

Blight Sweet Blight

Ohio tried to take these ‘deteriorating’ homes. That proves our property rights need more protection.

BY ILYA SOMIN

In late July, the Ohio Supreme Court issued what may be the most important eminent domain decision since the U.S. Supreme Court ruling in *Kelo v. City of New London* (2005).

Norwood v. Horney indirectly raises an important issue that has often been ignored in the debate over *Kelo*: the condemnation of supposedly “blighted” property.

Eminent domain abuse cannot be effectively addressed without limiting blight condemnations, which have caused more harm than any other kind of taking.

Kelo held that the condemnation of private property for transfer to another private party to promote “economic development” does not violate the Fifth Amendment takings-clause guarantee that property can be condemned only for a “public use.”

This result has been criticized for going against the clear textual meaning of “public use,” which requires that government take ownership of the condemned land or at least that the public have a legal right to use the property. Even if “public use” is defined broadly to include “public purpose,” as the *Kelo* majority does, it does not follow that condemnations that systematically benefit narrow interest groups at the expense of the general public should be permitted. By allowing government nearly unlimited discretion to take property for economic development, *Kelo* facilitates the abuse of the condemnation power for the benefit of politically powerful interests. Virtually any condemnation that benefits a for-profit business can be justified on the basis that it can increase development.

Furthermore, development takings often fail to actually achieve the economic benefits that supposedly justified them in the first place. None of the states that permit economic-development taking require the new owners of condemned property to actually produce any economic growth.

Such concerns have caused a massive political backlash against *Kelo*, leading some two dozen states to enact reform laws that limit or ban economic-development takings. Eleven state supreme courts, including two since *Kelo*, have held that such

condemnations are forbidden under their state constitutions.

Yet even many critics of *Kelo* ignore the danger posed by blight condemnations. In her scathing *Kelo* dissent, Justice Sandra Day O’Connor emphasized that she believes that such takings are constitutional. None of the 11 state supreme courts that banned *Kelo*-style economic-development takings have imposed parallel restrictions on blight takings. And only a handful of the states that have enacted post-*Kelo* reform laws restrict blight condemnations in any meaningful way.

Unfortunately, blight condemnations have most of the same shortcomings as takings for economic development: They transfer property to private parties, often fail to help their supposed beneficiaries, and are vulnerable to exploitation by powerful interest groups.

Moreover, a ban on economic-development takings is unlikely to be effective without parallel restrictions on blight condemnations. Effective reform efforts must address the two major flaws of current blight takings: overexpansive definitions of blight and abusive takings in truly blighted areas.

SPRAWLING DEFINITIONS

Early blight cases upheld takings in areas that closely fit the intuitive notion of blight: dilapidated, dangerous, or disease-ridden neighborhoods. In *Berman v. Parker*, the 1954 decision in which the Supreme Court first upheld the constitutionality of blight condemnations, the D.C. neighborhood in question was characterized by “[m]iserable and disreputable housing conditions.”

Today’s legal definitions of blight are far more expansive. In 2001, a New York appellate court decided that the Times Square area of downtown Manhattan was sufficiently blighted to justify the condemnation of land to build a new headquarters for *The New York Times*.

The Nevada Supreme Court recently upheld a determination that downtown Las Vegas was blighted, thereby permitting condemnation of property for the purpose of building a parking lot for casinos. The court concluded that downtown Las Vegas suffered from “[e]conomic blight [that] involves downward trends

in the business community, relocation of existing businesses outside of the community, [and] business failures.”

Virtually any neighborhood occasionally suffers “downward trends in the business community.” If Times Square and downtown Las Vegas are blighted, it is difficult to find any place that isn’t.

Most states now have broad definitions of blight similar to those of New York and Nevada. Moreover, state courts generally review blight designations by redevelopment agencies under highly deferential standards such as “abuse of discretion,” “clear error,” and the even more permissive “fraud or bad faith.” Even a blight taking that goes beyond expansive state law definitions is still likely to be upheld by courts applying such standards.

Broad definitions of blight severely undermine the effectiveness of post-*Kelo* reform statutes in at least 10 states. For example, five new state laws define blight as including any conditions that impair “sound growth.” “Sound growth” is a broad enough standard to justify virtually any condemnation that might promote development. A reform law that technically forbids economic-development takings but allows them to continue under another name is unlikely to be effective in curbing eminent domain abuse.

URBAN RENEWAL?

Even in cases where the condemned property is genuinely blighted, condemnation often benefits development interests at the expense of the area’s residents. Condemnations in truly blighted neighborhoods probably have caused more harm than either economic-development takings or dubious expansions of the definition of blight.

