



POLICY REPORT

# Eminent Domain in N.C.

*The Case for Real Reform*

DAREN BAKST

MAY 2007

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## EXECUTIVE SUMMARY

### Background on Eminent Domain and *Kelo*

- Eminent domain refers to the government's power to seize private property without the consent of owners.
- In 2005, the United States Supreme Court, in the now infamous case of *Kelo v. City of New London*, held that the government could seize private property solely for economic development reasons. For example, if a house can generate more tax revenue as a strip mall, then the government can seize the house and transfer it to a strip mall developer.

### What Other States Have Done

- Seven states have already passed constitutional amendments to protect against eminent domain abuse, include neighboring states such as Florida, Georgia, and South Carolina.
- In Nevada, the voters overwhelmingly approved a new amendment but it requires passage in two consecutive general elections to become law.
- When a state brings up an eminent domain amendment to the voters, which does not also try to address regulatory takings, the voters overwhelmingly pass the amendment.

### What North Carolina Has Done

- The House Select Committee on Eminent Domain Powers developed a watered down interim report in 2006 and was supposed to meet after the short session to address just compensation and other critical issues. For no apparent reason, it never met again.
- The legislature passed a bill in 2006 that deleted provisions in existing law that ex-

pressly *allowed* for economic development takings. However, the legislature was not willing, in legislation, to expressly *prohibit* all economic development takings. In addition, the bill amended the state's urban redevelopment (blight) law.

### Why North Carolina Needs a Constitutional Amendment

- North Carolina's constitution has the weakest property rights protections in the country. It is the only state in the country that does not have an express constitutional provision that limits the taking of private property for a public use with just compensation.
- State legislation is the only thing coming between North Carolinians and the government's ability to take private property for economic development or any other reason. When legislation can be changed at the whim of political interests, this is far from adequate protection.

### Limit Takings to a Proper "Public Use"

- A constitutional amendment should only permit property to be taken for what has traditionally been understood to be a public use. Those reasons *generally* are not different from what North Carolina now allows in the state's eminent domain statute.
- Proper takings include property taken for use by the government or use by the general public. It also should include takings for utilities and common carriers in their role to provide services to the general public, and to protect against blighted property.
- The blight justification for taking property must be very narrow in scope. If not, a constitutional amendment could actually

be worse than the eminent domain abuse it is trying to solve. It should only mean taking property to protect the public from a clear and direct harm to the public's health and safety that is caused by that parcel of property.

- All takings for any private use should be prohibited (except for public utilities and common carriers, as explained above).

### Protect Against the “Blight” Excuse

- It is critical to understand that *most eminent domain abuse has not come from blatant economic development takings, but instead through the abuse of blight laws.*
- It is almost impossible to demonstrate that a taking is really for economic development reasons, as opposed to addressing some overbroad definition of blight.
- There is a “reverse Robin-Hood effect” when it comes to blight laws. The government takes private property from the poor to give to the wealthy.

### Provide “Just” Compensation

- The House Select Committee on Eminent Domain Powers had drafted a bill that identified a way to better compensate eminent domain victims.
- Many of the compensation issues that need to be addressed in a constitutional amend-

ment are consistent with the compensation issues that the Committee identified in its interim report.

- Generally, just compensation has meant fair market value.
- Just compensation should be “just.” It should make eminent domain victims “whole.” This means that they should be put in the same position that they would have been in had their property not been taken.

### Create a Fair Process for Eminent Domain Victims

- The government always should have the burden of proof in all eminent domain proceedings.
- The government should have the burden of proof to demonstrate that a taking of a specific piece of property is clearly necessary for the public use espoused and that no reasonable alternatives exist.

### Bottom Line

- An eminent domain amendment is a bipartisan issue, as seen by the wide support for recent eminent domain amendments even in North Carolina. Only politics and the desire to protect governmental interests will explain why a properly drafted amendment is not enacted.

## INTRODUCTION

Last year, the North Carolina legislature failed at its chance to enact meaningful eminent domain reform. While other states are taking real steps to protect the property rights of their citizens, the North Carolina legislature seems more interested in protecting the interests of government, not its citizens.

