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Property Rights at Risk?

Eminent Domain Law in Florida After
The U.S. Supreme Court Decision
In *Kelo v. City of New London*

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Executive Summary

Until the United States Supreme Court announced its 5-4 decision in *Kelo v. City of New London*, many Americans probably had given little thought to the doctrine of eminent domain. In and around law schools, it was widely perceived as an essential component of courses in property law and, in some states, a lucrative specialty for attorneys.

To most of the general public, however, “eminent domain” was not a major concern. Sure, the government could use the condemnation process to acquire private property needed for public purposes such as roads, parks, or schools, but the owners whose property was acquired would be compensated – sometimes quite handsomely.

Moreover, an attentive purchaser using due diligence and common sense often could determine whether all or a portion of a particular property was vulnerable to condemnation by the government for a public use at some time in the future. For instance, if a house or store sat

beside a traffic-choked stretch of two-lane road only six blocks from where the six-laning ended, that was a clue that the property’s owner eventually might lose a bit of his front lawn or parking area.

That kind of risk can be anticipated and evaluated. The *Kelo* decision, however, opened the door for local governments to expand their use of the doctrine of eminent domain in ways that create a great deal of uncertainty and, thus, anxiety among property owners.

The decision, which has been widely criticized by advocates of property rights, did have one redeeming feature, however: It as much as invited the states to respond by enacting their own ground rules for the use of eminent domain authority by the local governments within their jurisdiction. This policy paper is intended to offer helpful background information that policy makers in Florida (and other states) might use to respond to the *Kelo* decision’s invitation to act.

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INTRODUCTION

We Americans are well known for our love affair with private property rights, but the fact of the matter is that most of us would be stumped to explain exactly what those rights entail. Surely, very few of us would argue that a landowner can do *anything* he or she pleases with the property, subject to absolutely no restraint through government regulation acting on behalf of the public welfare. On the other hand, few would maintain that the government's power to regulate land use is boundless, leaving property owners completely at the mercy of the public will. The field between these two extremes, however, has proven over time to be fertile ground for debate, controversy, and litigation, leaving the line between property rights and government authority blurred in many settings.

Nevertheless, as fuzzy as the contours of our property rights may be, until recently the vast majority of Americans seemed certain of one thing: The government could not take land from one private citizen, even for fair compensation, and simply give it to another private citizen in the hope that the latter would use it in ways that produce more tax revenues for government coffers or jobs for the local economy. To be sure, with just compensation and adequate due process, the government ought to be able to take private land for uses such as roads, reservoirs, and other public infrastructure. But to take land from one person and give it to another just because the latter is richer or has a better business plan? No way. Can't happen. Not allowed.

Alas, after a 2005 decision of the United States Supreme Court, those of us who believed this are now much less sure. In *Kelo v. City of New London*,¹ the Court decided that a city could condemn parcels of residential land owned by different private individuals in the Fort Trumbull area of New London, Connecticut, add those parcels to other parcels the city had purchased through "voluntary" transactions, and devote the resulting 90-acre area to an economic development plan designed to include private hotels, restaurants, retail shopping, office space,

new residences, a marina, and other land uses contributing to a "small urban village" setting.

According to the city, the Fort Trumbull area was "distressed," and the development project would help turn things around by providing new jobs and increased tax revenues to the larger community. Although they would be displaced by this transformation of land uses, many owners of the targeted properties "voluntarily" sold their land to the city without forcing the city to exercise its power of eminent domain to take the parcels. As holdouts, however, Susette Kelo, who had lived in her water view home since 1997, Wilhelmena Dery, who had lived in her house *her entire life*, including 60 years with her husband, and several other lot owners in the area refused to sell. Their properties were not blighted or in poor condition—they just happened to be located in the path of the city's development project. The owners did not contest the amount of compensation the city offered, but rather challenged the very power of the city to accomplish the condemnation under the United States Constitution. After litigating their claims in the Connecticut state courts and losing,² the property owners sought a ruling from the United States Supreme Court.

The basis of their challenge was straightforward. Most states authorize state and local entities to condemn private land through the power of eminent domain, subject to whatever limitations the state law provides. A background constraint on all states in the use of eminent domain exists, however, in the Takings Clause of the Fifth Amendment to the United States Constitution, which applies to states through the Fourteenth Amendment. That clause provides that "private property [shall not] be taken for public use, without just compensation."³ The implication, of course, is that private property may be taken for public use with just compensation. Ms. Kelo and her fellow property owners, however, were not arguing over compensation, but rather over the "public use" character of the city's development plan. In short, they argued that because the development involved the transfer of land from them to other private entities,

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after which it was contemplated that the latter would use the land purely for private purposes and exclusive of general access by the public, the taking of the parcels was not for a public use. The Court disagreed.

As is true of many Supreme Court decisions, the legal holding of the case is not crystal clear. A number of factors appear to have been important to the Court's ruling that the city could displace Ms. Kelo and the others.⁴ **First**, the Court noted that the city carried out the condemnations pursuant to a carefully formulated, comprehensive development plan. **Second**, the plan was adopted only after thorough deliberation by the city. **Third**, there was no evidence that the plan was designed simply to confer private benefits to a particular class of identifiable individuals. **Fourth**, the city determined that the area was "distressed" and that the development plan would improve conditions by providing appreciable benefits to the community, including the new jobs and increased tax revenues. Under those circumstances, the Court ruled, state and local governments can have at it—pay the holdout private landowners their just compensation, move them out, and bring in the new private interests. If there is to be any prohibition or other control of such "economic development takings" by state and local governments, the Court informed us it will have to come in the form of state or local law, not the United States Constitution.

To be clear, the Court did *not* hold that government may transfer property from citizen A to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. But neither did the Court rule out such actions. Rather, the Court merely noted that such a one-to-one transfer, outside the confines of an integrated development plan, would be unusual and raise judicial suspicion.⁵ Exactly what the suspicious judge is supposed to do, the Court did not say. Apparently, though, even such a one-to-one transfer should not raise suspicion if it is part of an integrated development plan.

Kelo was a media sensation even before the Court issued its ruling, but afterwards it

went into the stratosphere of media coverage. Even months after the ruling, national and local newspapers continue to carry editorials about the decision, cover stories about similar development projects in states around the nation, and keep tabs on state legislative initiatives to wrest control of local government action.⁶ Unfortunately, some commentators misreported the Court's holding, which helped fuel public anxiety over the rampant prospect of any person's home being turned into a gas station overnight.⁷ On the other hand, many commentators sought to underplay the impact of the ruling, portraying it as an insignificant legal ruling or suggesting that the practice of economic development takings is not common.⁸ In fact, neither extreme view of *Kelo* is correct, but it would be difficult for anyone untrained in land use law to decipher the real impact of the case from the media coverage and commentary, much less from the text of the opinion itself.

