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In Honor of Walter O. Weyrach: Florida's Eminent Domain Overhaul: Creating More Problems than it Solved

Scott J. Kennelly

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NOTE

FLORIDA'S EMINENT DOMAIN OVERHAUL: CREATING
MORE PROBLEMS THAN IT SOLVED

*Scott J. Kennelly**

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* J.D. expected May 2008, University of Florida Levin College of Law. This Note is dedicated to my wife Leah for her constant love, support, and patience. I also would like to express the deepest gratitude to my parents, family, the Bartleys, and Daniel Nobel, whose encouragement drives me to succeed. For their guidance throughout the Note-writing process, I would like to recognize Professors Dennis Calfee, Michael Siebecker, and Michael Allan Wolf, my Note advisor Jon Huels, and the hard-working members and staff of the Florida Law Review. My time on this publication has helped make my law school experience a terrific one. I would especially like to thank Dustin Hall, Sam Horovitz, Rob Luck, Jason Marques, Cole Oliver, Garland Reid, Simon Rodell, and Ben Robinson for their friendship, their advice, and for the wonderful experiences we have shared.

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I. INTRODUCTION

A knock at your front door wakes you. Blurry-eyed, you open your door to a government official who tells you that the city would like to purchase your home for a price slightly greater than fair market value. According to the official, most of your neighbors have already agreed to sell their homes so that your “distressed” neighborhood can get an economic facelift, which will include a multi-tower condominium complex. While you briefly consider selling, you are bothered that the government will not put your property to what you deem a traditional public use.¹ Quickly remembering that your state representative helped pass eminent domain reform in Florida last year,² you smile and say that you will not sell your home (which is worth around \$100,000) for less than \$1 million.³ The government official refuses and promises to contact you in the future.

Six months later, you regret having turned away the official. Although you were happy when the city increased fire and police protection and repaved some roads in your neighborhood, the special assessments imposed on you from those projects⁴ have exponentially increased your property tax bill. Along with higher bills, you have repeatedly received government notices demanding that you comply with building permit restrictions and fill out paperwork to prevent the city from demolishing the porch that you are constructing.⁵ Additionally, although you knew of some drug dealing nearby, now the police catch a drug dealer in your neighborhood every few weeks, sometimes through controlled buys in your front yard. The city has warned you that you must take measures to abate this drug-related “public nuisance.”⁶

1. See Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 544 (2006) (arguing that the public is less concerned about undercompensation when the government proposes to use a condemnee’s land for a traditional public use); James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 866 (arguing that true public uses provide the condemnee with “some amount of implicit compensation”).

2. See *infra* notes 21–25 and accompanying text.

3. Now that you have realized that the government needs your property for the development to go forward, you want to get a “monopoly price” by holding out. See *infra* notes 205–07, 211 and accompanying text.

4. See *infra* notes 126–36 and accompanying text.

5. See *infra* notes 149–53 and accompanying text.

6. See *infra* notes 173–84, 186–89 and accompanying text.

Not surprisingly, when the government official again shows up at your door, you decide to “voluntarily” sell your home for slightly more than \$100,000. If you had not sold, the government might have either seized your property for your failure to pay the increased taxes⁷ or condemned your property for failure to abate the nuisance.⁸

Although this hypothetical paints a drastic scenario, the government’s current means likely are not any friendlier to the landowner than those that most people viewed as the “horrors” that occurred when the government used eminent domain for economic redevelopment. Before eminent domain was reformed in Florida,⁹ the government still attempted to negotiate a voluntary sale.¹⁰ If refused, the government had to follow the necessary eminent domain procedures,¹¹ to demonstrate that the proposed project qualified as a “public use,”¹² and ultimately to pay “just compensation.”¹³ Still, the fear and perception that landowners were given unjust compensation and that corrupt officials were abusing eminent domain to yield only private benefits has driven a harsh reaction to the U.S. Supreme Court’s 2005 ruling in *Kelo v. City of New London*.¹⁴ In *Kelo*, the Court upheld New London’s use of eminent domain to acquire land for a private development project.¹⁵ The Court reasoned that the project’s promise to create jobs, increase tax revenues, and revitalize an economically distressed area resulted in a constitutional “public use.”¹⁶

After *Kelo*, legislators across the country worried that “economic redevelopment” would become a blanket justification for eminent domain.¹⁷ Florida legislators acted quickly.¹⁸ One day after *Kelo* was

7. See *infra* note 137 and accompanying text.

8. See *infra* notes 173–84 and accompanying text.

9. See *infra* notes 21–25 and accompanying text.

10. See *infra* note 112 and accompanying text.

11. See *infra* note 113 and accompanying text.

12. See *infra* notes 46–53 and accompanying text.

13. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); FLA. CONST. art. X, § 6 (“No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.”).

14. 545 U.S. 469 (2005). Indeed, “*Kelo* remains a popular punching bag in the media.” Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1415 (2006); accord Robert C.L. Moffat, “*Not the Law’s Business: The Politics of Tolerance and the Enforcement of Morality*,” 57 FLA. L. REV. 1097, 1120 (2005) (noting the widespread backlash to the *Kelo* decision).

15. *Kelo*, 545 U.S. at 489–90.

16. *Id.* at 472, 490.

17. Florida Governor “Jeb Bush called the [*Kelo*] decision ‘horrible’” and urged quick state action. Carrie Johnson, *Property Ruling Appalls Officials*, ST. PETERSBURG TIMES, June 25, 2005, at 1B. The Alabama Senate reacted first, prohibiting local governments from using eminent domain for private development or to increase tax revenue. CASTLE COAL., INST. FOR JUSTICE, LEGISLATIVE ACTION SINCE *KELO* 2 (2006), available at [http://www.castlecoalition.org/pdf/legislation/state%](http://www.castlecoalition.org/pdf/legislation/state%20action%20since%20kelo%202.pdf)

decided, Florida's House of Representatives created the House Select Committee to Protect Private Property Rights.¹⁹ The committee was created to prevent *Kelo*'s perceived horrors by setting clear guidelines to allow eminent domain only where there is a clear public necessity and benefit.²⁰ After passing a bill intended to limit abuses of eminent domain,²¹ the Florida Legislature crafted a constitutional amendment to place before voters in a statewide referendum.²² Voters overwhelmingly passed this amendment on November 7, 2006.²³ Florida's current framework requires the government to wait ten years before transferring to a private entity private property taken by eminent domain and forbids the use of eminent

20legislative%20summary%2008-03-06.pdf. Georgia passed legislation that narrowed the definition of "blight" for condemnation purposes and declared that economic development was not a "public use." *Id.* at 4. Within one year of *Kelo*, twenty-nine of the forty-five states that had 2006 legislative sessions, including Florida, passed eminent domain reform. *Id.* at 1.

18. The *Kelo* Court indicated "that nothing in [its] opinion precludes any State from placing further restrictions on its exercise of the takings power." *Kelo*, 545 U.S. at 489. Florida was one of many states to react quickly to the decision. *See supra* note 17.

19. *Kelo* was decided on June 23, 2005. *Kelo*, 545 U.S. at 469. On June 24, 2005, Allan Bense, the Speaker of the Florida House of Representatives, announced that he was "immediately appointing a select committee of the Florida House of Representatives . . . to identify any areas of ambiguity and recommend appropriate changes to make sure the unfortunate situation . . . seen in Connecticut is not repeated in the state of Florida." Press Release, Fla. House of Representatives, Speaker Appointing Select Committee to Protect Private Property Rights (June 24, 2005), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?DocumentType=Press%20Release&FileName=64>.

20. *See* Press Release, Fla. House of Representatives, Speaker Appoints Members of Select Committee to Protect Private Property Rights (July 15, 2005), available at <http://www.myfloridahouse.gov/Sections/HouseNews/preview.aspx?PressReleaseId=66>.

21. *See* H.B. 1567, 108th Leg., Reg. Sess. (Fla. 2006) (creating FLA. STAT. §§ 73.013, 73.014, amending FLA. STAT. §§ 73.021, 127.01, 127.02, 163.335, 163.340, 163.345, 163.358, 163.370, 163.380, 166.401, 166.411, and repealing FLA. STAT. § 163.375). The bill passed on May 4, 2006, and became law on May 11, 2006. *Id.* It generally prohibits the transfer of property taken by eminent domain, with some enumerated exceptions, to another private entity within ten years of the taking. *See* FLA. STAT. § 73.013 (2007). Additionally, the bill prohibits the use of eminent domain to eliminate "blight" or "slum" conditions or to eliminate public nuisances. *See id.* § 73.014.

22. *See* H.R.J. Res. 1569, 108th Leg., Reg. Sess. (Fla. 2006) (codified at FLA. CONST. art. X, § 6). The Florida Constitution now includes the following provision: "Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings . . . may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature." FLA. CONST. art. X, § 6.

23. Les Christie, *Kelo's Revenge: Voters Restrict Eminent Domain*, CNNMONEY.COM, Nov. 8, 2006, http://money.cnn.com/2006/11/08/real_estate/kelos_revenge/index.htm (reporting that 69% of Florida voters passed the amendment). The passage of the amendment, or other ballot provisions for that matter, is not surprising. *See* Ballotwatch, Complete State-by-State Election Results (BW 2004-10) and Election Results 2006 (BW 2006-5), <http://www.iandrinstute.org/ballotwatch.htm> (last visited Feb. 10, 2008) (reporting that 67% of all state ballot propositions were approved by voters in both the 2004 and 2006 elections).

domain to eliminate “blight” conditions or public nuisances.²⁴ Additionally, the Florida Constitution requires a three-fifths majority in both legislative houses to grant exceptions to the eminent domain prohibitions on private use.²⁵

This Note initially discusses how the Florida Legislature’s reaction to *Kelo* was unnecessary.²⁶ However, accepting that the legislature felt the influence of the body politic to enact significant eminent domain reform,²⁷ this Note argues that the legislature did not fully consider the consequences of its actions. Instead, the legislature’s measures were overly broad and created ambiguity.²⁸ Additionally, the measures will have unintended consequences that could leave landowners and the community worse off than under the previous system.²⁹ Finally, this Note offers solutions that would both provide Florida with a more comprehensive eminent domain framework and capture the Florida Legislature’s actual intent to curb abuse and provide opportunities that benefit the public.³⁰

II. LEGISLATION WAS UNNECESSARY TO REACH THE DESIRED CONCLUSION

A. Existing Law Did Not Allow Takings for Economic Development

In the midst of strong public opinion against the *Kelo* decision,³¹ the Florida Legislature did not adequately analyze existing state case law to determine if a situation like the one addressed in *Kelo* could happen in Florida.³² Many state courts before and after *Kelo* had, without relying on

24. See *supra* note 21.

25. See *supra* note 22.

26. See *infra* Part II.

27. See *infra* note 31.

28. See *infra* Part III.

29. See *infra* Part IV.

30. See *infra* Part V.

31. See Castle Coal., The Polls Are In, http://www.castlecoalition.org/resources/kelo_polls.html (last visited Feb. 10, 2008) (listing post-*Kelo* public opinion polls that indicate negative reactions to the decision); see also Theodore C. Taub, Workshop, *Post-Kelo: Emerging Impacts and Issues in Eminent Domain* (ALI-ABA Course of Study, Aug. 17–19, 2006), WL SM004 ALI-ABA 1721, 1772 (“*Kelo* shook the American people out of their malaise concerning the extent of the governmental eminent domain power. Overwhelmingly, America’s reaction to this power has been negative in the extreme, mainly due to the oversimplifications and exaggerations of alarmists.”). One poll indicated that 88% of Floridians disagreed with the *Kelo* ruling and 89% supported legislation increasing property protections. *Florida Voters Favor Eminent Domain Restrictions*, JACKSONVILLE BUS. J., Nov. 8, 2005, <http://jacksonville.bizjournals.com/jacksonville/stories/2005/11/07/daily12.html>.

