IN THE SUPREME COURT OF OHIO

CITY OF NORWOOD,	:	**CASE NO. 05-1210, 05-1211**
	:	
Appellee,	:	**On Appeal from the Hamilton**
	:	**County Court of Appeals,**
vs.	:	**First Appellate District**
	:	
CARL E. GAMBLE, et al.,	:	**Court of Appeals Case Nos. C040783.**
	:	**C040783**
Appellants.	:	

BRIEF OF AMICI CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AND THE AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS IN SUPPORT OF APPELLANTS CARL E. GAMBLE AND JOY E. GAMBLE, et al.

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INTEREST OF THE AMICI CURIAE

All the *amici* are non-profit organizations which have, as one of their prime public policy objections, the protection of private property rights. They are therefore all keenly interested in the outcome of this case. The *amici* are:

(1) The National Federation of Independent Business Legal Foundation ("HFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The 600,000 members of NFIB own a wide variety of America's independent businesses, including restaurants, family farms, neighborhood retailers, service companies and technology manufacturers.

(2) American Association of Small Property Owners ("AASPO") is a nonpartisan, nonprofit corporation that has been working since 1993 for the right of small property owners to prosper freely and fairly – to make possible the American dream of building wealth through real estate. Based in Washington, DC, AASPO has chapters or affiliates in more than 25 states.

Amici represent those who, along with private homeowners, are most often the victims of property seizures by local governments acting in the name of "urban development".

ARGUMENT

Propositions of Law

1. Proposition of Law No. 1: The City of Norwood's Definitions of "Blight" and/or "Deteriorating" Do Not Meet The Constitutional Minimum Standards For Protecting Private Property.

2. Proposition of Law II: The Burden of Proof at the Necessity Hearing Under R.C. §163.09(B) Properly Belongs on the Governmental Entity Taking the Property.

3. Proposition of Law III: The Necessity Hearing Under R.C. 163.09(B) Should Be a Trial *De Novo*.

I. FACTS AND BACKGROUND OF LAW

Amici adopt the statement of facts set forth in Appellant's Brief.

A. Ohio's Constitutional Framework For Eminent Domain

Over 230 years ago, Thomas Jefferson penned these now famous words:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

The Declaration of Independence. Ohio's constitutional drafters, inspired by this language, expanded on it and incorporated it into Ohio's Constitution, as follows:

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, *acquiring, possessing, and protecting property*, and seeking and obtaining happiness and safety.

Ohio Const. art. I, §1. (emphasis added) The framers regarded the right to property so strongly that they termed it to be "inviolate," subject only to very limited governmental takings:

> Private property shall ever be held inviolate, but subservient to the public welfare. * * *

Ohio Const., art. I, §19. The term inviolate means not violated or unprofaned (sacred). Geddes & Grosset, *Webster's Dictionary and Thesaurus* 199 (2002).

The second sentence in Article I, Section 19 sets forth the two situations in which private property was "subservient to the public welfare," and therefore subject to a taking. The second sentence also explains the order of compensation.

> [1] When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and [2] in all other cases, *where private property shall be taken for public use*, a compensation therefore shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Const. art I, §19 (bracketed numbers and emphasis added). Thus, war, public exigency or non-toll public roads allowed an immediate taking, with compensation to follow. The second instance is when the private property is taken for *public use*. This clause is a parenthetical clause explaining "all other cases." In that instance, a jury must first determine the compensation which must be given to the property owner *before* the property is taken. These are the *only* instances in which the government can take private property. There is no third category.

This Court has recognized that private property may not be taken by the government and given to another private party for private purposes. *Bruestle v. Rich* (1953), 159 Ohio St. 13, 110 N.E.2d 778. While the United States Supreme Court recognized that the "concept of public welfare" in the United States Constitution as "broad and inclusive," see *Berman v. Parker* (1954), 348 U.S. 26, the Ohio Constitution is more restrictive. The term "public welfare" in Article 1 Section 19 is explicitly defined in sentence 2, clauses 1 and 2 thereof. Indeed, this court has recognized that "[t]he Ohio Constitution is a document of independent force." "i.e., independent of the U .S. Constitution. *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163. The Court further recognized that "[f]undamental rights (personal liberties) are those rights which are explicitly or implicitly embraced by our Constitution and the federal Constitution." Id. at 44. As a right explicitly embraced in the Ohio Constitution, the right to private property is a fundamental right.

B. Using Eminent Domain to Eliminate Blight.

In the 1950s, cities began to face blighted conditions. Until then, eminent domain had been reserved for true public usages such as roads, canals, ports, airports and similar purposes which were owned by government or owned by private entities for public use. See Katherine M. McFarland, Note, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny of Government uses of Eminent Domain*, 14 B.U. Pub. Int. L.J. 142, 144-48 (1994). Some cities seized upon the idea of declaring areas of the city as blighted, condemning and taking them and then transferring them to private third parties for redevelopment. Courts gave this a mixed reception. In 1953, the Ohio Supreme Court held for the first time that, under certain circumstances, private property could be seized and used for redevelopment. See *Bruestle*, supra. The property owners there claimed that because the seized property would be owned and controlled by a third party, it was not a public usage. Therefore, they argued, it was an unconstitutional taking. The court rejected that argument and interpreted the Ohio Constitution to allow such transfers through eminent domain. However, the Court expressly stated that the *primary purpose* of such takings must be the elimination of *slum and other blight conditions*. See id. at paragraphs 5, 6, 8, and 10 of the syllabus. Though the Court did not require that every single building in an area be substandard before the area could be seized, it did state as follows:

> An area may constitute a slum area *even though a small percentage of the buildings within the area are not substandard buildings* and a small percentage of the area constitutes vacant land.[1] The acquisition of such buildings and such vacant land may be reasonably necessary in order to clear such slum area and prevent recurrence of slum conditions therein.

