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Floridians' Property Rights Need Added Protection

By J.B. Ruhl

We Americans love our private property rights, even if most of us would be hard-pressed to explain exactly what they are. Nonetheless, until recently we were sure of one thing: The government couldn't take land from one private citizen and give it to another in the hope that the latter's use would yield more tax revenue or more jobs.

Granted, with fair compensation and due process, the government could take private land for public uses such as roads. But to take land from one person and give it to another? No way!

Alas, the U.S. Supreme Court's *Kelo v. City of New London* decision changed all that. It allowed that Connecticut city to condemn residents' homes, add them to other parcels the city had bought, and devote the resulting 90-acre area to an economic development project that included new homes, hotels, a marina, and other commercial uses.

The holdouts against this plan included Susette Kelo, who'd lived in the area since 1997, and Wilhelmena Dery, who had lived in her house *her entire life*. Their properties weren't blighted or in bad shape; they just happened to be in the way.

As far as the Court was concerned, though, that was tough luck because (1) the city had a plan, (2) it was adopted after thorough deliberation, (3) there was no evidence it was designed to benefit

particular individuals, and (4) the city had determined that the area was "distressed" and that the project would provide benefits such as new jobs and tax revenues. If there was to be any limitation on such takings, the Court majority added, it would have to come from state or local laws.

The *Kelo* case was a media sensation, but some of the coverage misrepresented the ruling. *Kelo* does not mean that any person's home can be turned into a business overnight, but neither is it an insignificant ruling of no consequence to Floridians.

Indeed, when you cut through the fog, several aspects of the decision are troubling. First, it renders a key passage of the Constitution meaningless. The Fifth Amendment's "Takings Clause" says "private property [shall not] be taken *for public use*, without just compensation."

However, because virtually any lawful use of property generates incidental public benefits, almost any taking for economic development will satisfy the *Kelo* decision's rather boundless conception of "public use."

In her dissent, Justice Sandra Day O'Connor complains that as interpreted in the *Kelo* majority's 5-4 ruling, "the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power."

Yet perhaps the most disturbing feature of *Kelo* is that it really could mean that land may be taken from Citizen A and given to Citizen B just to reap higher taxes. Although the *Kelo* ruling didn't explicitly allow such takings, it didn't preclude them -- merely suggesting instead that the courts should be "skeptical" of such takings.

As a result, local officials now need to exert relatively little effort to satisfy the *Kelo* majority's criteria. Indeed, Justice O'Connor pointed out what anyone experienced in land use law knows: Only a "stupid staffer" could fail such a test.

That's particularly true in Florida. After years of comprehensive planning, there's virtually no "smart staffer" in a local planning department without the expertise to fit any economic development taking -- even a one-to-one property transfer -- into *Kelo*'s "test" for constitutional compliance.

What *Kelo* means for Florida isn't easy to ascertain because current state law is murky regarding local governments' authority to engage in economic development takings. Although Florida's Community Redevelopment Act sets criteria for redeveloping slums and blighted areas -- and allows private developers to take part -- a strong case can be made that local governments also have the power to take land purely for economic redevelopment, without a finding of slums or blight.

Indeed, some eminent domain takings look awfully similar to that, leading many critics to allege that local governments' findings of blight are often mere pretexts for redevelopment intended to boost tax revenues.

Meanwhile, because Americans no longer can count on the U.S. Constitution to protect them from such takings, this is an opportune time for Florida to consider making the line between government

authority and private property rights a lot less fuzzy.

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