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.	:	
	:	

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

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II. INTRODUCTION

It has been more than 50 years since this Court last considered the constitutionality of condemning property for ownership by another private party. That case, *State ex rel. Bruestle v. Rich*, involved the clearance of a slum area in which at most 10 out of 331 buildings were not substandard. Today this Court confronts a quite different question – whether the Ohio Constitution permits the City of Norwood to condemn a fully-occupied mixed-use residential and commercial area in which none of the buildings are even dilapidated for transfer to a private developer who will construct another mixed-use residential and commercial area. This Court explained that the public purpose of the *Bruestle* condemnations was slum elimination. The justification used by Norwood is that some of the buildings in the area have lot sizes under 6,000 square feet or setbacks that do not meet current zoning requirements for new construction; there is traffic on the commercial streets, and two of the residential streets have dead-ends; and, worst of all, the homes and businesses in the area are owned by different people. While the clearance of slums may be a public purpose, even if the land is transferred to a private developer, the clearance of a neighborhood with such ordinary, unremarkable conditions certainly is not. Norwood and Rookwood ask this Court to dramatically extend the holding of *Bruestle* and follow the U.S. Supreme Court's recent decision in *Kelo v. City of New London*. If Ohio's historic constitutional protection of property is to retain any vitality, this Court must hold that Norwood cannot condemn the Appellants' homes for Rookwood's private development project.

Norwood asserts that the purpose of these condemnations is "urban renewal." But the City essentially admits that its goal was the increased taxes and economic development it hoped the new Rookwood development would bring. Because it has no authority to condemn to increase taxes, it relied upon the "deteriorating" designation, at the suggestion of Rookwood, to

secure the power of eminent domain as well as favorable financing. The "urban renewal" label is simply an excuse to transfer property from one owner to another. The Ohio Constitution does not sanction this use of eminent domain.

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.

As demonstrated in Appellants' opening brief, Norwood's urban renewal plan was hopelessly flawed, and relying on it did not constitute a sound reasoning process. *See* Merit Brief of Appellants Joseph P. Horney, Carol S. Gooch, Carl E. Gamble and Joy E. Gamble (hereinafter "Appellants' Merit Br.") at 12-16. Norwood and Rookwood make no effort to defend the study of existing conditions, essentially conceding that the study did not follow Norwood's code, contained huge numbers of errors, and could not be used to evaluate the presence or prevalence of "deteriorated" or "deteriorating" conditions in the area. Merit Brief of Appellee City of Norwood (hereinafter "Norwood Br.") at 17-21; Merit Brief of Appellee Rookwood Partners, Ltd. (hereinafter "Rookwood Br.") at 7-10.

Instead, the parties' response is that this Court can simply ignore the study and the references to it in the authorizing ordinance and uphold the "deteriorating" designation without it. Norwood Br. at 21; Rookwood Br. at 11. Indeed, Norwood describes the utter uselessness of the study as "harmless error." Norwood Br. at 21. There are two problems with this approach. First, the study was both required by law and integral to Norwood's "deteriorating" designation. The City cannot simply throw it out and sustain its "deteriorating" designation. Second, Norwood's claim that the study addresses only structures while the City based its "deteriorating" designation on area-wide factors is demonstrably untrue.

The plan itself, the Norwood Code, and the City's actions all make clear that the plan (and its study of existing conditions) was necessary and integral to Ordinance 55-2003, which made that designation. According to the plan, adopted by reference in that ordinance:

> 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)) (emphasis added).

Norwood's Municipal Code confirms this statement. The Norwood Code authorizes the Planning Commission to obtain "the necessary inspections, studies, plans, surveys and reports in connection with the urban renewal," either by contracting with third parties or by conducting the studies itself. Norwood Code § 163.04(a). The ordinance approving the urban renewal plan must incorporate or be accompanied by "documents submitted to Council to support findings made therein," and one of the elements that must be supported is "specific findings of fact as to the character of the project area." Norwood Code § 163.07(c) & (c)(1) (emphasis added). Without the existing conditions analysis, the City Council would have no documents supporting its factual findings or its conclusions that the area met the definitions of "deteriorating." The necessity of an existing conditions study is confirmed by the fact that other urban renewal plans and even draft urban renewal plans in Norwood have contained such studies. Deft. Exhs. 1, 2, 3, 11 & 12. It is also confirmed by the fact that the Planning Commission initiated the study, that Ordinance 55-2003 "approved and adopted" it, and that the ordinance took statistics and other information directly from the study. (App. 118). Because the completely invalid existing conditions study in the plan was necessary to the City's designation of the area as "deteriorating," the City did not use a sound reasoning process, and the "deteriorating"

designation must fail as a matter of law.

