"BLIGHT" AS A MEANS OF JUSTIFYING CONDEMNATION FOR ECONOMIC REDEVELOPMENT IN FLORIDA

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I. INTRODUCTION—THE KELO *CONTROVERSY*

On June 23, 2005, when Justice John Paul Stevens announced the majority opinion in *Kelo v. City of New London*,[1] the national outrage was palpable. The United States Supreme Court held that a Connecticut statute permitting local governments to condemn private property for the purpose of economic redevelopment was consistent with the Constitution's "public use" requirement for the exercise of eminent domain.[2] Popular magazines, newspapers, talk show hosts, and local, state, and national politicians joined in a nearly unanimous condemnation of the ruling.[3]

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1. 125 S. Ct. 2655 (2005).

2. *Id.* at 2668 (interpreting the public use requirement of the Fifth Amendment of the United States Constitution); *see also* U.S. Const. amend. V ("Nor shall private property be taken for public use, without just compensation").

3. *E.g.* Robert Trigaux, *Your Home Could Be Up for Grabs*, St. Petersburg Times 1D (June 24, 2005) (calling the United States Supreme Court's ruling "disturbing" and speculating that competitive developers in Florida might use the ruling to seek private property through eminent domain, especially in "[d]ensely packed Pinellas County"); *Hands off Our Homes*, The Economist 21–22 (Aug. 20–26, 2005) (characterizing the decision as a blow to

As of this writing, legislation aimed at "overturning" *Kelo*, or at least ensuring that its precepts are legislatively blocked, has been introduced in forty-five states.[4] Congress is now considering legislation with similar intent.[5]

Why the firestorm? In a nutshell, the *Kelo* decision laid bare the increasingly common practice of local governments (sometimes as few as three of five council members) entering into a partnership with big business to use the government's power of eminent domain to seize private property from individual owners and transfer ownership to a well-capitalized private business in order to achieve "economic redevelopment."[6] The justification for such a transfer from one private owner to another is generally offered as a cure for the ills of a community in economic doldrums.[7] It is proposed that the new development will create jobs, bring more "health" to the community, and of course, raise the ad valorem tax base, thus benefitting the community as a whole.[8] The ends (economic health and well-being) are said to justify the means (forcible seizure of private property).

Some have publicly suggested that such a property forfeiture as permitted in Connecticut by *Kelo* cannot happen in Florida because, unlike Connecticut, there is no specific statute authorizing condemnation for the express purpose of economic redevelop-

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individual property rights and reporting that polls show ninety percent of Americans disapprove of the ruling); Dan Ackman, *Forbes.com, Top Court's Less Than Landmark Ruling*, http://www.forbes.com/business/services/2005/06/23/pfizer-Kelo-scotus-cx_da_0623Kelo.html (accessed Feb. 12, 2006) (deriding the Court's ruling in the case as "a crock"); Emily Bazar, U.S.A. Today, *States Move to Protect Property*, www.usatoday.com/news/nation/2005-08-02-eminent-domain_x.htm?POE=NEW/SVA (last updated Aug. 2, 2005) (discussing quick reactions by state legislatures to counter the effects of the ruling).

4. Castle Coalition, *Legislative Center, Eminent Domain Legislation Status (2006)*, http://www.castlecoalition.org/legislation/index.html (accessed Apr. 8, 2006) (showing that legislation prohibiting the use of eminent domain for private development has been passed in thirteen states, is pending in twenty-seven states, has been defeated in four states, and has been vetoed in one state).

5. H.R. 3135, 109th Cong. (June 30, 2005) (Private Property Rights Protection Act of 2005); Sen. 1313, 109th Cong. (June 27, 2005) (Protection of Homes, Small Businesses, and Private Property Act of 2005).

6. Dana Berliner, *Public Power, Private Gain: A Five Year State-by-State Report Examining the Abuse of Eminent Domain* 4 (Inst. for Just. 2003); *see* Fla. Stat. § 163.356(2) (2005) (specifying that as few as five commissioners can be appointed by a local government to run a community development agency).

7. Berliner, *supra* n. 6, at 7.

8. *Id.*

ment.[9] Thus, there is no worry, and nothing is required judicially or legislatively in Florida to address the *Kelo* issue. That assumption is starkly wrong.