This Backgrounder is intended to cut through the fog surrounding *Kelo* to provide a sober account of what the case means, particularly what it means for economic development takings in Florida. Because the Court essentially removed the United States Constitution from having any role in constraining such takings, all eyes suddenly have turned to the states. What constraints, if any, will states place on themselves and their local governments in the pursuit of economic development takings?

This is a particularly appropriate question to ask in Florida, where state land use law already requires that cities and counties act consistent with their locally adopted comprehensive plans and only after significant deliberation. In other words, local governments in Florida that pursue economic development takings are unlikely ever to be tripped up by the lack of a plan and deliberation, so the real question is how Florida law would treat a city that uses its planning and deliberation to accomplish what the City of New London accomplished. In short, *can private land in Florida be transferred through eminent domain to other private entities on the premise that the latter will use the land in ways that will produce more jobs, tax revenues, and other public economic benefits?*

Notwithstanding claims reported in the media that Florida law clearly does or does not allow such practices, in fact the answer is not so clear. Local governments have extensive powers of eminent domain, which appear to be broader than the statutory authority to condemn “blighted” land. The Florida Supreme Court has on the one hand emphasized that eminent domain cannot be employed to take property for a “predominantly private use,”⁹ but on the other hand has approved the transfer of property interests from one private landowner to another when doing so fulfilled the public policy of “sensible utilization of land.”¹⁰ The Florida court has never confronted the issue of economic development takings in the context of an elaborate local development plan like the one in *Kelo*, so the question remains open whether the court would consider that form of eminent domain a “predominantly private use” or a “sensible utilization of land.”

The Florida Supreme Court may indeed have the chance to rule on that question if local governments in Florida attempt to engage in *Kelo*-style takings. But the question could be addressed sooner and more directly through other means as well, such as a constitutional amendment or state legislation. Yet what would any such initiative say about the matter? Should economic development takings *never* be allowed? Or, if allowed only under certain conditions, what conditions? Why stop *any* such actions, if indeed they lead to greater public welfare?

By raising these questions, *Kelo* is an important development in American law and Florida land use policy. To say otherwise is to be either naive or disingenuous. Regardless of whether one agrees with the decision, it presents a moment for Floridians to reflect on what our property rights mean within the larger context of public policy in a state that is rapidly growing in population and commerce and in which land thus becomes ever more important to our future.

DISCUSSION

This Backgrounder will explain how and why economic development takings have been put in

the forefront of Florida public policy and how best to sort through the issues they present. Part I frames the background of the “public use” provision of the United States Constitution’s Takings Clause, showing that *Kelo* arose inevitably from a long line of cases reaching as far back as the age of grist mills in the colonial era. Part II examines the impact of *Kelo* on the law, noting that even though it did not change the law in the strictest legal sense -- in that it overruled no prior decision of the Court -- it does have a dramatic evolutionary effect on the law of eminent domain. Part III then provides the background on Florida law necessary to appreciate what *Kelo* means for Floridians and Florida public policy. To demonstrate that the status of economic development takings remains unclear in Florida, Part IV presents a devil’s advocate argument suggesting that such takings are not currently precluded by our Constitution, statutes, or judicial precedents. Finally, Part V examines some of the options Florida might explore in responding to *Kelo*. While making no specific recommendations, this discussion of options is intended to stimulate informed debate.

I. Background: Public Uses From Grist Mills to Condos

The United States Constitution places only two direct constraints on the government’s use of eminent domain powers: The taking of private property must be for a “public use,” and the owner must be given “just compensation.”¹¹ Because eminent domain usually is exercised to facilitate public infrastructure having an obvious public purpose, such as roads, utility lines, and reservoirs, most of the friction between government and landowner entities in takings cases arises over the adequacy of compensation.

Whereas market value serves as an objective reference point for determining compensation in takings cases, pinning down the public use side of the equation has proven more elusive. The Supreme Court pointed out over a century ago that public use could not sensibly be interpreted literally—i.e., to require that the land taken

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The justification in all such cases was that the public purpose of the exercise of eminent domain was clear, and the public benefits were significant

must be occupied, enjoyed, and otherwise directly used by the general public—for that would raise numerous difficult questions of administration involving timing of access, price of access, and other restrictions.¹² But even if a governmental unit exercising eminent domain need not open the land it takes to general public access, this does not settle the question whether the land, whoever has access to it, must remain in the public domain. On that score the Supreme Court’s jurisprudence has taken a long evolutionary path leading to *Kelo*.

The Mill Acts and Other Early Settlement Cases

Even as far back as colonial times, the practice of eminent domain accommodated some component of *private* ownership or interest in the taken land. The Mill Acts, for example, were colonial and early state statutes that permitted a landowner on one side of a river or stream to institute a condemnation proceeding against the owner of land on the opposite bank in order to allow damming of the river, and consequently inundation of the latter’s land, for construction of a mill. Although not directly addressing the public use clause, the Court upheld such statutes as consistent with the states’ police powers.¹³ Similar practices, such as takings for private irrigation, mining, and railroads, were not uncommon, particularly in connection with development of the Western states. These practices also were upheld as within the scope of state authority.¹⁴ The justification in all such cases was that the public *purpose* of the exercise of eminent domain was clear, and the public *benefits* were significant.¹⁵

Expanding Interpretations of the Police Power

By the mid-1900s, therefore, public use, public purpose, and public benefit had become conflated into one in the Court’s takings jurisprudence, with purpose being the decisive factor. So long as the exercise of eminent domain fit within the government’s police powers by furthering the health, safety, or general welfare of the public, it was neither necessary that the land taken through eminent domain be available for general public access nor fatal if there was some private hand in

the ownership of the land. At the same time, the Court was steadily expanding the scope of “public purpose” in a variety of contexts, declaring that courts must defer to legislatures in their decisions about what constitutes a public purpose and whether particular acts of government serve the stated purpose. In the land use context, for example, the Court opened the public purpose door wide open when it upheld the validity of zoning regulation.¹⁶ By the late 1920s, with cities around the nation adopting zoning ordinance, which in turn were predicated on cities engaging in active land use planning initiatives, one could easily have foreseen more frequent use of eminent domain to serve local planning objectives.

