

# Defining Blight in South Carolina

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## TABLE OF CONTENTS

|  | Page No. |
|--|----------|
| I. Introduction: Competing Theories of Public Use.....               | 1        |
| II. Eminent Domain and the Concept of Blight .....                   | 2        |
| A. Historical Background .....                                       | 2        |
| B. The Process of Blight Removal Today .....                         | 4        |
| C. The Supreme Court and Blight.....                                 | 6        |
| D. Takings Jurisprudence and “Public Use” .....                      | 7        |
| E. Economic Development Takings in the Supreme Court .....           | 9        |
| F. The “Kelo Backlash” .....   | 9        |
| 1. <i>Federal Legislative Reaction to Kelo</i> .....                 | 10       |
| 2. <i>State Legislative Reactions to Kelo</i> .....                  | 10       |
| III. Eminent Domain in South Carolina.....                           | 11       |
| A. History and Progression of Eminent Domain Law .....               | 11       |
| B. The Public Use Requirement in South Carolina Law .....            | 13       |
| C. Blight in the South Carolina Courts .....                         | 13       |
| D. South Carolina Public Use Jurisprudence in the Last 30 Years..... | 17       |
| IV. The Constitutional Amendment and Current Statutory Schemes ..... | 19       |
| A. Proposed Legislation: Senate Bill 33.....                         | 21       |
| B. Proposed Legislation: Senate Bill 130 .....                       | 23       |
| 1. <i>Definitions of “Blight” and “Public Use”</i> .....             | 23       |
| 2. <i>Procedural Process</i> .....                                   | 26       |
| 3. <i>Judicial Burden of Proof</i> .....                             | 28       |
| 4. <i>Just Compensation</i> .....                                    | 29       |
| 5. <i>Right of First Refusal</i> .....                               | 30       |
| C. Proposed Legislation: House Bill 3067.....                        | 30       |
| V. Conclusion .....  | 31       |

## I. Introduction

In the now-famous case of *Kelo v. City of New London*,<sup>1</sup> the Supreme Court held that it was constitutional for local government to take private residences and transfer ownership of the property to private developers as part of a plan for economic redevelopment. Much of the public responded to this decision with fear and surprise. Legislatures in many states responded with laws limiting the power to use eminent domain.<sup>2</sup> South Carolina, a state that already had a history of strong property rights, passed an amendment to its state constitution in the year following *Kelo* and is now considering further legislative action. This paper provides an analysis of the history of the use of eminent domain at both the federal and local level, with a focus on the use of eminent domain for the revitalization of blighted areas.<sup>3</sup> Parts II and III discuss judicial and legislative theories of “public use” and “blight,” first in the U.S. Supreme Court and then in South Carolina courts. The paper then discusses the backlash that followed the Supreme Court’s decision in *Kelo*. Finally, Part IV provides an analysis of three bills currently under consideration by the South Carolina General Assembly dealing with condemnation of blighted property. In concluding, this paper provides a suggestion as to which of the currently proposed bills might best serve South Carolina.

### A. Competing Theories of Public Use

The Fifth Amendment to the United States Constitution provides, “nor shall private property be taken for public use, without just compensation.”<sup>4</sup> There are two competing theories of public use.<sup>5</sup> One interpretation, the so-called “narrow” view, reads the public use clause as meaning that the property in question must actually be used by the public.<sup>6</sup> The opposing

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<sup>1</sup> *Kelo v. City of New London*, 545 U.S. 469.

<sup>2</sup> *See infra* pp. 9-11 (discussing the backlash to the *Kelo* decision).

<sup>3</sup> *See infra* p. 3 (defining blight).

<sup>4</sup> U.S. Const. amend. V.

<sup>5</sup> Adrienne Archer, *Comment: Restricting Kelo: Will Redefining “Blight” in Senate Bill 7 Be the Light at the End of the Tunnel?*, 37 St. Mary’s L. J. 795, 805 (2006).

<sup>6</sup> *Id.*

“broad” view equates public use with public advantage.”<sup>7</sup> In the narrow view, public use means “the public owns, controls, and has access to the use” .<sup>8</sup> In contrast, “public use” in the broad view is not a limitation and requires that great deference be given to legislatures in determining what constitutes a public use.<sup>9</sup> As long as the government is acting within its police power for the public health, safety, and welfare, then it is justified in exercising eminent domain.<sup>10</sup>

It was not until after the Revolutionary War that most of the original thirteen colonies had added public use language to their constitutions, with South Carolina being the last to do so in 1868.<sup>11</sup> Many early courts held that government lacked the ability to take private property for private use.<sup>12</sup> Some courts relied on theories of natural law or thought a restriction on such takings was implied in their constitutions.<sup>13</sup> In the 19<sup>th</sup> century the theory of public use expanded to include the use of eminent domain to acquire property for private corporations that served as common carriers, including railroads, bridges, and canals, on the theory that they would be used by the public.<sup>14</sup> With the proliferation of urban renewal programs by the middle of the 20<sup>th</sup> century the narrow view of public use gave way to the broader view of eminent domain .<sup>15</sup>

## **II. Eminent Domain and the Concept of Blight**

### **A. Historical Background**

During the 1800’s eminent domain was used mainly to purchase undeveloped land,<sup>16</sup> but by the end of the 19<sup>th</sup> century improved land was also being condemned as an “important part of

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<sup>7</sup> *Id.*

<sup>8</sup> Mary Massaron Ross, *Public Use: Does County of Wayne v. Hathcock Signal a Revival of the Public use Limit to the Taking of Private Property?*, in EMINENT DOMAIN: USE AND ABUSE: KELO IN CONTEXT, 1, 3 (Dwight H. Merriam & Mary Massaron Ross, eds.. 2006).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Pol’y 491, 504 (2006).

<sup>12</sup> *Id.* at 505-06.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 510.

<sup>16</sup> Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Use of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 31 (2003).

city building, used for bridges, utilities, transportation, and other types of infrastructure.”<sup>17</sup> The use of eminent domain was not uncommon by the turn of the century, but the use of eminent domain to clear out areas of a city and transfer land to private developers was “nevertheless novel, both in form and scope.”<sup>18</sup>

The concept of blight, as it applied to the urban landscape, was developed between the 1920’s and 1940’s by “renewal advocates”<sup>19</sup>—a group including real estate interests, progressive reformers, urban planners, politicians, and other citizens—who had borrowed the term from horticulture, in which it referred to a spreading plant disease.<sup>20</sup> The analogy was obvious; cities were like living organisms and over time, as cities grew, downtown areas became diseased.<sup>21</sup> Renewal proponents argued that blight “was a disease that threatened to turn healthy areas into slums.”<sup>22</sup> Blight was a “vague” term which was used as a “rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.”<sup>23</sup> Over time, renewal advocates began arguing that slums and blighted areas not only created “contaminant” social problems, but also created economic problems for cities.<sup>24</sup> The concept was that blighted property was not being put to its highest and best use.<sup>25</sup>

In 1941, New York became the first state to pass a redevelopment act.<sup>26</sup> By 1950 a majority of states had passed acts allowing property acquired through eminent domain to be used to address urban blight through transfer to private developers.<sup>27</sup> However, “not all state courts

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.* at 3. A slum, as defined by urban planners, was an area with “run-down buildings, dirty streets, and a high crime rate that was almost exclusively inhabited by poor people,” *id.* at 16.

