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*spot*light

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A Model Amendment

Protecting North Carolinians' property rights

SUMMARY: North Carolina needs a constitutional amendment to protect property rights that will contain very specific language. This approach will ensure that courts are unable to undermine the rights that the amendment is designed to protect. The amendment should define key terms such as "public use" and expressly prohibit all takings for private use, including those for economic development purposes.

The attack on private property rights is getting some well-deserved attention. In *Kelo v. City of New London*,[1] the United States Supreme Court held that the government can take private property and transfer it to another private party solely for economic development reasons (economic development takings). For example, if a house can generate more tax revenue as a parking lot, then it may be possible for the government to take the house. As a result of this decision, North Carolinians should not look to the United States Constitution to protect their property.

Unfortunately North Carolinians should not look to their state constitution either. The state needed a property rights amendment even before *Kelo*. North Carolina is the only state, except for possibly New Hampshire, that does not explicitly prohibit the government from taking private property without just compensation.[2]

This *Spotlight* proposes model language for a constitutional amendment that would protect property rights. Most importantly, it explains the rationale and goals for such an amendment.

Protecting Property Rights and Heading off Problems

The model constitutional amendment would establish strong property-rights protections and place clear limitations on the government's ability to infringe on these fundamental rights. However, even when constitutional language is clear, courts can expand the meaning of the text far beyond what is intended. The nation's Founding Fathers never intended nor imagined in their wildest dreams that economic-development takings would be constitutional. For this reason, the model constitutional amendment anticipates the expansive arguments that can be made to limit property rights. As a result, the

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Model Language for an Amendment to Protect Property Rights in N.C.

In order to protect property rights, private property shall not be taken or damaged unless for a public use and upon just com pensation, as determined by a court, being first made to the owner. Public use shall only mean the necessary taking of private property for ownership by public entities or privately owned common carriers, private ways of necessity, and to eliminate a significant threat to the public health or safety caused by a specific property; leases and other similar arrangements made by the state, its political subdivisions, and privately owned common carriers with private entities are not a public use unless the lessee's occupied area and its functions are clearly incidental to the taking. The question of whether a use is a public use is a judicial question alone without any regard to legislative assertions that a use is public. Except by the express consent of the owner, private property may not be taken for any private use, including for economic development purposes, for use by a private entity, or on the basis that another private party will make a more profitable use of the property. At all times, the state and its political subdivisions shall have the burden of proving, by no less than clear and convincing evidence, the necessity for taking private property, the legality of the taking, and just compensation. In addition to the full value of private property as prescribed by law, just compensation shall include, but is not limited to, attorney fees to prevailing property owners in condemnation litigation, relocation and reestablishment costs, business goodwill, and the value of the property in light of its relationship to the proposed public use.

amendment's language is very specific to prevent the amendment from being read too broadly by courts.

"Public Use" Should Mean Public Use. The Fifth Amendment of the United States Constitution states that "Nor shall private property be taken for public use, without just compensation."[3] The model state constitutional amendment would narrowly define "public use" to give meaning to these words. The traditional understanding of "public use" is the transfer of private property for public ownership (e.g. road, school) or for use by the public (e.g. stadium, railroad).[4] Courts have broadened "public use" to mean "public benefit" or "public purpose."[5] As a result, the government has permission to take property for purposes beyond what was ever intended. After *Kelo*, "public use" basically has been eliminated from the U.S. Constitution.

Blight, Public Nuisances, and Public Use. To ensure that the government has the ability to use eminent domain for blight and public nuisances, the model amendment states that a permissible public use would be the elimination of a "significant threat to the public health or safety caused by a specific property." These types of takings should be permissible because the taking itself, as Justice O'Connor argues in *Kelo*, alleviates a significant harm to the public.[6]

The model amendment would address the misuse of blight laws to take non-blighted property. If a property is taken for public health or safety reasons, the threat must be "caused by a specific property."

Permitting the taking of blighted property can be problematic, as residents of Riviera Beach, Florida, are learning. In a story that has garnered national media attention, even non-blighted private homes near the beach are being taken for a yacht club, among other things, because they are in a "blighted area." Of course, there are economic motivations, but the legal rationale is blight.[7]

Local governments can map out areas so they can take non-blighted properties that are in blighted areas. One block can make the difference between luxury and blight in most downtown areas. By drawing an area in a favorable manner, the luxury block can appear to be in a blighted area.

North Carolina's urban renewal law, which addresses blight, makes it easy to take property. It even allows for the taking of property that *may become* blighted.[8] The model constitutional amendment would appropriately limit the reach of any urban renewal law.

No Takings for Private Use. One of the primary purposes of the model amendment is to ensure that *Kelo*-type takings are prohibited in North Carolina. The model amendment would allow the government to take private property only for a "public use." A clear definition of "public use" would be included within the amendment. However, to be direct, it would also expressly prohibit any takings for private use, including economic-development takings.