32. Florida House Speaker Bense remarked that the legislature created the House Select Committee to Protect Private Property Rights out of concern arising from the *Kelo* decision. See Press Release, Fla. House of Representatives, *supra* note 19. It is worth noting that local

reactionary statutes or constitutional amendments, held that economic redevelopment could in itself justify the use of eminent domain.³³ In fact, the first state supreme court to rule in an eminent domain case after *Kelo* invalidated the challenged taking for this reason.³⁴

In *City of Norwood v. Horney*,³⁵ the City of Norwood planned to use eminent domain to take several properties and then turn them over to a private developer.³⁶ The city justified the takings on the basis of economic benefit to the city and a study that found that the area was “deteriorating.”³⁷ The Ohio Supreme Court invalidated the forward-looking “deteriorating” justification and held that economic benefit alone was not sufficient under the state constitution to justify a taking of private property.³⁸ In 2006, similar invalidations based on state constitutions occurred in Michigan,³⁹ Oklahoma,⁴⁰ and Pennsylvania.⁴¹

governments wishing to exercise eminent domain would have had to adhere to Florida’s more strict state law rather than the federal standard. *See* Johnson, *supra* note 17.

33. *See, e.g.*, *City of Little Rock v. Raines*, 411 S.W.2d 486, 494–95 (Ark. 1967) (holding invalid a taking for the benefit of private industries because industrial development did not constitute a “public use”); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 7–8 (Ky. 1979) (holding invalid a statute granting the government the right to condemn private property for private industrial and commercial development under the state constitution’s “public use” clause); *Merrill v. City of Manchester*, 499 A.2d 216, 217–18 (N.H. 1985) (holding invalid a taking for industrial development under the state constitution’s narrow “public use” clause); *Karesh v. City Council*, 247 S.E.2d 342, 344–45 (S.C. 1978) (holding invalid a taking of land for lease to a private developer based on the state constitution’s narrow view of “public use”); *In re City of Seattle*, 638 P.2d 549, 559–60 (Wash. 1981) (holding that the state constitution’s “public use” clause prohibited the taking of private property for commercial development); *see also infra* notes 39–41 and accompanying text.

34. Francesca Jarosz, *Before You Grab That Property*, BUS. L. TODAY, Jan.–Feb. 2007, at 37, 38.

35. 853 N.E.2d 1115 (Ohio 2006).

36. *Id.* at 1124–26.

37. *Id.* at 1125.

38. *Id.* at 1142, 1146.

39. *See* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 775–76, 784 (Mich. 2004) (holding that while job creation and increasing tax revenues were goals that advance a “public purpose,” constructing a private business and technology park did not justify a taking because the privately owned structures did not constitute a “public use” under the state constitution).

40. *See* *Bd. of County Comm’rs v. Lowery*, 136 P.3d 639, 649–50 (Okla. 2006) (invalidating a proposed taking for a pipeline that would benefit a private entity and enable economic development because there was not a “public purpose” as required by the state constitution).

41. *See In re Redevelopment Auth.*, 891 A.2d 820, 830–31 (Pa. Commw. Ct. 2006) (noting that although the taking of private property to build a private religious school was invalidated by the Establishment Clause, *Kelo*-type takings are also prohibited by the state constitution’s “public use” requirement), *aff’d in part, rev’d in part*, No. 36 EAP 2006, 2007 WL 4555540 (Pa. Dec. 27, 2007). The Pennsylvania Supreme Court subsequently reversed, finding that the taking did not violate the Establishment Clause and citing *Kelo* in holding that the exercise of eminent domain to eliminate blight is proper. *In re Redevelopment Auth.*, 2007 WL 4555540, at *6.

If the Florida Legislature had sufficiently considered state case law, the legislature might have realized that its fears of eminent domain being used for economic redevelopment lacked a solid foundation.⁴² After all, Florida's constitutional and statutory law provided greater private-property protection than either the U.S. Constitution or the Connecticut law analyzed in *Kelo*.⁴³ In fact, the Connecticut Supreme Court stated, in its *Kelo* decision,⁴⁴ that Florida had a more restrictive view of what constituted a "public use."⁴⁵

Florida's previous takings system permitted some private benefit but only when the benefit was merely incidental to a public purpose.⁴⁶ Most notably, in *Baycol, Inc. v. Downtown Development Authority*,⁴⁷ the Florida Supreme Court reaffirmed that the government could not use eminent

42. This is not to suggest that all property law develops out of rash public opinion or even out of the persuasion of dominant interest groups. According to Saul Levmore, property law develops in two different ways: (1) on an efficient path where new property rights evolve out of the expectation that the value from their creation will exceed the expected costs and (2) out of the ideas of interest groups using their political influence to obtain property laws they deem favorable. Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 182–83 (2003); see also Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 100 (2005) (arguing that interest groups often seek to change the law in certain states rather than pursue "sweeping national changes").

43. Press Release, Office of the Attorney Gen. of Fla., Crist Offers Ideas for Protecting Property Rights (Aug. 17, 2005), available at <http://myfloridalegal.com/newsrel.nsf/newsreleases/2D9FC76C62CA763085257060005AC48C>.

44. 843 A.2d 500 (Conn. 2004).

45. *Id.* at 532 ("We acknowledge that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have, using a narrow view of their public-use clauses, ruled that economic development is, by itself, not public use for eminent domain purposes." (footnote omitted)).

46. See *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 455 (Fla. 1975); see also *Panama City v. State*, 93 So. 2d 608, 613–14 (Fla. 1957) (approving small, private concession buildings on condemned land because they were incidental to the other public facilities); *Sunny Isles Fishing Pier v. Dade County*, 79 So. 2d 667, 667–69 (Fla. 1955) (approving a lease for a private fishing pier on a large public beach); *Gate City Garage, Inc. v. City of Jacksonville*, 66 So. 2d 653, 658–59 (Fla. 1953) (approving a lease on property seized by eminent domain where the remainder of the property was used as a large public parking lot). Although the court in *Baycol* used the term "public purpose" synonymously with "public use," *Baycol*, 315 So. 2d at 455, the Florida Supreme Court later viewed this language as dictum and indicated a stricter eminent domain standard requiring "public use." See *Dep't of Transp. v. Fortune Fed. Sav. & Loan Ass'n*, 532 So. 2d 1267, 1270 (Fla. 1988); see also *Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238, 251 n.16 (Fla. 2001). Additionally, the Florida Supreme Court has distinguished between "public benefit" and "public purpose," permitting only the latter to serve as a justification for using eminent domain. See *Grubstein v. Urban Renewal Agency*, 115 So. 2d 745, 751 (Fla. 1959); cf. *White v. Pinellas County*, 185 So. 2d 468, 470 (Fla. 1966) ("'[P]ublic purpose' or 'public use' . . . in this case, as in many others, . . . are synonymous.").

47. 315 So. 2d 451 (1975).

domain to take private property for a predominantly private use.⁴⁸ Rather, the government could exercise eminent domain only for necessary public uses.⁴⁹ In *Baycol*, the government condemned property on which a parking garage and a shopping mall would be constructed.⁵⁰ Although the proposed parking was for the public, the court refused to validate the taking because there was no “public need” for parking absent the private shopping mall.⁵¹ Similarly, in *Grubstein v. Urban Renewal Agency*,⁵² the Florida Supreme Court indicated that mere economic redevelopment could not justify the use of eminent domain.⁵³ Thus, in Florida, there was not a legitimate fear that “big, bad government” would take our land.⁵⁴

B. Rampant Corruption Was Illusory

The fear of corruption in the takings process also drove the pervasive eminent domain reforms.⁵⁵ Eminent domain abuse has certainly been documented,⁵⁶ but such abuse was not actually as prevalent as thought.

48. *Id.* at 455.

49. *Id.*

50. *Id.* at 453–54.

51. *Id.* at 458.

52. 115 So. 2d 745 (Fla. 1959).

53. *Id.* at 750 (holding valid provisions that allow the clearance and private redevelopment of “slum areas” where the redevelopment relates directly to the public health, safety, and welfare); *see also Baycol*, 315 So. 2d at 457 (noting that *Grubstein* validated “condemnation of blighted or slum areas for public housing as a public purpose . . . based upon proof that the area involved had become infested with crime and disease affecting the public health and welfare, which, of course, is a proper public purpose”).

54. *See Johnson*, *supra* note 17 (quoting Michael Allan Wolf, a professor at the University of Florida Levin College of Law).

55. For example, “corruption” might result if an interest group “captured” the condemnation process to profit personally. *See Cohen*, *supra* note 1, at 546; Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 52 (1998); *see also* STEVEN GREENHUT, ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN 1–2 (2004) (typifying eminent domain corruption as where the government tells a landowner that she must surrender her property to make way for development by “a wealthy developer—perhaps a big campaign contributor and mover and shaker in the community, or an out-of-town corporation promising an expanded tax base”).

56. *See, e.g.,* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 52 (2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf. Berliner’s report lists a total number of “known condemnations benefiting private parties,” but the report gleans this number primarily from news stories. *Id.* In Florida, based on this arguably inaccurate information regarding a five-year period, there were only eight known development projects, resulting in sixty-seven filed condemnations, that would benefit a private party. *Id.* During that same period, there were 14,319 condemnations filed for all purposes in Florida. *Id.* Despite the report’s finding that only 0.47% of filed condemnations had a “private benefit,” the report concludes that “Florida cities are eager to use eminent domain as a redevelopment . . . tool.” *Id.* Moreover, Berliner’s report fails to explain whether the private benefit was incidental to some much greater public benefit or whether there was

Although eliminating “slum” and “blight” has long been considered a “public use,”⁵⁷ some people may have viewed the government’s use of eminent domain for this purpose as improper because of their misunderstanding of what conditions were necessary for an area to be deemed “blighted.”⁵⁸ Indeed, “the ordinary person pictures blight as rats and buildings that are falling down,”⁵⁹ even though such extreme circumstances have never been required for a property to be considered in this category.⁶⁰ Further, the public may have had a general impression that a purported “public use” after the taking was merely incidental to some underlying private benefit.⁶¹ Florida law, however, previously addressed this issue by requiring any private benefit to be incidental to a justified public purpose.⁶²

To be sure, egregious examples fueled public perception,⁶³ but those extreme examples should not have been enough to prohibit the use of eminent domain for mostly beneficial projects.⁶⁴ Unfortunately, the more difficult case, where a project has a minor private benefit but a great public purpose,⁶⁵ does not make for an exciting news story. Thus, the public never learns about those types of projects. Still, if the Florida Legislature wanted to curb the *perceived* abuse, it failed to recognize other legal avenues that government officials with corrupt purposes might use to achieve the same ends.⁶⁶

actually corruption that benefitted one at the expense of many. *See also* GREENHUT, *supra* note 55, at 2 (construing Berliner’s data to support the proposition that “[i]n thousands of documented recent cases . . . property owners are being forced to sacrifice their dreams to government agents acting on behalf of big developers, gambling casinos, large retail stores and multibillion-dollar corporations”).

57. *See* 29A C.J.S. *Eminent Domain* § 49 (2007).

58. *See* BERLINER, *supra* note 56, at 5.

59. *Id.*

60. *See* 29A C.J.S. *Eminent Domain* § 49 (2007).

