGAL STANDARD IN FLORIDA AND THE USE OF THE FLORIDA COMMUNITY REDEVELOPMENT ACT TO TAKE PROPERTY FOR ECONOMIC DEVELOPMENT

The closest analogy under Florida law is the Florida Community Redevelopment Act found at Chapter 163, Part III, Fla. Stat. (2004) (the "CRA"). Among other things, the CRA permits that taking of private property to eliminate "slum" or "blight." Section 163.335 describes the negative effects of slum and blight and declares it necessary to acquire property in such area, by eminent domain if necessary. Property acquired may then be disposed of "subject to use restrictions." Thus, while Florida law does not permit exercise of the power of eminent domain for economic development *per se*, the elimination of slum or blight as a justification for condemnation has been criticized, in certain circumstances, as too far reaching. The following recent court cases are examples of situations in which the use of the CRA has been criticized.

In the case of *Rukab v. City of Jacksonville Beach*, 811 So.2d 727 (Fla. 1st DCA 2002), on remand the trial court granted the taking of private property pursuant to the Community Redevelopment Act to transfer it to a private developer. Although the court's ruling was based on the need to eliminate blight, the land taken was in one of the most desirable locations in the Jacksonville MSA, next door to a new Hampton Inn, two-doors down from new office parks, and strategically located in front of the high-end residential rooftops of Marsh Landing (one of Jacksonville's premier developments with million dollar homes situated on the intracoastal waterway with an exclusive golf course).

Another recent example of the use of the Florida Community Redevelopment Act to take private property to transfer it for what appears to be primarily private economic development is the case of *City of Daytona Beach v. Mathas, et al.*, Case No. 2004-31846 (Fla. 7th Cir. Ct). In *Mathas*, the Seventh Judicial Circuit recently ordered the taking of Daytona Beach Boardwalk beach front businesses (order of taking August 19, 2005), including an oyster bar restaurant, for the purpose of transferring the property to a private developer to build a hotel condominium complex. Again, as in *Rukab*, the taking was ordered for the purported purpose of eliminating blight. In fact, the supposed blighted condition was based on a 24 year old blight study, no evidence existed that any of the taken properties were ever blighted, no updated blight study was performed in the 23 years prior to the taking, and property values of the beachfront businesses which were taken had increased by 24% in the most recent eight month period according to the testimony of the City's own appraiser.

Florida has case precedent to support a denial of the eminent domain power when there is a "predominance"of private purpose over public purpose. Likewise, there exist cases that plainly state both that the "tail cannot wag the dog" and that a taking cannot stand where the public benefit is merely incidental to the private gain.[10]

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[10] *See, Baycol, Inc. v. Downtown Development Authority of the City of Ft. Lauderdale*, 315 So. 2d 451, 455 (Fla. 1975).

However, there is also competing case precedent, primarily bond validation cases, that encourage a policy of judicial restraint. In these cases, judges rely on "legislative deference" or "presumption of correctness" when reviewing a slum or blight designation made by local government under Chapter 163. *See, Panama City Beach Community Redevelopment Agency v. State of Florida,* 831 So.2d 662 (Fla. 2002). Another problem is that, in combination with the case law precedent which encourages redevelopment, the Community Redevelopment Act has an extremely broad and vague definition of blight that can be used to justify economic development takings in almost any circumstance.

IV. POSSIBLE USE OF HOME RULE POWERS BY CITIES AND COUNTIES

Chapter 127, Right of Eminent Domain to Counties, Fla. Stat. (2004) and Chapter 166, Right of Eminent Domain to Municipalities, Fla. Stat. (2004) provide a general delegation of eminent domain power to Florida's counties and cities, respectively. These statutory provisions constitute what is commonly referred to as "home rule" powers of local government with respect to eminent domain. Without an express statutory limitation on the sovereign power of eminent domain, arguably the only constraints presently on home rule eminent domain power is the Florida constitutional requirement of public purpose.

At either the state or local level, there is potential that an argument may be made by a governmental entity for the use of eminent domain, pursuant to its home rule powers, apart from the Florida Community Redevelopment Act found at Chapter 163, Part III, Fla. Stat. (2004). Because eminent domain is a sovereign power, such power is only constrained to the extent that constitutional limitations are respected by the executive branch in executing the law, by the legislative branch in making the law, and by the judicial branch in interpreting the law.

The U.S. Supreme Court's opinion in *Kelo et al. v. City of New London* et al. reinforces the jurisdiction of each state to establish and interpret its own state constitution and statutes with respect to proper limits on the eminent domain power under color of state law. As stated before, at present, there is no expressed authorization found in Florida statutes or caselaw to exercise the power of eminent domain for a public purpose defined as economic development. While no such precedent exists, *Kelo et al. v. City of New London* prompts a Florida case of first impression.

Kelo was decided as to the protection afforded by the Fifth Amendment to the Federal Constitution. This protection is fairly narrow in that it states: ". . . [No] private property [shall] be taken for public use, without just compensation." The protection provided by the Article X, Section 6 of the Florida Constitution, is broader in that it states, in-part, "No private property shall be taken except for a public purpose. . ." Nonetheless, it is conceivable that an argument could be advanced that economic development is a "public purpose" and that a home rule entity may take property for

economic development without requiring a finding of slum or blight. The argument might be made that because such a taking was found, under *Kelo*, to pass federal constitutional muster, it should therefore pass Florida constitutional muster. The counter to this potential argument is an argument that Florida case law precedent, interpreting the public purpose requirement of the Florida Constitution, prevents the use of the power of eminent domain in these circumstances.

While we are not aware of any case in which local governments have actually attempted to use this "home rule" power to take private land for economic development, it has been considered as a possible option. This may be an area appropriate for legislative consideration as to whether some limitations should be imposed on the use of eminent domain in these circumstances. Any such legislation should be careful, however, not to create a defense to traditional takings for traditional public uses.

V. SUGGESTED AREAS FOR LEGISLATIVE CONSIDERATION

The Florida Community Redevelopment Act was enacted in 1969. Its purpose was pre-dominately to end the growing problem of urban decay: "slum" and "blight." Over the years, various legislative changes and supplements, as broadly interpreted by the courts, have allowed the law to become a tool for local government to condemn private property for economic development under the guise of "slum or blight" eradication.

While by no means an exhaustive list, the following are some suggested areas for legislative consideration which will protect private property rights in Florida while preserving the original intent of the Community Redevelopment Act. In suggesting these areas for review, there is no intention of altering the existing power of eminent domain as it relates to traditional areas of taking, (i.e. roads, schools, bridges, etc.). The Legislature will also need to strike a balance between protecting private property rights and maintaining eminent domain as a useful tool for eliminating blighted areas and encouraging community redevelopment.

1. Uncouple the use of tax increment financing and other redevelopment powers (including voluntary acquisitions) from the use of the power of eminent domain in the Community Redevelopment Act, particularly in § 163.335. This can be done by (a) leaving the current statutory framework in place under Chapter 163 in the context of tax increment financing and other redevelopment powers (including voluntary acquisitions) and (b) requiring a higher threshold of "slum" or "blight," with more objective definitions that are uniform across the State, when those terms are used as grounds for the exercise of the power of eminent domain.

2. Provide an appropriate level of judicial review for a taking based on a "slum" or "blight" determination by allowing the court to meaningfully review the determination

of "slum" or "blight" before permitting the taking of private property. Further, provide for legislative intent that the finding of slum or blight shall not be given judicial deference in a takings case.

3. Require that a blight study be performed under quantifiable specific criteria, and that time limitations be imposed on the use of a blight study, as a basis for the exercise of the power of eminent domain.

4. Limit the exercise of the power of eminent domain to the elected body, rather than the community redevelopment agency, which can be comprised of appointed, not elected, officials.

5. Require that there must be true slum or blight (using the definition with more objective criteria) within a reasonable geographic proximity to a property, before the property can be taken by eminent domain. This would not prevent the use of eminent domain where several structures are sound in an otherwise blighted area.

VI. CONCLUSION

The Property Rights committee of the RPPTL Section trusts that the foregoing background, analyses and suggestions for consideration are helpful to the Select Committee. Another strength of the RPPTL Section is in offering technical expertise and assisting in analysis of specific proposals to help insure that the end product clearly and efficiently achieves the public policy goals selected and does not lead to unintended consequences. The RPPTL Section remains available to the Select Committee to assist in this or any other manner deemed appropriate.