This report will explain what the North Carolina legislature passed last year and then address what kind of eminent domain reform is still needed. At the heart of any reform is a constitutional amendment, especially since the state constitution has the weakest property rights protection in the country. The state constitution also does not protect against the government seizing private property for economic development reasons.

While an amendment is critical, it is even more critical that an amendment is well drafted, so that property rights are not a mere illusion but are truly respected.

## WHAT ARE EMINENT DOMAIN AND KELO?

The government's power of eminent domain refers to its power to seize private property without the consent of owners. The Fifth Amendment of the United States Constitution states "Nor shall private property be taken for public use, without just compensation."<sup>1</sup>

In 2005, the United States Supreme Court, in the now infamous case of *Kelo v. City of New London*,<sup>2</sup> held that the government could seize private property solely for economic development reasons. For example, if a house can generate more tax revenue as a strip mall, then the government can seize the house and transfer it to a strip mall developer. The Court's opinion woke people up about these "economic development takings" and also the abuse of eminent domain in general.

Table 1: States that Passed Constitutional Amendments Protecting Against Eminent Domain Abuse in 2006

State	Voting Results
Florida	69.1 percent in favor; 30.9 percent opposed
Georgia	82.7 percent in favor; 17.3 percent opposed <sup>†</sup>
Louisiana	55 percent in favor; 45 percent opposed
Michigan	80.1 percent in favor; 19.9 percent opposed
Nevada*	63.1 percent in favor; 36.9 percent opposed
New Hampshire	86 percent in favor; 14 percent opposed
North Dakota	67.5 percent in favor; 32.5 percent opposed
South Carolina	86.1 percent in favor; 13.9 percent opposed

\* In Nevada, the voters overwhelmingly approved a new amendment but it requires passage in two consecutive general elections to become law.

<sup>†</sup> These results were based on 98% of precincts reporting.

Source: *Castle Coalition*

## HOW OTHER STATES HAVE RESPONDED TO EMINENT DOMAIN ABUSE

In 2006, other states took significant action to protect against eminent domain abuse. In fact, seven states have already passed constitutional amendments to protect against eminent domain abuse. Those states include neighboring states such as Florida, Georgia, and South Carolina.<sup>3</sup> In another state, Nevada, the voters overwhelmingly approved a new amendment but it requires passage in two consecutive general elections to become law.

California had the only eminent domain amendment that failed. Idaho voters failed to approve a ballot initiative that would have amended the state statutes, not the constitution. In both instances, unlike the eight amendments that were passed, there was an attempt to provide greater protections against "regulatory takings."<sup>4</sup> These takings refer to situations where the government is not trying to seize property but has regulated property so extensively, that the harm caused to the value of the property is so great that it amounts to a taking of property.

There is a clear pattern, as demonstrated in Table 1: *When a state brings up an eminent domain*

*amendment to the voters that does not also try to address regulatory takings, the voters overwhelmingly pass the amendment.*

There certainly is a problem with regulatory takings because the law provides little protection against them, but it is clear that amendments addressing them are tougher to enact than amendments dealing solely with the actual seizure of property. It should be noted, however, that Arizona voters did pass a statutory initiative that addressed regulatory takings.<sup>5</sup>

### HOW NORTH CAROLINA HAS RESPONDED TO EMINENT DOMAIN ABUSE

On December 8, 2005, Speaker of the House Jim Black formed the House Select Committee on Eminent Domain Powers.<sup>6</sup> The Committee's initial work seemed promising, especially when it began working on legislation that would have more fairly compensated eminent domain victims.<sup>7</sup> Unfortunately, it recommended a watered-down bill in its interim report that did not even address just compensation. Even worse, the committee was supposed to meet after the 2006 short session to address just compensation and other critical issues, yet never met again after submitting its interim report.<sup>8</sup>

During the 2006 short session, the General Assembly enacted legislation, HB 1965,<sup>9</sup> that had two primary features. First, it took the interim recommendations of the Eminent Domain Powers committee and deleted provisions in existing law that expressly *allowed* for economic development takings. The legislature was unwilling, however, to write legislation expressly *prohibiting* all economic development takings.