61. *See* Cohen, *supra* note 1, at 544 (arguing that “there is always a risk that the claimed public benefit . . . is ‘merely incidental’ to the true benefits accruing to the benefited private transferee” because of the deferential review of the public-use requirement).

62. *See supra* text accompanying notes 46–53.

63. *See* Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 35 (2006) (describing several eminent domain abuses, including New Jersey’s condemnation of property in Atlantic City that allowed Donald Trump to build a limousine parking lot).

64. Using this logic, one could ask whether we should prohibit corporations from giving stock options to CEOs because of egregious and highly publicized examples of stock option fraud by executives. *See* Charles Forelle & Nick Wingfield, *Apple Cites New ‘Irregularities,’ May Restate Results*, WALL ST. J., Aug. 4, 2006, at A3 (noting that more than eighty firms were under investigation for improprieties relating to backdating of stock options).

65. *See supra* note 46; *see also* Carrie Weimar, *Crimping Eminent Domain*, ST. PETERSBURG TIMES, Nov. 13, 2006, at 1B (noting that a city-owned parking garage, used by privately owned businesses, was built on land obtained through eminent domain).

66. *See infra* Part IV.

III. THE LEGISLATURE DID NOT FULLY CONSIDER THE CONSEQUENCES OF REFORM

Florida was not alone in reacting quickly to *Kelo*.⁶⁷ This Note's discussion in Part II is not intended merely to criticize⁶⁸ but rather to explain that Florida's legislative process was not deliberately conceived. By reacting quickly, the Florida Legislature inadequately addressed the complicated issue of eminent domain⁶⁹ and created an overly broad and ambiguous legislative framework.

A. Prohibiting Eminent Domain to Abate Public Nuisances

Private-property rights activists and Florida officials applauded the creation of the House Select Committee to Protect Private Property Rights.⁷⁰ However, almost no one predicted that the legislation that ultimately passed⁷¹ would be so extreme. For example, then-Florida Attorney General Charlie Crist's⁷² recommendations to the committee included (1) strengthening the criteria for determining whether "blight" exists and (2) shifting the presumption to favor the property owner instead of the government.⁷³

Mostly consistent with these recommendations, the committee's proposed legislation eliminated "slum" and "blight" as justifications for using eminent domain but permitted using eminent domain to eliminate threats to public health and safety.⁷⁴ The committee unanimously approved

67. See *supra* note 17.

68. "Any fool can criticize, condemn and complain and most fools do." Thinkexist.com, Criticism Quotes, <http://thinkexist.com/quotations/criticism/> (last visited Feb. 10, 2008) (quoting Benjamin Franklin).

69. Patricia Salkin, an associate dean and director of the Government Law Center at Albany Law School, warned that "quick reactions [to *Kelo*] can lead to ineffective policy." Jarosz, *supra* note 34, at 39. She recognized that most legislators want to be able to extoll their accomplishments to voters; thus, legislators will act before carefully examining their states' practices. *Id.*

70. See Jeb Bush, *Florida Safeguards Private Property*, TAMPA TRIB., May 15, 2006, at 15; Press Release, Castle Coal., Florida Enacts Meaningful Eminent Domain Reform, Bill One of Strongest Passed Nationwide (May 12, 2006), available at http://www.castlecoalition.org/media/releases/5_12_06pr.html; Press Release, FreedomWorks, FreedomWorks Florida Applauds Florida Eminent Domain Reform (May 18, 2006), available at http://www.freedomworks.org/newsroom/press_template.php?press_id=1813; Press Release, Office of the Attorney Gen. of Fla., *supra* note 43.

71. See *supra* notes 21–22 and accompanying text.

72. Charlie Crist was elected Florida's governor in November 2006. Florida Governor Charlie Christ: Executive Office of the Governor, Biography, http://www.flgov.com/gov_biography (last visited Feb. 10, 2008).

73. Press Release, Office of the Attorney Gen. of Fla., *supra* note 43.

74. See H.B. 1567(NS), 108th Leg., Reg. Sess. (Fla. 2006) (first engrossed version, Apr. 5,

this proposed legislation.⁷⁵ Specifically, the committee intended that the legislature provide courts with guidelines for determining when threats to health and safety existed.⁷⁶ On May 2, 2006, however, on motions by Florida Senator Daniel Webster, the bill was withdrawn from the Committees on Judiciary and Community Affairs, and a significant amendment was proposed.⁷⁷ The amendment would create Florida Statutes § 73.014, which would prohibit the use of eminent domain to abate or eliminate public nuisances, including ongoing public health and safety threats.⁷⁸

Two days later, the Senate adopted Webster's amendment, passed the bill, and certified it to the Florida House of Representatives,⁷⁹ which unanimously concurred.⁸⁰ Within those two days, local governments were stripped of the power to use eminent domain to deal with public nuisances.⁸¹ This prohibition likely resulted from a concern about abuse of the "public nuisance" classification. Indeed, courts had given discretion to local governments' classifications of activities as public nuisances.⁸²

2006); Stephen Majors, *House Panel Seeks Checks on Eminent Domain*, BRADENTON HERALD, Mar. 14, 2006, at 1.

75. Majors, *supra* note 74. The committee eventually reached a consensus that an "existing threat to health or safety" could justify a local government's use of eminent domain. Stephen Majors, *Lawmakers Working to Protect Private Property*, BRADENTON HERALD, Feb. 22, 2006, at 7.

76. Majors, *supra* note 74 (noting that the Florida Legislature could instruct the courts that a fire hazard or vermin infestation constituted a threat to public health and safety).

77. S. JOUR. 108-18, Reg. Sess., at 798-99 (Fla. 2006).

78. *Id.*

79. S. JOUR. 108-20, Reg. Sess., at 799, 804 (Fla. 2006).

80. H.R. JOUR. 108-26, Reg. Sess., at 984 (Fla. 2006).

81. The current statute reads as follows:

Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated *may not exercise the power of eminent domain to take private property for the purpose of abating or eliminating a public nuisance*. Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, abating or eliminating a public nuisance is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution. This subsection does not diminish the power of counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement or the elimination of public nuisances to the extent such ordinances do not authorize the taking of private property by eminent domain.

FLA. STAT. § 73.014(1) (2007) (emphasis added).

82. See *infra* notes 193-94 and accompanying text; see also *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 884 (Fla. 1972) ("The Legislature has broad discretion to designate a particular activity to be a public nuisance." (citing *Pompano Horse Club v. State ex rel.*

But this prohibition is overly broad, especially because Florida case law already held that overly restrictive nuisance abatement actions constituted takings.⁸³ In *Keshbro, Inc. v. City of Miami*,⁸⁴ the Florida Supreme Court invalidated a one-year closure of an apartment complex by the city's nuisance abatement board.⁸⁵ The court reasoned that there was no indication of persistent drug activity at the complex.⁸⁶ Similarly, the Second District Court of Appeal in *City of Saint Petersburg v. Bowen*⁸⁷ concluded that a temporary compensable taking occurred when the city ordered Bowen's property closed for one year.⁸⁸ The appellate court reasoned that although the city had determined that illegal drug activity on Bowen's property created a public nuisance, the closure constituted a taking because it proscribed all uses of the property rather than the particular nuisance.⁸⁹ The appellate court also noted that the closure was "one of the most invasive methods of abating the purported nuisance that was available."⁹⁰

B. Prohibiting "Beneficial Takings"

Although the legislature explicitly prohibited the use of eminent domain to abate public nuisances, it did away with an entire category of takings more subtly. The near-total prohibition on taking private property and then transferring the property to private ownership precludes "beneficial takings" from occurring.⁹¹ There are many privately run operations that, although not traditional "public uses" (e.g., roads and public utility facilities),⁹² fulfill a considerable "public purpose." Florida's current rule prevents the government from using eminent domain for

Bryan, 111 So. 801 (Fla. 1927)); *Bal Harbour Vill. v. Welsh*, 879 So. 2d 1265, 1267 (Fla. 3d DCA 2004) ("The legislature has broad discretion to declare a particular activity to be a public nuisance and enact legislation to abate [it].").

83. See *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 876–77 (Fla. 2001); *City of Saint Petersburg v. Bowen*, 675 So. 2d 626, 631–32 (Fla. 2d DCA 1996).

84. 801 So. 2d 864 (Fla. 2001).

85. *Id.* at 876–77.

86. *Id.* at 877. However, where another property's operation was inextricably intertwined with drug-related activity, the court allowed a similar temporary closure. *Id.* at 876; see also *infra* notes 178–84 and accompanying text.

87. 675 So. 2d 626 (Fla. 2d DCA 1996).

88. *Id.* at 628, 632.

89. *Id.* at 627–28, 632.

90. *Id.* at 629.

91. See Cohen, *supra* note 1, at 565–66, 565 n.438 (noting that these "benign" uses, where a government's assessment of whether to condemn property is more likely to be made in good faith, would be prohibited by an overarching rule without exceptions).

92. See Alan C. Weinstein, Commentary, *Eminent Domain: Judicial and Legislative Responses to Kelo*, PLAN. & ENVTL. L., Nov. 2006, at 3, 10.

“beneficial takings,” such as constructing performing arts centers, sports arenas, not-for-profit hospitals, or museums operated by non-public entities.⁹³

Interestingly, the Florida Statutes expressly authorize the use of eminent domain to construct, among other things, hospitals.⁹⁴ However, this authorization is tempered by the fact that property for this use cannot be transferred to a private entity.⁹⁵ Expectedly, prohibiting the transfer of lands taken by eminent domain to a private entity will lead to government-run development and enterprises,⁹⁶ such as hospitals, parking facilities,⁹⁷ and stadiums,⁹⁸ or will prevent advantageous projects from being constructed.⁹⁹ The Florida Constitution does provide a window of opportunity for privately run beneficial takings—the legislature may permit this type of taking with the support of three-fifths of both houses.¹⁰⁰ But one has to wonder whether this exception will lead to the undesirable outcome of merely shifting the risk of corruption from local governments to the state legislature.¹⁰¹

C. *Creating Ambiguity in the Law*

The legislative vote that is required to convey “[p]rivate property taken by eminent domain . . . to a natural person or private entity”¹⁰² is also ambiguous. This ambiguity becomes evident by considering two common scenarios. First, an electric company wishes to acquire, via the local government’s exercise of eminent domain, a utility easement through a

93. See Cohen, *supra* note 1, at 565. Also, parking garages and other redevelopment projects that have proven successful have been prohibited under the new framework. See Johnson, *supra* note 17; Weimar, *supra* note 65.

94. FLA. STAT. § 166.411 (2007) (authorizing the use of eminent domain to accomplish the purposes stated in § 180.06).

95. See *id.* § 73.013 (expressly prohibiting the transfer of property taken by eminent domain to a private entity).

96. See Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/06/the_kelso_case_p.html (June 26, 2005, 21:09 EST) (noting that the City of New London’s use of eminent domain likely would survive a public-use challenge if it had built office space and parking on condemned land).

97. See Weimar, *supra* note 65.

98. George W. Bush, then-managing partner of the Texas Rangers Major League Baseball team, helped convince the city of Arlington, Texas, to use eminent domain to seize property for a privately run baseball complex. See *City of Arlington v. Goldust Twins Realty Corp.*, 41 F.3d 960, 962 (5th Cir. 1994); Bob Sablatura, *Campaign '94: George W. Bush; Campaign Brings Renewed Scrutiny of Stadium Deal*, HOUSTON CHRON., May 8, 1994, at A11.