THE KELO DECISION: PLANNING, REDEVELOPMENT, AND EMINENT DOMAIN

By Tom Pelham, AICP*

The Fifth Amendment to the United States Constitution provides that private property can only be taken for a "public use" and upon payment of just compensation. For many decades the Supreme Court has interpreted "public use" broadly to mean "public purpose." A taking will be upheld if it is for a public purpose rather than solely to confer a private benefit even if the condemned land is not to be open for use by the general public.

Recently, the case of *Kelo v. City of New London, Connecticut*, 2005 WL 1469529 (2005), presented the Supreme Court with an opportunity to revisit its prior interpretations of the Public Use doctrine. Like many previous cases, *Kelo* involved the use of the eminent domain power to implement a local government's urban redevelopment plan. Nevertheless, the case attracted national attention because New London condemned a number of nonblighted, well-maintained residences solely for economic development purposes. The City's redevelopment plan called for transfer of these and other privately owned properties to private developers for development to increase the City's job base and tax revenues. In a 5-4 decision, the Supreme Court in *Kelo* held that New London's exercise of the eminent domain power to promote economic development did not violate the Public Use requirement.

The *Kelo* decision has been widely criticized by private property rights advocates and others who believe that local governments have abused the power of eminent domain. These critics are urging enactment of both federal and state legislation to restrict the use of the eminent domain power. It would be unfortunate if emotional over-reactions to the *Kelo* decision should

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lead to legislation which unwisely or unnecessarily weakens the ability of local governments to improve their communities through legitimate redevelopment programs. Because of the potential impact on urban planning and redevelopment, Florida's planners need to understand *Kelo* and closely monitor any legislative responses to the decision.

THE NEW LONDON REDEVELOPMENT PLAN

New London, Connecticut, in 1998 was an economically distressed city, with a declining population and an unemployment rate nearly twice that of the State. To bolster its economic base, the City adopted a redevelopment plan for an area known as Fort Trumbull, comprising both privately owned properties and 32 acres of land formerly occupied by a naval facility. After the pharmaceutical company, Pfizer, Inc. announced in 1998 that it planned to build a $300 million dollar research facility adjacent to Fort Trumbull, the New London Development Corporation (NLDC)initiated planning activities to prepare a redevelopment plan for the area. The NLDC received financial support from the State, input and assistance from various State agencies, and public input at a series of public neighborhood meetings. Ultimately, the City Council approved a comprehensive, integrated redevelopment plan for the Fort Trumbull area and designated the NLDC as its development agent to implement the plan.

The integrated plan for the area included an urban village with a waterfront conference hotel, restaurants, shopping and other commercial uses, a river walk, 80 new residences, research and development office space, a state park, a new U.S. Coast Guard museum, parking, and a renovated marina. Through implementation of the plan, New London hoped to take advantage of the proposed Pfizer facility and the new business which it would attract. Redevelopment of the Fort Trumbull area was projected to create jobs, new tax revenues, and revitalization of

downtown New Jersey. In addition, the Plan was designed to enhance the esthetic qualities of the City and to create leisure and recreational opportunities on the waterfront.

New London condemned fifteen residential properties in the designated redevelopment area after the private owners refused to sell the residences to the City. These properties were not blighted and in fact were well-maintained. Some of the properties were designated for park or marina support services, such as parking. The other properties were designated for office space use. After the City initiated eminent domain proceedings, the owners—the *Kelo* petitioners—challenged the taking of their land.

THE CONNECTICUT COURT DECISIONS

The Connecticut trial court prohibited the taking of the privately owned properties which were designated for park or marina support use, but approved condemnation of the properties designated for office space. On appeal, the Connecticut Supreme Court upheld the takings of all of the properties. The State's highest court agreed with the lower court that the takings were authorized by Connecticut's municipal development statute which contains a legislative determination that the taking of developed land as part of an integrated economic development plan is a "public use." Further, the Connecticut Supreme Court, citing the prior United States Supreme Court decisions in *Hawaii Housing Authority v. Midkiff*, 467 US 229 (1984) and B*erman v. Parker*, 348 US 26 (1954), held that such an economic development plan is for a valid public use under both the federal and Connecticut constitutions. Finally, the Connecticut high court held that the takings of the petitioners' properties were "reasonably necessary" to achieve the intended public purpose of the redevelopment plan.

THE UNITED STATES SUPREME COURT DECISION

The Supreme Court agreed to review the Connecticut Court's decision to determine whether New London's taking of property for the purpose of economic development satisfies the Public Use Doctrine of the federal Constitution. In a five-four decision, the Supreme Court upheld the Connecticut Supreme Court's decision that New London's taking of petitioners' property for economic development was not unconstitutional. The Court majority reasoned that upholding New London's action was consistent with its prior decisions. In a nutshell, the Court noted that for many decades the Court had equated "public use" with "public purpose," that public use does not mean that the condemned land has to be available "to use by the general public," and that economic development is a "legitimate public purpose," and is therefore for a "public use."

Reliance on Precedent

As did the Connecticut Court, the Supreme Court relied heavily on its prior decisions in *Berman* and *Midkiff*. In *Berman* the Court upheld the taking of privately owned property pursuant to a redevelopment plan for a blighted area of Washington D. C. Under the plan, the redevelopment area, including a non-blighted department store, was to be condemned and transferred to private parties for redevelopment. Rejecting the department store owner's contention that the condemnation of its non-blighted store was not a valid public use, the Supreme Court opined that the redevelopment area "must be planned as a whole," and that the Court would give great deference to the judgment of the legislature. The Court in *Berman* defined "public use" in very broad terms to include values that are "spiritual as well as physical, esthetic as well as monetary," Proclaiming that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean,

well balanced as well as carefully patrolled," the Court stated that it would not second-guess the legislature.

The *Midkiff* case involved far more sweeping economic legislation than did *Berman* or *Kelo*. In 1967 the Hawaii legislature enacted reform legislation designed to break up the state's land oligopoly. The legislature had determined that 47% of the state's lands were privately owned by only 72 private landowners (49% of the state's land was in public ownership). Worse still, more than 40% of the privately owned lands were owned by only 18 landholders. The Hawaii legislature concluded that this extreme concentration of land ownership was adversely affecting the state's economy by skewing the residential market, inflating land prices, and forcing many citizens to lease, rather than buy, their homes.

To correct this problem, the 1967 Hawaii Land Reform Act provided for condemnation of residential lands and the resale of those lands to existing lessees. In other words, the state took lands from a few private landowners and transferred ownership to many other private owners in order to break up the land oligopoly. In a unanimous decision authored by Justice O'Connor, the Supreme Court in *Midkiff* held that the Hawaii Act did not violate the public use requirement. Citing B*erman*, the Court reiterated that the public use requirement is coterminous with the scope of the state's police powers, that judicial deference must be given to the legislature's public use determinations, that the Court's role in reviewing the legislative determination is "an extremely narrow" one, and that the exercise of the eminent domain power would be upheld if it is "rationally related to a conceivable public purpose." Given the sweeping language used by the Court in *Berman* and *Midkiff*, the Court's decision in *Kelo* should not be surprising.

The Importance of A Redevelopment Plan

Planners should take special note of another important factor in the *Kelo* decision. The Court gave great weight to New London's redevelopment plan. In rejecting arguments that the condemnation of petitioners' properties was not for a public purpose, the Court repeatedly referred to and relied on the Plan. For example, in rejecting the argument that the actual purpose of the condemnations was to bestow a private benefit, the Court emphasized that the takings "would be executed pursuant to a 'carefully considered' development plan," and that the Plan was not adopted "to benefit a particular class of identifiable individuals."

Regarding the *Kelo* petitioners' argument that the takings were to benefit Pfizer, Inc. or other private development entities, the Court noted that both the Connecticut trial judge and Connecticut Supreme Court had found no evidence of an illegitimate purpose. On the contrary, the Court noted the state court's conclusion that the redevelopment plan was not intended to serve these private interests, but was "to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront."

The Court also indicated that the traditional deference to be accorded the City's determination of the appropriate redevelopment area was further justified by the existence of a carefully formulated economic development plan:

> Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piece meal basis, but rather in light of the entire plan.

