

spotlight

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YOUR HOME IS THEIR CASTLE *Ten Simple Ways Government Can Abuse Eminent Domain*

S U M M A R Y : Current law does not protect North Carolinians from eminent domain abuse. The state and local governments can seize private property for economic development reasons. However, the potential for eminent domain abuse is far more extensive than these “economic development takings.” From the state’s dangerous urban redevelopment law to the government finding clever ways to seize property for private businesses, North Carolina needs comprehensive protection from eminent domain abuse.

North Carolinians are not protected from eminent domain abuse. If there was a benefit from *Kelo v. City of New London*,¹ it was the fact that the public was alerted to the problems of eminent domain. In *Kelo*, the United States Supreme Court held that the government can seize private property solely for economic development reasons (e.g. increased tax revenue, more jobs, etc). In other words, your house could be seized for a strip mall if it means the government gets more tax revenue. However, eminent domain problems are far more numerous than these economic development takings.

The need to expressly prohibit economic development takings clearly is a must. However, an express prohibition is not enough. This *Spotlight* identifies 10 ways state and local government can abuse the power of eminent domain in North Carolina. Many of these abuses would exist even if there were an express prohibition on economic development takings.

*1) Government takes your house for a strip mall because the state legislature gave your city the power to seize private property for **economic development**.*

There are several local acts (bills passed by the legislature affecting specific local communities), including one for Charlotte, that expressly allow for economic development takings.² The House Select Committee on Eminent Domain Powers, which failed to address most of the critical eminent domain issues, did recommend a draft bill that would repeal these local acts.

This committee also recommended the repeal of a provision that allows the state and local governments to use eminent domain to complete revenue bond projects that are designed to promote economic development.³ The provision was hidden so well that nobody on the committee knew about it for several

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months, including the legislative research staff. Until the local acts and revenue bond provision are repealed, they are still the law.

The revenue bond provision is a clear example of why an explicit prohibition on all economic development takings is needed. Who knows what other buried provisions exist? These unknown provisions are a way that the government can abuse the power of eminent domain by using laws that most people do not even know about.

*2) Government takes your pristine property because it is **in a “blighted area.”***

The state’s urban redevelopment law allows the government to seize property in what are called “blighted areas.” This statute only requires that two-thirds of the properties in an area be blighted.⁴ This means that one-third of the properties can be non-blighted.⁵ As a result, a house can be in pristine condition and still be seized.

Clever map drawing can give the government the property that it wants. For example, if four blocks of property are in bad shape and two blocks adjacent to these four blocks are luxurious, the government can take all six blocks. If a private developer needs certain property, maps can be drawn so that the right percentages are met to seize property.

Abuse exists because the “area”, and not individual properties, has to be “blighted.” If the government wants to address blight, the property itself should be blighted. The urban redevelopment law should have an appropriate and narrow definition of “blighted property” not a “blighted area.” A blighted property should mean a property that causes a clear harm or danger to the public health or safety.

The North Carolina judiciary, in 1998, made it even easier for the government to abuse the urban redevelopment law. In a North Carolina Court of Appeals case, *Redevelopment Commission of Greensboro v. Johnson*,⁶ the Court held that property owners were not entitled to know why the city was seizing their property while not seizing other property in the same area. A North Carolinian therefore could have his well-kept house seized and the politically connected neighbor with a run-down house could be left alone. Even worse, the government does not have to explain its actions.

*3) Government takes your well-kept house or prospering business because it is **in a “nonresidential redevelopment area.”***

North Carolina’s urban redevelopment statute can be used as an end run around any prohibition on economic development takings because it allows the government to take property for economic reasons, even though it does not expressly call it an economic development taking.

Local governments can declare an area a “nonresidential redevelopment area,” which only has to be “predominantly” nonresidential. At least 50% of the property in the area also must be causing economic harm as defined by the statute.⁷ The statute is convoluted but basically requires that these properties hinder sound economic growth, affect surrounding development, and hurt the public welfare. This is an easy standard to meet—the area could even be experiencing economic growth, but not sound economic growth, and this would be enough to meet the standard. If a property is taken to fix economic harm, this is no different than taking it for economic development. When the government is trying to fix economic harm, it also is trying to promote economic development.

*4) Government takes your well-kept house in a nice neighborhood because your house **might become blighted or cause economic harm in the future.***

North Carolina’s urban redevelopment law is so broad that it allows the government to seize property that might in the future become “blighted”⁸ or cause economic harm.⁹ This provision basically allows the government to take whatever private property it wants for its own purposes.

*5) Government threatens to take your house and offers you very little for it, and because you cannot afford a lawyer or an appraiser, **you sell your house to the government at the low price.***

The government is required to pay “just compensation” when seizing private property through eminent domain. Since the government has the power of eminent domain and knows many people will never challenge their offers, it can make very low below market offers to purchase private property. Many individuals often do not have the money

to hire their own appraisers much less attorneys to represent them. The North Carolina Supreme Court made it even harder for property owners to challenge low compensation offers. In *Board of Education v. McMillan*, the Court held that property owners have the burden to prove just compensation.¹⁰

6) *Government tries to seize your house and offers you very little compensation. You sue the government and are awarded “fair market value” but **only receive two-thirds of fair market value.***

Even when fair market value is provided to property owners, this is a poor measure of “just compensation.” If a property owner sues the government and wins, common practice is for plaintiff attorneys to receive one-third of the award. This means property owners really receive two-thirds of fair market value.

