Select Committee to Protect Private Property Rights

Tuesday October 18, 2005
4:00 p.m.—6:00 p.m.
Morris Hall

Meeting Packet

Allan G. Bense
Speaker

Marco Rubio
Chair

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October 6th
Questionnaire

Chair Rubio requested that staff of the House Select Committee to Protect Private Property Rights solicit written responses to the following questions. In order to provide the responses to the Select Committee Members prior to the Tuesday, October 18 meeting of the Select Committee, please email your written responses to me no later than 5:00 PM on Wednesday, October 12. Chair Rubio also requests that interested parties who submit written responses to the questions attend the Select Committee's October 18 meeting to address Member questions regarding their responses.

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?

5 . In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida Courts show to local government determinations?

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

Thanks,

Tom Hamby, Staff Director
House Select Committee to Protect Private Property Rights

R.C. Urban–Citizens for
Responsible Growth

R.C. Urban
Citizens for Responsible Growth

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.
A. An amendment of the Constitution and applicable Statutes of the State.
B. Economic Development is the development of property by a non-governmental private party for the economic good of that private party, i.e. the building of apartment houses, condos, shopping malls

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?
Blight is a condition often caused by lack of proactive code enforcement by local government.

"Blighted Areas" often include a large percentage of well cared for and maintained properties for no other reason than they do not conform with the City Council's current "vision" of what they would like that area to look like and the Councils desire to increase their tax-base. Then terms like: inadequate: street layout and public transportation, or faulty lot layout or outdated building density patterns..etc. are used are used to justify taking well cared and maintained properties in the "blighted area".

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?
If 80% or more of an area consists of deteriorating and unsafe structures and/or are a hazard to public safety or health then, providing 'just payment' was made for the taken property. However, 'just payment' should include: a) fair market value or replacement value for like kind property, whichever is greater; b) all court and attorney expenses incurred due to fighting condemnation; c) all moving expenses; d) plus 30% of fair market value or replacement value, whichever is greater, as compensation for being forced to move.
Eminent Domain is most often used to obtain property for developers at cost most often less than that of 'true market value'; otherwise, the developer would purchase the property directly from the owner.

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?
It was the intent of our founding fathers to protect citizens right to own property. That is clear in reading
the Bill of Rights and Federalist Papers. Eminent Domain came into being because it was recognized that at times it was necessary to obtain property for

governmental and public use;such as: military installations, government buildings, parks, libraries, public schools, airport, public roads ... wherein ownership resides in government. Economic Development & Industrial Development differ substantially in that private property is taken from one private entity and transferred by government to another private entity primarily for the receiving entity's private gain (in which the original owner does not share).

I am told that most CRA activities do not require the use of eminent domain. If true, there should be a small impact if more stringent definitions of slum and blight are adopted.

I am certain that our Legislature has the brainpower to find multiple ways to provide tax increment financing to encourage renewal of areas where necessary or desirable.

5 . In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida Courts show to local government determinations?

The Florida Courts should uphold the citizens rights and the Law and assure that local governments do not abuse their police powers. They should not defer to local government any of the Court's oversight responsibilities.

J.B. Ruhl—Matthew &
Hawkins Professor of
Property FSU

J.B. Ruhl
Matthew & Hawkins Professor of Property
Florida State University

Mr. Hamby-

I am happy to provide some ideas in response to your message. As you may recall, I previously provided a monograph on Kelo and Florida eminent domain law that sets out my perspectives on the matter. I have taken a slightly different path from the one suggested in the questions in response. If it is acceptable to submit my response by e-mail, it is as follows:

These five questions suggest what I believe should be guiding policy objectives for the overall status of eminent domain in contexts where the ultimate use fits neither the "public employment" nor the "common carrier" categories:

1. We wish to prevent the use of eminent domain when used for the sole purpose of economic development.

2. We wish to allow use of eminent domain, under well-defined circumstances, to facilitate eliminating or preventing recurrence of slums and blight.

3. We wish to allow use of tax increment financing, perhaps more liberally than we wish to allow the use of eminent domain, to facilitate eliminating or preventing recurrence of slums and blight.

4. We wish to specify a more demanding standard for judicial review of uses of eminent domain in slum and blight contexts than is presently the case.

However, the five questions strike me as premised on reform approaches that are more complicated than necessary for achieving these goals. In particular, I do not believe it is necessary to define "economic development" in order to prevent use of eminent domain for purely economic development purposes, nor do I believe that more stringent definitions of "slum area" and "blight area" are required. Rather, the four stated goals can be accomplished as follows:

1. In order to ensure that home rule powers do not impliedly authorize local jurisdictions to engage in eminent domain solely for economic development, provide that eminent domain powers may be used only when the intended use of the taken property involves one of the following: (1) direct public ownership and employment, including but not limited to transportation facilities, schools and other government buildings, parks and other recreational facilities, and publicly-owned utilities; (2) ownership by private parties employing the property subject to public regulation as a regulated common carrier or other publicly-regulated utility, including but not limited to transportation facilities, energy generation and distribution, water production and distribution, and telecommunications; or (3) eliminating or preventing recurrence of slum or blight conditions.

2. In order to limit the use of eminent domain in slum and blight contexts, provide that it may be employed only under the following circumstances: The jurisdiction proposing to exercise eminent domain demonstrates by a preponderance of evidence that (1) no other parcel available through fair market voluntary transactions substantially meets the needs of the intended project; (2) it has exhausted all other alternative means of acquiring the parcel to which eminent domain is proposed to be applied; (3) failure to include the parcel in the project will render the project incapable of eliminating the blight conditions or preventing their recurrence; and (4) the parcel will be used in a manner that serves only a critical public need for preventing recurrence of slum or blight conditions.

3. Because suggestions 1 and 2 above focus on eminent domain and sharply limit its use in slum and blight contexts, no further revisions are needed to allow continued use of tax increment financing for slum and blight amelioration under the existing CRA standards and procedures.

4. The "preponderance of the evidence" language in suggestion 2 above addresses the standard of judicial review.

As an additional safeguard in the slum and blight contexts, where use of eminent domain results in residents having to relocate, particularly if the new owner is a private development entity with the expectation of securing private gain from the project, a fixed percentage of the tax increment and private profit gains could be devoted to a dedicated relocation assistance fund that would ensure a certain level of replacement housing within the jurisdiction. For example, the fund could supplement the fair market compensation provided through the eminent domain proceeding so as to fill any gap needed to cover the mortgage on the jurisdiction's median single family detached home value, or, in the case of a displaced renter, to cover the difference in the prior rent and the jurisdiction's median two-bedroom unit rental rate.

If the legislature were to consider redefining slum are and blight area, I would suggest first conducting an empirical study of all uses of eminent domain in CRA projects since the statute was amended to identify the criteria on which jurisdictions rely and assess whether those criteria are being used with adequate basis for finding the existence of conditions reasonably characterized as slum or blight.

I appreciate the chance to provide these comments. If a more formal transmission is required please let me know. Also, I am trying to rearrange my schedule to permit me to attend at least some of the October 18 meeting.

Sincerely,

J.B. Ruhl

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S. William Moore—
Brigham Moore Law Firm

S. William Moore
Brigham Moore Law Firm

From: Bill Moore
To: Tom Hambry
Date: October 10, 2005

In response to your e-mail of October 6, 2005, I propose the following:

1. CHANGES IN FLORIDA LAW

Chapter 163.335 et seq. must be thoroughly examined and extensively modified to ensure that eminent domain will be used to cure only "true" slum or blight, and not be used to advance economic development. The term "economic development" should be defined as, "the enhancement of the community or redevelopment area by means of any or all of the following: increased tax base, more opportunity for employment, greater attractions of the area for tourists or businesses, or for a higher and better use."

Chapters 127 and 166 must also be amended consistently.

Florida's constitutional provision, Article X, Section 6, relating to eminent domain should be revised as follows:

"No taking for economic development shall constitute a public purpose under this section. The term economic development shall be defined as the enhancement of a community or area by means of any or all of the following: increased tax base, employment opportunity, greater attractiveness for tourism, or for a higher and better use; however if a valid public purpose is proven, an incidental benefit of economic development will not invalidate the exercise of eminent domain."

2. CHANGES IN DEFINITIONS OF "SLUM" AND "BLIGHT"

(7) "Slum area" means an area having physical or economic conditions *proven to be* 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; *except when clearance of a "slum area" is determined to be a public purpose underlying the exercise of the eminent domain power, in which case the area must be proven to have at least two of the following factors:*

(a) Inadequate provision for ventilation, light, air, sanitation, or open spaces, *except when this factor is utilized as a ground for the exercise of eminent domain, in which case the term "inadequate" shall mean that condition which is proven to lead to health or safety dangers according to currently applicable state or local government codes;*

(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~~ *and* other studies and ~~the requirements of the Florida Building Code~~ *the provisions of the applicable local comprehensive plan;*

(c) The existence of conditions that endanger life or property by fire or other causes, *except when this factor is utilized as a ground for the exercise of eminent domain, in which case such conditions of endangerment shall be deemed that which constitutes a public nuisance at common law;*

Any designation of a "slum area" shall be consistent with the legislative intent of this part as set out in s. 163.335.

Further, as a condition precedent to the use of the eminent domain power, it must be shown that the existence of two or more of the factors used in support of a "slum" designation must predominate the immediate neighborhood surrounding the property sought to be condemned at the time of any proposed taking even though the neighborhood may already have been previously designated to be within a "slum area." It is the expressed intent of the Florida Legislature that redevelopment not occur in piecemeal fashion requiring slum to be pinpointed on a specific property for it to be publicly acquired; however, it is not the intent of the Florida Legislature that private property be acquired through the use of the eminent domain power if the immediate neighborhood surrounding the property sought to be condemned does not meet the definitional requirements set out in this part.

