

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 REASON FOUNDATION, IN SUPPORT OF
APPELLANTS**

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II. INTEREST OF AMICUS CURIAE

With the consent of the parties, the Reason Foundation respectfully submits this brief as an *amicus curiae*. The question presented in this case is whether it is a “public use” under the Takings Clause for a city to authorize the condemnation of non-blighted private property to be handed over to private developers to build private residential and office space on the theory that such development may increase tax revenues and improve the local economy. As a national research and educational organization dedicated to advancing individual liberties, including private property rights, an organization that employs and is supported by Ohio residents and businesses, *amicus* Reason Foundation has an interest in the outcome of this case. Reason Foundation promotes voluntarism and individual responsibility to social and economic interactions, the rule of law, private property, limited government; and the seeking of truth via rational discourse, free inquiry, and the scientific method. The world leader in privatization, Reason Foundation is known for practical and innovative public policy ideas that emphasize competition, transparency, and accountability for results. Reason Foundation publishes *Reason*, the magazine of free minds and free markets, and has a research program dedicated to land use, planning, and urban redevelopment. Reason Foundation has participated in *amicus curiae* in significant cases involving individual rights and the rule of law, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 206 (2003), and *Ashcroft v. Raich*, No. 03-1454 (U.S. 2004), and *Kelo vs. City of New London* (04-108) 268 Conn. 1, 843 A.2d 500, affirmed.

III. SUMMARY OF ARGUMENT

The opinion in the *City of Norwood v. Horney and Gamble* presents the Court with the

question of whether unblighted private property can be acquired through eminent domain and transferred to a private developer. This brief aims to demonstrate, through historic and current examples, that land assembly for real estate development naturally occurs in the marketplace and that limitations on the use of eminent domain for such development would not halt re-development or the improvement of local economies through private investment. In fact, restraints on eminent domain increase the probability of re-development efforts by current property owners by giving them the assurance that the unpredictable application of eminent domain will not destroy their investments. Because the eminent domain process results in the undervaluation of property interests, its anticipated use deters current owners from expending resources to improve their properties.

In the eminent domain process, property to be ‘taken’ valuation ignores future profits. The transfer of private property to developers *increases* the risk of ownership of urban land, and it also *decreases* risk for the influential developers who are recipients of the land. When the government uses eminent domain on the behalf of a developer, the land acquired is a subsidy to the developer. It allows him to maximize their profits by using the equity of the current owners. The homeowners and small businesses least able to sustain losses are being asked to carry the burden for development.

The properties in *Norwood* were targeted by Rookwood Partners because the location was desirable. In fact, the property was identified for its proximity to Interstate 71 and an upper income neighborhood in the City of Cincinnati. The developer, Rookwood Partners, approached the city of Norwood and asked that an urban renewal study be commissioned for the neighborhood with the intention of using the results as a basis for using eminent domain to acquire the properties after their owners decided not to sell. Clearly Rookwood Partners expects

profit in that location. The subsequent finding that the neighborhood was in danger of deteriorating is a *posthoc* justification for the acquisition.

Development has traditionally been accomplished by the private sector. There is no real economic reason for the recent departure from that tradition evident in the suddenly rampant use of eminent domain to assemble private property for re-conveyance to private developers upon the allegation that the desired property is "underutilized" or in danger of being blighted at some nebulous point in the future. In addition to the liberty interests, potential for corruption, history of over-subsidized failures, and burden of public bond debt which militate against such a distortion of the "public use" clause (discussed in other briefs supporting the Appellants in this case), there is the simple reality that naturally occurring economic incentives have and will continue to adequately promote healthy development by the private sector. Moreover, where government wishes to stimulate development, there is a vast array of development incentives available to accomplish that without resort to the lend-lease of its eminent domain power for land assembly.

In summary, the over-use of eminent domain will have a chilling effect on the rigorous economic screening of projects naturally occurring in the private marketplace, and may result in an increased number of unsustainable development projects. It will also undermine the work ethic that is essential for the success of a free economy and survival of a free society.

IV. ARGUMENT

A. Location, Location, Location

Rockwood Partners targeted the Edwards Road Area as the site for its development because of excellent visibility, highway access, and close proximity to some of greater Cincinnati's most affluent residential areas and the downtown central business districts of Norwood and Cincinnati. Such scenarios are commonplace.

Billionaire hotel magnate, John Q. Hammons, owns Embassy Suite hotels throughout the country. He recently admitted that he flies over cities looking for prime real estate and then asks the local government entities to use eminent domain to acquire the sites¹ -- even though his hotel chain announced in 1998 that it would stop building new hotels to reduce debt load. He now uses his own funds buttressed by acquisition using eminent domain.² Mr. Hammons recently located an unblighted block with productive businesses in Lincoln, Nebraska. Government bureaucrats were eager to use eminent domain to acquire the properties even though other high-quality hotels in the nearby areas had recently been remodeled and were still experiencing only 59% occupancy³.

Samuri Sam's, a recently opened fast food franchise business in leasehold commercial space on the targeted block, was owned by a former football player for the University of Nebraska. He calculated that between his loss of business revenue, loss of business location, loss of remodeling investment in his leasehold space, and forced untimely sale of the new home he and his pregnant wife had just purchased, they would lose everything that they had, and be forced to move in with

¹ Deena Winter, *City Weighs Use of Eminent Domain for Development*, Lincoln Journal Star, February 20, 2005, available at <http://www.journstar.com/articles/2005/02/20topstory/doc4217cf330de01973006499>.