[1] This appears to be the essential difference between the concepts of "nuisance" and "blight". "Nuisance" permits a governmental entity to seize an individual piece of property because of the condition of that property. "Blight" is applicable to a general area that constitutes a nuisance overall, even if a small percentage of such properties themselves are not nuisances.

Id. at paragraph 11 of the syllabus. Notably, the specific mention of "substandard buildings" and "vacant land" focuses on the actual condition of the property being seized, not simply a finding that another use of the property would be a "better" use. And if the primary purpose of such a seizure must be to eliminate slum and blight, then a finding that slum or blight *actually exists* is a constitutional prerequisite.

The need for a finding of actual blight as a prerequisite to a lawful taking of private property was confirmed by this Court in *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 553 N.E.2d 597. There, this Court again noted that a finding of blight was an "essential predicate" to the city's exercise of the power of eminent domain. The Court further stated:

> Thus, in the circumstances of this case, 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.*" If so, then the taking would be for a purpose that has properly been determined to be a public purpose -- urban redevelopment. See Annotation (1972), *45 A.L.R. 3d 1096.*

Id. at 160. The Court again emphasized the role of the judiciary in ensuring that legislative acts did not violate constitutional provisions: "[t]he authority of the courts to determine whether an action, even a legislative action, violates constitutional provisions has been unquestioned for many years. Indeed, the concept of judicial review of the constitutionality of legislative acts is a distinguishing feature of American jurisprudence." Id.

Unfortunately, the seduction of urban redevelopment has led to an expansion of public seizures of private property beyond anything contemplated by the framers of the Ohio

Constitution.[2] The legal rules for pursuing these plans have become so pro-developer that Ohio's private property owners face a "perfect storm" of three adverse premises that, taken together, effectively eliminate the protection guaranteed to them under the Ohio Constitution:

- First, cities seeking to seize private property because it is "blighted" would have the right define the term "blight" themselves. After the city targets a property, it hires its own consultant to confirm that it is "blighted" and then makes a unilateral decision, interpreting its own definition of blight "liberally," that the property is blighted.
- Second, at the necessity hearing in common pleas court, the city's blight determination is presumed correct. The burden of proof regarding the propriety of the taking is placed upon the party least able to bear it – the private property owner.
- Third, the property owner's burden of proof is elevated beyond the standard preponderance of the evidence burden of proof and he/she must prove that the city "abused its discretion" in its fact finding actions.

The city has effectively acted as legislator, fact investigator, fact finder, prosecutor, judge and jury. To top it off, the city has a financial incentive (increased taxes) to conclude that the

[2] Because of this expansion, courts and legislatures now are becoming increasingly uncomfortable with using eminent domain for urban redevelopment. For example, the Michigan Supreme Court has drastically changed Michigan law regarding eminent domain law in connection with urban redevelopment. See *Wayne v. Hathcock* (Mich. 2004), 684 N.W.2d 765 (overruling *Poletown Neighborhood Council v. Detroit* (Mich. 1981), 410 Mich. 616. Justice Thomas of the U.S. Supreme Court expounded at length why using the "public use" language is improper for urban redevelopment, explaining: "For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that this government may take property only if it actually uses or gives the public a legal right to use the property." *Kelo v. City of New London* (2005), 125 S. Ct. 2655, 2686. Other courts have simply given greater scrutiny to the cities' determinations of blight. This Court should certainly do one of those things here.

property is blighted. These factors, taken together effectively deprive Ohio property owners – including small businesses – of the protection afforded their property rights under the Ohio Constitution.

II. THE CONSTITUTION MANDATES THE PROPER PROTECTION OF PROPERTY OWNERS

A. Proposition of Law No. I: The City of Norwood's Definitions Of "Blight" And/Or "Deteriorating" Do Not Meet The Constitutional Minimum Standards For Protecting Private Property.

Amici agree with Appellants below that the trial court's finding that their property did not meet Norwood's own definition of "blight" alone compels the conclusion that the taking was improper. But this case is about more than just the label a city attaches to various definitions. If Norwood or another municipality could evade this result in future cases simply by taking the definition of "deteriorating" and relabeling it as "blight", the protections provided Ohio property owners by the Constitution would be illusory.

Ohio's "home rule amendment" authorizes municipalities to exercise the power of eminent domain. Ohio Const. art. XVIII, §3; *Worthington v. Columbus* (2003), 100 Ohio St.3d 103. However, a municipality may not exercise that power in derogation of property rights guaranteed by the Constitution, and it is the duty of the courts to ensure that they do not exceed that authority:

> The power of eminent domain is an incident of sovereignty, but the courts possess full authority to determine its proper limits and to prevent abuses in this exercise. *Giesy v. Cincinnati, Wilmington & Zanesville Rd. Co., 4 Ohio St., 309.* The limits to which the court's power may extend are not governed by principles of equity….The limit of the court's power is to enjoin an unlawful or improper exercise of the power of eminent domain beyond the limits of a constitutional or statutory grant of such power.

Blue Ash v. Cincinnati (1962), 173 Ohio St. 345.

Both Ohio's Legislature, via R.C. Chapt. 1728.01 (the Community Urban Redevelopment Corporation Law, or "CURCL"), and the City of Norwood, via §163.04 of its Ordinances, have defined "blight" for purposes of eminent domain. Amici do not dispute that cities may draft their own definitions of blight to account for specific facets of blight that may be occurring in the particular city. However, those definitions and the manner in which they are applied cannot lower the bar for what constitutes a lawful seizure of private property under the Ohio Constitution.

"Blight", in the context this Court's decision in *Bruestle*, is a *slum*. This Court's constitutional definition of "blight" should be confined to those areas that pose an immediate, concrete and *objective* harm to the community. The definition of "blight" should not include a comparison of the relative economic benefit to be brought by the planned redevelopment. After all, compared to the tax revenue produced by a high-rise office building, almost every home or collection of small businesses would be "blighted"; a conclusion clearly not in keeping with this Court's discussion in *Bruestle* of "substandard buildings" and vacant land. If land is truly blighted, then it is blighted *regardless* of whether there is a redevelopment plan or not.

