

# spotlight

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## PROPERTY RIGHTS AFTER *KELO* *North Carolina Needs a New Constitutional Amendment*

**S U M M A R Y :** The United States Supreme Court's opinion in *Kelo v. City of New London* drastically weakened the property rights of all citizens. North Carolinians can protect themselves by amending the state constitution. An amendment is necessary because state legislation does not provide adequate protection of property rights. All fundamental rights, especially property rights, should be protected in the state's highest law, the state constitution.

In its recent opinion in *Kelo v. City of New London*,<sup>1</sup> the United States Supreme Court drastically weakened the property rights of all citizens by broadly redefining what are constitutional "takings." A "taking" under the United States Constitution means that the government is appropriating private property for public use, in return for just compensation. According to the Court in *Kelo*, the United States Constitution permits the government to transfer property from one private party and provide to it to another private party if the "taking" would presumably further the economic development of a community. This new permissible type of taking places few limits on the government and invites an unrestrained use of the power of eminent domain.

North Carolina law also does not provide protections from these economic development takings. However, like other states, North Carolina can protect its citizens and ensure that property rights are respected. Federal protection of rights are not the maximum but the minimum amount of rights protection needed to be provided to citizens—they are the "floor" and states can and often do provide greater rights protection. To adequately protect property rights, North Carolina should prohibit the use of economic development takings by immediately enacting a new amendment to its state constitution.

### ***Kelo* and the Problems with Economic Development Takings**

The Takings Clause, found in the Fifth Amendment of the United States Constitution, restricts government power: "Nor shall private property be taken for public use, without just compensation."<sup>2</sup> The "public use" restriction was of particular importance in the *Kelo* case and in examining economic

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development takings.

This restriction limits the types of takings that are constitutional. “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”<sup>3</sup> Transfers of property for public ownership (e.g., road) or to a private party for use by the public (e.g., railroad, stadium) traditionally are the types of takings that meet the public use requirement.<sup>4</sup>

However, before *Kelo*, the Supreme Court also had permitted takings that transfer property to private parties for private use. These takings though only were allowed in very narrow circumstances.<sup>5</sup> For example, one of these narrow circumstances was to address the problem of “blighted neighborhoods”—the Supreme Court permitted a taking in a “blighted neighborhood” where the properties were in such bad condition that that they allegedly were harmful to the public.<sup>6</sup>

In *Kelo*, the Court had to decide whether a transfer of property to a private party for purely economic development reasons, unrelated to blight, met the public use requirement. In its decision, the Court held that these economic development takings are constitutional, and, as a result, made the Fifth Amendment’s “public use” requirement meaningless.

As long as the government is not being “irrational” in determining what serves an economic development purpose, an economic development taking will be permissible. There does not have to be a likelihood that the taking will achieve the government’s goals.<sup>7</sup> The perceived benefits for the taking could be to create jobs, generate tax revenue, or even to make a city more attractive.<sup>8</sup>

This requirement is so easy to meet as to make any taking constitutional. As Justice O’Connor writes in her dissent in *Kelo*:

Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.<sup>9</sup>

An additional problem with economic development takings is there is no practical way to prevent takings for private gain, with only incidental or pretextual public benefits. Justice Kennedy in his concurrence argues that the Court can simply look to the record and determine how the government made its decision. Of course, any state or local government can easily show that it had some public benefit in mind and its intent was not to benefit a private party.

According to Justice O’Connor:

Whatever the details of Justice Kennedy’s as-yet-undisclosed test, it is difficult to envision anyone but the ‘stupid staff[er] failing it...The trouble with economic development takings is that private benefit and incidental public benefits are, by definition, merged and mutually reinforcing.<sup>10</sup>

Economic development takings also will disproportionately impact low-income neighborhoods and small businesses more than other groups. The government will take from the poor to give to the rich (or anyone better off) with the idea that the rich will somehow use the property to further an economic development purpose. In his recent Senate testimony, NAACP’s Washington Bureau Director Hilary Shelton explained:

Lastly, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas with low property values with those with higher values.<sup>11</sup>

Of course, all property owners are at risk because there always will be a subjective way for a government to argue that another party could use the property in a more beneficial manner. Justice O’Connor argues “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”<sup>12</sup>

## Existing State Legislation Does Not Protect North Carolina Citizens

Some individuals have argued that North Carolina does not need any statutory changes or a constitutional amendment to protect from *Kelo* because existing statutory language protects the state's citizens. Ellis Hankins, Executive Director of the North Carolina League of Municipalities, wrote:

Some members of the General Assembly have said that we need to "tighten" the N.C. eminent domain law in response to the Supreme Court decision. That is unnecessary, of course, since state law is crystal clear and does not authorize our state government, cities, or counties to use eminent domain for general economic development purposes.<sup>13</sup>

The North Carolina general eminent domain law, as referenced in the above statement, does not explicitly permit economic development takings. It does require a taking to be for a public use or for a *public benefit*.<sup>14</sup> This broad standard is comparable to the United States Supreme Court's use of "public purpose" to meet the public use requirement. The public purpose standard formed the basis for the conclusions reached in *Kelo*.

If this were not enough, the general eminent domain statute is not the only statute or local act covering eminent domain issues. One state law not only does not prohibit general economic development takings, but *it explicitly permits them*. In 2000, the General Assembly amended the Charlotte city charter to explicitly permit the city to use eminent domain for economic development purposes.<sup>15</sup>

There also are state statutes that are so broadly written that they could lead to economic development takings. North Carolina's "Urban Redevelopment Law"<sup>16</sup> is precisely the kind of statute where "enterprising" municipalities and their attorneys could attempt economic development takings, if not in name, then in effect. Under this statute, property can be condemned in non-blighted areas if certain factors (*e.g.*, age or obsolescence of buildings) substantially impair the sound growth of the community, have seriously adverse effects on surrounding development, and are detrimental to the public health, safety, morals or welfare. The statute goes even further by allowing property to be condemned if by reason of these factors, there is a clear and present danger that the area *will* have these problems in the reasonably foreseeable future. In terms of real world application, this statute is so subjective that it certainly could be used for economic development takings.

