IN THE SUPREME COURT OF OHIO

CITY OF NORWOOD,	:	**Case Nos. 05-1210, 05-1211**
	:	
Appellee,	:	**On Appeal from the Hamilton**
	:	**County Court of Appeals,**
v.	:	**First Appellate District**
	:	
JOSEPH P. HORNEY, et al.,	:	**Court of Appeals Case Nos. C040683,**
	:	**C040783**
and	:	
	:	
CARL E. GAMBLE, et al.,	:	
	:	
Appellants.	:	
	:	

MERIT BRIEF OF APPELLANTS JOSEPH P. HORNEY, CAROL S. GOOCH, CARL E. GAMBLE AND JOY E. GAMBLE

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II. INTRODUCTION

This case is about an abuse of power by the City of Norwood in pursuit of a private development project it believes will increase its tax base. The City of Norwood has used its power of eminent domain to take the home of senior citizens Carl and Joy Gamble and the rental home of Joe Horney and Carol Gooch, as well as other properties in the Edwards Road Corridor area of Norwood, so that it can give their land to a private developer to create a high-end shopping center with apartments and office space. In order to condemn this prime real estate for a major corporate citizen of the city, Norwood had to justify its use of eminent domain by labeling the area "deteriorating" under Norwood's city code. In this case, this Court must decide what limits the Ohio Constitution places on the use of eminent domain to transfer property to private parties.

The City of Norwood had to go to painful lengths even to apply the "deteriorating" label to this area of well-maintained residences and businesses. Although there was no dilapidation, no tax delinquencies, and no vacancies, the City claims that the neighborhood is "deteriorating" based on ordinary conditions shared by ordinary neighborhoods throughout the area, including failure to conform to building requirements for new construction and "diversity of ownership" – ownership of adjacent properties by different people, the classic definition of a neighborhood. The City relied on an essentially worthless study of the existing conditions of the area and justified its designation by conditions that its new plan will not cure, as well as conditions that describe virtually any neighborhood, including affluent ones, in Norwood and the surrounding area. The City used anything but a "sound reasoning" process, and indeed it designated the area as "deteriorating" solely as a pretext for using eminent domain and obtaining financing. This Court should not sustain this flagrant misuse of the eminent domain power.

But this use of eminent domain raises an even deeper problem. In Ohio, as elsewhere, the underlying constitutional rationale of urban renewal appropriations is to remove the existence of actual conditions of slum and blight. Thus, it makes sense that this Court has never allowed the use of eminent domain to transfer property in a non-blighted area from one private owner to another for private development, and that it has held that lower courts must examine whether municipalities have engaged in a "sound reasoning process" when they declare a neighborhood "blighted" so that they may use eminent domain to take it. In this case, this Court is presented for the first time with the question of whether the existence of non-blighted conditions – i.e., so-called "deteriorating" conditions – justifies private-to-private transfers of property.

This Court has not seriously looked at the constitutionality of condemnations for eventual use for private development in more than 50 years. The appellate court held that Section 19, Article I of the Ohio Constitution permits the taking of non-blighted property by private developers. If this Court agrees, it will dissolve any boundary between private and public use. The Ohio Constitution demands more, and this Court should take this opportunity to draw an outer boundary to the use of eminent domain for private development.

III. STATEMENT OF FACTS

The Gambles and Their Home

Carl and Joy Gamble have owned their home at 2641 Atlantic Avenue for 35 years and raised two children there. (Transcript of Proceedings (hereinafter "T.p.") 407-408).[1] At trial, Mrs. Gamble, who is a life-long resident of Norwood, described their home as "lovely" and "unique," stating she is only aware of one other one like it in the whole city. (T.p. 407, 409,

[1] With one exception, all citations to the Transcript of Proceedings are to the transcript of the trial that the trial court conducted on the issue of the City's right to take the two homes at issue in this appeal, as well as other properties. There is one noted citation to the transcript of the compensation trial for the home owned by Mr. Horney and Ms. Gooch.

223). Mr. Gamble worked for the same grocery company for 48 years and, in 1991, he purchased, along with Mrs. Gamble, a small grocery store on Gilbert Avenue in Cincinnati. (T.p. 399-400). They owned and ran the store until the couple both retired in 2001. (T.p. 400, 408-409). In addition to their home, Mrs. Gamble owns a vacant lot that fronts on Edmondson Road that the couple has converted into a large back yard in which Carl Gamble has planted trees and a flower garden. (T.p. 401-402). They spend significant time in the back yard during the summer. (T.p. 402). The couple has never tried to sell their home and do not wish to move. (T.p. 403). Mr. Gamble stated that they retired to live there the rest of their lives. (T.p. 404). Mrs. Gamble testified: "All of our memories are there. We're rooted there. We do not want to be uprooted. . . . We want to stay right there until we're carried out feet first." (T.p. 411).

Mr. Horney's and Ms. Gooch's Rental Home

Joseph Horney was born in Cincinnati, grew up in an area close to the Edwards Road Corridor area of Norwood, and has lived in the Cincinnati area all of his life. (T.p. 388-99). Mr. Horney, who is a project manager for a local construction company, bought the rental home at 2652 Atlantic Avenue in 1991 with a small inheritance from his grandparents and lived in it himself for a few years after its purchase. (T.p. 389; App. 78; T.p. 390-91). He has made many improvements to the home both on the exterior and interior, doing most of the work himself. (T.p. 391). At the time of the proceedings below, Mr. Horney and his wife, Ms. Gooch, who works for an insurance company, were renting the home to two sets of tenants – one of whom had lived there for approximately 10 years. (T.p. 235 (compensation trial); T.p. 391-92). Mr. Horney and Ms. Gooch are attached to their rental home and ask this Court to restore it to them.

The Origins of the Urban Renewal Plan and the City's Use of Eminent Domain for the Benefit of Rookwood Partners

In 2002, Jeffrey Anderson of Jeffrey Anderson Real Estate, Inc., one of the developers comprising Rookwood Partners (hereinafter "Rookwood"), approached the City about building Rookwood Exchange, a complex of private office space, rental apartments or condominiums, and chain retail stores, in the Edwards Road Corridor area of Norwood. (App. 81; T.p. 28, 44-46). (App. 81; T.p. 46-48, 584-585). Anderson already owns and operates two developments in the area, Rookwood Commons and Rookwood Pavilion. (T.p. 43).

Under the Norwood City Code, there was only one way that Rookwood could have the City use eminent domain to obtain the properties of those owners, like the Gambles and Mr. Horney and Ms. Gooch, who did not want to sell their homes and businesses. It had to have the City conduct an urban renewal study finding that the area was "slum, blighted, or deteriorated" or "deteriorating." *See* Norwood Code §§ 163.02(b) and (c). As recently as November of 1998, however, the City had indicated that the area was in good condition. According to an urban renewal plan it approved for the immediately adjacent area (called Southeast Norwood) at that time, "[a] conscious decision was made to exclude from the plan area adjacent residential property north of Edmondson which was unnecessary to support the redevelopment area and which *generally was in good shape*." (emphasis added) (Deft. Exh. 1, p. 5; App. 105). The "adjacent residential property" that was "in good shape" refers to the Edwards Road Corridor area at issue in this case. (T.p. 37). The Southeast Norwood plan went on to state that "Norwood desires to enhance that residential area by ensuring better traffic control and quality buffering from the Project Area." (Deft. Exh. 1, p. 5).

These plans changed after Jeffrey Anderson and Rookwood announced the Rookwood Exchange Project in 2002. Rookwood, not the City, raised the idea of doing an urban renewal

study for the Edwards Road Corridor area. (App. 82). On November 18, 2002, representatives of Rookwood went before the Norwood Planning Commission and requested that it recommend that an urban renewal study be conducted for the Edwards Road Corridor area. (*Id.*; T.p. 69-70. On that same day, the Commission recommended to the Norwood City Council that an urban renewal study be conducted. (App. 82; T.p. 53-55).

On January 25, 2003, a representative of Rookwood appeared before the City Council and informed it that not all property could be acquired by a private agreement and that any redevelopment agreement between the City and Rookwood would have to include the concept of eminent domain in order for the project to proceed. (App. 82; T.p. 54).

In April 2003, the Norwood City Council authorized the preparation of an urban renewal study for the Edwards Road Area. (App. 82; Deft. Exh. 7). The Norwood Planning Commission selected the firm of Kinzelman Kline Gossman ("KKG") to prepare the study. (App. 82; T.p. 84-87). Rookwood offered and agreed to reimburse the City for the costs of preparing the study. (App. 82-83; T.p. 38).