<sup>23</sup> *Id.* at 3. See also Timothy Sandefur *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain reform?*, 2006 MICH ST. L. REV. 709, 722-23 (2006) (“There is also no legal requirement placing a time limit on blight designations. Although it seems likely that condemning property under a very old blight designation could violate the basic standards of fairness protected by the Due Process Clause, there appears to be no reported case holding that a blight designation has gone stale.”).

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> *Id.* at 32.

<sup>27</sup> *Id.*

agreed that urban renewal was an appropriate governmental function.”<sup>28</sup> Among them was the South Carolina Supreme Court, which invalidated the state’s urban renewal act in the 1956 case of *Edens v. City of Columbia*.<sup>29</sup>

## **B. The Process of Blight Removal Today**

It was consistent with twentieth century ideas of scientific planning, social engineering and modern design to use eminent domain to clear slums and to declare the removal of blighted areas as a public use.<sup>30</sup> The idea that government should “intervene and alter the economic situation to improve the neighborhood”<sup>31</sup> continues today. When city planners encounter an area that is declining or “underperforming” economically, they will seek out a developer willing to build in the area.<sup>32</sup>

The typical first step in the process of redevelopment is to have an area designated as blighted and have a report drafted stating so.<sup>33</sup> Once the developer selection is finalized and the blight report is drafted, city officials “finalize” a redevelopment plan, which includes an artist’s rendition of the proposed development.<sup>34</sup> In some states, a public hearing is held before a redevelopment plan can be adopted.<sup>35</sup> The city will then adopt the plan and designate the area blighted.<sup>36</sup> The next steps are administrative in nature: the properties targeted for condemnation are appraised and property owners are told that if they do not accept the purchase price offered they will be subject to eminent domain.<sup>37</sup> Property owners rarely seek to defend condemnation actions in court because they feel their chances of winning are low.<sup>38</sup> Once property is

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<sup>28</sup> *Id.*

<sup>29</sup> *Edens v. City of Columbia*, 91 S.E.2d 280 (1956). See discussion *infra* pp. 14-16.

<sup>30</sup> J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. & POL’Y 131, 136 (2005) (discussing how legal protection of the property interests of poor residents is withdrawn through the use of eminent domain for slum clearing because the poor are the ones whose homes are considered blighted).

<sup>31</sup> *Id.* at 721.

<sup>32</sup> *Id.* at 721.

<sup>33</sup> *Id.* at 722 (“These consultants are too often willing to tell cities whatever they want to hear.”), *id.*

<sup>34</sup> *Id.* at 723.

<sup>35</sup> *Id.* at 723.

<sup>36</sup> *Id.* at 723.

<sup>37</sup> *Id.* at 724.

<sup>38</sup> *Id.* at 724.

condemned, it can be leased or resold by the city to the developer for a “token amount.”<sup>39</sup> Cities can recoup the expenditures of condemnation through a mechanism known as “Tax Increment Financing” where the developer who moves in is taxed to pay back the city for the cost of the property over time.<sup>40</sup>

### C. The Supreme Court and Blight

The leading U.S. Supreme Court case involving blighted property is *Berman v. Parker*<sup>41</sup>, a case that “opened the door to an era of urban reconstruction that continues today.”<sup>42</sup> By the time *Berman* was argued in 1954, the Court had for more than twenty years treated cities’ efforts at urban renewal with deference.<sup>43</sup> *Berman* got to the Court on appeal of a judgment dismissing a complaint seeking to enjoin the use of eminent domain to condemn the plaintiff’s property under the District of Columbia Redevelopment Act of 1945.<sup>44</sup> The Act stated that Congress had made a “legislative determination” that “conditions exist” in the D.C. area “with respect to substandard housing and blighted areas” that were “injurious to the public health, safety, morals, and welfare,” and that it was the policy of the government to go about “eliminating” such areas by “all means necessary and appropriate for that purpose.”<sup>45</sup> The Act did not define “blighted areas” or “slums,” but did define “substandard housing conditions,” stating that property may be subject to eminent domain if “lacking sanitary facilities, ventilation, heat, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors,” and was deemed detrimental to the community.<sup>46</sup>

*Berman* was a department store owner whose non-blighted property was part of the condemnation plan of the city.<sup>47</sup> Experts had said that his building was located in an area that

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<sup>39</sup> *Id.* at 724.

<sup>40</sup> *Id.* at 724. See generally George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law* 52 HASTINGS L.J. 991, 996-1002 (2001) (discussing Tax Increment Financing).

<sup>41</sup> 348 U.S. 26 (1954).

<sup>42</sup> Cohen, *supra* note 11 at 4.

<sup>43</sup> *Id.* at 46.

<sup>44</sup> *Berman v. Parker* 348 U.S. 26, 28 (1954).

<sup>45</sup> *Id.* See D.C. CODE § § 5-70 1- - 5-719 (1951).

<sup>46</sup> *Id.* 28 n. 1.

<sup>47</sup> *Id.* at 28.

was designated as blighted and would have to be removed as part of an entire redevelopment scheme.<sup>48</sup> Berman challenged the taking of his property under the Fifth Amendment.<sup>49</sup> The Supreme Court allowed the taking of Berman’s department store and upheld the Redevelopment Act<sup>50</sup> stating that, “it is well within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>51</sup> The Court was deferential to the legislature’s judgment whether to exercise its police power for the public health and safety,<sup>52</sup> declaring, “Once the objective is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.”<sup>53</sup> The Court was in effect saying that once a legitimate public purpose is established, it is up to Congress to determine how to carry out a project.<sup>54</sup>

#### **D. Takings Jurisprudence and “Public Use”**

In discussing the Public Use requirement of the Fifth Amendment, the Court in *Berman* stated that it was up to the legislature to determine whether a community redevelopment project would better serve the “public end” through governmental ownership or through “private enterprise.”<sup>55</sup> Continuing, the Court stated that it “cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”<sup>56</sup> This deferential treatment of legislative determinations of public use was further developed in *Hawaii Housing Authority v. Midkiff*,<sup>57</sup> thirty years later.<sup>58</sup> The Court in *Midkiff* stated that deference should be given to legislatures in dealing with public use considerations, unless such

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<sup>48</sup> Haley W. Burton, *Not So Fast: The Supreme Court’s Overly Broad Public Use Ruling Condemns Private Property Rights with Surprising Results*, 6 Wyo. L. Rev. 255, 261 (2006).

<sup>49</sup> *Supra* note 45 at 31.

<sup>50</sup> *Id.* at 36.

<sup>51</sup> *Id.* at 33.

<sup>52</sup> *Supra* note 49 at 260.

<sup>53</sup> *Supra* note 45 at 33.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 34.

<sup>56</sup> *Id.*

<sup>57</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 299 (1984).