(8) "Blighted area" means an area in which there are a substantial number of deteriorated, or deteriorating structures, in which *area* conditions, as indicated by *accurate* government-maintained statistics *and* ~~or~~ other *competent* studies, are *proven to* lead~~ing~~ to *measurable* economic distress or *to* endanger life or property and in which two or more of the following factors are present*; except when clearance of a "blight area" is the public purpose asserted to support the exercise of emienent domain, in which case the area must exhibit at least three of the factors listed below; except that subsections (b), (e), (f), (g), and (i) shall not be factors authorizing the exercise of eminent domain.*

(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities*; except when this criterion is used to support a "blight" designation as a ground for the exercise of eminent domain, in which case the terms "defective" or "inadequate" shall mean that the infrastructure element must substantially fail to achieve the purpose for which it was originally constructed and that conservation and rehabilitation efforts cannot reasonably be achieved by the public entity charged with the maintenance of the infrastructure;*

(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; *except that this criterion shall not be used in support of a "blight" designation as a ground for the exercise of eminent domain;*

(c) *Predominance of* faulty lot layout in relation to size, adequacy, accessibility, or usefulness; *except when this criterion is used in support of a "blight" designation as a ground for the exercise of eminent domain, in which case the term "faulty" shall be deemed that which is in conflict with pre-existing minimum lot standards set out in the currently*

applicable local comprehensive plan or local building codes;

(d) *Predominance of* unsanitary or unsafe conditions*; except that when this criterion is used in support of a "blight" designation as a ground for the exercise of eminent domain, in which case the terms "unsanitary" or "unsafe" shall be deemed those conditions which are indicated by government-recorded violations of federal, state, or local health and safety laws;*

(e) Deterioration of site or other improvements; *except that this criterion shall not be used in support of a "blight" designation as a ground for the exercise of eminent domain;*

(f) Inadequate and outdated building density patterns; *except that this criterion shall not be used in support of a "blight" designation as a ground for the exercise of eminent domain;*

(g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality; *except that this criterion shall not be used in support of a "blight" designation as a ground for the exercise of eminent domain;*

(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; *except that this criterion shall not be used in support of a "blight" designation as a ground for the exercise of eminent domain;*

(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~~ *state or local building codes* in the area than the number of violations recorded in the remainder of the county or municipality *despite the reasonable code enforcement efforts of local government; except that when this criteria is used in support of a "blight" designation for the exercise of eminent domain, the demonstrated failure of local government to enforce its own codes in a reasonable manner shall defeat the use of this factor.*

(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.

Any designation of a "blighted area" shall be consistent with the legislative intent of this part as set out in s. 163.335.

Further, as a condition precedent to the use of the eminent domain power, it must be shown that the existence of three or more of the factors used in support of a "blight" designation must predominate the immediate neighborhood surrounding the property sought to be condemned at the time of any proposed taking even though the neighborhood may already have been previously designated to be within a "blighted area." It is the expressed intent of the Florida Legislature that redevelopment not occur in piecemeal fashion requiring blight to be pinpointed on a specific property for it to be publicly acquired; however, it is not the intent of the Florida Legislature that private property be acquired through the use of the eminent domain power if the immediate neighborhood surrounding the property sought to be condemned does not meet the definitional requirements set out in this part.

However, the term "blighted area" *for purposes of all powers granted in this part except those of eminent domain,* **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.**

3. WHEN IS IT APPROPRIATE TO CONDEMN FOR SLUM/BLIGHT?

Local governments should be permitted to exercise their eminent domain powers to implement the eradication of the redefined "slum or blight." To allow condemnation in order "to prevent" those conditions is an open door to evisceration of all *Kelo*-reform measures proposed. "Preventive" condemnation should not be allowed.

4. SAVING THE PROPER USE OF TAX INCREMENT FINANCING

If economic development is defined as set out above, a caveat should be added: "If private property is taken by eminent domain for the public purpose of clearance of slum or blight or for affordable housing, and the result of such a governmental taking incidentally leads to economic development, such result shall not invalidate the appropriate exercise of eminent domain."

A further protection of tax increment financing is a complete de-linking of eminent domain and voluntary acquisitions for cooperative tax increment financing. This goal can be accomplished by carefully defining each relevant term in Chapter 163 in order to distinguish between forcible seizures of private property and voluntary acquisitions.

5. Any delegation by the Legislature of its eminent domain powers should be "strictly construed" by the courts, as currently provided in theory by case law. However Chapter 163, 166, and 127 need to be modified to specify that no deference be given to a slum/blight finding by a local government when that finding is used as a basis for the exercise of eminent domain. Rather, the potential condemnor must be required to prove by "clear and convincing" evidence that there is both a legitimate public purpose and a reasonable necessity for the taking of private property. Instead of

than "presuming the correctness" of the local government's condemnation resolution or slum/blight "finding," the court should review those declarations with "heightened scrutiny."

Please call me at (941) 365-3800 if you have any questions.

Thank you.

Bradley S. Gould, Esq.

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MEMORANDUM

TO: Tom Hamby, Staff Director

FROM: Bradley S. Gould, Esq. BSG

DATE: October 11, 2005

SUBJECT: House Select Committee to Protect Private Property Rights Questionnaire

I. Changes in the law to prohibit takings for economic redevelopment:

1. Section 166.411 Florida Statutes:

Municipalities are only authorized to exercise the power of eminent domain for valid public purposes as set forth below:

(1) ...thereof, except that no municipality may condemn private property for the purpose of economic development as defined in s. 163.340(25), nor shall it be allowed to transfer ownership or control of private property to another private citizen or private entity unless such exercise is for a valid public purpose.

(11) For the purpose of slum or blight clearance as long as the municipality conforms to the requirements set forth in s. 163.375.

2. Section 127.01, Florida Statutes:

(3) No county may condemn private property for the purpose of economic development as defined in s. 163.340(25) nor shall it be allowed to transfer ownership or control of private property to another private citizen or private entity unless such exercise is for a valid public purpose.

(4) A county may exercise the power of eminent domain for the purpose of slum or blight clearance as long as the county conforms to the requirements of s. 163.375.

II. Changes to the statutory definitions of "slum area" and "blighted area":

(7) "Slum area" means an area having physical or economic conditions that are proven to have resulted in 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; except for purposes of eminent domain, in which case at least two of the following factors must be proven:
(a) Inadequate provision for ventilation, light air, sanitation, or open spaces, except when this factor is utilized as grounds for eminent domain, in which case the term "inadequate" shall mean that condition which is proven to lead to health or safety dangers according to currently applicable state or local government codes;
(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 and other studies and the provisions of the applicable local comprehensive plan;
(c) The existence conditions that endanger life or property by fire or other causes, except when this factor is utilized as grounds for eminent domain, in which case such conditions must constitute a public nuisance at common law.

(8) "Blighted area" means an areas in which there area substantial number of deteriorated, or deteriorating structures, in which area conditions, as indicated by accurate government maintained statistics and other competent studies are proven to have caused measurable economic distress or to endanger life or property and in which two or more of the following factors are present, except for purposes of eminent domain, in which case at least three of the factors below, except that subsections (b), (e), (f), (g), and (i) shall not be factors authorizing the use of eminent domain.
(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities, except for purposes of eminent domain, in which case this factor shall mean that the infrastructure element must substantially fail to achieve the purpose for which it was originally constructed and that rehabilitation efforts by the public entity charged with e maintenance of the infrastructure.
(c) Predominance of faulty lot layout in relation to size, adequacy, accessibility, or usefulness; except for purposes of eminent domain in which case this factor shall be proven based upon the preexisting minimum lot standards set forth in the local comprehensive plan or local building codes.
(d) Predominance of unsanitary or unsafe conditions, except for purposes of eminent domain, in which case this factor shall be proven by government-recorded violations of federal, state, or local health and safety laws.
(l) A greater number of violations of the *state or local building codes* in the area than the number of violations recorded in the remainder of the county or municipality except for purposes

of eminent domain, in which case the demonstrated failure of local government to enforce its own codes in a reasonable manner shall defeat the use of this factors.
(10) " Community redevelopment area" means a slum area, a blighted area, or an areas in which there is a shortage of housing that is affordable to residents of low or moderate income, including the elderly, which the governing body designates as appropriate for community redevelopment.

III. Circumstances to take private property to eliminate and prevent slum or blight conditions

Please refer to Section II above.

IV. Changes to ensure that CRAs can continue to designate areas as slum or blight for purposes of tax increment financing

Please refer to Section II above.

Vince Cautero

Vince Cautero

Mr. Hamby,
My responses to your questions are found below. Please keep in mind that these opinions represent my personal, professional judgement and do not necessarily represent the opinions of the City of Marco Island.