This is not a minor distinction. Economic development takings can be accomplished through other means than mere provisions that expressly use the magical words “economic development.” There also is an assumption in the bill that all the express economic development takings have been identified in North Carolina's long and convoluted statutes.

If, as some argue, economic development takings have been taken care of, then there is no

reason to oppose legislation that expressly prohibits economic development takings. There would be no harm and it would give people more peace of mind.

Second, the bill amended the state's urban redevelopment (blight) law. In the past, the government could seize property even if it was in pristine condition, as long as it was in an area that was considered blighted. Now, the government may seize property only if that parcel of property is “blighted.”<sup>10</sup> Property also could have been taken for very weak reasons, such as it might become blighted in the future. The urban redevelopment law now states that property can be taken only if it meets the much higher standard for a “blighted parcel” of property. The law still is overbroad, however, and could allow takings for reasons other than what should constitute “blight.”

Takings for blight are allowed, for instance, if it can be shown that a parcel of property by reason of its age<sup>11</sup> substantially impairs the *sound* growth of the community and is *conducive* to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime, and is detrimental to the public health, safety, morals, *or* welfare.<sup>12</sup> That may sound like a tough standard, but it is not.

Courts give the government significant deference in determining issues regarding blight—which spells trouble for property owners when a blight law is overbroad.

According to North Carolina's amended blight law, the government has to overcome three hurdles. First, the government may take property based on a subjective decision as to whether *sound* growth is substantially impaired in a community by the parcel of property. If a community is experiencing economic growth, the government might still be able to take the property because “sound growth,” not economic growth in general, has to be substantially impaired. Besides this hurdle applying economic development factors to determine blight, which should be impermissible, it also is an easy standard to meet — properties that are in communities that are growing economically could be taken.

The second hurdle, which would appear to be

the toughest for the government, deals with the long list of conditions, which includes ill health and transmission of disease, among others. However, the law does not say that these conditions actually have to exist or will likely exist in the future, only that the property is *conducive* to these conditions — which could mean almost anything.

The third hurdle is the easiest to meet. It requires that the property be detrimental to the public health, safety, morals, *or* welfare. If the “or” was an “and,” this might offer some protection, but taking property because it hurts “public welfare” is so broad that it also could mean almost anything.

The changes to the urban redevelopment law still are a major accomplishment, but they are only a partial step toward protecting North Carolinians in light of what still needs to be done. While it is tougher now for the government to use the blight law as an end run around any prohibition on economic development takings, there still needs to be some tightening up of the language to ensure that only property that is truly blighted can be taken. In other words, it should allow the taking of property only to protect the public from a clear and direct harm to the public’s health and safety that is caused by that parcel of property.

### WHAT NORTH CAROLINA NEEDS TO DO TO RESPOND TO EMINENT DOMAIN ABUSE

The changes made so far to protect against eminent domain abuse are minor. When compared to what needs to be done, the actions so far can only be described as baby steps in the right direction.

#### *The Need for a Constitutional Amendment*

First and foremost, North Carolina needs a constitutional amendment to protect its citizens. North Carolina’s constitution has the weakest property rights protections in the country. It is the only state in the country that does not have an express constitutional provision that limits the taking of private property for a public use with just compensation. Instead, the Constitution only states that “no person shall be ... deprived of his ... property, but by the law of the land.”<sup>13</sup>

The North Carolina Supreme Court has

explained how the Law of the Land provision<sup>14</sup> applies to eminent domain:

*Every state constitution, except North Carolina’s, contains similar provisions prohibiting the taking of private property for public use without just compensation. While North Carolina does not have an express constitutional provision against the “taking” or “damaging” of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of “the law of the land” within the meaning of Article I, Section 19 of our State Constitution.<sup>15</sup>*

The North Carolina Supreme Court has to read the most basic eminent domain protections into the state constitution through “the law of the land” provision. After *Kelo*, “the law of the land” as applied in the state constitution almost certainly would permit economic development takings.<sup>16</sup> Therefore, North Carolina, for all practical purposes, has no state constitutional protection against economic development takings, and certainly has no express protection.