By the middle of the century, however, the Court had not yet clearly established whether there were any limits to the exclusion of public access and the extent of private ownership. As Justice Thomas points out in his dissent in *Kelo*, eminent domain statutes authorizing takings for mills, irrigation ditches, and railroads usually treated the private recipient of the land as a common carrier, requiring it to provide the benefits of the undertaking—e.g., access to the mill, the irrigation water, or the railroad transportation—to some defined segment of the public.¹⁷ The Court’s jurisprudence, in other words, may have laid the seeds for *Kelo*, but it was still a long way from endorsing *Kelo*-style economic development takings.

Using Eminent Domain to Correct Land Use Ills

Two subsequent landmark decisions then suggested the constraints imposed by the public use clause, if any, would not pose much of a barrier to government’s exercise of the eminent domain power. The first was the Court’s 1954 decision in *Berman v. Parker*,¹⁸ in which it upheld condemnation for purposes of facilitating redevelopment of blighted areas, even when the redevelopment plan involved transfer of the land to private ownership. Later, in the Court’s unanimous 1984 decision in *Hawaii Housing Authority v. Midkiff*,¹⁹ the Court approved of Hawaii’s statewide transfer of land from what amounted to an oligopoly of owners—a vestige of the islands’ historical land tenure regime—to

their multitude of tenants. In *Berman* the Court stressed that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”²⁰ And *Midkiff* in particular cinched the equation of public use and public purpose in the unequivocal passage that “the ‘public use’ requirement is...coterminous with the scope of a sovereign’s police powers.”²¹

Cities Discover Economic Development Takings

Armed with *Berman* and *Midkiff*, it was not long before local governments began engaging in economic development takings. Indeed, the genesis of the practice preceded *Midkiff* by several years, when in the infamous *Poletown* case the Michigan Supreme Court approved Detroit’s condemnation of a non-blighted residential area and transfer of the land to General Motors as the site of a new automobile manufacturing facility.²² The Michigan court held that the project did not violate the “public use” clause of either the United States Constitution or the Michigan Constitution because “the power of eminent domain is to be used in this instance primarily to accomplish the essential public purpose of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.”

Since *Poletown*, courts from other states have used similar reasoning to uphold takings to facilitate everything from private parking lots to Manhattan skyscrapers. To be sure, courts in some states have condemned the practice, including, ironically, in Michigan, where the Michigan Supreme Court recently overturned *Poletown* and declared the practice of economic development takings a violation of the state’s constitution.²³ But while the state courts became increasingly split on the public use issue, the United States Supreme Court was mum since *Midkiff*, meaning *Kelo* would be the case to decide which view would prevail insofar as the United States Constitution is concerned.

II. Did Kelo Change the Law?

The previous section explains how the law of “public use” in eminent domain practice evolved

up to the point of *Kelo*, suggesting that it was inevitable that the Court would someday have to confront the economic development takings issue. But was the holding in *Kelo* the inevitable result of the Court’s prior rulings? Did *Kelo* change the law, or simply confirm that *Midkiff* meant what it said?

In the strictest sense, *Kelo* did *not* change the law, in that the 5-4 majority of the divided Court was able to point to *Berman* and *Midkiff* and portray *Kelo* as fitting well within their sphere. The majority did not have to overrule those opinions, or add any gloss to them, or inject new criteria to the mix. Rather, the majority ruling boils down mainly to a recitation of *Berman* and *Parker* and the pronouncement that, just as public use equated with public purpose in those cases, so too would it in the circumstances presented in *Kelo*. From there, with the public purpose of economic development squarely within the realm of government police powers, *Kelo* was an easy case to decide. It would have been “incongruous,” in the majority’s view, not to hold as it did—there would have been “no basis for exempting economic development from our traditionally broad understanding of public purpose.”²⁴

But that version of *Kelo* makes the case look too easy. There is in fact a well-reasoned basis for distinguishing between *Berman* and *Midkiff* on the one hand and *Kelo* on the other. Indeed, the Justice who authored the unanimous opinion in *Midkiff*, Justice Sandra Day O’Connor, did just that! It was she who penned the line in *Midkiff* that “the ‘public use’ requirement is...coterminous with the scope of a sovereign’s police powers,” and it was she, in her dissent in *Kelo*, who declared that the majority’s ruling represents a “moving away from our decisions” in *Berman* and *Midkiff* and “significantly expands the meaning of public use.”²⁵

Her reasoning was straightforward and not built on fine distinctions. In *Berman* and *Midkiff*, she explained, “extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman*, through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth.”²⁶ These exigencies warranted the use of eminent domain outside its normal public

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infrastructure and common carrier settings because “eliminating the existing property use was necessary to remedy the harm.”²⁷ In other words, blight and land oligopolies are bad for society, and if the only way to be rid of them is to take the property, it matters little whether the taken property is kept in the public domain or turned over to private interests, so long as the new land use pattern remedies the problem.

Kelo presented no such circumstances. The City of New London never alleged that Ms. Kelo’s use of land “inflicted affirmative harm on society.” Rather, she stood in the way of what the city thought would be an even better use of the land. Moreover, the city never alleged that the only way to revitalize the local economy was to take Ms. Kelo’s land. Certainly that was a convenient means, but was it the *only* means? In short, Ms. Kelo’s house wasn’t bad for society, nor was taking it necessary for a better society.

Economic development takings thus are a different creature altogether from those involved in *Berman* and *Midkiff*. Justice O’Connor noted that “errant language” in those opinions—i.e., her own line equating public use with the police power—opened the door to the majority ruling in *Kelo*, but as she explained, those cases “did not put such language to the constitutional test, because the takings in those cases were within the police power but also for ‘public use.’”²⁸ *Kelo*, therefore, was a new case, and the Court’s prior opinions did not compel upholding economic development takings.

So why, when the language in those opinions was put to the constitutional test, would Justice O’Connor have found the taking in *Kelo* unconstitutional? She had two reasons, one jurisprudential and the other practical. First, she observed that the majority ruling would render a passage of the Constitution meaningless, which is something the Court is normally quite reluctant to do. Since virtually any lawful use of property generates incidental public benefits, almost any economic development taking will satisfy the majority’s conception of public use. In that case, she explained, “the words ‘for public use’ do not realistically exclude any takings, and thus do not exert any constraint on the eminent

domain power.”²⁹ What, then, are they doing in the Constitution?