99. See Moffat, *supra* note 14, at 1120–21 (“The immediate outcry of protest [from *Kelo*] has resulted in many large, socially worthwhile projects being dropped for fear of adverse publicity.”).

100. See *supra* note 22.

101. See *infra* Part IV.C.

102. FLA. CONST. art. X, § 6.

neighborhood. Second, the electric company wishes to convey a portion of that easement to a broadband Internet company. Both conveyances are seemingly permitted under Florida Statutes § 73.013, which provides exceptions to the prohibition on private-to-private transfers of land taken by eminent domain.¹⁰³ However, the Florida Constitution now prohibits the conveyance of private property taken by eminent domain “to a natural person or private entity.”¹⁰⁴

An ambiguity arises from the sequence in which these provisions were enacted.¹⁰⁵ Although a conveyance to a utility is permitted by the statute,¹⁰⁶ the subsequently passed¹⁰⁷ constitutional amendment would supersede the statute.¹⁰⁸ Thus, according to the express terms of the Florida Constitution, the Florida Legislature must approve by a three-fifths majority a general law authorizing these simple transfers.¹⁰⁹

It is also unclear whether the legislature would be permitted to pass a “blanket” authorization for such transfers or whether the legislature would be constitutionally required to authorize the transfers on an ad hoc basis. Indeed, the express language of the Florida Constitution is singular: “[P]roperty taken . . . pursuant to a *petition* to initiate condemnation proceedings”¹¹⁰ Therefore, a legislative authorization for multiple transfers might be unconstitutional.

Moreover, even if an electric company could lawfully *acquire* the easement by eminent domain (i.e., it was not deemed a *transfer* but an initial acquisition) under Florida Statutes § 73.013, as in the first example, the subsequent transfer to a broadband Internet company would be prohibited by the Florida Constitution. The electric company is a private entity that acquired private property by eminent domain, and now the electric company wishes to convey that property to the broadband Internet

103. “[O]wnership or control of property acquired [by eminent domain] may not be conveyed . . . to a natural person or private entity . . . except . . . to a natural person or private entity: . . . (c) That is a public or private utility for use in providing electricity services or systems, . . . telephone . . . , or similar services or systems” FLA. STAT. § 73.013(1) (2007).

104. *See supra* note 22.

105. House Bill 1567, which created Florida Statutes § 73.013, became effective on May 11, 2006. *See supra* note 21. The constitutional amendment became law upon passage on November 7, 2006. *See supra* notes 22–23 and accompanying text.

106. *See supra* notes 21, 103.

107. *See supra* notes 22–23 and accompanying text.

108. *See State ex rel. Curley v. McGeachy*, 6 So. 2d 823, 827 (Fla. 1942) (“The provisions of the Constitution will always prevail over statutes where there is conflict between the two”); *Pub. Med. Assistance Trust Fund v. Hameroff*, 689 So. 2d 358, 359 (Fla. 1st DCA 1997) (“[N]either the common law nor a state statute can supercede a provision of the federal or state constitutions.”).

109. *See supra* note 22.

110. FLA. CONST. art. X, § 6 (emphasis added).

company, another private entity.¹¹¹ Although the legislature likely did not intend to prohibit this type of transfer, the Florida Constitution's express language would forbid the transfer.

IV. UNINTENDED CONSEQUENCES OF REFORM

Even more than the specific consequences that result from the legislative language, the entire scheme of eminent domain reform will result in a general host of negative consequences. Governments typically used eminent domain as a last resort to acquire land for economic redevelopment because settling the dispute directly with the landowner was more practical, easier, and less expensive.¹¹² Governments preferred settling because seeking to take property by eminent domain required governments to follow elaborate statutory procedures.¹¹³ Despite the recent reforms, those officials who would use government power for corrupt purposes will continue to do so. However, without the ability to use eminent domain for projects that will end up in private hands, these officials will turn to mechanisms that lack the same procedural checks and are more harmful to property owners.¹¹⁴

Indeed, Florida's current system does not prohibit the government from seizing property; instead, the system merely prohibits seizure through the

111. Merely because Florida law permits the electric company to acquire property taken by eminent domain does not render the company a public entity.

112. See Weimar, *supra* note 65. This is because acquiring property through eminent domain involves the costs of litigating the taking in court. See Bell & Parchomovsky, *supra* note 14, at 1441; see also WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 69 (1995) (noting that an empirical study of the use of eminent domain verified that eminent domain is less efficient than voluntary transfers for acquiring property (citing Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 473–97 (1976))); *infra* note 210 and accompanying text (describing the statutory procedures for taking property under eminent domain).

113. FLA. STAT. § 166.401 (2007) (requiring the local government to adopt a resolution authorizing the acquisition of property by eminent domain); *id.* §§ 74.031–.111 (requiring the condemning authority to file a declaration of taking, including a statement about the property taken and an appraisal of each parcel in the proceeding; the clerk of the court to issue summons to show cause to the affected landowners; and hearings if the landowners request them); FISCHER, *supra* note 112, at 69.

114. See Bell & Parchomovsky, *supra* note 14, at 1416, 1439–40 (arguing that a strict public-use requirement will likely encourage more uncompensated government takings that are achieved by using other available government powers). To combat this phenomenon, Bell and Parchomovsky suggest that the public-use rule “should be set to match the rules restricting other government powers.” *Id.* at 1439. A system without such a comprehensive framework would lead to other undesirable results because “[i]n a state where corruption abounds, laws must be very numerous.” Thinkexist.com, Corruption Quotes, <http://thinkexist.com/quotes/with/keyword/corruption/2.html> (quoting Publius Cornelius Tacitus) (last visited Feb. 10, 2008).

use of eminent domain.¹¹⁵ A local government can still tax, regulate,¹¹⁶ and attempt to abate public nuisances¹¹⁷ to effectively seize property or to coerce landowners into selling their property.¹¹⁸ Additionally, the Florida Legislature can override the prohibition on private-to-private transfers,¹¹⁹ and this power merely shifts the risk of “corruption” from local governments to the state. Unfortunately, the public did not properly see eminent domain “as the least offensive of government’s property-related powers.”¹²⁰

A. Unbridled Use of the Powers to Tax and Regulate

The U.S. Supreme Court has held that “taxation for a public purpose, however great, [is not a] taking.”¹²¹ Unless a tax is completely arbitrary,¹²² the government may legitimately exercise its taxing power to “take” a landowner’s property without consent and without compensation.¹²³

115. See Bell & Parchomovsky, *supra* note 14, at 1426–27.

116. *Id.* at 1416, 1427–33. Yet despite the concern that “[w]e now have government taxes on our property to the point we feel like renters of the property from the government instead of owners,” H.R. JOUR. 108-11, Reg. Sess., at 363 (Fla. 2006) (explanation of vote by Rep. Bob Allen), the Florida Legislature did not attempt to couple the recent eminent domain reform with additional measures to scrutinize taxation.

117. See FLA. STAT. § 73.014(1) (2007) (“This subsection does not diminish the power of counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement or the elimination of public nuisances to the extent such ordinances do not authorize the taking of private property by eminent domain.”).

118. The government can have the same effect on property by using its taxing power or regulatory powers as it can by using eminent domain. Bell & Parchomovsky, *supra* note 14, at 1432. Bell and Parchomovsky point out the uses of these three powers to achieve the same result:

In the first instance, the government uses its power of eminent domain to seize a use right over a small strip of a lot that abuts a stream and imposes a conservation easement. In the second instance, using its regulatory powers, the government forbids all nonconservational use of the small strip abutting the stream. In the third case, the government taxes lots abutting the stream at the value of the uses carried out within the small abutting strip.

Id.

119. See *supra* note 22.

120. Bell & Parchomovsky, *supra* note 14, at 1416.

121. County of Mobile v. Kimball, 102 U.S. 691, 703 (1880).

122. See Brushaber v. Union Pac. R.R., 240 U.S. 1, 24–25 (1916) (noting that a tax would violate the Fifth Amendment only if the tax is “so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property”); Quarty v. United States, 170 F.3d 961, 968–69 (9th Cir. 1999) (noting that only arbitrarily imposed taxes violate the Takings Clause).

123. See Bell & Parchomovsky, *supra* note 14, at 1433; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 66 (1986). This is true despite the recognition that “the power to tax involves the power to destroy.” *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

Because local governments generally assess real-estate taxes, these governments can extraordinarily affect property values¹²⁴ and can even seize title to private property.¹²⁵

Moreover, a local government may impose very different taxes or narrowly targeted “special assessments”¹²⁶ on select groups of property owners, as long as the basis is not completely arbitrary.¹²⁷ In fact, to be valid, the services funded by a special assessment do not need to confer a unique benefit on the affected property.¹²⁸ There needs to be only a logical relationship between the services provided and the benefit conferred.¹²⁹ In Florida, courts have upheld special assessments for funding road projects,¹³⁰ water management programs,¹³¹ solid-waste disposal services,¹³² police protection,¹³³ and fire protection.¹³⁴

124. Bell & Parchomovsky, *supra* note 14, at 1432. Although Florida’s “Save Our Homes” Act prevents local governments from increasing a homesteaded property’s assessed value by more than 3% annually, the Act does not limit the taxes that the government can impose. *See* FLA. STAT. § 193.155 (2007); City of Jacksonville, Fla., Property Appraiser, Save Our Homes—Amendment 10—Homestead Cap, <http://www.coj.net/Departments/Property+Appraiser/Save+Our+Homes-Amendment+10.htm#Taxcap> (last visited Feb. 10, 2008); Palm Beach County, Property Appraiser, Save Our Homes, <http://www.co.palm-beach.fl.us/papa/SaveOurHomes.htm> (last visited Feb. 10, 2008); Leon County, Property Appraiser, FAQ Answers—Save Our Homes, <http://www.co.leon.fl.us/propappr/faq2.cfm> (last visited Feb. 10, 2008).

125. *See* Bell & Parchomovsky, *supra* note 14, at 1432. Courts have upheld even “in-kind taxation,” which requires the taxpayer to pay in property other than cash, allowing the government to directly seize the taxed property’s title. *Id.*; *see also* Eduardo Moises Penalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2208–10 (2004) (noting that the U.S. Supreme Court has upheld a state’s authority to tax property in-kind).

126. *See* FLA. STAT. ch. 170 (2007); *id.* §§ 197.363, .3632.

127. *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180, 184 (Fla. 1995); Penalver, *supra* note 125, at 2201–04; *see also* *Harris v. Wilson*, 693 So. 2d 945, 949 (Fla. 1997) (upholding a special assessment because there was competent, substantial evidence to support the government’s conclusions of a special benefit from the assessment and those conclusions were not arbitrary); *State v. Sarasota County*, 693 So. 2d 546, 548 (Fla. 1997); Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 258 (2002) (“[E]ven a slight, tenuous correlation between the amount paid in taxes or assessments . . . and the benefits received . . . is sufficient to shield a measure from a takings challenge.”). To be valid, “special assessments” must be likely to confer some specific benefits on the affected property owners. 2 RALPH E. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 34.01[8] (rev. vol. 2006).

128. *Lake County v. Water Oak Mgmt. Corp.*, 695 So. 2d 667, 669 (Fla. 1997).

129. *Id.*

130. *Bodner v. City of Coral Gables*, 245 So. 2d 250, 253 (Fla. 1971).

131. *Sarasota County*, 693 So. 2d at 548–49; *Sarasota Church of Christ, Inc.*, 667 So. 2d at 186–87.

132. *Water Oak Mgmt. Corp.*, 695 So. 2d at 670; *Harris*, 693 So. 2d at 947.

