MORE THAN JUST A PLOT OF LAND: OHIO'S REJECTION OF ECONOMIC DEVELOPMENT TAKINGS

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I. INTRODUCTION

In response to the United States Supreme Court decision in *Kelo v. City of New London*,[1] the State of Ohio dramatically altered its eminent domain laws in just over two years. The *Kelo* decision, which broadened the circumstances under which the government may take private property,[2] engendered much debate and media coverage.[3] In the wake of the decision, the State of Ohio sprang into action, citing fears that the *Kelo* decision granted power to government greater than allowed by the Ohio Constitution.[4] Through a court decision, *City of Norwood v. Horney*,[5] and the passage of comprehensive eminent domain reform,[6] Ohio has swung the pendulum from an increasingly liberal interpretation of when property may be taken to a restriction of this power in the state.

This paper focuses on the development of eminent domain law in Ohio and proposes that it radically changed in direct response to the *Kelo* decision. These changes discussed later in the paper include increased judicial scrutiny of takings, banning takings premised on economic development, and adding more procedure and cost to the condemnation

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[1] 545 U.S. 469 (2005).

[2] *Id.* at 483–84.

[3] Adam Liptak, *Case Won on Appeal (to Public)*, N.Y. TIMES, July 30, 2006, at wk 3 (stating the outcome of the *Kelo* decision provoked a revolt by the state legislatures, and gave rise to a "tidal wave of outrage"); *see also* Jonathan V. Last, *The* Kelo *Backlash*, WKLY. STD., Aug. 21, 2006, at 14.

[4] Am. Sub. S.B. 167, 126th Gen. Ass., Reg. Sess. (Ohio 2005), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=126_SB_167 (last visited September 10, 2009) [hereinafter Senate Bill 167].

[5] 853 N.E.2d 1115 (Ohio 2006).

[6] Am. Sub. S.B. 7, 127th Gen. Ass., Reg. Sess. (Ohio 2007), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=127_SB_7 (last visited September 10, 2009) [hereinafter Senate Bill 7].

process. The main thrust of the changes to Ohio law was to provide more clarity and consistency to the takings process, and provide greater protection to Ohio land-owners.[7]

The rest of this section features an explanation of the general concept of eminent domain and how the Fifth Amendment limits this power. Part II will discuss the development of the modern concept of public use in the United States Supreme Court, showing how the Court has increasingly deferred to legislatures in this area. Part III will focus on the development of eminent domain law in the State of Ohio, showing that the state has largely followed the trend of the United States Supreme Court. Part IV will review the *Kelo* decision, and Part V will review the changes wrought within the State of Ohio in response to the *Kelo* decision. This begins with review of the *City of Norwood* decision and its change to the interpretation of the Ohio Constitution. Following will be a review of the legislative changes to the Ohio Revised Code, ending with a review of potential problems that remain after the substantial changes in Ohio.

A. Introduction to Eminent Domain

Eminent domain is the government's inherent power to take private property and is an attribute of the government's sovereignty.[8] The Fifth Amendment of the United States Constitution[9] does not grant this power; rather, it limits this power.[10] This limitation requires that if private property is taken, it must be for public use, and the government must pay just compensation.[11] The limitation of the Fifth Amendment applies to the states through the Fourteenth Amendment.[12]

The term "public use" "has had an uneven existence" and can be defined narrowly or broadly.[13] A narrow reading construes "public use" to

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[7] Senate Bill 167, *supra* note 4, § 4(B); *see also City of Norwood*, 853 N.E.2d at 1152 (citing *Kelo*, 843 A.2d at 581 (Zarella, J., concurring in part and dissenting in part)).

[8] ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 506 (2d ed. 1993).

[9] U.S. CONST. amend. V ("[N]or shall property be taken for public use, without just compensation.").

[10] CUNNINGHAM, *supra* note 8, at 506.

[11] *Id.*

[12] *Id.* (citing Chi., Burlington & Quincy R.R. Co. v. Chi., 166 U.S. 226, 242 (1897)).

[13] GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT 44 (1998).

mean property physically used by the public,[14] such as land taken for a post office or city park. The broader interpretation of "public use" is construed as public purpose or benefit[15] and is generally conceded as the dominant view.[16] This concept of public use was widely employed to create the nation's infrastructure, such as building roads, railroads, dams, and expanding utilities.[17] The taking is premised on the idea that these projects provide a general benefit to the public.[18] As we will see, this concept has also been employed as a tool to cure social harms, such as blight[19] and real estate market failures.[20]

In addition to constraints on the term "public use," the second limitation on the government's power of eminent domain is that the government must pay "just compensation" for what it takes.[21] Just compensation generally means the fair market value of the property.[22] This amount does not take into account the subjective value of the property (what the property is worth to the owner or what they would sell it for) or consequential costs to the owner (lost profits, moving expenses, and loss of good-will).[23]

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[14] *Id.*; *see also* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y., 491, 493–94 (2006).