1. I do not belive changes are necessary to any FL laws to prohibit takings of private property for exonomic development purposes. The question is misleading at best. There is an underlying assumption that a local government can "take" someone's property without paying just compensation. We know that this isn't true. I hope the legislators, when and if they consider changes to the existing laws, have a full understanding of the Kelo decision. The American Planning Association recently produced a report through its Planner Advisory Service (#535) on the four Supreme Court decisions in 2005 that should be required reading for those in policy decision making roles. I suggest this report be submitted to the House Select Committee. Pertaining to your definition of economic development, I believe the definition offered by Edward Blakely in 2000 is appropriate - "Effective local economic development planning stimulates the formation of industries that are the natural outgrowth of local resources, improves local firms' ability to procude better products, identifies new markets for local products, transfers knowledge to the least advantaged local workers, and nutures new firms and enterprises within the region".
2. No changes to the definitions are needed.
3. The circumstances where this mgiht be appropriate are when a local government has an adopted plan that promotes economic development activities in certain areas under their jurisdiction.
4. The answer to this questions depends upon what changes are made.
5. I believe courts should give great deference to local government decisions regardless of whether or not a takings claim involves the Redevelopment Act or any other statutory provision. Local governments should be trusted to make decisions in the best interests of their entire population.

Thank you for the opportunity to comment.

Vincent A. Cautero, AICP
Community Development Director

Florida League of Cities

Florida League of Cities

Florida League of Cities' Response to House Select Committee to Protect Private Property Rights Questionnaire

October 12, 2005

1. What changes to Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

The Florida League of Cities believes that Florida's constitutional restriction on exercising eminent domain for a "public purpose" and its well-established body of case law, which requires a predominant public benefit while permitting an incidental private benefit, prohibits takings of private property for the sole purpose of "economic development." Attempts to define "economic development" could result in countless broad or subtle definitions, likely resulting in an unworkable standard for the purpose of exercising the power of eminent domain. Rather, "public purpose" determinations, with a careful weighing of public benefits versus private entity benefits, should be made on a case-by-case basis under Florida's well-established body of case law. (For a more detailed discussion of this response, please see the attached Addendum.)

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

Modifying the standards for determination of "slum area" or "blighted area" may provide a level of indirect protection to private property owners from exercises of eminent domain to eliminate or prevent slum or blight conditions; however, such modifications do not provide direct protections to private property owners. The Florida League of Cities suggests, in the context of a comprehensive discussion on the use of eminent domain by a community redevelopment agency, that rather than modifying existing standards to determine a "slum area" or "blighted area," the Legislature consider providing both reasonable procedural and substantive protections to private property owners facing an exercise of eminent domain in a redevelopment context. Such protections could include, for example: requiring specific grants of eminent domain authority by a local government body prior to any exercises of such power; requiring a determination that a specific property is required to achieve the goals of the redevelopment plan; pursuit of good faith negotiations to acquire the property prior to the exercise of eminent domain; submission of good faith and extraordinary offers for the property, including homestead property; payment of residential relocation costs; etc. Reasonable procedural and substantive safeguards would provide immediate, tangible protections to private property owners.

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

Before addressing this question, the Florida League of Cities believes the intent and purpose of "redevelopment" must be addressed. Under Florida's Community Redevelopment Act, a

community redevelopment agency cannot expend public funds nor use the power of eminent domain to acquire property for the purpose of economic development. Rather, the power of eminent domain may only be exercised by a community redevelopment agency after a legislative determination of slum or blight exists and a redevelopment plan is adopted to correct slum or blight conditions. The purpose of redevelopment is to eliminate and prevent the recurrence of slum or blight conditions, not economic development.

Efforts to eliminate and prevent future slum or blight conditions may result in the community redevelopment agency acquiring, by purchase, eminent domain, or otherwise, properties to accomplish the goals of the redevelopment plan. (As discussed in the League's September 1, 2005 letter to the Select Committee, eminent domain is typically employed as a last resort in the redevelopment process, and can be used at a property owner's request for advantageous federal tax purposes.) Clearly, and most certainly by design, activities creating economic improvement will occur in a redevelopment area as a redevelopment plan is implemented. Some of these activities, such as affordable housing, street design, lighting, sidewalks, parks and open spaces, utilities, etc., will be performed by the public sector. Other activities, such as retail stores, entertainment, private housing, etc., will be performed by the private sector, which is uniquely qualified to perform these activities and accomplish pertinent goals of redevelopment plans. Properties acquired to accomplish specific goals of redevelopment may be transferred to private parties. However, public funds have not been expended nor has eminent domain been exercised for the purpose of transferring property from one private owner to another private party: these powers have been exercised to eliminate and prevent slum or blight.

Under current law, the power of eminent domain may be used for redevelopment purposes if the property is deemed to be "necessary" to accomplish the goals of the redevelopment plan. If a local government intends to take private property from one property owner and transfer it to another private party under a redevelopment plan for the purpose of eliminating and preventing the recurrence of slum or blight conditions, the Florida League of Cities will consider, in the context of a comprehensive discussion on the use of eminent domain by a community redevelopment agency, imposing a heightened standard for such a taking, supported by appropriate evidence, to accomplish the goals of the redevelopment plan.

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blight for purposes of tax increment financing?

In response to Question 2, the Florida League of Cities suggests there be no changes to the statutory definitions of "slum area" or "blighted area," but rather suggests the consideration of reasonable procedural and substantive protections. Because this question presupposes the Legislature adopting more stringent definitions of slum and blight for the purpose of eminent domain, the Florida League of Cities believes the current standards and statutory factors for determinations of "slum area" or "blighted area" for the purpose of tax increment financing should be maintained. For the purpose of exercising the power of eminent domain, the current standards for determinations of "slum area" or "blighted area" could be strengthened by, for example, requiring a specified number of current statutory factors be met, creating groupings of

current statutory factors and requiring a specified showing, providing threshold percentages of specified current statutory factors, etc. However, bifurcating slum or blight determinations, and possibly creating new standards for each, will require enactment of appropriate protections, such as: prospective application; preserving current redevelopment activities, agreements, and judicial determinations; protecting contractual bond covenants; etc.

5. In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida Courts show to local government determinations?

It is not clear what "local government determinations" this question is addressing. Local governments make "legislative" determinations when creating a community redevelopment agency. In the context of exercising the power of eminent domain, a local government has the burden to establish a public purpose and reasonable necessity of the taking. Each standard identified below should be maintained.

Generally, in the context of a municipal governing body's legislative determinations of municipal purpose, the courts will not interfere with the decision absent a clear abuse of discretion. *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983). For eminent domain, challenges to the reasonable necessity of the taking can be raised if the condemner acts without authority or in an incorrect manner; acts in bad faith; or abuses its discretion. *City of Miami Beach v. Broida*, 362 So. 2d 19 (Fla. 3d DCA 1978). A legislative determination that a taking serves a public purpose may not be overturned by the courts unless it is shown to be clearly erroneous. *Department of Transportation v. Fortune Federal Savings and Loan Association*, 532 So. 2d 1267 (Fla. 1988). Regarding a determination of "public purpose" in eminent domain, courts have "consistently allowed an incidental private purpose where the purpose of the taking was clearly and predominantly a public purpose." *Baycol, Inc. v. Downtown Development Authority*, 315 So. 2d 451 (Fla. 1975). However, neither the Florida Legislature nor a municipality can declare a private purpose to be a public one and by that declaration circumvent the Florida Constitution. "There are certain limits beyond which the Legislature cannot go. It cannot authorize a municipality to spend public money or land or donate, directly or indirectly, public property 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, 785 (Fla. 1952).

Addendum on Question 1

While the exact question of whether a municipality (or other governmental entity) 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 solely for this purpose. *See Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (citing the Florida Supreme Court decision *Baycol, Inc. v. Downtown Development Authority*, 315 So. 2d 451 (Fla. 1975), for the assertion that Florida courts have a narrow view of its public purpose 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 solely 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 <u>regardless</u> of the government's stated purpose for the action.

The difficulty with the 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 a case-by-case 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).

Dicta in the *North Miami* case suggests that eminent domain for solely "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 <u>in themselves</u> do not make the acquisition of land for a private entity a valid public purpose. *Town of North Miami,* 59 So. 2d at 785.

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. The above examples illustrate the perils with attempting to statutorily define "economic development."

HambyLtr3.doc

Rodney C. Wade, Esq.

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Dear Staff Director Hamby:

You have solicited written responses to questions that the House Select Committee to Protect Private Property Rights will consider on October 18, 2005. My responses to these questions 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 the responses to these questions will prove helpful to 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 law as well as 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.

In *Kelo*, the United States Supreme Court found that the City of New London, Connecticut, exercised a valid public purpose in authorizing the use of eminent domain proceedings to acquire private property to further a redevelopment plan which involved promoting private economic redevelopment of the depressed and blighted area of the municipality. It should be pointed out, however, that *Kelo* did not approve economic redevelopment takings lacking sufficient legislative analysis. It did not approve takings where the private benefit outweighs the public benefit, and it did not approve takings for a purely private purpose. The true impact of the *Kelo* decision may be seen in the development of new legislation in state courts throughout the country to address the perceived expansion of the power of eminent domain rather than any monumental shift in takings jurisprudence.

To facilitate the work of the Select Committee, a questionnaire was sent to the Office of the County Attorney asking for input into five issues. My response to the questionnaire is as follows:

1. **What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define "economic development."**

"Economic development" may be defined as development which occurs when the private market is providing sufficient capital and economic activity to achieve a positive level of improvement. The private sector may initiate economic development without any active public involvement beyond the government's traditional regulatory role.

In general, the current protections afforded private property rights under the Florida Constitution, the Florida Statutes, and case law are adequate to prohibit takings of private property for the sole purpose of economic development. 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) and *Canal Authority v. Miller*, 243 So. 2d 131, 133, 134 (Fla. 1970), 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 Florida Community Redevelopment Act (Chapter 163, Florida Statutes) 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. Certain modifications to the CRA statutes could 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. 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."

