CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

Vol. XXX, No. 1 THE FLORIDA BAR September 2006

Hurricane *Kelo* Hits Florida

by Mark Bentley, Esq., AICP, GrayRobinson, P.A., Tampa, Florida

♪ "Yesterday —
If your property was in a CRA, ♪
♪ We could take it for a Circle K,
Oh, I believe in yesterday." ♪
— *Anonymous Local Government Official*

I. *Kelo* Triggers New Legislation

As a result of the U.S. Supreme Court's 2005 landmark decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), the Florida Legislature enacted radical legislation clarifying *Kelo*'s effect on Florida takings law. These statutory amendments, contained in Chapter 200611, Laws of Florida, will severely restrict condemning authorities' power to take private property exclusively for traditional public uses, and will expressly prohibit takings for economic development. This legislation was swiftly signed into law by Governor Bush on May 11, 2006, who commented that he "was proud to sign a law that severely limits government from abusing eminent domain to take private property against the wishes of the owner and give it to another private property owner." In addition, the Legislature has supported placing a constitutional amendment on this November's ballot which, if approved by the voters, would permanently prohibit the taking of private property for private economic benefit and impose greater, more permanent restrictions on government's ability to take private property. According to Speaker-Designate Marco Rubio, who championed this legislation, "[t]he approval of these two measures recognizes that the American

See "Hurricane Kelo" page 4

Communication Disruption By Hurricanes– What Are Your Remedies As a Cable and Telephone Subscriber?

During last hurricane season, many residents in both Florida and along the Gulf Coast lost cable and telephone services in the wake of Hurricanes Katrina, Rita and Wilma. These hurricanes caused an unprecedented disruption in communications leaving thousands of people without access to news and emergency information and without the ability to contact loved ones.[1] Every Floridian should know what remedies are available to a subscriber in the event a hurricane disrupts communications.

Emergency Preparedness Plans

In light of last year's hurricanes, the nation's top cable companies have pledged to review and assess their emergency preparedness plans and continue ongoing efforts to coordinate emergency activities with first responders, government agencies and service providers.[2] After a comprehensive analysis of the adequacy and effectiveness of infrastructure recovery efforts, earlier this year the Federal Communications Commission ("FCC") released recommendations on ways to improve disaster preparedness and network reliability and resiliency during emergencies.[3] As a result, cable operators are working to ensure that their systems are ready in the event of another hurricane.[4] For example, Comcast Cable

See "Disruption," page 6

INSIDE:

dream is alive and well, and private property rights are honored in the state of Florida."

In *Kelo*, the City of New London was experiencing severe economic decline and formed a non-profit corporation ("corporation") to assist the City in its economic development efforts. The corporation formulated a comprehensive economic redevelopment plan and was also delegated condemnation authority by the City to implement the plan. The strategy was for this private corporation to acquire the properties and then convey them to private developers for a massive mixed use project. Several propertyowners whose properties were not affected by slum and blight refused to sell to the corporation. Consequently, the corporation exercised its eminent domain authority to acquire the holdout owners' properties. The owners then sued the City in state court arguing that the City had misused its eminent domain authority for private redevelopment, as the Fifth Amendment limits governmental taking of private property for a public use. Specifically, the Takings Clause states that "private property [shall not] be taken for public use, without just compensation." Furthermore, under Section 1 of the Fourteenth Amendment, this "public use" limitation is also imposed on the actions of state and local governments. The owner argued that because the stated purpose of the corporation was for economic development, the taking did not qualify as a "public use" under the Fifth Amendment. The state court's ruling in favor of the City was appealed to the Connecticut Supreme Court, which affirmed its decision, and the propertyowners then appealed the decision to the U.S. Supreme Court.

The Supreme Court was virtually split, ruling in a five to four decision that because the City's development plan was authorized by a state statute that specifically sanctioned the use of eminent domain to promote economic development, and served a "public purpose" under the Fifth Amendment's "public use" provision, the taking did not violate the Takings Clause. The Court emphasized that local governments should be afforded wide latitude in taking private property for local land use decisions. In its conclusion, however, the Court cautiously refrained from seeking preemption of additional state action, stating that "[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed many states already impose 'public use' requirements that are stricter than the federal baseline."

II. Florida Legislature Seeks to "Fill the Gap"

After the *Kelo* decision's initial shockwave hit, Florida lawmakers scurried to find a way to prevent a similar situation from occurring in Florida. Given the *Kelo* Court's strong deference to state government's interpretation of its own laws, it was felt that because Florida courts had not ruled on a *Kelo*-type case, determining whether the Florida Constitution allows a *Kelo*-type taking was an issue that must be decided by the Florida Supreme Court, and not the U.S. Supreme Court. Specifically, the potential question to be resolved by the Florida Supreme Court was whether, under Florida law, the taking of private property for economic development constituted a valid public purpose for which private property may be taken and conveyed to another private owner. Notably, the Florida Legislature's fear was well-founded, as the Legislature has statutorily declared economic development a public purpose qualifying for the disposition of public funds under Florida Statutes Chapters 125 (relating to counties) and 166 (relating to cities). Therefore, prior to this new legislation there existed a legitimate argument that local governments in Florida could lawfully exercise eminent domain authority for economic development purposes even under circumstances similar to *Kelo*, where the condemned properties were not blighted or taken under a redevelopment statute.