133. *Quietwater Entm’t, Inc. v. Escambia County*, 890 So. 2d 525, 527 (Fla. 1st DCA 2005); *Williams v. Escambia County*, 725 So. 2d 392, 392 (Fla. 1st DCA 1998).

134. *Water Oak Mgmt. Corp.*, 695 So. 2d at 670.

No judicial doctrine exists that mandates when a landowner should be compensated because of excessive taxation.¹³⁵ Thus, a local government could impose high taxes or special assessments to persuade people to sell.¹³⁶ If they do not sell and taxes go unpaid, then the government may seize the property¹³⁷ and ultimately turn the property over to a private entity.¹³⁸

Unlike the broad judicial deference given to taxes,¹³⁹ “courts have developed a massive regulatory takings jurisprudence” to analyze property regulations.¹⁴⁰ The U.S. Supreme Court has held that regulations resulting in a permanent physical invasion of property constitute takings.¹⁴¹ Additionally, in *Penn Central Transportation Co. v. New York City*,¹⁴² the Court listed factors for courts to consider when determining whether a regulation rises to the level of a taking: the extent of interference with the owner’s reasonable investment-backed expectations, the character of the governmental action, and the degree of diminution in property value.¹⁴³

In *Lucas v. South Carolina Coastal Council*,¹⁴⁴ the Court found that a regulation not targeted at nuisance prevention amounts to a taking if the regulation deprives a landowner of all economically beneficial use of the property.¹⁴⁵ Overarching these tests, substantive due process requires that regulations substantially advance a legitimate state interest¹⁴⁶ and yield a government benefit that is roughly proportional to the property

135. Bell & Parchomovsky, *supra* note 14, at 1432–33. The U.S. Supreme Court has consistently rejected challenges to taxes asserted to be excessive. Penalver, *supra* note 125, at 2199. In fact, the Supreme Court upheld a tax that threatened to put a taxpayer out of business. *Id.* (discussing how the Supreme Court in *City of Pittsburg v. Alco Parking Corp.*, 417 U.S. 369 (1974), upheld a 20% tax on parking receipts even though the tax threatened to render the taxpayer’s business unprofitable).

136. See Shannon Behnken, *Priced Out of Paradise*, TAMPA TRIB., Mar. 22, 2007, at 1 (discussing the negative effects of high property taxes on property ownership); see also Steve Bousquet, *Legislators’ Big Challenge: Taxes*, ST. PETERSBURG TIMES, Mar. 6, 2007, at 1A; David McKalip, *Florida Needs Tax Cap*, ST. PETERSBURG TIMES, Feb. 15, 2007, at 17A.

137. See FLA. STAT. § 170.10 (2007) (providing the procedure for instituting legal proceedings against a property owner who fails timely to pay special assessments and for foreclosing on property for nonpayment); *id.* § 173.01 (allowing municipalities to foreclose on special assessment liens). When the local government approves the special assessment by resolution, the assessment lien attaches to the property. BOYER, *supra* note 127, at § 34.01[8].

138. See *infra* notes 195–96 and accompanying text.

139. See *supra* note 135 and accompanying text.

140. Bell & Parchomovsky, *supra* note 14, at 1432–33.

141. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

142. 438 U.S. 104 (1978).

143. *Id.* at 124, 126.

144. 505 U.S. 1003 (1992).

145. *Id.* at 1028–29. The Court indicated that situations where the government deprives a landowner of all economically beneficial use are “relatively rare.” *Id.* at 1019.

146. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

surrendered.¹⁴⁷ As long as a government avoids or passes these regulatory takings tests, it may enact regulations that effectively seize property without providing compensation.¹⁴⁸

A local government may enact regulations to force landowners to jump through strict “procedural hoops” to maintain their property. For example, in *Sosa v. City of West Palm Beach*,¹⁴⁹ the landowner’s lack of diligence led to a government-imposed demolition of his property.¹⁵⁰ In *Sosa*, the city issued a notice and order of condemnation on a structure that Sosa was remodeling.¹⁵¹ The city claimed that an inspection revealed that the structure was severely deteriorated, violated multiple codes, would cost more to repair than the estimated value, and was unsafe for human habitation.¹⁵² After the owner repeatedly failed to obtain the proper certifications and permits yet continued work on his property, the city ordered demolition of the structure.¹⁵³ Sosa brought a claim to challenge the demolition, but the court dismissed it on procedural grounds because Sosa had not complied with the prerequisites for bringing suit.¹⁵⁴

A local government may also use its zoning power to negatively affect land values¹⁵⁵ and ultimately obtain property. For example, the government could limit development,¹⁵⁶ institute temporary moratoriums on processing

147. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

148. *Bell & Parchomovsky*, *supra* note 14, at 1431. To steer clear of a regulatory-takings challenge, a government could also use its taxing power to achieve the same result. *See Note, The Principle of Equality in Takings Clause Jurisprudence*, 109 HARV. L. REV. 1030, 1038 (1996) (arguing that South Carolina could have avoided the Takings Clause scrutiny and effectively prohibited Lucas from developing his beachfront property by taxing him “at an amount that made it fiscally impossible for him to build a home there”).

149. 762 So. 2d 981 (Fla. 4th DCA 2000).

150. *Id.* at 981.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 981–82. Sosa presented his Harris Act claim, *see infra* notes 165–70 and accompanying text, to the city less than 180 days before filing suit and failed to present the city with a property appraisal supporting his claim before bringing suit. *Id.* at 982.

The Act . . . requires that “[n]ot less than 180 days prior to filing an action under this section against a government entity, a property owner . . . must present the claim in writing to the head of the governmental entity. The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property”

Id. (quoting FLA. STAT. § 70.001(4)(a) (1997) (final three alterations in original)).

155. Using this power, the government may adversely affect land values just as much as a partial taking would. *See FISCHEL*, *supra* note 112, at 1.

156. *See Glisson v. Alachua County*, 558 So. 2d 1030, 1032 (Fla. 1st DCA 1990) (holding that the county’s limitation on development for “resource protection” did not on its face constitute a

site plan applications,¹⁵⁷ or impose injunctions on issuing development permits¹⁵⁸ in particular areas. Additionally, the government could use its comprehensive plan to designate certain areas for future government use.¹⁵⁹

In *Palm Beach County v. Wright*,¹⁶⁰ the Florida Supreme Court found that a municipality may legitimately adopt a thoroughfare map to designate corridors for future roadways and to forbid land use activity that would impede future construction of the roadway.¹⁶¹ Although the map was not recorded, was frequently amended, and could adversely affect property values, the court upheld the validity of the map because of the legitimate governmental interest in effective planning.¹⁶² The court noted that even if an individual landowner successfully challenged such a map on the ground that it deprived the landowner of substantially all of the property without compensation,¹⁶³ the government could “choose between paying just compensation to keep the regulation in effect or removing the regulation.”¹⁶⁴

taking).

157. *See* *WCI Cmty's., Inc. v. City of Coral Springs*, 885 So. 2d 912, 914–16 (Fla. 4th DCA 2004) (holding that the city’s use of a temporary moratorium in processing development applications, which caused WCI’s inability to meet its financial commitments, did not constitute a taking). The Florida Legislature proposed an amendment that would make moratoriums on development that last longer than one year actionable under the Bert J. Harris, Jr., Private Property Rights Protection Act, but the proposal died in committee. *See* S. 2852(NS), 109th Leg., Reg. Sess. (Fla. 2007); *see also infra* notes 165–70 and accompanying text.

158. *See* *Bradfordville Phipps Ltd. P’ship v. Leon County*, 804 So. 2d 464, 468, 471 (Fla. 1st DCA 2001) (holding that the county’s twenty-two-month injunction on issuing development permits in a particular area was not a regulatory taking). *But see supra* note 157 (discussing the Florida Legislature’s attempt to discourage moratoriums lasting longer than one year).

159. However, the government may not use such designations solely to depress land values. *See* *Joint Ventures, Inc. v. Dep’t of Transp.*, 563 So. 2d 622, 626 (Fla. 1990) (“[D]eliberately attempting to depress land values in anticipation of eminent domain proceedings . . . has been consistently prohibited.”).

160. 641 So. 2d 50 (Fla. 1994).

161. *Id.* at 51, 54.

162. *Id.* at 53–54. Similarly, the Florida Supreme Court has found that a map of reservation by the Florida Department of Transportation does not constitute a regulatory taking unless the landowner can show that the map deprived him of all or substantial economic use of his property. *Weisenfeld v. Dep’t of Transp.*, 640 So. 2d 73 (Fla. 1994), *aff’g* 617 So. 2d 1071 (Fla. 5th DCA 1993).

163. The court in *Wright* noted that the map may result in a taking, but actions for inverse condemnation must be brought by individual landowners who would have to demonstrate the various factors that lead to a regulatory taking. *Wright*, 641 So. 2d at 54.

164. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 57 (Fla. 1994) (finding that although the roadway reservations were found invalid in a previous case, landowners with property inside the boundaries of the map were not entitled to a per se finding of a taking).

More than a decade ago, the Florida Legislature attempted to protect landowners from overly burdensome regulation by enacting the Bert J. Harris, Jr., Private Property Rights Protection Act.¹⁶⁵ Under the Act, a court faced with a challenged regulation must determine whether the regulation puts an “inordinate burden” on the property owner.¹⁶⁶ Although the statute attempts to define “inordinate burden,”¹⁶⁷ the definition is vague and expansive.¹⁶⁸ The uncertainty in this definition and others in the Act may have been the reason that so few suits were filed under the Act.¹⁶⁹ Moreover, those suits that have been filed have generally been unsuccessful.¹⁷⁰

165. FLA. STAT. § 70.001 (2007) (creating a cause of action for property owners aggrieved by government action that “inordinately burdened an existing use of real property or a vested right to a specific use of real property”).

166. See Julian Conrad Juergensmeyer, *Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 FLA. L. REV. 695, 702–03 (1996). The landowner must show that (1) the regulation leaves him “permanently unable to realize investment-backed expectations on the property” or (2) the regulation disproportionately burdens the landowner and leaves the property with permanently unreasonable uses. Roy Hunt, *Property Rights and Wrongs: Historic Preservation and Florida's 1995 Private Property Rights Protection Act*, 48 FLA. L. REV. 709, 717 (1996).

167. See FLA. STAT. § 70.001(3)(e) (2007).

168. See Juergensmeyer, *supra* note 166, at 703.

The great irony of the Harris Act is that it sought to bring clarity to the admittedly muddled body of case law regarding regulatory takings and be more protective of property rights by creating a remedy for “inordinate burdens,” an impact of regulation that explicitly falls short of the federal taking standard. Yet it uses, and in some case modifies, the same terms of art as federal taking case law to flesh out the meaning of “inordinate burden,” while saying that the terms cannot be construed with reference to that case law.

Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, FLA. B.J., July–Aug. 2004, at 61, 63.

169. See Trevarthen, *supra* note 168, at 64. Still, the Act provides landowners with some leverage in obtaining government settlements from burdensome regulation. See *id.* at 64–65; see also *Charlotte County Park of Commerce, L.L.C. v. Charlotte County*, 927 So. 2d 236, 239 (Fla. 2d DCA 2006) (discussing a settlement agreement arising from a landowner's possible Harris Act claim).