2. **What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?**

Attorney General Charlie Crist offers several good suggestions to tighten the criteria for determining slums and blight as stated in Florida Statutes § 163.340(7) and (8) in his letter of August 17, 2005. He states that in 1981 there were only six statutory criteria to declare an area as "blighted." Now there are 14 in addition to a catch-all paragraph allowing condemnation when only 1 of the criteria is met, provided all the taxing authorities in an area agree. Each of the criteria in Section 163.340(7) and (8) should be reexamined to determine if it adequately protects 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 Florida Statutes § 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 five-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.

3. **Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?**

In Florida, "public use" has included the delegation of the power of eminent domain to private entities affected with a public interest that is, e.g., mills, railroads, and utilities have been sustained as consistent with the full and fair compensation clause of the state constitution. It is impossible to square the narrow view of "public use" in regard to public initiatives in support of economic development when eminent domain has been used in this state for literally centuries to promote economic development through the establishment of dams, railroads, utilities, and other privately owned businesses which are regulated "as affected by a public interest." A popular use today is "sports stadiums."

The Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954) addressed the issue of whether the compulsory acquisition of land for a housing development was valid. The Court stated:

The concept of public welfare is broad and conclusive. 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.

The Court further stated that, "The public end may be as well or better served through an agency of private enterprise than through a department of government . . . ." In other words, the Court held that if a compulsory acquisition was directed at a legitimate public purpose, it did not matter that property acquired by eminent domain for redevelopment was conveyed to a private entity for use.

The Florida Community Redevelopment Act is sufficiently narrow in scope as it relates to the exercise of eminent domain. The purpose of the act is to eliminate slum 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." Once a slum or blighted area is taken under the CRA, slum or blight is to be eliminated, and eventually the property may be returned to the tax base with subsequent development on the site.

4. **If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?**

First, it should be understood that community redevelopment agencies do not designate areas as "slum" or "blighted" for purposes of tax increment financing or any other purpose. Those powers are retained by the municipality or the county as provided in Section 163.358(1), Florida Statutes, which reserves to the counties and municipalities "[t]he 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 hearing required with respect thereto."

Counties and municipalities should be given enough latitude to determine and designate areas as "slum" or "blighted" for purposes of eliminating slum or blight which will in turn increase the tax base. Within areas that have been properly designated as community redevelopment areas, a properly designated and duly authorized community redevelopment agency is authorized to undertake community redevelopment, which is defined in Section 163.340(9), Florida Statutes, as follows:

[U]ndertakings, 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.

A more common sense definition of slum and blight should not require statutory changes to ensure local governments the ability to continue to designate areas as slum or blighted for purposes of eliminating slum or blight and therefore increasing the tax base. It should be noted that the American Heritage Dictionary of the English Language, 4th Edition, offers what may be the simplest definition of "blight": "Something that impairs growth, withers hopes and ambitions, or impedes progress and prosperity."

5. **In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida Courts show to local government determinations?**

There is currently a divergence of opinion as to what level of deference courts should show to local government determinations. At one end of the scale is the view of "public use" taken in the United States Supreme Court decision of *Berman v. Parker*, 348 U.S. 26 (1954). In that case, the Court observed that:

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. . . . . This principle admits no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

On the other end of the scale is the belief that no judicial deference should be given to legislative determinations. In Florida, judicial deference to the legislature when the courts consider the broad and general public purpose for redevelopment, as occurred in the bond validation cases of *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1981) and *Panama City Beach Community Redevelopment Agency v. State of Florida*, 831 So. 2d 662 (Fla. 2002), should not be confused with the court's sole role in the balance of powers of deciding constitutional questions of necessary public purpose in a specific eminent domain case. The ultimate issue in both the *Miami Beach Redevelopment Agency* case and the *Panama City Beach Community Redevelopment Agency* case was bond validation which was to be used for redevelopment. Bond redevelopment cases are not subject to the strict scrutiny of eminent domain cases. Although redevelopment might have a general public purpose, whether the taking of private property for redevelopment is necessary for a public purpose in effect, whether the taking comports with the Constitution, is always a question to be decided by the courts. *City of Lakeland v. Bunch*, 293 So. 2d 66, 68 (Fla. 1974); *Adams v. Housing Authority City of Daytona Beach*, 60 So. 2d 663, 669 (Fla. 1952); *Wilton v. St. Johns County*, 123 So. 527, 533 (Fla. 1928); *Rukab v. City of Jacksonville Beach*, 811 So. 2d 727, 731 (Fla. 1st DCA 2002).

Thank you for the opportunity to discuss this important issue. I look forward to meeting you at the House Select Committee Meeting on October 18, 2005.

Sincerely,

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Florida Association of
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FLORIDA ASSOCIATION OF COUNTIES, INC.

Answers to Questions Posed By The House Select Committee on Private Property Rights

October 12, 2005

The staff of the House Select Committee on Private Property Rights has asked the Florida Association of Counties, among other interested parties, to answer the following questions:

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?

5. In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida courts show to local government determinations?

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The Florida Association of Counties has begun the process of establishing its policy positions on these questions and on the issues raised by the Select Committee staff in September; the Association will finalize as many positions as possible in early December. At this point, the Association is continuing its commitment to upholding the protections for private property rights for Floridians and to following and preserving the procedural and substantive safeguards that exist through Florida's current law. The Association also believes that this long history of Florida law already protects Floridians from a *Kelo*-type taking outside the confines of the Community Redevelopment Act, Chapter 163, Part III, Florida Statutes. In addition, while the community redevelopment agencies are useful mechanisms for eradicating slum and blight conditions, there may be some statutory changes that could occur inside the confines of the Community Redevelopment Act that would promote additional safeguard and accountability measures for property owners affected by the creation and activities of community redevelopment agencies. Accordingly, the Florida Association of Counties' answers to questions 2 and 4, as articulated by the Select Committee staff, will be provided primarily in the response to question 2.

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

Any coerced taking of private property in Florida must be proven to be taken for a valid public purpose – regardless of the articulated label placed upon the act of the taking. Florida's current constitutional, judicial and statutory protections prohibit a county from exercising its power of eminent domain for any purpose that is not a public purpose. In addition, the current law in Florida protects property owners from taking private property when that taking is primarily for a private purpose.

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, Inc. v. Downtown Development Authority, 315 So. 2d 451, 455 (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). A private benefit that is incidental to the public purpose does not eliminate an otherwise predominate public purpose. "The mere fact that someone engaged in private business for private gain will be benefited by . . . [a] 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).

Furthermore, neither the Florida Legislature nor a local government can declare a private purpose to be a public one and by that declaration circumvent the constitutional protections. "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).

Florida law does not contain an express 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 the law in Florida is quite clear and extraordinarily real. Eminent domain is prohibited for the purpose of "economic development," however defined, unless the condemning authority proves that (1) the "economic development" was a valid public purpose; that (2) the property was reasonably necessary for the public purpose; and that (3) full compensation was paid to the property owner.

Accordingly, the focus of the more specific comments for this question will be on the Community Redevelopment Act (as discussed in questions 2, 3, 4, and 5 below) because that Act is the closest that articulated Florida statutory law gets to specific "economic development" and "eminent domain" purposes.

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?[1]

Florida's Community Redevelopment Act, created under Chapter 163, Part III, Florida Statutes, recognizes that the prevention and elimination of slum or blight is a matter of state concern so that the state, its counties, and municipalities do not continue to be endangered by areas which are focal centers of disease, that promote juvenile delinquency, and that consume a disproportion of public revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services and facilities. See sec. 163.335(1), Fla. Stat. In furtherance of eradicating these grave societal conditions, the Florida Legislature has empowered local governments[2] to create community redevelopment agencies, conferring on them

[1] The response to this question is also applicable to question 4.

many powers, including the power to expend public money and to condemn property in furtherance of the redevelopment plan. See sec. 163.335(3), Fla. Stat.

The Supreme Court of Florida has also 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 redevelopment projects using eminent domain to clear blighted areas and to provide for the ultimate disposition of substantial portions of acquired properties for use of private concerns served a public purpose, was not conclusive but 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. The Court stated:

> 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 courts in Florida have also pointed out that "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 owners 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.

The current definition of "blighted area" allows a community redevelopment agency ("CRA") to be established once it is shown that: (1)"a substantial number" of deteriorating structures exist in the area that lead to either economic distress or that endanger life or property; and that (2) the area contains two factors out of 14, including mere defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities. See sec. 163.340(8), Fla. Stat. Other factors include, but are not limited to, unsanitary or unsafe conditions; deterioration of site and other improvements; inadequate and outdated building density patterns; falling lease rates

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[2] The ability of counties to control, or even participate in, the creation and activities of municipally-created community redevelopment agencies is statutorily limited and for non-charter counties, not existent at all. In addition, as of January of 2005 there were 144 community redevelopment agencies in Florida, of which only 19 were created by counties; the remaining 125 were municipally-created. See LCIR Report, "Local Government Concerns Regarding Community Redevelopment Agencies in Florida," Jan. 2005.

compared to the remainder of the jurisdiction; and residential and commercial vacancy rates higher than the rest of the jurisdiction. See id.

The power of eminent domain under the current CRA law is tied to the creation of a CRA. Accordingly, changes to the statutory definitions of "slum area" and "blighted area" for the creation of a CRA would also apply to the exercise of eminent domain and to the expenditure of public money under the CRA law. There are several ways in which the statutory definitions, particularly of "blighted area" could be changed: "substantial number" could be quantified or amended to state "predominance of" or "majority of"; the requirement for "two or more" factors could be changed to require a higher number of factors; the findings of slum and/or blight could be required to be updated periodically by the CRA; and requirements for special notice and public hearings could be created before the resolution of necessity creating the CRA under section 163.355, Florida Statutes, could be adopted.