[15] SKOURAS, *supra* note 13, at 44.

[16] CUNNINGHAM, *supra* note 8, at 510. See Justice Thomas' dissent in *Kelo*, 545 U.S. at 505–23, for an argument as to why this should not be the dominant view.

[17] *City of Norwood*, 853 N.E.2d at 1132.

[18] *Id.* (citing Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 9–10 (2003); Charles Fels et al., *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681, 702 (1974)).

[19] Berman v. Parker, 348 U.S. 26, 28 (1954). The definition of blight varies between jurisdictions; however, it generally consists of an area, which due to its deterioration, is detrimental to public health, safety, morals, and welfare. *E.g.*, *id.* at 28; *see also City of Norwood*, 853 N.E.2d at 1125 n.5 (example of a codified blight definition); Edward Imperatore, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1029–34 (discussing the origin of the word, "blight," and its subjective definition).

[20] *E.g.,* Haw. Hous. Ass'n v. Midkiff, 467 U.S. 229, 232 (1984).

[21] U.S. CONST. amend. V.

[22] CUNNINGHAM, *supra* note 8, at 512; SKOURAS, *supra* note 13, at 41.

[23] SKOURAS, *supra* note 13, at 42–43.

II. HISTORICAL DEVELOPMENT OF "PUBLIC USE" IN THE UNITED STATES

The United States Supreme Court long ago rejected the narrow interpretation of public use, meaning "actually used by the public."[24] The broader, more modern concept of public use is much more flexible, allowing for property to be taken by the government when it is for a public purpose or benefit.[25]

A. A Major Expansion of Public Use

The modern interpretation of what constitutes a valid public use was first set forth in *Berman v. Parker*.[26] The petitioners in the case owned a department store[27] within an area of Washington D.C. that was to be redeveloped pursuant to an act of Congress.[28] Citing "technological and sociological changes, obsolete layout and other factors," Congress made a determination that conditions existing in the City of Washington D.C. were injurious to the public health, safety, morals, and welfare, and that all means necessary and appropriate should be employed to eliminate such conditions.[29] The area was deemed blighted, citing substandard housing conditions, which included lack of sanitary facilities, ventilation, and light.[30] Congress further stated that the conditions within the city could not be fixed "by the ordinary operations of private enterprise alone" and authorized the "comprehensive and coordinated planning of the whole of the [city]."[31] Congress declared that the acquisition and assembling of property for redevelopment pursuant to a redevelopment plan as a valid public use.[32] In addition, Congress authorized that after assembling the real estate and transferring land to public agencies for the purpose of

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[24] *Midkiff*, 467 U.S. at 244 (discussing Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923) ("It is not essential that the entire community nor even any considerable portion, should directly enjoy or participate in any improvement in order [for it] to constitute a public use.")).

[25] CUNNINGHAM, *supra* note 8, at 510.

[26] 348 U.S. 26, 31 (1954).

[27] *Id.* at 31.

[28] *Id.* at 28.

[29] *Id.* (quoting District of Columbia Redevelopment Act, Pub. L. No. 592, § 2, 60 Stat. 790 (1945)).

[30] *Id.* at n.1 (applying the District of Columbia Redevelopment Act § 3(r)).

[31] *Id.* at 29 (quoting District of Columbia Redevelopment Act § 2).

[32] *Id.*

building roads, schools, and parks, the remaining property could be sold to a third party for development.[33]

The petitioners argued that this transfer of their property to a private entity for development violated the Fifth Amendment, as the taking would be for private use.[34] Further, the petitioners argued that the property in question was commercial property and not blighted.[35]

In a unanimous decision, the Court authorized community redevelopment programs as a vehicle to ameliorate blight.[36] Further, the Court held that the judiciary has an extremely narrow role in determining if a taking is within the definition of public purpose,[37] and stated, "The concept of the public welfare is broad and inclusive."[38] The Court also held that the legislature may determine what is within the public interest.[39] The decision allowed the taking of non-blighted properties pursuant to a redevelopment plan, stating that the means of executing a project is up to Congress to decide.[40] If the means required transfer of the condemned property to a private party, "[t]he public end may be as well or better served . . . ."[41]