Norwood claims that Appellants have challenged only the existing conditions study and that the study addresses only the condition of structures and not "area-wide" conditions. Norwood Br. at 10-12. However, the conditions that Norwood lists as area-wide and supposedly not covered by the study are either in fact covered by the study or are simply not factors to be considered under Norwood's "deteriorating" definition. The traffic, dead-end streets, curb cuts, and nonconforming setback and lot size requirements – listed as (a), (d), (e), and (f) in Norwood's brief at 10-12 – appear in the study as "unsafe, congested, poorly designed streets," "faulty street arrangement," "unsafe conditions," "nonconforming use," and "obsolete platting." (Supp. 15-18). Noise and light – listed as (b) and (g) in Norwood's brief at 10, 12 – do not appear in Norwood's code definition of "deteriorating," and are thus not a proper part of the "deteriorating" inquiry. *See* Norwood Code § 163.02(c); App. 12. Of the many conditions that appear in the study (with errors), only a few – code violations, lack of maintenance, and dilapidation – actually pertain to structures. The rest pertain to other features of the parcels or area. In other words, Norwood is completely wrong when it says that the existing conditions study addresses only structures and does not address Norwood's supposed "area-wide" concerns.

It is true that the study engages in a parcel-by-parcel evaluation, but that is exactly what is required by Norwood's code definition of "deteriorating." Nearly all of the conditions listed the definition require parcel-by-parcel evaluation, and because the study was worthless, the City Council did not have access to any accurate information about the prevalence of these conditions. Without a study, no such evaluation is possible.

Both Norwood and Rookwood argue that Appellants have conceded sufficient facts to justify the "deteriorating" designation. Norwood Br. at 10-12; Rookwood Br. at 2. Even if this

were true, which it is not,[1] the City's reliance on a study that did not comply with its own code and that was so error-riddled as to be worthless would still be an unsound reasoning process.

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.

In their opening brief, Appellants explained that Norwood's reliance on conditions that its plan will not cure to support its "deteriorating" designation does not reflect a sound reasoning process. Appellants' Merit Br. at 17-19. Two of the conditions emphasized by Norwood in its brief and at trial – traffic and vehicles backing up onto busy streets – will in fact not be addressed by the redevelopment plan, and therefore this Court should not consider those conditions as supporting the "deteriorating" designation.

Both Norwood and Rookwood apparently concede that Norwood cannot base its "deteriorating" designation on conditions that it will not cure. *See* Norwood Br. at 21-22; Rookwood Br. at 10. Instead, they claim that the plan will address the complained-of traffic conditions, making statements with erroneous citations or no citations at all.

At the outset, it is important to note that despite the City's claims, there was no traffic safety problem in the area to begin with. The traffic engineer responsible for the traffic study testified about the Edwards Road corridor plan area, "I'm not aware of any serious accident record on the street. It is a typical urban street. It's well marked, well defined and I see no

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[1] Norwood lists all the supposed "deteriorating" conditions remaining if the existing conditions study is pushed under the carpet. Norwood Br. at 10-12, 20. Most of these conditions are utterly ordinary and unremarkable; these ("diversity of ownership," "nonconforming uses," and "obsolete platting") are discussed in Proposition of Law No. III. Others will not be altered by Rookwood's redevelopment plans. These (traffic and "faulty streets") are discussed in Proposition of Law No. II.

outstanding safety problems on the street." (T.p. 211).[2]

Norwood concedes that the plan will increase traffic in the area. Norwood Br. at 22. (And in fact, the traffic will increase by more than 13,000 cars per day, plus any additional traffic generated by the 70,000 square feet of retail and 90 more residential units added to the plan after the completion of the traffic study. (T.p. 196-197, 200-02, 229-30; Deft. Exh. 15). Norwood states, without accurate evidentiary support, that the streets will be better designed with better traffic flow. Norwood Br. at 22. Instead, the evidence showed that there was an adequate level of traffic control at the time the study was conducted and that there would be an adequate level if the plan was implemented. (T.p. 196, 198). Indeed, the plan calls for the addition of only a single traffic light, and, according to the study, traffic control will be adequate with more than 13,000 additional cars per day. (T.p. 197-98).[3]

Another supposed safety issue that will not be cured is that of vehicles backing up onto busy streets. The concept plan approved by the City calls for two points at which trucks must back up onto a busy street. (T.p. 49-50; Jnt. Exh. 5, addendum A). The traffic engineer was very concerned about this plan because it would require trucks to either back up on their blind side or to back up in a way that involved backing across both directions of traffic. (T.p. 203-204).