This Article will summarize the current Florida law and practice that permits condemnation of private property for de facto economic redevelopment, offer a critique of that law and practice, and propose solutions.

II. ECONOMIC REDEVELOPMENT IN FLORIDA— CURRENT LAW AND PRACTICE

There are over 160 Community Redevelopment Agencies (CRAs) in the State of Florida.[10] Some communities have several.[11] A CRA, once established pursuant to Florida's Community Redevelopment Act,[12] can analyze a given area or neighborhood, declare it to be "slum" or "blighted," and exercise the power of eminent domain to "clear" the "infected" area by seizing private property from unwilling sellers.[13] Thus, the seized property can then be assembled into an economically desirable tract and then offered to a private developer that has the financial ability to redevelop the area in accordance with a redevelopment plan adopted by the CRA. Taking for economic redevelopment is thereby achieved, albeit under the label of "slum" or "blight" clearance.

The community is said to benefit by the removal of the slum or blight and the creation of a healthy, job-rich environment with a greatly increased tax base. The private developer benefits by receiving an assembled tract at less cost than by individual private purchases from willing sellers, and by gaining the use of the increased tax base as security for a municipal bond that underwrites the enormous infrastructure cost of a new private devel-

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9. John Haughley, Sun Herald, *Ruling Has Little Bearing in Florida*, www.sun-herald.com/NewsArchive2/062405/tp3ch19.htm?date=062405&story=tp3ch19htm (June 24, 2005).

10. Fla. Dept. of Community Affairs, *Housing Community Development, Special District Information Program*, http://www.dca.state.fl.us/fhcd/sdip/OfficialList/by_distr.asp (accessed Mar. 20, 2006).

11. *Id.*

12. Fla. Stat. § 163.356(1) (2005).

13. For a statutory definition of "blighted area," see Section 163.340(8) of the Florida Statutes.

opment. Normally, a developer must front the costs for infrastructure such as roads, water, and sewer lines and hope to recover these costs in retail sales to end users. Using a CRA, however, the developer need not expend any money for infrastructure, as those costs may all be paid by bond funds secured by the area's anticipated future increase in taxable value (known as "tax increment financing").

The third party to the CRA triangle is the private owner whose land, home, or business is seized. That owner does not participate in the developer's profit. The owner, who may have held a home or business for years, is simply dispossessed and paid what the CRA or a condemnation jury believes to be "full compensation." As noted below,[14] that measure of "full compensation" may not be anywhere near current market value based on the highest and best use; rather, this compensation may be a depressed value considering the current "external depreciation" (read "slum/blight" condition), but without recognizing the enhancement in value from the proposed project as realized by the private owners just outside the new redevelopment area. However, even if complete "full compensation" is secured by the condemnee, that citizen has still lost the right to say "no."

Thus, though there is no specific law in Florida that directly authorizes condemnation for the express purpose of economic redevelopment, by the relatively simple expedient of declaring an area to be "slum or blighted," a CRA can, indeed, condemn private property and devote the condemned property to "economic redevelopment."[15] Here is how it works.

Prior to 1959, the law in Florida was clear that private property could not be condemned for private use or a predominantly private purpose.[16] The power of eminent domain was seen by the Florida Supreme Court as "one of the most harsh proceedings known to the law."[17] Eminent domain was to be used sparingly

14. *Infra* nn. 37–40 and accompanying text (discussing the shortcomings of the legal definition of "just compensation").

15. *See* Fla. Stat. § 163.360 (providing that an area must first be found "a slum area" or "a blighted area" before a CRA can be initiated); Fla. Stat. § 163.370 (enumerating the powers of local governments to demolish and remove buildings in slum or blighted areas); Fla. Stat. § 163.375 (permitting CRAs to acquire property through eminent domain pursuant to the authority conferred on them by local government).

16. *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483, 486–487 (Fla. 1947).