Finally, the Court cautioned that transferring land ownership from one private citizen to another solely for the purpose of achieving more productive uses and higher taxes might violate the public use requirement if "executed outside the confines of an integrated development plan." However, the Court concluded that *Kelo* did not involve such a situation because New London had based its actions on an adopted integrated redevelopment plan.

In a concurring opinion, Justice Kennedy also emphasized the importance of a comprehensive development plan. He observed that New London's plan was designed "to address a serious city-wide depression" and was adopted in accordance "with elaborate procedural requirements." Further, he observed that the Connecticut trial court had closely scrutinized the evidence and determined that the primary motivation of the development plan was to revitalize the local economy and not to benefit Pfizer or private developers.

The Role of the States

The Connecticut municipal development act implemented by New London authorized the exercise of the eminent domain power to promote economic development. In holding that New London's exercise of that statutory power did not violate the public use requirement of the federal Constitution, the Court emphasized that states may restrict the exercise of the takings power by its local governments. Also, the Court noted that some states, through legislation or state constitutional provisions, have adopted stricter public use requirements than those imposed by the federal Constitution. Significantly, the Court noted that out of respect for our federalist system, it had historically "eschewed rigid formulas" in applying the public use requirement because states need flexibility to deal with their varying public needs and resources.

Although some *Kelo* critics have attacked the Supreme Court itself, the *Kelo* decision is a model of judicial restraint. It adheres to and applies precedents which have been established for decades. It accords great deference and respect to the judgments of the legislature and refuses to judicially second guess its decisions. It recognizes that in our federalist system, state legislation is the appropriate vehicle for addressing abuses of the eminent domain power by local governments because conditions vary from state to state. Finally, recognizing that even with compensation condemnation may cause individual hardships, *Kelo* did not endorse New London's action as sound public policy or opine on the merits of the City's redevelopment plan. Rather, *Kelo* only held that New London did not violate the federal constitution.

Ironically, Justice O'Connor, who wrote the Court's unanimous opinion in *Midkiff*, authored the dissenting opinion in *Kelo*. For the dissenters, she argued that government should only be allowed to condemn property and convey it to private parties if the taking eliminates some harmful property use such as a slum, a proposition which the majority characterized as "novel" and contrary to longstanding precedents. Justice O'Connor criticized the majority opinion with the following hyperbolic judicial sound bite:

> The specter of condemnation hangs over all property. Nothing is to prevent he State from replacing any motel with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

THE AFTERMATH OF *KELO* AND FLORIDA'S COMMUNITY REDEVELOPMENT ACT

The *Kelo* decision has generated much commentary and controversy. The media has shamelessly hyped the decision as a "David and Goliath" struggle between irresponsible local governments and big developers on one side and homeowners on the other. Legal scholars are

debating the merits of the decision on television and in newspaper editorials. Private property rights organizations are using the decision as justification to limit use of eminent domain. Both federal and state legislative leaders have called for the enactment of laws to counteract the decision. In Florida, immediately following announcement of the decision, the Speaker of the State House of Representatives announced the formation of a Select Committee to Protect Property Rights to review the decision and Florida law on eminent domain.

As a result of the controversy, the 2006 Florida Legislature is likely to consider proposed legislation on this issue. A legislative review of Florida's eminent domain laws regarding community redevelopment should not be feared. Government should always be sensitive to private property rights. Also, as the Supreme Court has indicated in *Kelo*, state legislatures have the power and responsibility to monitor, and correct if necessary, the exercise of eminent domain by local governments. Legislative review of Florida's laws in this area can help determine whether there have been abuses of Florida's laws by local governments.

Any legislative review should begin with Florida's Community Redevelopment Act of 1969, Chapter 163, Part III, Florida Statutes. This Act, which authorizes Florida's local governments to exercise the power of eminent domain for community redevelopment, is more restrictive than the Connecticut state statute involved in *Kelo*. Unlike the Connecticut statute, Florida's Act does not authorize local governments to condemn privately owned property solely for economic development purposes. Rather, it authorizes use of eminent domain only in slum and blighted areas, as defined in the Act, or in an area in which there is a shortage of affordable housing for low and moderate income residents, including the elderly, or in a deteriorating and economically distressed coastal and tourist area. Additionally, underscoring a factor deemed important by the Supreme Court in *Kelo*, the condemnation power must be exercised in

accordance with a community redevelopment plan that meets statutory substantive requirements and is prepared and adopted in accordance with statutory procedural safe-guards.

The Community Redevelopment Act is important to Florida's future. The existence of slum, blighted, and deteriorating and economically distressed coastal and tourist areas are injurious to the State's economy and the health, safety and welfare of its citizens. Affordable housing, especially for low and moderate income groups, is a serious problem in many areas in Florida. If the powers granted by the Act are being abused, appropriate corrective action should be taken. However, care should also be taken to insure that any legislative responses to *Kelo* do not cripple the ability of local governments to protect and enhance their communities by implementing needed redevelopment plans which benefit the public as a whole.

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Florida Redevelopment Association

Policy Statement
Eminent Domain

Adopted by FRA Board of Directors on August 20, 2005

The Florida Legislature has specifically authorized the use of eminent domain for the redevelopment of slum and/or blighted areas.[1] A historical role of a Community Redevelopment Agency ("CRA") in Florida has often been to acquire land for sale or lease to the private sector to remove or prevent slum or blight. Most often the land is acquired through negotiated purchase with a willing seller. If negotiated purchase is unsuccessful, CRAs may acquire the property through the exercise of the power of eminent domain. The use of eminent domain should be a last resort to complete the land assembly process.[2]

A CRA may not use the eminent domain power unless and until the elected governing body that created the CRA has authorized the use of the power for a specified property.[3]

The United States Supreme Court recently addressed the use of eminent domain in an economic development context and the application of the 5th Amendment's "public use" provision.[4] A majority of the Court found that based on long-standing precedent, the City of New London had the authority to take private real property for the purpose of economic development and conveyance to a private developer. That case did not involve the use of eminent domain to take real property in an area found to be slum or blighted. The United States Supreme Court found that such a taking was permissible under the 5th amendment in 1954.[5]

Florida authorized the use of eminent domain for community redevelopment in 1969 when the Legislature enacted the Community Redevelopment Act of 1969.[6] This power had also been provided in various special acts creating downtown development authorities during the 1960s.[7]

In 1980 the Florida Supreme Court found the tax increment financing program established in §163.387, Florida Statutes (1999)[8] to be permissible under Florida's Constitution.[9] In its opinion the Court found that the use of eminent domain by a community redevelopment agency to acquire property from one person to convey it to another for redevelopment was permissible as serving a public purpose.
Subsequent court decisions have upheld the acquisition of property by a CRA for conveyance to a private party for a redevelopment project.[10]

There are also federal tax benefits to the property owner selling property under threat

of condemnation, i.e. eminent domain, or having property acquired through the eminent domain process. In the absence of condemnation, property owners have one (1) year to reinvest the proceeds from the sale of their property before the capital gains tax is applied. But according to federal tax law a property owner has two (2) years to reinvest the proceeds of a sale of property sold under threat of condemnation or pursuant to an order of taking before the capital gains tax applies.[11] Thus, eminent domain is often used as a threat to take advantage of the federal tax benefit rather than as an involuntary taking of property.

Land assembly for community redevelopment is important because the market for larger, consolidated properties is much preferred than that for small, fragmented properties. Developers are reluctant to undertake the costly, time-consuming land assembly process, particularly when they are unsure of the ultimate outcome. By assembling properties, CRAs can attract private investment. Land assembly supports smart growth initiatives to recycle older, urban areas. Without the power of eminent domain, CRAs will have much difficulty in assembling land, especially where many landowners are involved.

Principles for Use of Eminent Domain for Redevelopment

1. CRA initiated land assembly should be an inclusive process initiated with a discussion amongst residents and local businesses in the target area.

2. Eminent domain should be used as a last resort in the land assembly process. It should be used when a property owner is unwilling to sell or refuses to sell at a fair market value plus premium and relocation costs and only after attempted negotiations have failed.

3. When embarking on a redevelopment project that requires land assembly, all reasonable efforts should be made to avoid relocating occupied residences and businesses. The community must carefully weigh the benefits of redevelopment versus displacement.