² *Id.*

³ Deena Winter, *Operators of Other Hotels Say Project Won't Add Customers*. Lincoln Journal Star, February 27, 2005, available at <http://www.journstar.com/articles/2005/02/27/local/doc42214c2a6505962416468>.

her parents. He enlisted the assistance of his friends and fellow ex-Cornhuskers to defeat the use of eminent domain at the level of the city council.⁴ It did not hurt his cause that Cornhusker ex-coach, Tom Osborne, is now Congressman Osborne. Most property owners, or their leasehold business tenants, do not have such influence and are typically powerless to affect legislative decisions. After defeat of the use of eminent domain, Samuri Sam's was sold, and the businessmen on that block fear that they will not have the clout to defeat eminent domain when Mr. Hammons returns, as he most certainly will.

Increasingly, however, eminent domain has become a standard part of the economic development "tool kit", where private interests expect to see it used as a routine part of their investment decisions. Ohio cities are either condemning or threatening to condemn more than 400 properties between 1998 and 2003 alone. These actions range from clearing land for Chrysler plant in Toledo to enabling the expansion of a Toyota-Mercedes Benz auto dealership in Akron to making way for a Walgreen's pharmacy in Norwood (a project preceding and independent of Rookwood Exchange, the subject of this litigation). In many cases, these actions uproot long-time residents and neighborhood businesses who have made substantial commitments to their community and their property.

B. The Private Sector Has Been and Will Continue to be Successful in Bringing about Healthy Economic Development Without the Use of Eminent Domain.

The economy of this country was built by the private sector. Though government has at times played an important role in facilitating development, it has been the actions of the private sector that have assembled and cleared the land, and built the factories, businesses, and homes that have created the economic foundation of local economies.

⁴ Deena Winter, *Council Approves Amended Hotel Project*, Lincoln Journal Star, March 1, 2005, available at <http://www.journstar.com/articles/2005/03/01/local/doc42240873b0ba4065947368>.

Today, the same incentives, which have always attracted private investment and spawned sustainable development, continue to draw private real estate developers all over America. Private developers continue to mobilize to opportunities born of supply and demand, whether they are build-to-suit projects or speculative ventures (premised upon the idea that once the project is underway, it will attract users that will rent space or purchase the project).

Obviously, land is a key component for any real estate project - from suburban development to urban infill or redevelopment. Developers can acquire land at many stages of the development process. Some land bank property for years, waiting for the appropriate market opportunity. Others purchase the land from long-term owners or land speculators who have assembled the land. They may purchase the property without a specific development in mind, but with the recognition that the market is ready for some development of the site. For speculative ventures, developers commonly acquire an option and close or lease the land only after substantial predevelopment analysis has been done and the developer is confident enough to commit to the project. If the location is right, and the appropriate value can be generated by the assembly, the private sector has a variety of negotiating techniques to induce individual private owners to either sell or joint venture in the project.

In metropolitan areas, significant land assembly efforts are often necessary for major real estate development, but the private sector does this well. For example, in Las Vegas, Focus Property Group acquired 2,400 acres of land (consisting mostly of parcels of five acres or less) in order to build a master-planned community now known as Mountain's Edge. Though it took over five years to assemble the land, the project is now under construction and will ultimately consist of 10,000 single family residences, 3,000 multi-family units, 150 acres of commercial development, parks, trails, and several schools. Focus Property Group (a company established in

1990 which specializes in the study of real estate patterns, assemblage of land, and development of planned communities) successfully secured a re-zoning, obtained development approvals, and installed preliminary infrastructure necessary to launch construction.⁵ Similarly, in Howard County, Maryland, more than

⁵ Hali Bernstein Saylor, *Focus Provides Service to Builders*, Las Vegas Newspapers, Jan. 17, 2004, available at <http://www.lvnewspapers.com/realestate/REJan-17-Sat-2004/Front/22950800.html>; Andy Flaherty, *Land Development in Nevada: From Dirt to Dream House*, Builder & Developer Magazine, June 2004, available at www.bdmag.com/issues/jun_2004/d_headlines.htm; Larry Bross, *Nevada's Land Disposal Lauded by Federal Government*, Builder & Developer Magazine, July 2004, available at http://www.bdmag.com/issues/jul_2004/d_headlines.htm.

15,000 acres were assembled to create the new city of Columbia.⁶

The private sector is also effective in urban land assemblage. For instance, in 1999, Commonwealth Development Group assembled 21 separate parcels of land in Providence, Rhode Island to construct a 1.4 million-square-foot mall with space for 160 shops and Nordstrom's as the anchor tenant. The \$460 million project included a four-level mall built atop a five level parking deck and is designed to compliment the architecture surrounding the nearby state capitol building.⁷

Likewise, in the mid-1980s, two West Palm Beach, Florida developers discreetly assembled all of 26 contiguous blocks of a run-down inner city area by purchasing over 300 separate parcels from 240 different landowners in nine months (using twenty different brokers), and then convinced the city to approve a master plan for a mixed use development, then dubbed "Downtown/Uptown." All the buildings, except for an historic church, were razed. But for the real estate crash of the early 1990's, these developers would likely have successfully completed the project. They were, however, forced into foreclosure, and the city purchased the assemblage and issued bonds for infrastructure. This attracted major developers from New York and Miami who leased the land from the City and developed it successfully. Thus, the 77 acre area that had been privately assembled is now the thriving mixed use development (residential, retail and entertainment) known as "CityPlace," and its economic impact on West Palm Beach has been compared by some to the impact of Disney World on Orlando.⁸(Disney World, of course, was a

⁶ Robert Moxley, *Creating a New City: Columbia, Maryland* in *Land Acquisition: The Realtor's Perspective* 23, (Robert Tennenbaum, ed., Perry Publishing, 1996).

⁷ Jon Springer, *Providence Place Debuts Under Deadline, Shopping Centers Today*, Nov. 1, 1999, available at <http://www.icsc.org/srch/sct/current/sct9911/14.html>.