Second, Justice O’Connor voiced a practical concern that many have expressed with regard to economic development takings, namely that “the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.”³⁰ The Founders were aware of the Mill Acts, but in Justice O’Connor’s view they “cannot have intended this perverse result.”³¹

Justice O’Connor also pointed out what is perhaps the most disturbing feature of *Kelo* to the average American—that is, could this decision really mean that land can be taken from citizen A and given to citizen B just to reap higher taxes? As noted previously, the *Kelo* majority did not explicitly hold that such could be accomplished and suggested that courts should be skeptical of these one-to-one transfer takings. But when one considers what little effort a city would have to exert to satisfy the majority’s criteria—a plan, some deliberation, a finding of purpose, and a finding of incidental public benefit—Justice O’Connor pointed out what anyone experienced in local land use practice knows, namely that only a “stupid staffer” could fail the test.³² This is particularly true in Florida. Simply put, after over 20 years of comprehensive planning and zoning, there is virtually no “smart staffer” in a Florida city or county planning department without the expertise to fit any economic development taking—even a one-to-one transfer of property—into the majority’s “test” for constitutional compliance. This reality forces the question of what *Kelo* means for Florida.

III. Florida’s Experience

Like the United States Constitution’s Takings Clause, the Florida Constitution constrains the exercise of eminent domain through its provision that “no private property shall be

taken except for a public purpose and with full compensation.”³³ After *Kelo*, however, many Floridians are asking of this provision the same question that was asked of the United States Constitution’s Takings Cause: What does it really mean? More specifically, does Florida’s “public purpose” requirement prohibit *Kelo*-style economic development takings? This is a particularly pertinent question since the *Kelo* Court, by removing the United States Constitution from having any constraining effect on eminent domain other than requiring just compensation, essentially left it to the states to decide whether economic development takings go too far.

History seldom comes in packages as tidy as historians sometimes suggest, but the evolution of Florida case law on the public use issue does sort reasonably well into several phases: (1) cases from the early 1950s suggested a very limited role for private interests in eminent domain and appeared to rule out economic development takings; (2) cases from the end of that decade then relaxed that strict interpretation to make room for blight redevelopment; (3) cases from the 1970s articulated competing themes of requiring predominantly public use to justify eminent domain versus accommodating predominantly private use if it served the objective of efficient use of land; and (4) modern cases suggesting that the public purpose standard is broad and confusing. To understand what impact *Kelo* may have on Florida, it is useful to review the evolution of these four periods of Florida law.

The Era of Strict Interpretation

The Florida Supreme Court has long recognized the “common carrier” principle—i.e., that private land taken through eminent domain can be transferred to a private entity which, like railroads, irrigation districts, and power companies, operates as a regulated common carrier obligated to provide some form of access or benefit to an identified segment of the public.³⁴ The Court’s first direct foray into the property redevelopment question, however, indicated a strong aversion to any use of eminent domain that involved transferring the land to private ownership. In *Adams v. Housing*

Authority of Daytona Beach,³⁵ the Court held that although a city may condemn houses in blighted areas, it could not transfer the land to private redevelopment interests. Rather, the city would have to use its other police powers, such as zoning and regulation, if it wished to rectify the conditions causing blight. In particular, the private component of the redevelopment effort offended the court’s sense of propriety:

The whole development plan as set forth in this record, together with the plats and maps attached, is the usual prospectus put forth by a real estate developer of a new subdivision, for private enterprise and for industrial and commercial purposes to be conducted by private individuals, associations or corporations for private gain and profit. It is inconceivable that anyone would seriously contend that the acquisition of real estate for the declared purposes set forth in the proposed Redevelopment Plan is for a public use or purpose.³⁶

Adams was consistent with other decisions the Court had issued around this time acknowledging that private enterprise will often produce public benefits, but that such benefits do not equate with a public purpose. For example, in words Justice O’Connor might have used in her *Kelo* dissent, the Florida Supreme Court rejected a city’s plan to use public debt to support private redevelopment, observing that

every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new super market, a new department store, a new meat market ... or other establishments which could be named without end, may be of some material benefit to the growth, progress, development and prosperity of a municipality. But those considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose.³⁷

In Adams v. Housing Authority of Daytona Beach,³⁵ the [Florida Supreme] Court held that although a city may condemn houses in blighted areas, it could not transfer the land to private redevelopment interests.

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If these were the Florida Supreme Court’s last words on the public use question, it would be difficult to conceive of economic development takings being permitted. But the narrow view expressed in *Adams* and other cases of this era did not persist.

1960s: Accommodating the War Against Blight

Adams did not preclude the government’s use of condemnation in blighted areas; it just precluded the use of private redevelopment plans as part of the solution. The problem was that private redevelopment is often critical to the success of efforts to rid cities of blight, so the pressure to accommodate some private component in this public purpose continued. The Court opened the door in the landmark case of *Grubstein v. Urban Renewal Agency of City of Tampa*,³⁸ in which the Court allowed some private hand in slum redevelopment programs. The *Grubstein* opinion pointed to the basis for allowing cities to clear slums and provide public housing in return—i.e., “removing breeding places for crime and disease, and promoting the health, safety, morals, peace and general welfare of the people”³⁹—and found the same purpose behind such programs that rely in part on private redevelopment interests. The Court concluded that “in the one case the redevelopment is in the form of low-cost housing for low-income groups; in the other, it is in the form of private development. But the public purpose sought to be achieved is, in principle, identical.”⁴⁰ Although *Grubstein* related only to slum clearance, it is considered the case that “set the precedent subsequently recognized and followed nationally for condemnation of blighted or slum areas,”⁴¹ and that it was the “point of departure from earlier *Adams*.”⁴²

Grubstein thereby set the stage for Florida cities to integrate private redevelopment into their blight removal programs, and they have been active in doing so ever since. Indeed, Florida’s Community Redevelopment Act (CRA)⁴³ provides legislative endorsement of using eminent domain for eliminating blight, and it is routine for cities to lean heavily on private interests to support such efforts. Recently, for example, the City of Daytona

Beach prevailed in litigation challenging its extensive use of private redevelopment as part of its comprehensive effort to transform itself under the CRA authority.⁴⁴

Of course, *Kelo* did not focus on blight. Instead, it specifically dealt with using private redevelopment to prevent “decline” rather than getting rid of “blight.” The problem is that the line between decline and blight is not always so clear. Florida’s CRA process requires cities to designate blighted areas according to a statutory set of criteria⁴⁵ that many critics claim are too open-ended and subject to manipulation, such that what a city may designate as blight may actually be an area in decline, if even that bad off.⁴⁶ In other words, cities may be using CRA blight designations as cover for what are in fact *Kelo*-style economic development takings. Courts generally defer to cities in their designations of blight, however, so there has not been careful policing of the decline-blight line.⁴⁷ After *Kelo*, that line is irrelevant for purposes of the United States Constitution, so criticism of CRA takings has intensified and, beyond that, the question of what Florida cities can do with eminent domain outside of the blight context has been brought to the forefront.