4. In cases where eminent domain is used for occupied residential or business properties, relocation costs must be covered. Relocation costs should not be just the appraised cost of the taken residence or the business, but should take into account the market to which the displaced property owner will be looking for replacement housing or business location.

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[1] §163.346, Florida Statutes (2005).
[2] Most condemnation proceedings for redevelopment have been uncontested. The contested actions have been in Delray Beach, Jacksonville Beach, downtown St. Petersburg, and Charlotte County.
[3] §163.346, Florida Statutes (2005).
[4] Kelo vs. City of New London (Case No. 04-108; Decision released 6/24/05)
[5] Berman vs. Parker, 348 U.S. 28 (1954)
[6] Codified as Part III, Chapter 163, Florida Statutes (2005), originally enacted as Chapter 69-305, Laws of Florida.
[7] For example, see Chapter 65-1541, Laws of Florida, creating the Fort Lauderdale Downtown

Development Authority

[8] As added to the Community Redevelopment Act by Chapter 77-588, Laws of Florida.

[9] State vs. Miami Beach Community Redevelopment Agency, 392 So. 2nd 875 (Fla. 1980).

[10] See Holloway vs. Lakeland Downtown Development Authority, 417 So. 2nd 963 (Fla. 1982); State vs. Panama City Beach Redevelopment Agency, 831 So. 2nd 662 (Fla. 2002).

[11] §1033, Internal Revenue Code

Community Redevelopment in Florida and Eminent Domain: A Response to Kelo

The recent decision by the Supreme Court of the United States in the case of Kelo vs. City of New London (No. 04-108, June 23, 2005) upholding the use of eminent domain by the City of New London to acquire private property for an economic development project has raised questions concerning the application of that decision to the use of eminent domain by community redevelopment agencies in Florida. There are significant differences between the facts and the underlying state law in Connecticut from the law and history in Florida.

The eminent domain action in *Kelo* was undertaken by a non-profit corporation, the New London Development Corporation ("NLDC"), created to assist the City of New London in planning economic development. The focus of the *Kelo* case was the proposed redevelopment of the area of the City known and referred to as Fort Trumbull. The area had suffered from various actions, including the closure of a military installation, which contributed to high unemployment. The City had attracted Pfizer to locate a research facility in the Fort Trumbull area. The NLDC had prepared a plan for the revitalization of the Fort Trumbull area that included a variety of public and private uses. In January, 2000, the City designated the NLDC as its development agent in charge of implementing the plan for revitalization of the area. The plan was also approved by the State of Connecticut. The NLDC was charged with the responsibility to acquire the parcels in the Fort Trumbull area and was successful in acquitting most of the property in the area except for the parcels owned by nine (9) persons. In November, 2000 the NLDC initiated condemnation proceedings to acquire the remaining fifteen (15) parcels owned by the nine (9) persons.

Under Connecticut's municipal development statute (See Conn. Gen. Stat. §8-186 *et seq.*), there is no requirement that the City or the NLDC find the area or any of the properties in the area to be "blighted." The statute says that the taking of property for economic development is a public use and in the public interest. Prior to the United States Supreme Court decision, the Connecticut Supreme Court held that economic development qualified as a valid public purpose under both the Connecticut and United States constitutions. 268 Conn., at 40, 843 A. 2d at 527.

The United States Supreme Court upheld the decision of the Connecticut Supreme Court by finding the taking of the property by the City of New London through the NLDC did not constitute the taking of private property for a private use without just compensation in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. The Court relied on precedent going back to at least 1954 in the case of Berman v. Parker, 348 U.S. 26 (1954), which is the base authority for all redevelopment programs throughout the country. The legal principle in *Berman* was upheld in the subsequent case of Hawaiian Housing Authority v. Midkiff, 467 U.S. 229 (1984). In *Kelo*, the Court did not create new law or expand existing law as has been alleged in many media reports. It merely found that Connecticut was acting within existing law,

i.e., that the state determines the public purpose for a taking of property. In reality, this was a state's rights case and the Supreme Court deferred to the state. This was not "new" law or "expanded" law, but a continuation of long-standing precedent.

Many advocates of property rights have argued in numerous news articles and columns that Florida law is really no different from Connecticut's and that Florida home owners should be fearful of government takings of their property. (See "Kelo Can Happen Here, too" by Valerie A. Fernandez in South Florida Sun-Sentinel, July 18, 2005). Unlike Connecticut, Florida requires a finding of "slum" or "blight" before the condemnation authorization of s. 163.375, Florida Statues (2005) is triggered. Florida does not allow condemnation solely for "economic development" as was the case in *Kelo*. But some have contended that the definition of "blight" in s. 163.340(8), Florida Statutes (2005) is so broad that it provides little protection to a homeowner. (See "Blight Defined Too Broadly" by Frank Schnidman, South Florida Sun-Sentinel, July 18, 2005).

But such is not the case. In fact, in 2002, notwithstanding the statements of some, the definition of "blight" was tightened through legislation that was negotiated and agreed upon between the Florida Redevelopment Association, the Florida League of Cities and the Florida Association of Counties. (See Chapter 2002-294, Laws of Florida). Prior to that legislation a finding of blight only required a city or county to find that one of the factors listed in s. 163.340(8), Florida Statues (2001), be found to exist. Following this legislation, a city or county could find "blight" existed only if there is a "substantial number of deteriorated or deteriorating structures" and conditions as indicated by "government-maintained statistics or other studies are leading to economic distress or endanger life or property" and at least two of the following conditions existed at the time of the finding:

> (a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;
> (b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;
> (c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
> (d) Unsanitary or unsafe conditions;
> (e) Deterioration of site or other improvements;
> (f) Inadequate and outdated building density patterns;
> (g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;
> (h) Tax or special assessment delinquency exceeding the fair value of the land;
> (i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;
> (j) Incidence of crime in the area higher than in the remainder of the county or municipality;

(k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;
(l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;
(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
(n) Governmentally owned property with adverse environmental conditions caused by a pubic or private entity. (Section 163.340(8), Florida Statutes (2005)).

If all of all of the taxing authorities agree then only one of the factors in (a) through (n) must be shown to exist. Section 163.340(8), Florida Statutes (2005).

The Connecticut law at issue in the *Kelo* decision did not require ANY of these conditions to be found to exist.

Florida's cities and counties and community redevelopment agencies have used the power of eminent domain very sparingly since it was authorized by the Legislature in 1969. Chapter 69-305, Laws of Florida. The impetus for the 1969 legislation was the desire of the City of Miami Beach to redevelop that area of the City known as South Beach. Under the 1969 Constitution special acts could not be enacted for just Dade County. Several cities had created downtown development authorities in the 60s and 70s through special acts (e.g., Orlando, Lakeland, Tampa, Fort Lauderdale, Clearwater, Bradenton), but Miami Beach could not. Then Representative Murray Dubbin, now City Attorney of Miami Beach, sponsored the 1969 bill to give Miami Beach and all other cities and counties the legislative authorization to do what other cities in Florida had done through special acts. In 1977 the tax increment financing provision was added to the Act. Chapter 77-391., Laws of Florida. The constitutionality of the tax increment financing statue was upheld by the Florida Supreme Court in the case of State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1981).

Miami Beach had desired to have the authority to acquire property through eminent domain so it could assemble property for conveyance to a "master developer". Though the 1981 Florida Supreme Court decision was a bond validation case, the court acknowledged in dicta that the Redevelopment Act allowed the use of eminent domain to acquire property for resale to another.

Since the enactment of the Community Redevelopment Act in 1969 the power of eminent domain for redevelopment has been used very sparingly by Florida local governments and CRAs. (See attached list of eminent domain actions). Notwithstanding the media comments about the abuse of eminent domain for redevelopment, Florida cities, counties and community redevelopment agencies have exercised great restraint in using this awesome power. Florida has a long history of respecting private property

rights (e.g., see Bert Harris Private Property Rights Act) and local officials have subject to public pressure not to abuse the power of eminent domain.

Most condemnations for redevelopment in Florida are not noticed because they are not contested. In many cases, the property owner wants to sell the property under threat of condemnation so the owner can take advantage of Section 1033 of the Internal Revenue Code that allows an extended period for reinvestment of the proceeds of the dale before the capital gains tax applies.