Currently, “just compensation” does not taken into consideration attorney’s fees, relocation costs, loss of business goodwill, and other clear harms that cost the property owner. In tort law, a plaintiff is supposed to be made “whole.” In other words, they are put in the same position they would have been in if they had not been injured. This same principle should hold true for eminent domain victims.

7) *Government takes your house for a school, but **then the school project mysteriously falls through and a movie theater is built** on your property.*

The state’s eminent domain statute¹¹ lists numerous ways for property to be seized. If a property is seized for a public use as listed under the law, there is no requirement that it ultimately be used for that reason. It is not unusual for a property to be taken for a public use and that use falls through. There also is no way to know if the public use is simply a pretext for an improper use. There needs to be clear restrictions that prevent the government from using the property for a private use, such as economic development, when the public use project falls through. One solution is to allow the property owner to get back his property before the government can use it for another purpose.

8) *Government takes your house, demolishes it, and **leases the property to a private company** for its business purposes.*

The government can seize private property alleging a public use and then simply lease it to a private entity. A good example of this problem occurred in North Carolina. In *Piedmont Triad Airport Authority v. Urbine*,¹² the North Carolina Supreme Court held that an airport authority could seize private property even though all of the property seized was going to be leased to a private company, specifically to FedEx. The Court held that it was a legal taking, and not a taking for a private use (which would be illegal), despite the fact that the public would not be able to use the leased premises (a cargo facility for FedEx).

9) *Government takes your house **unnecessarily** because the proposed reason for taking the property, for all practical purposes, no longer exists.*

For example, the Triangle Transit Authority (TTA) continues to seize private property for a light rail system even though the project is for all practical purposes dead. A Durham man, who received a very low appraisal for his auto garage from the TTA, is suing them in order to challenge the compensation offered. This case should not even exist though because the TTA is trying to take his business for a light rail station.¹³ The government should have to show that a taking is necessary and no viable alternatives exist.

10) *Government threatens to take your house and since you cannot afford legal advice, **you accept the “negotiated” offer.***

The government does not even need to have a legitimate legal basis for seizing property to get private property owners to sell their property. When the threat of eminent domain hangs over “negotiations” regarding a property, private property owners have little leverage whatsoever.

Some will have the means to challenge the government in court, but many will never be able to take this type of action, and the government knows this. When the government threatens to use eminent domain, this should be an

automatic trigger for the government to pay reasonable attorneys' fees on behalf of the property owner or to arrange for some form of free legal guidance. The fees could be limited to covering the legal guidance provided to a property owner so he knows his rights. There might even be a "Miranda warning" informing property owners that free legal assistance will be provided to them. If it is necessary for protecting one's fundamental rights against self-incrimination (under the Fifth Amendment of the U.S. Constitution) than there is no reason why it is not appropriate for protecting the fundamental right of property rights (which also exists under the Fifth Amendment).

Conclusion

Unfortunately, the preceding list is not exhaustive. Eminent domain abuse existed before *Kelo* and certainly exists after *Kelo*. The legislature should bear in mind all the numerous ways that this incredible power can be used against property owners.

North Carolina must focus on a constitutional amendment to adequately protect property rights. This focus is justified. A constitutional amendment is the only true way to protect private property given that legislation can change statutes at the whim of political interests. However, a constitutional amendment that simply prohibits economic development takings is not a solution to eminent domain abuse. A constitutional amendment needs to protect against other types of eminent domain abuses, including those discussed in this *Spotlight*.

When it comes to property rights, unlike most other fundamental rights enumerated in the United States Constitution, the government and courts have "gutted" this right. Currently, it is such a weak right, it is more akin to a government granted privilege. Property rights must be respected and provided the protections necessary for a fundamental right. The only way to do that is through an explicit and detailed amendment to the North Carolina Constitution.

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Notes

1. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) at <http://laws.findlaw.com/us/000/04-108.html>.
2. See, e.g., North Carolina S.L. 2000-89 at <http://www.ncga.state.nc.us/Sessions/1999/Bills/House/HTML/H1647v7.html>.
3. N.C. Gen. Stat § 159-83(a)(1) at http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_159/GS_159-83.html.
4. There is no definition of "blighted properties." "Blighted" in this sentence refers to property that meets the conditions necessary to create a "blighted area."
5. N.C. Gen. Stat § 160A-503(2) at http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-503.html.
6. *Redevelopment Commission of Greensboro v. Johnson*, 129 N.C. App. 630, 500 S.E.2d 118 (1998).
7. N.C. Gen. Stat § 160A-503(10) at http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-503.html.
8. Q.v., note 4.
9. N.C. Gen. Stat § 160A-503(21) at http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-503.html.
10. *Board of Education v. McMillan*, 250 N.C. 485, 108 S.E. 2d 895 (1959).
11. N.C. Gen. Stat § 40A *et. seq.* at http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_40A.html.
12. *Piedmont Triad Airport Authority v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001) at <http://www.aoc.state.nc.us/www/public/sc/opinions/2001/367-00-1.htm>.
13. Andrea Weigl, "N.C. law on taking land scrutinized," Raleigh News & Observer, January 5, 2006, at <http://www.newsobserver.com/102/story/385041.html>.