<sup>58</sup> David L. Callies, *Phoenix Rising: The Rebirth of Public Use, in EMINENT DOMAIN: USE AND ABUSE: KELO IN CONTEXT*, 49 (Dwight H. Merriam & Mary Massaron Ross, eds., 2006).

determinations are “shown to involve impossibility”.<sup>59</sup> “There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is ‘an extremely narrow’ one.”<sup>60</sup> The court used the same rational basis test that it had used in *Berman* to evaluate the constitutionality of a Hawaii law aimed at breaking up a land oligopoly.<sup>61</sup> The law involved transferring property from one private party to another. As one author noted, it is a “long-accepted principal” that a government cannot take the property of A for the “singular purpose” of transferring to B, even if A is paid just compensation.<sup>62</sup> However, “it is clear that the sovereign may take property and transfer it to another private party if the purpose of the taking is future public use.”<sup>63</sup> The Court gave the Hawaii Legislature great deference in its determination that these land transfers were a valid exercise of their police power.<sup>64</sup>

Another important case in the development of blight jurisprudence is the “notorious” *Poletown*<sup>65</sup> case.<sup>66</sup> Although it was a Michigan State Supreme Court case and not a U.S. Supreme Court case, and although it was later overturned,<sup>67</sup> *Poletown* remains a legal landmark. In this case, the Michigan Supreme Court upheld a taking by the City of Detroit of an entire neighborhood to provide General Motors with a site to build a new production plant.<sup>68</sup> The Court held that the taking was for a public use, considering the previous economic downturn of the area and the potential benefits of bringing in the auto maker.<sup>69</sup> The *Poletown* case shows the extent to which the public use definition has been taken.<sup>70</sup> *County of Wayne v. Hathcock*<sup>71</sup>

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<sup>59</sup> *Id.* at 49, *citing* Hawaii Housing Authority v. Midkiff at 240.

<sup>60</sup> *Supra* note 48 at 240, *citing Berman, supra* note 25 at 32.

<sup>61</sup> *Supra* note 44 at 262-63.

<sup>62</sup> *Supra* note 5 at 814.

<sup>63</sup> *Id.*

<sup>64</sup> *Supra* note 44 at 263.

<sup>65</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455 (1981).

<sup>66</sup> *Supra* note 23 at 139.

<sup>67</sup> *Infra* note 72.

<sup>68</sup> Ross, *supra* note 8 at 10-11.

<sup>69</sup> Byrne, *supra* note 31 at 139.

<sup>70</sup> *Id.* at 140.

<sup>71</sup> *County of Wayne v. Hathcock*, 648 N.W.2d 765.

overturned *Poletown*, ruling that in the absence of blight, government cannot, under Michigan law, take private property and transfer it to a private owner, regardless of the amount of certainty of the economic benefit to the public.<sup>72</sup> It is important to recognize that *Hathcock* did not invalidate the clearing of slums or blighted areas as a public purpose.<sup>73</sup>

### C. Economic Development Takings in the Supreme Court

An economic redevelopment condemnation is “undertaken with the purpose of transferring property from its present owner to a new owner who will use the property more profitably.”<sup>74</sup> In *Kelo v. City of New London*<sup>75</sup> the Supreme Court determined that it was constitutional under the Takings Clause of the Fifth Amendment to exercise the power of eminent domain in furtherance of an economic redevelopment plan.<sup>76</sup> The City of New London implemented a plan in the Fort Trumbull area to revitalize the area’s economy.<sup>77</sup> The plan included the construction of a \$300 million research facility by the Pfizer pharmaceutical company,<sup>78</sup> with the clear intent of creating jobs, generating tax revenue, bringing new life to the downtown area, and making “the City more attractive and... creat[ing] leisure and recreational opportunities.”<sup>79</sup> The City of New London had been labeled a “distressed municipality” after “decades of economic decline.”<sup>80</sup> It is notable that unlike the town in *Berman*, there was no claim that New London was blighted, just “distressed.”<sup>81</sup> The nine petitioners in the case owned fifteen properties in the area, none of which could be considered blighted or in poor condition. For example, Petitioner Susette Kelo had made “extensive improvements to her house, which she prize[d] for its water view”<sup>82</sup> and Petitioner Wilhemina Dery was born in her Fort Trumbull

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<sup>72</sup> Byrne, *supra* note 31 at 145.

<sup>73</sup> *Id.* at 146.

<sup>74</sup> Sandefur, *supra* note 24, at 721.

<sup>75</sup> *Supra* note 1 at 469.

<sup>76</sup> *Id.* at 490.

<sup>77</sup> *Id.* at 473.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 474-75.

<sup>80</sup> *Id.* at 473.

<sup>81</sup> Archer, *supra* note 5 at 797.

<sup>82</sup> *Supra* note 1 at 475.

house in 1918 and had lived there ever since.<sup>83</sup> The properties were condemned “only because they happened to be located in the development area.”<sup>84</sup> In writing for the five-Justice majority, Justice John Paul Stevens said that “those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”<sup>85</sup> He went on to emphasize that the plan the city proposed was comprehensive, and therefore a judicial determination should not be made on a “piecemeal basis, but rather in light of the entire plan.”<sup>86</sup> Justice Stevens stated that “promoting economic development is a traditional and long accepted function of government.”<sup>87</sup>

The majority in *Kelo* went on to “emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.”<sup>88</sup> Justice Stevens went on to say that while takings for economic development purposes are certainly controversial, the Court can only determine whether they are constitutional under the Takings Clause.<sup>89</sup>

#### F. The “Kelo Backlash”<sup>90</sup>

The public reaction to *Kelo* was “swift and fierce.”<sup>91</sup> Public opinion polls showed that an overwhelming portion of the population opposed the Court’s decision.<sup>92</sup> Because the *Kelo* decision authorized the taking of people’s homes, it brought fear to the average citizen that his

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 483.

<sup>86</sup> *Id.* at 484.

<sup>87</sup> *Id.*

<sup>88</sup> *Supra* note 1 at 489.

<sup>89</sup> *Id.* at 490.

<sup>90</sup> Sandefur, *supra* note 24 at 711.

<sup>91</sup> *Id.* at 726.

<sup>92</sup> *Id.*

property could be taken by the government for another's commercial gain.<sup>93</sup> Lawmakers on both sides of the aisle were angered by the outcome and felt called to action.<sup>94</sup> In the months that followed the *Kelo* decision, legislators in thirty-eight states proposed more than eighty-nine bills aimed at limiting the use of eminent domain at the state level.<sup>95</sup> Ronald D. Utt of the Heritage Foundation said the result of *Kelo* was, "a firestorm of national indignation that led citizens to demand better protection from their public officials."<sup>96</sup> However, some scholars were quick to point out that the Court in *Kelo* made a fairly predictable decision just following along with prior precedent. Professor J. Peter Byrne of the Georgetown University Law Center went so far as to call the public reaction to *Kelo* "paranoid."<sup>97</sup> Another said that in light of *Berman* and *Midkiff*, *Kelo* seemed, "thoroughly unremarkable."<sup>98</sup>

### *1. Federal Legislative Reaction to Kelo*

There were several bills proposed at the federal level in reaction to the ruling in *Kelo*.<sup>99</sup> The Private Property Protection Act of 2005 (H.R. 4128) would have prevented "any government entity that received federal funds from using eminent domain for economic development."<sup>100</sup> The Private Property Rights Implementation Act of 2006 (H.R. 4772) would have allowed property rights cases to be filed in federal court rather than in state court (which is the current custom).<sup>101</sup> The goal of the second bill was to "expedite" the judicial process that can be slower in state courts.<sup>102</sup> Both bills passed a House vote but both bills died in the Senate at

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<sup>93</sup> Cohen, *supra* note 11 at 549.

<sup>94</sup> *Id.*

<sup>95</sup> Sandefur, *supra* note 24, at 727.

<sup>96</sup> Ronald D. Utt, *States Vote to Strengthen Property Rights*, HERITAGE FOUNDATION REPORTS, p.4, Feb. 1, 2007.

<sup>97</sup> Byrne, *supra* note 31, at 150.

<sup>98</sup> James Freda, *Does New London Burn Again?: Eminent Domain, Liberty, and Populism in the Wake of Kelo*, 15 CORNELL J.L. & PUB. POL'Y 483, 499 (2006).