Unlike Connecticut, before a Florida community redevelopment agency can take a person's property through eminent domain the following must have occurred:

- The elected governing body (city or county) must have found the existence of "slum" or "blight" as defined in the Community Redevelopment Act.
- The finding can only be made at a public meeting after notice has been published in a newspaper of general circulation in the area at least 10 days in advance of the vote.
- Before a condemnation proceeding can be commenced in circuit court, the CRA or local government condemning the property must make a good faith offer to the property owner for the property based upon an appraisal of the fair market value of the property and allow a 30 day period for the owner to consider the offer. (Most good faith offers are at least 150% of the appraised value).
- A condemnation proceeding may not be filed in circuit court until the elected governing body that created the CRA authorizes the use of eminent domain for the specific property.

Under Florida eminent domain law, the property owner is not only paid full and fair compensation for the property, but is also reimbursed for any and all reasonable attorneys fees and other costs incurred in the course of the condemnation proceeding. Florida's Community Redevelopment Act requires the redevelopment plan to provide a process and guidelines for relocation of residents displaced from a community redevelopment area.

Below is a listing of eminent domain actions that have been initiated by Florida CRAs or local governments for redevelopment. Note the limited number of actions actually filed and contested for the 36 years the statutory authority for such actions has been on the books. While some local governments and CRAs have threatened to use eminent domain for large-scale controversial projects (e.g., Riviera Beach), most of those have not led to condemnation actions being filed. Recently much attention has been given to condemnation actions brought by Charlotte County for the Mudock Village project. While the County through its CRA intends to ultimately convey much of the acquired property to a private developer, the eminent domain actions were necessary to clear title to antiquated platted lands and the County has offered not only to pay a premium above full fair market value to the property owners but also to move their houses to a new location.

Florida has many hurdles that must be overtaken before local governments and CRAs can take private property and also provides more protection to private property owners than any other state in the country. *Kelo* was in Connecticut. It will not happen and has not happened in Florida.

Prepared by David E. Cardwell on July 23, 2005. The views expressed herein are solely those of the author and do not reflect any official position of the Florida Redevelopment Association.

Attachment: List of CRA eminent domain actions

Redevelopment and Eminent Domain in Florida
Examples

Fort Myers
The Fort Myers CRA is currently utilizing eminent domain in a redevelopment district composed of a 1920's platted subdivision that was never built. It has no road or utility access and no development on any of the parcels. It consists of undersized lots and has extensive title problems. Many of the parcels have gone through several generations of ownership and in some cases the ownership can not be determined. Over the years several developers tried to assemble the parcels without success. In the 1990's the city created a redevelopment area that encompasses about 500 acres of this property. In 2004, pursuant to its redevelopment plan, the CRA accepted proposals for redevelopment, selected a developer and entered into a development agreement for development of this area. The CRA agreed to assemble the parcels the developer was unable to purchase. The CRA has been successful in the court with the eminent domain proceedings for the parcels that the CRA was unable to purchase through negotiation.

Gainesville
Parcels in the downtown redevelopment area that were dilapidated and used by vagrants were condemned and sold to a developer who constructed rental apartments.

Gulf Breeze
Threatened condemnation of a vacant, undeveloped, unkempt property to allow expansion of hospital, construction of a sports medicine clinic and improved road network.

Lakeland
Threatened condemnation for assembly of a site for development of housing in an area "trapped" between major downtown roads.

Delray Beach
Condemnation of commercial properties to allow for construction of parking to serve the downtown area.

Charlotte County
Condemnation of old platted subdivision to clear title and allow for replating from substandard to standard lots sizes that will permit development of Murdock Village project.

Jacksonville Beach
Condemnation of properties for assembly to permit construction of public and private redevelopment projects.

Panama City Beach
Condemnation for development of pier project.

St. Petersburg
Condemnation for land assembly to permit development of Bay Plaza redevelopment project in downtown redevelopment area by master developer

Daytona Beach
Condemnation of an old dedication on a plat of property for a public park to clear the dedication and allow for development of a convention center hotel to serve the Ocean Center.

Boca Raton
Condemnation to complete assembly of the site on which the Mizner Park project was developed.

West Palm Beach
Condemnation of property to complete site assembly for the CityPlace project consisting of public and private uses

Fort Lauderdale
Condemnation of property for the right of way of realigned road near AIA to allow for one-way pairs to relieve traffic on AIA.

7/27/2005

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05 AUG 11 PM 1:

August 10, 2005

The Honorable Allan G. Bense, Speaker
Florida House of Representatives
420 The Capitol
Tallahassee, FL 32399-1300

Re: Florida Redevelopment Reform

Dear Representative Bense:

We have met on occasion as I reside in Jacksonville (Mandarin), but you may not recognize me by name or find yourself familiar with my personal interest in protecting private property ownership.

I am a lawyer with Brigham Moore LLP. Our entire practice is devoted to representing owners in property rights or eminent domain cases. We have offices in Jacksonville, Miami, Sarasota, Tampa Bay, and West Palm Beach with twenty lawyers, again, exclusively representing property and business owners. While I have practiced in Florida courts for fifteen years, my father and grandfather both practiced in this area before me. In fact, my grandfather's case, Dade County v. Brigham, is the case in which the Florida Supreme Court established that the constitutional guarantee of "full compensation" includes payment of the owner's defense in a case. The rationale of the Florida Supreme Court in 1956 was that the constitutional measure of compensation should make the owner whole, leaving the owner in the same position after the taking as the owner was before the taking as far as is possible or practicable.

Florida courts have historically interpreted our state constitution under strict construction of its original intent to protect and preserve private property rights. Notwithstanding, the U.S. Supreme Court decision in *Kelo v. City of New London* has declined to define any federal baseline that prevents the taking of private property from one citizen so as to give to another private party for economic development. *Kelo*, however, reserved to the states its jurisdictional authority to preserve the civil right of private ownership under state constitutional and statutory law. For your reference, I have enclosed a copy of the *Kelo* decision and an article I submitted to the Southeast Real Estate Business periodical providing an overview of what appears to be the likely implications of what Justice O'Connor referred to as the Court's "abdication of our responsibility."

Your selection to the House Select Committee comes at what may be as the most important time and place for private property rights in Florida since the framing of our state constitution. Although the Legislature has not delegated authority to use the power of eminent domain for economic development, there is policy and practice in place that allows essentially the same thing

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to occur under Chapter 163, Florida Statutes, (Redevelopment). Kelo invites a response, albeit state by state, to what has been shown to be an erosion of private property rights nationwide.

I represented Tony Rukab in Jacksonville whose property was taken through Chapter 163 and made available to developer Toney Sleiman to build a shopping center. The property abuts Marsh Landing Parkway with exposure to J. Turner Butler Boulevard proximate to the A1A interchange, a stone's throw from the Atlantic Ocean at Ponte Vedra Beach. This is not, what everyday citizens in Jacksonville call a "slum" or "blighted area." It is, in fact, one of the most desirable locations in the Jacksonville MSA with a swank office park two doors down that rents at $22/sq.ft., a new Hampton Inn immediately next door, and strategically located in front of the high-end residential rooftops of Marsh Landing, one of Jacksonville's premier developments with million dollar homes situated on the intracoastal waterway with an exclusive golf course. Despite all effort, I was not able to persuade the Florida courts that the taking of the property for a shopping center was predominantly a private, not public, purpose. I fought for Mr. Rukab, and his wife Aida, for five years, through two appeals and finally a jury valuation trial. See, Rukab v. City of Jacksonville Beach, 811 So.2d 727 (Fla. 1st DCA 2002). They wanted to develop the property themselves seeking a reward for their own industry and investment-backed expectation, having hoped to earn income on both land they own and building improvements they would construct. The profit for development, instead, now goes to the private developer who took away their land and who already owns tremendous assets locally pursuant to private property rights he, too, is blessed to enjoy. He did not negotiate a purchase with the Rukabs under a system of free enterprise, and the evidence is abundantly clear how even the negotiations leading up to the taking our warped. He had use of a "privatized" power of eminent domain – a power reserved for public good – all in his back pocket.