On July 7, 2003, the Edwards Road Corridor Area Urban Renewal Plan was presented to the Norwood Planning Commission. The Edwards Road Corridor area consists of 99 buildings and 25 parcels of vacant land located at the eastern boundary of the City of Norwood and contiguous with the western boundary of Oakley and the City of Cincinnati. The Commission recommended to the City Council on that date that the Plan be approved.

Major Flaws in the Plan

The urban renewal plan as ultimately approved by the City suffered from numerous, obvious, and undisputed flaws. First, the plan – which had the nominal purpose of informing the City Council of whether the area was "slum, blighted, or deteriorated" under § 163.02(b) or

"deteriorating" under § 163.02(c) – combined those two definitions for purpose of its evaluation of the conditions in the area. (App. 86, 98; Supp. 1; T.p. 153-155). Thus, the study did not actually assess the area according to either definition. (T.p. 154-155).

The plan's failure to follow Norwood's code did not stop there. It used a series of assessment factors drawn from the definitions in § 163.02 to evaluate each property in the area. (App. 86; Supp. 1). The plan then created subcriteria for each assessment factor in order to define what conditions earned that particular assessment factor. (Supp. 14-18). A number of the subcriteria used in defining the assessment factors were simply incorrect. For example, it was improper to include noise and "excess light" as "lack of adequate provision for ventilation, light, air, and sanitation." (App. 12).

In addition, the study engaged in rampant double- and triple-counting of the same conditions on a property to earn more than one negative assessment factor. (App. 12). These errors, along with many others, had serious consequences:

> According to Defendants' experts, *47% of the assessment factors noted by KKG were in error. The City does not dispute that errors existed.* The KKG plan double-counted the same conditions several times. KKG witnesses admitted that their method double-counted the same conditions.

(*Id*.) (citations omitted) (emphasis added).

Many of the subcriteria that the plan used to say the area met different factors – e.g., the existence of ribbon driveways, the lack of handrails on steps in homes, the existence of "weeds and minor paint needs" and the existence of homes of more than 40 years of age – are incorrect, and are trivial and common throughout Norwood. (T.p. 669, 307-308; Deft. Exh. 25; T.p. 239, 220; T.p. 446-447; T.p. 159). The plan also used other criteria common to virtually every neighborhood, including "incompatible uses" (i.e., the nearness of commercial uses to residential

uses, which is a feature of many successful and affluent neighborhoods in the Cincinnati area[2]) and "non-conforming uses" (defined as the fact that buildings did not meet current zoning and building requirements for new buildings – a feature of just about every building over five years old[3]), it also relied on "diversity of ownership" – i.e., the fact that individual people owned their individual homes and businesses. (T.p. 131, 306). Of course, virtually every neighborhood in America has that feature.

Approval of the Plan

On August 12, 2003, the Edwards Corridor Urban Renewal Area Plan was presented to the Norwood City Council at a public hearing. (App. 83; T.p. 645-646, 830-831). The City Council heard testimony at that hearing outlining a number of the above problems with the plan, including the existence of significant double-counting, the inclusion of criteria that were not part of Norwood's code, and the use of both trivial and common conditions to support the "deteriorating" designation. (T.p. 87-89; Deft. Exh. 8).

At its following meeting, on August 26, the City Council passed and approved Emergency Ordinance 55-2003, which adopted the plan and designated the Gambles' neighborhood as a "deteriorated area" and a "deteriorating area" under Chapter 163 of the Norwood Municipal Code. (App. 83; App. 118). (Under Chapter 163, a "deteriorated area" is actually called a "slum, blighted, or deteriorated area." *See* Norwood Code § 163.02.) Emergency Ordinance 55-2003 included statistics taken directly from the plan about the incidence of various supposedly negative conditions in the area. (App. 118).

[2] (T.p. 308, 311-315).
[3] (T.p. 245).

The City's Redevelopment Contract With Rookwood Partners

On the same day it approved the plan, the Norwood City Council passed Ordinance 56-2003, which authorized the Mayor to enter into a Redevelopment Contract between the City and Rookwood Partners. (App. 84; T.p. 89-90; Jnt. Exh. 3; Jnt. Exh. 4). Under the Redevelopment Contract, Rookwood Partners agreed to reimburse the City for all the costs – including attorneys' fees in appropriation cases – of acquiring the properties through the City's use of eminent domain. (App. 84; T.p. 745, 783-784).

Also under the terms of the contract, the City could not exercise the power of eminent domain in the Edwards Road Corridor area unless and until Rookwood Partners gave it permission to make an offer to a property owner to purchase his property. (Jnt. Exh. 4 at 14-15). That permission could be withheld at Rookwood Partner's "absolute discretion." *Id*. Furthermore, the Redevelopment Contract established a series of deadlines regarding the City's use of eminent domain; the City's failure to meet those deadlines resulted in Rookwood Partners' ability to terminate the contract without liability. (App. 10; Jnt. Exh. 4, pp. 16-18).

Commencement of Eminent Domain Actions

On September 9, 2003, the City Council approved Resolution 19-2003, which declared the intent of the Council to appropriate by eminent domain the Gambles' home, the home of Mr. Horney and Ms. Gooch, and the properties of the other owners in the Edwards Road Corridor area who did not wish to sell. (App. 85; Jnt. Exh. 7). At its next meeting, on September 22, 2003, the City Council passed a series of ordinances approving the appropriation of those properties. (App. 85; Jnt. Exhs. 8-12). The City filed its eminent domain action against the Gambles and Mr. Horney and Ms. Gooch on November 7, 2003. *See* Complaint for Appropriation of Real Property, *City of Norwood v. Carl Gamble, et al.,* Case No. A0308650

(Hamilton County Ct. of Common Pls. November 7, 2003) (hereinafter "Gamble Complaint"); Complaint for Appropriation of Real Property, *City of Norwood v. Joseph Horney, et al.*, Case No. A0308648 (Hamilton County Ct. of Common Pls. November 7, 2003) (hereinafter "Horney Complaint"). The stated, sole purpose of the condemnation of the two homes and the other properties in the Edwards Road Corridor area was "urban renewal." (Gamble Complaint, para. 4; Horney Complaint, para. 4; Supp. 47).

Almost immediately after it acquired title to the Gambles' home and Mr. Horney and Ms. Gooch's rental home, the City transferred title and possession of the homes to Rookwood.[4] Rookwood is paying all the costs of this litigation. (App. 84; T.p. 745, 783-784).

Procedural Posture

The trial court consolidated the five appropriation actions for the purpose of conducting a trial on the issue of the City's right to take the properties. *See* Entry Granting Motion to Consolidate, *City of Norwood v. Matthew F. Burton*, Case Nos. A0308646-A0308650 (Hamilton Cnty. Ct. Common Pls. January 26, 2004). Two of those properties are at issue in this action.[5] On June 14, 2004, Judge Myers of the Hamilton County Court of Common Pleas issued a decision. The court held that the City had abused its discretion in designating the Edwards Road

[4] The City acquired title to Mr. Horney and Ms. Gooch's rental home on October 8, 2004, and transferred title to Rookwood on October 11, 2004. *See* Affidavit of Joseph P. Horney, Exhibit 2 to Docket No. 11, Appellants Carl E. Gamble, Joy E. Gamble, Joseph P. Horney and Carol S. Gooch's Motion For An Injunction Pending Appeal, *City of Norwood v. Joseph P. Horney, et al.*, Case Nos. C040683, C040783 at ¶¶ 4-5 and attached exhibits. The City acquired title to the Gambles' home on November 3, 2004 and transferred title to Rookwood on the same day. *See* Docket No. 11, Appellants Carl E. Gamble, Joy E. Gamble, Joseph P. Horney and Carol S. Gooch's Motion For An Injunction Pending Appeal, *City of Norwood v. Joseph P. Horney, et al.*, Case Nos. C040683, C040783 at 8.

[5] The First District recently issued its opinion in the appeal of one of the five properties, owned by Matthew Burton. It affirmed the trial court's decision based on the same reasoning it used in Appellants' cases. Mr. Burton will be seeking review of the First District's decision and will ask for consolidation with this action.

area as "slum, blighted, or deteriorated" under its code, and thus that the City could not use that designation as a justification for its appropriations. (App. 86-87; 99). However, the Court also ruled that the City did not abuse its discretion in determining that the area meets the definition of "deteriorating" under the Norwood Code and, thus, that the City could use its power of eminent domain to take their properties. (App. 98-104). The First District Court of Appeals affirmed the trial court's decision. (App. 75). The owners then sought review in this Court.

