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.	:	

BRIEF *AMICUS CURIAE* OF THE PROPERTY & ENVIRONMENT RESEARCH CENTER IN SUPPORT OF APPELLANTS.

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The Property & Environment Research Center (PERC) respectfully submits this brief *amicus curiae* in support of appellants, Joseph P. Horney and Carl E. Gamble, et al. Located in Bozeman, Montana, PERC is an original research institute focused on developing market solutions to environmental problems. PERC objects to any interpretation of the laws and Constitution of the State of Ohio that authorizes cities to label "blighted" or "deteriorating" areas that pose no current threat to the health, safety, or welfare of the area's residents. Granting cities more expansive authority will lead to harmful consequences for environmentally-sensitive areas throughout the state, as property owners will be forced either to develop their lands or risk condemnation at the hands of nearby municipalities. Development and density in such areas will therefore be accelerated at a rate greater than that which the market would naturally sustain.

When cities label as "blighted" or "deteriorating" areas that pose no health, safety, and welfare of the residents, the plight of the affected property owners is, justifiably, the primary focus of the debate. Nevertheless, such use of eminent domain has other ramifications. When a blight designation is used as a pretext to take private property, environmentally-sensitive areas may be threatened. Whereas private property owners may desire to leave their land undeveloped in order to preserve its natural character or promote environmental conservation, cities could choose to ignore those concerns so that the land could be put to a more intensive use. This involves additional paving; concrete work; channelizing of streams and rivers; higher residential density; and commercial uses that may involve toxic chemicals (such as photo labs, dry cleaners, and copy shops).

Environmentally-sensitive and valuable areas may be destroyed in the process because the developer—who obtains the land for below its market price—has not been required to internalize the value of the environmental resources. Such a regime creates for property owners

a strong disincentive to preserve or properly care for environmental resources, even before eminent domain is threatened, by eroding the property rights they would otherwise enjoy.

A. Cities across the country have already shown a willingness to place blight designations on harmless property that is either undeveloped or environmentally sensitive.

It would seem difficult to prove that vacant land is somehow "blighted," yet cities routinely invoke the designation to acquire undeveloped parcels. Because undeveloped land tends to be the most environmentally beneficial as well as environmentally sensitive, pretextual blight designations are especially pernicious in this context.

For instance, Stanislaus County, California, recently condemned land in order to build an access road for an upscale private resort. The land was being used as pastureland for raising cattle, and was owned by several private individuals, a trust, and a partnership. The owners objected to the condemnation, claiming that the road would disrupt the land's ability to be used as pasture. Holland, "Road to Planned Resort OK'd; Stanislaus Supervisors Condemn Strip Leading to Diablo Grande," Modesto Bee, June 12, 2002, at B2. Environmental groups also objected to Diablo Grande's development, claiming that it threatened an endangered species in the area. Walsh, "Diablo permit stands," Sacramento Bee, March 24, 2004, *available at* http://www.modbee.com/local/story/8323284p-9158106c.html. The Stanislaus County supervisors were unconcerned—the needs of the Diablo Grande resort, despite the location in an environmentally sensitive region of the country, took precedence over a handful of farmers and ranchers.

Sometimes pretextual blight designations lead to the accelerated development of property that, because of its environmental sensitivity, would be too expensive to develop otherwise. For

instance, in Princeton, Minnesota, the city has initiated condemnation in order to provide water and wastewater to a private 519-home development called Heritage Village. Stottrup, "Eminent domain process could start Nov. 9," Princeton Union Eagle, August 27, 2005, *available at* http://www.unioneagle.com/2005/October/27eminentdomain.html. The development will displace valuable wetlands, but it could not proceed without the condemnation of neighboring property because the project would become too expensive. Thus, although wetlands are not actually being condemned, the condemnation of nearby land will lead to the destruction of environmentally-sensitive habitat because doing so allows project to be completed at below market cost.