How can this happen under Florida law? As a lawyer, I argue a client's case utilizing legal authorities. Foremost, is both U.S. and Florida Constitutions. Next, I look to law established in Florida Statutes. Likewise, I also have case precedent in reported decisions of our Florida courts where constitutional and statutory provisions are both interpreted and applied to specific facts and circumstances found in similar or dissimilar cases. The problem is not found in a lack of legal precedent. Florida has case precedent to support a denial of the eminent domain power when there is a "predominance" of private purpose over public purpose; there exists cases that plainly state both that the "tail cannot wag the dog" and that a taking cannot stand where the public benefit is merely incidental compared to the private gain. *See, Baycol, Inc. v. Downtown Development Authority of the City of Ft. Lauderdale, 315 So. 2d 451, 455 (Fla. 1975).* However, there also exists competing case precedent, primarily in the instance of bond validations, that support a policy of judicial restraint. In these cases, judges wash their hands and extol the virtues of such legal incantations of "legislative deference" or "presumption of correctness" when reviewing a slum or blight designation made by local government under Chapter 163. *See, Panama City Beach Community Redevelopment Agency v. State of Florida,* 831 So.2d 662 (Fla. 2002). Again, these instances relate primarily to bonds, most particularly the tax increment financing that pays the bonds back intended for community redevelopment areas. More and more, the judicial restraint applied to bond validations is spilling over into redevelopment cases involving the exercise of the eminent domain pursuant to Chapter 163. With a convenient choice between two lines of precedential authority, the application

of Florida law in the Florida courts is becoming increasingly inconsistent. Florida judges are unclear about whether to enforce the plain meaning of constitutional language that protects individual liberty or apply a more vague standard to the assertion of public purpose that has been watered-down to promote use of tax increment financing within community redevelopment areas. The definition of blight within Chapter 163 is now so ill-defined as it makes almost any neighborhood of small lots and diverse ownership a candidate for private property redistribution when it may be the intent of the initial finding of necessity for redevelopment was to provide tax increment financing to be directed at an area from which public investment was to be made, not condemnation.

In 2001, the Florida Legislature passed a bill and made law changes to Chapter 163 that actually lowered the bar for a finding necessity for redevelopment by local government. Again, the definition of blight within Chapter 163 serves as a threshold not only for tax increment financing, but also for eminent domain. The bill was subject to an earlier summer workshop between cities and counties, wherein the issue at hand was the concern of counties whose future tax base dependent upon proration of property taxes between local governments. The future tax base was being shifted to the cities that were designating more and more of the private property within their jurisdictions to be blighted and, therefore, eligible to pass through all taxes paid on the future appreciation in value on private property (known as the "tax increment") avoiding proration with other taxing authorities like the counties. The summer workshop did not invite private property right advocates or private property owners to the table. The compromise made between cities and counties resulted in setting forth a "sunset" provision for redevelopment that would accommodate a return back to a pro-rated tax base, but also resulted in changes to the definition of blight. These changes were purported to narrow the instances of local governments determining blight by increasing the number of blight "factors" that must exist as a prerequisite to a finding of necessity for redevelopment. However, from a practitioner's standpoint, the changes also added applicable blight "factors" that are far more vague, apply in almost any instance of residential platting, and provide greater impetus for blight to be found simply because government says it exists. Further, the changes expunged catch-all language that required blight to be demonstrable, and not based on the mere presence alone of the blight "factors." The language removed required that blighted conditions "arrest sound growth" <u>and</u> constitute a "menace to the public health, safety, morals, and welfare." It was this language in courts that allowed a qualitative and quantitative "check and balance" to a local government's decision, instead of the mere presence of vague statutory factors characteristic not only of blighted neighborhoods, but most residential subdivisions in Florida.

Most citizens do not question government when taking private property for necessary public uses such as a road, school, library, or park. Most can follow that, in the instance of genuine slum or blight, solving such problems escapes the extent of police power and may require the extreme of taking private property from one to give to another. It is an "ends" and "means"question. If truly a slum or blighted area, then there is likely a public purpose to be accomplished in turning the area around that the community knows and agrees with the notion that such a neighborhood requires the assistance of government. However, when the slum or blight label is dubious and used as a pretext to take private property from a small property or business owner to provide a more politically favored developer an alternative to arms-length negotiations, isn't the tail wagging the dog?

Common sense suggests that slum and blight do not have to be mysterious terms that only judges and lawyers understand. The instances where tax increment financing can be an effective tool for redevelopment can be distinguished from those more extreme instances where the use of government's sovereign power of eminent domain to condemn and redistribute private property may be justified.

The key to reform is not to throw "the baby out with the bath water."

Economic development should never serve as a basis to take private property. Faith in the free enterprise system, and an understanding of the virtue of a constitutional form of government in both principles of limited government and protection of civil liberties, are the philosophical underpinnings that revolt against such an expansion in the exercise of sovereign power and disregard for human nature in government that requires "check and balance." However, the degree of slum or blight found within an area should be considered when justifying the use of government power and to authorize the use of less intrusive redevelopment tools over others which should be a tool of last resort. Simply put, the instances where tax increment financing is an appropriate response to the problems of slum and blight are more prevalent than the relatively few extreme instances where eminent domain may be constitutionally considered as the last available alternative.

To this end, I am enclosing a work product of my law firm that incorporated the efforts of lawyers within our firm who have represented property owners in redevelopment cases throughout Florida over the past 40 years. Our experience traces back to historic redevelopment projects within Miami's Overtown and South Beach. More recently, we have represented or consulted with owners in Miami (Art and Design District), Miami Beach (South Beach), Hollywood (Hollywood Circle), West Palm Beach (Old Town Square and Riveria Beach), Daytona Beach (Broadway to Silver Beach and Mainstreet/Boardwalk CRA's), Jacksonville Beach (Southend CRA), Amelia Island (American Beach CRA), and Charlotte County (Murdock Village). We have represented owners in both trial and appellate courts, and have been involved in legislative reforms in the past including passage of the Bert J. Harris Private Property Rights Protection Act and revisions to Chapter 73 & 74, Florida Statutes (Florida's Eminent Domain Code). More importantly, we have experienced firsthand instances wherein redevelopment efforts are seemingly justified so as to be in the public interest and wherein blight appears to be only a pretext for private gain.

We, respectfully, enclose a proposed set of revisions to Chapter 163, Florida Statutes, and related statutes delegating authority to local governments to use eminent domain which affect the following:

- **generally, "uncouple" or "de-link" tax increment financing and other redevelopment powers from eminent domain;**

- **require a higher threshold of "slum" or "blight" for use of the eminent domain power without raising the bar or changing the definition of "slum" or "blight"**

provided by statute as it applies to tax increment financing and other redevelopment powers;

- **distinguish a finding of general underlying necessity for the purpose of establishing a community redevelopment area from a specific necessity for acquisition by eminent domain;**

- **if challenged by a property or business owner, provide for a heightened judicial review of any resolution to take private property that will require clear and convincing evidence that public benefits predominate over incidental private gain at the time of taking;**

- **while allowing the taking of private property that may not exhibit conditions of "slum" or "blight" itself, require that it must first be shown that "slum" or "blight" be genuine and exist in the immediate neighborhood of the private property sought to be acquired;**

- **provide property and business owners opportunity to defend against a taking if showing that existing private enterprise and ownership has a possible, practicable, and economically feasible plan to cure or rehabilitate "slum" or "blight" conditions as an alternative to the use of eminent domain;**

- **define compensation to include payment of business damages if a taking for redevelopment, whether in whole or part, damages a business that is in lawful operation at the time of taking;**

- **define compensation to provide for business or residential relocation and re-establishment or other losses associated with a taking for redevelopment;**

- **define compensation to provide private homeowners equitable compensation equal to substitution of comparable replacement housing notwithstanding if such measure exceeds the market value of the home taken for redevelopment;**

- **encourage and establish specific guidelines for the encouragement of private enterprise to include existing private enterprise and ownership; and**

- **encourage and establish specific guidelines for affordable housing when asserted as a basis for the specific necessity for acquisition by eminent domain.**

I would welcome an opportunity to speak with you regarding the proposed statutory revisions or other matters concerning the need for redevelopment reform. If invited, I, or one of my law partners, would be happy to meet with you at or near your district office and spend with you whatever time you desire to understand the legal and practical rationale behind our proposed statutory revisions. As the House Select Committee holds public workshop or other meetings, we would also welcome any opportunity for us to be a resource as legislative changes are considered.