The central importance of *Berman* is that the "public use" requirement of the Fifth Amendment is to be construed broadly.[42] The decision transferred the power to decide what constitutes a public use from the judiciary to the legislature and the states "effectively [taking] the judiciary out of the public use business."[43] In addition, the concept of justifying a taking as being within the public use because it is pursuant to a comprehensive redevelopment plan is a theme that runs throughout takings law, as well as in this paper.[44]

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[33] *Id.* at 30.
[34] *Id.* at 31.
[35] *Id.*
[36] *Id.* at 35–36.
[37] *Id.* at 32.
[38] *Id.* at 33.
[39] *Id*.
[40] *Id.*
[41] *Id.*
[42] SKOURAS, *supra* note 13, at 44.
[43] *Id.* at 46.
[44] *See, e.g.*, Bailey v. Hous. Auth. of Bainbridge, 107 S.E.2d 812, 814 (Ga. 1959); Hous. and Redevelopment Auth. of St. Paul v. Greenman, 96 N.W.2d 673, 680 (Minn. 1959).

B. Public Use Expands Further

The public use requirement of the Fifth Amendment was further broadened in *Hawaii Housing Authority v. Midkiff*.[45] To address the problems caused by a land oligopoly, the Hawaii State Legislature enacted a program in which residential property would be condemned and sold to the existing lessees of the property.[46] The land-owners brought suit, seeking an injunction against the enforcement of the legislation.[47] The land-owners argued the legislation was unconstitutional because the taking was not for the public use.[48]

The Court, in Justice O'Connor's majority opinion, held the legislation did not run afoul of the Fifth Amendment.[49] The Court then further broadened the scope of the public use doctrine to include the exercise of eminent domain when it is rationally related to a conceivable public purpose.[50] Citing the legitimate exercise of the state's police powers in correcting a malfunctioning residential land market, the Court held that the state's approach to correcting the problem was comprehensive and rational.[51] Further, the Court held that the means employed did not need to necessarily accomplish the stated goal, so long as the legislature "rationally could have believed" that the Act could promote its objective.[52]

Next, the Court addressed the appellant's argument that the taking was purely to confer a benefit on a private party. The fact that the property was condemned and then transferred to a private party did not defeat the public purpose.[53] "The Court long ago rejected any literal requirement that condemned property be put into use for the general public."[54] The legislation could meet its goals without the government taking ownership of the land because "it is only the takings purpose, and not its mechanics, that must pass scrutiny . . . ."[55]

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[45] 467 U.S. 229 (1984).

[46] *Id*. at 232–33.

[47] *Id.* at 234–35.

[48] Midkiff v. Tom, 702 F.2d 788, 804 (9th Cir. 1983), *rev'd, Midkiff*, 467 U.S. 229 (1984).

[49] *Midkiff*, 467 U.S. at 239.

[50] *Id*. at 241.

[51] *Id.* at 242.

[52] *Id.* (quoting W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981)).

[53] *Id.* at 243–44.

[54] *Id.* at 244.

[55] *See id.*

Together, *Berman* and *Midkiff* set the stage for the next expansion of the Public Use Clause, twenty years later, in *Kelo*.

III. DEVELOPMENT OF EMINENT DOMAIN LAW IN OHIO

The development of eminent domain law in Ohio has also been one of increasing deference to the legislature.[56] The Ohio Constitution states that owning property is an inalienable right.[57] Further: "private property shall be held inviolate, *but* subservient to the public welfare."[58] Similar to the Fifth Amendment, the Ohio Constitution allows government to take property for the public use, provided it compensates the owner.[59]

Although the language of Ohio's constitution speaks of the fundamental rights of owning property, until the *City of Norwood* decision, the Ohio judiciary had been allowing the government increasingly wider latitude in taking private property.[60] This broadening tended to parallel the United States Supreme Court's analysis, with each case pushing the boundaries of the public use doctrine.

During the nineteenth century, the Supreme Court of Ohio echoed the Ohio Constitution's declaration that the right to own property is a fundamental right.[61] However, within thirty years, the Supreme Court of Ohio had softened its stance, stating: "Police power is a very elastic and undefined thing. Within the past generation it has been given a constantly widened interpretation."[62] In *Pontiac Improvement Co. v. Board of Commissioners*,[63] the Supreme Court of Ohio upheld the right of the legislature to delegate eminent domain powers not just to local governments, but also to private parties and corporations.[64] Under the decision, if the state delegates the power to take, the terms of the grant must be strictly construed.[65] In the case, the court upheld the right of a metropolitan park board to appropriate a parcel for incorporation into an

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[56] *City of Norwood*, 853 N.E.2d at 1135.