IV. ARGUMENT

The City of Norwood Did Not Employ a Sound Reasoning Process in Designating the Area "Deteriorating" under Norwood's City Code.

For the first three propositions of law in this case, the Court must decide whether its previous holdings that blight designations must be reviewed for a "sound reasoning process" actually provide any sort of meaningful check on municipalities' use of their eminent domain powers. The First District treated the deference traditionally afforded to municipalities in making those designations as nothing more than a rubber stamp.

A valid urban renewal designation of an area as slum or blighted under an appropriate statute (in this case, Norwood's municipal code) is a constitutional prerequisite to the use of eminent domain when a municipality's purported purpose is urban renewal. *See AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 160, 553 N.E.2d 597, 600 (making clear that when an appropriation is based on a blighted designation under a statute, "the question whether the taking of the landowner's property would be for a public purpose, as required by both the Ohio and United States Constitutions, is embedded in the question of whether the project area is a 'blighted area.'"). In order to determine whether a particular designation of slum or blight truly addresses actual slum and blight conditions, and thus can be used to supply a public use for the appropriation, Ohio courts

examine whether a municipality engaged in a "sound reasoning process" in making that designation under its code. *See AAAA Enterprises*, 50 Ohio St.3d at 161, 553 N.E.2d at 601.

Norwood's code also requires a valid urban renewal designation. As the trial court found, "[t]he code does not permit eminent domain for purely economic development, no matter how beneficial such development may be." (App. 92). The ordinance authorizing the condemnations thus also clearly stated that the condemnations were for the purpose of urban renewal, Norwood Ordinance 55-2003 (App. 118) and the City even stipulated that the purpose of the condemnations was urban renewal. (Supp. 47).

It is therefore vital to ask whether Norwood used a "sound reasoning process" in making its urban renewal designation and concluding that the area was "deteriorating" under Norwood's code. If Norwood failed to employ a sound reasoning process or otherwise abused its discretion, then these condemnations cannot stand. And indeed, it is hard to imagine a less sound approach to concluding an area is deteriorating. As will be discussed below in the sections dealing with propositions of law numbers I, II, and III, Norwood relied upon a study so hopelessly flawed that the City didn't even bother to defend it; its plans do not even call for elimination of factors that supposedly support the "deteriorating" designation; and the area itself was a perfectly normal area and consistent with the rest of the city and surrounding area.

Despite these obvious and undisputed flaws in the plan the City relied upon, the trial court and the First District held that the City did employ a sound reasoning process when making its "deteriorating" designation under its code. This "see-no-evil" holding is simply untenable; reliance on the plan could not have been a sound reasoning process as a matter of law (or common sense). Indeed, if the City's reasoning process was not unsound as a matter of law, it is hard to imagine any set of facts under which a reasoning process could ever be unsound. While

courts certainly provide deference to municipalities' blight and slum designations, that deference has an outer limit, and it has been passed here. This case provides excellent guideposts with which this Court can mark that limit. Unless it does so, Ohio courts will equate deference with rubber-stamping, thereby ignoring this Court's admonition that they must "not abdicate the historic role of the courts in the protection of constitutional rights through the exercise of the power of judicial review." *AAAA Enterprises*, 50 Ohio St.3d at 160, 553 N.E.2d at 600.

Proposition of Law No. I:

> When a municipality relies on an urban renewal plan in order to attempt to make a neighborhood eligible for appropriation by designating it as "deteriorating," the existence of substantial flaws in that plan must, as a matter of law, make the reasoning process that supports the designation unsound.

In finding the area to be "deteriorating," the City explicitly relied on a plan that was deeply and obviously flawed. It clearly failed to follow Norwood's own code – instead of tracking the separate, mutually exclusive definitions of "slum, blighted, or deteriorated" and "deteriorating," it created a new definition using some, but not all, criteria from each definition, making it impossible to evaluate the area in relation to Norwood's definition of "deteriorating." It was so riddled with error that *at least* 47% of the assessment factors were in error. Indeed, as the KKG principal who was responsible for the plan admitted, there is no way it could have been used to evaluate whether the area met Norwood's definition of either "slum, blighted, or deteriorated" or "deteriorating." (T.p. 154-155). The City was aware of problems when it adopted the plan. It just chose to ignore them. This was anything but a sound reasoning process.

A. The Urban Renewal Plan Prepared By KKG Did Not Track the Definitions Provided By § 163.02 of the Norwood Code; Thus It Was Invalid, and Relying on It Did Not Constitute a Sound Reasoning Process.

The stated purpose of the urban renewal plan, as adopted by the City in Ordinance 55-2003, was to give the City the necessary information to make decisions about what should happen in the area and whether to use eminent domain. Jnt. Exh. 4, p. 9. According to the plan, adopted by reference in that Ordinance 55-2003:

> In conformance with Chapter 725 of the Ohio Revised Code and Chapter 163 of the City of Norwood's Municipal Code, an Urban Renewal Plan must be supported by a study of existing conditions that identifies the incidence of factors that must be considered by Norwood City Council in making a determination that an area is blighted, deteriorating, or deteriorated.

(Supp. 11; App. 118 (adopting Jnt. Exh. 2)).

The plan accordingly included an assessment of existing conditions, using factors set forth in the Norwood Code's two separate definitions for "slum, blighted or deteriorated" and "deteriorating." Norwood Code § 163.02(b) & (c).[6]

[6] Norwood Code § 163.02(b) reads as follows:

> "Slum, blighted or deteriorated area" means an area within the corporate limits of the City in which there are a majority of structures or other improvements, which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsafe and unsanitary conditions or the existence of conditions which endanger life or property by fire or other hazards and causes, or any combination of such factors, and an area with overcrowding or improper location of structures on the land, excessive dwelling unit density, detrimental land uses or conditions, unsafe, congested, poorly designed streets or inadequate public facilities or utilities, all of which substantially impairs the sound growth and planning of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals and general welfare.

The plan should have assessed whether the existing conditions met either designation under Norwood's code. The definitions are mutually exclusive; a "deteriorating" area is one that, by definition, "is not a slum, blighted or deteriorated area." Norwood Code § 163.02(c). As the trial court found, however, the plan analysis quite obviously combines the two definitions, using some, but not all, criteria from each definition. (App. 86; Supp. 11-19 & Exh. I; T.p. 154-155). In effect, the plan, adopted by the City, created a new, partial combination statute and then compared the area to that. Indeed, it would not be possible to use the study to determine if the area met either definition. (T.p. 154-155). The City could not have used it determine if the area met its own definition of "deteriorating." Nonetheless, the City cited numerous statistics from the plan in the ordinance itself. (App. 118). Certainly the City should have recognized that it could not rely upon a study that did not follow its own ordinances. Explicit reliance on a study that can't be used to support that finding is <u>not</u> a sound reasoning process.

Norwood Code § 163.02(c) reads as follows:

> "Deteriorating area" means an area, whether predominately built up or open, which is not a slum, blighted or deteriorated area but which, because of incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, inadequate community and public utilities, diversity of ownership, tax delinquency, increased density of population without commensurate increases in new residential buildings and community facilities, high turnover in residential or commercial occupancy, lack of maintenance and repair of buildings, or any combination thereof, is detrimental to the public health, safety, morals and general welfare, and which will deteriorate, or is in danger of deteriorating into a blighted area.

B. The Edwards Road Corridor Area Urban Renewal Plan Contained a Multitude of Errors; Thus Relying On It Did Not Constitute A Sound Reasoning Process.

The combination of definitions was not the only problem with the plan. The plan also contained so many errors that it could not have been reasonably used by the City Council. The plan is supposed to contain an objective, quantified analysis of the existing conditions in the Edwards Road Corridor area. (Supp. 19). It tabulates and creates percentages that were then incorporated into Ordinance 55-2003, which adopted the plan. (App. 118).