1970s: A Growing Population Presents Conflicting Policy Goals

A number of scenarios could lead a Florida city to make the move from blight takings to economic development takings—that is, to act without the cover of CRA authority. For example, the CRA could be amended to tighten the criteria, or the courts might become less tolerant of questionable blight designations, or a city may simply decide that a blight designation is unjustified but that an economic development taking is appropriate in any event. Such cases would present two distinct questions about the scope of eminent domain authority under Florida law. One is whether cities can accomplish an economic development taking at all, whether with or without transferring property to private interests. The other question is, if cities may generally accomplish economic development takings, what level of private involvement, if any, is permitted?

Some commentators have suggested that the CRA is the sole authority for using eminent domain in redevelopment contexts, and thus a finding of blight (or slum) is necessary in all cases.⁴⁸ Under this view, no form of *Kelo*-style economic development taking is permitted, even one without private involvement. But neither the CRA nor any other state statute explicitly prohibits non-blight economic development takings.⁴⁹ Moreover, the Florida Supreme Court has made it clear that political subdivisions with “home rule” status under the Florida Constitution, such as municipalities and charter counties,⁵⁰ do not require a statutory “grant” of authority to exercise eminent domain, but rather may be subjected by the state legislature only to constraints of authority. As the Court recently explained with respect to a different eminent domain statute:

Municipalities are not dependent upon the legislature for further authorization, and legislative statutes are relevant only to determine limitations of authority.... Although section 166.401...purports to authorize municipalities to exercise eminent domain powers, municipalities could exercise those powers for a valid municipal purpose without any such “grant” of authority. If the state has the power to take particular land for public purposes, then a municipality may also exercise that power unless it is “expressly prohibited.”⁵¹

As no Florida statute expressly prohibits *Kelo*-style economic development takings, it appears cities may accomplish them *unless* their private character runs afoul of the public purpose requirement. On the question of using eminent domain to transfer interests in land from one private entity to another, the Florida Supreme Court has — since the 1970s — steadfastly held to two principles the effects of which, in the *Kelo* context, are irreconcilable. Because the Court has never had before it a *Kelo*-style economic development taking, we do not know which principle will trump the other.

The first principle is represented by the Court’s 1975 decision in *Baycol v. Downtown Development Authority of the City of Fort Lauderdale*.⁵² The city proposed to take a parcel of property so as to allow development of a private retail shopping center, arguing that the public purpose requirement was met because the shopping center would require parking and the city would include a public parking component in the final development. Notably, the shopping center was a latecomer to the city’s “plan,” which was described as an overall effort through bonded capital infrastructure improvements to improve traffic in the identified district. With respect to the actual taking, the city advanced no public purpose other than to provide parking—it never mentioned economic development as the purpose of the taking.

The *Baycol* Court saw through the obvious bootstrapping involved in the city’s position:

Our decisions...have consistently allowed an *incidental* private use where the purpose of the taking was clearly and predominantly a public purpose....On the other hand, “the tail cannot wag the dog” and allow the *public* purpose to be only incidental to a predominantly private one, which appears to be the case here.”⁵³

The bottom line principle from *Baycol* is that “the public interest must dominate the private interest.”⁵⁴ But that simply begs the question of how one defines the public and private interests, and the Court in other decisions has forged the principle that tangible, foreseeable benefits to the state define a predominant public purpose. After *Baycol*, for example, the Court in *Deseret Ranches of Florida v. Bowman*⁵⁵ allowed one private landowner to exercise eminent domain, as authorized by a state law for such purposes, to obtain an easement of necessity across another person’s land. No doubt relying on *Baycol*, the landowner across whose land the easement was claimed argued that although the statute “provides a public benefit...the benefit is incidental to a purpose which is predominantly

The bottom line principle from Baycol is that “the public interest must dominate the private interest.”

Deseret Ranches thus utterly complicates what some thought might have otherwise been a straightforward argument that Baycol prohibits Kelo-style economic development takings.

private, that purpose being to provide a private land owner with conventional access to the outside world.”⁵⁶ Using language that surely rings of *Kelo*, the Court disagreed:

The inverse of appellant’s contention is true: the statute’s purpose is predominantly public and the benefit to the landowner is incidental to the public purpose....Although state public policy may have altered with respect to the methods of land use since 1961, sensible utilization of land continues to be one of our most important goals. We take notice that Florida grows in population at one of the fastest rates of any state in the nation. Useful land becomes more scarce in proportion to the population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stock raising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they may be utilized in the enumerated ways.

Deseret Ranches thus utterly complicates what some thought might have otherwise been a straightforward argument that *Baycol* prohibits *Kelo*-style economic development takings. In *Deseret Ranches*, it was clear that *all* the direct benefits of the taking were private, and any public benefits were purely *incidental*. Yet the “sensible utilization of land” was, for the Court, of such a dominant public purpose as to allow that rather lopsided outcome to be characterized as consistent with *Baycol*. One does not have to possess much imagination to think of how economic development takings could be portrayed as also serving the predominant public purpose of “sensible utilization of land.”

1980s – Present: The Public Purpose Analysis Grows Ever More Confused

Nothing about the Court’s jurisprudence since *Baycol* and *Deseret Ranches* has resolved their potential conflict in the economic development takings setting. When the Court, in *State v. Miami Beach Redevelopment Agency*,⁵⁷ upheld the use of private interests in blight redevelopment under a predecessor version of the CRA, *Baycol* played little role in the Court’s reasoning. The Court described *Baycol* as follows:

[In *Baycol*] the local downtown development authority planned to issue bonds to finance construction of a parking garage and shopping mall as one project. The bond resolution stated the purpose as improvement of traffic and parking facilities. After the validation of the bonds, the authority brought eminent domain proceedings. The landowners challenged the taking on the ground that there was no public purpose....[T]he Court held that the private uses were more than incidental and deprived the project of a public purpose. The Court concluded from the record that without the private commercial activities, there was no demonstrated need for the parking garage. Parking was the purported public use underlying the project. But parking was incidental to the predominant private use of the retail shops. The tail was wagging the dog.⁵⁸

One would be hard-pressed from that account of *Baycol* to argue that the Court thought of *Baycol* as coming anywhere near involving the kind of economic development taking accomplished in *Kelo*, much less having issued a sweeping condemnation of such actions. Moreover, the rationale the *Miami Beach* Court used to uphold the use of private interests in CRA blight redevelopment programs, clearly does not close the door on *Kelo*-style economic development takings, but rather suggests that they may simply be

the next step. Borrowing the language from *Berman* that led directly to the majority opinion in *Kelo*, the *Miami Beach* Court observed that:

the experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole...The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. (citation omitted)...