This would include our contacting for you our past or present clients who have been personally affected by dubious slum or blight designations within their communities.

We look forward to your consideration and public service as to this issue.

Sincerely,

Andrew Prince Brigham

If Only Attorney General Crist Were Correct About Private Property Rights in Florida

by

Valerie A. Fernandez

Last month, the United States Supreme Court, in the Connecticut case of *Kelo v. New London*, authorized local governments to seize the homes of property owners and give the land to private companies. Florida Attorney General Charles Crist, and other sources, have been quoted as saying that Floridians don't have to worry about this decision because Florida law provides greater protection for private property owners than the United States Constitution or Connecticut law. Unfortunately, that not the case.

Florida's Community Redevelopment Act (CRA), allowing "blighted" areas to be condemned by local governments under eminent domain, gives public entities unbridled discretion in making a determination of blight. This determination forms the basis for a local government to declare a legitimate public purpose in order to condemn your home as it sees fit. In fact, in Florida, it's just as easy to kick you out of your home as it is in Connecticut.

In order to declare an area blighted, a local government only needs to find that two of the thirteen statutory factors are present. The factors include such subjective areas as inadequate street layout, property assessments which have failed to show appreciable increases over five years, faulty lot layout, diversity of ownership, and emergency medical service calls proportionately higher than the rest of the community, to name a few.

It's easy for any local government intent on redevelopment to find two of 13 such factors. If such a finding is made, the local government has the power to declare "blight" and condemn your home or business property without proving any other legitimate public use. In fact, eminent domain abuse has been occurring in Florida long before Mrs. Kelo received her condemnation notice from the City of New Haven.

Redevelopment plans are being approved and eminent domain proceedings initiated in growing numbers throughout Florida. The most blatant examples of eminent domain abuse are described in the Institute for Justice study entitled *Public Power, Private Gain*. The Florida local government players depicted in the study include the cities of Boynton Beach, Daytona Beach, Jacksonville Beach, Riviera Beach, and West Palm Beach.

In Charlotte County, some 1,100 acres of land, known as the West Murdock Area, are sought by the County Commission for "(re)development" by a private (for profit) corporation – just as in the *Kelo* case. Under the County's plan, there would be no public ownership, no residual public control, and no public use, of the acquired land. The end use will be for a private development. The proposal for the new "Murdock Village" calls for over 3,300 residential units (no "affordable housing"), and nearly 1.2 million square feet of private commercial development. Key to the redevelopment plan are both the County's delivery of a large assembled unit and the ability of the private developer to utilize public tax increment financing, provided for under the CRA. Murdock Village has been described as "one of the more aggressive situations in the state," when it comes to the use of eminent domain for economic development. It is a "poster child" for the need to establish limits on government's ability toseize private property to benefit other private parties.

Florida's open-ended "slum and blight" definition paves the way for virtually any private

property in the state to be condemned in the name of "public benefit." As a result, local governments routinely confiscate private homes and small businesses for redistribution to politically-connected and well-heeled companies that use these displaced people's property for their own profit.

Over the years, the Florida Legislature has statutorily expanded "public use" to include more and more justifications for takings. In order for Attorney General Crist's statement about the status of property rights in Florida to be accurate, the Community Redevelopment Act must be tightened. Unless the legislature assumes its role of preserving private property rights, we, as Florida citizens, could easily find ourselves in the same sad position as Mrs. Kelo.

Ms. Fernandez is the managing attorney of Pacific Legal Foundation's Atlantic Center in Coral Gables. PLF is the oldest and largest public interest legal organization in the country engaged in defending private property rights in the courts. www.pacificlegal.org

STATE OF FLORIDA

CHARLIE CRIST
ATTORNEY GENERAL

August 17, 2005

The Honorable Marco Rubio, Chairman
Select Committee to Protect Private Property Rights
Florida House of Representatives
The Capitol, Suite 317
402 South Monroe Street
Tallahassee, FL 32399-1300

Dear Chairman Rubio:

Congratulations on your appointment to lead the House Select Committee to Protect Private Property Rights. I commend you as Chairman, and Speaker Bense, for wisely creating a select committee to strengthen the protections under Florida eminent domain law to even further protect the rights of private property owners. As we all recognize, private property is the bedrock of a stable, prosperous, and democratic society.

As I stated in June, the U.S. Supreme Court's decision in *Kelo v. City of New London* raises serious concerns as to the protections afforded individual property owners. Under the Court's ruling, property owners, including homeowners and small business owners who may have lived, worked, and provided jobs in an area their entire lives, could be displaced to make way for private development for the sole purpose of supporting new or different economic development. Fortunately, Florida's Constitution and Florida statutory law provide greater protection of private property rights than either the U.S. Constitution or the Connecticut law described in *Kelo*. However, the *Kelo* decision was disturbing in its potential application to all states, and a re-examination of Florida law is prudent to ensure that Floridians are not vulnerable to any future Court interpretations that would jeopardize their private property rights.

In response to the *Kelo* decision, I asked our legal experts in the eminent domain field to evaluate existing Florida law. We also have had discussions with your staff in order to develop proposals for strengthening the law. The following suggestions attempt to outline several considerations our office has identified which I hope will assist your committee as it evaluates the current status of eminent domain law in Florida:

- **Change the Presumption in the Law From Favoring the Taking of Property to Protecting Private Property Rights.** The legislative findings in the Community Redevelopment Act of 1969 establish the power of eminent domain for public uses and purposes, and declare as a matter of legislative determination that these powers are necessarily in the public interest. Fla. Stat. §163.330 (2005). This presumption in favor of the public interest should be shifted to favor the rights of private property owners by squarely placing the burden on government to show that the exercise of eminent domain is the least intrusive means necessary to achieve an articulated public purpose. The standard articulated by the Florida Supreme Court in *Baycol v. Downtown Development Authority of the City of Fort Lauderdale*, 315 So. 2d 451 (1975), could be codified in Fla. Stat. §163.330, to shift the presumption in favor of the property owner. In that decision, the Supreme Court held:

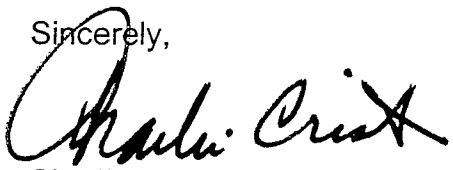
  > We have been long committed in a consistent series of cases to the proposition that eminent domain cannot be employed to take private property for a predominantly *private* use; it is rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without proper purpose the private property of our citizens cannot be confiscated, for the 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. *Baycol* at 10-11 (second emphasis added).

- **Tighten the Criteria for Determining "Blight."** In 1981, there were only six statutory criteria to declare an area as "blighted." Now there are *fourteen,* in addition to a catch-all paragraph allowing condemnation when only one of the criteria is met, provided all taxing authorities in an area agree. Each of the criteria in ss. 163.340(7) and (8) should be reexamined to determine if they adequately protect private property rights. For example, the standards for consideration of the listed criteria could be raised to require that "all or substantially all" buildings meet the listed conditions in a proposed redevelopment area. In addition, a standard listed at Fla. Stat. s.163.340(8)(b) that potentially jeopardizes the private property rights of all Floridians in an economic downturn involves aggregated assessed property values in the area having *failed to increase* appreciably over a 5 year period. This standard should be eliminated altogether. Another solution may be to require that more than the current minimum of two of the listed criteria -- if not all -- be present in order to qualify an area as blighted for redevelopment purposes.

- **Create an Overall Standard in the Law to Limit When Property Can Be Taken.** Language could be added to Fla. Stat. §163.375, to define the scope of county and municipal government authority in eminent domain proceedings in a manner that preserves the strongest defense for property owners against the threat of government encroachment on their private property rights. Currently, Fla. Stat. §163.375, establishes the right of any county, municipality, or community redevelopment agency, with county or municipal government approval, to condemn any interest in real property which it deems necessary for community redevelopment. There is no provision in this section that protects the rights of private property owners. To do so, the Legislature could add a clause to that section stating: "The power of eminent domain shall only be used to condemn dilapidated and deteriorated buildings and improvements on real property for community redevelopment purposes."