⁸ See Johanna Marmon, *Urban Renewal-West Palm Beach*, South Florida CEO, May 2002, available at http://www.findarticles.com/p/articles/mi_m0OQD/is_4_5/ai_100500854; Becky Swann, *The Story of CityPlace*, International Real Estate Digest, Feb. 27, 2001, available at

paradigmatic private assemblage, the success of which is known worldwide).⁹

These examples of successful private land assemblage, driven by naturally-occurring economic forces, are in stark contrast to many publicly-funded, speculative real estate assemblages which have failed miserably.

Examples of failures are not hard to find.

The infamous taking of the Detroit neighborhood called Poletown for General Motors¹⁰, did not result in the predicted economic boost to Detroit. It was only 15 years later, under a different economic climate that revitalization actually occurred.¹¹ It was the fostering of a healthy private sector by the local Detroit government that gave Detroit's economy a boost. Nothing can now undo the severe economic sacrifice made by the property owners, nor can the community fabric of that neighborhood be restored.

Another example of an urban renewal failure is the recent sale of "Block 37" in Chicago, publicly acquired and cleared by the city more than fifteen years ago to foster redevelopment on

<http://www.ired.com/news/2001/0102/cityplace.htm>; David Takesuye, *Reuniting Assets*, Urban Land Institute, Sept. 2003, available at <http://research.uli.org/Content/Awards/2002/CityPlace.htm>; Susan Salisbury, *Paydirt*, Palm Beach Daily Business Review, Dec. 16, 1998 at A1. Though not mentioned in these articles, the City condemned a few small parcels for CityPlace. This was because a few original owners (who had readily sold to the two developers during the original private assemblage) had gotten their properties back through foreclosure and were unwilling to re-sell to the City for the same price range later. By the time the City sought to acquire them, the large assemblage had occurred, land had been cleared for development, zoning approvals had been obtained, and their land had increased in value. When these few owners refused to accept the City's offered price (because it was premised on appraisals which included no assemblage value), the City filed eminent domain proceedings.

⁹ Richard E. Foglesong, *Married to the Mouse: Disney World and Orlando* (Yale Press 2001); Kent Wetherell, *Florida Law Because of and According to Mickey: The "Top 5" Florida Cases and Statutes Involving Walt Disney World*, 4 Fl. Coastal L. J. 1 (Fall 2002) at 1-3; Mark Derr, "Tommorrowland Today," *St Petersburg Times*, Oct. 22 1989.

¹⁰ *Poletown Neighborhood Council v. Detroit* (1981) 410 Mich. 616, 304 N.W.2d 455.

¹¹ Bill Johnson, *The Detroit News*, February 27, 1998. Also see footnote 17.

State Street. The land sat idle, and the City finally sold it this year for a \$23 million loss.¹² Or, the half city block (formerly eight separate properties) on Wisconsin Avenue (a main retail corridor) condemned, cleared, and consolidated by the City of Milwaukee in 1985 for hotel development – it has been used as a parking lot ever since.¹³ Demolition and consolidation of parcels failed miserably in Detroit and St. Louis where populations dropped significantly from 1950 to the year 2000 after urban renewal, intended to foster economic growth, backfired.¹⁴ Several abysmal failures have resulted more recently from economic development condemnations in California.¹⁵

Even in small cities, urban redevelopment projects can fail. Two blocks of land adjacent to a major university campus research facility were taken from a private landowner. He had

¹² Gary Washburn, *City Loses on Block 37 Sale, Bets on Future*, Chicago Tribune, Oct. 13, 2004; William Sluis, *Block 37: New Partner Sought; Tenant Wavers*, Chicago Tribune, Nov. 28, 2004.

¹³ Tom Daykin, *Hotel Planned to Complement Midwest Airlines Center*, Milwaukee Journal Sentinel, Nov. 13, 2004, available at <http://www.jsonline.com/bym/news/nov03/184819.asp>; Tom Daykin, *City Sells Downtown Site for \$1*, Milwaukee Journal Sentinel, Mar. 24, 2004, available at www.jsonline.com/bym/news/mar04/217054.asp; Mark Savage, *New Hotel Planned for Downtown*, Milwaukee Journal Sentinel, Nov. 28, 1999, available at www.jsonline.com/news/metro/nov99/hotel29112899.asp.

¹⁴ Regarding Detroit's decline despite (or perhaps because of) urban renewal efforts, see Joel Kotkin, *The Future of the Center: The Core City in the New Economy* (Davenport Inst. Nov. 1999), available at: <http://www.publicpolicy.pepperdine.edu/davenportinstitute/reports/center/center3.html> and Julia Vitullo-Martin, *Detroit Fights Back*, 5 City Journal 55 (Summer 1995), available at: http://www.city-journal.org/html/5_3_detroit-fights.html. Regarding the ineffectiveness of urban renewal in St. Louis, see the City's own website available at <http://stlouis.missouri.org/citygov/planning/research/data/about/history.html>, stating "urban renewal efforts and public housing development programs could not stem the tide of population loss, and in some cases contributed to the decline." See also M. Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949-1962* (The M.I.T. Press, 1964).

¹⁵ See Douglas Shuit, *Long Beach Mall Finds Its Niche, But Not Survival*, L.A. Times, June 15, 1999 at B13; Anne Rackham, *Legal Costs, Failed Project Plan Carry Hawthorne to Brink*, Auditor Reports, L.A. Bus. Jour., Apr. 24, 1995 at 1; Michael Flagg, *Troubled Hotel Becomes Symbol To Critics*, L.A. Times, Sep. 12, 1994; Ted Rohrlich, *City Made Bad Realty Investments, Report Shows*, L.A. Times Mar. 30, 1998 at B1.

painstakingly purchased blighted properties, demolished them, and assembled the land without the use of eminent domain to build a high-quality, mixed-use development with computing and communications support complementing the research facility.¹⁶ The government argued that the land was blighted because it was vacant, at the same time that it was making repeated threats to initiate condemnation of the land in mid-construction, should the developer actually embark on his proposed development. It took many years for the government to develop the land, which it eventually gave to other more politically connected private persons, with no equity of their own in the project. The structures they erected, began to fall apart almost immediately, and are known to local residents in the neighborhood as “Yu-go’s.” (The term has a dual meaning: the cheap Yugo automobile no longer sold in America; and, ‘you go’ when the government is ready to take some more land).