[57] OHIO CONST. art. I, § 1, ("All men . . . have certain inalienable rights, among which are those of . . . acquiring, possessing, and protecting property . . . .").

[58] OHIO CONST. art. I, § 19, (emphasis added).

[59] *Id.*

[60] *City of Norwood*, 853 N.E.2d at 1135.

[61] Reece v. Kyle, 31 N.E. 747, 750 (Ohio 1892).

[62] Pontiac Improvement Co. v. Bd. of Comm'rs of Cleveland Metro. Park Dist., 135 N.E. 635, 640 (Ohio 1922).

[63] 135 N.E. 635, 640 (Ohio 1922).

[64] *Id.* at 637.

[65] *Id.*

existing park.[66] However, this sets the stage for the delegation of such authority to private corporations for redevelopment of blighted areas.

In 1953, the Supreme Court of Ohio held that redevelopment takings to ameliorate blight are valid public uses in *State ex rel. Bruestle v. Rich*.[67] The case was decided just prior to *Berman*, and it is strikingly similar. The City of Cincinnati planned to redevelop an area of the city characterized as "blighted."[68] Although not every building within the area was blighted, and some of the land was vacant, the court authorized the condemnation of the entire area.[69] To eliminate the blighted conditions and prevent a reoccurrence, the court held that it may be necessary to condemn an entire area, non-blighted buildings and all.[70] The small number of non-substandard buildings, 10 of the 331 buildings in the area, and the small amount of vacant land, 3.7% of the area,[71] was likely very persuasive to the court.

The court also focused its attention on the meaning of "public use."[72] Although the Ohio Constitution states that property may be taken for the public use,[73] a previous version of the Ohio Constitution stated that private property is subservient to the public welfare.[74] This change was not meant to limit the scope of takings, but to add limitations to when and how compensation should be paid for the appropriated property.[75] Therefore, property taken for the public welfare is regarded as taken for the public use. Further, courts are to defer to the legislative body in deciding what constitutes a public use, and such a determination should not be overruled unless it is manifestly arbitrary or unreasonable.[76]

Similar to the United States Supreme Court in *Berman*, the Supreme Court of Ohio took an analogous stance in *Bruestle* by expanding the definition of public use to mean public welfare.[77] In addition, it began the

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[66] *Id.* at 640.

[67] 110 N.E.2d 778, 787 (Ohio 1953).

[68] *Bruestle*, 110 N.E.2d at 781.

[69] *Id.* at 789–90.

[70] *Id.* at 789.

[71] *Id.* at 785 (quoting OHIO CONST. art. I, § 19).

[72] *Id.* at 783.

[73] *Id.* at 786 (quoting OHIO CONST. of 1802, art. VIII, § 4).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 787 (quoting State ex. rel. Gordon v. Rhodes, 100 N.E.2d 225, 226 (Ohio 1951)).

[77] *Id.* at 787.

precedent of deference and minimal scrutiny given to legislative decisions in this area.

A more recent Supreme Court of Ohio case, *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*,[78] suggested that a city may transfer the property directly to a private party for redevelopment.[79] Further, it mandated extreme deference to legislative decisions.[80] In the case, the City of Columbus entered into an agreement with a redevelopment corporation to redevelop a portion of its downtown area characterized at "blighted."[81] As part of the agreement, the city was required to use its best efforts, including the power of eminent domain, to acquire parcels within the project area.[82] Under the agreement, the redevelopment corporation could lease or sublease portions of the area, and sell portions to third parties.[83] The characterization of the area as "blighted" was questionable, as none of the buildings were in poor condition.[84] In oral argument, the city agreed that the exercise of eminent domain was predicated on the city council's determination that the area was "blighted."[85]

In reviewing a motion for summary judgment, the question before the court centered on the city council's designation of the area as blighted.[86] If the area was "blighted," then the city was exercising its eminent domain powers lawfully, as urban redevelopment has already been determined to be a valid public purpose.[87]

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[78] 553 N.E.2d 597 (Ohio 1990).

[79] *Id.* at 602.

[80] *Id.* at 600 (stating that a city council is permitted to use considerable discretion when determining whether an area is blighted).