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[2] The evidence also showed that, despite the claims of dangerous conditions, there were more traffic accidents adjacent to the other Rookwood development on Edwards Road than in the area at issue in this case. (T.p. 795-796). Similarly, a 21-year veteran of the fire department could remember no accidents involving fire or emergency vehicles in that entire time. (T.p. 611).

[3] Moreover, Norwood asserts that onstreet parking will be eliminated and that this will improve traffic flow. Norwood Br. at 22. The transcript citation, however, does not indicate that the onstreet parking will be eliminated. (*See* T.p. 220-21). Rookwood also claims that the parking garages will somehow improve traffic. Rookwood Br. at 10. The pages of the transcript that it cites do not discuss the impact of possible parking on traffic. Rookwood Br. at 10, citing T.p. 48, 224, 585. Both parties assert that increased traffic is bad for single-family homes (and, presumably, the small businesses in the area as well) but will somehow be an asset once the number of people and businesses in the area has significantly increased. Norwood Br. at 22. Conspicuously, no witness testified to this effect, and it is difficult to see why thousands more cars per day is an asset to the hundreds more people expected to live in the area.

Another of the sites also involved trucks backing up close to a busy intersection. (T.p. 202-205). Norwood points out that it is possible that these plans will change and no longer require trucks backing up into traffic. Norwood Br. at 21-22. While that is certainly a possibility, at the time of trial the City had approved this plan, the one that called for trucks backing up in an unsafe manner. (T.p. 49-50; Jnt. Exh. 5, addendum A).

The fact that the City would, on the one hand, cite traffic and unsafe backing-up as terrible, worrisome problems and, on the other hand, approve a plan with even more traffic and trucks backing up on their blind sides into busy streets shows just how little the City actually cared about this issue. By the time the City was coming up with supposedly "deteriorating" conditions, it already had approved Rookwood's plan. Since the result was a foregone conclusion, it really didn't matter if the approved plan cured supposed traffic safety issues or not.

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.

As described in Appellants' opening brief, the characteristics justifying the "deteriorating" designation of the Edwards Road neighborhood are ordinary, common traits of normal neighborhoods. Calling such characteristics as "diversity of ownership" to be evidence of a "deteriorating" neighborhood does not reflect a sound reasoning process. Both Norwood and Rookwood complain about the lack of a definition of "normal". Norwood Br. at 23-24; Rookwood Br. at 14, n.6. This is not a term of art. Appellants use it in the sense that any layperson would understand. It just means a neighborhood that is occupied and functioning, neither startlingly wealthy nor poor, neither brand-new nor run-down, with characteristics similar to other neighborhoods in the metropolitan area.

The area in question in this lawsuit was in fact a normal neighborhood. Its residences

were occupied and there was no evidence that any of the homes were listed for sale at the time Rookwood began approaching owners. (T.p. 392-93; 577-79, 598, 603). There were no business vacancies (T.p. 392-93; Supp. 17), and the area was experiencing ongoing commercial development, encouraged by the City's recent rezoning. (T.p. 116-117). There were no tax delinquencies. (Supp. 16). None of the buildings were substandard or even dilapidated. (T.p. 104-105, 117-119; Supp. 17). The engineer hired to conduct the traffic study of the area described the Edwards Road area as "a typical urban street." (T.p. 211). From the limited information available, it appears that property values in the area were rising. (T.p. 305).

The uncontested testimony showed that the supposedly "deteriorating" conditions in the area were in fact common throughout the area. *See* Appellants' Merit Br. at 20-21. Both Norwood and Rookwood assert that Appellants have conceded these "deteriorating" conditions. In fact, Appellants and their experts have conceded only the existence of harmless, common conditions to which the City gives scary-sounding, "deteriorating" labels. Of course Appellants "concede" that different houses and businesses are owned by different people. They also agree that some properties do not reflect the current zoning rules for new construction, such as set-back requirements. But the testimony at trial was that virtually every neighborhood has "diversity of ownership," and virtually any building more than five or ten years old will have zoning nonconformities resulting from changes in zoning after construction. (T.p. 306, 345-246). Similarly, Appellants agree that some of the properties have lot sizes between 4,800 and 5,900 square feet, while the current zoning requirement is 6,000 square feet. (T.p. 241-42). But again, having a lot size under current zoning requirements – what the plan labels as "obsolete platting –

is "very common," including in the more expensive neighborhoods of Norwood. (T.p. 242-45).[4]