If the Court continues to follow *Bruestle*, it appears that the Ohio legislature's definition of blight contained in R.C. §1728.01(E) is consistent with the constitutional limits on the power of eminent domain. That provision provides two alternative definitions separated by the disjunctive "or," for a finding of "blight". The first portion of that provision properly views the property through the prism of whether it is objectively harmful:

> "'Blighted area' means an area within a municipality containing a majority of structures that have been extensively damaged or destroyed by a major disaster, or that, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, unsafe and unsanitary conditions which **endanger lives or properties by fire or other hazards and causes**; . . ."

Id. (emphasis added). It is noteworthy that nothing in this portion of R.C. §1728.01(E) would justify a finding of "blight" based on a perceived economic benefit alone.

The second definition contained within R.C. §1728.01(E) states as follows:

> ". . . or that, by reason of location, in an area with inadequate street layout, incompatible land uses or land use relationships, overcrowding of buildings on the land, excessive dwelling unit density, or other identified hazards to health and safety, are conducive **[***10]** to ill health, transmission of disease, juvenile delinquency and crime **and** are detrimental to the public health, safety, morals and general welfare."

(emphasis added).

Importantly, economic inefficiencies from "inadequate street layout, incompatible land uses," etc., standing alone, are not sufficient to meet this definition of blight. Those factors must also 1) "[be] conducive to ill health, transmission of disease, juvenile delinquency, and crime," **and** 2) **"**[be] detrimental to the public health, safety, morals, and general welfare." Again, the gist of R.C. §1728.01(E) is objective harm caused by the property in question, not simply a finding that the property is not being used as efficiently in an economic sense as it could be. Improvement of the "general welfare" alone is not enough unless also accompanied by "ill health, transmission of disease, juvenile delinquency, and crime." Indeed, if "inadequate street layout", "incompatible land uses", or "dwelling unit density" alone were enough to trigger a finding of blight, many quaint historic districts in smaller towns – as well as many curvy old streets that add much of the charm to European cities – would be considered "blighted" and subject to seizure.

This Court has not yet opined on whether the definition of blight contained in R.C. §1728.01(E) constitutes a "floor" below which municipalities may not go. However, Amici believe that said provision's focus on actual harm caused by the property in question is

sufficiently broad to encompass all constitutionally acceptable definitions of blight, and should be endorsed by this Court as the standard below which cities may not go. They may be more specific, but not to the extent that the bar is actually lowered.

Measured against this standard, the City of Norwood's seizure of private property does not come close to meeting constitutional muster. A finding that detached single and two-family properties is not the "best use" for land is not sufficient because "best use" is not the constitutional standard. Nor is a mere "adverse impact on the physical, aesthetic, and functional qualities of the area." *Norwood v. Horney* (2005), 161 Ohio App.3d 316, 2005 Ohio 2448 at ¶12.

In reaching its flawed decision below, the court of appeals, citing to *AAAA Enterprises, Inc., supra* expressly noted that it believed that it was required to give the definition of "blighted area" a "liberal interpretation." Id. at ¶31. While *AAAA Enterprises* included dicta that "given the importance of urban redevelopment there is reason to give the definition of "blighted area" a liberal interpretation," it was certainly not a requirement or holding of the *AAAA Enterprises* case. Indeed, since the issue of redevelopment does not enter into the equation unless it is first determined that the property in question is actually blighted, the importance of the redevelopment plan is actually irrelevant to whether the property is blighted. Permitting the perceived benefits of urban redevelopment to weaken this constitutional protection is permitting the tail to wag the dog. It is the prerequisite finding of blight that permits a seizure of property for redevelopment – not the perceived benefits of redevelopment that should be driving whether an area meets the constitutional standard for "blight". Applying a liberal interpretation of "blight" inevitably erodes the constitutional standard.

Additionally, the historical record of urban redevelopment since the 1990 decision in *AAAA Enterprises* casts significant doubt on the policy justifications for permitting a lax or "liberal" interpretation standard. See infra, Section III. Instead, the Court should require neither a liberal nor a strict interpretation of blight, but rather a *correct and accurate* interpretation.

A classic example of the potential for abuse of a liberal standard occurred recently in Lakewood, Ohio. There, the city of Lakewood was attempting to seize private property for purposes of planned redevelopment. Taking advantage of a perceived right to define "blight" in whatever manner would be necessary to take the property in question, Lakewood ended up defining "blight" to include things such as a home not having an attached two-car garage, a rarity in the entire city. In fact, the definition of blight was so broad that it would have included the homes of the mayor and every member of city council.[3] Lakewood voters eventually rebelled, and used a referendum to defeat the attempted seizure.

Lakewood is a perfect example of what can happen when the proverbial fox is guarding the henhouse. Cities attempting to take land for redevelopment will simply draft ordinances that define "blight" in a manner that describes the particular property they wish to seize. Whether the land is actually blighted is beside the point. Fortunately for the Lakewood citizens whose homes were going to be seized, a majority of their fellow citizens managed to stop the land-grab. But the constitutional rights of individual citizens should not be granted or withheld at the whim of a majority. It is the job of the courts, not citizen referendums dependent upon majority voter support, to protect the constitutional rights of Ohio's citizens.

[3] *Ohio's "City of Homes" Faces Wrecking Ball of Eminent Domain Abuse*, Institute for Justice (Washington, D.C.) available at http://www.ij.org/private_property/lakewood/backgrounder.html (last visited Nov. 7, 2005).

Accordingly, Amici request that this Court find that municipal definitions of "blight" for purposes of seizing private property must meet constitutional minimums and that R.C. §1728.01(E), prescribes the proper "floor" for evaluating municipal claims of blight. Such findings must be correct and accurate and may not be based on relative economic benefits, but rather on evidence that the properties in question affirmatively harm the community rather than simply being not the best use of the land in question.