Even if North Carolina law did not permit economic development takings, the General Assembly can easily change the law. When dealing with fundamental rights, North Carolina should not leave open the possibility that critical protections can easily be taken away. The people of North Carolina should protect their fundamental property rights by passing a constitutional amendment that is unambiguous and virtually impossible to weaken.

## North Carolina Needs a Constitutional Amendment

If the Supreme Court decided that the United States Constitution no longer protects freedom of speech or limited the right so extensively that it made it almost meaningless, would it be enough that a North Carolina statute may protect freedom of speech? Of course not, and there is no reason that property rights, which are even more fundamental than freedom of speech, should be treated any differently.

If North Carolina citizens are going to be protected from economic development takings, the protections must come from the state. As mentioned above, statutes can easily be changed. A constitutional amendment is the only way to ensure that fundamental rights are not changed at the whim of political interests. In North Carolina, the state constitution, which is the highest state law, can be amended only if three-fifths of both houses of the General Assembly pass the amendment, and then a majority of voters must approve the amendment.<sup>17</sup>

Amendments to any constitution should be added very rarely and under extreme caution. These guiding documents are meant to be difficult to change. However, it is hard to imagine a time when a constitutional amendment is more appropriate than now. The new amendment would not be creating a new right or doing anything even remote-

### Some States with Stronger Constitutional Property Rights Provisions than the Fifth Amendment

<b>ALABAMA</b>	<b>ARIZONA</b>	<b>COLORADO</b>
<b>OKLAHOMA</b>	<b>MISSISSIPPI</b>	<b>MISSOURI</b>
<b>SOUTH CAROLINA</b>	<b>WASHINGTON</b>	<b>WYOMING</b>

Source: Castle Coalition

[http://www.castlecoalition.org/legislation/model/state\\_constitution.asp](http://www.castlecoalition.org/legislation/model/state_constitution.asp)

ly controversial. In fact, all it would be doing is to reaffirm the meaning of a fundamental right that was so important to our founders that they included it in the Bill of Rights.

North Carolina's constitution also is the only state constitution in the nation, except for possibly New Hampshire's, that does not expressly prohibit the taking of property without just compensation.<sup>18</sup> While economic development takings may not be expressly prohibited in these other constitutions, as of yet, at least these other states have this minimum property rights protection expressly listed in their constitutions. The North Carolina State Constitution only says "No person...shall be in any manner deprived of his life, liberty, or property, but by the law of the land."<sup>19</sup> North Carolina courts have incorporated federal constitutional protections into the state constitution through the "law of the land" provision. Now that the United States Supreme Court has weakened the law of the land in the area of property rights, the state constitution also has become weaker. To protect against economic development takings and the further erosion of property rights, the law of the land provision needs to be replaced by a strong constitutional amendment that on its face clearly protects property rights and expressly prohibits economic development takings.

## Conclusion

A major component of the American dream is home ownership. Economic development takings can crush this dream and create a nightmare of unrestrained government power. When the government condemns private property for some vague economic purpose, the action is reminiscent of a Third World totalitarian state, not the United States of America. A sure way to hurt local economies is to launch an open season on property rights. If local governments want economic development, protecting property rights should be their first order of business.

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## Notes

- 1 *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) <http://laws.findlaw.com/us/000/04-108.html>
- 2 U.S. Const., Amdt. 5.
- 3 Op. cit. at note 1, p. 2661 citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).
- 4 *Ibid.*, p. 2673.
- 5 "Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform," Institute for Justice, 2005, at 2. [http://www.castlecoalition.org/pdf/Kelo-White\\_Paper.pdf](http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf)
- 6 *Berman v. Parker*, 348 U.S. 26 (1954)
- 7 Op. cit. at note 1, p. 2667 citing *Midkiff* 467 U.S., at 242.
- 8 *Ibid.*, p. 2659.
- 9 *Ibid.*, p. 2675.
- 10 *Ibid.*
- 11 "The Kelo Decision: Investigating Takings of Homes and other Private Property," Testimony of Hilary O. Shelton before the Senate Judiciary Committee, September 20, 2005. [http://judiciary.senate.gov/testimony.cfm?id=1612&wit\\_id=4660](http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4660)
- 12 Op. cit. at note 1, p. 2676.
- 13 Ellis Hankins, "U.S. high court didn't authorize N.C. cities to do anything more," North Carolina League of Municipalities, [http://www.nclm.org/A1%20Center%20Page%20News/eminent\\_domain\\_hankins.htm](http://www.nclm.org/A1%20Center%20Page%20News/eminent_domain_hankins.htm)
- 14 N.C. Gen. Stat. § 40A <http://www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0040A>
- 15 North Carolina H.B. 1647 (2000) <http://www.ncga.state.nc.us/Sessions/1999/Bills/House/HTML/H1647v7.html>
- 16 N.C. Gen. Stat. § 160A-500 et seq. [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter\\_160A/Article\\_22.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_22.html)
- 17 N.C. Const. art. XIII § 4.
- 18 A list of state constitutional provisions can be found on the Castle Coalition web site at [http://www.castlecoalition.org/resources/state\\_constitutions/index.asp](http://www.castlecoalition.org/resources/state_constitutions/index.asp)
- 19 N.C. Const. art. I § 19.