These are but a few examples of municipal land speculation, underwritten by taxpayers, which were never economically sustainable. Several more are discussed in S. Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* (2004).

This pattern of failure is often the result of inadequate planning and economic evaluation by governments and/or undue influence of special interests. As one commentator put it:

The greater involvement of business in setting local public policy, the increasing competition for jobs between localities, and a concomitant rise in the amount of state and local government subsidy of corporate activity all suggest that local government is extremely susceptible to corporate influence when making its economic development decisions. Such influence may prevent local officials from performing the rational calculus needed to decide whether a taking's displacement costs - including the loss of valuable affordable housing stock, small business matrices, and viable communities - are indeed outweighed by unenforceable promises, or no promises at all, of job creation, income, sales, and property tax revenue, and speculative spin-off spending.¹⁷

¹⁶ *Patterson v. City of Lincoln* (1996), 250 Neb. 382, 550 N.W. 2d 650.

¹⁷ Adam Hellegers, *Eminent Domain as an Economic Development Tool*, 2001 L. Rev. M.S.U.-D.C.L. 901 (2001) at 903. See also John Gibieaut, *The Money Chase*, A.B.A. Jour., Mar. 1999 and Robin Paul Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*,

Planners and bureaucrats have little background in economics, psychology and sociology. It should not be a surprise that their focus is on the physical attributes of redevelopment and speculative anticipated tax revenues and inflated cost:benefit ratios. The Cincinnati Business Courier analyzed two decades of efforts by the City of Cincinnati to revitalize its downtown using various forms of subsidization.¹⁸ After investing \$508 million into dozens of projects, including major retail developments, the study found that property values in subsidized blocks appreciated more slowly, employed fewer people, and housed fewer residents than the unsubsidized blocks. “Five of the largest six subsidized projects are worth less than the city’s investment in them.”¹⁹ Private investment was discouraged by the city’s efforts, putting nearly one third of the central business district in government ownership.

Unfortunately the lack of insight into societal problems often results in developments lacking residents or business owners with commitment and long-term social ties. Development project costs do not include the losses of “societal capital”²⁰ -- for example, the lack of assistance within neighborhoods for the elderly, increased crime, and lessened attention to the overall attractiveness of neighborhoods. These attributes of a neighborhood are priceless, but there is definitely a pecuniary affect on the overall economy. As neighborhoods erode, citizens will

40 Vand. L. Rev. 67 (1987), which advocates leaving commercial/retail economic development to the marketplace because:

Under current practices for facilitating urban revitalization through co-financing activities, special interest groups are using the political means to reallocate resources to their own uses. This results in a distortion of market allocations because allocations are made on the basis of pure political power rather than according to competitive criteria. *Id.* at 99- 100.

¹⁸ Dan Monk and Lucy May, *Road to Nowhere*, Cincinnati Business Courier, May 31, 2002.

¹⁹ *Id.*

²⁰ See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community*, New York, Simon & Schuster (2000) for a discussion of “social capital.”

continue to look more toward government to take care of their needs, increasing the demands on welfare programs, Medicare, and Medicaid, and thereby accelerating the already high costs of these programs.

C. Prohibiting the Exercise of Eminent Domain for Projects Initiated by Developers Will Not Prevent Redevelopment

The use of eminent domain may appear expedient, but it is not essential to development.

One treatise described the respective roles of government and the private sector as follows:

Development in the United States has traditionally occurred through a conventional process in which the public and private sectors perform independent functions and therefore tend to remain at arm's length from one another. As a general rule, simple projects in strong markets have historically followed conventional modes of development, and any mix of function between the public and private sectors has been seen as a conflict of interest on the part of local government, the public sector was expected to perform the functions of regulation and broad planning, providing the needed services - schools, roads, water, sanitation, fire and police protection - to support new development. The private developer originated projects based on information about the market and formulated a specific plan for a project with public policy in mind - all without the public's direct involvement in stages one and two of the process. Consequently, the public sector did not assume any of the entrepreneurial risks or absorb any project-specific costs typically borne by the private sector.²¹

Much has been written about the departure from this traditional model, when government took on more of an entrepreneurial role during the period of federally-funded urban renewal, and there has been substantial criticism of how local government handled the roles of land assembly, and the resulting impacts on municipalities.²²

As a result of cutbacks in federal urban aid in the late 1970's, local governments were forced to return to the more traditional model of providing catalytic incentives for development instead of themselves undertaking land assemblage. Developers had not done very well with urban

²¹ Mike E. Miles, Gayle Berens and Marc A. Weiss, *Meshing Public and Private Roles in the Development Process in Real Estate Development: Principles and Process* 269 (Nancy H. Stewart, ed, 3d ed., Urban Land Institute 2000).

²² See, e.g., M. Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949-1962* (The M.I.T. Press, 1964) and C. Hartman, *Between Eminence & Notoriety: Four Decades of Radical Urban Planning* (CUPR Press, 2002).

renewal, and were therefore concerned about whether project economics were realistic.²³ A popular text on real estate development²⁴ provides an exhaustive list of incentives devised by local governments. It illustrates that there are many catalytic alternatives beside use of eminent domain.²⁵

The most common form of government incentive, and historically, the most effective, is the provision of infrastructure. Investments in water, sewer, bridges, street grids and transit helped create, for example, the high real estate values in New York City's Manhattan Island. A pattern of such successful intervention extends across the nation.