B. Proposition of Law No. II: Placing The Burden Of Proof On The Property Owner To Disprove That The Taking Is Necessary Is Unconstitutional.

1. The City Is The Legislature, The Investigator, The Prosecutor, The Judge And The Jury.

The procedure for appropriating property for "blight" and re-development stacks the deck against the property owner from the beginning. First, the city drafts the enabling ordinance defining "blight." Later on, the city identifies (possibly because a developer coveting the land points it out to the city) certain property that it wishes to take. The city then investigates and makes an initial determination (without any input from the property owner) that the property is blighted. At this point, the city has become adverse to that specific property owner. The city then hires its own consultant to determine if the property is blighted. Of course, the consultant knows his/her client is the city and knows the expected result. While the consultant *might* conclude that there is no blight, the bias is obvious. Next, the city, acting as both the adverse party and the fact finder [judge], holds a "legislative" hearing to determine if its own initial determination of blight is in fact accurate. At that same time, the city also determines how much tax revenue it will collect if it adopts an urban redevelopment plan and gives the "blighted" property to a developer. While the property owner may participate, the process is so biased at this point, there is little doubt of the outcome.

In making and issuing its "findings" the city interprets its own definition of "blight" *liberally*. *AAAA Enterprises*, supra, 50 Ohio St.3d at 160. The city also knows that its determination will stand unless the city somehow blows it so badly that it fails the review standard of "abuse of discretion." Id. at 161. Indeed, abuse of discretion means "an attitude that is unreasonable, arbitrary or unconscionable." Id. This sets up a "perfect storm" into which the city forces the property owner to sail, and from which few owners have ever emerged with their property. The city then, acting as judge and jury, enacts its "finding" that the property is, surprise, surprise, "blighted." The city then files its petition/complaint in common pleas court for appropriation. The court then holds a "necessity hearing." R.C. §163.09(B).[4] At this stage, the defeated property owner is told that *he/she has the burden of proof* to show that the city, which has already acted as lawmaker, adversary, judge and jury and found in its own favor, abused its discretion and was wrong. See R.C. §163.09(B). Even Las Vegas provides better odds. Of course, at this point, the city has added incentive to make sure the property owner cannot ascend this Himalayan mountain of proof because if the city were to recognize that it was wrong and cancel the proceedings, it has to pay the property owner for legal fees and other costs. See R.C. §163.21(A)(2).

2. The Burden Of Proof Rightfully Belongs On The City.

Nearly always, the plaintiff has the burden of proof to prove the allegations in a complaint. See McCormick on Evidence §337 (2d ed. 1972); Ohio Jury Instructions §3.10 (noting that "[t]he person who claims that certain facts exist must prove them by a preponderance of the evidence. This duty is known as the burden of proof. . . . The burden of proof is on the plaintiff to prove the facts necessary for (his) (her) case by a preponderance of the

[4] The statute requires the hearing within 15 days, which does not give the property owner much time to prepare.

evidence.")

While the legislature may sometimes establish rules of evidence for certain causes of action, its authority is limited. Long ago, the Ohio Supreme Court stated that the legislature must respect constitutional rights if it chooses to legislate in this area:

> "There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy over which its legislative department necessarily has authority, *limited* only *by the constitutional guarantees respecting due process of law, vested rights* and the inviolability of contracts. *Railroad Co.* v. *Erick*, 51 Ohio St. Reports, 146." (emphasis added)

Pennsylvania Co. v. Mccann (1896), 54 Ohio St. 10, 42 N.E. 768.

In 1910, the Ohio Supreme Court held that the Ohio constitution mandates that the burden of proving necessity in eminent domain cases lies upon the entity appropriating the property.

> The general rule is that the burden is upon him who asserts the affirmative, and the affirmative proposition that the proposed ditch will be conducive to the public health, convenience and welfare was encountered at the threshold of the case. The rule that the burden of proof is upon him who asserts the affirmative *applies with especial force in a case of this character because the question stated involved the constitutional right of the public to take the property of the defendants in error.*

Joint Bd. of County Comm'rs v. Whisler (1910), 82 Ohio St. 234, 236; 92 N.E. 21. The court reaffirmed this holding in *Cincinnati v. Louisville & Nashville Railroad Co.* (1913), 88 Ohio St.283, 289; 102 N.E. 951. Thus, the Ohio Supreme Court has already determined that *the Constitution* mandates that the burden of proof in these appropriation cases is on the city (or other governmental entity). To this date, the court has never overruled these cases.

In or about 1967, the legislature ignored this Court's rulings and impermissibly reversed this presumption in R.C. §163.09(B). The statute now places the burden of proof on the property owner. It also transforms the *allegations* in the petition into prima-facie *evidence* of the

necessity.

> In 1968 one court declared this shift in the burden to be unconstitutional:
>
> > Question of burden of proof: It is the opinion of the court that the proof of necessity must be upon the condemning authority as was true under R.C. 2709.10, and that the 1967 amendment found in R.C. 163.09(B), *is void*. The requirement of the new statute placing the burden of proving that the appropriation is unnecessary on the landowner, is in derogation of the Constitution of Ohio, Article I, Section 19. (emphasis added)

Toledo Edison Co. v. Harrison Marina, Inc. (1968), 24 Ohio Misc. 298, 241 N.E.2d 750. However, in 1984 another court (without referencing the prior court) declared it to be constitutional. See *Ohio Edison Co. v. Carroll* (1984), 14 Ohio App.3d 421, 423, 471 N.E.2d 825. Neither court provided much reasoning.

While this Court has never addressed the constitutionality of the burden shifting provision in R.C. §163.09(B), *Whisler* and *Cincinnati* make it clear that the statute is not constitutional.[5] Since this Court has already determined that the constitution *mandates* that the burden of proof in eminent domain cases lies on the appropriating public entity, it should declare that portion of R.C. §163(B) unconstitutional and reaffirm its previous imposition of the burden of proof on the appropriating entity.