<sup>99</sup> Utt, *supra* note 96 at 2.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

the end of the 109<sup>th</sup> Congressional Session.<sup>103</sup> Other similar Senate bills also did not become law.<sup>104</sup>

## 2. State Legislative Reactions to *Kelo*

Eminent domain bills proposed in various states since 2005 have had “mixed results.”<sup>105</sup> As of the fall of 2006 twenty-four states had enacted legislation as part of the *Kelo* backlash.<sup>106</sup> These statutes vary in their breadth, depth, and effectiveness. Timothy Sandefur, Staff Attorney at the Pacific Legal Foundation, classifies ten of these statutes as providing “little or no protection for property owners” and said that other laws appear “consciously designed” to be ineffective.<sup>107</sup> However, he says that some other new laws do impose “significant limits” on the exercise of eminent domain, giving “hope that meaningful reform is on the horizon.”<sup>108</sup>

South Carolina passed an amendment to its constitution pertaining to eminent domain as part of the November 2006 elections.<sup>109</sup> While South Carolina was already an unlikely place for an economic development condemnation action to take place,<sup>110</sup> the constitutional amendment emphasized the state’s resistance to such takings.

### III. Eminent Domain in South Carolina

#### A. History and Progression of Eminent Domain Law

Prior to the 1868 addition of a takings clause to the South Carolina Constitution, the South Carolina government “utilized its inherent authority to seize land for public use.”<sup>111</sup> In the

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Sandefur, *supra*, note 24, at 712.

<sup>106</sup> *Id.* at 727. Sandefur reviews all 24 state laws and their potential effect. He does not mention South Carolina because the South Carolina Constitutional Amendment was passed after the publication of his article.

<sup>107</sup> *Id.* at 712.

<sup>108</sup> *Id.*

<sup>109</sup> Castle Coalition, *Legislative Action Since Kelo*, available at [www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf](http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf) (Jan. 2007).

<sup>110</sup> Matthew Howsare, *Kelo in South Carolina? Economic Development is Not a Public Use for Purposes of Eminent Domain in South Carolina*, 57 S.C.L. REV. 505, 506 (2006).

<sup>111</sup> *Id.* at 518.

1796 case of *Lindsay v. Commissioners*,<sup>112</sup> the South Carolina Constitutional Court of Appeals confirmed the authority of the City Council of Charleston to take private property in order to build roads. Petitioner Lindsay challenged both the taking and the amount of compensation paid for his land. The Court stated that “the power of the supreme authority of the state to lay out and keep in repair roads and highways, for the public use and convenience of the citizens of the country, was the law of the land long before the Magna Charta was ever thought of, or our constitution promulgated.”<sup>113</sup>

The *Lindsay* opinion discussed the history of takings in South Carolina, noting that the first takings went as far back as 1686-7 and that the roads in South Carolina were built absent compensation to the landowners whose land they were built on.<sup>114</sup> The Court went on to emphasize that “the act in this case did not take away the freehold of one man and vest it in another; but as a matter of great public convenience to the city, declared that a highway or street should be opened and made from one part of it to another.”<sup>115</sup> The South Carolina Court thought it was important that the land had never been used by the petitioner and that no houses or fences were torn down in the process of building the road.<sup>116</sup> The Court explained that the right of eminent domain was part of the common law of South Carolina.<sup>117</sup> The South Carolina Court of Appeals later affirmed the holding of *Lindsay* in *State v. Dawson*,<sup>118</sup> which included a discussion of a series of cases confirming the power of the government to take property for roads without paying any compensation.<sup>119</sup> Then, in 1868, a South Carolina constitutional amendment added a just compensation requirement to the takings clause which reads, “Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation first being paid therefore.”<sup>120</sup>

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<sup>112</sup> *Lindsay v. Commissioners*, 2 S.C.L. 38 (1796 S.C.Const.App.).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *State v. Dawson*, 21 S.C.L. 100 (S.C.App., 1836).

<sup>119</sup> *Id.*

<sup>120</sup> S.C. Const. art. I, 13.

## **B. The Public Use Requirement in South Carolina Law**

*Riley v. Charleston Union Station Co.*<sup>121</sup> is the “seminal case in South Carolina regarding the public use doctrine.”<sup>122</sup> In *Riley* the defendant was incorporated for the purpose of operating a railway station and was given the right to “acquire” by “condemnation, all property necessary for the same.”<sup>123</sup> Petitioners challenged the taking of their property under the Fifth and Fourteenth Amendments of the U.S. Constitution as well as under the South Carolina Constitution. The Court stated that, “the first general principle which must control this question is, when the Legislature, in effect, declares that the construction, maintenance, and operation of the...station...is a public purpose, so as to authorize the condemnation of the property, this conclusion is binding on the court, if there be any reasonable ground to support it.”<sup>124</sup> In discussing the public use requirement, the Court recognized that some courts take the broader view that “public use” means “public benefit,” but said that, “A more restrictive view, however, would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain.”<sup>125</sup> The Court determined that no matter whether they used a broad or narrow interpretation, that the operation of a railway station was a public use. The Court said, “The question whether the use is public depends upon the nature of the use, and not upon the possessions of the particular individuals or corporations that may be interested in such use.”<sup>126</sup>

## **C. Blight in the South Carolina Courts**

In the 1938 case of *McNulty v. Owens*,<sup>127</sup> the South Carolina Supreme Court held that slum clearance and low-cost housing projects were a public purpose.<sup>128</sup> In reaching its conclusion, The Court considered factors including, “the obvious need for low-cost housing, the

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<sup>121</sup> *Riley v. Charleston Union Station Co.*, 51 S.E. 485 (S.C., 1905).

<sup>122</sup> Howsare, *supra* note 111 at 520.

<sup>123</sup> *Supra* note 122 at 495.

<sup>124</sup> *Id.* at 495-96.

<sup>125</sup> *Id.* at 496, *cited by* Howsare, *supra* note 111 at 520.

<sup>126</sup> *Id.*

<sup>127</sup> *McNulty v. Owens*, 199 S.E. 425 (S.C., 1938).

<sup>128</sup> *Id.* at 429-30.

apparent inability of private capital to supply such housing, and the satisfactory solution of the problem afforded by similar governmental programs of slum clearance and low-cost housing here [in South Carolina] and elsewhere”.<sup>129</sup> The challenger in the case asked for an injunction against the proposed actions of condemnation and construction of new low-income housing, claiming both taxpayer standing and standing based on potential competition between his rental properties and the new housing facility.<sup>130</sup>

The Columbia Housing Authority was to act in conjunction with the City of Columbia and the United States Housing Authority. Under their agreement the Columbia Housing Authority and the City together were obligated to tear down the same amount of “unsanitary dwellings” as they built, “so as to make the demolition equivalent to the number of dwelling units erected.”<sup>131</sup> The Court cited *Riley* for the proposition that the Court was to give great deference to any legislative determination of, “whether an act is for a public purpose.”<sup>132</sup> In support for the proposition that the proposed condemnation was for a public purpose, the Court looked to the Act that set up the Columbia Housing Authority in 1934.<sup>133</sup> Under the section heading “Declaration of Public Interest” the statute stated:

“It is hereby declared as a matter of legislative determination that in order to promote and protect the health, safety, morals, and welfare of the public, it is necessary in the public interest to provide for the creation of public corporate bodies to be known as housing authorities, and to confer upon and vest in said housing authorities all the power necessary or appropriate in order that they may engage in low-cost housing and slum clearance projects; and that the powers herein conferred upon the housing authorities include the power to acquire property to remove unsanitary or substandard conditions, to construct and operate housing accommodations and to borrow, expend, lend, and repay moneys for purposes herein set forth, are public objects essential to the public interest.”<sup>134</sup>

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<sup>129</sup> *Id.* at 429.