17. *Id.* at 485.

and with the greatest regard for the sanctity of private property as guaranteed by our organic law.[18] In *Adams v. Housing Authority of Daytona Beach*,[19] the Florida Supreme Court forcefully set out the law that forbade condemnation of private property for private economic redevelopment:

> It may be taken as established law that the incidental benefit accruing to the public from the establishment of a large factory, mill, department store, or other industrial or commercial enterprise is not a valid ground for ranking such an enterprise as a public use and intrusting it with the power of acquiring a suitable site by eminent domain. Private enterprises that give employment to many and produce various kinds of commodities for the use of the people are not necessarily public uses. Every legitimate business, to a greater or less extent, indirectly benefits the public by benefiting the people who constitute the state, but that fact does not make such enterprises public businesses.[20]

Two years later, in 1954, from the other end of the constitutional spectrum, came the equally bold decision by the United States Supreme Court in *Berman v. Parker*[21] which, for the first time, authorized the condemnation of private property to clear neighborhood slum conditions.[22] The condemnation was held consistent with the Fifth Amendment's "public use" requirement, even though the condemned property would be transferred to private developers.[23] The overriding "public use" was the eradication of a vicious slum in a desperately poor area:

> Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was

18. *Id.* at 485–487.

19. 60 So. 2d 663 (Fla. 1952), *overruled in part, Baycol, Inc. v. Downtown Dev. Auth. of Ft. Lauderdale*, 315 So. 2d 451 (Fla. 1975).

20. *Id.* at 669 (quoting 18 Am. Jur. *Eminent Domain* § 45 (1938)).

21. 348 U.S. 26 (1954).

22. *Id.* at 34–36.

23. *Id.* at 28–30.

> necessary to redevelop Area B in the interests of public health . . . .
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> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river . . . .
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> The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.[24]

Florida followed suit. In 1959, in *Grubstein v. Urban Renewal Agency*,[25] the Florida Supreme Court ruled that slum clearance was a "public purpose" and that an incidental private gain by a private redeveloper did not vitiate the overall public goal of ridding the community of a dangerous slum.[26] The Court stated,

> Manifestly, incidental benefits will inure to private individuals or corporations under the Housing Authorities Law and the Urban Renewal Law. But in both, the use to be made of the condemned property is fixed and definite and control of such use is retained by the condemning authority; in both, slum clearance is the dominant or primary purpose of the enactment, and redevelopment of the cleared property is the subordinate purpose, linked to the primary purpose by the necessity of preventing the recurrence of the slum condition and of putting the property to some use. Thus, under both laws, the plan of slum clearance and redevelopment may be said to be for a "public use", under the definition quoted above.[27]

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24. *Id.* at 30, 32–34.
25. 115 So. 2d 745 (Fla. 1959).
26. *Id.* at 751.
27. *Id.* at 749–750.

The *Grubstein* Court was careful to acknowledge that the *Adams* rule (forbidding condemnation to clear mere "blight") was still the law, but held that the seriousness of the "slum" damages permitted such use of eminent domain.[28]

In 1969, the Florida Legislature, in response to federal and state case law, enacted the Community Redevelopment Act of 1969.[29] The Act, as amended repeatedly over the next thirty-five years, codifies a relatively simple mechanism for redevelopment.[30]

First, a county or municipality must adopt a resolution finding that an area within its jurisdiction is "slum" or "blighted," or it contains a shortage of affordable housing and that the rehabilitation or redevelopment of the area is "necessary" in the interest of the public's "health, safety, morals or welfare."[31]

Then, upon that "finding of necessity" and a further official "finding" that there is a need for a community redevelopment agency, the local government may create a CRA to exercise the powers of the local government in accordance with the Act.[32]

Next, although this sequence is not a legal requisite, the CRA prepares a community redevelopment plan for the slum or blighted area.[33] The framework for the contents of that redevelopment plan is set out in one provision of the Act.[34] Then, in order to guarantee the acquisition of all property needed, another of the Act's provisions authorizes either the local government or the CRA to condemn any interest in private property that the entity "deems necessary" for community redevelopment.[35]

Unlike any other condemnation statute in Florida, however, the Act permits a CRA condemnor to introduce evidence of the slum or blighted condition of the area in which the condemned property is located, regardless of the fact that the local government has taken no steps to eradicate that slum pursuant to its police powers.[36] This provision, aimed at lowering the con-

28. *Id.* at 751.
29. Fla. Stat. §§ 163.330–463.
30. *Id.*
31. *Id.* at § 163.355.
32. *Id.* at § 163.356.
33. *Id.* at § 163.360.
34. *Id.* at § 163.362.
35. *Id.* at § 163.375.
36. *Id.* at § 163.375(2)–(3).