Norwood and Rookwood then claim that however common the characteristics of the area, one overriding difference is the proximity of an interstate highway, which Norwood portrays as a disastrous condition in this long-time mixed use neighborhood.[5] Norwood Br. at 10, 20-23, 25-36; Rookwood Br. at 3-4, 12-14. In fact, Ohio has the fourth largest interstate highway system in the country, covering 17,520 miles. *See* http://www.dot.state.oh.us/dist10/did_you_know.htm. Obviously there are many other neighborhoods in Ohio near those 17,000 miles of highway. Yet, under Norwood's reasoning, all could be classified as "deteriorating," just as any neighborhood with "diversity of ownership" could be called "deteriorating." Indeed, both Norwood and Rookwood stress the importance of the diversity of ownership in the neighborhood as a "deteriorating" characteristic. Norwood Br. at 11; Rookwood Br. at 12, n.4. The City's finding that the Edwards Road area was "deteriorating" based on such ordinary, common neighborhood characteristics shows that it did not use a sound reasoning process.

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.

In their opening brief, Appellants explain that the Ohio Constitution differs from the U.S. Constitution and urge this Court to reject the abdication of judicial review embodied in the *Kelo*

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[4] Appellants also agree that there are two dead-end streets in the area. Norwood has 46 dead-end streets, and it is common knowledge that residents prefer such streets. (Pltf. Exh. AA; T.p. 315).

[5] Norwood bizarrely tries to draw analogies between cases addressing zoning regulations and this case. Presumably, the purpose is to argue that because, for example, this Court found the area in *Shemo v. Mayfield Heights* (2000), 88 Ohio St. 3d 7, 2000-Ohio-258, 722 N.E.2d 1018, to be unsuitable for a single family neighborhood, it should make the same finding in this case. Not only are the zoning cases utterly inapplicable, but the area in *Shemo* was vacant and there was testimony that it was not suitable for residential use. 88 Ohio St. at 7, 12, 722 N.E.2d at 1018, 1020, 1024. In contrast, this area is not vacant, and the City obviously believes it is habitable, since the plan calls for hundreds more residents.

decision. In particular, they ask this Court to find that the purpose of urban renewal condemnations is the elimination of slum or blighted conditions, not the elimination of anything that a city chooses to label "urban renewal." Appellants' Merit Br. at 23-25, 29-32.

A. *Bruestle* Does Not Dictate the Outcome of this Case.

Norwood, Rookwood, and their amici rest most of their argument on this Court's 1953 decision in *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, 110 N.E.2d 225. Norwood argues that *Bruestle* applies to the facts of this case, while Rookwood and the amici claim that this Court would actually need to overturn *Bruestle* in order to rule in favor of Appellants. Norwood Br. at 30-32; Rookwood Br. at 25. To the contrary, *Bruestle*, while it serves as precedent, does not control the outcome of this case, because *Bruestle* held that slum elimination was a public use. It did not, as Norwood and Rookwood would have it, hold that elimination of any neighborhood was a public use. A decision in favor of Appellants in this case will not require this Court to overturn its decision in *Bruestle*.

As explained in Appellants' opening brief, the area being condemned in *Bruestle* was a slum, as that term was understood in the 1950's. The Court repeatedly described the area as a "slum area" or having "slum conditions" and described the purpose of the condemnations as "slum elimination" or "slum clearance". *See Bruestle*, 159 Ohio St. at syllabus ¶ 1 (referring to "slum conditions" three times); at syllabus ¶ 6 (describing the area as "slum conditions" and "slum area" and describing the purpose of the use of eminent domain as "slum elimination" and "slum clearance"); at syllabus ¶ 11 ("slum area"); at 22 ("slum conditions in the area," purpose of condemnation "to eliminate the slum conditions and other conditions of blight and provide against their recurrence"); at 27-28 ("slum and other conditions of blight"); at 28 (describing three times the purpose of condemnations as "to eliminate slums and provide against their

recurrence"); at 29 ("slum conditions"); at 31 ("slum conditions," "slum elimination," and "slum clearance"); at 33 (referring to area as a "slum area" with "slum conditions").

In addition to the repeated description of the area as a slum, it is plain that the area suffered from more than diversity of ownership and nonconforming zoning. In order to designate the area, the city council of Cincinnati found that a "majority of the structures are detrimental to the public health, safety and welfare, and that said area is a blighted area." *Bruestle* at syllabus ¶ 11. Indeed, only a "small percentage" – 10 out of 331 buildings – were not substandard. *Id.* at syllabus ¶ 11, 33.

Bruestle holds that the elimination of a slum area containing 97% substandard buildings and the provision against the recurrence of these conditions constitutes a public use for which eminent domain may be used under the Ohio Constitution.[6] From this, Norwood and Rookwood conclude that the elimination of non-slum, non-blighted conditions in an area with no substandard buildings is also a public use for which eminent domain may be used. *Bruestle* does not go that far; it doesn't even come close.