170. See, e.g., *Osceola County v. Best Diversified, Inc.*, 936 So. 2d 55, 59 (Fla. 5th DCA 2006) (disallowing a landowner's recovery under the Harris Act for the county's denial of a conditional use permit to operate a landfill); *Palm Beach Polo, Inc. v. Vill. of Wellington*, 918 So. 2d 988, 994–95 (Fla. 4th DCA 2006) (denying a developer's suit under the Harris Act because the land was subject to a development limitation at the time of its purchase; thus, the developer had no reasonable investment-backed expectation of development); *Sosa v. City of West Palm Beach*, 762 So. 2d 981, 981–82 (Fla. 4th DCA 2000) (dismissing a Harris Act suit because the landowner failed to present an appraisal prior to filing suit and filed the suit before the 180-day waiting period had lapsed).

Thus, using its police power to tax and regulate, the government may harass landowners and negatively affect property values to coerce landowners to sell at or below fair market value. Moreover, a landowner who has to bear the cost of litigation to challenge a government action would likely sell when faced with depressed land values and the knowledge that the government would likely win on the grounds of having a legitimate state interest. This coercive method is akin to “condemnation blight.” Condemnation blight involves the use of the government’s regulatory powers or other policies to lower the compensation it must pay for a future taking.¹⁷¹ Although no future taking can occur under Florida’s current framework,¹⁷² a government could use the similarly corrupt practices of excessive taxation or regulation to compel a landowner to sell to the only willing purchaser—the government.

B. *Strict Abatement of Public Nuisances*

As under Florida’s framework before *Kelo*, a local government may still use its police powers to abate or eliminate public nuisances.¹⁷³ Without being able to use the power of eminent domain to abate or eliminate public nuisances,¹⁷⁴ a local government will aggressively exercise its legitimate police powers to do so. Those legitimate powers deprive a property owner of any compensation for her loss. For example, the government could cease the existing use and economic benefit of a property by denying needed permits because of a perceived public nuisance, such as noxious odors¹⁷⁵ or “incompatibility” with the surrounding area.¹⁷⁶ The government could also require a landowner to

171. Bell & Parchomovsky, *supra* note 14, at 1435. Of course, the government’s actions should not be considered for purposes of determining the market value of the land being taken. *See Dade County v. Still*, 377 So. 2d 689, 690 (Fla. 1979).

172. Threatening to take property is not as feasible under the new framework, but the government could still negatively affect land values by falsely insinuating that the property would be taken for a prescribed “public purpose.” This insinuation would achieve the same result because speculation would lower the perceived economic viability of the property.

173. *See supra* note 117 and accompanying text.

174. *See supra* note 81 and accompanying text.

175. *See Best Diversified*, 936 So. 2d at 57–58. In *Best Diversified*, the owner of a forty-acre property, which had been used as a landfill since the 1960s, operated a construction and demolition debris facility under a five-year permit from the Florida Department of Environmental Protection (FDEP) and a conditional use permit from the Board of County Commissioners. *Id.* at 57. The landowner’s re-application for the FDEP and county permits was denied based on neighbors’ complaints of noxious odors. *Id.* at 57–58. Although the landowner contended that the FDEP and the county prevented him from properly closing the landfill to allow it to be put to non-landfill uses, the court found that he was not entitled to compensation because no taking had occurred. *Id.* at 59–60.

176. *See Windward Marina, L.L.C. v. City of Destin*, 743 So. 2d 635 (Fla. 1st DCA 1999). In *Windward Marina*, the court upheld the City of Destin’s denial of the plaintiff’s application for a final development order to construct a dry-dock marina. *Id.* at 640. In doing so, the court reasoned

abate a nuisance or order the temporary closure of his property for failing to abate a nuisance.¹⁷⁷

In *Keshbro, Inc. v. City of Miami*,¹⁷⁸ the Florida Supreme Court upheld an order to temporarily close the Stardust Motel.¹⁷⁹ Over five years, the City of Miami Nuisance Abatement Board had issued orders closing the entire motel for a one-year period, a portion of the motel for six months, and finally the entire motel for six months, due to multiple reported incidents of drug activity and prostitution.¹⁸⁰ After the board issued the last order, the motel owner claimed that the temporary closure constituted a taking.¹⁸¹ Although finding that the closure deprived the owner of all economically beneficial use of his property, the court held that the government had lawfully issued the closure to abate a public nuisance that was “inextricably intertwined” with the motel’s operation.¹⁸²

Since *Keshbro*, state circuit courts have upheld fines and one-year closures of properties where numerous drug-related violations have occurred.¹⁸³ Seemingly, as long as records indicate a persistent public nuisance, like drug activity, a municipality may temporarily close one’s property without providing any compensation.¹⁸⁴ It would be unreasonable

that the city had the authority to determine that the proposed development would have been incompatible with the surrounding uses, creating a safety hazard that would constitute a public nuisance. *Id.* at 639; *see also* *Test v. Broward County*, 616 So. 2d 111, 114 (Fla. 4th DCA 1993) (validating the city’s condemnation of residential properties as a “public use” because the properties’ use rendered them public nuisances in light of their incompatibility with a nearby airport).

177. *See infra* notes 178–84 and accompanying text; *see also* FLA. STAT. § 60.05(2) (2007) (“[T]he court . . . may enjoin: (a) The maintaining of a nuisance; (b) The operating and maintaining of the place or premises where the nuisance is maintained; . . . (d) The conduct, operation, or maintenance of any business or activity operated or maintained . . . on the premises in connection with or incident to . . . the nuisance.”).

178. 801 So. 2d 864 (Fla. 2001).

179. *Id.* at 867, 876.

180. *Id.* at 867–68.

181. *Id.* at 868.

182. *Id.* at 875–76.

183. *See, e.g.,* *Kyong-Ja v. City of Tampa*, No. 98-0091, 1999 WL 33756531, at *1–2 (Fla. Cir. Ct. May 12, 1999) (upholding fines and the closure of Kyong-Ja’s motel for one year because numerous drug-related violations at the motel had rendered the property a public nuisance and “[t]he direct closure of businesses by nuisance abatement boards . . . have been upheld by the courts of this state”); *Ellana v. City of Tampa*, No. 97-3911, 1997 WL 33644726, at *1–2 (Fla. Cir. Ct. Sept. 15, 1997) (upholding a one-year closure of Billy’s Market by deferring to the City of Tampa Nuisance Abatement Board’s determination that numerous drug-related violations constituted a public nuisance).

184. *See Keshbro*, 801 So. 2d at 876–77. In *Keshbro*, the Florida Supreme Court held that the City of St. Petersburg’s order to close an apartment complex for one year constituted a taking because “there was no extensive record indicating that the drug activity had become an inseparable part of the operation of the apartment complex.” *Id.* at 868, 877.

after such a temporary closure to expect the landowner to transform the property for another use during that period.¹⁸⁵ Thus, a closure deprives the landowner of any beneficial use of that property for the government-determined period.

Significantly, Florida case law also suggests that the government may contribute to rendering a property a public nuisance. In *Powell v. City of Sarasota*,¹⁸⁶ police conducted “controlled buys” of narcotics from a tenant on the Powells’ residential rental property and later brought a nuisance abatement action against them because of the drug activity.¹⁸⁷ While the Powells ultimately prevailed, the majority noted that the action could have proceeded if the Powells had been given an adequate opportunity to abate the nuisance and had failed to take adequate measures to do so.¹⁸⁸ It was seemingly irrelevant that no evidence indicated that the Powells’ property was a public nuisance before the police operations.¹⁸⁹

If the landowner does not take the requested measures to abate the nuisance, a local government may undertake the necessary measures.¹⁹⁰ Then, the government may impose a lien or special tax on the property for the costs incurred and may enforce the nuisance abatement lien against the property.¹⁹¹ Of course, in imposing the lien, the local government must afford the landowner procedural due process.¹⁹²

185. *See id.* at 875 (citing *City of Miami v. Keshbro, Inc.*, 717 So. 2d 601, 604 n.7 (Fla. 3d DCA 1998), *aff’d*, 801 So. 2d 864 (Fla. 2001)).

186. 857 So. 2d 326 (Fla. 2d DCA 2003).

187. *Id.* at 327.

188. *Id.* at 327–28. Fortunately for the Powells, they had not been afforded the opportunity to abate the nuisance, so the action could not proceed. *Id.* at 328.

189. *See id.* at 328 (Villanti, J., concurring).

190. *See City of Jacksonville v. Sohn*, 616 So. 2d 1173, 1174 (Fla. 1st DCA 1993) (noting that the city could enter the plaintiff’s land to abate a public nuisance pursuant to the city’s ordinance); *City of Venice v. Valente*, 429 So. 2d 1241, 1242, 1244 (Fla. 2d DCA 1983) (holding constitutional an ordinance establishing the conditions that render a building unsafe and thus a public nuisance, and providing for the repair or demolition of such buildings at the landowner’s expense).

191. *Sohn*, 616 So. 2d at 1174 (holding that nuisance abatement liens may not be enforced against owners personally but may be enforced against the subject property); *see also* FLA. STAT. § 173.02 (2007).

192. *See Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003). In *Massey*, the plaintiffs failed to obtain the appropriate permits before constructing improvements on their property. *Id.* at 143. After a hearing, the Charlotte County Code Enforcement Board entered an order finding the plaintiffs in violation of the building code, requiring them to comply within thirty days, and warning them that a fine would be imposed for failure to comply. *Id.* at 143–44. Although the order also indicated that a fine could become a lien on the property, the court held that the lien imposed on the plaintiffs’ property after they failed to comply violated procedural due process. *Id.* at 144, 147. The court reasoned that the plaintiffs were not given any notice or opportunity to contest the validity of the fines or the lien before the board imposed them on the plaintiffs. *Id.* While the court quashed the lien order in this case, it did not find facially unconstitutional Florida Statutes § 162.09, which the board used to impose the lien on the plaintiffs. *Id.* at 145.

Significantly, reviewing courts consider the administrative decisions of bodies like public-nuisance abatement boards without reweighing the evidence.¹⁹³ In fact, a court will not substitute its judgment for that of the administrative body unless the court determines that procedural due process was not given, that the essential requirements of law were not observed, or that the administrative body's findings were not supported by competent substantial evidence.¹⁹⁴ This judicial deference gives local governments wide latitude to compel a landowner to abate what the government deems a public nuisance.

Whereas property seized by eminent domain results in compensation for the landowner, property "seized" by increased taxation, regulation, or enforcement of public nuisances results in no compensation for the landowner or perhaps in an elimination of all viable use (from the landowner's perspective). The government may use these legitimate police powers to coerce a landowner to sell or may foreclose on the property and sell it at a public auction.¹⁹⁵ In either case, a private entity could obtain the property.¹⁹⁶

C. *Shift of Potential Corruption to the State Legislature*

With the approval of a three-fifths majority of both houses, the Florida Legislature may create exceptions to the prohibition on private-to-private transfers.¹⁹⁷ This three-fifths-majority requirement was put in place supposedly to ensure that "future Legislatures can't go back and change [eminent domain regulation]."¹⁹⁸ Although the requirement offers some protection, it also opens up an avenue for abuse by merely shifting the risk of "corruption" from local governments to the state legislature. Indeed, the Florida Legislature is no more immune from special-interest groups or political pressure than local governments; thus, strongly supported projects, such as those backed by the governor, could get approval.

193. See FLA. R. APP. P. 9.190(b)(3); see also *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) (discussing circuit court review of local administrative action under Florida Rule of Appellate Procedure 9.030(c)(3)).