demnee's award, is in apparent contrast to the Florida Supreme Court's holding in *Adams*.[37] Note that the Legislature in 1985 revised its general eminent domain code (perhaps unconstitutionally) to provide that the condemnee-property owner has no opportunity to be credited with the highest and best use of the property to the extent that it is enhanced by the anticipation of the proposed public project.[38] Thus, the owner of property condemned by a CRA is charged with the existing negative influence but is not credited with the potential value enhancement due to the proposed redevelopment project. Such a unique legislative manipulation of "full compensation" is designed ultimately to lower the cost of acquisition for which the private developer must reimburse the CRA condemnor. It should also be noted that due to a seemingly irrational quirk in Florida eminent domain law, an owner whose business is completely taken, such as in a community redevelopment area, receives no compensation at all for the business loss,[39] while one whose business is only partially taken does receive such compensation.[40]

Finally, and very significantly, the Act authorizes "redevelopment revenue bonds," which can be used to finance the redevelopment plan.[41] Such bonds have been found to be neither in violation of the Florida Constitution's prohibition against public bond financing for private purposes,[42] nor in violation of the constitutional restraint against bonds secured by ad valorem taxes without a "vote of the electors."[43] In sum, those various sections of the

37. *See Adams*, 60 So. 2d at 666 (stating that governmental entities should employ their police powers to eliminate blight or slum conditions in other ways before exercising eminent domain).

38. Fla. Stat. § 73.071(5) (2005). For a contrary view of "full compensation," see *Department of Transportation v. Nalven*, 455 So. 2d 301, 304 (Fla. 1984).

39. Fla. Stat. § 73.071(3)(b).

40. *Id.*

41. Fla. Stat. § 163.385.

42. *State v. Osceola County*, 752 So. 2d 530, 540 (Fla. 1999) (finding that a county's issuance of bonds to fund construction of a convention center did not violate the provisions of Article VII, Section 2, of the Florida Constitution regarding purposes for which revenue bonds can be issued).

43. *See State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 898–899 (Fla. 1980) (holding that a municipality's issuance of bonds for a redevelopment project without a vote of local electors did not violate Article VII, Section 12, of the Florida Constitution).

Act[44] open the door to bond financing (without developer investment) based upon "anticipated" future ad valorem tax increases.

The decision in *State v. Miami Beach Redevelopment Agency*,[45] authorizing tax increment financing, also expanded the opportunity of local governments to use private redevelopment efforts to clear both slum *and* blighted conditions.[46] This holding was an expansion of the more narrowly tailored opinion in *Grubstein*.[47] It was significant to the Florida Supreme Court in *Miami Beach Redevelopment Agency* that the area targeted for redevelopment was a place of "sub-human living conditions," exhibiting many of the ills noted in *Berman*.[48]

After *Miami Beach Redevelopment Agency*, literally hundreds of CRAs surfaced. Challenges by state attorneys, affected taxpayers, and condemnees have been rather routinely set aside.[49] These decisions have significantly expanded the *Grubstein* and *Miami Beach Redevelopment* holdings authorizing condemnation for slum/blight clearance and approving the highly deferential "fairly debatable" standard of review.[50] The door to using forcible seizure of private property for private economic redevelopment is thus wide open in Florida and has been since at least 1980.

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44. Fla. Stat. § 163.385; Fla. Stat. § 163.387; Fla. Stat. § 163.390.

45. 392 So. 2d 875 (Fla. 1980).

46. *Id.* at 890–891 (holding that "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, [are] in furtherance of a public purpose and [are] constitutional").

47. *Grubstein*, 115 So. 2d at 751 (validating slum clearance, but leaving open the question of whether blight clearance was constitutionally valid).

48. *Miami Beach Redevelopment Agency*, 392 So. 2d at 882–883, 889–890 (quoting and discussing *Berman*, 348 U.S. at 31–32).