In addition to these statutory changes, there are enhanced accountability measures that could statutorily be created. For example, current law, with limited exceptions for some charter counties, does not authorize counties to participate in the creation or operation of CRAs established by municipalities inside the counties. Accordingly, the tax investment of the counties (and thus, the county taxpayers), is contributed to the municipally-created CRAs, without oversight or approval. Requiring appropriate intergovernmental coordination of the entities that contribute to the tax increment financing would necessarily assist in narrowing the use of eminent domain. For example, a statutory change could be enacted to require that all taxing authorities that must contribute to the tax increment of the CRA agree to the creation of the CRA and, thereby, to the exercise of its powers, including eminent domain. Such a circumstance adds layers of accountability to the creation process by empowering all of the directly impacted elected public officials to participate in the creation and operation of the CRA in their jurisdictions.

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

The Supreme Court of Florida and the Florida Legislature have long believed that the power of eminent domain may be exercised to clear slum areas and to redevelop those areas so as to avoid a recurrence of the slum condition and the evils attendant to that area, regardless of whether the redeveloped land is held by a public entity or whether the redeveloped land is transferred to private development. The public purpose of clearing slum areas and preventing their recurrence is the dominant and primary purpose for the exercise of eminent domain in these circumstances; the redevelopment of the area is the subordinate purpose. For example, in 1959, the Supreme Court upheld an act of the Florida Legislature that allowed the City of Tampa to condemn 40 acres of slum area within the city and immediately transfer the title to the private purchaser for development according to the plans and specifications required under the project plan. The Court in Grubstein v. Urban Renewal Agency of the City of Tampa, 115 So. 2d 745 (Fla. 1959), noted that "the use to be made of the condemned

property is fixed and definite and control of such use is retained by the condemning authority; . . . slum clearance is the dominant or primary purpose . . . ., and redevelopment of the cleared property is the subordinate purpose[.]"

When the conditions of the slum or blighted area rise to the level of creating a menace to the public health, safety and welfare of the citizens of the state, then it may be appropriate to use eminent domain for the public purpose of removing the slum area and preventing the recurrence of the slum condition. In addition, in a "blighted area," there may be permanent, inherent, and fundamental defects in land within an area that prevent any use of the land, let alone any efficient or desirable use, thus rendering the land dysfunctional. These permanent defects create a disproportionate burden on the local taxpayers to continue to try to improve the conditions of the area. When the regulatory or police power fails to cure such an inherent permanent defect, the power of eminent domain may be necessary to serve the valid public purpose of removing the defect. However, the power of eminent domain should only be used after other methods of curing the defect have been repeatedly tried and have failed.

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?

A more complete analysis of this question is contained within the response to Question 2 above. If, however, the Florida Legislature were to dissect the powers of a CRA and only statutorily narrow the definitions of "slum area" and "blighted area" as they apply to the power of eminent domain in the CRA context, then the Legislature would need to ensure that the ability of a CRA to execute the adopted redevelopment plan is not rendered impossible thereby. The redevelopment plan is generally financed through the issuance of debt against which is pledged the estimated tax increment. Those estimates are based upon the complete and successful execution of the redevelopment plan.

The Florida Association of Counties recognizes that the charge of the Select Committee is to address concerns regarding the protection of private property rights. However, the Association would be remiss if it did not notify the committee that other problems exist within community redevelopment agencies beyond the power of eminent domain. Current law allows municipalities to create community redevelopment agencies in non-charter counties without any intergovernmental participation from the county which must then contribute its tax increment to the community redevelopment agency. The Association has been seeking legislative solutions to this current statutory scheme and believes that any solution to the excessive use of powers given to the community redevelopment agencies must address the intergovernmental issue as well.

5 . In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida courts show to local government determinations?

Some concern has been raised as to the fact that in the *Kelo* decision, the United States Supreme Court deferred to the legislative finding that economic development

was a public purpose for purposes of eminent domain. This deference to local government legislative findings also exists in Florida and has for 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 prove a legislative declaration that economic development was a public purpose -- before the courts would defer to the finding. "[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).

Furthermore, neither the Florida Legislature nor a local government can declare a private purpose to be a public one and by that declaration circumvent the constitutional protections. "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).

While legislative findings, whether made by a county commission or by the Florida Legislature or by another public body with legislative discretion, are entitled to judicial deference they are judged on a case-by-case basis and they are subject to challenge and defeat. The Florida jurisprudence is filled with circumstances and cases under which a private citizen has proven that a legislative finding or act was arbitrary and in so doing, invalidating the entire governmental action.

In the context of the community redevelopment agencies, the courts in Florida have already declared that legislative findings of slum or blight are not impenetrable for all CRA purposes. "[T]he 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 owners 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.

Douglas J. Sale—
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October 13, 2005

Tom Hamby, Staff Director
House Select Committee to
Protect Private Property Rights
1101 The Capital
402 South Monroe Street
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Dear Mr. Hamby:

Thank you for this opportunity to again address the Select Committee. Please accept a brief introduction to place in context my response to the Committee's questions.

In upholding the Washington, D.C., redevelopment plan, and the power of eminent domain to assemble the land involved for transfer back to the private sector, the United States Supreme Court began its analysis as follows:

> "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." *Berman v. Parker, 348 U.S. 26, 32 (1954).*

The power of eminent domain and the power to tax are among the most invasive powers of our government, and in every case strike to the fundamental question of the government's purpose. The Committee's task at hand is no less daunting. The question of whether to condemn property for private redevelopment begs the question of whether, under the unique circumstances of a particular location, using private development as a tool to abate the current conditions and prevent their recurrence is a proper purpose of government. In the end, the purpose of government is always defined by many legislative determinations, each made on its own facts.

I write to respectfully urge the Select Committee to consider whether any attempt by the state legislature to define the reach, or trace the outer limits, of public purpose in every particular, local redevelopment circumstance may be as fruitless as the Court recognized in *Berman*. The wisdom of the Florida Community Redevelopment Act is that the Act does not attempt to define public purpose in every local circumstance. Rather, within the boundaries established by the legislature, locally elected city and county commissioners are delegated the responsibility to make a legislative determination of whether, under unique and local circumstances, undertaking a specific redevelopment plan is a legitimate purpose of government. The definitions of slum and blight seek, in general terms, to roughly outline those boundaries. Findings of slum or blight and subsequent redevelopment plans under Chapter 163, Part III, are quite literally "social legislation" intended to reach "public needs" in the sense discussed by the *Berman* Court over fifty years ago before much of the "social legislation" we now take for granted was even conceived. See *Berman* at 32.

To completely abandon the power to forcibly assemble land in order to remedy slum or blighted area conditions through the attraction of private investment will leave many dangerous or distressed and unproductive areas to be redeveloped only at the natural bottom of a downward economic spiral which, in the interim, will spin off an array of evils and lost opportunities for good. Florida's legislature has expressly acknowledged the encouragement of the use of private enterprise as a tool, not the objective, of redevelopment. See F.S. 163.345 and F.S. 163.360(7)(d). Successful redevelopments to remedy problem areas require private capital, private expertise and private risk taking. The attraction of these private advantages sometimes requires wholesale clearage to remedy slum or blighted area conditions or the assembly of tracts of land large or compact enough to be attractive for private uses. By repealing the power to condemn the land if negotiation fails, Florida government will strip the public of the ability to assemble such tracts where needed to enlist the private sector as a tool to eliminate even the most offensive social or economic evil. Being only a tool, the private sector should always be obligated to use the condemned property under the terms and conditions of a publicly adopted redevelopment plan or "social legislation." The obligation and power of local government to require that any property acquired for redevelopment be used under the terms and conditions of such a plan already exists. See F.S. 163.380(1).

The issues the Committee faces are complicated, but the principles I believe the Committee seeks to protect are boldly chiseled in Florida law today. For example:

- "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." *State of Florida et al v. Miami Beach Redevelopment Agency,* 392 So.2d 875, 886 (Fla. 1980)

- "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... Applying reason to this basic proposition, our decisions have, however, consistently allowed an incidental private use where the purpose of the taking was clearly and predominantly a public purpose." *Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale*, 315 So.2d 451, 455 (Fla. 1975).

- 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." *Miami Beach, Id.* at 887

Eminent domain is a harsh proceeding and, in the context of forcibly transferring one person's property to another in the name of abatement and redevelopment, it is appropriate for the state legislature to define the public policy goals that must be the paramount objective of such a transfer. The definitions of slum or blight to be eliminated seek to do just that. Where the tool chosen is redevelopment by the private sector to efficiently eliminate slum or blight and prevent its recurrence, incidental private benefit should not be allowed to demonize that predominately public purpose. There will always be a private benefit. Otherwise private parties would have no incentive to purchase or accept the condemned property as part of the redevelopment plan, and then work the public's will as stated in that plan.

The true debate is not public purpose versus private property rights. The true debate is majority versus minority will. Said another way, the issue at heart is what types of problem areas should, if negotiation fails, require a minority (the hold-outs who would decline any compensation) to subordinate their will to the will of the majority voiced through elected state and local representatives in the form of the "social legislation" termed a redevelopment plan.

Turning to your questions:

1. **What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.**

   Definition of economic development project: "A project dedicated to a private use without serving a predominately public purpose through that use, regardless of any public benefit derived."