We look forward to working with your staff in offering guidance to the House Select Committee to Protect Private Property Rights to make any changes necessary to the law that will assure Floridians that their property rights are secure and protected from arbitrary or unconstitutional takings by their government. If we may be of any additional assistance to you, please do not hesitate to call on us.

Sincerely,



Charlie Crist

CC/cdm

cc: The Honorable Allan Bense
Speaker, Florida House of Representatives

Mr. Bob Ward, Chief of Staff
Florida House of Representatives

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

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Assistant Senate Minority Leader
Illinois
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Susan Clarke Schaar
Clerk of the Senate
Virginia
Staff Chair, NCSL

William T. Pound
Executive Director

To: State Legislators Interested in Eminent Domain Issues

From: Larry Morandi, Group Director
Environment, Energy & Transportation

Date: August 30, 2005

Subject: Eminent Domain

This memorandum describes how state legislatures are responding to the U.S. Supreme Court decision delivered on June 23, 2005, in *Kelo v. New London* (04-108). In that case, the court determined that the "public use" provision of the takings clause of the 5th Amendment to the U.S. Constitution permits eminent domain for economic development purposes that provide a "public benefit" pursuant to a Connecticut statute. At the same time, the court acknowledged that nothing in its decision precludes a state from placing further restrictions on the use of eminent domain. This memorandum will discuss the categories of legislation that the National Conference of State Legislatures (NCSL) has observed, and present summaries and links to bills considered since the decision came down.

Categories of Legislation

NCSL has been tracking five types of legislation that state legislatures have either considered or are still considering since the decision in *Kelo* was reported. Each category restricts the use of eminent domain for economic development purposes to some degree, while providing certain exceptions. The limitations may apply to economic development agencies created by local governments, or to municipalities and counties themselves. A broad range of approaches have been employed, from reiterating that eminent domain may be exercised solely for a public use, to prohibiting it for specified purposes.

1. *Authorization for a Public Use.* Stipulates that eminent domain may be used only for a "stated public purpose" or a "recognized public use." The legislation may not define what constitutes such purposes or uses. (Delaware enacted this type of approach at the end of its 2005 regular session; see attached summary of "Post-*Kelo v. New London* State Eminent Domain Legislation.")

2. *Restriction of Use to Blighted Properties.* Limits the use of eminent domain for economic development purposes to blighted properties only, or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan. This approach establishes additional criteria defining what constitutes blight that a local government must satisfy before condemning private property for economic development purposes.

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3. *Enhanced Public Notice, Hearing and Negotiation Criteria.* Requires local governments to hold public hearings before condemning property for economic development purposes; notify affected property owners in advance of a hearing; and negotiate in good faith with property owners before condemning land.

4. *Local Government Approval.* Requires a vote of the locally elected legislative body before a redevelopment agency may initiate eminent domain for economic development purposes. The vote may have to meet a super-majority threshold. In some instances, the use of eminent domain by a local government may require approval by the state legislature.

5. *Prohibiting Eminent Domain for Specified Purposes.* Prohibits the use of eminent domain for economic development (e.g., residential, retail or commercial); for the primary purpose of generating additional tax revenue; or to transfer private property to another private use. This legislation normally includes exceptions, most frequently for blighted properties. (Alabama enacted this type of approach during its 2005 special session; the Texas Legislature passed similar legislation during its second special session that is awaiting action by the governor; see attached summary of "Post-*Kelo v. New London* State Eminent Domain Legislation.")

Other approaches designed to provide additional time to asses policy options include placing a moratorium on the use of eminent domain for economic development purposes until a specified date, and establishing special legislative committees or task forces to study the issues and report back to the legislature with findings and recommendations.

A summary of legislation considered by states that were either in session or are still in session at the time the *Kelo* decision came down is attached to this memorandum. Direct links to all bills are included (with the exception of Alabama, whose link is to the legislature's bill tracking Web page).

POST-*KELO v. NEW LONDON* STATE EMINENT DOMAIN LEGISLATION

Alabama
2005 Special Session
SB 68
Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. Contains a blight exception.
(Enacted.)

HB 14
Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.
(Passed House; did not pass Senate.)

SB 81, SB 89, SB 92
Prohibits the use of eminent domain for retail, commercial, residential or apartment development.
(Did not pass Senate.)

HB 102, SB 91
Prohibits the use of eminent domain for an economic development purpose and stipulates that its application may only be used for a public use.
(HB 102 did not pass House. SB 91 did not pass Senate.)

California
2005 Session
AB 1162, SB 1026
Places a moratorium on the use of eminent domain to acquire owner-occupied residential property for a private use until January 1, 2008.
(AB 1162 passed Assembly; in Senate committee. SB 1026 passed Senate; in Assembly committee.)

SCA 12
Stipulates that public use does not include taking owner-occupied residential property for a private use.
(In Senate committee.)

ACA 22, SCA 15, AB 590
ACA 22 and SCA 15 stipulate that private property may only be taken for a stated public use. AB 590 stipulates that "public use" does not include taking non-blighted property for another private use.
(ACA 22 introduced. SCA 15 introduced. AB 590 in Assembly committee.)

Delaware
2005 Session
SB 217 (with House Amendment 1)
Restricts the use of eminent domain by the state or a political subdivision to a recognized public use.
(Enacted.)

Illinois
2005 Session
HB 4091
Stipulates that the use of eminent domain may only be for a "qualified public use," meaning for public ownership and control. Prohibits eminent domain for private ownership or control, including economic development, unless approved by the state legislature.
(Introduced.)

Michigan
2005 Session
HB 5060, HB 5078
Prohibits the use of eminent domain to transfer private property to another private entity for the primary benefit of the private entity.
(In House committee.)

Minnesota
2005 Special Session
HF 117, HF 132
Prohibits the use of eminent domain to transfer private property to another private party.
(Did not pass House.)

HF 123
Prohibits the use of eminent domain for economic development purposes.
(Did not pass House.)

New Jersey
2005 Session
SB 2739
Prohibits the use of eminent domain to condemn legally occupied residential property that meets applicable housing codes as part of a redevelopment project.
(In Senate Committee.)

New York
2005 Session

AB 8865, AB 9051, SB 5949
Requires a local government to vote to approve the proposed use of eminent domain to condemn private property for another private use.
(AB 8865 and AB 9051 in Assembly committee. SB 5949 in Senate committee.)

AB 9043, AB 9050, SB 5946
Requires that an economic development plan approved by a local government be prepared when eminent domain is used for economic development purposes. Requires a public hearing to be held and includes additional public notice requirements. Requires the amount of compensation paid to a property owner when eminent domain is used for economic development purposes to be greater than 100 percent of fair market value.
(AB 9043 and AB 9050 in Assembly committee. SB 5946 in Senate Committee.)

SB 5936
Stipulates that eminent domain can be used for economic development purposes only if the area is blighted.
(In Senate committee.)

SB 5938
Stipulates that eminent domain can only be used for specified public projects. Requires approval of the county legislature or city council if an industrial development agency decides to use eminent domain.
(In Senate committee.)

Ohio
2005 Session
SJR 6 (not available online)
Removes from municipalities the constitutional authority to use eminent domain unless the power is specifically granted to them by the state legislature.
(In Senate committee.)

SB 167
Places a moratorium on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted until December 31, 2006. Creates a task force to study eminent domain issues.
(Introduced.)

Oregon
2005 Session
HB 3505
Authorizes a public body to use eminent domain only if the primary purpose is to allow the public to own or use the property; such property may not be transferred to another private entity.
(Passed House; did not pass Senate.)

Pennsylvania
2005 Session
HB 1835, HB 1836
Prohibits the use of eminent domain to turn private property into a nonpublic interest, or for the purpose of increasing the local government's tax base.
(In House committee.)

Texas
2005 Second Special Session
SB 7
Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.
(Passed both houses; awaiting governor's action.)

HB 12, HB 16
Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.
(Did not pass House.)

HJR 11, SJR 5
Prohibits the use of eminent domain for economic development purposes or to confer a private benefit on a private party, with certain exceptions.
(HJR 11 did not pass House. SJR 5 did not pass Senate.)

2005 First Special Session
HJR 19, SJR 10, SB 62
Prohibits the use of eminent domain for economic development purposes in most instances.
(HJR 19 passed House; did not pass Senate. SJR 10 did not pass Senate. SB 62 passed both houses; did not pass conference committee.)