49. *See e.g. JFR Inv. v. Delray Beach Community Redevelopment Agency*, 652 So. 2d 1261 (Fla. 4th Dist. App. 1995) (affirming court order authorizing taking of landowner's property for a development plan); *Batmasian v. Boca Raton Community Redevelopment Agency*, 580 So. 2d 199 (Fla. 4th Dist. App. 1991) (rejecting landowner's appeal of a court order to surrender condemned property deemed blighted); *Post v. Dade County*, 467 So. 2d 758 (Fla. 3d Dist. App. 1985) (rejecting landowner's challenge to a condemnation order); *Florio v. Miami Beach*, 425 So. 2d 1161 (Fla. 3d Dist. App. 1983) (affirming dismissal of landowner lawsuit opposing order to demolish or renovate building).

50. *JFR Inv.*, 652 So. 2d at 1262.

III. A CRITIQUE

From the earliest days of our Republic, the United States Supreme Court has disapproved of condemnation for private purposes:

> An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.[51]

Economic redevelopment of seriously depressed areas can be both socially productive and individually rewarding for the community and the areas' inhabitants. A slum, whether in Washington, D.C., or Miami, can be a cesspool of crime, drugs, disease, and abject poverty. It is those conditions that give constitutional credence to government-sponsored redevelopment. That redevelopment cannot always be completed solely by government; it may best be accomplished by enlightened capitalism.[52]

The use of eminent domain to rid a community of the canker of a true slum is not a seriously contested issue in any court or legislature in the nation.[53] Similarly not at issue is *voluntary* economic redevelopment of merely "blighted" areas. An area may not have the fatal characteristics listed in *Berman*[54] or *Miami Beach Redevelopment*,[55] but it may still warrant upgrading by the community. When those efforts involve the consensual cooperation of the area's property owners and inhabitants, and when the goal is truly a public one, then the incidental benefit to a private redevelopment partner is not constitutionally suspect.[56] Such benign

51. *Calder v. Bull*, 3 U.S. 386, 388 (1798).
52. *Berman*, 348 U.S. at 33–34.
53. *Grubstein*, 115 So. 2d at 746.
54. 348 U.S. at 30.
55. 392 So. 2d at 882–883.
56. *See e.g. Panama City Beach Community Redevelopment Agency v. State*, 831 So. 2d 662 (Fla. 2002) (challenging only the definition of "blight" used by the redevelopment agency, not the incidental benefit to the cooperating landowner).

efforts constitute the majority of economic redevelopment in Florida.

The issues arising from *Kelo* and causing such national ire are (1) the relatively small number of cases in which the redevelopment system is used mainly for the benefit of the private redeveloper and for the political benefit of governmental sponsors;[57] and (2) using the harsh power of eminent domain to seize private property from one citizen and transfer it to another more powerful, wealthy citizen, under the rationale of economic development.[58] Though these instances make up the minority of economic redevelopment efforts in Florida, they are neither rare nor decreasing in occurrence.[59]

It is important to note the more egregious abuses, and then analyze those provisions in the current Florida law that permit such abuses in the exercise of eminent domain. By recognizing these problem areas, relatively straight-forward solutions become apparent.

Consider, for example, the case of homeowners in West Palm Beach, Florida, whose Spanish mission-style house sat adjacent to a proposed county golf course.[60] The golf course project was part of a larger county redevelopment effort on land near Palm Beach International Airport.[61] The homeowners, John and Gwendolyn Zamecnik, did not want to sell their classic home.[62] Palm Beach County condemned the property, won a contested taking, and proceeded to turn the Zamecniks' home over to the golf course manager to use as his home.[63]

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57. *Kelo*, 125 S. Ct. 2669 (Kennedy, J., concurring) (stating that a court should strike down any taking intended primarily to favor a private party).

58. *Id.* at 2677 (O'Connor, J., dissenting) (concluding that "[t]he beneficiaries [of the Court's decision] are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms").

59. Berliner, *supra* n. 6, at 52.

60. Thomas R. Collins, *Evicted Homeowners Feel Betrayed over Failed Project*, Palm Beach Post 1A (Mar. 15, 2005).

61. *Id.*

62. *Id.*

63. *Zamecnik v. Palm Beach County*, 768 So. 2d 1217, 1217 (Fla. 4th Dist. App. 2000) (upholding a trial court's order of the taking and its finding that the condemnation was for a public purpose and "reasonably necessary"); *see* Collins, *supra* n. 60, at 1A (reporting that Palm Beach County, which already has 170 golf courses, killed the golf course project and was considering proposals to turn the land into a public park or an industrial park).