3. Public Policy Justifies Placing The Burden Of Proof On The City.

Not only would the Court's ruling that the burden of proof lies on the government follow this Court's legal precedents, but would also be good public policy. This is especially true in this type of case (i.e., an eminent domain case transferring the property from one private owner to

[5] This Court has, of course, reversed the Ohio Legislature's enactments in the past when they conflicted constitutional rights. For example, the Court struck down certain statutes because they conflicted with the constitutional right to a jury trial for punitive damages. *Zoppo v. Himestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.2d 397. The Court has also held that legislative enactments that conflict with the court rules of civil procedure are unconstitutional. *Rockey v. Lumber Co.* (1993), 66 Ohio St.3d 221, 611 N.E.2d 7890.

another private owner who will make a profit therefrom.) One might argue that it is constitutionally permissible to shift the burden of proof where a public utility or a governmental entity contends that it needs land for public right of way or for a true *public use.*[6] However, when the appropriating entity is motivated by increased tax revenues or when the property will be conveyed to a developer who will own it and make a profit from it, without public access, there can be no doubt that the city should have the burden of proof. While the *Bruestle* court allowed eminent domain to be used for urban redevelopment, it could not have anticipated the aggressive usage of this doctrine which eventually followed. Now, 60 years later, not only is the process is heavily biased against the property owner, but the large private developers trying to get the property from the current owner are better able to lobby the city for their interests than the beleaguered owner. The developers have lots of development money – often grant money from the federal or state government. The property owner is usually an outgunned poor homeowner or a small business owner.

Of course, the city wants to take the property and give it to the developer so it can make money through the revenues. The city's motivations are not pure. Indeed, its motives for declaring blight are highly suspect. In fact, the present case illustrates just how suspect. Here the properties were not even blighted (only "deteriorating"), but the city saw the promise of more

[6] For example, if there is a war, or a road which must be fixed immediately, society trusts that the government is taking appropriate actions to address those exigencies. Similarly, if the property is to be taken for a road, a canal, a railroad or similar "*public use*" where the public actually needs the property and the public will actually have unfettered access to and will be using the property, then society can presume that the public entity is actually doing this for the entire public and not for any sort of gain and not for the benefit of another private party. In these circumstances there might be a rational reason to place upon the property owner the burden of showing that the road or other public use is not necessary. In these circumstances, the city is not motivated by tax revenues. It is not taking one person's store or establishment and giving it to another for that other party's private gain. Finally, the appropriated property is for the use of the public at large.

tax benefits ($1,790,000-2,720,000) to help plug its budget deficit ($3,600,000). See Trial Ct. Op. at 15. This supposedly justifies taking some folks property and giving it to others who predict, but do not guarantee, that their usage of the property will produce greater tax revenues. Shifting the burden of proof in these cases to the property owner and presuming that the petition's/complaint's allegations are correct is not logical, fair or equitable. As this court has already twice held, Article I, Section 19 of the Ohio Constitution mandates that the burden of proof is on the appropriating entity.

Moreover, Ohio's laws on nuisance properties reinforces that the burden of proof should lie on the government. If a property is *truly* "blighted," it can sue to have it declared to be a nuisance, However, the city cannot just allege the property is a nuisance and force the property owner to prove that it was *not* a nuisance. The *city* has the burden of proof of showing that the property was, in fact, a nuisance. *Jackson v. Columbus* (1974), 41 Ohio App.2d 90, 96, 332 N.E.2d 283.[7]

Accordingly, this Court should enforce its prior holdings in *Whisler* and *Cincinnati*, and re-impose the burden of proof on the city where it belongs.

C. Proposition of Law No. III; The Necessity Hearing Under R.C. §163.09(B) Should Be A Trial *De Novo*.

This Court should require that the R.C. §163.09(B) necessity hearing proceed as a trial *de novo*, rather than a review of the municipality's unilateral findings (in its favor) on an abuse of discretion standard. In this case, the necessity hearing was a hearing to determine if the property was "blighted." The property owner should be given the same due process safeguards when its

[7] Here it is even more important. In a nuisance case, the property owner's property is "blighted." In an eminent domain blight case, the property owner's property may be one of those in the "small percentage" which is not blighted at all but simply happens to be in the "blighted area." See *Bruestle*, 159 Ohio St. 13, at paragraph 11 of the syllabus.

property is being taken by a municipality and given to another party as it is when his or her property is taken by a municipality in a court action for nuisance or when it is taken in another type of legal proceeding. This is especially so when the party taking the property drafted the enabling legislation, conducted the findings of fact, held the hearing in which it presented its own evidence and over which it presided and at the end of which it made the decision. This is the perfect storm described above into which a property owner is forced in order to keep its property. This cannot be said to be fair or to satisfy the demands of justice and due process.

In 1990, this Court previously addressed the issue of the standard of review that a court should apply to a city's designation of an area as a "blighted area" under CURCL. *AAAA Enterprises*, supra, 50 Ohio St.3d 157. In that case, the city argued that this Court should review its blight designations pursuant to CURCL under a highly deferential review: namely, whether the finding represented "perversity of will, passion, prejudice, partiality, or moral delinquency." Id. at 159. The "perversity of will" test has been adopted by this Court for appellate review of trial court reviews of independent administrative agency decisions. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. The property owners only argued that the taking was unconstitutional, but made no argument on what they believed to be the proper standard of proof for the necessity hearing.

Despite lack of input from the property owner on the proper standard of review at the necessity hearing, this Court wisely rejected the city's proposed standard and recognized that a higher standard of review is necessary to protect private property ownership under the Ohio Constitution. The Court explained:

> If we were to accept the city's contention that its city council's determination that an area is a "blighted area" … can only be judicially overturned upon a finding that the city council's decision constituted "perversity of will, passion, prejudice, partiality, or moral delinquency" – essentially a bad-faith standard – **we would be**

> **abdicating the judicial responsibility to interpret constitutional provisions and to protect rights secured by those provisions**, since any determination made in good faith, no matter how erroneous, would be effectively immune from judicial review.