The study's analysis was, in short, a mess. It used incorrect subcriteria for several assessment factors (for example, giving points off for supposed code violations that weren't actually code violations under Norwood's code) and double- and triple-counted the same conditions on a property to earn more than one negative assessment factor. (App. 86). These and many other errors resulted in (at least) 47% of the assessment factors being in error.[7]

The trial court recognized that the errors made it impossible to look at the prevalence of any of the factors in the area. Indeed, these problems with the plan moved the trial court to hold that the City did abuse its discretion in designating the area as "slum, blighted, or deteriorated" pursuant to § 163.02(b) of the Norwood Code. (App. 99) (noting that "nothing in the KKG Plan or elsewhere . . . would permit Council to conclude that a majority of structures fit that definition, particularly considering that the KKG Plan combined definitions and contained several errors.") (emphasis in original). Amazingly, even the person principally responsible for the study agreed that it would not be reasonable for the City to conclude from the plan that the area was blighted. (App. 101; T.p. 117). If the City abused its discretion by relying on the plan to find the area to be "slum, blighted, or deteriorated," it makes no sense that these problems,

[7] The study also used age over 40 as a negative factor. Eighty-eight percent of Norwood homes meet that criteria. (T.p. 496; 288-289; Def. Exh. 22). If the negative points for age and other admitted errors are taken into account, the error rate is closer to two-thirds. (T.p. 532).

which infect the whole plan, do not also dictate the same conclusion in regard to the City's designation of the area as "deteriorating."

Combined with the fact that the plan did not track the City's own definitions, the City had no quantitative information about the prevalence of either "deteriorated" or "deteriorating" conditions in the area. Finding an area "deteriorating" while relying on a plan that cannot be used for that purpose is most emphatically not a "sound reasoning process."

The City has essentially abandoned any defense of the plan or its numbers and instead convinced the trial and appellate courts to cross out the portions of the City's ordinance that are in error and then to find that, with those portions removed, the courts should defer to the City's findings in this new edited ordinance. The First District was willing to engage in this creative exercise, but this Court should not.

In all the caselaw and technicalities, it is easy to lose track of what is really happening here. The City did a study and used that study to show supposedly terrible conditions in the area to justify condemning and taking it. The study was fatally flawed, in some very obvious ways. But the City went ahead anyway. When the study was shown to be largely worthless, the City then said it could do without the study, because after all the owners admitted that some front yards were too small, two residential streets had dead ends, the area had driveways onto the street like many nearby areas, and, of course, buildings next to each other were owned by different people. If this Court sanctions such maneuvers and finds that the use of a plan like this constitutes a "sound reasoning process," it will simply invite more of the same – more sham studies finding "deteriorating" conditions, more belated rationalizations for projects that have already been approved. This Court should refuse to issue that invitation.

Proposition of Law No. II:

> In designating an area as "deteriorating" in order to make it eligible for eminent domain, a municipality may not constitutionally base that designation on conditions that a new development will either keep the same or exacerbate.

Not only was the City's plan hopelessly flawed, but it also does not even cure the conditions it claims justify the "deteriorating" designation and razing of the area. The City says it is condemning the area because it has too much traffic. Its plan creates more traffic. The City says it is condemning to eliminate cars backing up onto the street, but it voted to approve a site concept plan that has trucks backing up onto the street. These conditions were obviously not foremost in the minds of City Council in designating the area as "deteriorating." This Court should not condone the taking of homes and businesses for supposed problems that won't even be remedied by the redevelopment project.

The purpose of appropriations under an urban renewal plan is to remediate blighted conditions that are harmful to the public; it is the removal of those conditions that allows the appropriation to take place in the first place. *See State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, 27-28, 110 N.E.2d 778, 787 (purpose of redevelopment condemnation is "the elimination of slum and other conditions of blight and provisions against their recurrence"). Thus, an urban renewal plan must actually be aimed at addressing the conditions it is supposed to ameliorate; the use of a designation of blight fails "if it is clearly shown that the city's plans to use the property once acquired are irrelevant to any reasonable design for eliminating the blight." *Eighth & Walnut Corp. v. Public Library of Cincinnati* (1st App. Dist. 1977), 57 Ohio App.2d 137, 147, 385 N.E.2d 1324, 1330.

It should come as no surprise that indeed, most development plans usually do address the conditions that are used to justify the condemnations. In at least a few cases, however, courts

have been confronted with plans that do not remedy the supposed justifying conditions and have held that appropriations that are justified by the need to eliminate a problem must actually aim at eliminating that problem. *See, e.g., Eighth & Walnut*, 57 Ohio App.2d at 147, 385 N.E.2d at 1330 ("**[**T**]**he adoption of a plan of urban renewal *not addressed to the problem of correcting such predetermined blight* would also fail.") (emphasis in orginial); *Beach-Courchesne v. City of Diamond Bar* (Cal. Ct. App. 2000), 95 Cal.Rptr.2d 265, 276 (rejecting finding of blight that authorized use of eminent domain because, among other reasons, "there is a total 'disconnect' between the cause of the alleged blight and the proposed remediation."); *see also City of Center Line v. Chmelko* (Mich. Ct. App. 1987), 416 N.W.2d 401, 404-05 (rejecting attempted appropriation on behalf of a car dealership based in part on alleged parking shortage; not only was there no shortage, but plans showed no new parking would be created).

In a different context, *Craigmiles v. Giles* (6th Cir. 2002), 312 F.3d 220 employed similar reasoning. Tennessee prohibited persons who were not funeral directors from selling caskets. One of the reasons the state gave was the protection of public health and safety in the burial of bodies. However, the Sixth Circuit recognized that Tennessee law permitted bodies to be buried without a casket and thus rejected the claim that public health and safety had anything to do with the law. *Id.* at 225. The law did nothing to address the conditions supposedly justifying it.

In this case, for example, the so-called traffic safety issues that the City has used to justify the "deteriorating" designation and the resulting appropriations in this case – driveways from which residents sometimes back out onto main roads and increasing traffic volume – will either remain the same or be exacerbated by the City's plans; thus, the City's plans for the property are "irrelevant to any reasonable design" for eliminating those conditions. In regard to the issue of cars backing out of driveways into major roads, the City approved a concept plan for

Rookwood's project in which trucks would back out onto the same roads. (T.p. 49-50; Jnt. Exh. 5, addendum A (ground floor concept plan)). Similarly, increased traffic cannot be a legitimate reason to designate the area as "deteriorating" and to use eminent domain. As the traffic engineer hired by the City testified, Rookwood's project will add *over 13,000 cars per day* to the area's traffic; even with this addition, traffic will still be acceptable. (T.p. 196-199).[8] Moreover, there were more traffic accidents next to a nearby Rookwood development than in the area subject to condemnation. (App. 88). Thus, it makes no sense to hold, as did the courts below, that the existing traffic conditions in the area provide any justification for the City's appropriations. In reversing the First District, this Court should demonstrate that a city does not employ a "sound reasoning process" when it condemns property based on conditions that a future development will not attempt to cure.

Proposition of Law No. III:

> A municipality does not employ a sound reasoning process when it designates a normal neighborhood as "deteriorating" in order to make it eligible for eminent domain.

Assuming that "deteriorating" designations can provide a constitutional basis for the use of eminent domain, affixing such a designation to a normal neighborhood is an abuse of discretion and cannot, as a matter of law, be the result of a sound reasoning process. The trial court and First District actually held that "diversity of ownership" – different people owning homes and businesses next to each other – is a basis for finding an area "deteriorating." If this Court allows the condemnation of "deteriorating" neighborhoods for private development under

[8] The City also cited a lack of "connectivity" between the residences and various community resources, like the nearby library. (App. 86; T.p. 136). However, the Rookwood Exchange project would not change this situation. As the trial court pointed out, the residents of the 200+ apartments would have no greater "connectivity." (App. 86). Thus, the lack of connectivity was not a statutory basis for the blight or deteriorating designation. It is notable that the City relied on other conditions it had no plans to remedy in designating the area blighted.

Ohio's Constitution (*see* Proposition of Law No. IV), at the very least "deteriorating" cannot include normal neighborhoods. This Court should hold that the existence of conditions found in practically every neighborhood cannot be a part of a sound reasoning process supporting a "deteriorating" designation.