Similarly, consider the plight of Tony Rukab, owner of vacant land that the City of Jacksonville Beach had resolved to give to a private shopping center developer.[64] Although Rukab won the right to contest the taking,[65] he ultimately lost the contest.[66] Economic redevelopment of the vacant, unimproved area (declared "blighted") won the day over Mr. Rukab's right of private ownership.

These examples can be seen as "abuses." They came about largely due to the ambiguous and contradictory statutory scheme in Chapter 163, Florida Statutes. To begin with, the Florida Community Redevelopment Act lists fourteen factors constituting "blight."[67] The local government (or CRA) need only find two of these factors to meet the statutory definition.[68] Some of the listed blight factors are objective and quantifiable, such as "falling lease rates" as compared to the rest of the county or municipality,[69] or "tax or special assessment delinquency exceeding the fair value of the land."[70] CRAs not able or willing to find these objective blight criteria, however, are able to turn to a variety of loose, subjective factors that also meet the statutory definition of blight. For example, the CRA may find "lot layout" in the area to be "[f]aulty."[71] The "building density patterns" may be found "inadequate and outdated."[72] "[C]onditions" may be seen as unsafe or unsanitary,[73] or there may be a "[d]eterioration of site or other improvements."[74]

Missing from the statutory definitions are the meanings of such terms as "inadequate," "outdated," "faulty," "unsanitary," "unsafe," or "deteriorated." This lack of precision invites abuse. A lot layout may be "faulty" to one planner and perfectly fine to another. The terms "unsanitary" or "unsafe" can certainly have ob-

64. *Rukab v. Jacksonville Beach*, 811 So. 2d 727, 729 (Fla. 1st Dist. App. 2002).

65. *Id.* at 733 (remanding for a hearing on whether the taking was for a "public necessity").

66. *Rukab v. Jacksonville Beach*, 866 So. 2d 773, 774 (Fla. 1st Dist. App. 2004) (affirming without opinion the trial court's order of the taking).

67. Fla. Stat. § 163.340(8).

68. *Id.*

69. *Id.* at § 163.340(8)(g).

70. *Id.* at § 163.340(8)(h).

71. *Id.* at § 163.340(8)(c).

72. *Id.* at § 163.340(8)(f).

73. *Id.* at § 163.340(8)(d).

74. *Id.* at § 163.340(8)(e).

jective content (i.e., health code violations); however, a home with a functioning well and septic system can also be termed "unsanitary" or "unsafe" at the discretion of the local CRA. To allow condemnation of private property simply by labeling an area "outdated" or "inadequate" is to invite arbitrary and irrational seizures, a result not in harmony with the original legislative intent.[75] A circuit court's standard of review is that of "fairly debatable";[76] the level of proof required of a condemnor is "competent substantial evidence";[77] and a circuit court is directed to defer to the legislative wisdom of the local government.[78]

Florida has a long history of requiring land-use laws to be precise and objective, and holding vague and standardless regulations void.[79] While these decisions involve zoning and regulatory matters rather than eminent domain actions, the constitutional principles are the same. Standards must be "applicable alike to all property owners similarly conditioned."[80] Ordinances that "allow all manner of latitude . . . give every opportunity for the exercise of the power with partiality. Such laxness and inexactness in a delegation of the power is not sanctioned by the courts."[81]

Another flaw in the statutory scheme of redevelopment is that while a redevelopment plan must be consistent with the local government's approved comprehensive plan,[82] there is no requirement that a redevelopment plan be in place before a CRA

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75. *See id.* at § 163.335 (indicating the Legislature's intent to permit condemnation of "slum and blighted areas which constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state"). Other states have found criteria for "blighted areas" similar to that of Section 163.340(8) to be vague and unconstitutional. *See e.g. Wheaton v. Sandberg*, 574 N.E.2d 697, 700–701 (Ill. App. 2d Dist. 1991) (holding that a city's eminent domain ordinance was unconstitutionally vague in its criteria of "blighted").

76. *JFR Inv.*, 652 So. 2d at 1262.