Given the lack of constitutional protections on the state and federal level, state legislation is the only thing coming between North Carolinians and the government’s ability to take private property for economic development or any other reason. When legislation can be changed at the whim of political interests, however, that is far from adequate protection. A constitutional amendment would ensure that the legislature could not undermine property rights unless it amended the constitution again. To amend the constitution, three-fifths of both houses of the legislature would have

to pass the amendment and then a majority of the voters would have to approve it.<sup>17</sup>

Even if the state legislature was the model of ethics, it is absurd to protect a fundamental right through legislation. If legislation were a proper means for the protection of rights, then the North Carolina Constitution would not need to protect any rights. Freedom of speech could be protected through legislation. The North Carolina legislature could pass an equal protection bill and get rid of equal protection in the constitution. These absurd examples are no different from applying this legislative protection argument to property rights.

Quite simply, any legislator that opposes a constitutional amendment to protect against eminent domain abuse is being disingenuous, at best, about any concern for property rights. North Carolina needed a constitutional amendment even before *Kelo*, and now after *Kelo*, that need is only magnified. There are three primary issues that need to be considered in developing a constitutional amendment. First, there needs to be clarification on when the government should be allowed to take private property. Second, victims of eminent domain takings should be properly compensated. Lastly, there should be a fair process for those affected by eminent domain.

## DEVELOPING A CONSTITUTIONAL AMENDMENT

### *Step One: Limit When Government May Take Private Property*

The proper reasons for taking private property do not necessarily have to be spelled out in an amendment. Once it is understood what are permissible takings, then language can be drafted to ensure that takings are limited to the proper reasons that are identified.

Property can only be taken for a “public use” as is directly stated in the Fifth Amendment of the United States Constitution. Unfortunately, over the years, the United States Supreme Court decided that “public use” should mean something more, including “public purpose” or “public benefit.” The Court, for all practical purposes, just deleted “public use” and replaced it with words that it preferred.

A constitutional amendment should only include what has traditionally been understood to be a public use. Those reasons *generally* are not different from what North Carolina now allows in the state’s eminent domain statute.<sup>18</sup> The reasons are what most people would consider to be a “public use.”

Property taken for a “public use” should mean property taken for use by the government or use by the general public. It also should mean takings for utilities and common carriers in their role to provide services to the general public. In addition, a public use should include the taking of property to protect against blighted property — this means taking property to protect the public from a clear and direct harm to the public’s health and safety that is caused by that parcel of property. An amendment should clarify what blight entails because it will help to ensure that overbroad blight legislation is not developed.

There are many ways to draft language to ensure that takings are limited to a public use. There will be concerns, however, that the language is too narrow and keeps the government from taking property, and there will also be concerns that the language is too broad and allows the government too many ways to take property. *When in doubt about the language, the legislature should defer to protecting individual rights and not to the government’s power to seize private property.*

There are several other factors that should be considered in ensuring that property is only taken in cases of true public use, as defined above:

### *Takings for Private Uses*

Even after *Kelo*, the taking of private property for purely a “private use” is prohibited.<sup>19</sup> The fact that private property is taken and transferred to a private party for its use does not necessarily mean that the taking is for a “private use” (in the legal sense). If there is an alleged “public benefit” of some kind, such as economic development, then the taking may be considered to be for a “public use.”

All takings for any private use should be prohibited. The North Carolina Supreme Court



in a case called *Piedmont Triad Airport Authority v. Urbine*<sup>20</sup> has raised the bar as to how far an amendment has to go to protect North Carolinians from takings for private uses. The Court held that an airport authority that seized private property and leased it to Federal Express could do so, even though the property was for the exclusive use and benefit of Federal Express. According to the Court, the taking was not for a “private use” because the use by Federal Express was *incidental* to the public use of improving airports.