194. See *Haines City Cmty. Dev.*, 658 So. 2d at 530.

195. See FLA. STAT. § 45.031 (2007).

196. Where the landowner voluntarily sells to the government, the government may turn the property over to a private entity as long as the proposed project fits within a broad definition of "public use." See, e.g., *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 891 (Fla. 1980) (holding that the city's redevelopment agency could issue bonds to purchase property in a "blighted" area because the proposed redevelopment would be for a public purpose). Where the property is foreclosed and a judicial sale takes place, any person may bid for the property at the public auction. See FLA. STAT. § 45.031.

197. See *supra* note 22.

198. Majors, *supra* note 74 (quoting Florida Representative Bill Galvano, a member of the House Select Committee to Protect Private Property Rights).

For example, former Florida Governor Jeb Bush was determined to lure biotechnology development to Florida.¹⁹⁹ In 2004, using the influence of \$369 million in state money, the esteemed law firm Broad and Cassel, and former University of Florida President Marshall Criser, Jr., Jeb Bush convinced Scripps Research Institute to locate in Florida.²⁰⁰ One of the sites that Scripps considered for its research complex was at Mecca Farms in Riviera Beach, which would have required condemning hundreds of homes and businesses.²⁰¹ Ultimately, because of environmental concerns with the location, Scripps decided to locate on government-donated land elsewhere,²⁰² thus, eminent domain never became an issue. However, the political will behind the Scripps project was demonstrated by the governor's strong push for the legislature to pass a bill that would have prevented a court-ordered demolition of the research facilities had environmentalists successfully challenged the construction at Mecca Farms.²⁰³

The Scripps facility exemplifies the type of project for which the Florida Legislature, compelled by political support, would likely make an exception. This is not to say that allowing these types of projects is wrong; after all, the government would be weighing the inconvenience to individual property owners against tremendous public good that biotechnology would bring to Florida. Still, Florida's recent eminent domain reform might permit large state-backed projects to proceed with the help of eminent domain, while small local projects would be barred for lack of statewide support.

D. Increased Costs to the Taxpayers from Holdouts

Florida's new eminent domain framework will foster a holdout problem that will ultimately cause land acquisition costs to be passed on to the taxpayers. A landowner's holdout power has long justified the use of eminent domain.²⁰⁴ Absent eminent domain, a landowner has the

199. Scott Barancik, *Bush Family Friend Takes Lead on Scripps*, ST. PETERSBURG TIMES, Jan. 20, 2004, at 1A.

200. *Id.*

201. Deana Poole & Connie Piloto, *Scripps Hopefuls Detail Visions to Entice Institute*, PALM BEACH POST, July 29, 2004, at 1A.

202. See Hector Florin, *Targeting Land for Biotech Wins Nod from Panel*, PALM BEACH POST, July 15, 2006, at 1B; Charles Pattison, *End Uncertainty by Relocating Scripps*, TAMPA TRIB., Oct. 7, 2005, at 17.

203. See S.V. Date, *Proposal Would Allow Mecca Construction Despite Lawsuits*, PALM BEACH POST, Apr. 29, 2005, at 12A; Neil Santaniello & Cadence Mertz, *Bill Prevents Scripps "Doomsday,"* S. FLA. SUN SENTINEL, Apr. 29, 2005, at 1B.

204. See Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 21 (2006) (noting that contemporary courts view "the holdout problem as a major, if not the 'principal,'

incentive to “hold out” for an exorbitant price when the government wishes to acquire his land.²⁰⁵ To illustrate this incentive, Richard Posner gives the example of a railroad or pipeline company purchasing right-of-way easements to provide service between two points.²⁰⁶ Without eminent domain, each intervening landowner has the power to demand a premium because all other easements that the company has purchased will be worthless without his as well.²⁰⁷ Thus, Posner concludes that “a flat rule against takings in which the land ends up in the hands of private companies would . . . be unsound.”²⁰⁸

Competition can combat the holdout problem in a “thick” market (where there are many available alternatives to a particular property), but the problem is more difficult in a “thin” market (where the property for the proposed project is scarce or uniquely suited for the project).²⁰⁹ In fact, in a thick market, purchasing property on the open market is less expensive than acquiring it through eminent domain because of the requisite procedures for takings.²¹⁰ When a landowner knows that the market is thin for his property, however, he will hold out for a premium,²¹¹ especially when a purchaser, like the government, has deep pockets.²¹²

justification for” eminent domain). Despite the holdout problem, Posner believes that the government should be required to buy property on the open market. Posting of Richard Posner, *supra* note 96.

205. Posting of Richard Posner, *supra* note 96.

206. *Id.*

207. *Id.*; *see, e.g.*, Merrill, *supra* note 123, at 75 (arguing that the costs of acquiring the parcels needed to construct an underground pipeline to transport crude oil from a producing field to a far-away refinery might be prohibitively expensive without eminent domain because landowners may choose to hold out). Posner also explains the usefulness of eminent domain when a developer needs to acquire many separately owned contiguous parcels for a project. Posting of Richard Posner, *supra* note 96. Indeed, a government unable to use eminent domain for economic development “would be forced to pay buyers exorbitant amounts to acquire property.” *See* Jarosz, *supra* note 34, at 39 (citing David Barron, a professor at Harvard Law School).

208. *See* Posting of Richard Posner, *supra* note 96.

209. *See* Cohen, *supra* note 1, at 534–35 (discussing the effects of the market for property on holdout incentives). A property’s market may also become thin after the government has acquired almost all of the parcels needed for the proposed project except the holdout landowners. *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 971–72.

210. Cohen, *supra* note 1, at 535. The procedures required to exercise eminent domain make it more expensive in a thick market. Merrill, *supra* note 123, at 77–78. Due process costs include “obtaining legislative authority, drafting and filing the complaint, serving process, securing a formal appraisal, the possibility of a trial and appeal.” *Id.* at 77. Moreover, in a thick market, the government may simply buy a different parcel of land rather than pay the holdout’s demanded premium. *See* Fennell, *supra* note 209, at 972.

211. Cohen, *supra* note 1, at 534–35. Merrill suggests that the government should be required to use the market where there exists such a functioning market for a resource, but eminent domain should be permitted when barriers to market exchange exist. Merrill, *supra* note 123, at 74.

212. *See* Kelly, *supra* note 204, at 21 (noting that owners would not have the incentive or ability to hold out if they were unaware that their property was being purchased for a large project);

On a large scale, with each landowner demanding a premium, costs for the proposed project can become prohibitively expensive.²¹³ If the project does not proceed, the community loses out on a project that the government believed would benefit the community. If the project does proceed, the community taxpayers ultimately bear the significantly higher cost of assembling the needed parcels.

V. SOLUTIONS TO REACH A DESIRABLE RESULT

A. *Eliminate the Public-Nuisance Prohibition and Strengthen Criteria*

In prohibiting eminent domain to abate or eliminate public nuisances,²¹⁴ the Florida Legislature took a valuable tool away from municipalities to clean up truly “contaminated” or “crime-infested” areas, which constitute traditional public nuisances.²¹⁵ The legislature should allow the government to use eminent domain to abate or eliminate those public nuisances that pose existing threats to the public health and safety. In fact, this was the effect of the bill that the House Select Committee to Protect Private Property Rights approved and that remained in the proposed legislation until the bill was amended two days prior to its passage.²¹⁶ Additionally, the Castle Coalition, a nationwide grassroots property rights and protection initiative started by the Institute for Justice, adopts this approach in its model legislation.²¹⁷ Thus, including such a provision

see also Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969, 1976–77 (1987) (arguing that holdout problems that arise when a seller knows of a buyer’s deep pockets could be overcome by permitting principals to conceal their existence).

213. Merrill, *supra* note 123, at 75. To combat holdouts, many developers use “pre-commitment” contracts, whereby the developer promises to pay all potential sellers in a targeted area the same price. Cohen, *supra* note 1, at 568. This allows the developer to legitimately argue that he cannot pay the holdouts’ substantially higher price because it would result in an obligation to raise every other landowner’s price, thus preventing the project altogether. *Id.* Still, Cohen admits that those landowners who are not strategically, but sincerely, holding out, will not be affected by this strategy. *Id.*

214. *See supra* notes 80–81 and accompanying text.

215. Generally, a public nuisance is something that annoys the community or poses harm to the public health. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1036 (Fla. 2001); *see also* 58 AM. JUR. 2D *Nuisances* § 34 (2007) (defining a “public nuisance” as, among other things, “behavior which unreasonably interferes with the health [and] safety” and “whatever tends to endanger life or generate disease and affects the health of the community” (footnotes omitted)).

216. *See supra* notes 74–80 and accompanying text.

217. *See* Castle Coal., About Us, <http://www.castlecoalition.org/profile/index.html> (last visited Feb. 10, 2008); Castle Coal., Model Language for State Statutes Limiting Eminent Domain Abuse, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=310&Itemid=117 (last visited Feb. 10, 2008) [hereinafter Castle Coal., Model Language] (limiting eminent domain

probably would not draw much criticism from private-property rights supporters.²¹⁸

Still, the Florida Legislature may fear that local governments would abuse the power to classify certain activities as “public nuisances.”²¹⁹ Accordingly, the legislature should strengthen the criteria that classify a public nuisance for eminent domain purposes.²²⁰ For example, the legislature could adopt specific guidelines for when a property’s condition threatens health and safety.²²¹ This approach, which was also adopted by the Castle Coalition’s model legislation,²²² would look something like the proposed revised legislation in this Note’s Appendix when incorporated into Florida’s existing framework. Such rigid guidelines would accomplish the legislature’s goal of curbing eminent domain abuse while giving local governments the freedom to take measures to protect their citizens.

B. Allow “Beneficial Takings” but Require Sufficient Compensation

Prohibiting all private-to-private transfers prevents “beneficial takings” to establish not-for-profit hospitals, museums, or sports complexes.²²³ Although the government should attempt to obtain voluntary transfers from landowners,²²⁴ any holdouts will very likely prevent the project from proceeding because of the prohibitive expense.²²⁵ On the other hand, the government may decide to operate the facility itself.²²⁶

to when it is necessary for a public use and defining “public use” as removal of a public nuisance or elimination of a direct threat to public health or safety).

218. Despite the fact that the Castle Coalition’s model legislation permits eminent domain to eliminate public nuisances, it still champions Florida’s reform as “a model for other state legislatures.” See CASTLE COAL., *supra* note 17, at 4.

219. See, e.g., *supra* Part IV.B (discussing how “noxious odors” or “incompatibility with the surrounding area” can constitute public nuisances and noting the great judicial deference to local governments’ determinations of a public nuisance).

220. This would not be an effort to enumerate all nuisances but rather to determine which conditions would warrant using eminent domain to abate or eliminate the nuisance. See *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 884 (Fla. 1972) (“It has been said that an attempt to enumerate all nuisances would be almost the equivalent as an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights.”).

221. The House Select Committee to Protect Private Property Rights intended the Florida Legislature to provide specific guidelines. See *supra* note 76 and accompanying text.

222. See Castle Coal., Model Language, *supra* note 217.

223. See *supra* notes 91–93 and accompanying text.

224. Even when eminent domain was available for non-traditional takings, the government usually attempted to purchase the property before exercising the power. See *supra* note 112 and accompanying text.