77. *Batmasian*, 580 So. 2d at 200.

78. *Panama City Beach*, 831 So. 2d at 667–670.

79. *See e.g. N. Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956) (invalidating a zoning ordinance that lacked "reasonable standards"); *Drexel v. City of Miami*, 64 So. 2d 317, 319 (Fla. 1953) (invalidating an ordinance that allowed the city council "all manner of latitude" to grant or deny permits to construct parking garages); *S.E. Fisheries Assn. v. Dept. of Nat. Resources*, 453 So. 2d 1351 (Fla. 1984) (finding no expression by the Legislature that a state law prohibiting possession of certain saltwater fish traps applied outside the territorial waters of the state).

80. *North Bay*, 88 So. 2d at 526.

81. *Drexel*, 64 So. 2d at 319.

82. Fla. Stat. § 163.360(2)(a).

exercises its condemnation power.[83] Thus, the condemnation may directly conflict with the county's comprehensive plan and still be permitted.

Yet another definitional problem arises with the term "open land." The Act attempts to limit the acquisition of open land to situations in which affordable housing is necessary.[84] Because most upscale developers would understandably prefer not to devote their development to low-cost housing, this provision would restrict the acquisition of vacant land.[85] However, because the term "open land" is undefined, CRA-developer attorneys are able to define the term away from its commonly understood synonyms such as "vacant" or "unimproved."[86] Instead, the attorneys can argue that open land means "unplatted." Thus, any vacant land that has a plat on it, of whatever vintage, could thereby become available for condemnation by a CRA and transfer to a high-end developer. This result would not seem to be consistent with the announced legislative intent regarding "affordable housing," but the lack of clarity and definition in the Act makes the contrary result possible.

Another serious flaw in the Act is the authority it bestows upon a local government CRA to declare an area "blighted" and then essentially freeze that area virtually in perpetuity pending redevelopment. A finding of blight, however appropriate in 1980 in Miami Beach,[87] may not bear any relationship to the facts twenty-five years later. Yet current law does not require an "update" of the blight determination and therefore it permits condemnation to "clear blight" where no blight now exists.[88] The rationale of *Batmasian v. Boca Raton Community Redevelopment Agency* has no such chronological limitation on a determination of blight, as the Fourth District Court of Appeal permitted a 1989 condemnation based upon a finding of blight in 1980.[89] Other de-

83. *Id.* at § 163.370(3)(a).

84. *Id.* at § 163.360(8).

85. *See Panama City Beach*, 831 So. 2d at 669 (noting that Section 163.360(8) contains "restrictions concerning [the open land's] acquisition").

86. *See id.* (using the term "vacant" as a synonym for "open land").

87. *See Miami Beach Redevelopment Agency*, 392 So. 2d at 882–883 (referencing "sub-human living conditions" that justified condemnation of property for redevelopment).

88. *Batmasian*, 580 So. 2d at 201.

89. *Id.*

cisions are to the same effect. In *Rukab v. Jacksonville Beach*, a condemnation in 2002 was allowed even though the "blight" finding was in 1985.[90] And in *JFR Investment v. Delray Beach Community Redevelopment Agency*, the same court again sanctioned a taking based upon a ten-year-old blight study.[91] With no judicial check, and no legislative requirement to update, a "blight" finding can go on for as long as the life of the redevelopment plan—forty years![92]

IV. SOLUTIONS

In suggesting statutory or constitutional fixes to the problems outlined above, one must be careful not to damage or inhibit the good community work most CRAs do, using the voluntary cooperation of willing property owners. The technique of tax increment financing is certainly a valuable tool to induce private developers to invest in a marginal area in need of major upgrading.

The real danger is in the unrestricted use of eminent domain powers to achieve private development goals in desirable areas that are not truly slum or blighted, so as to constitute "a law that takes property from A. and gives it to B." that was so abhorrent to Justice Samuel Chase 200 years ago.[93] Case law exists in Florida to right these wrongs, as illustrated by the "vagueness" decisions cited above.[94] Yet the surest remedy is positive law, legislative or constitutional.