Florida's first step to counter *Kelo* occurred on June 24, 2005, when House Speaker Allen Bense announced the creation of the Select Committee To Protect Private Property Rights, chaired by Representative Marco Rubio, who sponsored both the newly enacted legislation and the proposed constitutional amendment. The Committee was charged with the task of analyzing Florida eminent domain law to determine the existence of any ambiguities and to recommend necessary changes to ensure the protection of private property rights.

At this point in time, there are over 140 established community redevelopment areas ("CRAs") in the state of Florida, and the number is rapidly increasing on an almost monthly basis. Notably, the Florida Community Redevelopment Act authorizes the use of eminent domain for the elimination of slum and blight, which Florida courts have upheld as a valid public purpose. However, the statutory definition of "blighted area" was considered by many observers to be extremely vague and provided an easy test for local governments to meet; thereby creating an opportunity to abuse their condemnation authority. For example, under Section 163.340(8), F.S. (2006), an area can be considered

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

Mary Helen Farris, Tampa ..... Chair
Elizabeth Miranda Hernandez, Coral Gables ..... Chair-elect
Grant Williams Alley, Ft. Myers ..... Secretary-Treasurer
Kathryn Kaye Collie, Orlando ..... Immediate Past Chair
Joseph Jarret, Bartow ..... Editor
Carol J. Kirkland, Tallahassee ..... Associate Editor
Ricky Libbert, Tallahassee ..... Program Administrator
Colleen Bellia, Tallahassee ..... Layout

"blighted" and subject to condemnation and private redevelopment if it meets only two of fourteen criteria, such as "inadequate and outdated building density patterns," a "predominance of defective or inadequate street layout," an "incidence of crime in the area higher than in the remainder of the county or municipality," or "falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality."

The first major step leading to the enactment of the new legislation seeking to prevent a *Kelo* situation from occurring in Florida took place on April 6, 2006, when Florida's House of Representatives unanimously passed House Bill 1567. The Bill was enacted into law as Chapter 2006-11, Laws of Florida, and applies to all eminent domain petitions filed after its effective date, which is May 11, 2006. This law (among several things) amends Chapter 73, Florida Statutes, creating a prohibition against the transfer of property taken through eminent domain to a private entity or natural person. However, various exceptions to this "bright line" prohibition are carved out for certain unique circumstances relating primarily to governmental type functions, such as common-carrier services or systems, public infrastructure, public or private utilities for electrical service, stormwater, or telephone services, along with several others. The new law does provide local government some flexibility, as it requires that the condemned land must be retained by the condemning authority for at least ten years after acquiring title before it can be transferred to a natural person or private entity.

Most significantly, the new law makes it crystal clear that local governments are now restricted to taking private property for uses that have traditionally had a public purpose, such as roads, utilities and government infrastructure. Local governments can no longer take private property located in or out of a Community Redevelopment Area and "flip" it to a private developer for shopping malls, movie theaters, condominiums, or other private development purposes, as it once could based on the theories of elimination of a nuisance, slum or blight. Specifically, Chapter 73, Florida Statutes, has been amended to expressly state that the taking of private property for the elimination of a nuisance or a slum and blight condition do not satisfy the "public purpose" requirement contained in Article X of the Florida Constitution.

As a result of the new legislation, the Community Redevelopment Act's "blighted area" test can no longer be used as an "end run" around the Florida Constitution's "public purpose" requirement. Notably, property that is acquired in a CRA is also subject to the same "cooling off" period contained in Chapter 73, Florida Statutes, which prohibits the transfer of property acquired by eminent domain to a natural person or private entity for a period of ten years. In addition, the law repeals the Legislature's prior delegation of eminent domain authority to CRAs, and now prohibits a CRA from exercising eminent domain authority, thereby limiting the exercise of the eminent domain authority in a Community Redevelopment Area to cities and counties.

In light of the perceived gaps in Florida's eminent domain scheme and the potential adverse affect that *Kelo* could have on Florida takings jurisprudence, the Florida Legislature also passed House Joint Resolution 1569 proposing a constitutional amendment, which, if approved in a November 2006 referendum, would permanently prohibit the transfer of ownership or control of private property taken by eminent domain to any natural person or private entity, unless authorized by general law passed by a three-fifths vote of each house of the Legislature. The amendment would become effective on January 2, 2007.

III. Conclusion

Some government observers feel that the new legislation and proposed constitutional changes are a "knee-jerk" over-reaction to *Kelo* that will undoubtedly have a chilling effect on Florida's ongoing redevelopment efforts. Many property owners, however, believe this legislation is a major step toward preventing government abuse and ensuring that the Founding Fathers' intent to protect private propertyowners will continue to be safeguarded. Governor Bush himself aligned with those seeking protection of property rights and stated in a May 15, 2006 Tampa Tribune editorial, "Florida's private property rights are now the toughest in the nation. I applaud the Florida Legislature for using its power to protect Floridians' fundamental right to own property against the menacing power of eminent domain." In any event, the Legislature's swift and decisive enactment of these new eminent domain laws has sent a clear signal to local governments that protecting the rights of private propertyowners is an important interest in the state of Florida.