California City, California, recently proposed to turn 15,000 acres of undeveloped land in the Mojave Desert into an automotive test track. Cooper, "The eminent domain debate: Californians losing homes, businesses to development," Sacramento Bee, August 21, 2005, at A1. Landowners sued the City in an attempt to protect their property from seizure, as the undeveloped land is part of the fragile ecosystem of the Mojave Desert. California Attorney General Bill Lockyer even filed a brief opposing the City's actions. His office noted that "There's tremendous economic incentive to condemn vacant land as blighted, but redevelopment means what it says. It's conditional on finding urbanization and blight." *Id.* The Attorney General correctly identifies the problem: undeveloped land cannot be "blighted" unless it has been the sire of some environmental catastrophe, yet cities are often willing to falsely label these open spaces in order to effectuate condemnations that they hope will spur economically beneficial development.

B. Allowing the city-developer to condemn land for economic development purposes will encourage current owners to accelerate their realization of the land's environmental value.

Pretextual blight designations go further than damaging environmentally sensitive areas that are within the project. The mere fact that city-developers have the right to condemn land in order to further redevelopment projects, removes sticks from the bundle of property rights enjoyed by landowners. Morriss and Meiners, The Destructive Role of Land Use Planning (2000), 14 Tul. Envtl. L.J. 95. This is especially problematic in environmentally sensitive areas near existing urban boundaries. In those areas, landowners may be reluctant to engage in environmentally sensitive land management practices that require extensive future planning. Why should a landowner focus on soil management, wildlife conservation, or timber management if he knows that his land is not protected from a city-developer's pretextual use of the eminent domain power? By removing an important right from the bundle of sticks that property owners enjoy, a holding in favor of the City of Norwood would raise just such an issue.

By way of example, consider how endangered species laws have changed the way private property owners manage environmental resources. Anecdotal evidence indicates that many property owners will accelerate the economic yield of their property (by, for example, harvesting old growth timber sooner rather than later) out of fear that they will not be able to access that economic potential once endangered species protections take effect. Stroup, Eco-nomics: What Everyone Should Know About Economics and The Environment (2003) 55-56. One landowner in North Carolina learned that an endangered species of woodpecker had been spotted at the boundary of his property. Once the woodpecker nested in his trees, he would be unable to harvest the timber because doing so would result in a loss of habitat for the woodpecker. The

landowner therefore began clear-cutting the entire property, stating that "I cannot afford to let those woodpeckers take over the rest of the property. I'm going to start massive clear-cutting. I'm going to a 40-year rotation instead of a 75- to 80-year rotation." *Id.* at 57. The law therefore has a paradoxical effect: rather than preserving habitat for endangered species, it accelerates habitat destruction as landowners act to preempt the possibility of losing part or all of the land's value.

The lower courts' holdings in this case, which allowed the City of Norwood to condemn a normal neighborhood and hand the property over to other private parties for redevelopment, would have a similar effect. "Under the tragedy of the commons theory, the lack of exclusive use precludes internalization of costs and benefits." Hite, Back to the Basics: Improved Property Rights Can Help Save Ecuador's Rainforests (2004) 16 Geo. Int'l Envtl. L. Rev. 763. In the absence of conditions that are presently and demonstrably harmful to the community's health, safety, or welfare, property owners should exclusively enjoy the right to determine whether their property will be developed or redeveloped. Denying them this right would create perverse incentives, especially in areas that border urban growth. Furthermore, these urban boundary areas tend to be especially environmentally-sensitive, which amplifies the negative effect.

C. Norwood's approach stifles innovative and creative approaches to environmental conservation.

Pretextual blight designations also threaten environmentally sensitive areas because they reduce the degree of creativity and innovation that developers are willing to bring to new projects. "Mixed use" development and "compatible uses" may be all the rage these days in planning circles, but such phrases are frequently code for very large, master-planned developments that incorporate a plethora of mixed, but entirely brand-new, uses on a large area

of land.[1] Such developments result in condominiums next to retail stores, hotels next to municipal buildings, and a mixture of moderate and high-income housing in one area. Unfortunately, they also produce a one-size-fits-all vision for how an area should look. Eclectic and "non-compatible" uses are disallowed through a mixture of planned development zoning, restrictive covenants, and deed restrictions.