<sup>130</sup> *Id.* at 427.

<sup>131</sup> *Id.* at 428.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* citing 38 St. at Large, p. 1370 §2.

<sup>134</sup> *Id.*

In writing the Housing Authority statute the South Carolina General Assembly emphasized through the language of the Act that their actions were within their police power. The Court next considered evidence concerning the state of housing in the City of Columbia, noting that one-third of the dwellings in the city lacked indoor toilets, that almost half of the dwellings lacked indoor bathing facilities and that many were without lights and/or were “in need of substantial repair.”<sup>135</sup> The South Carolina Supreme Court noted that “experience in other parts of the country...indicate a very substantial improvement in health and in morals where sanitary housing has been provided for persons of low income.

In *Edens v. City of Columbia*<sup>136</sup> the South Carolina Supreme Court “made several important distinctions between South Carolina public use law and the law of other jurisdictions.”<sup>137</sup> The redevelopment plan in question involved using the power of condemnation to take property in a blighted area of the city, “which is principally occupied by slum dwellings” and selling the property at “fair value” to private persons and corporations.”<sup>138</sup> The property was to be taken by the Housing Authority of the City of Columbia under the “Redevelopment Law” that had been adopted four years earlier.<sup>139</sup> The Court quickly pointed out that this “is not a slum clearance project, within the authority of *McNulty v. Owens*. The project does not contemplate erection of housing upon the land for the present residents of the area.”<sup>140</sup> The Court cited *Crommett v. City of Portland*<sup>141</sup> for the idea that without the right of eminent domain, redevelopment acts “cannot be carried out.”<sup>142</sup> The Court distinguished South Carolina’s power of eminent domain from that possessed by other states, noting that in “other states the power of

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<sup>135</sup> *Id.* at 429.

<sup>136</sup> *Edens v. City of Columbia*, 91 S.E.2d 280 (1956).

<sup>137</sup> *Howsare*, *supra* note 111 at 520.

<sup>138</sup> *Supra* note 138 at 280.

<sup>139</sup> *Id.*, citing S.C. Code § 36-401 et seq. (1952).

<sup>140</sup> *Id.* at 281.

<sup>141</sup> *Crommett v. City of Portland* 107 A.2d 841, 849 (1954).

<sup>142</sup> *Supra* note 138 at 281.

eminent domain may be exercised for a public purpose, benefit or the public welfare, as contrasted with the requirement of our constitution that it be for a public use.”<sup>143</sup>

The Court reviewed prior South Carolina cases and came to the conclusion “that ‘public use’ means just that and private property cannot be taken except for public use, without the consent of the owner.”<sup>144</sup> “Public benefit and public use are not synonymous in the better and more clearly constitutional view,” said the Court. “We think that the latter (public use) is necessary for the constitutional exercise of the power of eminent domain.”<sup>145</sup> The court emphasized that the purpose of the ‘Redevelopment Law’ was not to replace substandard housing with better housing, but rather to clear out a predominantly lower-class residential area and turn it into a commercial and industrial area.<sup>146</sup> The court said of this plan, “no matter how desirable the object is from a municipal planning viewpoint, it cannot be attained by the exercise of the power of eminent domain.”<sup>147</sup> The South Carolina Supreme Court briefly discussed the Supreme Court’s ruling in *Berman v. Parker*,<sup>148</sup> decided two years earlier, stating that South Carolina’s understanding of public use was not considered by the Supreme Court to be “essential of the exercise of the power of eminent domain.”<sup>149</sup> Finally, the South Carolina court pointed out that their holding could, of course, be overturned by an amendment to the state constitution, a course of action that had been taken in other states.<sup>150</sup>

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<sup>143</sup> *Id.* at 282.

<sup>144</sup> *Id.* at 283.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 284.

<sup>147</sup> *Id.*

<sup>148</sup> *Supra* note 45.

<sup>149</sup> *Supra* note 135 at 284-85.

<sup>150</sup> *Id.* at 285.

#### D. South Carolina Public Use Jurisprudence in the Last Thirty Years

The South Carolina Supreme Court determined in 1978 in *Karesh v. City Council of Charleston*<sup>151</sup> that the City of Charleston could not, under South Carolina law, use the power of eminent domain to acquire land that would be transferred to a private developer to build a parking garage and convention center. Both the convention center and the hotel were to be held by the developer under a long-term lease that would give him full control over the development.<sup>152</sup> The court stated that, “While in other jurisdictions the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, the courts of South Carolina have adhered to a strict interpretation of our constitutional provision.”<sup>153</sup> The Court cited *Edens* for the proposition that, “what constitutes a public use is ultimately a judicial question.”<sup>154</sup>

The court discussed the fact that both the convention center and the parking garage would contain new retail stores that would replace existing stores.<sup>155</sup> The Court stated, “We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other private shopkeepers.”<sup>156</sup> The court went on to say that while there were other cases “recognizing parking facilities as a public use for which property may be condemned,” in this situation the private developer would be the ones in control of the garage.<sup>157</sup> The court noted that “the guarantee that the public will enjoy the use of the facilities, so necessary to the public use concept, is absent.”<sup>158</sup> Finally, the court noted that “all prior legislation authorizing the power of eminent domain in redevelopment work limits such

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<sup>151</sup> *Karesh v. City Council of Charleston*, 247 S.E.2d 342, 343 (1978).

<sup>152</sup> *Id.* at 345.

<sup>153</sup> *Id.* at 344.

<sup>154</sup> *Id.*, citing *Edens*, *supra* note 138.

<sup>155</sup> *Id.* at 344.

<sup>156</sup> *Id.* at 345.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

condemnation to areas that are ‘predominantly slum or blighted,’” and that the trial judge found the city block in question not to be such an area.<sup>159</sup>

A year later the validity of a City of Charleston ordinance allowing and funding the building of a parking facility was confirmed in *Goldgerg v. City Council of Charleston*.<sup>160</sup> The court distinguished *Karesh* on the grounds that the “constitutional impediments” had been removed by the City Council. The newly proposed parking garage was to be owned and operated by the City. The court stated that “the constitutional vice of a municipal corporation joining hands with a private developer to undertake a project primarily of benefit to the developer is not present in this project.”<sup>161</sup>

The most recent public use case in South Carolina<sup>162</sup> is *Georgia Department of Transportation v. Jasper County*,<sup>163</sup> decided in 2003. The case involved land along the Savannah River that the Georgia Department of Transportation used for dredging. Jasper County wanted to condemn the land and lease most of it to a private developer under a 99 year lease, where the developer would build a “maritime terminal” that would “handle freight of general public use” and “operate in conjunction with a business park [that the] County plans to develop on the forty remaining acres of the condemned property.”<sup>164</sup> The South Carolina Court stated that while the “economic benefit to County is very attractive, it cannot justify condemnation in this case.”<sup>165</sup> The court explained that, “we take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property.”<sup>166</sup> The Court went on to say, “the public use implies possession, occupation, and enjoyment of the land

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<sup>159</sup> *Id.*

<sup>160</sup> *Goldgerg v. City Council of Charleston*, 254 S.E.2d 803, 804 (1979).

<sup>161</sup> *Id.*

<sup>162</sup> *Supra* note 89 at 522.