Other common and effective government incentives are zoning and density allowances to attract corporate relocation and to increase the economic feasibility of the desired development. This regulatory form of incentive can be further augmented by fast track regulatory processes for desired types of development, including one-stop permitting program where a staff person is assigned specifically to shepherd targeted types of projects efficiently through the administrative process.

Waivers and rebates of fees are also substantial regulator incentives. Direct financial assistance is common in the form of property tax abatements, bond financing, low interest loans, infrastructure improvements, or utility rate incentives. The list of examples could go on and on, and it illustrates the "let's make a deal" ability of local government to work with a developer to

²³ M. Anderson, *id.* p.122, recites that ... the developer's investment is relatively small and the potential profit is high, but so are his risks, and the past experience of private developers indicates that urban renewal under federal auspices has not been as lucrative or as easy as originally anticipated. Most of the developer's profits are still on paper, and though they may be large, his chances of getting them are small.

²⁴ Mike E. Miles, Gayle Berens and Marc A. Weiss, *Real Estate Development: Principles and Process* (Urban Land Institute, 3d ed., 2000).

²⁵ *Id.* at p. 281. Other sources include lists with additional incentives. See. e.g., T Lyons and R. Hamlin, *Creating an Economic Development Action Plan: A Guide for Development Professionals* (Praeger Publishers, 2001).

make the economics of a desired project work.

The public sector therefore has many tools at its disposal to foster redevelopment and economic development. Land assembly is just one of them, and there are many techniques to facilitate land assembly without resort to eminent domain, including contribution of surplus government property,²⁶ land exchanges or swaps between the public and private sectors, and relocation assistance from the public sector for owners or space users in the property slotted for redevelopment.

D. The Use of The Use of Eminent Domain to Assist Private Developments Forces Loss and Extended Risk Onto Property and Leasehold Owners, Subsidizes Developers, and Discourages Investment in American Urban Areas

A developer that utilizes the government to acquire properties through eminent domain is avoiding the restraints placed on him by market forces, and therefore does not carry the risk usually associated with such high profit endeavors. Politically influential developers are being subsidized by the groups of people least capable of accepting the burden.

Low and moderate-income families have a disproportionate amount of their wealth in land. The equity in their residence or business is a main source of retirement income. Small businesses often exist on small profit margins and goodwill, and location is critical to their economic survival. The redistribution of land in America following urban renewal projects is a significant source of increasing poverty in America.²⁷

Although the theoretical compensation is the full and equivalent value, it is well-established

²⁶ A sizable chunk of the Mountain's Edge assemblage was government surplus land acquired by auction. See sources cited at note, supra.

²⁷ Charles C. Geisler, *Land and Poverty in the United States: Insights and Oversights*, 71 Land Economics (1995).

that eminent domain results in the undervaluation of property²⁸ and is at odds with the general principle of fundamental fairness. The city of Cincinnati, for example, has been ordered to pay property owners four, five times, and six times the amounts they agreed to using eminent domain when they have been challenged in court.²⁹

The comparable sales approach, most favored by courts, is usually used but is inappropriate in an area ripe for development. Appraisers find the comparable sales approach to be easy to manipulate. They are given great latitude in using sales that are old, distant in time, not of arms length transactions, while simultaneously avoiding recent sales that would require them to value property at a higher, more realistic value. Although the black letter law prevents this, it is common in practice. Appraisers hired by the government will value assembled land at lower than the sum of individual lots if it suits their purpose.

When a property owner is the developer or a willing seller, he may hold the property until the time is ripe for development. Like any sophisticated investor, he will hold the land until a desirable interest rate is available. If he is forced to sell, the economic conditions may not bring a reasonable price. Appraisers should, but do not, adjust for the effect of interest rate cycles or transient fluctuations in the market due to tax changes, or inflation,³⁰ nor must they adjust the purchase price to the time of buildability.³¹

²⁸ Frank L. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law*, 80 Harvard Law Review 1165 (1967).

²⁹ Mya Frazier, *Eminent Domain Case May Cost City \$4.3M More: Jury Raises Appraised Value Sixfold on Third Street Site*, Cincinnati Business Courier, December 3, 1999; See also Greenhut, *Abuse of Power*, Seven Locks Press (2004) for cases outside of Ohio.

³⁰ *Patterson v. City of Lincoln* (1996) 250 Neb. 382, 550 N.W. 2d 650.

³¹ The purchaser of land for development must hold the land, waiting until conditions have arrived making the appropriate development buildable. These conditions for buildability typically include occurrence of a solid trend toward low interest rates, adjustment of the rental or sales market to transient conditions, solidification of predicted development nearby, and successful acquisition of related parcels, easements, special permits, etc. Having estimated the

In simple terms, this means that the current property owners are divested of future profits, which are transferred to the recipients of their land. When a landowner is not made whole, he is no longer in a position to reinvest in equivalent property, his wealth is redistributed to special interest groups, and his Constitutional guarantee of just compensation is denied.

The burden for proving value falls on property owner. This is an onerous burden because property owners have limited resources compared to the government and affluent developers. Both the government and the special interest developer have every incentive to low ball the value the property to enhance benefit: cost ratios used to justify speculative anticipated tax revenues.

It should be of no surprise if private investment in inner cities disappears, or can be accomplished only with significant government subsidies. The risk of condemnation will chill, if not quell private investment. The United States is not operating under the burden of excess private savings and investment, particularly in its inner cities. Fear that adequate compensation will hedge risky investments is not realistic.³²

It is not necessary that property owners be “collateral damage.” There are alternatives that result in better developments and fairer treatment to the current owners. It rewards them for their efforts and encourages future investment.

wait until conditions for buildability arrive, the property owner estimates what the land will be worth to her in inflated future dollars when it becomes buildable, net of demolition and other costs. She sets a target acquisition cost at or below this, and discounts that value back to the purchase date. The estimated future target acquisition price is divided by a discount factor= $(1+\text{discount rate})^n$ where n is the number of years wait required, and the discount rate is the usual sum of real rate at 4%, and inflation rate at 5% but risk is much higher at about 11% for an approximate total of 20%. Reversing the perspective, one is able to look backward from a successful land assembly and development to see how astutely a buyer and seller predicted conditions for buildability.