This approach stifles innovation. Instead, large developments tend to follow fads and fashion, resulting in monolithic developments that age poorly when developers move on to the next big thing. Buried beneath these developments lie the neighborhoods, open spaces, and eclectic, market-driven solutions that were in place before the city-developer decided that it could manage these properties better than their rightful owners. City-developers, who can use the sovereign power of the state to implement development at below-market prices, have no reason to be innovate or creative in their approach to a project. Rather than implementing market-driven solutions—which truly are "compatible" with the history, demographics, topography, and landscape that currently exists—the developers who are given condemned homes and businesses are able to bulldoze everything that existed before and start anew. Anything of value (environmental concerns, social preference, collective memory, personal attachment) that drives the market price higher than the government-imposed price is lost when a municipality sacrifices its citizens' properties for the interests of a commercial developer.

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[1] For an extreme example of this type of project, consider the Sharyland development in McAllen, Texas. *Available at* http://www.sharyland.com. The project will span 22,000 acres across the Texas-Mexico border. Sharyland demonstrates how vast mixed-use developments can be. Many projects span into the thousands of acres. The redevelopment of Denver, Colorado's, old airport is a 4,700 acre mixed-use development. Rebchook, Despite slow housing market, Stapleton continues to sizzle, Oct. 27, 2004, Rocky Mountain News *available at* http://www.rockymountainnews.com/drmn/real_estate/article/0,1299,DRMN_414_3283529,00.html.

D. Environmentally-conscious property owners will value their property's non-economic, environmental contributions more highly than a city or commercial developer.

If the Court sides against the property owners in this case, it will deprive Ohio citizens of the opportunity to protect environmentally sensitive areas in future cases by demanding a market price that may be higher than the government-imposed value. In addition to constituting improper uses of governmental authority, pretextual blight designations ignore the environmental concerns of individual property owners. Private property owners are likely to value environmentally sensitive areas more highly than either municipal officials or the commercial developers to whom the property will be given.

The appraisal process does not take into account environmental concerns unless there is *immediate* economic value tied to environmental preservation which, in many instances, there is not. Beckhart, No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property (1993), 66 S. Cal. L. Rev. 2251. In these instances, then, the appraisal process will undervalue the land by the amount that the owner's valuation of environmental protection differs from the appraiser's assessment of the immediate economic worth of the property's natural resources.

There are many instances where an individual may, for environmental reasons, value land more highly than a city or commercial developer. Farmers and ranchers, for example, will have concerns about open space, vegetation, soil content, and wildlife that directly conflict with a city-developer's desire to maximize the parcel's immediate economic returns. Further, many families hold land in trust for reasons associated with environmental conservation. Land Trust Alliance, About LTA, *available at* http://www.lta.org/aboutlta/index.html. Non-profit groups, such as The

Nature Conservancy, also hold environmentally-sensitive areas in trust in order to achieve conservation goals. The Nature Conservancy, How We Work, *available at* http://www.nature.org/aboutus/howwework/. Such groups use sophisticated systems of deed restrictions to ensure future environmental conservation. Often these areas are near urban boundaries, and therefore will be considered by a city to be ripe for development. If cities are permitted to label these undeveloped areas "blighted" or "deteriorating" so that they may be condemned for use in a development project, the conservation restrictions previously imposed on the properties would thereby be erased and the conservation goals of the trusts therefore frustrated.[2]

If this Court allows blight designations to be applied to areas that pose no health, safety, or welfare concerns, cities will be able to condemn undeveloped land merely by claiming that there has been a market failure because a commercial developer finds himself unable to purchase all the land he desires at his preferred price. *Kelo v. City of New London* (2005), 125 S.Ct. 2655, 2668, 162 L.Ed. 2d 439. Such a ruling would permit developers to ask cities to place blight designations on undeveloped areas so they can avoid negotiating a deal with an owner who does not want to see his land developed.

A holding that the Ohio Constitution places no limits on cities' authority to label property "blighted" would therefore play right into the hands of municipalities and commercial developers who are primarily concerned with maximizing the economic value of an area without respect for its environmental value. If, however, the Court recognizes constitutional limits on cities' use of

[2] Even individual homeowners, such as those affected in the present case, play an important role in environmental conservation. Private homes cultivate green space; encourage tree, plant and animal diversity; control water runoff; and reduce development density. The uses to which individuals put their land, from landscaping, to gardening, to management of soil content, to open space, all play important roles in the larger environmental conservation scheme of a community.

blight designations to condemn private property, individual property owners will not face condemnation for choosing to safeguard the natural character of their properties.