225. See *supra* notes 99, 205, 211–13.

226. See *supra* note 96 and accompanying text.

However, the Florida Legislature may fear that blanket permission to engage in “beneficial takings” would open the door for local governments to abuse this classification. Indeed, the House Select Committee to Protect Private Property Rights and the Florida Legislature intended to prevent abuses of eminent domain resulting in private benefit at the public’s expense.²²⁷ Accordingly, the legislature could enact measures to discourage the takings or make such takings a limited exception to the prohibition on private-to-private transfers.²²⁸ For example, the legislature could require local voter approval for such projects or could require that the facility not be operated for profit.²²⁹ The legislature could also enumerate specific types of facilities that might qualify for a “beneficial taking,” including hospitals and museums.²³⁰

Further, to discourage takings except when exceptionally beneficial, the legislature could increase the compensation to landowners for these takings.²³¹ There is ample support for the view that the constitutionally mandated “just compensation” requirement is undercompensatory.²³² Indeed, the U.S. Supreme Court’s “fair market value” (i.e., “what a willing buyer would pay in cash to a willing seller” at the time of the taking²³³) is inappropriate on its face because the owners of condemned

227. See *supra* note 20 and accompanying text.

228. Of course, this solution assumes that such “blanket” authorizations for beneficial takings would be permitted by the Florida Constitution. See *supra* Part III.C.

229. Cohen, *supra* note 1, at 566. Cohen proposed the following constitutional amendment:

The State or its subdivisions shall not exercise the power of eminent domain for the purpose of acquiring property that will be transferred to a non-governmental entity or individual. Notwithstanding the preceding sentence, the State or its political subdivisions may exercise the power of eminent domain for the purpose of acquiring property that will be transferred to and used as the site for a not-for-profit museum, public performing arts center or other cultural venue, stadium, sports arena, or hospital. Should it become desirable to exercise the power of eminent domain to acquire property that will be transferred to and become the site of a type of not-for-profit entity not enumerated in this provision, the State or the relevant subdivision shall do so only upon a majority vote of the people held at public referendum. However, a public referendum may not authorize the use of the power of eminent domain to transfer property to any business or other organization operated for profit or to any individual.

Id. at 566–67.

230. See *supra* note 229.

231. See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 139–40 (2004) (noting that compensation at a premium is not a “radical idea,” because this used to be the rule in the United Kingdom and is still the rule in Canada).

232. Cohen, *supra* note 1, at 537.

233. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

land are not willing sellers.²³⁴ Like the “just compensation” requirement that discourages the government from abusing or overusing eminent domain,²³⁵ compensation at a premium would lead to a more trustworthy use of “beneficial takings.”²³⁶

Moreover, increased compensation would recognize that specific takings can result in losses greater than the property’s fair market value.²³⁷ Landowners often subjectively value their property more highly than the objective government assessment.²³⁸ For example, a landowner’s subjective value could encompass factors such as his preferences, the unique suitability of the property to his needs, relocation costs, attorneys’ fees, and lost business revenue.²³⁹

Overall, increased compensation may make landowners more indifferent to the loss of their property.²⁴⁰ Indeed, a large factor in the public call for eminent domain reform stemmed from the feeling that condemnees were being “unjustly compensated.”²⁴¹ Thus, the Florida Legislature might define “just compensation” for beneficial takings to

234. Cohen, *supra* note 1, at 537.

235. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58 (4th ed. 1992) (“The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power.”); see also Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999) (“[T]he obligation to pay compensation can constrain government inclinations to exploit politically vulnerable groups and individuals.”).

236. Essentially, like the “just compensation” requirement, this premium requirement would force the government to consider whether the proposed project will produce more value in the property than the amount of compensation required to obtain that property. Cohen, *supra* note 1, at 541–42.

237. See Parchomovsky & Siegelman, *supra* note 231, at 140 (arguing that a court should base its decision whether to award heightened compensation on the availability of similar property in the same community).

238. Posting of Gary Becker to The Becker-Posner Blog, <http://www.becker-posner-blog.com/archives/2005/06/index.html> (June 27, 2005, 07:35 EST) (asking why a landowner should be “forced to sell at a price that could be way below its full value to her?”); Posting of Richard Posner, *supra* note 96 (recognizing that “a particular parcel in the hands of a particular owner will generally yield him an idiosyncratic value that is on top of the market value”).

239. Posting of Richard Posner, *supra* note 96 (“Generally, property is worth more to the owner than the market price . . . because it fits his tastes or needs best as a consequence of its location or improvements . . . or because relocation costs would be high.”); see also Cohen, *supra* note 1, at 538 (arguing that the “subjective premium” an owner places on his property “may include sentimental attachment, unique suitability of the property to the owner’s needs, relocation costs, replacement costs of the land and improvements, consequential damages to retained property, attorneys’ fees, lost business revenue, goodwill or going-concern value, and the aggravation of having to move”).

240. Merrill, *supra* note 123, at 64.

241. See Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 580, 580 n.8, 588 (1995) (discussing the criticism of unjust compensation).

include relocation costs²⁴² or might give landowners a percentage over fair market value for a taking.²⁴³ Florida already requires the government to pay the condemnee's attorneys' fees and costs incurred in defending an eminent domain action.²⁴⁴ Of course, it is impossible to precisely compensate an owner for his subjective value,²⁴⁵ but these "practical difficulties in assessing the worth an individual places on particular property"²⁴⁶ do not have to stand in the way of increasing compensation for beneficial takings.

C. Eliminate the Ambiguity in the Florida Constitution

The ambiguity in the Florida Constitution²⁴⁷ might be resolved by amending the Florida Statutes. As long as the constitution permits a "blanket" authorization for certain types of transfers, the legislature could amend the current statutes to provide for, among other things, transfers of land taken by eminent domain to a private utility and from one private utility to another.²⁴⁸ Of course, this change would require at least a three-fifths approval from both houses of the legislature.²⁴⁹ If a "blanket" authorization would not be constitutionally permissible, the legislature would have to place a correcting amendment on the next election ballot.²⁵⁰

242. In Illinois, the state's eminent domain system was reformed to provide greater rights to property owners, including compensation for a landowner's relocation costs. *See Jarosz, supra* note 34, at 37.

243. However, some argue that overcompensating a landowner is also dangerous. *See Cohen, supra* note 1, at 557 ("Overly generous awards may lead to inefficient overinvestment by property owners."); Fennell, *supra* note 209, at 993, 993 n.118 (arguing that overgenerous awards for eminent domain could lead to "perverse incentives," including overinvestment in the property); Merrill, *supra* note 123, at 92 (arguing that property owners would have an incentive to increase their chances of condemnation).

244. *See* FLA. STAT. § 73.091 (2007).

245. *See supra* notes 238–39 and accompanying text (discussing possible factors that may be included in an owner's "subjective premium").

246. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). Indeed, the Court settled on fair market value merely because it was the most practical measure of compensation. *Parchomovsky & Siegelman, supra* note 231, at 139 n.265 (noting that the Court in *564.54 Acres of Land* adopted the fair market value standard for just compensation because of the Court's desire for a working rule, considering the difficulties in assessing the actual value of condemned property).

247. *See supra* Part III.C.

248. *See supra* Part III.C.

249. *See supra* note 22.

250. This measure would be necessary because the constitutional language supersedes any statutory enactment. *See supra* note 108.

D. *Decrease Abuse of Police Power*

Without eminent domain, government officials who wish to force out a landowner may resort to misusing their police powers, including imposing excessive and targeted taxes or regulations and aggressively pursuing public nuisances.²⁵¹ Many theories propose protective measures that would limit situations where such actions rise to the level of a taking,²⁵² and states may impose tighter restrictions on the regulatory or taxing powers.²⁵³

If such sweeping changes were to be made, however, the issue would need to be carefully studied to provide a solution that would not upset local governments' police power discretion. A simpler solution is to give local governments more freedom to remedy truly harmful conditions²⁵⁴ and to provide great public benefits.²⁵⁵ Allowing these actions would lessen the propensity of the government to fabricate a need to use its police powers to "seize" property without compensation.

VI. CONCLUSION

The Florida Legislature should not have used the perceived inadequacies of the old eminent domain system to rationalize a blanket prohibition on eminent domain for most purposes.²⁵⁶ Florida's common law already indicated that a taking could not be justified by economic redevelopment. The Florida Legislature's reaction was overly broad, ambiguous, and could ultimately leave owners of land that the government wants to acquire worse off than under the previous system. Therefore, the legislature should implement a revised eminent domain framework to better serve the original purpose of eminent domain—to benefit the public that the legislature serves.

251. *See supra* Part IV.

252. *See supra* note 140 and accompanying text (noting the expansive regulatory-takings jurisprudence). *But cf.* Penalver, *supra* note 125 (arguing that the U.S. Supreme Court should view the Takings Clause more narrowly and not compensate landowners for regulations that could be viewed as legitimate taxes). *See generally* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 295–303 (1985) (arguing that progressive income taxes should qualify as unconstitutional takings); Kades, *supra* note 127 (proposing a principle "to draw the line between permissible taxes and those that violate the Takings Clause," and discussing existing theories that distinguish taxes from takings).

253. *See* Bell & Parchomovsky, *supra* note 14, at 1439.

254. *See supra* Part V.A.

255. *See supra* Part V.B.

256. This is akin to the logical fallacy of a false dichotomy, where we are asked "to choose between unrealistically polarized alternatives and thus to ignore the sensible analyses and policies that usually lurk in the grey areas between black and white categories." Paul H. Brietzke, *New Wrinkles in Law . . . and Economics*, 32 VAL. U. L. REV. 105, 127 (1997).

APPENDIX: REVISED STATUTE *
FLORIDA STATUTES § 73.014: TAKING PROPERTY TO ABATE
OR ELIMINATE A PUBLIC NUISANCE

(1)(a) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated *may* exercise the power of eminent domain to take private property *if it establishes by clear and convincing evidence that the property constitutes a public nuisance. Property that constitutes a public nuisance shall include only property that poses an existing threat to public health and safety and is one of the following:***

1. *A structure that, because it is dilapidated, unsanitary, unsafe, or vermin-infested, has been designated by the agency responsible for enforcement of the housing, building, or fire codes as unfit for human habitation or use;*

2. *A structure that, in its current condition, is a fire hazard, or is otherwise dangerous to the safety of persons or property;*

3. *A structure from which the utilities, plumbing, heating, sewerage, or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use;*

4. *A vacant or unimproved lot or parcel of ground in a predominantly built-up neighborhood that, by reason of neglect or lack of maintenance, has become a place for accumulation of trash and debris, or a haven for rodents or other vermin;*

5. *A property that has tax delinquencies exceeding the value of the property;*

6. *A property with code violations affecting health or safety that has not been substantially rehabilitated within one year of the receipt of notice to rehabilitate from the appropriate code enforcement agency;*

7. *A property that, by reason of environmentally hazardous conditions, solid-waste pollution, or contamination, poses a direct threat to public health or safety in its present condition;*

8. *An abandoned property, defined as property not occupied by a person with a legal or equitable right to occupy it and for which the condemning authority is unable to identify and contact the owner despite making*

reasonable efforts or property that has been declared abandoned by the owner, including an estate in possession of the property.

(b) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, abating or eliminating a public nuisance *in accordance with part (a)* is a valid public purpose or use for which private property may be taken by eminent domain and *satisfies* the public purpose requirement of s. 6(a), Art. X of the State Constitution.

(c) This subsection does not diminish the power of counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement or the elimination of public nuisances, *inclusive and exclusive of those described in part (a)*, to the extent such ordinances *to abate public nuisances not described in part (a)* do not authorize the taking of private property by eminent domain.

(2) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions. Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, taking private property for the purpose of preventing or eliminating slum or blight conditions is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution.

* Emphasis indicates additions or alterations to the current statute.

** The enumerated conditions that render a property a threat to public health and safety are adapted from the Castle Coalition's model legislation. *See* Castle Coal., Model Language for State Statutes Limiting Eminent Domain Abuse, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=310&Itemid=117 (last visited Feb. 10, 2008).