The most obvious legislative solution to cure the problem without fatally injuring "good" economic redevelopment is in delinking eminent domain exercise from voluntary acquisitions. This can be achieved by redefining "blight" criteria when used to support a condemnation of private property. Terms such as "inadequate," "faulty," and "unsanitary" can be defined objectively by reference to local building and health codes and, of course, to the local comprehensive plan. The loose blight terminology can still be used for voluntary acquisitions, while the tighter, more objective definitions can be applied only to eminent domain. And, if afford-

90. *Rukab*, 811 So. 2d at 730.
91. *JFR Inv.*, 652 So. 2d at 1262.
92. Fla. Stat. § 163.387(2)(a).
93. *Calder*, 3 U.S. at 388 (calling such a taking "against all reason and justice").
94. *Supra* nn. 79–81.

able housing truly is significant to the Legislature, the term "open land" should be defined as "vacant or unimproved," regardless of platting.

Another statutory solution to the abuses noted would be to require a "heightened scrutiny" of review of a "blight" determination when used to support a condemnation resolution. A "strict scrutiny" of the Act's requirements could be legislatively mandated in accordance with existing eminent domain law.[95] Circuit courts would then be required to apply *that* standard of review.

Certainly no condemnation should be authorized unless there is a clear need for the condemned area, set out definitively in the redevelopment plan. This is presently not required, and that loophole should be closed. The CRA's actions, particularly those involving the seizure of private property, should be required to be consistent with the currently approved local comprehensive plan. That consistency requirement seems obvious when one reviews the "[l]egal status of [a] comprehensive plan" in Florida's Local Government Comprehensive Planning and Land Development Regulation Act.[96] Moreover, quite inconsistently, the language of the Redevelopment Act does not force CRA-condemnors to comply with their own comprehensive plan.

The next legislative suggestion is probably the most contentious. CRAs should be required to update their "blight" studies and resolutions every seven years, just as the updating of comprehensive plans is mandated by statute.[97] A taking of private property based on "blight eradication" should not be sanctioned unless there is actually "blight." The stricture seems painfully obvious, yet such a limitation is not the law currently. A temporal limitation of seven years could be made applicable only when condemnation powers are sought, thereby keeping voluntary redevelopment programs free from further restraint. The point is to limit appropriately the exercise of eminent domain.

Additionally, the repressive compensation measures found in the Act[98] should be removed and substituted with generous reme-

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95. *Baycol*, 315 So. 2d at 455; *Rukab*, 811 So. 2d at 730.

96. Fla. Stat. § 163.3194(4)(a) (requiring the courts to consider whether a CRA's action is reasonably related to the comprehensive plan's purpose).

97. *Id.* at § 163.3191.

98. *Id.* at § 163.375.

dial provisions of relocation assistance, business reestablishment, and compensation based upon the redevelopment project's stated potential. If that potential is good enough to support tax increment financing for the developer, it certainly should be available to the dispossessed property owner.

Justice Kennedy's concurrence in *Kelo* suggested that, under certain circumstances, it may be desirable for a court to look into allegations of condemnation for predominantly private gain.[99] Such an inquiry, if conducted on a good faith allegation by a condemnee, may be made a legislative requirement by supplementing the eminent domain section of the Act. This suggestion was discounted by Justice Sandra Day O'Connor in her dissent,[100] and it may not be effective in practice, but at least the opportunity should be afforded to the reasonably suspicious landowner.

Finally, should there be a constitutional amendment? While condemnation to clear true slum and blighted conditions should still be an option for local governments, the use of eminent domain to achieve economic development should not be available. As noted in *Peavy-Wilson Lumber Co.*, every business project has some public benefit, but that is not the same as the constitutionally required "public purpose."[101]

Perhaps the only sure way to prevent "blight" findings from being a mask for economic development is an amendment to the Florida Constitution. A simple addition to Article X, Section 6 should suffice:

> 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.

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99. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

100. *Id.* at 2675 (O'Connor, J., dissenting) (stating that distinguishing private gain from public development is difficult because private and public gain from such developments are "merged and mutually reinforcing").

101. 31 So. 2d at 486–487; *Baycol*, 315 So. 2d at 457 (noting that "'public benefit' is not synonymous with 'public purpose'").

This proposed constitutional language, or a close approximation, would make the will of the people clear to the courts. Together with careful legislative reform, Florida's eminent domain law may avoid the *Kelo* effect.