It is almost impossible to see how a transfer of property from one private citizen to another private citizen (Federal Express) for its sole use is incidental to a proper public use. A constitutional amendment has to reverse this opinion, and prohibit the taking of property for a private use unless it is truly incidental to a proper public use.<sup>21</sup> For example, if there were a taking of property for a courthouse that will eventually have a privately run cafeteria, the cafeteria is truly incidental to the public use of a courthouse. Of course, public utilities and common carriers fulfilling a proper public use should not fall under the definition of a “private use.”

### *Economic Development Takings*

Simply stating that a taking may not be for economic development reasons is not enough because the government, if it is taking property for an economic development reason, will simply identify what appears to be a valid reason for taking the property. This reason may be a pretext (an excuse) for taking property for economic development or it could be an economic development reason hidden under the “umbrella” of a valid public use.<sup>22</sup> This happens when a statute defines a public use so broadly, it creates economic development reasons for taking property.

It is critical to understand that most eminent domain abuse has not come from blatant economic development takings, but instead through the abuse of blight laws. When blight is so broad it means almost anything, the government can take almost any property it wants in the name of removing blight, including for economic devel-

opment. Fixing blight and promoting economic development can be so intertwined, it may be impossible for the government in some situations to know what the true motivation is for taking private property. As a result, it is almost impossible to demonstrate that a taking is really for economic development reasons, as opposed to addressing blight.

As would be expected, the government will seize the properties that cost the least amount of money. The government also will target properties where individuals are less likely to put up any resistance if property is seized. The worst part of this abuse is those least able to afford having their property seized are the usual victims. There is a “reverse Robin-Hood effect.” The government takes from the poor to give to the wealthy.

As Hilary O. Shelton, NAACP Washington Bureau Director, stated in his 2005 Senate testimony on private property rights:

*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>23</sup>

In this same testimony, he said on the issue of urban renewal:

*Indeed, the displacement of African-Americans and urban renewal projects are so intertwined that “urban renewal” was often referred to as “Black Removal.”*<sup>24</sup>

A recent Institute for Justice report describes the incredible toll that blight laws have had on low-income individuals and African-Americans:

*Under that act [Federal Housing Act of 1949], which was in force between 1949 and 1973, cities were authorized to use the power of eminent domain to clear “blighted neighborhoods” for “higher uses.” In 24 years, 2,532 proj-*

*ects were carried out in 992 cities that displaced one million people, two-thirds of them African American.*<sup>25</sup>

While blight laws should be a major concern, there also are other ways for the government to take property for economic development under the guise of a proper public use. For example, in North Carolina, a regional public transportation authority, such as the Triangle Transit Authority (TTA), can take private property if it is “used or useful for the purposes of public transportation.”<sup>26</sup> Property does not even have to be used for public transportation, as long as it is useful to public transportation somehow.

This transportation authority provision is an example of how North Carolina government still can take private property for economic development, even if the law does not expressly use those “magical words.” The statute defines a valid public use (a public transportation system) so broadly that it permits an economic development taking.

If the TTA argued that economic development around rail lines, if a rail actually existed or was going to exist, would be useful for the rail by increasing the number of passengers, this probably would be allowed under this provision. The TTA could use this reason as an excuse to develop areas for purely economic development reasons or because it does think it will help the rail. Either way, the end result is takings for economic development. Both the blight and rail examples demonstrate why there needs to be a prohibition on takings that also are *indirectly* for economic development.

### *Speculative Takings*

The government can take property for a proper public use even though it knows the reason is unlikely to come to fruition. For example, the TTA has taken property for a rail system even though its rail project was, for all practical matters, dead.<sup>27</sup>

There also is nothing to stop the TTA from taking property based simply on an argument that it plans one day to use the property for rail.

### *Leases*

The government can take property and then lease it to a private party. This type of lease arrangement, which can be an end run around any prohibition on economic development takings, is precisely what happened in the *Piedmont* case with Federal Express.