Id. at 160 (emphasis added).

AAAA Enterprises instead adopted a heightened "abuse of discretion" standard of review for city blight designations under CURCL. Id. at 160-61. The Court required the reviewing court to determine whether "there exists a sound reasoning process" that the city "might have used in reaching its determination that the project area was a 'blighted area.'" Id. at 161.

The passage of time and the facts of many eminent domain cases, including this one, show that many courts are in effect, using the standard of review which *AAAA Enterprises* rejected. Amici agree with Appellants that the Appellants win on these facts even with a proper application of the *AAAA Enterprises* standard of review. Notwithstanding this, the Amici urges this Court to adopt the *de novo* trial review set forth herein. As the Court acknowledged in *AAAA Enterprises*, the result of a city's designation of an area as a "blighted" area can be a deprivation of private property rights secured by the Ohio Constitution. Id. at 160. Since the right to private property ownership is to be held "inviolate" under the Ohio Constitution, the review of any decision that substantially affects this constitutional right – such as the designation of one's property as "blighted" – should be by *de novo* trial with a neutral arbiter.

A city's finding that property is blighted is not entitled to the highly deferential abuse of discretion standard that is afforded to the factual findings of courts of record in this State.[8] The basic distinction between a court of record and a city council or other municipal body is that a court is an impartial and detached decision-maker, whereas a city council is not. In a court case,

[8] See *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 355 (holding that an appeals court may not disturb a trial court's finding of facts providing that "some competent and credible evidence" supports the finding).

there are at least two adverse parties and an independent judge or fact finder. However, in the case of a city making a blight determination, the city is acting both as the rule maker, the investigator, a litigant and as the finder of fact. Oftentimes, the city seeks to take the property to increase its tax basis or for other self-interested reasons. The city is essentially ruling on the merits of its own lawsuit.

The statutory provisions for a mayor's court provides a useful analogy. By statute, mayor's courts have very limited jurisdiction and are not courts of record in this State. R.C. Chapt. 1905. In such cases, the city officials (*hired by the mayor*) investigate the defendant's activities, the prosecutor (*hired by the mayor*) prosecutes the defendant and presents evidence against the defendant before *the mayor*. *The mayor* then determines which party is correct and determines the fine or other punishment to be imposed on the defendant. *The mayor* also is responsible for the city budget, a large portion of the revenue for which may come from court fines, *imposed by the mayor*. To safeguard against these conflicts of interest, R.C. §1905.25 provides that appeals from the mayor's court to a court of record "shall proceed as a trial *de novo*."

Even with this safeguard, both this Court and the U.S. Supreme Court have held that mayor's court may still violate due process in certain circumstances. For example, a "trial of a defendant charged with a traffic offense by a mayor acting as a judge, who is also chief executive and administrative officer of the municipality, and who as such officer is responsible for the financial condition of the municipality, violates due process of law." *State ex rel. Brockman v. Proctor* (1973), 35 Ohio St.2d 79, 298 N.E.2d 532, paragraph two of the syllabus. The U.S. Supreme Court also held that a defendant's constitutional due process rights are also denied when held before "an official" who " occupies two practically and seriously inconsistent

positions, one partisan and the other judicial . . ." *Ward v. Monroeville* (1972), 409 U.S. 57, 60; 93 S. Ct. 80. See generally, *Rose v. Peninsula* (N.D. Ohio 1995), 875 F. Supp. 442, 451-52 (describing conflicting authorities).

In *DePiero v. Macedonia* (6th Cir. 1999), 180 F.3d 770, the Sixth Circuit held that the plaintiff was deprived of due process because the mayor possessed too many potential conflicts of interest. Id. at 782. It also noted that the Supreme Court held in *Tumey v. Ohio* (1927), 273 U.S. 510, 535 that the mayor's court was to be accorded less deference because his responsibility for and interest in the financial needs of the municipality is such that he had a strong "official motive to convict and graduate the fine to help the financial needs of the village."

Similarly, when the court determines at the necessity hearing if the property is truly blighted, the common pleas courts should conduct a trial *de novo*, rather than requiring the property owner to prove that the city abused its discretion in its investigation and determination of the facts. In this situation, the city cannot possibly serve as a neutral and detached arbiter when it evaluates its own initial determination to take the property, its own fact finding, its own expert's credibility, and the amount of additional revenue it will receive if it finds in its own favor. 180 F.3d at 780**.**

One might argue that the mayor's court analogy is inapt because it involves a criminal law, rather than a civil proceeding. However, the mayors court can only preside over a matter which can result in a fine not to exceed $1,000.00. See R.C. §1905.01 and R.C. §4511.19(G)(1)(a). Indeed, even with a small traffic ticket the defendant is entitled to a trial *de novo*. In contrast, defendants in eminent domain proceedings risk loss of home or business. This can be a lifetime investment or one's livelihood. Despite the overwhelming conflicts of interest, cities currently have complete discretion to determine whether the defendant will lose his or her

property. The abuse of discretion standard simply does not pass constitutional muster. It does not adequately protect a property owner's Article I, Section 19 property rights.[9] The court should exercise its authority under *AAAA Enterprises* and require that the necessity hearing be a *de novo* trial. *AAAA Enterprises*, 50 Ohio St.3d at 161 (the court has the authority to determine if a legislative action violates the constitution). Justice and the constitution requires no less.

Accordingly, Amici request that this Court modify its holding in *AAAA Enterprises* to require that the necessity hearing be a *de novo* trial (with the burden of proof on the city).