We find this reasoning to be persuasive both on the question of whether redevelopment of merely “blighted” areas serves a public purpose and the question of whether the public purpose is destroyed merely because there will be private commercial uses in the redeveloped area.⁵⁹

Beyond that, the Florida Supreme Court for the most part has simply acknowledged the confusion surrounding the precise parameters of the public purpose standard. For example, in *Department of Transportation v. Fortune Federal S&L*,⁶⁰ the Court approved the highway department’s taking of more land than was necessary for immediate purposes for a road, the purpose of which was to save the state money by avoiding damages for business losses. The Court’s reasoning illustrates the tension surrounding the public purpose analysis:

The term “public purpose” does not mean simply that the land is used for a specific public function, i.e., a road or other right of way. Rather, the concept of public purpose must be

read more broadly to include projects which benefit the state in a tangible, foreseeable way....The *Baycol* decision does present us with one standard which we must employ. “[E]minent domain cannot be employed to take property for a predominantly private use....” (citation omitted) Thus, if the condemning authority uses the property for an essentially nonpublic use, the condemnation is invalid.”⁶¹

Moreover, adding to the confusion is that fact that the “public purpose” standard is used in other municipal powers contexts, such as bond validations and tax exemptions, in which the Court has increasingly let cities wrap the public purpose around private development. The Court recently bemoaned that “it is perhaps both confusing and unfortunate...that the same term—public purpose—has traditionally been used in both of these analytical contexts,”⁶² adding that “this ‘confusion’ is also evident in other areas—such as eminent domain—where judicial scrutiny of a claimed ‘public purpose’ is required.”⁶³ In a page right out of *Kelo*, for example, the Court has found that public bonding for a private convention center

serves a paramount public purpose... [T]he convention center would, among other things, promote gainful employment, promote outside business interests and tourism, and provide a forum for educational, recreational and entertainment activities. Such interests have been found to serve a public purpose.⁶⁴

If it were to be held that these are public purposes for bond validation, but not for eminent domain, that would be confusing indeed. In fact, the Florida Supreme Court has emphasized that the “public purpose” standard in the Florida Constitution’s bond validation and eminent domain provisions are “the same.”⁶⁵ As the Court has put it, “if a project serves a public purpose sufficient to

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allow the expenditure of public funds and the sale of bonds under Article VII, Section 10, then the use of eminent domain in furtherance of the project is also proper.”⁶⁶ Therefore, those who allege that *Kelo* “can’t happen in Florida” are at odds with a state Supreme Court ruling suggesting just the opposite.

IV. Devil’s Advocacy: Can Economic Development Takings Happen in Florida?

Commentators who suggest *Kelo* presents no concern in Florida rely heavily on *Baycol*’s open-ended “predominant public interest” test. However, to suggest that *Baycol* or any other opinion of the Court slams shut the door to economic development takings not only requires blinders when reading the cases, but grossly underestimates the will of local governments, the influence of private development interests, and the ingenuity of planners and lawyers. Indeed, the setting is ripe for Florida’s version of *Kelo*. After all, *Baycol* is now over 25 years old, and since then:

- Florida has developed a well-established regime of local planning;
- The pressing need for “sensible utilization of land” as identified in *Deseret Ranches* has continued to challenge public policy;
- The Florida Supreme Court has expanded the scope of “public purpose” in other municipal powers contexts such as the issuance of bonds; and
- The United States Supreme Court has given the green light to economic development takings in the eminent domain context.

Moreover, armed with the case law described in the previous section, any creative law student could put together the argument for adopting the rationale of *Kelo* as Florida law as well. If a Florida city were to recreate the *Kelo* taking, its lawyers would defend the action in court by arguing:

- The private interest involved in *Baycol* was a retail shopping facility that the city never described as necessary to facilitate either economic development or even the purported public purpose of improving traffic flow in the district, and thus was appropriately prohibited under the public purpose requirement;
- By contrast, as the Court has held many times in public bonding cases, halting the debilitating effects of economic and social decline is an important public purpose that frequently will require more sensible utilization of land;
- As the Court has also held many times in public bonding cases, private redevelopment facilitates that public purpose by generating gainful employment, outside business interests and tourism, and educational, recreational, and entertainment activities;
- The private character of the redevelopment is necessary to allow the market to direct the sensible utilization of land, but is merely the incidental vehicle through which the dominant public purpose of halting decline is served;
- The city’s allowance for private interests has been made only after the development of a comprehensive land use plan, which the city has adopted through careful and thorough public deliberation processes; and
- Therefore, the city’s economic development taking does not violate *Baycol*’s requirement of a predominant public interest, but rather falls cleanly within the Court’s public purpose jurisprudence.

To be sure, one could just as reasonably argue the opposite—i.e., that economic development takings seek merely to improve conditions, not fight the evils of blight, and therefore do not meet *Baycol*’s standard of predominant public interest. But that’s the point—neither argument is compelled by Florida law and precedent; each passes the

so-called “straight face” test. It is difficult even to say which holds closer to the spirit of the Court’s jurisprudence.

Indeed, nobody could be assured that, even if the Court were to consider *Baycol* as having ruled out non-blight economic development takings, it wouldn’t simply depart from *Baycol*. After all, the Court did so in *Grubstein*, where it departed from *Adams* in order to allow the use of private redevelopment interests. In other words, the Florida Supreme Court could decide that the majority in *Kelo* got it right and that any suggestion to the contrary in *Baycol* or other Florida decisions is no longer good law. It is, therefore, entirely appropriate for Florida to consider options for managing the impact of *Kelo* on its law of eminent domain.

V. Options for Florida

Emotions run high over the issue of economic development takings, and many who object to *Kelo* call for decisive countermeasures. After all, the *Kelo* majority took an extreme position on the question, essentially knocking the public use requirement out of the United States Constitution. The majority clearly did not want the federal courts to become the arbiters of local redevelopment plans, so it adopted a clean and efficient test that will require little policing by the federal courts: Armed with a plan and some deliberation, any city can use eminent domain to engage in the public purpose of economic redevelopment.