## **DEVELOPING A CONSTITUTIONAL AMENDMENT**

### *Step Two: Compensate Eminent Domain Victims Properly*

The House Select Committee on Eminent Domain Powers had drafted a bill that identified a way to better compensate eminent domain victims. For example, it required that businesses be compensated for “costs likely to be incurred that are associated with moving the business.”<sup>28</sup>

The bill required that better notice of condemnation be provided to certain eminent domain victims, including the amount estimated to be just compensation. If a court awarded compensation to the owner that was at least 25% more than the amount stated in the notice, the owner was entitled to reimbursement of costs and expenses, “including reasonable attorney fees, appraisal fees, engineering fees, and other relevant services made necessary because of the condemnation proceedings.”<sup>29</sup>

The eminent domain bill that passed contained none of these modest provisions. The interim study report, however, stated that these issues would be addressed after the short session:

*The Committee will consider the following issues when it resumes its work after the 2006 Regular Session:*

- *The adequacy of damages paid to persons whose property is condemned.*
- *Payment of damages to persons who operate businesses on condemned property that is affected by a condemnation action, whether or not they own the condemned property.*
- *Payment of attorneys’ fees and other expenses associated with condemnation proceedings.*

- *How to ensure that initial offers to condemnees and affected businesses are sufficient so that the likelihood of contested condemnations can be reduced.*<sup>30</sup>

For no apparent reason, the Committee never met again and, as a result, never addressed these issues or other eminent domain issues that it intended to examine.<sup>31</sup> The enacted legislation also did not address compensation. Many of the compensation issues that need to be addressed in a constitutional amendment are consistent with the compensation issues that the Committee identified in its interim report.

Generally, just compensation has meant fair market value. When individuals are eminent domain victims, fair market value is far from just. There are relocation costs, loss of business goodwill, and intangible losses that are hard to quantify. In many instances, homeowners may be forced from neighborhoods because they no longer can afford to live in the same area after losing their properties. Businesses may never operate again because locations were critical to their success.

There also are attorney and appraisal fees that take away from an award based on fair market value. If an attorney receives one-third of the amount paid by the government, which is common, then the property owner is only receiving two-thirds of any award based on the fair market value of a property.

Just compensation should be “just.” It should make eminent domain victims whole. This means that they should be put in the same position that they would have been in had their property not been taken. If two people are in a car accident, the negligent party has to make the victim whole. Yet, when the government purposely uses the force of the state to seize private property, the amount that it is required to pay would not even come close to making the eminent domain victim whole.

Paying eminent domain victims may become more costly with this approach. However, if the taking of private property is truly for the public, then the public should bear the actual costs of taking the property, not the victims who, by no

choice of their own, have had their lives uprooted.

There are several common eminent domain abuses related to just compensation that should be addressed, such as:

- *Creating a Level Playing Field.* When the government makes its offer, property owners are in no position to negotiate, unless they have the money to go to court. Even then, the costs of going to court, both financially and emotionally, can deter property owners from challenging the government’s offer.

The government should be required to provide money up front that can be accessed by property owners if they seek to challenge any offers. This will help ensure that the poor are not steamrolled by the government. The government also should be required to pay for attorney fees and other court costs, unless a court determines that a property owner acted in bad faith in filing suit.

- *Trial by Jury.* An amendment should clearly state that a property owner has the option of having a case heard by a jury. This will give the property owner a choice to determine the best means to secure the fairest award.

## DEVELOPING A CONSTITUTIONAL AMENDMENT

### *Step Three: Create a Fair Process*

Courts defer to the legislative and executive branch when it comes to defining critical questions such as what should constitute a “public use.” This is like a court deferring to the police to define what constitutes a “reasonable search and seizure” under the Fourth Amendment of the United States Constitution. This point is especially important because this deference makes it easier for the government to do end runs around the law.

The eminent domain process should:

- *Require the Government to Have the Burden of Proof.* The government always should have the burden of proof in all eminent domain proceedings. Property owners should not be required to show that an award was just or that a taking was, in fact, for a valid public

use. If the government wants to seize property, it should show why it should be able to.

- *Require Takings to Be Necessary.* The government should have the burden of proof to demonstrate that a taking of a specific piece of property is clearly necessary for the public use espoused and that no reasonable alternatives exist. This also should include a requirement that the taking is for a use that is going to be a reality, not a fantasy of government officials, such as the rail was for the TTA.<sup>32</sup> In other words, speculative takings should be prohibited as discussed earlier in this report.