[81] *Id.* at 598.

[82] *Id.*

[83] *Id.*

[84] *Id.* ("Of the twenty seven parcels . . . twenty were used for parking, and one was a vacant lot. Of the remaining six parcels, their descriptions varied, but most were described as being in essentially good condition.").

[85] *Id.* at 600.

[86] *Id.*

[87] *Id.* (citing Jonathan M. Purver, Annotation, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R. FED. 3d 1096 (1972)). However, as we have already seen in *Bruestle*, urban redevelopment is a valid public use in Ohio. Bruestle v. Rich, 110 N.E.2d 778, 787 (Ohio 1953).

The court acknowledged that making a determination of whether an area is blighted involves the exercise of considerable discretion.[88] In addition, due to the importance of urban redevelopment, the definition of "blighted area" must be given a liberal interpretation.[89]

The court determined that the standard of review for the city council's decision is whether the council abused its discretion in determining the area was blighted.[90] The court defined "abuse of discretion" as "an attitude that is unreasonable, arbitrary or unconscionable."[91] The court further defined an unreasonable decision as one in which "there is no sound reasoning process that would support the decision."[92] Thus, the trial court should focus on whether the city council made the blight designation based on a sound reasoning process, not whether the trial court would have agreed with the city council's designation.[93] In the end, the court remanded the case back to the trial court to make further findings based on its abuse of discretion standard.[94]

In *AAAA Enterprises*, the court set forth a low standard of review for courts reviewing blight designations. However, the importance of the case lies not just in its actual holding, but also in that the court did not take issue with the city's contract to take property and transfer it directly to a third party developer.

IV. KELO: THE CASE HEARD ROUND THE WORLD

Kelo features the United States Supreme Court's latest broadening of the Public Use Clause and has sparked much criticism from all arenas. Leading up to the decision, scholars believed that due to the substantial deference to the legislature, the Public Use Clause provided no meaningful check on the government's power of eminent domain.[95] Some hoped this latest case would provide for more judicial review of takings cases.[96] Instead, the Court maintained its standard of extreme judicial deference with an outcome that would provoke change in Ohio.

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[88] *AAAA Enter., Inc.*, 553 N.E.2d at 600.

[89] *Id.*

[90] *Id.* at 599.

[91] *Id.* at 601 (citing Huffman v. Hair Surgeon, Inc., 482 N.E.2d 1248, 1252 (Ohio 1985)).

[92] *Id.*

[93] *Id.*

[94] *Id.* at 602.

[95] CUNNINGHAM, *supra* note 8, at 510; *see also* Cohen, *supra* note 14, at 495.

[96] Cohen, *supra* note 14, at 495–96.

A. Facts of Kelo

The State of Connecticut characterized the City of New London as a "distressed municipality."[97] The population was declining, and the city's unemployment rate in 1998 was nearly double the state average.[98] The naval base in the area, an employer of over 1500 residents, had closed.[99]

In response, state and local officials targeted the area for economic revitalization.[100] The New London Development Corporation (NLDC), a private non-profit entity, was designated as the city's "development agent in charge of implementation" of a redevelopment plan approved by the city and state.[101] This plan was "projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."[102] The plan encompassed a ninety-acre area divided into several parcels, including a waterfront district with marinas, a river walk, as well as office and retail space.[103] The anchor of the area would be a new $300 million dollar research and development facility owned by the pharmaceutical company Pfizer, Inc.[104] Local planners believed the new facility would draw other employers to the area, furthering the area's redevelopment plans and serving to rejuvenate New London.[105]

The city council authorized the NLDC to acquire property in furtherance of the redevelopment plan.[106] The property could be acquired either by purchase or by exercising eminent domain in the city's name.[107] The NLDC was successful in purchasing most of the property needed; however, after failed negotiations with petitioners, the NLDC initiated condemnation proceedings.[108]

The nine petitioners owned fifteen parcels within the redevelopment area.[109] None of the properties were blighted or in poor condition.[110] In

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[97] Kelo v. City of New London, 545 U.S. 469, 473 (2005).
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 474–75.
[102] Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004).
[103] *Kelo*, 545 U.S. at 474.
[104] *Id.* at 473.
[105] *Id.*
[106] *Id.* at 475.
[107] *Id.*
[108] *Id.*
[109] *Id.*

fact, one of the petitioners, Susette Kelo, had made extensive improvements to her home, which she prized for its water view.[111] Another petitioner was born in her home in 1918 and had lived there her entire life.[112]