³² See William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra Law Rev. 1 (1995).

E. Allowing Existing Landowners to Participate in Economic Development Projects is a Common Practice in Many Countries, and is a Viable Alternative to Condemning Out Existing Property Owners.

The United States is a relatively young country, and has not had the wealth of experience in land assembly that many older nations have accumulated.³³ During the modern era, it has used eminent domain for land reassembly to a much larger extent than many other countries because of the spate of federally supported condemnations for slum and blight clearance. This, and the more recent trend of using eminent domain for development of non-blighted areas and re-conveyance, has arguably retarded the use of resourceful assembly techniques developed in other countries.

Over time, the practice of including property owners in redevelopment through economic incentives, rather than condemning them out, may nonetheless increase in the United States because of the lack of funds to acquire the property, objections to the use of eminent domain, and the growing recognition that, for truly successful economic development, the existing landowners must be brought to the table as one of the important "stake holders."³⁴

1. Government-Created Incentives: An Historic Example

Though land assembly in partnership with existing landowners has become more common in other countries, the United States is not without some precedent for it. President George Washington resourcefully accomplished the land assembly needed to develop our nation's capital by involving landowners in the process and allowing them to share in the economic rewards.

Washington accomplished this without any exercise of eminent domain, through a joint

³³ W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982).

³⁴ Florida Atlantic University / Florida International University Joint Center for Environmental and Urban Problems, *Development Without Displacement Community Handbook* (August 2000), available at http://www.catanese.fau.edu/3publications/dvlp_wo_displacement.pdf.

venture by which land would be voluntarily pooled, re-zoned (agricultural land to platted developable lots), and redistributed among the contributing landowners, who would be compensated for the new public spaces in cash and swap-backs of up-zoned land. One historical account described Washington's program as follows:

The Proprietors Enter Partnership with the Government. The new arrangement provided that the proprietors should convey their land to the federal government, and after the city plan had been prepared they would receive back, in exchange, every other one of the platted lots. For a set price of twenty-five pounds per acre, the proprietors would be compensated for federal building reservations as well as for the unplatted lands required for public use as squares, walks, and similar elements. The land required for streets and alleys would be dedicated by the proprietors without charge. At one stroke, this new arrangement placed the proprietors in partnership with the federal government - and with each other - in urban development.³⁵

This historic example is still timely, given the array of economic incentives that governments can extend.

2. Landowner-Organized Assembly

There are also instances where the landowners themselves recognize the economic benefit of assembly and act on their own to mobilize to the economic opportunity. An interesting account of this is chronicled in the magazine piece, *When Neighbors Sell as a Group*, Changing Times Magazine, August 1985, as follows:

To Randy and Susan Campbell the prospect of selling their Atlanta home at anything near its appraised value looked dim. Newly erected office buildings had hemmed in their neighborhood, forever changing the rural character that had attracted them to the area just four years ago. The traffic had become so bad that it blocked the entrance to their subdivision during morning and afternoon rush hours. To top it off, property values were on the skids.

But you needn't feel sorry for the Campbells; their property is now under contract for \$225,000, which is easily twice what it normally would have fetched as a residence. That, however, is a fair price when the Campbell's half-acre lot is packaged with other lots that

³⁵ F. Gutheim, *Worthy of the Nation: The History of Planning for the National Capital*, The Smithsonian Institution Press, 1967), p. 23. For the full text of the agreement, see H. P. Caemmerer, *Washington: The National Capital*, Washington, D.C., U.S. GPO (1932), pp. 19-21 and W. Tindall, *Standard History of the City of Washington* (1914), pp. 76-78.

make up the Lake Hearn subdivision and sold as part of an 83-acre tract of commercial real estate. One of these days their neighborhood will turn into six office buildings, a hotel and possibly even a museum.

Other sets of neighbors who have banded together to cut deals with commercial developers are reporting that they're getting prices three and four times higher than the going residential prices. It hasn't been easy by any means, but the handful of neighborhoods that have succeeded (there have been about a dozen to date, with dozens more taking a stab at it) have blazed a trail for those who want to try it."³⁶

In addition to describing steps for neighbors to follow in assembling their properties, finding a developer, and selling as a single site, the article discusses "holdout" problems and compensation issues, as follows:

More than likely there will be a few holdouts, but they don't have to stop you at this point. Architects have produced any number of ingenious designs that can skirt missing pieces.

The 22 residents of the Courtlands neighborhood in Arlington, Va., and 45 Atlanta families in the Peachtree-Dunwoody Valley subdivision agreed that sellers would get an equal number of dollars for each square foot of land they owned....

The 46 Oak Brook, Ill., residents living in the Ernie Pyle subdivision also worked out a compromise. They developed a formula for sharing the wealth that was weighted in favor of land area owned, with some concessions made to the value of the homes.³⁷

The obvious economic incentive for voluntary landowner participation in projects that will enhance the tax base and stimulate local economic vitality is the ability to be compensated, not on the current use market value, but on the basis of the value of their land for the more intensive use envisioned. That is why the owners band together and work in concert with a selected developer to obtain local government approvals for the redevelopment project.³⁸

³⁶ *Id.*, pp. 45-48.

³⁷ *Id.* at 46.