III. PUBLIC POLICY FAVORS TIGHTER SCRUTINY OF PUBLIC SEIZURES OF PRIVATE PROPERTY FOR PRIVATE DEVELOPMENT.

As governmental seizures of private property for transfer to private developers have become increasingly common, it has become more apparent that it often causes greater harm than good. While mega-corporations sometimes benefit, in the long run they often do not. Moreover, the small property owner almost always is harmed. The balance of harm is shifting away from the urban re-development model.

A. Small Businesses Are Damaged.

Inherent in any forcible seizure of private property is that the owner is compelled to vacate the property at a price below that which he would have accepted to leave voluntarily. Common sense dictates that the loss of location, goodwill, and possibly the former customer base will have an adverse impact on a great many small businesses victimized by eminent domain

[9] An additional factor weighs against using the same standard in *AAAA Enterprises* here: unlike in *AAAA Enterprises*, here, the city is being given an abuse of discretion standard while interpreting its *own* ordinances. Even to the extent that this Court should find that a municipality is neutral and detached enough to qualify for the abuse of discretion standard when interpreting CURCL, a state statute, they should not be given the same deference when interpreting ordinances of their own creation. To permit a municipality to draft the rules, then apply them in a self-interested manner with a deferential standard of review effectively constitutes an abdication of judicial responsibility to safeguard Ohioans' property rights. *Cf. AAAA Enterprises*, 50 Ohio St.3d at 160.

proceedings.

Urban renewal plans often amount to a subsidy because preferred land is being acquired at what are inherently below-market rates.[10] Many such plans also include more direct subsidies, either via tax abatement or other relief.

These direct and indirect subsidies unfairly penalize small and family-owned businesses because the urban renewal plans rarely include independently owned small business. It is the larger employers and developers who put together the large-scale projects. Larger businesses mean that there are fewer owners/managers involved, making it easier to reach agreement compared to a project involving a larger number of smaller business. While favoring a smaller number of larger stores may seem on the surface to make better policy, it actually makes projects more "brittle". The withdrawal of a large player in a particular project can break the entire project.

If land is truly blighted, the owners of the land are less likely to go to the time and expense of resisting eminent domain proceedings. Further, the economic benefits of redevelopment are going to be significantly greater in a relative sense for truly blighted areas than they will be for areas that are not truly blighted.

Likewise, the risk of actual harm from seizing properties that are not truly blighted is correspondingly higher. If truly blighted areas are seized but the redevelopment falls through, the harm to the public is minimal. But if the seized areas are blighted only under a "liberal" definition drafted by a municipality self-interested in the outcome, the loss to the community and to individual citizens is far more significant.

[10] True market rates, by definition, are set when owners sell their property *voluntarily*.

B. Redevelopment Discourages Private Investment.

The threat of eminent domain seizures effectively places a Sword of Damocles over the head of business and homeowners in the affected community. When such plans are announced, common sense dictates that normal upkeep and investment will suffer. What homeowner will invest in a new roof, or waterproof the basement, when their city announces a planned takeover? What business is going to invest in new wiring or make capital improvements during the perhaps years-long debate that accompanies many redevelopment projects? If non-blighted properties are permitted to be seized simply because there is an (alleged) better economic use for the property, then no business or home is safe.

C. Urban Renewal Has Been Far From An Unqualified Success.

This Court has suggested that urban redevelopment serves the public good. *AAAA Enterprises*, 50 Ohio St.3d at 160. But as seizures have become more common, it has become more apparent that seizures of private property for redevelopment not only harm the small businesses whose property is seized, but often make matters worse rather than better in the seized area.

A great many urban renewal projects, both in Ohio and around this country, have failed to live up to the promises of their backers. In many cases, forcing healthy business and hard-working homeowners to vacate their properties to make way for planned development has resulted in failed redevelopment, vacant lots, and a worsening of problems. In other case, the promised benefits of redevelopment failed to materialize, and ended up costing rather than benefiting municipalities.

One recent example from Ohio illustrates the hardship caused when a promised redevelopment collapses. In 1998, retailing giant Nordstrom wanted to open a new department

store in downtown Cincinnati, Ohio. However, because a Walgreens pharmacy already occupied that space, the Walgreens would have to be relocated. Walgreens agreed to move to another location one block away from its current store, but that location was occupied by a CVS pharmacy that refused to give it up to its competitor. The City began the process of taking the CVS building so that Walgreens could move in and Nordstrom could avoid negotiating its own real estate transaction.

The chain reaction continued when CVS sued to stop the condemnation but settled with the City. Under the settlement, the City would seize four other private properties across the street from the CVA location and move Walgreens to that new location. Included among the displaced businesses was Kathman's Shoe Repair, which was forced by the City to close its doors after being in business for 95 years.

Unfortunately for everyone involved – especially the small business squeezed out of their former locations, Nordstrom announced in November 2000 that it was pulling out of the Cincinnati deal because of its declining profits.[11] The City eventually paved over the erstwhile Nordstrom site as a City-owned parking lot.[12]

Other Ohio projects have ended up being a net drain on local economies. The Eastlake ballpark in Ohio was built to serve as an economic stimulus for the community, but sent the city into a fiscal emergency in May 2004 when the promised benefits far outstripped the cost of the project. Eastlake taxpayers could pay anywhere from $15 million to $26 million over the next 25 years on stadium loans, whereas Mayor Dan DiLiberto promised that the minor-league baseball

[11] Lisa Biank Fasig & Robert Anglen, *Nordstrom Won't Build Downtown After All*, Cincinnati Enquirer, Nov. 23, 2000.
[12] Robert Anglen, *Nordstrom Site to Become Parking Lot*, Cincinnati Enquirer, Nov. 24, 2000; Ken Alltucker, *Consultant's Priority: Curing Downtown's Heart*, Cincinnati Enquirer, Jan. 15, 2003, at 1D.

park would cost residents virtually nothing. After a $4 million budget for land acquisition increased to $6.5 million, the city's borrowing for the stadium totaled $26.8 million; with interest, $48 million.[13]