<sup>163</sup> *Georgia Department of Transportation v. Jasper County*, 586 S.E.2d 853 (2003).

<sup>164</sup> *Id.* at 854.

<sup>165</sup> *Id.* at 856.

<sup>166</sup> *Id.*

by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.”<sup>167</sup>

It is apparent from the preceding line of cases that the South Carolina Supreme Court interprets the State’s takings clause narrowly, which “virtually eliminated the possibility of a *Kelo*-style taking in South Carolina.”<sup>168</sup> While the Court in *Karesh* did call eminent domain an “elastic” term, based on “changing social conditions” and the facts “in each particular case,”<sup>169</sup> when taken in context of prior case law it is clear that this statement was not intended to open the door for economic development takings, but rather to allow a case-by-case judicial determination of what constitutes a public use, within the confines of prior precedent. It is interesting to note that “although all courts interpret the public use requirement as some sort of limitation on the government’s exercise of eminent domain, only one state, South Carolina, requires property taken through eminent domain literally to be used or occupied by the public to satisfy the public use requirement.”<sup>170</sup>

#### **IV. The Constitutional Amendment and Current Statutory Schemes**

In November 2006 over 85% of the voters of South Carolina approved a “constitutional amendment that provides home and business owners across the state with meaningful protection against eminent domain abuse.”<sup>171</sup> The amendment adds the following to the current constitutional provision: “Private property must not be condemned by eminent domain for any

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<sup>167</sup> *Id.* at 856-57, citing *Edens*, *supra* note 138, at 283.

<sup>168</sup> Howsare, *Supra* note 111 at 523.

<sup>169</sup> *Supra* note 153 at 344, quoted by Howsare, *supra* note 111 at 523.

<sup>170</sup> Elizabeth F. Gallagher, *Breaking New Ground: Using Eminent Domain for Economic Development* 73 *Fordham L. Rev.* 1837, 1841 (2005), quoted in part by Howsare, *supra* note 89 at 519.

<sup>171</sup> *Supra* note 110 at 12.

purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.”<sup>172</sup> The constitutional amendment reserves an exception for the condemnation of blighted property:

For the limited purpose of the remedy of blight, the General Assembly may provide by law that private property constituting a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors may be condemned by eminent domain without the consent of the owner and public to a public use or private use if just compensation is first made for the property.<sup>173</sup>

The Constitutional Amendment also deleted an entire portion of the South Carolina Constitution dealing with slum clearance and redevelopment<sup>174</sup> that had been added to the Constitution between 1967 and 1971.<sup>175</sup> Before its removal, Article XIV, Section 5 of the South Carolina Constitution<sup>176</sup> provided that particular counties, including Spartanburg, York, Florence, Greenville, Charleston, Richland, and Laurens, were authorized to “undertake and carry out slum clearance and redevelopment work in areas which are predominantly slum or blighted, the preparation of such areas for reuse, and the sale or disposition of such areas to private enterprise for private use or to public bodies for public uses,” and that the General Assembly conferred on the named counties the “right to exercise the power of eminent domain as to any property essential to the plan of slum clearance and redevelopment.”

While the first part of the Constitutional Amendment was aimed at ensuring a narrow definition of public use in South Carolina by excluding condemnation for economic development, the second aspect of the Amendment dealing with blighted areas could potentially have a broadening effect. While under the Constitution prior to amendment only the named

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<sup>172</sup> H.B. 3052, § 1. A., 117<sup>th</sup> Cong. (S.C., as reported by H. Comm. On the Judiciary, Jan. 9, 2007) (hereinafter H.B. 3052).

<sup>173</sup> *Id.* §1. B.

<sup>174</sup> *Id.* §1 C.

<sup>175</sup> Howsare, *supra* note 111 at 524.

<sup>176</sup> S.C. Const. art. XIV, §5 (2006).

counties were permitted to use eminent domain for slum clearing, the changes to the Constitution now potentially allow the General Assembly to enable all governmental entities, not just those counties previously named, to exercise the power of eminent domain for slum clearing.

The South Carolina General Assembly is currently considering three bills—two originating in the Senate and one in the House—dealing with the exception the constitutional amendment carves out for blight. One bill seeks to eliminate the use of eminent domain for slum clearing or blighted areas. The other two bills are substantially similar, but do have a notable variation between them. Each bill will be discussed in turn, highlighting the most significant aspects of the proposed legislation.

#### **A. Proposed Legislation: Senate Bill 33**

Senate Bill 33<sup>177</sup> essentially does away with any exception from the state’s narrow public use doctrine for slums or blighted areas. The bill deletes all South Carolina Code sections dealing with eminent domain for blighted areas<sup>178</sup> and also amends sections relating to condemnation “so as to reference the circumstances that are not public use and do not justify condemnation of property.”<sup>179</sup> The bill states that a “condemnor may commence an action pursuant to this chapter for the acquisition of an interest in real property necessary for a public use in compliance with Article I, Section 13 of the Constitution of South Carolina.”<sup>180</sup> The bill then lists three items that are not considered public uses that a “condemnor may not condemn property for: (1) purposes of private retail, office, commercial, industrial, or residential

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<sup>177</sup> S.B. 33, 117<sup>th</sup> Cong. (S.C., 2007) (hereinafter S.B. 33).

<sup>178</sup> S.B. 33 § 1 (deleting Item (15) of § 4-9-30 authorizing the right of counties to exercise eminent domain for slum clearing), § 2 (deleting provision of §5-7-50 authorizing the right of municipalities to exercise eminent domain for slum clearing).

<sup>179</sup> S.B. 33 Purpose Clause.

<sup>180</sup> S.B. 33 § 3.

development; (2) enhancement of tax revenue, or (3) to transfer to a private person, nongovernmental entity, or public-private partnership, corporation, or other business entity.”<sup>181</sup>

In categorizing states’ eminent domain reform bills following *Kelo*, Sandefur<sup>182</sup> classifies the most restrictive laws (those that limit the use of eminent domain the most) as “meaningful reforms.”<sup>183</sup> He discusses the South Dakota statute first, saying it was “the first state to enact a meaningful restriction on eminent domain.”<sup>184</sup> The South Dakota bill is highly analogous to South Carolina’s proposed S.B. 33 in that both do not allow property acquired by eminent domain to be transferred to private entities and both prohibit the use of eminent domain for tax revenue. The main similarity between these statutes is that both disallow an exception for blight, “or other similar loopholes.”<sup>185</sup>

If the South Carolina Generally Assembly is truly looking for the most restrictive measure to ensure that private property is never condemned for a non-public use (in the most narrow sense of the term) S.B. 33 would be suitable. However, the Assembly should keep in mind that the 2006 Constitutional Amendment, ratified by a huge margin of the voting public, allowed an exception for blight.<sup>186</sup> It may not be the will of the people of the state to eliminate the blight exception since it was part of the Amendment they ratified by such a broad margin. Therefore, S.B. 33 is likely not a suitable solution for the citizens of South Carolina.

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<sup>181</sup> S.B. 33 § 3.

<sup>182</sup> *Supra* note 24 at 757.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 758.