## CONCLUSION

There are many issues that need to be addressed when developing a constitutional amendment. Since government has come up with so many ways to abuse eminent domain, the amendment has to cover a lot of ground.

Eminent domain is a significant power that should be used sparingly. Unlike a private citizen buying property from a willing seller, the government is using force to seize property against the will of a property owner.

The North Carolina Constitution, at the start

of its text, is instructive in understanding why property rights should be respected and eminent domain rarely used:

*We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.<sup>33</sup> (Emphasis added).*

If it is self-evident that there is a right to the enjoyment of the fruits of an individual's labor — and what is private property if it is not the fruit of one's labor? — then it is equally self-evident that the government should not infringe upon this right, except in rare circumstances.

This year, North Carolinians will see if the legislature cares more about the North Carolina League of Municipalities and governmental interests than it does about the rights of its citizens, as it did last year. An eminent domain amendment is a bipartisan issue, as seen by the wide support for recent eminent domain amendments even in North Carolina.<sup>34</sup> Only politics and the desire to protect governmental interests will explain why a properly drafted amendment is not enacted.

## NOTES

1. U.S. Constitution, Amendment 5, [usinfo.state.gov/usa/infousa/facts/funddocs/billeng.htm](http://usinfo.state.gov/usa/infousa/facts/funddocs/billeng.htm).
2. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), [laws.findlaw.com/us/000/04-108.html](http://laws.findlaw.com/us/000/04-108.html).
3. See the Castle Coalition web page that lists the 2006 ballot measures, [www.castlecoalition.org/legislation/ballot-measures/index.html](http://www.castlecoalition.org/legislation/ballot-measures/index.html).
4. *Ibid.* See also Utt, Robert D., “States Vote to Strengthen Property Rights,” Heritage Foundation, February 1, 2007.
5. *Ibid.*
6. House Select Committee on Eminent Domain Powers: Interim Report to the 2006 Regular Session of the 2005 General Assembly of North Carolina, [www.ncleg.net/documentsites/legislativepublications/Study%20Reports%20to%20the%202006%20NCGA/Eminent%20Domain%20Powers%20-%20House%20Select%20Committee.pdf](http://www.ncleg.net/documentsites/legislativepublications/Study%20Reports%20to%20the%202006%20NCGA/Eminent%20Domain%20Powers%20-%20House%20Select%20Committee.pdf).
7. “Eminent Domain Damages/Costs,” Bill Draft 2005-RL-8 [v.5], General Assembly of North Carolina, March 1, 2006.
8. *Op. cit.*, note 6.
9. S.L. 2006-224 (HB 1965), [www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1965v6.html](http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1965v6.html).
10. N.C. Gen. Stat. § 160A-500 *et seq.*, [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). There is no definition of “blight” per se. The urban redevelopment law allows property to be taken if it is a “blighted parcel.” The text of the language needs some technical corrections due to some presumably unintended inconsistencies that were created after the law was amended in 2006.
11. N.C. Gen. Stat. § 160A-503(2a), [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-503.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-503.html). There are other property conditions besides age that could apply.
12. *Ibid.*
13. N.C. Const. art. I § 19.
14. “The term ‘law of the land’ as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with ‘due process of law’ as used in the Fourteenth Amendment to the Federal Constitution.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004) citing *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976).
15. *Bailey v. State*, 348 N.C. 130 (1998), citing *Long v. City of Charlotte*, 306 N.C. 187, 195, 293 S.E.2d 101, 107 (1982).
16. See, e.g., *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004) as an example of the North Carolina Supreme Court looking to the United States Supreme Court to determine “the law of the land.” In this case, the North Carolina Supreme Court looked to the United States Supreme Court to determine whether a limitation on punitive damages violated the Law of the Land provision. This is not to say that the Court has not looked to natural law or even to other states. There are few places to turn, however, in order to determine whether economic development takings should be legal other than the United States Supreme Court. Also, besides being the highest court in the land, the United States Supreme Court just addressed this specific legal question. Quite simply, it is highly unlikely and unreasonable to expect that the North Carolina Supreme Court would determine that the United States Supreme Court’s decision in *Kelo* does not constitute “the law of the land” on the issue of economic development takings. Please note that the North Carolina Supreme Court would not be able to ignore the United States Supreme Court if it wanted to go below the rights afforded by the United States Supreme Court. It can exceed the rights guaranteed by the United States Supreme Court.
16. N.C. Const. Art. XIII § 4.
17. N.C. Gen. Stat. § 40A *et seq.*, [www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0040A](http://www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0040A).
18. *Op. cit.*, note 2.
19. *Piedmont Triad Airport Authority v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001).
20. Unfortunately, the North Carolina Supreme Court in *Piedmont* took what clearly was not an incidental private use and called it incidental, thereby making it more difficult through constitutional language to prohibit *Piedmont*-type takings and also allow for a true “incidental” private use.
21. It is possible that the “valid” public use could be incidental to taking the property for economic development. It all comes down to how courts decide what it means to take property “for” a specific reason. It could mean that property may be taken if there is only a 1% valid public use reason or it could mean that property may be taken if the valid public use reason is clearly the primary reason for taking the property. Constitutional language has to protect against the 1% situation.
22. “The Kelo Decision: Investigating Takings of Homes and Other Private Property,” Testimony of Hilary O. Shelton before the United States Senate Committee on the Judiciary, September 20, 2005, [judiciary.senate.gov/testimony.cfm?id=1612&cwit\\_id=4660](http://judiciary.senate.gov/testimony.cfm?id=1612&cwit_id=4660).
23. *Ibid.*
24. Fullilove, Mindy Thomas, “Eminent Domain & African Americans,” Institute for Justice, *Perspectives on Eminent Domain Abuse* series, Vol. 1.
25. N.C. Gen. Stat. § 160A-601, [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_)