The trial court pointed to five conditions as supporting the "deteriorating" designation: "incompatible uses" (or mixed use, i.e., the nearness of commercial uses to residential uses), "non-comforming uses," "faulty street arrangements," "obsolete platting," and "diversity of ownership." (App. 100). And, as the uncontroverted testimony at trial showed, these conditions are common throughout Norwood and the surrounding area. The Urban Renewal Plan refers to Oakley Square and Hyde Park Square as nearby successful areas that Norwood should seek to emulate in the Edwards Road area after removing the current homes and businesses. (Supp. 10). These areas have "incompatible land uses" because they have commercial uses next to residential ones. (T.p. 308, 311-312; Deft. Exhs. 26 &27). Oakley has automotive uses and fast food next to residences. (T.p. 311-312; Deft. Exh. 27). Mt. Lookout Square, another upscale area nearby, also has a mix of residential and neighborhood-scale commercial uses, including automotive ones. (T.p. 313-314). In regard to "faulty street arrangements," the Edwards Road Area has cul-de-sacs on two of the streets in the area, which do not allow fire trucks to turn around. Similarly, Hyde Park Square has "faulty street arrangements" because it has fire trucks backing up and parking with cars backing up onto a busy street. (T.p. 309-310; Deft. Exh. 26). Furthermore, there are 34 dead-end streets in Norwood, which would prevent fire trucks from entering in both directions. (T.p. 608; Pltf. Exh. AA).[9] The urban renewal plan's standard for

[9] And as a 21-year employee of the Fire Department testified, he could not recall a single accident involving emergency equipment on the two streets in the Edwards Road area that have cul-de-sacs. (T.p. 611).

"non-conforming" uses was that buildings in the Edwards Road Area did not meet Norwood's standards for brand-new construction. (T.p. 130, 134, 142-43, 147-48, 152). Unfortunately for property owners, only a miniscule percentage of buildings over five years old would comply with all zoning and current building requirements for new buildings. (T.p. 245).[10] In regard to "obsolete platting," nonconforming lot sizes are common in Norwood, as even the City Planner admitted. (T.p. 242, 158). Finally, it is common sense, and beyond dispute, that "diversity of ownership" – here, the ownership of individual homes and businesses by individual people (App. 101 n.3) – is a feature of every residential neighborhood and commercial street with neighborhood-scale businesses. (T.p. 131, 306). In sum, the Edwards Road area was a normal neighborhood similar to areas throughout the city – and for that matter, throughout the region. The City's "deteriorating" designation would make all those areas subject to condemnation.

Courts have frowned on the application of blight or deterioration designations to such ordinary areas. *See, e.g., Henn v. City of Highland Heights* (E.D. Ky. 1999), 69 F. Supp.2d 908, 914 (finding that area was not blighted, but instead was "a normal real estate market of moderately priced housing"); *Walser Auto Sales, Inc. v. City of Richfield* (Minn. Ct. App. 2001), 635 N.W.2d 391, 403, *aff'd by evenly divided court*, (Minn. 2002), 644 N.W.2d 425 (holding that the absence of "modern insulation standards" could not support determination that buildings were "structurally substandard"; *Spruce Manor Enterprises v. Borough of Bellmawr* (N.J. Super. Ct. 1998), 717 A.2d 1008, 1012-13 (holding that a finding of blight could not be based on a building's lack of compliance with "current design standards" regarding things like recreational facilities, number of parking spaces, and handicap accessibility).

[10] Building code requirements for Norwood change every three years. (T.p. 245-46). Zoning also changes with greater frequency than buildings. (T.p. 161).

The characteristics of the Edwards Road area that the City and lower courts claimed made it "deteriorating" are just ordinary features of Norwood and the Cincinnati area in general. The buildings were all well-maintained. (Supp. 55). There was no dilapidation, no vacant buildings, and no tax delinquencies. (App. 101). But building and zoning codes changed – the area didn't meet current standards for new construction. Dead end streets may be appreciated by residents but not the fire department. And shockingly, different people owned the different homes and businesses. The City's "deteriorating" designation amounts to no more than saying "this is an ordinary, well-maintained older neighborhood, like those throughout the area." This Court should hold that the City abused its discretion and did not use a sound reasoning process in concluding that such a neighborhood was "deteriorating."

Proposition of Law No. IV:

> If a municipality's code actually allows the conclusion that a normal neighborhood is "deteriorating" and thus subject to appropriation, then that code is unconstitutional.

The previous three propositions of law assumed that "deteriorating" conditions could be a constitutional justification for eminent domain and then showed how Norwood abused its discretion and failed to use a sound reasoning process in reaching the conclusion that the Edwards Road area was "deteriorating." Proposition of Law Number IV, however, addresses the question of whether the Ohio Constitution permits the use of eminent domain to take property in "deteriorating" areas and transfer that property to private parties for private development. If Norwood can, as it did here, designate a normal neighborhood as "deteriorating" under its code, then this Court should find that Norwood's code is in violation of the Ohio Constitution.

Section 19, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution provide independent prohibitions against governments using the power of eminent domain for private use. Section 19, Article I provides that "[p]rivate property shall ever

be held inviolate, but subservient to the public welfare." While "subservient to the public welfare" provides a limit on a property owner's ability to keep his land, it, along with "inviolate," also places a meaningful limit on the ability of local governments to take it from him for the private use of others. This Court has recognized this limit in holding that eminent domain may not merely or primarily be used to take property for private purposes,[11] and has given it substance in the urban renewal context by instructing lower courts to examine the validity of blight designations in order to ensure that private ends are not being served.[12] However, if the presence of so-called "deteriorating" conditions – i.e., non-blighted conditions that are common to practically every neighborhood – is enough to allow the use of eminent domain under a municipal code, the constitutional constraints on the eminent domain power are removed. If removing an ordinary neighborhood satisfies the Ohio Constitution's public use requirement, then cities can simply select any area, raze it, and transfer it to a private developer, because doing so will achieve the purpose of removing the "deteriorating" conditions of ordinary neighborhoods. This Court should not adopt this unlimited vision of the power of eminent domain in Ohio.

A. The Purpose of Urban Renewal Condemnations Is the Elimination of Slum or Blighted Conditions.

The underlying constitutional rationale of urban renewal condemnations is that they rid the community of the offensive conditions of slum and blight. In *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, 27-28, 110 N.E.2d 778, 787, this Court upheld the use of eminent domain for "the elimination of slum and other conditions of blight and provision against their recurrence." *Bruestle* involved a classic "slum" area. It appears that of the 331 buildings in the

[11] *See Bruestle*, 159 Ohio St. at 27, 110 N.E.2d at 786.
[12] *See AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 160-161, 553 N.E.2d 597, 600-601.

area, only 10 were not substandard. *Bruestle*, 159 Ohio St. at 33, 110 N.E.2d at 789. Moreover, the Court's comment that no one would "seriously contend" that the elimination of slums and blight was not a public purpose presumes universal public acknowledgement of the need for elimination of such areas. *See id*., 159 Ohio St. at 27-28, 110 N.E.2d at 787.

Such a comment could only be made in the context of genuine slum conditions. *See also, e.g., Kelo v. City of New London* (2005), 125 S.Ct. 2655, 2674 (O'Connor, J., dissenting) (in *Berman v. Parker* (1954), 348 U.S. 26, "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society…. Thus a public purpose was realized when the harmful use was eliminated"); *Randolph v. Wilmington Housing Authority* (Del. 1958), 139 A.2d 476, 482 (the "elimination of slums" is "the abatement of a public nuisance" and therefore a public use); *Eighth & Walnut Corp. v. Public Library of Cincinnati* (1st App. Dist. 1977), 57 Ohio App.2d 137, 147, 385 N.E.2d 1324, 1330 ("[B]light is the diagnosis and urban renewal the cure, the latter following inevitably from the former and both required to justify, constitutionally, the surgical technique of eminent domain."); Jonathan M. Purver, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes* (1972), 45 A.L.R.3d 1096 § 2(b) (discussing public purpose of blight removal).

Breaking new ground, the First District held below that the existence of non-blighted conditions – i.e., so-called "deteriorating" conditions in an area where blight might possibly exist in the future – justifies private-to-private transfers of property. Worse yet, under its holding, municipalities can designate practically any neighborhood, whether wealthy, middle-class, or poor, as "deteriorating" in order to make it eligible to be taken by eminent domain. This case thus presents this Court with an issue of first impression – whether eminent domain may be used to take property in non-blighted areas and transfer that property for private development.