³⁸ The landowners in both the Lake Hearn neighborhood of Atlanta, Georgia and the Courtlands neighborhood of Arlington, Virginia assisted the developer during the rezoning process, the success of which was a precondition for the purchase by the developer of the properties at the higher price. See *When Neighbors Sell as a Group*, *Changing Times Magazine*, August 1985 at 48, T. Clary and P. Rasmussen, *The Buyout Phenomenon*, *Planning*, October 1985, at 18, and Robert Guenther, *Atlanta Neighborhoods Unite to Sell Homes to Developers*, *The Wall Street Journal*, May 23, 1984, Page 33, col 1.

Self-organized reassembly also occurs in the commercial setting. An effort by a group of downtown Schenectady, New York, businessmen to pool their business property in the mid-1970s led to the rebirth of the deteriorated downtown business district into a two-level shopping mall that vied with the suburban centers for beauty, charm and variety. Their efforts won them an Award for National Excellence in the National Recognition Program for Community Development Partnerships from President Ronald Regan in 1982.³⁹

3. Third Party Private Sector Assemblage

Brokers and developers have also discovered the merit of involving existing landowners in assembly and development. Real estate brokers often specialize in neighborhood buyouts, seeking areas that fit a profile for profitable assembly and then packaging them for sale to a developer.⁴⁰ For example, in the mid-1980's, a strong trend of such brokerage assembly in older residential neighborhoods led the City Commission of Dallas, Texas to adopt a policy for dealing with the increased number of neighborhood requests for rezoning and redevelopment.⁴¹

In Northern Virginia, a real estate broker hired by a group of neighbors in the Poplar Terrace subdivision is currently working with a selected developer toward a rezoning which would replace their 70 existing homes on 40 acres with 1,326 residential units. This development project has been cited as an example of "Smart Growth" because of its proximity to public transit, and even has support from environmentalists. The average price of the homes in Poplar

³⁹ See P. Jansak, *Private Lot Pooling for Urban Revitalization: The Case of Schenectady, New York*, The Platted Lands Press, October 1985, at 4. Though for a variety of economic and management reasons, the corporation filed for bankruptcy, it was not because of the assembly effort, and in spite of the financial problems, the merchants who formed the corporation did what the local government had not been able to accomplish - they instigated the multi-million dollar renaissance of a truly blighted downtown.

⁴⁰ See R. Knack and J. Peters, *Starting to Spread*, Planning, October 1985, at. 21.

⁴¹ Dallas, Tex, Res. 852290 (July 17, 1985). A similar ordinance became necessary in Arizona. See Scottsdale, Ariz., Res. 3157 (May 15, 1989) on "Neighborhood Assemblage Policy."

Terrace is currently around \$400,000. Under the terms of their agreement, the selected developer (Centex Homes) will pay participating homeowners \$760,000, or more depending on the number of homes approved by local government. There are five holdouts among the 70 owners in the subdivision, but "Centex can just build around them," according to the leader of the neighborhood association.⁴²

Developers also go directly to landowners to negotiate for the sale of their assembled land or for their participation in the development project on the economic premise that the value of the future assemblage justifies either buying out existing landowners at premiums above current appraised value⁴³ or allowing them to share in the profits of the future development through joint venture.⁴⁴

An example of a premium buyout is the 1984 sale of forty-five acres in the underutilized "Farmer's Market" area of Downtown Dallas, Texas, comprising 5 percent of the downtown. Under the lead of a private developer, existing landowners formed an assemblage partnership. Though this project began with the expectations that the partnership would be involved in the development, a syndicate of investors and developers who saw the potential of the project made the traditional "offer too good to refuse."⁴⁵

⁴² P. Whoriskey, *N. Va. Neighbors Hoping to Raze, Rebuild, Profit*, The Washington Post, Sept. 20, 2004, p. A1.

⁴³ See *When the Commercial Builders Invade Suburbs*, U.S. News & World Report, Apr. 29, 1985, at 70 for a discussion of instances where landowners have sold directly to developers - for the right price.

⁴⁴ See R. Knack and J. Peters, *Starting to Spread*, Planning, Oct. 1985, at 21 for a discussion of the growing experience with neighborhood assemblages.

⁴⁵ For a discussion of the land assemblage and development partnership in the Farmer's Market area in Dallas, see J. Northrup, *The Land Assemblage and Development Partnership*, 16 Real Estate Review 1986) at 90. A case study of this effort can be found at J. Northrup, *The Farmer's Market District: A Land Assembly and Redevelopment Program in Downtown Dallas*, Urban Land, Nov. 1984 at 19. This article also outlines the role that the city played to assist in the success of the District's redevelopment.

A good example of joint venturing with existing landowners is found in Ft. Lauderdale, Florida where a successful urban town home development, known as The Ellington at Victoria Park, is underway. It all started when a developer approached the owner of the first of three sites needed along 6th Street and persuaded him to contribute his properties to a joint venture. Through a refinance, the owner was given some cash out of the deal immediately, and he then assisted the developer in obtaining contracts from his neighbors. In total, the joint venture accomplished nine separate purchases of older homes, apartment buildings, motels, duplexes, etc. to assemble the land for the now award-winning (American Institute of Architects Award for Excellence) development.⁴⁶ By remaining with a project in this fashion, existing owners can share in the risks and rewards of redevelopment.

4. Foreign Experience Involving Landowners in "Land Readjustment"

Providing land owners with the opportunity to assemble their own property and work with developers, to either participate in the redevelopment project or benefit from the increased value created by the assemblage, has existed for many years in a number of foreign countries. Referred to as "Land Readjustment," "Land Consolidation," "Land Pooling," etc., this process essentially pools the land parcels into a single site with the owners retaining a percentage share of ownership rights before and after the development.⁴⁷

⁴⁶ See Robyn A. Friedman, *Townhouse Project Slated for Victoria Park*, Sun-Sentinel, Jul. 8, 2002 at 10, Hannah Sampson, *Up on a Roof; a New High Life*, Miami Herald, Aug. 2, 2004 at B1, and <http://www.theellington.net>.