160A/GS\_160A-601.html.

26. See, e.g., Benjamin Niolet, “TTA, garage owner settle strife over site,” *The News & Observer*, August 22, 2006, [www.newsobserver.com/215/story/477615.html](http://www.newsobserver.com/215/story/477615.html).

27. *Op. cit.*, note 7 at 7.

28. *Op. cit.*, note 7 at 8-9.

29. *Op. cit.*, note 6.

30. *Ibid.*

31. *Op. cit.*, note 27.

32. N.C. Const. Art. I § 1, [www.ncga.state.nc.us/Legislation/constitution/article1.html](http://www.ncga.state.nc.us/Legislation/constitution/article1.html).

33. See H.B. 878 in the current legislative session, which has 96 sponsors, [www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H878](http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H878), and H.B. 2213 from last session, which had 88 sponsors, [www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2005&BillID=H2213](http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2005&BillID=H2213).

### ABOUT THE AUTHOR

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Prior to joining the Foundation, Bakst was Policy Counsel for the National Legal Center for the Public Interest, a Washington, D.C., think tank that focuses primarily on business regulation. He also worked in government relations in Washington, D.C., and founded and still is President of the national non-profit organization, Council on Law in Higher Education, which provides policy and legal analysis for colleges and universities — the organization is celebrating its 10th anniversary.

Bakst serves on the Federalist Society’s Administrative Law and Regulation’s Executive Committee and is a member of the American Legislative Exchange Council’s Task Force on Commerce, Insurance, and Economic Development. A licensed attorney, Bakst earned his J.D. from the University of Miami and his LL.M. in Law and Government from American University, Washington College of Law. Both his B.A. and M.B.A. are from The George Washington University.

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The John Locke Foundation is a nonprofit, nonpartisan policy institute based in Raleigh. Its mission is to develop and promote solutions to the state’s most critical challenges. The Locke Foundation seeks to transform state and local government through the principles of competition, innovation, personal freedom, and personal responsibility in order to strike a better balance between the public sector and private institutions of family, faith, community, and enterprise.

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*“To prejudge other men’s notions  
before we have looked into them  
is not to show their darkness  
but to put out our own eyes.”*

JOHN LOCKE (1632–1704)

Author, *Two Treatises of Government* and  
*Fundamental Constitutions of Carolina*



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