Until *Bruestle*, this Court had approved the use of eminent domain for the ownership of private parties only in limited circumstances. *See, e.g., Giesy v. Cincinnati, Wilmington & Zanesville Railroad Co.* (1854), 4 Ohio St. 308, 324-25 (railroad depot); *Sessions v. Crunkilton* (1870), 20 Ohio St. 349, 356 (drainage ditch that would not be owned by neighbors but would benefit them). Indeed, very few Ohio cases challenging public use involve private ownership and use of the condemned property. *Bruestle* was decided during the peak of urban renewal, when there was a widespread belief that slums throughout the country had to be cleared. And it allowed the condemnation of viable properties within a slum area where the properties were necessary for redevelopment. *Bruestle*, 159 Ohio St. at 33, 110 N.E.2d at 789-790. This Court has not considered the constitutionality of taking property to be used for private development since *Bruestle*, now more than 50 years ago. This Court should take this opportunity to adhere to *Bruestle*'s rationale that property may be taken for urban renewal and transfered to private parties only if the condemnation eliminates slum or blighted conditions.

B. The Ohio Constitution Offers More Protection than the U.S. Constitution.

This Court has often found that different provisions of the Ohio Constitution offer greater protection for individual rights than their federal counterparts. Indeed, this Court takes very seriously its commitment to always consider whether the Ohio Constitution provides the same or different protections than the federal one. "'[W]hen a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.' … [W]e believe that the Ohio Constitution is a document of independent force." *Arnold v. City of Cleveland* (1993), 67 Ohio St. 35, 42, 616 N.E.2d 163, 169 (quoting *Davenport v. Garcia* (Tex. 1992), 834 S.W.2d 4, 12; *see also Preterm Cleveland v. Voinovich* (10th App. Dist. 1993), 89 Ohio App. 3d 684, 689-90,

627 N.E.2d 570, 574 (citing cases dating to 1941 for the "obvious" proposition that the Ohio Constitution can confer broader rights than the U.S. Constitution).

This Court is particularly likely to hold that the Ohio Constitution affords greater protection when its language differs from the parallel federal provision. *See, e.g.*, *Humphrey v. Lane* (2000), 89 Ohio St. 3d 62, 66-67, 728 N.E.2d 1039, 1044 ("the words of the Ohio framers do indicate their intent to make an independent statement on the meaning and extent of the freedom [of religion]"); *Simmons-Harris v. Goff* (1999), 86 Ohio St. 3d 1, 10, 711 N.E.2d 203, 211-212 (analyzing the Ohio and federal establishment clauses similarly but noting that the Court was not holding that Ohio would in the future follow the federal caselaw); *Arnold v. City of Cleveland* (1993), 67 Ohio St. 3d 35, 43, 616 N.E.2d 163, 169 (finding Ohio's right to bear arms protected the rights of individuals more than the federal constitution, based on differing language); *Preterm Cleveland v. Voinovich* (10th App. Dist. 1993), 89 Ohio App. 3d 684, 691, 627 N.E.2d 570, 574-575 (interpreting *Palmer v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313 and explaining that Section 1, Article I of the Ohio Constitution indicates that it was intended to give greater protection of individual rights and natural rights than the federal constitution).

In the past, significant U.S. Supreme Court decisions that constrict the protection of rights under the federal constitution have been the catalyst for this Court to re-examine the meaning of the Ohio Constitution's parallel provision and find that Ohio provides greater protection. For example, this Court had interpreted the confrontation clause of the U.S. and Ohio Constitutions as coextensive until the 1990s. *See, e.g., State v. Boston* (1989), 46 Ohio St. 3d 108, 545 N.E.2d 1220. However, after the U.S. Supreme Court held in 1992 that the federal confrontation clause permitted child hearsay testimony in a molestation case, this Court reconsidered and held that the Ohio Constitution provides greater protection than the federal one.

See State v. Storch (1993), 66 Ohio St. 3d 280, 612 N.E.2d 305; *see also, Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St. 3d 279, 649 N.E.2d 182 (reexamining Ohio Constitution's free speech clause after U.S. Supreme Court decision in *Milkovich v. Loraine Journal Co.* (1990), 497 U.S. 1 and concluding that the Ohio provision provides greater protection); *Humphrey v. Lane* (2000), 89 Ohio St. 3d 62, 66-67, 728 N.E.2d 1039, 1043-1044 (reexamining Ohio's free exercise clause after U.S. Supreme Court decision in *Employment Div. v. Smith* (1990), 494 U.S. 872 and concluding that the Ohio provision provided greater protection).

Thus, it is appropriate for this Court to re-examine the Ohio Constitution's limits on the use of eminent domain for private development in the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London.* *Kelo* held, essentially, that the incidental financial benefits to the public of private enterprise constitute a "public use" under the U.S. Constitution. The Court's sole caveat was that the government must follow procedures in deciding to condemn and have a plan showing that the private development has the possibility of generating economic benefits to the locality. In dissent, Justice O'Connor explained the impact of the Court's decision:

> To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property -- and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment.

Kelo v. City of New London (2005), 125 S.Ct. 2655, 2671 (O'Connor, J., dissenting).

Kelo involved a condemnation that was admittedly for "economic development" – to increase tax revenues, jobs, and the general economic health of the region. There was no pretense that the purpose of the condemnations was the elimination of blight. *Id.* at 2660. Norwood does not have the authority to condemn for economic development; it can only

condemn under its urban renewal code, when property is either "slum, blighted, or deteriorated" or "deteriorating." (App. 59, 92). This case therefore does not involve the exact same issues as *Kelo*. However, if this Court does not require the presence of blighted conditions in an area before taking it for private development, it will surely open the door to economic development condemnations under the guise of "deteriorating" designations. Because a "deteriorating" label can be placed on any virtually any neighborhood, municipalities can use supposedly "deteriorating" conditions as an excuse for condemnations whenever they wish to transfer property to private developers. Thus, while the instant case involves a different statutory authorization for eminent domain than in *Kelo*, this Court must exercise great caution in marking the outer boundaries of permissible condemnations for private development. If it does not do so, Ohio will shortly follow the lead of Connecticut and the U.S. Supreme Court and read "public use" out of the Ohio Constitution.

The Framers of the Ohio Constitution surely did not intend such a result. The language of Ohio's takings clause is unique. Like those of other states, it prohibits takings for private use and provides compensation for takings. But it also states "Private property shall ever be held inviolate, but subservient to the public welfare." Section 19, Article I. If the Framers had meant simply that property is subject to the public welfare, there would be no need to say that it should be held "inviolate." This language indicates that the Framers were trying to strike a balance – to provide genuine protection for private property but also to allow takings when public welfare demanded them. It is the role of the courts to maintain that balance. *See AAAA Enterprises*, 50 Ohio St. 3d at 159-61, 553 N.E.2d at 599-601; *see also State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 131, 702 NE.2d 81, 93 (interpreting Section 19, Article I in context of forfeiture

and holding "[j]ust as private property rights are not absolute, however, neither is the state's ability to restrict those rights.")

In recent years, other state supreme courts have confronted these issues, especially in relation to the substantial shift in the use of eminent domain for private development from seriously blighted to ordinary neighborhoods that are desirable for development. Recent decisions from the Illinois and Michigan Supreme Courts indicate growing discomfort with the use of eminent domain in the context of private development. Although both cases, like *Kelo*, involve projects conducted nominally under the rubric of "economic development," their reasoning is instructive. In *Southwestern Illinois Dev. Auth. v. National City Environmental, L.L.C.* (Ill. 2002), 768 N.E.2d 1, *cert. denied*, (2002), 537 U.S. 880, the Illinois Supreme Court found that the taking of land for additional parking for a successful racetrack was unconstitutional. Like in this case, it was clear that the primary motivation for the taking was the additional tax revenues and potential economic growth. *Id*. at 9-10. The court noted that the new project would alleviate certain public safety problems – problems that were much more significant than the claimed issues in this case. *Id*. at 5-6. The parking lot in *SWIDA* would eliminate serious traffic congestion, *id.*, whereas here the plan will increase traffic (T.p. 196-199). The *SWIDA* project would also alleviate safety problems with pedestrians crossing the highway. *Id*. at 5-6, 9. These concerns were obviously minor next to the purpose of promoting the racetrack development, however, and the court did not allow them to become the sham justification for the takings. *Id*. at 9-11.[13] Without the presence of actual slum or blight conditions, eminent domain could not be used for this private project. *See id*. at 9 (distinguishing

[13] The *SWIDA* dissent also contains an extensive discussion of the evidence of projected public benefits from the project, including economic benefits and alleviation of safety problems. *See SWIDA*, 768 N.E.2d at 11-17, 24 (Freeman, J., dissenting).

blight condemnations). Here, Norwood asks this Court to pretend that its motivation for these condemnation is the elimination of the embarrassingly trivial and common "deteriorating" conditions in the area. Like the court in *SWIDA*, this Court should not sanction such pretense and should find that the takings are for private, not public, use.