The problem for anyone wishing to rein in this result through state law, as the majority invited states to consider, is that it is excruciatingly difficult to articulate an alternative test that relies on so bright a line for knowing what is and is not permitted. Justice O’Connor’s line between using eminent domain to combat affirmative public harms, which she says justified *Berman* and *Midkiff*, versus pro-development takings of the sort employed in *Kelo*, invites endless debate as to which side of the line the next case falls on. Her formula would have made for easy application in *Kelo*, but shortly some case

between *Berman* and *Kelo* would come along, and what then?

No doubt this is why Justice Thomas resorted to a formula for public use that produces as sharp a line as the majority’s ruling, but in favor of property owners rather than government. In his separate dissent in *Kelo*, Justice Thomas suggested that the problem did not begin with *Kelo*, but rather with *Berman* and *Midkiff*. His view, which he based on a thorough historical analysis, is that “the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.”⁶⁷ Justice Thomas, therefore, would have overruled *Berman* and *Midkiff* and held against the city in *Kelo*.

Of course, whether the majority, Justice O’Connor, or Justice Thomas has the better view of what the Fifth Amendment’s public use requirement means is, for the time being at least, an academic question. The majority won. But it is not an academic exercise to ask what Florida might do in response to *Kelo*. Assuming one is convinced that the result in *Kelo* is not something Florida should allow, but also that one is *not* convinced that Florida law already prohibits such uses of eminent domain, what makes sense for Florida to do?

One option, of course, is to simply wait and see what the Florida Supreme Court decides in its first test case. Perhaps *Baycol* does mean what some suggest, and the problem is not a real one in Florida. But this presents two concerns. The first is the time and, to be candid, the pain that some would have to endure before such a case could be decided. The second concern is that *Baycol* and *Miami Beach* specifically endorsed *Grubstein* and the use of eminent domain to combat blight, even when private redevelopment is part of the plan. As concern has been expressed that the CRA has been abused by many cities—i.e., using blight designations to insulate from attack what are in truth economic development takings—a decision rejecting *Kelo* would not necessarily resolve that issue.

It is therefore appropriate for Florida, as have several other states, to consider a constitutional

*Emotions run high over the issue of economic development takings, and many who object to **Kelo** call for decisive countermeasures.*

Perhaps those displaced by economic development takings should receive an increment of tax revenue gains and private profits that flow from the redevelopment.

or statutory amendment addressing *Kelo*. If the sense were that Justice Thomas has the best view of the matter, it would be easy to implement his test through a relatively short constitutional amendment providing that “no private property shall be taken except for a public purpose, *for a use which the public shall have the right to employ*, and with full compensation.” The consequence, of course, is that this would wipe out the use of private redevelopment interests in eminent domain programs designed to combat slums and blight. All that would be left for eminent domain would be takings for public infrastructure and for the “common carrier” uses. Justice Thomas apparently was comfortable with that, and it would be important that Floridians as well understand that would be the consequence were such a constitutional amendment seriously entertained.

If the sense is that this “nuclear” option goes too far, the challenge becomes defining lines or standards capable of clear interpretation and easy administration. On the other hand, the range of options is broad, lending itself well to testing different approaches through legislative deliberation. Some options that seem well-suited for consideration are:

- Expressly prohibit the involvement of private development interests in any property redevelopment initiative relying on eminent domain, except in CRA slum and blight designations. This would be a necessary first step to ensure that cities do not have the power to accomplish *Kelo*-style economic development takings that use private interests. Indeed, if the sense is that economic development takings are undesirable even *without* private involvement, the CRA could be amended to state it is the sole authority for use of eminent domain in all property redevelopment contexts.
- Tighten the CRA blight designation standards with substantive limits and procedural safeguards. For example,

a study of past and ongoing CRA initiatives could empirically identify the criteria cities rely on in cases that raise concern and the manner and extent to which private redevelopment interests are involved. The CRA could be amended to make the more troublesome criteria less available and to require that cities undergo additional procedures, such as fact-based hearings or public referenda, before relying on them and before using private interests.

- More broadly, amend the CRA to require that cities in all cases bear a much higher burden to justify use of eminent domain. For example, require cities to demonstrate that the CRA initiative furthers a “critical public need,” that without use of eminent domain the city would have been “incapable of achieving the public purpose” of the initiative, and that any involvement of private development interests in the initiative is justified only by the city proving a “lack of practicable alternatives.”

All of these approaches focus on the public use side of the equation, either by giving life to the public use requirement or making it more difficult to employ eminent domain. At oral argument in the Supreme Court, however, Justice Kennedy in particular expressed some thought that the real issue may be compensation. As he exclaimed, “It does seem ironic that 100 percent of the premium for the new development goes to the... developer and to the taxpayers and not to the property owner.”⁶⁸ In other words, if the point of the taking in *Kelo* was that the city could reap higher tax revenue and more jobs, why shouldn’t Ms. Kelo have shared in some of the gain? Perhaps those displaced by economic development takings should receive an increment of tax revenue gains and private profits that flow from the redevelopment. Of course, as Justice Scalia pointed out later in the argument, Ms. Kelo didn’t want more money; she just wanted to keep her house. One is probably

on safe ground thinking that many Floridians, probably most, want only the same.

CONCLUSION

One hears of few people who hope to find themselves someday in Suzette Kelo's shoes. Even the most civic-minded of people have expressed dismay over the possibility that her fate may be theirs. After *Kelo*, however, all hope that the United States Constitution may have protected any of us from such a turn of events is dead.

It is now up to states to decide whether to restrain themselves and their local subdivisions from engaging in economic development takings. One conclusion of this Backgrounder is that it is ill-advised, if not wishful thinking, to think that Florida has already done so and has decided against allowing such uses of eminent domain. The Florida Supreme Court has not spoken directly on the question of whether the Florida Constitution prohibits *Kelo*-style takings, and no existing statutory provision expressly constrains local governments from engaging in economic development takings with substantial private involvement.

It is, therefore, an opportune time, albeit borne of inopportune circumstances, for Floridians to take this moment to consider making the line between government authority and private property interests a little less fuzzy. The difficulty is that, unless one draws the line at the *Kelo* majority's "anything goes" extreme or at the opposite "nothing goes" approach Justice Thomas suggested, drawing the line is a delicate and demanding exercise. It is hoped that this Backgrounder has at least informed and stimulated the dialogue that we Floridians must have if we hope to arrive at a line that makes sense.

Endnotes

- ¹ 125 S.Ct. 2655 (U.S. 2005).
- ² *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004).
- ³ U.S. Const. amend. V.
- ⁴ *Kelo*, 125 S.Ct. at 2664-65.
- ⁵ *Id.* at 2666-67.