First, clarify the definition of "blight." See 2 below. Although there is little or no evidence of condemnations actually being filed for purely "economic development" purposes, the current definition of "blight" arguably is broad enough to invite such an attempt.

In the post-Kelo debate, the term "economic development" has become convenient shorthand for the potential abuse of the Community Redevelopment Act to forcibly transfer property from one person to another in the name of some publicly sponsored project which the debater believes to be unworthy of the exercise of such a harsh proceeding. Typically, the alleged abusive goal is to up-grade the use of land to attract jobs, business and other private sector benefits which, it is argued, are best left to the Chambers of Commerce. Although such projects do indeed produce "public benefits," they serve primarily private as opposed to public purposes and, under current Florida case law, should not be constitutionally available for public funding or assembly by eminent domain. This is nothing new, but there is no case making this holding directly. If the legislature fears the Florida Supreme Court will not hold the line on this principle, a second change would be to codify it in words similar to those quoted above which have a context and history in existing case law.

Third, establish new procedural requirements and consider additional compensation discussed in 3 below.

2. **What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?**

Slum. No change. Definition clearly describes active and direct menace to public order. (see *Miami Beach, supra,* at 879). It is a traditional public purpose to address this sort of evil.

Blight. Definition describes area where conditions not conducive to sound growth and consequently public good impaired. See *Miami Beach, supra.* Perhaps not as compelling a public purpose as slum, but nonetheless clearly important to the general welfare. Being mindful of the law of unintended consequences, I hesitate to make specific suggestions but acknowledge that the qualifying criteria for blight are broad. The range of dilemmas in Florida runs the gamut from hundreds of thousands of boom-platted lots, to extreme urban decay. The problem the Committee faces is that the criteria must be somewhat broad because "each case must turn on its own facts," the purposes of government being neither abstractly nor

historically capable of complete definition. See *Berman, supra.*

Attempting to define or describe "blight" for the purpose of exercising the power of eminent domain and, thereby, defining the purpose of government in circumstances not as bad as "slum," but certainly not good, may be an impossible task. The problem, of course, is that there can be no "one size fits all" definition truly serving the public interest in all local situations across the state. This is why I suggest clarifying the definition on the front end, tightening the procedures in the middle, and increasing compensation at the end. Community redevelopment is an important institution, and the best and most lasting institutional changes typically result from the evolution and combination of many relatively small changes, not radical revisions which frequently carry unintended consequences.

I would be happy to work with you or a task force to discuss ways to narrow the definition without eliminating the flexibility local government needs to respond to unique problems. To start, the relationship between the general definition and the litany of factors could be clarified as follows:

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

Then, each of the factors listed could be compared with the general definition to see how well it serves as a compulsory indicator that the intent of the general definition has been met. The basic structure of the definition is very workable.

3. **Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?**

Where the following, new requirements are met:

- Extraordinary notice is given to potentially affected owners prior to the adoption of a F.S. 163.355 mandatory resolution finding necessity.

- The resolution finding necessity discloses the fact that property can be condemned if negotiations fail, and explains why the taking of land may be necessary to enlist private enterprise in the attack on slum or blight.

- Each parcel to be condemned is uniquely determined at the time of the take to be material to the elimination of the slum or blight as determined in the finding of necessity resolution.

- Additional compensation is paid.

If the power to condemn will be used, that fact should be prominently disclosed by extraordinary notice to owners prior to the adoption of the finding of necessity resolution. In all cases, it would appear logical and proper that property not be taken by eminent domain until the resolution of necessity is adopted and that, in addition, where private-to-private transfers are possible, the resolution explain why, in the circumstances at hand, it may become necessary to assemble land in order to engage the private sector in redevelopment. Moreover, requiring the government to subsequently determine, at the time each decision to take is made, that the property to be taken is material (not critical, but not merely related either) to the enlistment of private enterprise would provide significant additional safeguards and a new opportunity for judicial review. Given the short time to prepare this response, if the Committee is interested in this idea I would respectfully request an opportunity to research precedent for the use of the word "material" to avoid unintended consequences and hopefully minimize litigation over its use in this crucial context.

Incidentally, to my friends in the redevelopment community I would point out that under current law (Florida Statute 73.071(5)), the government should not be required to pay any increase in the value of the property which might occur after the scope of the redevelopment plan is known and which is solely a result of the project location. This is fair because the owner is certainly not assisting with the redevelopment effort and should not be rewarded for being an obstacle to achieving a public purpose. I am mindful that my thoughts on this point have changed since my first letter to you.

Condemning and abating a nuisance which is injurious to the public health, safety and welfare has always been an accepted purpose of government. Compare Florida Statute 166.411(7). To take property for the reasonable necessity of clearing and preventing the recurrence of conditions which are or will be injurious to the public health, safety and welfare is no more than what members of a civilized society expect their government to do, especially where the government is required to pay full compensation.

I would invite the Committee to carefully consider relaxing limitations on compensation which have developed in public use takings. It has been pointed out to me by eminent domain counsel experienced on both sides of the table that some of these limitations are arguably acceptable when the property taken will actually be used by the public, but are philosophically problematical when the taking (and a loss) is sustained by one private owner in an effort to turn the property over to

another private owner, albeit as a tool to accomplish a public purpose. Examples would include paying business damages for a complete taking, shortening the business existence threshold from five to three years, paying moving and relocation costs similar to the Federal Relocation Act, and paying the economic value of intangible entitlements lost, such as the ability to operate without competition due to grandfathered zoning status or a low mortgage rate lost upon payment of condemnation proceeds. There may be others and some of these may overlap.

Philosophical opposition is even more acute when a homestead is taken. Everyone is sensitive to that. However, if homestead property is shown to be material to an adopted redevelopment plan, the will of the majority should prevail to accomplish the pubic purpose. Should the sensitivity become intolerable, additional compensation could be paid, arguably akin to pain and suffering. The reality, though, is that everyone will demand and receive the additional money regardless of whether they truly wanted to stay in the house condemned. To be a practical option, the compensation formula must be straightforward, easy to apply and universally applicable to avoid creating even more disputes that will have to be resolved.

4. **If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?**

None, if the earlier suggestions are accepted. Every redevelopment initiative does not necessarily require private-to-private transfers by the power eminent domain. In fact, today when that power is universally available, most plans do not. If the law is changed to require those redevelopment initiatives that may need the power to state that fact in the finding of necessity resolution, then by simply devising and adopting a redevelopment effort which does not expressly contemplate condemnations, a local government can elect tax increment financing with no prospect of a private-to-private condemnation.

However, if the definitions of slum and blight are changed dramatically for the sole purpose of condemning property, in effect creating a two tier system of CRA's, then additional definitions will have to be created, local governments will have to select which type of CRA to pursue, and a host of procedural and transition issues will have to be addressed.

5. In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida Courts show to local government determinations?

First, a thumbnail of the current standard of review which the courts have established for themselves is necessary. Those opposed to takings under the Act are able to easily confound and confuse the standard of review because two bodies of case law are combined, namely, the CRA law and the eminent domain law. To make matters worse, the eminent domain law itself has two different standards for separate elements of the action. Still, sorted out into their respective camps, the current standards make perfect sense and are surprisingly similar.

Under the CRA law, the determination of slum or blight and the adoption of a redevelopment plan are legislative determinations and may not be disturbed by the court where the local government had a reasonable basis to make them. Sometimes this is referred to as "supported by competent, substantial evidence," or not "clearly erroneous," or "fairly debatable" among reasonable people. *Panama City Beach Community Redevelopment Agency v. State*, 831 So. 2d 662 (Fla. 2002). This deferential standard has been termed a rule of reason designed to allocate decision-making authority between the city or county commission and the court, and to prevent the court from substituting its judgment on matters of policy for that of the body elected to that duty. *Lee County v. Sunbelt Equities II*, 619 So. 2d 996, 1002 (2d DCA 1993).

Under the eminent domain law, there are two standards. First, in recognition of the harshness of the procedure, the Florida Supreme Court requires a strict construction of the statutes affording the power of eminent domain. *Rukab v. City of Jacksonville Beach*, 811 So. 2d 727, 731-2 (1st DCA 2002) (citing *Baycol, supra*). Second, if the statutes are strictly followed, then the condemning authority's burden returns to a rule of reason:

> "The condemning authority is obliged to show a reasonable necessity for the condemnation. Once such a reasonable necessity is shown, the exercise of the condemning authority's discretion should not be disturbed in the absence of illegality, bad faith or gross abuse of discretion." *Id* at 731 (again citing *Baycol, supra*.)

The similar, deferential standards developed in both bodies of case law is an important implementation of the separation of powers between the legislative and judicial branches of government and should not be upset lightly. Moreover, it is uncertain that the courts would accept the legislature deciding what standard of review they should apply - the power to make the standard less deferential today would be precedent to make the standard even more deferential tomorrow.

Finally, it is most unclear why the legislature would consider attempting to revise the standard of judicial review when the legislature controls the delegation of authority to condemn. If there is a consensus that local government in Florida is actually exceeding the intended delegation of eminent domain power (and hopefully there is not), the direct solution would be to limit the authority delegated, not pass the issue off to the courts.

In the end, all of this is about the proper purpose of government and that is a legislative, policy matter.

Conclusion

Private property should not be condemned and transferred to another for economic development purposes, which I would define as "a project dedicated to a private use without serving a predominately public purpose through that use, regardless of any public benefit derived." I believe Florida constitutional law currently provides this protection. Nonetheless, if the legislature fears the Florida Supreme Court will not hold the line on this principle, it could be codified in words similar to those quoted above which have a context and history in existing case law.