In 1999, the City of Toledo condemned 83 homes to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be a slum. After threatening to leave town otherwise, Chrysler asked for and received $232 million in state and municipal aid for its new plant. Using $28.8 million loaned to the City by HUD, Toledo paid for relocation of the property owners and used eminent domain to acquire the homes of those who resisted its offers. Toledo had hoped to repay the loan through increased tax revenue from the expected 4,900-person Chrysler workforce. However, the new plant that Jeep built was fully automated, assembling cars by laser-guided robots without much human participation. In total, the new plant employs only 2,100 workers.[14]

Other cities around the country have had similar negative experiences where eminent domain seizures wiped out homes and business, planned redevelopment never occurred, and the result was vacant lots. In Chicago, Block 37, a historic old neighborhood largely populated by African-American businesses and residents was largely seized in a redevelopment plan. Though most of the old businesses were profitable, the city thought it could raise more tax money via redevelopment.[15] The plan was a spectacular failure. Sixteen buildings were demolished and it was not until five mayoral administrations later that the land was sold to developers—for 33

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[13] Mark Gillispie, *Eastlake Ballpark is major problem; pricey minor league diamond losing sheen*, Plain Dealer, February 22, 2005, at B1.
[14] Gideon Kanner, *The New Robber Barons*, Nat'l L.J., May 21, 2001, at A19.
[15] Ross Miller, *Progress brings us back to the prairie*, Chicago Tribune, July 16, 1993; Hugo Lindgren, *The secret life of a city block*, Newsday, Mar. 24, 1996; Cheryl Kent, *What's the deal? A look at Chicago's Block 37 misses the chance to explain how big cities take shape*, Chicago Tribune, Apr. 28, 1996.

cents on the dollar.[16] In 1990, 14.5% of office space was already vacant, and financing for building more on Block 37 bottomed out. Since then, three other plans have been announced and the latest is still being negotiated.[17] Other cities have suffered similar experiences. including: Phoenix, Arizona[1819]; Mesa, Arizona[20]; Indio, California[21]; East Hartford, Connecticut[2223]; Hartford, Connecticut[24]; West Palm Beach[25]; Atlantic City, New Jersey[26]; Las Vegas, Nevada; New Haven, Connecticut[27], and; Miami, Florida[28], and Vancouver, Washington.[29]

This Court should request that seizures of private for purposes of redevelopment have gone from being a rare but necessary means to get rid of blight, to an often-misused excuse for

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[16] Miller, supra n. 15.
[17] *In Chicago, it's Block 37 – again*, Architecture Magazine, Oct. 12, 2004.
[18] Jordan Rose, *New Land Condemnation Laws Abuse Citizens*, Tuscon Citizen, Aug. 29, 2002, at 7B.
[19] See *Phoenix v. Soza*, No. CV2001-000068 (Maricopa Super. Ct. May 14, 2002); see also *24th St. Broadway Development Touted*, Arizona Republic, Oct. 18, 1995.
[20] Paul Green, *Eminent Domain: Mesa Flexes a Tyrannous Muscle*, East Valley Tribune, Sept. 2, 2001; Robert Robb, *Count on City-Driven Project to Fail*, Arizona Republic, Sept. 21, 2001.
[21] Xochitl Pena, *Mall makeover in Indio's future*, Desert Sun, Nov. 15, 2004, at 4R.
[22] Christopher Keating, *Nardis Seeks More Time for Move*, Hartford Courant, Apr. 9, 2001, at B1.
[23] Carrie Budoff, *Project Faces Cost Overrun; Agency Asking for $75,000*, Hartford Courant, Nov. 19, 2001, at B3.
[24] *Citino v. Hartford Redev. Agency*, 721 A.2d 1197, 1209-10 (Conn. App. Ct. 1998).
[25] Thomas R. Collins, *Evicted homeowners feel betrayed over failed project*, Palm Beach Post, March 15, 2005.
[26] Bill Kent, *Real-Life Monopoly: MGM Bids on the Boardwalk*, N.Y. Times, July 14, 1996, at 13NJ-6; Amy S. Rosenberg, *A.C. Residents Hold Ground; They Say they Will Make Way for Casinos—For a Fair Price*, Philadelphia Inquirer, July 26, 1996, at B1; John Curran, *MGM Grand Frustrated by Atlantic City Project*, Las Vegas Rev. J., June 28, 1999, at 1D; Amy S. Rosenberg, *MGM Grand Is Picked to Develop South Inlet; Atlantic City's Council Gave the Firm the Right to Build a Casino Complex.*, Philadelphia Inquirer, Jan. 6, 2000, at B3; *MGM Grand May Cash in Its Chips on Casino Site*, Las Vegas Rev. J., May 22, 2000.
[27] Harry Siegel, *Urban legends: the Decline and fall of the American city*, Weekly Standard, Mar. 15, 2004; Avi Salzman, April Rabkin, *When the bulldozers never arrive*, N.Y. Times, Aug. 14, 2005.
[28] J.M. Kalil, *Before Goodman, failed projects tainted view of downtown*, Las Vegas Rev. J. Journal, Dec. 19, 2004, at 40A.
[29] *Vancouver Files Suit to Condemn Old Hotel*, Oregonian, Nov. 25, 1999, at B5, *Vancouver, Hotel Owners Agree on $750,000 Price*, Oregonian, Nov. 12, 2001, at C2.

the latest get rich quick scheme for many municipalities. In the process, the legitimate property rights of citizens have been trampled, and the seduction of allegedly cheap land has led to projects that were not independently viable economically getting taxpayer support. The consequences have been far from uniformly beneficial, and cannot justify a lessened standard or review or reduced burden of proof on cities seeking to abrogate constitutionally protected property rights.

CONCLUSION

Accordingly, Amici requests that this Court reverse the Court of Appeals decision and remand this case for further consideration based on the principles and standards presented herein.

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