The Michigan Supreme Court decision last year in *County of Wayne v. Hathcock* (Mich. 2004), 684 N.W.2d 765 demonstrates the same recognition of the dangers of allowing eminent domain for private development in the absence of actual slum or blight conditions. The Michigan court noted that prior to its infamous decision in *Poletown Neighborhood Council v. City of Detroit* (Mich. 1981), 304 N.W.2d 455, it had permitted eminent domain for eventual transfer to private parties only in three limited circumstances. The first category concerns condemnations in which condemned land is transferred to a private entity because public necessity requires collective action. *Hathcock*, 684 N.W.2d at 781-82. The primary example in this category is the construction of "instrumentalities of commerce," such as railroads, gas lines, and canals, all of which require coordination of land assembly. *Id.* at 781-82.

The second category involves private transferees that remain subject to strict operational controls in carrying out the public use. *Id.* at 782. These cases typically concern the instrumentalities of commerce mentioned above or other closely regulated entities such as water or power companies that might be privately-owned, but are nonetheless performing vital public services. *Id.* In these instances, a public body such as a utility commission must maintain sufficient control of the private company to ensure that the public services are provided. *Id.*

Finally, the third category covers instances where the land transferred to a private party is selected on the basis of "facts of independent public significance." *Id.* at 782-83. The condemnation of blighted property is the most common example that falls into this last category.

In blight condemnations, the property is selected for condemnation for a public reason – the removal of blight – independent of the use to which the condemned property will eventually be put. *Hathcock*, 684 N.W.2d 475-476.

Up until now, this Court also has approved eminent domain for eventual transfer to private parties only in these three categories. *See, e.g., Giesy v. Cincinnati, Wilmington & Zanesville Railroad Co.* (1854), 4 Ohio St. 308, 324-25 (railroad depot); *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, 110 N.E.2d 778 (slum). The condemnations at issue in this case fall into none of these.[14] Bizarrely, the First District suggested that this development might fall into the second category of closely regulated private projects. (App. 74-75). In support of this claim, the First District cites the development agreement, which generally obligates Rookwood to develop in conformance with the plan. (App. 75). But that type of minimal obligation, if it can even be called an obligation at all, is not the type of public control that the Michigan Supreme Court was describing. Instead, the court referred to closely regulated industries, like public utilities, where the public body retains significant control over the actual management, operations, and public utilization of the eventual use. *See Hathcock*, 684 N.W.2d at 782 (petroleum pipeline regulated by Public Service Commission and obligated to provide service to the public was public use; water power generator that power company would "own, lease, use and control" not public use); *see also Poletown*, 304 N.W.2d at 479-80 (Fitzgerald, J., dissenting). The examples in both *Hathcock* and the dissent in *Poletown* (essentially adopted by the court in *Hathcock*) make clear that a private developer, operating in its normal private

[14] Certainly, the mere clearing of this neighborhood does not itself serve a public use. It is an ordinary neighborhood, with continuing development, and the City had no interest in clearing it until Rookwood proposed putting a development there. (App. 89, 105). And a shopping mall and apartments are quite obviously not "instrumentalities of commerce."

manner, would in no way fit into one of the three categories of permissible takings for private ownership.

The decisions of the Illinois and Michigan Supreme Courts, while not controlling, should be persuasive to this Court. Each recognized that allowing condemnation for private development in areas without significant slum or blighted conditions would effectively allow condemnation for private use. This Court should take this opportunity to draw a similar line.

C. The First District Did Not Fulfill Its Constitutional Role.

Under Ohio's Constitution, courts must hold private property "inviolate" by preventing condemnation for private use while also allowing property to be taken when there is a genuine public use. The First District, however, gave no weight at all to the idea that private property is a significant interest under Ohio's Constitution. It repeated the findings of the City,[15] stated that it was required to apply "great deference," and upheld the takings. (App. 67-68.)

The First District relied on three cases from this Court: *Bruestle*, *AAAA Enterprises*, and *Gahanna*. But neither *Bruestle* nor *AAAA* go nearly as far in approving the use of eminent domain for private development projects as did the appellate court, and *Gahanna* did not involve eminent domain. As discussed above, the area in *Bruestle* was severely blighted, and the Court could conclude that the public welfare did demand the removal of such an area. *See Bruestle*, 159 Ohio St. at 33, 110 N.E.2d at 789 (10 of 331 buildings not substandard). *AAAA* does of course state that there must be deference to local decisionmaking, but it also emphasizes the importance of genuine scrutiny by courts. "We must not abdicate the historic role of the courts

[15] Indeed, the appellate court cited the City's findings in support of its decision even when the trial court expressly held that reliance on those findings was impermissible. For example, the trial court held that the City could not use excess light and noise as "deteriorated" or "deteriorating" conditions because they do not appear in Norwood's code. (App. 86). But the First District cites both light and noise, just as the City does. (App. 67-68).

in the protection of constitutional rights through the exercise of the power of judicial review." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 160, 553 N.E.2d 597, 600. Finally, the First District cited *State ex rel. Ryan v. City of Gahanna* (1984), 9 Ohio St.3d 126, 459 N.E.2d 208 as a case in which this Court upheld the appropriation of property an area that is not blighted. (App. 70). This description is wrong on three counts: First, the *Gahanna* Court did not uphold anything; it struck down an improper bond arrangement for a development project. *See id*. at 129-131, 211-212. Second, the City of Gahanna's claim that blight existed in the project area was explicit and undisputed. *See id.* at 128, 210. Third, and most importantly, *Gahanna* in no way involved the use of eminent domain. In short, no decision of this Court requires the blind deference exercised by the appellate court.

D. <u>These Takings Violate the Ohio Constitution</u>.

The Ohio Constitution demands greater scrutiny, and these takings cannot withstand any but the most abjectly deferential approach. The City can couch its explanation of events in legal language, but it is clear what is going on here. The City of Norwood needs money. One of its largest corporate citizens proposed expanding its already substantial shopping center, thereby generating increased tax revenues. (App. 81; T.p. 28, 44-46). The neighborhood targeted by Rookwood was in fine shape, and Norwood hadn't planned on getting rid of it. (App. 105; Deft. Exh. 1, p.5). But the operation of another large shopping center, along with condos or apartments, would, the City hoped, add substantial tax revenues. Rookwood agreed to pay for almost everything, including all legal and consulting fees. (App. 84; T.p. 745, 783-784). When some owners refused to sell, Rookwood reminded the City that it needed to do a study to designate the area blighted so that the City could use eminent domain. (App. 58-59; App. 82-83). The study had a number of quite obvious flaws, but the City nevertheless approved the

designations required to take the remaining properties. (App. 86, 88, 118). When the owners refused to sell "voluntarily," the City condemned the properties and immediately transferred title to Rookwood. *See* supra. n. 4. The purpose of these condemnations was to permit a specific private development for a specific private developer, and the "deteriorating" designation served as the vehicle to do that.

The requirements of the "deteriorating" designation are so minimal, and the conditions so ordinary, that, as discussed throughout this brief, it can apply to virtually any neighborhood. Urban renewal condemnations are justified by the fact that they eliminate harmful conditions. The idea that the purpose of these appropriations is the elimination of the desperate conditions of diversity of ownership, small front yards, residential street cul-de-sacs, and older, well-maintained buildings in the Edwards Road Corridor area is absurd. If this Court upholds the takings in this case as "public uses," however, it will be telling municipalities that they can in fact take property for whatever private development projects they want, as long as they go through the motions of a "deteriorating" designation first. Ohio's constitutional protection of private property will become nothing but surplus verbiage. Instead, this Court should find that eminent domain may not be used to take property and transfer it to private developers unless the project will result in the elimination of actual slum or blighted conditions. Ohio is standing on a precipice. This case presents a vital opportunity for this Court to step back, rather than go blithely over the edge.

Proposition of Law No. V:

> Urban renewal plans that are prepared for the purpose of obtaining eminent domain authority and tax increment financing rather than the removal of blight, as well as the appropriations that follow, are pretextual; thus, they are unconstitutional under Section 19, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution

The uncontroverted evidence developed at trial demonstrates that the purpose of creating the urban renewal plan was not for the elimination of blighted or deteriorating conditions but rather to obtain eminent domain authority and tax increment financing for the project. Thus, the condemnations are pretextual and in violation of the public use clauses of the U.S and Ohio Constitutions.