<sup>186</sup> *Supra* note 174

## B. Proposed Legislation: Senate Bill 130

### 1. Definitions of “Blight” and “Public Use”

Senate Bill 130<sup>187</sup> preserves the current statutory exception for the use of eminent domain for redeveloping blighted areas<sup>188</sup> while seeking to clarify the definition of blight,<sup>189</sup> a much needed change considering that the current statutory definition of “blighted area” is “unclear because it is one hundred and fifty seven words long and difficult to understand.”<sup>190</sup> The following new definition of “blighted” is included in the proposed statute:

‘Blighted’ means an area or property in which there is a predominance of buildings or improvements, or which is predominantly residential in character, and which, by reason of: (i) dilapidation, deterioration, age or obsolescence; (ii) inadequate provision for ventilation, light, air, sanitation, or open spaces; (iii) high density of population and overcrowding; (iv) unsanitary or unsafe conditions; (v) the existence of conditions that endanger life or property by fire and other causes; or (iv) any combination of these factors: (a) substantially impairs the sound growth of the community; (b) is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime; and (c) is detrimental to the public health safety, morals, or welfare.<sup>191</sup>

The bill then provides that an area is not considered a “blighted area or subject to the power of eminent domain...unless the local governing body determines that at least two-thirds of the number of buildings within the area are of the character described in this item and substantially contribute to the conditions making the area a blighted area.”<sup>192</sup> While this definition is one hundred and fifteen words long, it is much clearer than the previous definition of blight. This definition of “blighted” is not identical to the definition of blight from the recent Constitutional Amendment, but can arguably comport

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<sup>187</sup> S.B. 130, 117<sup>th</sup> Cong. (S.C., 2007) (hereinafter S.B. 130).

<sup>188</sup> S.B. 130 § 5.

<sup>189</sup> S.B. 130 §§§§ 7, 9, 16, 17.

<sup>190</sup> *Supra* note 89 at 525.

<sup>191</sup> S.B. 130§§§§ 7, 9, 16, 17.

<sup>192</sup> *Id.*

with the Amendment because of the inclusion in the Amendment of the vague term “deleterious land use” as a factor in determining whether private property is blighted.<sup>193</sup>

In discussing blight definitions, Sandefur noted that vague definitions of blight allow officials to declare almost any property as “blighted” if they so desire.<sup>194</sup> He says that “such amorphous standards make it possible to declare property blighted whenever officials believe it is failing to produce revenue at their preferred level.” While this viewpoint may seem more than a little cynical, it is apparent that S.B.130 provides some amorphous standards that a potential condemnor could latch on to, for example, the factor of “substantially impairing the sound growth of the community.”

The Castle Coalition, an organization whose slogan is “Citizens Fighting Eminent Domain Abuse,” published Model Blight Legislation<sup>195</sup> providing that for property to be condemned because it is blighted, the condemnor must prove by clear and convincing evidence that the property is “condemnation-eligible.” That definition has nine factors including whether the property is: a nuisance; designated as “unfit for human habitation”; a fire hazard; unfit for its intended use because of lack of basic facilities; a vacant lot in a built up area that has become a collecting ground for trash or vermin; property valued at less than the taxes owed on it; property where the owners were notified of health or safety code violations that they did not remedy; property that is a threat because of environmental conditions; and/or abandoned property.<sup>196</sup> This code provision is similar to the proposed definition of blight in the Senate Bill, but with one distinct difference. The Castle Coalition Model Legislation applies only to a specific piece of property, not to a “blighted area.” Therefore, the South Carolina bill gives less protection to a Berman-type property owner whose non-blighted property is located in a designated blighted area. Under the proposed Senate Bill, that owner’s property can still be condemned as long as

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<sup>193</sup> *Supra* note 174 . “Deleterious” is defined as “unwholesome; psychologically or physically harmful,” BLACK’S LAW DICTIONARY 459 (8<sup>th</sup> ed. 2004).

<sup>194</sup> *Supra* note 24 at 722.

<sup>195</sup> Castle Coalition, Model Blight Legislation, *available at* [http://www.castlecoalition.org/legislation/model/model\\_blight\\_legis.html](http://www.castlecoalition.org/legislation/model/model_blight_legis.html)

<sup>196</sup> *Id.* §1-9.

2/3 of the property surrounding the owner's is blighted. Therefore, the Senate Bill gives less protection to private property owners than the Castle Coalition recommends.

As far as S.B.130's definition of public use is concerned, the bill actually leaves the issue up to judicial interpretation. The bill defines "public use" as "the standard in the Constitution of South Carolina, 1895, by which private property may be condemned by eminent domain."<sup>197</sup> The Constitution, as recently amended, does not specifically define "public use", but rather excludes private ownership and tax purposes from uses that can be considered public.<sup>198</sup> The South Carolina courts have interpreted the public use requirement narrowly, and a court "would have difficulty reasoning around its own precedent and the explicit text of the constitution, which expressly forbids the taking of private property for private use without the owners' consent."<sup>199</sup> Therefore, while such a nondescript public use definition may be potentially problematic to private property advocates in other states, the definition certainly does not lend itself to liberal interpretation in South Carolina.

## 2. *Procedural Due Process*

The procedures required by S.B. 130 before an eminent domain action can occur are fairly lengthy. A governing body has to perform a cost-benefit analysis, "establish criteria for the objective to be accomplished as a result of the proposed taking," "include a fiscal impact statement that addresses whether the value of the proposed taking to the public is greater than the amount of just compensation owed to the property owner as a result of the proposed taking, and identify alternatives to achieving the stated objective other than through a taking of property," and hold a meeting between government officials and stakeholders, and produce a written report.<sup>200</sup>

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<sup>197</sup> S.B. 130 § 2, (5).

<sup>198</sup> *Supra* note 174.

<sup>199</sup> Howsare, *supra* note 11,1 at 523.

<sup>200</sup> S.B. 130 § 1 (amending §4-9-32).

Some scholars feel that including these types of requirements before property can be condemned could “invigorate political debate.”<sup>201</sup> They think procedural requirements that provide more information to decision makers about a potential condemnee’s property and community could lead to a greater appreciation by the decision makers of the value of the existing community.<sup>202</sup> Assistant Professor Charles E. Cohen stated that “concerns about a breakdown of the democratic process are among the most potent criticisms of public-private takings generally.”<sup>203</sup> By providing a set of criteria by which a condemnation must be evaluated, one that compares potential harm to benefit and one that also requires the participation of stakeholders, S.B. 130 could potentially quell some fears about a lack of due process in takings. However, other scholars argue that procedural requirements will not lead to meaningful eminent domain reform. For example, Sandefur argues that the public participation requirement is a “procedural barrier that is quite easy for city officials to cross.”<sup>204</sup> If passed, only time will tell whether these standards become effective tools for private property owners to protect their rights, or merely procedural red tape that governments can comply with to a statutorily satisfactory level without making meaningful changes in their approach to condemnation of blighted property.

Regardless of the outcome of pending legislation, the fact remains that few private property owners will fight condemnation, simply because they cannot afford to do so.<sup>205</sup> The poor are more likely than the wealthy to be targeted by eminent domain because their properties are more likely to be considered “slum” or “blighted” and therefore priced at lower market values.<sup>206</sup> Senate Bill 130 addresses costs of trial by having the government bringing the condemnation action pay the potential condemnee’s reasonable attorney’s fees.<sup>207</sup> The bill

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<sup>201</sup> Byrne, *supra* note 31, at 159.

<sup>202</sup> *Id.* Byrne compares this type of cost/benefit analysis being proposed for eminent domain with the National Environmental Policy Act and the National Historical Preservation Act because those statutes require decision makers to “weigh more carefully the various costs of demolition.”

<sup>203</sup> Cohen, *supra* note 11, at 546.

<sup>204</sup> Sandefur, *supra* note 24, at 730.