Where private-to-private transfers by the power of eminent domain are contemplated in a redevelopment initiative, the local government could be compelled to provide at the outset extraordinary notice and explain the need for the taking in the resolution finding necessity to redevelop, and subsequently required to determine, at the time each decision to take is made, that the property to be taken is material (not critical, but not merely related either) to the enlistment of private enterprise in the redevelopment effort. Not only would the use of the power to condemn be subject to public scrutiny at the adoption of the mandatory finding of necessity, but the finding of materiality could be challenged in the condemnation proceeding. Extraordinary, personal notice of the decision to take should be required for the property owners in the area to be acquired.

Unlike current law, this process would require the nexus between the takings and the public purpose to be established in the very beginning, during the public scrutiny of the finding of necessity proceedings, and then re-examined in the subsequent takings resolution for each specific parcel. On the other hand, consistent with current law, the legislative determination of what is a public purpose would continue to be made broadly at the state level and then in particular circumstances on a case by case basis by a city or county commission which is directly accountable for its actions.

This would appear to be an optimal process to:

- Make case by case legislative determinations defining the purpose of government, and provide flexibility to confront varied local problems;
- Protect the minority from condemnations not specifically needed to advance the "social legislation" expressed in a finding of necessity adopted by the majority through their elected representatives; and
- Protect the right of the majority to pursue a legitimate public purpose through the power of eminent domain when negotiation fails.

Finally, it should be recognized that that some of the limitations on compensation developed in public use takings are arguably acceptable when the property taken will actually be used by the public, but are philosophically problematical when the taking (and a loss) is sustained by one private owner in an effort to turn the property over to another private owner, albeit as a tool to accomplish a public purpose. In those situations, some of the compensation limitations could be relaxed.

Setting the emotional rhetoric aside, there is no compelling reason to remove private-to-private condemnations from the redevelopment tool box in needful cases. There is middle ground. Community redevelopment is an important institution, and the best and most lasting institutional changes typically result from the evolution and combination of many relatively small changes, not radical revisions which frequently carry unintended consequences. Once again, thank you and the Committee members for your attention and effort on this important issue.

Very truly yours,

Douglas J. Sale

DJS/sm

ADDENDUM A

Select Committee to Protect Private Property Rights

Tuesday October 18, 2005
4:00 p.m.—6:00 p.m.
Morris Hall

ADDENDUM A (10/14/05 8:30 a.m.)

Allan G. Bense
Speaker

Marco Rubio
Chair

Wade Hopping—
Property Rights Coalition

Wade Hopping
Property Rights Coalition

MEMORANDUM

TO: Tom Hamby, Staff Director
House Select Committee to Protect Private Property Rights

FROM: The Property Rights Coalition

RE: Questionnaire Responses

DATE: October 13, 2005

In response to your request for answers to several questions relating to private property rights, the following are the responses of the Property Rights Coalition (PRC). The Property Rights Coalition is comprised of associations, corporations, and individuals who are supportive of bringing appropriate protections of private property rights. The Property Rights Coalition was very active during the drafting and passage of the Bert J. Harris Jr. Private Property Rights Protection Act contained in Chapter 70, F.S.

Summary of PRC's Positions

Although the PRC has not drafted specific amendments to existing statutory language at this time, the position of the PRC to the Select Committee's questions can be summarized as follows:

1. Existing statutory provisions allowing relatively liberal standards for Tax Increment Financing within Community Redevelopment Areas should be retained. The current broad definitions of slum and blight could thus be retained for this purpose only. The initial designation of the community redevelopment area can appropriately continue to be a "legislative" determination subject to judicial review pursuant to the current "fairly debatable" standard.

2. At a minimum, the Florida Community Redevelopment Act of 1969, ss.163.330-163.380, F.S. should be amended to make it clear that the Act may not be used for the sole purpose of economic development. Stricter definitions of "slum" and "blight" areas should be adopted for the purposes of eminent domain takings.

3. A new standard should be created which requires specific quasi-judicial findings by the local Community Redevelopment Agency or local government as a condition precedent for the taking of any private property within the community redevelopment area. The enhanced standard should provide that decisions by governmental agencies to take property by eminent

domain are subject to enhanced judicial scrutiny based on a different, more property-rights-friendly standard than the current "fairly debatable."

4. In order to accomplish these goals, the PRC believes that significant amendments should be considered for ss. 127.01 and 166.41, F.S., and the following sections in Part III of Chapter 163:

· 163.335	· 163.355	· 163.362
· 163.340	· 163.358	· 163.370
· 163.345	· 163.360	· 163.375
· 163.346	· 163.361	· 163.380

The intent of the amendments to the Act would be to create a dual approach which would enable Community Redevelopment Agencies to continue to function as financing mechanism by making it relatively easy for the use of Tax Increment Financing, while at the same time discouraging the excessive use of eminent domain in the taking of private property. This dual approach would give home and business owners a better chance to challenge the decision to take their property on an individual, case-by-case basis.

Response to the Committe's Questionnaire

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

At a minimum, the Florida Community Redevelopment Act of 1969, ss.163.330-163.380, F.S., should be amended to make it clear that the Act may not be used for the sole purpose of economic development. Furthermore, the home rule powers of counties and municipalities should be amended to ensure that their eminent domain powers are likewise limited. Particular attention should be directed to ss. 127.01, 125.045, 166.411, and 166.021, F.S.

At this time, the PRC has not embraced a specific definition of "economic development." The PRC however, is evaluating the concept of defining "economic development" for the purpose of community redevelopment as that development that is designed primarily to create or expand non-public jobs and service opportunities (e.g., condominiums, hotels, and shopping centers). The PRC's interest is focused principally on development by private parties which do not involve traditional uses and activities such as roads and other linear facilities, public housing developments, drainage ways, public parks, public schools and universities, or other public buildings used for a variety of governmental or other appropriately deemed public uses.

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

The PRC suggests consideration of revisions to s. 163.340, F.S., the "definitions" section of the Act:

- In subsection (7), the definition of "slum area" should be limited by amendments which require that the factors which define "slum area" must be applied <u>at the time of taking</u> and be restricted to the property being taken and properties immediately adjoining the property to be condemned.

- In subsection (8), the term "blighted area" should be limited in its application when it is used for eminent domain purposes. Amendments to that definition should result in a requirement that at least three factors be present for the exercise of eminent domain powers by the Community Redevelopment Agency.

Additional limitations should be considered in supporting a taking by a Community Redevelopment Agency or a local government pursuant to its home rule powers. It is worthy of consideration to exclude the following factors indicating "blight" when the exercise of eminent domain by a Community Redevelopment Agency or a local government is contemplated:

- to address low ad valorem tax values [paragraph (8)(b)]
- site or improvement deterioration [paragraph (8)(e)]
- outdated building density patterns [paragraph (8)(f)]
- falling lease rates [paragraph (8)(g)]
- high vacancy rates [paragraph (8)(h)]

Further, the Legislature should consider requiring a preponderance of "blight factors"to be present in the property being taken and the surrounding area at the time of a taking, and a demonstration that a preponderance of "blight factors" exists should be a condition precedent to the taking.

The Legislature should prohibit the taking of bona fide agricultural properties and operations by eminent domain.

The PRC suggests that the Legislature should consider retaining the current liberal statutory language for determining "slum" and "blight" for purposes of subjecting an area to Tax Increment Financing, while tightening the statutory definitions when applying the "slum" and "blight" concepts to the exercise of eminent domain powers by a Community Redevelopment Agency or a local government.

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party

for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

The PRC suggests a two-part analysis for takings of private property in order to ameliorate slum or blight. The first part of the analysis should be to determine whether the property is in fact slum or blighted property and, if not, that should end the possibility that property will be taken under the Community Redevelopment Act. Under no circumstances should eminent domain be available to prevent or to prevent the reoccurrence of slum or blight. If the subject property is demonstrated to be actually "slum" or "blighted," then the statute should define for what purposes the property may be used after it is taken.

The latter issue – the purposes for which a "slum" or "blighted" area may be taken – is a much more difficult issue to resolve. Reflecting perhaps differing viewpoints likely held by legislators and members of the general public, some members of the PRC believe that there are no circumstances under which property should be subject to a forced transfer from one private owner to another private owner. Others believe that such transfers could appropriately take place if: (1) the initial taking was to truly eliminate slum and blight, and (2) if the owners of the property become the beneficiary of enhanced compensation. In the near future, the PRC will grapple with the differing views on this subject in order to reconcile them in order to maximize the PRC's assistance to the Select Committee.

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?

A more stringent test should be created for slum and blight takings through eminent domain. This more stringent test for taking by eminent domain should involve both procedural changes to the laws cited above, as well as changing the level of deference that Florida courts show to local government determinations from fairly debatable to some more stringent standard.

The PRC believes by making appropriate amendments to the definitions of "slum area" and "blight area" in s. 163.340, by amending s. 163.355 to require different findings of necessity, and by amending s. 163.375 to clarify that all taking resolutions must be supported by clear and convincing evidence and directing courts to giving heightened scrutiny to taking resolutions – that the statute could be amended to create a new test for the use of eminent domain while retaining the current more relaxed test for the purposes of Tax Increment Financing.

5. In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida courts show to local government determinations?

The PRC believes that the s. 163.375, F.S., relating to eminent domain, should be amended to:

- Require the adoption of a specific condemnation resolution by a local government with specific findings of necessity and identification of the public purpose, along with appropriate notice to the property owner for each parcel to be taken.