⁴⁷ See W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982) for the first book in English on land readjustment. Though not a technical guidebook or manual, it provides an overview of agricultural and urban land readjustment. It includes chapters on Japan, South Korea, Taiwan, West Germany and Australia. See also F. Schnidman, *Land Readjustment*, Urban Land, Feb. 1988 at 2, which outlines the foreign experience with land readjustment and discusses how it can be used as a technique for urban development and redevelopment; M. Schultz and F. Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 The Urban Lawyer 197 (Spring 1990) for a

An interesting case study of foreign land assembly is Roppongi Hills in Tokyo, Japan.

Roppongi Hills is a widely acclaimed, \$5 billion mixed-use project on 27 acres (11 hectares) in the heart of the city. It was privately assembled over several years, involving negotiations with more than 600 separate land-right holders. In the end, 200 of these owners chose not to wait for the completion of Roppongi Hills and sold to the developer/landowner partnership, but 400 landowners have remained in partnership with the developer. They hold shares in the development partnership, and many have relocated to the newly constructed residential buildings.⁴⁸

The idea of formalizing landowner participation in development and redevelopment through a land readjustment process has been of interest for a number of years, and many academics and scholars, as well as developers and government officials, continue to hold conferences and seminars on how it can be accomplished.⁴⁹

discussion of how foreign concepts of owner participation can be fostered in the United States, including examples where it has happened without general enabling legislation by traditional real estate techniques; G. Larsson, *Land Readjustment: A Modern Approach to Urbanization* (Avebury, Ashgate Publishing Limited, 1993), containing a manual-like discussion of land owner participation under land readjustment and the process by which it operates; and L. Minerbi, P. Nakamura, K. Nitz, and J. Yanai, *Land Readjustment: The Japanese System: A Reconnaissance and a Digest* (Oelgeschlager, Gunn & Hain in association with the Lincoln Institute of Land Policy, 1986) for a very detailed examination of how the process of land owner participation works in Japan.

⁴⁸ *Roppongi Hills*, Vol. 33 Urban Land Institute Case Studies # 17, Oct.-Dec. 2003 also available at http://www.casestudies.uli.org/DCS_Frameset_Other.asp?Section=8&CSID=C033017A.

⁴⁹ United States land readjustment possibilities are examined in M. Schultz and F. Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 *The Urban Lawyer* 197 (1990). See also, G. Liebmann, *Land Readjustment for America: A Proposal for a Statute*, 32 *The Urban Lawyer* (2000). W. Doebele, *Land Readjustment: A Different Approach to Financing Urbanization* (Lexington Books, 1982), is a product of the proceedings of a 1979 conference on "Land Consolidation: Potential for New Urbanization at the Rural Fringe" held in Taoyuan, Taiwan. Since that time a dozen major international conferences have been organized with a goal of expanding the understanding and adoption of legislation to provide a framework for landowner participation in urban development and redevelopment. The most recent session was held March 21-22, 2002 in Cambridge, Massachusetts at the Lincoln Institute of Land Policy.

V. CONCLUSION

The use of eminent domain for land assembly for development projects initiated by private parties is an inappropriate function of government. It is unnecessary for successful urban redevelopment, will chill the desire to maintain of properties in older urban areas, and provide disincentive for redevelopment efforts by all the private landowners except the politically connected. Developers do not target areas that they wish to develop because they have an altruistic desire to alleviate or prevent urban blight. They target areas because of desirable locations that will generate profits. Private property owners are left worse for the 'taking,' because eminent domain undervalues property, especially property that has been 'held' for a period of time by the current owner. The current owner is therefore becomes required by government to provide the equity for a developer who often has made little if any real investment in the development. This has resulted from the recently acquired taste for expediency among certain members of the private development community who hunger for government to speed up the development process and/or cut existing landowners off from the economic potential of their land by assembling land for them through condemnation. Lured by proffered visions of tax base enhancement and upscale amenities, some local officials are supporting this sort of "corporate welfare," and it not only raises serious Fifth Amendment questions, but skews the evaluation of projects and their long range community impacts. These issues are particularly acute in Ohio where eminent domain is not longer used with impunity in urban redevelopment efforts. Indeed, it is considered a routine tool for redevelopment and private parties, as in the case of Rookwood

This session, "Tools for Land Management and Development: Land Readjustment," brought together experts from Japan, Korea, Israel, Finland, The Netherlands and the United States to once again review and analyze approaches to implementing a more efficient and effective process of including existing land owners in the land planning and development process.

Exchange, are becoming increasingly bold in their willingness to explicitly request its use to improve their “bottom line”.

Private enterprise has built and rebuilt America's cities, and will continue to do so without over-use of eminent domain, in response to sound economic trends. The exercise of governmental authority to transfer property from one person to another is simply not an essential component in redevelopment. Land assembly for re-development is best left to the private sector because it has the developed skill and expertise to more effectively evaluate risk, to understand the complexities of real estate development, and produce sustainable economic development.

For all the reasons stated here, this Court need not be concerned that a ruling in favor of the Appellants in this case will stifle urban re-development in America. On the contrary, this Court should rightly be concerned that allowing the unbridled use of eminent domain for land assembly of unblighted properties and re-conveyance will lead to many ill-conceived, special interest projects, and have a chilling effect on the rigorous economic evaluation traditionally carried out by the private sector.

Respectfully submitted,

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VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS WAS SENT BY REGULAR U. S. MAIL, POSTAGE PREPAID, TO ALL PARTIES ENTITLED TO SERVICE PURSUANT TO SUPREME COURT PRACTICE RULES, ON THE 9TH DAY OF NOVEMBER, 2005.

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