The elimination of slum and blight constitutes a public use because it eliminates a public harm. Appellants' Merit Br. at 17. Courts in other states also have been able to distinguish between condemnations for the purpose of eliminating slum or blight and condemnation in areas that lack slum or blighted conditions. *See, e.g.*, *County of Wayne v. Hathcock* (Mich. 2004), 684 N.W.2d 765, 782-83; *Southwestern Illinois Dev. Auth. v. National City Environmental, L.L.C.* (Ill. 2002), 768 N.E.2d 1, 9, *cert. denied*, (2002), 537 U.S. 880; *Merrill v. City of Manchester*

[6] According to Rookwood, the inclusion of the prevention of the recurrence of slum or blight means that eminent domain can be used even if there was no blight to eliminate. Rookwood Br. at 17. Neither *Bruestle* nor *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 553 N.E.2d 597 says anything of the kind, and obviously, to have a condition "recur," it must exist in the first place.

(N.H. 1985), 499 A.2d 216, 217-19 (condemnation for industrial park not a public use where no harmful condition was being eliminated).[7]

The Michigan Supreme Court similarly explains that eminent domain may be used constitutionally in such areas because the slum or blight is a fact of "independent significance." *County of Wayne v. Hathcock* (Mich. 2004), 684 N.W.2d 765, 782-83.[8] In other words, even if there were no private development project planned, the removal of the conditions in the area would eliminate a significant public harm. *Id.*; *see also Kelo v. City of New London* (2005), 125 S.Ct. 2655, 2673-75 (O'Connor, J., dissenting) (condemnation in blighted areas eliminates public harm). There are no such facts of independent significance about the Edwards Road area – until Rookwood approached the City with its development plans, the City had called for the area to remain intact because it was in good condition. (Deft. Exh. 1, p.5; App. 105).

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[7] The Ohio legislature recognizes the distinction as well. While Norwood emphasizes that its "deteriorating" definition is similar to R.C. § 725.01, Norwood Br. at 32, Chapter 725 deals only with financing and does not authorize the use of eminent domain. On the other hand, R.C. Chapter 1728 does authorize the use of eminent domain in blighted areas, and that definition of blight requires the presence of conditions that harm the public. *See* R.C. § 1728.01(E).

[8] Ohio caselaw regarding condemnations for public ditches reflects a similar analysis. This Court held such condemnations were constitutional where the ditches would benefit the public health, safety, or welfare. *See, e.g., Reeves v. Treasurer of Wood County* (1858), 8 Ohio St. 333, 345-46. But where the purpose of the ditch was to allow private parties to make more profitable use of their land, this Court held that there was no public use. *See McQuillen v. Hatton* (1884), 42 Ohio St. 202, 204-05 ("The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact is not a sufficient reason for taking other private property to increase the prosperity of individual men"). These cases, decided shortly after the passage of the Ohio Constitution, also provide insight into the meaning of Section 19, Article I.

As discussed in Appellants' opening brief, prior Ohio Supreme Court caselaw regarding eminent domain for private ownership falls within the three *Hathcock* categories. Appellant Merit Br. 30-32. Other than the two urban renewal cases, the other cases of private ownership involved instrumentalities of commerce and closely regulated industries. *See, e.g., Geisy v. Cincinnati, W. & Z. R.R. Co.* (1854), 4 Ohio St. 308, 323-24 (railroad); *Ward v. Marietta & Newport Turnpike & Bridge Co.*, 6 Ohio St. 15, 16-17 (1856) (bridge); *Ohio Power Co. v. Deist* (1951), 154 Ohio St. 473, 477, 96 N.E.2d 771, 773-774 (aerial bucket for private power company); *Langenau Mfg. Co. v. Cleveland* (1953), 159 Ohio St. 525, 534-35, 112 N.E.2d 658, 662-663 (railroad).

Norwood repeatedly describes Appellants as saying that an area must be a "true slum" in order for eminent domain to be permissible. Norwood Br. at 27, 29. Despite Norwood's use of quotation marks, the phrase "true slum" appears nowhere in Appellants' opening brief, and Appellants have consistently maintained that eminent domain may be used to eliminate slum or blight. Appellants' Merit Br. at 23-25. Contrary to Norwood's arguments, it would not have to wait until the area was infested with crime and disease if Appellants prevail in this case. Norwood Br. at 27. Norwood's code permits the use of eminent domain in blighted areas where the majority of the properties in the area have some kind of problem. Norwood Code § 163.02(b). The City would not be able to condemn if some properties had some characteristic like "diversity of ownership" or zoning nonconformance, but it could condemn when the area met Norwood's own definition of "blighted."