- ⁶ See, e.g., Emily Bazar, *States Move to Protect Property: Ruling Prompts Bills on Eminent Domain*, USA Today, Aug. 3, 2005, at A1.
- ⁷ George Will, for example, incorrectly described the Court as holding that "government [can] profit by seizing the property of people of modest means and giving it to wealthy people who can pay more taxes than can be extracted from the original owners." George Will, *Supreme Court Ruling Leaves the Little Guy Even More Vulnerable*, Tallahassee Democrat, June 26, 2005, at 5E.
- ⁸ For example, shortly after the *Kelo* decision was issued Florida Attorney General Charlie Crist declared that *Kelo*-style takings "cannot" happen in Florida because of greater property rights protection under Florida law. See Attorney General Charlie Crist News Releases, *Crist: Court Decision Doesn't Threaten Florida Property Owners* (June 28, 2005).
- ⁹ *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451 (Fla. 1975).
- ¹⁰ *Deseret Ranches of Florida, Inc. v. Bowman*, 349 So.2d 155 (1977).
- ¹¹ These limits are provided in the Fifth Amendment's prohibition that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V. This prohibition is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).
- ¹² See *Strickley v. Highland Bay Gold Mining Co.*, 200 U.S. 527, 531 (1906) (stressing "the inadequacy of use by the general public as a universal test").
- ¹³ See *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885).
- ¹⁴ These uses of eminent domain are surveyed in *Nichols, The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615, 619-24 (1940).
- ¹⁵ See *Fallbrook Irrigation Dist. V. Bradley*, 164 U.S. 112, 158-64 (1896); *Clark v. Nash*, 198 U.S. 361 (1905).
- ¹⁶ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
- ¹⁷ See *Kelo*, 125 S.Ct. at 2683-84 (Thomas, J., dissenting).
- ¹⁸ 348 U.S. 26 (1954).
- ¹⁹ 467 U.S. 229 (1984).
- ²⁰ 348 U.S. at 32.
- ²¹ 467 U.S. at 240.
- ²² See *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).
- ²³ See *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004). Many cases on both sides of the issue are surveyed in an amicus brief a group of law professors filed in the *Kelo* Supreme Court litigation. See *Kelo v. City of New London*, No. 04-108, Brief Amicus Curiae of Professors David Callies et al. (U.S.)
- ²⁴ *Kelo*, 125 S.Ct. at 2665-66.
- ²⁵ *Id.* at 2675 (O'Connor, J., dissenting).
- ²⁶ *Id.* at 2674.
- ²⁷ *Id.*
- ²⁸ *Id.* at 2675.
- ²⁹ *Id.*
- ³⁰ *Id.* at 2677.
- ³¹ *Id.*
- ³² *Id.* at 2675.
- ³³ Fla. Const. Art. X, § 6.
- ³⁴ See *Demeter Land Co. v. Florida Public Service Co.*, 128 So. 402 (1930).
- ³⁵ 60 So.2d 663 (Fla. 1952).
- ³⁶ *Id.* at 668.
- ³⁷ *State v. Town of North Miami*, 59 So.2d 779, 785 (Fla. 1952).
- ³⁸ 115 So.2d 745 (Fla. 1959).
- ³⁹ *Id.* at 748.

It is now up to states to decide whether to restrain themselves and their local subdivisions from engaging in economic development takings.

- ⁴⁰ *Id.*
- ⁴¹ *Baycol*, 315 So. 2d at 457.
- ⁴² *Id.* Although the *Baycol* Court describes *Grubstein* in this manner, it was actually not until after *Baycol* that the Court explicitly endorsed the use of private interests in blight redevelopment programs. See *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980) (bond validation case).
- ⁴³ Fla. Stat. Ch. 163, Part III.
- ⁴⁴ *City of Daytona Beach v. Mathas*, No. 2004-31836-CICI (Fla. Cir. Ct, 7th Jud. Cir., Aug. 2005) (Order of Taking).
- ⁴⁵ Fla. Stat. § 163.340.
- ⁴⁶ See, e.g., Dana J. Berliner, *Eminent Domain Abuse Should Worry Floridians*, Tallahassee Democrat, July 27, 2005, at 5E.
- ⁴⁷ The court in the recent Daytona Beach litigation thoroughly reviewed the principles of judicial deference to cities' designations of blight. See *City of Daytona Beach v. Mathas*, No. 2004-31836-CICI (Fla. Cir. Ct, 7th Jud. Cir., Aug. 2005) (Order of Taking).
- ⁴⁸ Florida Attorney General Charlie Crist initially declared that “[u]nder Florida law, only if property is designated as a blighted area can it be taken through the extraordinary power of eminent domain for redevelopment.” Attorney General Charlie Crist News Releases, *Crist: Court Decision Doesn't Threaten Florida Property Owners* (June 28, 2005) (emphasis in original).
- ⁴⁹ Nothing in the CRA expressly provides that “an area must be proven to be ‘blighted’ before government can begin the process of taking private property for private redevelopment.” Attorney General Charlie Crist News Releases, *Crist: Court Decision Doesn't Threaten Florida Property Owners* (June 28, 2005). Although a blight designation is necessary to use the CRA as the authority for using eminent domain, the CRA does not purport to provide the sole authority for using eminent domain for private redevelopment.
- ⁵⁰ See Fla. Const. Art VIII, § 2.
- ⁵¹ *City of Ocala v. Nye*, 608 So.2d 15, 17 (Fla. 1992).
- ⁵² 315 So.2d 451 (Fla. 1975).
- ⁵³ *Id.* at 455-56.
- ⁵⁴ *Id.* at 456.
- ⁵⁵ 349 So.2d 155 (Fla. 1977).
- ⁵⁶ *Id.* at 156
- ⁵⁷ 392 So.2d 875 (Fla. 1980)
- ⁵⁸ *Id.* at 887-88.
- ⁵⁹ *Id.* at 890-91.
- ⁶⁰ 532 So.2d 1267 (Fla. 1988)
- ⁶¹ *Id.* at 1270.
- ⁶² *Sebring Airport Authority v. McIntyre*, 783 So.2d 238, (Fla. 2001).
- ⁶³ *Id.* at
- ⁶⁴ *State v. Osceola County*, 752 So.2d 530, 539 (Fla. 1999).
- ⁶⁵ *State v. Miami Beach Redevelopment Agency*, 392 So.2d at 885.
- ⁶⁶ *Id.*
- ⁶⁷ *Kelo*, 125 S.Ct. at 2680 (Thomas, J., dissenting).
- ⁶⁸ *Kelo v. City of New London*, No. 04-108, Transcript of Oral Argument at 44 (U.S. Feb. 22, 2005).

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