Large-scale condemnations to alleviate blight began with the “urban renewal” programs of the 1940s and 1950s. Since 1950, blight condemnations have displaced some 4 million Americans, most of them poor African-Americans or Hispanics. Studies show that the majority ended up living in worse conditions than before.

In the 1950s and 1960s, blight condemnations so often targeted black neighborhoods that many referred to urban renewal as “Negro removal.” Overt racism is far less common today, but the political weakness of poor African-Americans ensures that they remain disproportionately victimized by both development and blight condemnations. For this reason, the National Association for the Advancement of Colored People, which is often skeptical of property rights, filed an amicus brief in *Kelo* on the side of the property owners.

The sheer scale of forced relocations caused by blight condemnations dwarfs the harms inflicted by *Kelo*-style economic-development takings. Moreover, the residents of blighted neighborhoods often suffer massive harm from condemnation while their former homes are converted to commercial or residential uses that primarily benefit developers and middle-class residents. In *Berman*, for example, only about 300 of the 5,900 new homes built on the site were affordable to the 5,000 residents of the area expelled as a result of condemnation.

POSSIBLE REFORMS

Reformers should seek both to eliminate overly broad defin-

itions of blight and to prevent abusive condemnations in genuinely blighted areas.

The first of these problems is easier to solve. Several states, notably Georgia and Indiana, have enacted post-*Kelo* reform laws that define blight narrowly. They limit the definition to areas that are clearly dilapidated, cause the spread of disease, or pose a direct threat to public safety.

Norwood shows one way state constitutional law can address the problem. In that case, numerous homes in relatively good condition were condemned under a city code that allowed the taking of “deteriorating” property. The code defines a “deteriorating area” as one characterized by conditions such as “incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete plotting, [and] diversity of ownership.”

In addition to forbidding condemnation of property for economic development, the Ohio Supreme Court refused to permit condemnation under this rationale because the city’s definition of “deteriorating” is based on “factors [that] exist in virtually every urban American neighborhood.” For this reason, the Court concluded that the *Norwood* condemnations were “void for vagueness” and violated the state public-use clause. Although *Norwood* considered the condemnation of “deteriorating” areas rather than “blighted” ones, the same reasoning can also be used to strike down overly broad definitions of blight.

The problem of abusive condemnations in truly blighted areas is far more difficult to solve.

Two states (Florida and Utah) have banned blight condemnations entirely. This approach may be the best solution because condemnation is rarely the best way to eliminate blight. State and local governments have many other tools for promoting economic growth in poor areas. Alternatives include tax breaks, deregulation, transfer of abandoned property to new owners, and enforcement of laws against buildings that cause public nuisances, spread disease, or become safety hazards.

Indeed, condemnation may actually impede the elimination of blight by rendering property rights insecure. Most development economists now agree that strong protection for property rights is a key prerequisite for economic growth in poor areas. Owners who fear the loss of their rights are less likely to develop their property or establish businesses. The threat of blight condemnation thus may well deter productive economic activity in poor neighborhoods more than it stimulates it.

Even if condemnation is the most effective way to eliminate blight in some areas, it is highly unlikely that government will actually limit its use to those locations. The development interests that benefit from blight condemnations have far more political clout than politically weak residents of blighted neighborhoods. The political power of these interest groups is far more likely than any economic theory of efficient condemnation to determine which blighted properties get condemned.

If a categorical ban on blight condemnations is considered too radical, an alternative would be to require condemning authorities to bear the burden of proving that condemnation really is necessary to eliminate the blight in question. This approach might force judges to address difficult evidentiary questions, but

it is nonetheless preferable to leaving blight condemnations virtually unrestricted.

JUDGES MUST ACT

Political factors ensure that the problem of blight condemnations is unlikely to be solved by legislative action alone. Although politicians are currently under pressure to produce reforms after *Kelo*, most of the laws enacted so far have left expansive definitions of blight intact. Ordinary voters lack the time and expertise to carefully study legislative definitions of blight. Legislators can often satisfy them by enacting toothless reforms that do not offend the powerful interest groups that benefit from condemnation. Such tactics are likely to become even

more effective as the *Kelo* backlash wanes and public attention moves on to other issues.

Broad judicial deference to legislative definitions of blight would effectively gut state and federal constitutional guarantees that property can be condemned only for a public use. Judicial power, as well as legislative power, should be exerted to curb blight condemnations. The *Norwood* decision is an important step in the right direction.

Ilya Somin is an assistant professor at George Mason University School of Law. He has written several pro bono amicus briefs in blight cases for the Institute for Justice, which represented the property owners in Norwood.