This case confronts the Court with an issue of first impression. *Bruestle* does not dictate the result, and nor would this Court have to overrule it to find that an area must be a slum or blighted in order for its elimination to constitute a public use. It would simply have to hold, as *Bruestle* did, that the constitutional public use of urban redevelopment is the elimination of slum or blighted conditions and that the replacement of property that is neither a slum nor blighted does not constitute the public purpose of urban redevelopment.

B. This Court Should Interpret the Ohio Constitution Differently Than the U.S. Constitution.

In their opening brief, Appellants explain at length why the Ohio Constitution offers greater protection than the United States Constitution. Appellants' Merit Br. at 25-32. This Court often interprets the Ohio Constitution to provide greater protection, especially when the

language differs from the United States Constitution.[9] It is particularly appropriate to look at the meaning of the Ohio Constitution after a significant decision in which the U.S. Supreme Court narrowed the protections provided by the U.S. Constitution. Appellants' Merit Br. at 26-27. Norwood bizarrely characterizes this as a request for this Court to change the meaning of the Ohio Constitution. Norwood Br. at 27. Rather, as this Court considers an issue of first impression – whether condemning nonblighted neighborhoods constitutes a public use – it should look to its own history and interpretation and consider whether the Ohio Constitution provides more protection than the U.S. Constitution, as interpreted by the U.S. Supreme Court in *Kelo*. *See* Appellants' Merit Br. at 25-29.

C. Section 13, Article VIII of the Ohio Constitution Does Not Support Sanctioning Eminent Domain for Economic Development.

The City, Rookwood, and their amicus First Suburbs Consortiums attempt to rely on Section 13, Article VIII of the Ohio Constitution as a broad statement of Constitutional policy that authorizes Ohio municipalities to condemn homes and businesses in an effort "to improve the economic welfare of the people of the state." Their reading of this section is entirely incompatible with the unquestionably limited purposes for which the section was adopted and with this Court's prior treatment of this section. Section 13, Article VIII was adopted in 1964 as a response to this Court's decision in *State ex rel. Saxbe v. Brand* (1964), 176 Ohio St. 44, 197 N.E.2d 328, in which the Court strictly interpreted Article VIII's prohibitions against state entities' loaning of credit in aid of private interests.[10] Article VIII is intended to avoid "placing

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[9] Rookwood apparently agrees with this conclusion. After explaining how this Court interprets the Ohio Constitution differently especially when the text differs from the U.S. Constitution, it inexplicably ignores the fact that the Ohio and U.S. takings clauses have quite different language. Rookwood Br. at 22-23.

[10] *The Ohio State Constitution: A Reference Guide*, Steven Steinglass & Gino Scarselli, p. 260; *see Stark Cnty. v. Ferguson* (5th App. Dist. 1981), 2 Ohio App.3d 72, 75, 440 N.E.2d 816, 819.

public tax dollars at risk to aid private enterprise. *State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow* (1991), 62 Ohio St. 3d 111, 114, 579 N.E.2d 705, 708. The General Assembly and the citizens of the state determined that it would be desirable for public entities to have the authority to make loans and issue bonds for the purpose of economic development, and so they adopted Section 13, Article VIII, which expressly exempts these loans of government credit from the other prohibitions in the Constitution. Thus, Section 13, Article VIII, does nothing more than carve out a narrow exception from the more general constitutional rules that would otherwise prohibit the lending and borrowing funds for economic development.[11]

D. Norwood and Rookwood Seek the Power of Eminent Domain Without Any Constitutional Limits.

The City, Rookwood, and their amici all openly ask this Court to adopt the reasoning of the U.S. Supreme Court in *Kelo* and to hold, essentially, that if the local governing body says it's a public use, it's a public use. Norwood Br. at 38; Rookwood Br. at 7; Amicus Brief of First Suburbs Consortium of Northeast Ohio in Support of Appellee at 9-10. Indeed, these parties ask this Court to adopt *Kelo* and go even one step further. They ask this Court to hold that economic development is a public use and to uphold condemnations for economic development even without the statutory authority to condemn for economic development. Further, they ask this Court to sanction a developer-driven process that was not present in *Kelo*. This Court should decline the request to read any constitutional protections out of the Ohio Constitution.

Norwood spends much of its brief arguing that it can use eminent domain here for

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[11] *See State ex rel. Burton v. Greater Portsmouth Growth Group* (1966), 7 Ohio St.2d 34, 36-37, 218 N.E.2d 446, 449 (Section 13, Article VIII "has a single purpose, to allow the state and governmental subdivisions to give their financial assistance to private industry or to other governmental units in order to create new employment within the state.").

economic development and encouraging jobs as an alternate to using it for urban renewal. Norwood Br. at 1, 4, 14, 33, 37, 39, 41. This is perplexing, because Norwood has no statutory authority to make such condemnations, and its ordinance identifies the purpose of the condemnation as urban redevelopment. (App. 92; App. 118). Yet it is utterly clear from Norwood's brief that its true motivation for this taking was tax growth. That is not something Norwood can condemn for, however much its leaders might wish to.