As the appellate court below acknowledged, pretextual takings – where the real purposes of the condemnations are different from the stated ones – are illegal and routinely invalidated throughout the country and in Ohio. (App. 71).[16] Indeed, as noted by Justice Kennedy, even under the broad public use standard established by the Supreme Court in *Kelo*, pretextual takings are still illegal. *Kelo*, 125 S.Ct. at 2669 (Kennedy, J., concurring) ("A court applying rational –

[16] *See also, e.g., AvalonBay Communities, Inc. v. Town of Orange* (Conn. 2001), 775 A.2d 284 (invalidating as pretextual industrial development plan designed to prevent the construction of affordable housing); *Wilmington Parking Auth. v. Land with Improvements* (Del. 1986), 521 A.2d 227 (parking authority nominally condemned land for parking, while in reality trying to prevent development); *Pheasant Ridge Assoc. Ltd. Partnership v. Burlington Town* (Mass. 1987), 506 N.E.2d 1152 (pretext of condemnation was park and moderate income housing, while real purpose was exclusion of lower income housing); *City of Center Line v. Chmelko* (Mich. Ct. App. 1987), 416 N.W.2d 401 (dealership's plan showed that property would be used for inventory storage, rather than as a site creating jobs); *Cottonwood Christian Ctr.* (C.D. Cal. 2002), 218 F. Supp.2d 1203, 1229 ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or it is merely pretext."); *99 Cents Only Stores v. Lancaster Redevelopment Agency* (C.D. Cal. 2001), 237 F. Supp.2d 1123, *appeal dismissed as moot*, (9th Cir. Mar. 7, 2003), No. 1-56338, 2003 WL 932421 (question before the Court was whether the city had presented a valid or pretextual public use for its plan to condemn commercially viable real estate to transfer it to another entity).

basis review under the Public Use Clause should strike down a taking that, by a showing, is intended to favor a particular private party, with only incidental or *pretextual* public benefits . . . .") (emphasis added).

The First District's decision in *Eighth & Walnut Corp. v. Public Library of Cincinnati* (1st App. Dist. 1977), 57 Ohio App.2d 137, 148, 385 N.E.2d 1324, 1331, is the leading Ohio pretext case and it sets forth precisely the pretext inquiry in urban renewal cases in this state:

> Whether the city's . . . urban renewal plan, which had called for a residential-commercial mix to achieve the stated objectives, was done in aid of its purpose and plan to eliminate slums and blight . . ., or, on the contrary, was accomplished for other reasons, as, for example, solely to accommodate the desire of the library to expand its facilities, irrespective or in spite of the legitimating purpose of eliminating blight. Should the latter be found to have been the case, we think it clear that the constitutional fundament for the exercise of eminent domain by the city must be missing . . ..

It is important to note that the court in *Eighth & Walnut* held that a taking could be pretextual even if the purported reason for the taking was for a recognized public purpose, such as urban renewal. *Id.*, 57 Ohio App. 2d at 148.

Here, Norwood's urban renewal plan for the Edwards Road area was accomplished for "other reasons" – namely, the ability to acquire eminent domain authority and tax-increment financing for the building of Rookwood Exchange – not for its alleged purpose to eliminate blighted and deteriorating conditions. The most important evidence in conclusively demonstrating that the plan in this case was pretextual was the uncontradicted testimony of the City's witnesses. As the trial court recognized, the City's witnesses testified that the reason why a plan was undertaken was for obtaining eminent domain authority and for the ability of the City to engage in tax-increment financing. (App. 107-108).[17]

[17] *See also* T.p. 29-30, 66, 82, 83, 108-109, 167.

This conclusion is bolstered by the timing and events leading up to the adoption of the plan. The Edwards Road Corridor area had previously been excluded from another urban renewal plan because it was generally in good shape.[18] (App. 105; Deft. Exh. 1, p. 5). Moreover, it was undisputed that Rookwood Partners, not the City, raised the idea of doing an urban renewal plan and underwrote the plan's costs.[19] (App. 82, 83).

Once the City did decide it would have to use eminent domain, matters proceeded quickly. The plan was completed in three months and approved by the Planning Commission on the same night it was presented. The City Council held its first public hearing on August 12, 2003. (App. 83; T.p. 645-646, 830-831). At the council's very next meeting, on August 26, the City Council passed and approved Emergency Ordinance 55-2003, which adopted the plan and designated the Gambles' neighborhood as a "deteriorated area" and a "deteriorating area" under Chapter 163 of the Norwood Municipal Code. (App. 83; App. 118). At the next city council meeting, two weeks later, the City Council approved Resolution 19-2003, which declared the intent of the Council to appropriate by eminent domain the Gambles' home, the home of Mr. Horney and Ms. Gooch, and the properties of the other owners in the Edwards Road Corridor area who did not wish to sell. (App. 85; Jnt. Exh. 7). And at its next meeting, on September 22, the City Council passed a series of ordinances approving the appropriation of those properties.

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[18] The chronological development and timing of a particular project plan are factors courts look at in determining whether a condemnation is pretextual. *See, e.g., AvalonBay Communities,* 775 A.2d at 299; *Wilmington Parking Auth.*, 521 A.2d at 230. Moreover, absence of any prior interest on the part of a city in obtaining a site or neighborhood has also been considered an important factor in pretext determinations. *See, e.g., Pheasant Ridge Assoc. Ltd. Partnership,* 506 N.E.2d at 1157.

[19] To determine pretext, courts also examine who initiated the discussion of urban renewal and whether a private party is underwriting the urban renewal study and the condemnation actions themselves. *See, e.g., Chmelko,* 416 N.W.2d at 403; *Southwestern Illinois Development Auth. v. National City Environmental LLC* (Ill. 2002), 768 N.E.2d 1, 4, *cert. denied,* (2002) 537 U.S. 880.

(85; Jnt. Exhs. 8-12). The evidence in this case unquestionably demonstrates that the Edwards Road Corridor Urban Renewal Plan was pretextual and illegal.

As noted, the appellate court below acknowledged the well-established body of case law prohibiting pretextual takings, and then proceeded to misapply it to the facts of the instant case. The court below tried to distinguish the clear application of *Eighth & Walnut* to this case by claiming that here, unlike in *Eighth & Walnut*, a full evidentiary hearing took place. But the appellate court completely misreads the import of *Eighth & Walnut.* The case concerns the proper legal standard for determining pretext, not simply whether a hearing must be held. In this case, a full evidentiary hearing did indeed take place and it demonstrated beyond dispute the real reason why the urban renewal study was pursued. Thus, the property owners here proved the very issue upon which the court in *Eighth & Walnut* had ordered a hearing in that case.

After making a wholly unpersuasive attempt to distinguish *Eighth & Walnut*, the appeals court then sets forth what can only be described as a series of random and disconnected sentences concerning the urban renewal plan. The court mentions that the city went through an extensive process in enacting the urban renewal plan; that the mayor of Norwood testified that the city could not afford to eliminate the supposedly deteriorating conditions in the area without a private developer doing so; and that Norwood used its eminent domain powers because it was the "only way to effectuate the urban renewal project." (App. 72). Thus, the court, concluded, "[t]here was no pretext." *Id.* These claims, however, have absolutely nothing to do with whether the urban renewal plan was pretextual.

As stated previously, the question in pretext is whether the stated purpose offered by the government is different from the real purpose. In this case, the government claimed that the purpose of the urban renewal plan was the elimination of blighted or deteriorating conditions.

However, the property owners were able to prove at trial, as admitted to by city witnesses, that the real purpose for the urban renewal plan was to obtain eminent domain authority to remove appellants (and others) from their properties when they refused to sell voluntarily. The appellate court nowhere addresses this undisputed evidence and thus erred as a matter of law in its conclusion that there no was no pretext in this case.

V. CONCLUSION

This case will decide what, if any, boundaries the Ohio Constitution places on the use of eminent domain to transfer property to private developers. The Ohio Constitution does not allow Norwood to use urban renewal as a legal fiction in order to acquire desirable real estate for private developers. And this Court must say so if the Ohio Constitution is to provide any check on takings for private use.

For the foregoing reasons, Appellants respectfully pray that this Court reverse the judgment of the First District Court of Appeals and return their homes to them.

Dated: November ___, 2005

Respectfully submitted,

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VI. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellants Joseph P. Horney, Carol S. Gooch, Carl E. Gamble and Joy E. Gamble was sent via Regular U.S. Mail on this ____ day of November, 2005, upon the following:

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