<sup>205</sup> See Cohen, *supra* note 11, at 547-48 (discussing that most targets of Kelo-style takings would be the poor and “politically powerless.” He discusses how many African-American communities were “destroyed” by the process of “Negro Removal” during the rise of urban renewal programs).

<sup>206</sup> Freda, *supra* note 99 at 504.

<sup>207</sup> S.B. 130 § 7.

further provides that the “property owner or a person having an interest in the property may be represented by counsel of his own selection” and have the costs paid by the petitioners<sup>208</sup> (the body bringing the eminent domain proceeding/the condemnor). This provision of the bill seems to offer property owners a chance to fight eminent domain proceedings that they might otherwise deem too financially risky. However, this provision refers to another code section, the Eminent Domain Procedure Act,<sup>209</sup> which would be amended by the bill so that if the power of eminent domain is used to acquire blighted property, the property owner is only entitled to recover his attorneys fees and costs if “he prevails.”<sup>210</sup> By requiring success on the merits, this limitation may cause some potential condemnees not to challenge the proceeding for fear that they might lose their case and have to come up with money to pay their attorney.

### *3. Judicial Burden of Proof*

The bill provides that in a condemnation action the public body has the burden of proving, by clear and convincing evidence, that the “proposed condemnation is for a public use that is not merely incidental, indirect, pretextual, or speculative.”<sup>211</sup> The provision also provides that the condemnor must prove that “the entity will own, operate, and retain control over the condemned property, except as may be permitted by Article I, Section 13 of the Constitution of the Sate of South Carolina.”<sup>212</sup> This provision creates a rule whereby a condemnor typically has to prove by clear and convincing evidence that the public will use the property in the narrowest sense, but preserves the exception for blight that is part of the new constitutional amendment.

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<sup>208</sup> *Id.*

<sup>209</sup> SC 28-2-510.

<sup>210</sup> S.B. 130 §12.

<sup>211</sup> S.B. 130 § 3 (A)(1).

<sup>212</sup> S.B. 130 § 3 (A)(2).

#### 4. *Just Compensation*

Defining the level of compensation that is “just” for taking private property can be difficult. At the federal level, fair market value is considered just compensation.<sup>213</sup> Senate Bill 130 does not provide a definition of “just compensation,” nor does it add anything to the current status of just compensation for residential property in South Carolina law.<sup>214</sup> The bill does provide for reestablishment expenses to move a small business, farm, or nonprofit organization, up to \$50,000 or the maximum amount allowed by federal legislation (Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970), whichever is greater. In contrast, legislation in other states, such as Indiana, specifically addresses compensation. Indiana provides that the government must compensate the owners 125% of the value of the condemned property.<sup>215</sup> There is an ongoing debate between scholars over what level of compensation is truly “just.” Cohen states that “proposals for increased compensation are also problematic”<sup>216</sup> because the determination of value is subjective and “there are dangers associated with overcompensating as well as undercompensating.”<sup>217</sup> Cohen says that some property owners may spend money on improvements in anticipation of a profit if their property is facing condemnation and may attempt to make their property a target of condemnation in the hopes of making a profit.<sup>218</sup>

Professor Byrne pointed out that at the federal level, “while the Takings Clause requires just compensation for the property taking, it steadfastly has ignored the more complex losses imposed by residential displacement.”<sup>219</sup> Usually the federal government only pays condemnees for the property itself, but not for moving expenses, the potentially higher cost of replacement housing, and personal losses.<sup>220</sup> Because most condemnees in blighted and slum areas have

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<sup>213</sup> Freda, *supra* note 98 at 503-04 (discussing a theory that property owners benefit from condemnation through the benefits of a revitalized community, but countering that argument by pointing out the importance of minorities, “whether politically or economically, has the right to have ownership of their piece of the community).

<sup>214</sup> S.B. 130 § 15.

<sup>215</sup> Sandefur, *supra* note 24, at 759.

<sup>216</sup> Cohen, *supra* note 11, at 557.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Supra* note 31 at 151.

<sup>220</sup> *Id.*

lower incomes, the proportional impact that moving expenses have on their income is dramatic.<sup>221</sup> This means that “low income residents must bear a higher percentage of their losses.”<sup>222</sup> Senate Bill 130 does not address these concerns, even though other states have chosen to provide additional compensation beyond fair market value.

### *5. Right of First Refusal*

Senate Bill 130 includes a provision giving property owners whose property is condemned the right to “reacquire” their property and gives them the right of first refusal in certain circumstances. If the property owner held their property in fee simple, then when it is condemned the condemnor must inform them of their “right to reacquire the condemned property if the condemned property is not used for the public use for which it was condemned within ten years after the condemnation date” or “a right of first refusal to repurchase the condemned property if the condemned property is sold fewer than twenty years after the condemnation date.”<sup>223</sup> The bill then lays out a plan for determining the price for a potential repurchase of condemned property. The purchase price is based on a percent of the fair market value of the property or the condemnation price, whichever is greater. The percent increases the longer the period of time since the condemnation.<sup>224</sup>

### **C. Proposed Legislation: House Bill 3067**

House Bill 3067 is substantially similar to S.B. 130. Almost all of the provisions of the two bills are identical. The one notable distinction between the two bills is that the House bill contains a provision dealing with just compensation. The bill defines “just compensation” as “the value of the property taken and the damages, if any, to the property not taken so that: (a) a

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> S.B. 130 § 2 (B).

<sup>224</sup> For example, a sale back to the owners that takes place between 10 and 12 years from the condemnation date will cost the condemnees 50% of the fair market value of the property, while for a condemned property sold by the condemnor between 18 and 20 years after the date of condemnation the purchase price can be no more than 90% of fair market value. S.B. 130 § 2 (C).

full and complete equivalent for the loss sustained is realized by the owner whose property has been taken or damaged; and (b) the property owner is in as good a pecuniary position as if his property were not taken.”<sup>225</sup> The bill goes on to say that “the computation of just compensation must include a reduction for any benefits derived by the landowner as a result of the proposed project including, but not limited to, the value of property or rights relinquished or reverting to the landowner.”<sup>226</sup> The intent of this provision is to require full compensation to a landowner whose property is condemned, and to address what to do if property is only partially condemned. The bill requires that if a landowner is allowed to keep a portion of the condemned land, then the value of the property that the landowner keeps must be considered when computing his compensation. This provision is not specific enough to provide any real guidance in determining what level of compensation is “just,” and may actually lower the amount of compensation a landowner receives because of the “reduction for any benefits derived” Clause.<sup>227</sup>

## V. Conclusion

While the power for government to exercise eminent domain is interpreted broadly by the U.S. Supreme Court, South Carolina and other states choose to narrow that scope. The legislative history of South Carolina demonstrates the state’s long-standing belief in a narrow interpretation of “public use,” requiring that the property actually be used by the public. South Carolina has also reserved a more permissive use of eminent domain for the clearing of blighted property than the narrowest definitions available allow. While these two concepts may appear to be inconsistent, some authors and scholars have determined that it is possible to retain a statutory and/or constitutional blight exception while preserving strong private property rights. In order to do so, a statute must be narrowly tailored so as not to leave any opportunity for government to abuse the blight exception and condemn at will. Senate Bill 130 has many aspects consistent

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<sup>225</sup> H.B. 3067 §7.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

with a more narrow interpretation of blight, such as an improved definition of blight and a shift in the judicial burden of proof in a condemnation action. While Senate Bill 130 does not protect private property rights as much as Senate Bill 33, Senate Bill 130 will prove to be the more valuable legislation in the long run because it provides clear rules for the redevelopment of blight.