Norwood's way around this difficulty was to label the area as "deteriorating" and then claim the condemnations were for "urban redevelopment." According to Norwood, if the City claims the project is for "urban redevelopment," it's for urban redevelopment. And as this Court has held that urban redevelopment is a constitutional public purpose, then this "urban redevelopment" project must also be constitutional. Norwood Br. at 17-21. The only way this circular reasoning makes sense is if "urban redevelopment" means "whatever we call urban redevelopment." As discussed above and in Appellants' opening brief, the public purpose of "urban redevelopment" condemnations is the elimination of slum or blight and the provision against their recurrence. *Bruestle*, 159 Ohio St. at 27-28, 110 N.E.2d at 787. Just because Norwood labels this as an "urban renewal" project does not mean it has anything to do with eliminating slum or blighted conditions. The use of eminent domain to eliminate the Edwards Road area, which is neither a slum nor blighted, is not a constitutional public purpose.

The City and Rookwood also ask this Court to exercise even less judicial review than *Kelo* by ignoring the extent to which this redevelopment "plan" was driven by Rookwood itself. In *Kelo*, the City of New London conducted a government-funded study of the area. *Kelo v. City of New London* (2005), 125 S.Ct. 2655, 2659. The report examined a variety of different options for the area. *Kelo v. City of New London* (Conn. Super. 2002), 2002 WL 500238 at *96. At the

time the plan was approved and the area slated for acquisition, no developer had been chosen or identified. *Kelo*, 125 S.Ct. at 2661-62 n.6. While Appellants certainly do not agree with the decision in *Kelo*, the process used by Norwood in this case was far more developer-driven than the process used by New London in *Kelo*. In other words, the condemnations at issue in this case are even less a public use than those in *Kelo*.

With an astonishing lack of irony, Rookwood proclaims "Norwood's vision for the Area is to create a new kind of neighborhood." Rookwood Br. at 10. But the vision was entirely Rookwood's, not the City's. Rookwood first approached the City with its plan for the area. (App. 81; T.p. 28, 44-46, 584-585). When some owners refused to sell, Rookwood raised the idea of an urban renewal designation in order to use eminent domain. (App. 82). When writing the study and "plan" for the area, the consultants recognized that the project had already been designed and would not be changing. (T.p. 108). Alternatives were of course not considered. (Supp. 1-46). The City paid so little attention to the study that it failed to notice that it did not track Norwood's code and that it was riddled with errors. Appellants' Merit Br. at 5-7. While *Kelo* upheld eminent domain pursuant to a redevelopment plan that was created without any private developer in mind, in this case the "plan" was entirely and obviously developer-driven.

The briefs of Norwood, Rookwood, and their amici make plain the choice before this Court. It can hold that the Ohio Constitution imposes some limit on the use of eminent domain for private development and requires that the project at least eliminate slum or blighted conditions. Or, it can hold that the Ohio Constitution allows the use of eminent domain to eliminate such conditions as "diversity of ownership" so that the property can be transferred to private developers. No prior case of this Court controls, and this Court must decide whether Section 19, Article I's admonition that property shall be held "inviolate" imposes any limit on

eminent domain in Ohio.

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 urban renewal plan in this case was pretextual. The real reason the plan was pursued was not to alleviate blight, but rather to obtain eminent domain authority and tax increment financing for the project. As Appellants set forth in their opening brief, the chain of events leading up to the creation of the urban renewal plan and undisputed witness testimony about it demonstrates its pretextual nature. *See* Appellants' Merit Br. at 35-39.

The City boldly claims, without any support in the record, that the "Plan was commissioned to determine whether the conditions in the Area justified urban renewal activities." Norwood Br. at 40. The evidence in this case, however, demonstrates exactly the opposite: the urban renewal plan was pursued in order to obtain eminent domain and tax increment financing. *See* Appellants' Merit Br. at 36-38. The City is correct that cities may pursue eminent domain and tax increment financing if a valid urban renewal plan is in place. But they cannot be *the* reasons why urban renewal is pursued in the first instance. In other words, the tail cannot wag the dog. Urban renewal must be conducted for the purpose of eliminating slums and blight. If it is done for some other reason, such as to accommodate the desire of a party to obtain property through eminent domain, then the constitutional basis for the exercise of eminent domain authority is gone.[12]

[12] In addition, the City simply restates arguments about whether the City Council used a sound reasoning process in adopting the urban renewal plan. *See* Norwood Br. at 39-40. But this issue

Rookwood either does not understand Appellants' pretext claim or willfully misconstrues it. Rookwood, like the City, emphasizes that without the commitment of Rookwood, the urban renewal project could not go forward. *See* Rookwood Br. at 32-33. This claim has nothing to do with whether or not the urban renewal plan was pretextual. As noted, a pretextual taking occurs when the real purpose of the condemnations is different than the stated one. Accordingly, in pretext claims, it does not matter if the government could actually go forward with the stated public purpose if pretext was not involved.