E. The government-imposed price is always lower than the market price for any parcel. This results in lost environmental value when the land is condemned through eminent domain.

Environmentally sensitive areas can be threatened when property is declared "blighted" in order to further economic redevelopment through the use of eminent domain. In their rush to put every area of the city to its "best" use, municipal officials are likely to overlook myriad factors that a private property owner would consider in a competitive market. Individuals value land for countless reasons, including factors that are not captured when an appraiser determines the land's "fair market value." If landowners only cared about receiving the appraiser's price for their property, then developers would never need to approach cities about the use of eminent domain. The homeowners in the City of Norwood rejected the developer's offer of the appraised price for their homes. Each of them had a unique reason for deciding not to sell. It is these reasons that municipal officials overlook when they use pretextual blight designations to further economic development projects.

Cities use eminent domain to foster economic redevelopment under the rubric that the entire development area cannot be redeveloped unless every tract within the area is acquired by a single owner. The unified area will then be developed under a grand project plan that will supposedly "maximize" the use of every parcel. Carla T. Main, "How Eminent Domain Ran Amok," Policy Review, Oct/Nov 2005 *available at* http://www.policyreview.org/oct05/main.html/. Developers seek to acquire large unified areas of land because, by doing so, they can create vast developments of retail, commercial, and

residential uses. *See, e.g.* Fixmer, "Whole Foods goes to Hollywood in mixed-use project," Los Angeles Business Journal, Sept. 26, 2006 *available at* http://www.findarticles.com/p/articles/mi_m5072/is_39_27/ai_n15689066. This approach to development also fits with the modern planning paradigm of planners which advocates "[h]igh-density development, infill development, redevelopment, and the adaptive re-use of existing buildings [to] result in efficient utilization of land resources[.]" American Planning Association, Policy Guide on Smart Growth, adopted April 14, 2002, *available at* http://www.planning.org/policyguides/smartgrowth.htm?project=Print/. Environmental resources, which take time to cultivate and protect, are routinely overlooked.

The problem is that developers—through cities—use eminent domain as a way to obtain property for less than its actual market price. Regardless of a parcel's government-imposed value, the actual market price of the property is whatever the individual landowner is willing to accept to sell the property. That price may equate with the property's government-imposed value, or it may exceed it exponentially. When city-developers use eminent domain to transfer land from one private individual to another, they are making an implicit claim that the property owner does not have a right to value the land at greater than its government-imposed value if the developer is willing to put the land to a higher, more immediate, economic use. This determination ignores every other reason, especially environmental reasons, that an individual may have for valuing a piece of property. Through this process, great environmental value may be lost.

IV. CONCLUSION

The ability to make market-driven, long-term, individual decisions about environmental conservation is one of the most important sticks in a property owner's bundle of rights. When a property owner faces the prospect of losing his land to a private commercial developer so that

development density on the property can be increased, the property owner is incentivized to maximize the property's immediate economic value at the expense of future expected value. The problem with this, from the standpoint of environmental conservation, is that environmental benefits tend to be long term benefits.

Thus, the regime proposed by Appellees would have a doubly pernicious effect. Not only would it encourage city-developers to undertake more large-scale development projects (meaning more paving, more stream channelization, and higher density, all of which threaten environmentally-sensitive areas); Appellees' regime also creates perverse incentives for all owners of property that could potentially be in city-developers' crosshairs. For these reasons, PERC respectfully requests that this Court uphold a robust notion of property rights in Ohio, thus ensuring that the market, rather than the ambitions of city-developers, can ensure that environmental resources are fully valued.

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Respectfully submitted,

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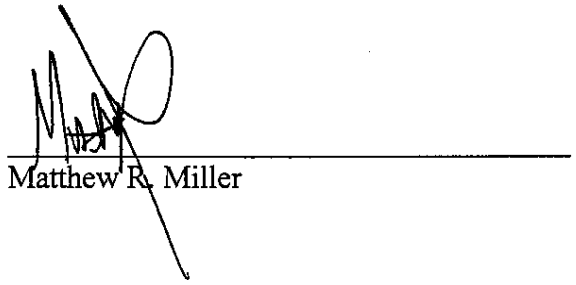

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