- Require all taking resolutions be supported by clear and convincing evidence.

- Require the Community Redevelopment Agency to disclose at hearing on the record its ultimate plans for the use of the property being taken.

- Create a "public purpose" requirement for takings under the Act, and set standards that courts must use to review such takings.

- Require courts to give heightened scrutiny to such taking resolutions.

The PRC also believes that consideration should be given to statutorily authorizing additional compensation to the property owner such as:

- requiring payment of business damages to the private property owner for both partial and total takings

- requiring payment of <u>all</u> actual relocation costs;

- requiring just compensation to include the replacement cost of any housing or buildings in order to offset economic losses to private property owners for the facilities being taken.

For further information, please contact:
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Glenn D. Vann—Port St.
Lucie CRA Director

Glenn D. Vann, Director
Community Redevelopment Agency
City of Port St. Lucie

TO: Tom Hamby, Staff Director
House Select Committee to Protect Private Property Rights

FROM: Glenn D. Vann, Director
Community Redevelopment Agency
City of Port St. Lucie

This correspondence comes in relation to your resent survey regarding eminent domain in the State of Florida. Below please find the related questions and corresponding answers:

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

Current Florida laws offer proper and adequate protection of private property from unwarranted and unnecessary uses of eminent domain.
Municipalities, counties, and all other governmental entities are specifically empowered to utilize eminent domain only in situations that involve and promote the common good of the community. As written, Florida statutes are consistent with a recent decision by the U.S. Supreme Court in its ruling in Kelo v. City of New London. That decision upheld the right of government to use eminent domain for projects designed to enhance economic development in the community. Economic development in this case is defined as measures that generate jobs and increase the tax base.

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

The current definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act accurately describe the many downtown areas, communities and neighborhoods that are in serious states of physical and/or economic decline. The state's definition of "slum and blight" is in sync/accordance with the federal definition of the same. Millions of dollars in federal funds have been utilized in redeveloping communities throughout the state. In the State of Florida, for the past thirty years, Community Redevelopment Agencies have utilized the term "slum and blighted areas" to properly define and characterize areas of the community needing drastic measures of redevelopment.

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

Local governments should only utilize eminent domain in situations/circumstances where it is clearly a last resort , and that the project benefits the common good of the community.

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?

As mentioned in section 2 of this questionnaire, there should be no changes to the current definition of "slum and blight" in the Florida state statutes. The current statutory definition of the term adequately defines the condition of areas needing serious measures of redevelopment.

5 . In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida Courts show to local government determinations?

No changes are needed to Florida's Community Redevelopment Act. The State's Community Redevelopment Act has successfully and productively steered/regulated significant measures of redevelopment to Florida's most physically and economically affected areas. Any changes to the Community Redevelopment Act would stand to lessen the positive impact that the state has experienced and enjoyed over the past thirty years through the existence of Florida's CRAs.

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ADDENDUM B

Select Committee to Protect Private Property Rights

Tuesday October 18, 2005
4:00 p.m.—6:00 p.m.
Morris Hall

ADDENDUM B (10/17/05 10:30 a.m.)

Allan G. Bense
Speaker

Marco Rubio
Chair

H. Adams Weaver—
Jones Foster Johnston &
Stubbs, P.A.

H. Adams Weaver
Jones Foster Johnston & Stubbs, P.A.

In response to the questions posed in your October 6, 2005 email regarding questions by Chair Rubio, I offer the following:

1. In Florida, economic development through the use of eminent domain occurs when a local government Community Redevelopment Agency, declares an area blighted and then takes private property to immediately turn the property over to a private developer for a use that will theoretically raise the ad valorem tax base. To limit economic development, the definition of blight needs to be clarified so that it is applied uniformly. In the recent case, City of Daytona Beach v. Mathas, the City's land planner testified that the blight meaning of the statute varies from community to community. How is a property owner to know if his property or area is or may be "blighted?"

2. a. The definition of "blight" is ambiguous. When the statute requires a "substantial number" of deteriorating or deteriorated structures, what is meant by "substantial?"

b. The current definition allows a finding of blight based on such things as failure to show appreciable increase in assessed values for ad valorem tax purposes, "faulty" lot layout, "outdated" building density patterns, and "diversity of ownership." These criteria, and others, really support a taking for economic development purposes, and are not indications of true blight.

c. The purported purpose of Section 163, Part 3, F.S., is to reduce or eliminate blight. Therefore, a taking in eminent domain should only be allowed for a project reasonably connected to curing blight. A jurisdiction should not be allowed to declare "blight," and then seize land at will. The courts should be allowed to determine whether the genuine reason for the taking is to remedy blight.

d. There is no statutory time for the determination of blight. A jurisdiction should not be able to make an initial finding of blight, and then rely on that finding indefinitely.

e. There is no express allowance for a condemnee to raise the defense that blight, if it ever existed, has been remedied. Since eminent domain powers are supposed to be used only for a public purpose, it makes sense that the public purpose should still exist as of the date of taking.

3. If based on a uniform definition and to cure an objectively determined standard of blight or slum and if it is determined the private sector alone cannot bring back the area, then eminent domain should be allowed as a last resort.

4. Consideration should be given to separating the criteria for the use of eminent domain and the allowance of tax increment financing. The statute uses the same criteria for both. Some jurisdictions take the blight definition seriously, do not want to expose their citizenry to the fear of eminent domain, and do not want to have a blight label. Those jurisdictions do not get to take advantage of tax increment financing.

5. So as to avoid the mere pretext of blight, the court should review projects with a reasonableness standard, rather than a deferential standard.

Dana Berliner—Institute
for Justice

Dana Berliner
Institute for Justice

Responses of Dana Berliner
Senior Attorney, Institute for Justice
To Questions from
Florida House Select Committee to Protect Private Property Rights
October 18, 2005

1. **What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development?**

To prohibit takings of private property for the purpose of private commercial development, it is necessary to do two things: (1) explicitly prohibit the taking of property for private commercial development and (2) reform Florida's definition of slum and blight conditions so that it is not possible to use that law as an exception to the prohibition against takings for private commercial development.

Although the term "economic development" can be used, "private commercial development" is significantly clearer. More important, the question asks how to prohibit takings that are "solely" for economic development. That should absolutely not be the standard. In any taking, there are multiple purposes. For example, in New London, the takings were for economic development. However, small portions of the project area were slated to be used for a public walkway. The walkway was nowhere near the homes, but it could be considered another, minor purpose of the project. Using the term "solely" simply invites condemning authorities to come up with other supposed purposes of the use of eminent domain and then invites owners to litigate about how important "economic development" was as a purpose.

Instead of requiring these difficult judicial inquiries into the intent of city councilors and redevelopment agencies, the legislation should simply state the circumstances under which eminent domain can and cannot be used to transfer property to private parties. That type of legislation will lay out rules that both owners and government entities can understand and follow. It will encourage certainty and discourage litigation.

If this legislature is determined to use the term "economic development," it should be defined as:

> "Economic Development--The term "economic development" means any activity to increase tax revenue, tax base, employment, or general economic health, when that activity does not result in (1) the transfer of land to public ownership; (2) the transfer of land to a private entity that is a state or federally regulated common carrier, such as a railroad or utility; or (3) the transfer of property to a private entity when eminent domain will remove a direct threat to public health or safety, defined as the

removal of public nuisances, removal of structures that are beyond repair or that are unfit for human habitation or use, or acquisition of abandoned property; (4) the lease of property to private entities that occupy an incidental area within a public project."

2. **What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?**

As discussed in my prior testimony, Florida needs to amend its current definitions of slum and blighted areas. The current law permits condemnation of an entire neighborhood even if there is nothing wrong with a majority of the properties. Also, many of the factors that supposedly render an area blighted are so vague and subjective that they would apply to virtually any property. Instead, Florida should adopt a definition of blight that describes areas that do in fact have serious problems. One example of such a definition appears in S.B. 881, recently introduced in the Pennsylvania legislature.

3. **Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?**

It is appropriate to condemn property if doing so will eliminate an actual threat to public health or safety. It is not appropriate to condemn property for the purpose of supposedly preventing slum or blight conditions that do not exist but might possibly exist one day. Every area might one day be blighted, but that should not be a reason for taking someone's home or business and transferring it to another private party.

4. **If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?**

If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, it should create a new section in the Community Redevelopment Act that defines a "redevelopment condemnation area" or "condemnation-eligible property." It can then specify that eminent domain is authorized only for those properties, while leaving in place all of the other current provisions related to "blighted" areas, including those dealing with tax increment financing. This will preserve the ability of local governments to take advantage of all the other financing tools for encouraging economic development while limiting the power to transfer property from one private party to another.

5. **In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida Courts show to local government determinations?**

Under current law, Florida courts apply an extreme level of deference to local government determinations that an area is blighted. That level of deference leads courts to abdicate their responsibility to review takings and enforce Florida's Constitution. Unless an owner can show that the blight designation was made in bad faith or by fraud, it will be virtually impossible for an owner to disprove a blight designation. Instead, the government should carry the burden of showing that its taking is for a public purpose. The law recently passed by Texas removes the presumption in favor of the government's findings. Mississippi requires the government to establish public purpose. Other states similarly have proposed laws reducing the level of deference shown by courts to government findings. This Legislature could state that there is no presumption either of validity or invalidity. It could require the government to bear the burden of clear and convincing evidence of blight. But even requiring a preponderance of the evidence would still be a significant improvement over the current situation, which virtually precludes judicial review.