

## **Real Estate Review: Urban Forum** **Private property owners threatened by twisted concept of ‘blight’**

**by Andrew P. Brigham and William Moore**

**F**rom Panama City to Riviera Beach, owners of private property are under siege by a powerful combination of local governments and wealthy developers. These government-developer teams have devised a method to acquire small, privately owned properties by using the government’s power to take private property for “public” use.

Florida law permits community redevelopment agencies (CRAs) to condemn property in order to achieve community redevelopment. The assembled properties are sold by a local government to a favored private developer that redevelops the land into potentially more profitable uses: a shopping center, high-end condominium, or even a golf course community for well-to-do baby boomers.

This technique of government land assemblage for private economic redevelopment has been a growing trend throughout the nation. In city after city privately owned lands are being forcibly seized by local governments whose only reason for taking is “economic redevelopment.” Florida has been a particularly fertile ground for such CRAs. Jacksonville, Port Charlotte and Fernandina Beach are just a few of the locales now subject to this phenomenon.

The problem that has emerged, both nationally and in Florida, is the recurring phenomenon that the target areas are often the

more valuable neighborhoods. These neighborhoods, often coastal, are coveted due to their high value potential. They are simply not, at present, built out to their highest and best use.

Frequently these target areas are not slums, nor are they blighted in the ordinary sense of the term. They are simply areas that, if bulldozed and rebuilt, could generate more income and market value than under their existing private use.

So at what point does a governmental taking for economic redevelopment violate the Florida Constitution’s public purpose requirement for eminent domain?

The developers’ private use of condemned property is ostensibly permitted by state law providing for clearance of slum or blight. The statute is intended to allow governments the latitude to eradicate slums or blighted areas by using public funds, and if necessary, the power of eminent domain in order to achieve community redevelopment.

To satisfy the public purpose requirement, a local CRA can claim that the coveted area is blighted, and thereby declare it necessary to take from the current private owners. The law, as currently written, permits a blight determination by a CRA if the government demonstrates only two of 14 conditions.

Many of the blight conditions are subjectively phrased, such as “faulty lot layout,” “inadequate street layout” or “unsanitary conditions.” What those terms

mean is not defined in the statute, but is left for the government to decide. A reviewing court now applies a very deferential standard of review and requires only that the determination be fairly debatable, before affirming the seizure.

Once the blight determination is made, the way is clear for the CRA to condemn such private areas and turn them over to a private developer who can then use favorable municipal bond terms to pay for a portion of the new development. Left out of the resulting benefits of redevelopment are the previous owners of the condemned properties. Those owners have lost their homes, lands, or businesses through no fault or imprudence of their own. They were simply in the way of what someone had decided to be a higher and better use.

One of the more dramatic demonstrations of the concept can be found in a 1981 decision by the Michigan Supreme Court. It permitted the city of Detroit to condemn and destroy more than 1,000 homes and more than 100 businesses in a Polish-American neighborhood that was found to be in economic distress.

The ultimate use of the condemned land? A General Motors plant and office building.

The court’s decision permitting such use of the eminent domain power of government significantly broadened the notion of public purpose and served as a much-cited precedent for subsequent redevelopment.



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Twenty-three years later, last July, the Michigan high court reconsidered its decision. In *County of Wayne v. Hathcock*, the court reversed itself and announced that economic redevelopment for eventual private use was not consistent with the state constitution's public use requirement for eminent domain. Other court decisions in California and Illinois have presaged the Michigan court's opinion. However, the *Hathcock* decision is the clearest statement yet on this point declaring when government goes too far.

#### **Florida follows trend**

Florida has followed the national trend. As recently as 2002, in a bond validation case, the Florida Supreme Court ruled that Panama City Beach, hardly a slum, fit the statutory definition of blight ("it was not a nice place"), and therefore could be declared blighted.

The trial court had found that redevelopment of undeveloped open land was essentially a contradiction in terms and that to accept the city's blight testimony would be a complete departure from common sense. Nevertheless the Supreme Court, deferring to the local government's power under the state's community redevelopment law, reversed the trial judge and granted the validation of the municipal bond funding.

While not an eminent domain decision, the Panama City Beach case is cited regularly by developer-CRA teams attempting to seize

private properties for economic redevelopment.

The flexible, developer-friendly blight law apparently is not enough for some local governments. Toward the very end of this year's legislative session, a bill was quietly introduced that purported to streamline the community redevelopment process. This bill provided that, in addition to the subjective blight criteria of the existing law, a new ground for seizing private property would be if that property were in an antiquated subdivision.

The New Age definition of the term antiquated was any plat recorded before January 1980. Simply by being platted before 1980, an entire neighborhood would have been subject to a blight designation, and therefore condemnation.

Since most residential subdivisions in Florida were platted before 1980, this bill would have rendered a majority of the single-family homes in Florida at risk of a "blight" seizure. Due to a frenzy of last minute opposition from property rights advocates, the bill was defeated in the last hours of the session.

Alarmed at this aggressive attempt at expanding already loose redevelopment law, many of those concerned about property rights have sought to educate legislators about their concerns and formulate changes to Florida's

community redevelopment law. Several proposed amendments are considered key. A suggested change in the law is to objectify or quantify the loose, subjective blight criteria now found in the CRA law. Instead of simply labeling an area as unsafe or unsanitary, the CRA would be required to prove that existing health and safety criteria (derived from federal or state standards) were substantially violated, and that there could be no reasonable remedial alternative.

Perhaps the most significant amendment to the existing redevelopment law would mandate that the reviewing court apply an analytical standard of strict scrutiny when deciding upon the legitimacy of a blight determination. The CRA would be required to prove its case against the private owner by competent, substantial evidence and not the minimal showing now accepted.

Before any of these changes can be made, the public, made up of millions of individual private property owners, will have to impress upon their legislators that private property is a significant, fundamental right and that forced governmental seizures through eminent domain should be permitted only when reasonably necessary for a truly public purpose.

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