In fact, in most of the pretext cases cited in Appellants' opening brief, it was beyond dispute that the stated public use was legitimate. *See* Appellants' Merit Br. at 35, n.16. The pretext problem in those cases, however, was that the evidence demonstrated that the real motive for the taking was different from the stated public use. For instance, in *Pheasant Ridge Assoc. Ltd. Partnership v. Burlington Town* (Mass. 1987), 506 N.E.2d 1152, there would have been no question that the city could have condemned for a public park, absent pretext. However, the evidence in that case demonstrated that the real reason and motivation behind the taking was not to condemn for a public park and other stated purposes, but rather to prevent the construction of lower income housing. *See id.* at 771, 779. Here, regardless of whether the urban renewal plan properly found the area to be blighted or deteriorating (it did not), the uncontroverted evidence in this case clearly demonstrated that the real reason for doing the urban renewal plan was to obtain eminent domain authority (and tax increment financing). That amounts to a pretextual taking.[13]

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has absolutely nothing at all to do with pretext, which concerns whether the real reason for a condemnation is different from the stated one. *See* Appellants' Merit Br. at 35-36.

[13] Contrary to Rookwood's allegation, the trial court's finding that the "Defendants have failed to prove that the urban renewal plan was conducted other than for eliminating deteriorating conditions" is not a factual finding. *See* Rookwood Br. at 32. As recognized by the trial judge, it is a conclusion of law, and it was included in the judge's opinion under "Conclusions of Law." (App. 107). In fact, in her opinion, the trial judge recognized all of the facts that establish pretext

Rather than responding to the pretext cases cited by Appellants, Rookwood's brief contains a long analysis of public use cases that have nothing to do with pretext. In *Grisanti v. City of Cleveland*,[14] *Goldstein v. Cincinnati*,[15] and *Kim's Auto*,[16] all cited by Rookwood in support of its pretext argument, the primary issue in those cases was whether the urban renewal plans would *result* in benefits that redounded primarily to public or private interests. The cases did not address what the *actual motivations* for the urban renewal plans were.[17]

Neither the City nor Rookwood address pretext law. They both claim that stating something makes it so – if the City Council says it is doing an urban renewal study to eliminate blighted or deteriorating conditions, then the evidence demonstrating the real motivations for the plan is irrelevant. That blatantly contradicts pretext doctrine. The evidence in this case demonstrates that while the purported purpose of the urban renewal plan was the removal of blight and deteriorating conditions, the real reason for it was because certain property owners would not sell their properties and, as a result, the city needed eminent domain authority. The condemnations are thus pretextual and must be struck down.

Dated: December 9, 2005

(as set forth at App. 111-113) and recognized that "that the City witnesses testified that the plan was undertaken to determine if eminent domain could be used for eminent domain and for TIF financing . . . ." (App. 107-108). The trial judge and the appeals court simply drew the wrong legal conclusion from those facts (that no pretext was involved because the stated purpose of the urban renewal plan was to eliminate blighted and deteriorating conditions).

[14] *Grisanti v. City of Cleveland* (Ohio Com. Pl. 1961), 179 N.E.2d 798, 18 O.O.2d 143.

[15] *Goldstein v. City of Cincinnati* (1st App. Dist. 1981), 1981 WL 9717. (A copy of this decision is attached to Rookwood Br. at Appx. 15-20).

[16] *City of Toledo v. Kim's Auto and Truck Service* (2004), 101 Ohio St.3d 1415, 2004-Ohio-106, 801 N.E.2d 852.

[17] In *Dayton v. Kuntz* (2d App. Dist. 1988), 1988 WL 28104, upon which Rookwood also relies, the property owner alleged that the sole purpose in adopting the urban renewal plan was to bolster a previously failed project. The court in *Dayton*, however, did not address whether the property owner proved his case on this contention and went on to hold (wrongly) that cities can use eminent domain for other purposes beyond the removal of blight. (A copy of this decision is attached to Rookwood Br. at Appx. 1-9).

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III. Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Reply 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 9th day of December, 2005, upon the following:

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