Last Resort. Local governments and proponents of eminent domain constantly argue that private property is only taken as a last resort. The amendment provides protections to ensure that this would truly be the case, including:

1) Requiring Necessity: A taking should be "necessary." The government should not take private property if viable alternatives exist.

2) Putting the Burden of Proof on the Government: If the government takes private property, the property owners should not have the burden to show why their rights have been violated or how much money they should receive in return for their property. This obvious point is not the accepted practice in North Carolina. In a North Carolina Supreme Court case, *Board of Education v. McMillan*, the Court held that property owners have the burden to prove just compensation.[9] The model amendment would make it clear that the state and its political subdivisions would always bear the obligation to demonstrate why a taking is legal and necessary and what amount of money constitutes just compensation.

Leases. The model amendment would seek to prevent the government from getting around the law by simply leasing condemned property to private developers. One potential problem is the $1 lease arrangement. In *Kelo*, while negotiations had not been finalized, some private developers would have received a 99-year lease for $1 per year. This arrangement apparently did not bother the United States Supreme Court,[10] but the rights of North Carolinians need to be protected from this kind of charade.

A similar arrangement took place in North Carolina. An economic-development taking was allowed under the guise of a permissible public taking. The North Carolina Supreme Court in *Piedmont Triad Airport Authority v. Urbine* held that an airport authority could lease cargo facilities taken through eminent domain to FedEx because FedEx's use of those facilities improved the airport. The taking was allowed despite the fact that the public would not have access to the cargo facilities.[11]

By containing a provision that would allow only those leases that are incidental to the taking, the $1 lease arrangement and the *Piedmont*-type of taking would be prohibited. "Incidental" leases would be allowed for the government to own buildings and lease out property for services such as restaurants, as might be the case with an arena or a civic center.

Judicial Question Only. Courts, including the U.S. Supreme Court, have given so much deference to legislative bodies that the legislatures are the ones defining "public use." When they have this deference, legislative bodies will define it without regard to the true meaning of "public use" (as seen with economic-development takings). The judiciary alone should define what constitutes a "public use," and some states already have language in their constitutions that specifically codify this requirement.[12] As Justice Thomas stated in his dissent in *Kelo*, "We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable."[13]

Quick-Takes. In North Carolina, the government in many circumstances can take immediate title and possession of private property. Property owners can go to court and try and stop this process before their property is taken.[14] To prevent these "quick-takes," the model constitutional amendment would require that just compensation, as determined by a court, be made to the owner first. The objective is to ensure that all court proceedings occur before any property can be taken.

Just Compensation. Fair market value, which often is used to define just compensation, is a poor measure of what is truly "just." Private property owners incur costs greater than the monetary value of the property. For example, when homeowners are forced to move, it costs them money to relocate. Businesses that are forced to move may lose goodwill earned within communities. One piece of property in isolation is not an accurate way of measuring its worth—the property as it relates to the entire project is its worth.

The model amendment would define just compensation to include these considerations. It would also require that attorneys' costs be provided to property owners that prevail in any litigation. High attorneys' fees often dissuade individuals from fighting for their property rights. Paying for attorneys' fees would be another way to ensure that the government does not recklessly try to take private property. A true measure of "just compensation" would make the

target of the taking whole. This is the goal for the language used in this model amendment.

Conclusion

Property rights, for some reason, have been forgotten and neglected by too many leaders, and even by too many citizens. Eminent domain is generally seen as a threat to someone else, never to us. *Kelo* may have been a bad opinion, but it did remind Americans that property rights must be protected and that these rights should never be taken for granted. No public benefit or additional tax dollar justifies taking away fundamental rights. This proposed constitutional amendment would make it explicit that North Carolinians value property rights and that these rights are never negotiable.

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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. See the Castle Coalition web site, which lists all state constitutional amendments addressing property rights: http://www.castlecoalition.org
3. U.S. Constitution, Amendment 5, http://usinfo.state.gov/usa/infousa/facts/funddocs/billeng.htm
4. *Kelo*, p. 2673.
5. See *Kelo* and also *Carolina Telephone and Telegraph Co. v. McLeod*, 321 N.C. 426, 364 S.E.2d 399 (1988).
6. *Kelo*, p. 2674.
7. Pat Beall "Riviera Beach eminent domain case draws national spotlight," *Palm Beach Post*, December 11, 2005, http://www.palmbeachpost.com/politics/content/local_news/epaper/2005/12/11/c1a_blight_1211.html
8. N.C. Gen. Stat. § 160A-500 et seq., http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_22.html
9. *Board of Education v. McMillan*, 250 N.C. 485, 108 S.E. 2d 895 (1959).
10. *Kelo*, footnote 4.
11. *Piedmont Triad Airport Authority v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001).
12. At least 6 states — Arizona, Colorado, Mississippi, Missouri, Oklahoma, and Washington — have constitutional language explicitly stating that the meaning of "public use" is a judicial question alone.
13. *Kelo*, p. 2684.
14. N.C. Gen. Stat. § 40A-42, http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_40A/GS_40A-42.html