The petitioners argued that the condemnation of their property violated the Public Use Clause of the Fifth Amendment.[113] The relevant state statute defined the taking of private land for economic development as a public use and in the public interest.[114]

B. Opinion

Justice Stephens wrote the opinion for the sharply divided Court.[115] The opinion began by articulating that the city could not take the petitioners' properties for the purpose of conferring a private benefit on a private party.[116] Nor would the city be able to take the petitioners' properties "under the mere pretext of a public purpose."[117] Relying on the city's carefully considered redevelopment plan, the Court held the takings were not "adopted to benefit a particular class of identifiable individuals."[118] Further, the Court stated it had afforded legislatures broad latitude in determining what constitutes a legitimate public purpose for exercising its eminent domain power.[119] Stressing that states may enact stricter definitions of public use, and this holding is a merely a baseline, the Court affirmed the city's authority to take the petitioners' lands.[120]

C. Justice O'Connor's Dissent

Justice O'Connor's dissent was vehement. Arguing that the decision effectively removed the public use requirement from the Fifth Amendment, the Justice wrote, "Under the banner of economic development, all private

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *See* CONN. GEN. STAT. § 8-8186 (2001).

[115] *Kelo*, 545 U.S. at 472.

[116] *Id.* at 477 ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

[117] *Id.* at 478.

[118] *Id.*

[119] *Id.* at 483.

[120] *Id.* at 489.

property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."[121] The dissent argued that economic development takings should not be constitutional because of the indirect nature of the public benefit.[122] Taking no comfort in the city's carefully considered redevelopment plan, the dissent argued that allowing a taking based on an incidental public benefit means that that the words "for public use" do not exclude any takings and hence, does not curb eminent domain power.[123] A taking must provide a direct public benefit.[124] Therefore, a taking to eliminate an affirmative harm, such as blight, is a valid public purpose.[125] Harkening back to *Berman* and *Midkiff*, because the takings in those cases "directly achieved a public benefit," it was irrelevant that the property was ultimately transferred to a private individual.[126] Finally, although previous expansions of the public use doctrine were appropriate, this holding simply went too far.[127]

D. Analysis

The holding of *Kelo* sparked controversy and outrage throughout the United States.[128] Hundreds, if not thousands, of journal articles have been written about the case, with one author stating it best, "*Kelo* would gain a place of honor in the pantheon of highly unpopular Supreme Court decisions . . . ."[129]

Since the *Berman* decision, the United States Supreme Court has continuously refused to second-guess the legislature in the area of eminent domain.[130] The decision in *Kelo* only reinforced this notion. The Court felt it was best left to publicly elected officials to decide what is an appropriate public use. This was evidenced when Justice Stephens

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[121] *Id.* at 494 (O'Connor, J., dissenting).

[122] *Id.* at 501.

[123] *Id.*

[124] *Id.* at 500.

[125] *Id.* at 500.

[126] *Id.*

[127] *Id.* at 501–02.

[128] *See, e.g.*, Julia D. Mahoney, Kelo's *Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 104 (2006) (discussing how the decision "sparked a conflagration of outrage that even months later showed no sign of abating"); *see also* Quinnipiac University Polling Institute, Ohio Gov's Approval Up As Voters Get To Know Him (Mar. 21, 2007), http://www.quinnipiac.edu/x1322.xml?ReleaseID=1028.

[129] Mahoney, *supra* note 128, at 115.

[130] *Id.* at 115–16.

asserted that the states were within their rights to enact more stringent definitions of public use.[131] This follows with precedent in that the Court has continuously pushed the boundary of the Public Use Clause and has not found a case to be outside the scope of public use.[132] Regardless of the public outcry, the decision was not an aberration. Some even argue that *Kelo* moved away from the extremely deferential stance of precedent and provided for more judicial oversight than before.[133] By requiring a well-formed redevelopment plan, and that the taking is not "mere pretext" indicates some judicial scrutiny of a taking is required.

V. THE AFTERMATH IN OHIO

The *Kelo* decision shot the Ohio legislature into action. A scant month and a half after the decision, legislation was introduced to place a moratorium on takings in Ohio.[134] Within months, the general assembly passed Senate Bill 167.[135] The general assembly made specific findings: that as a result of the decision in *Kelo*, the interpretation and use of eminent domain law could be expanded and ultimately violate the Ohio Constitution.[136] Therefore, an immediate temporary moratorium on the use of eminent domain in the state was necessary.[137] Specifically, the moratorium prevented the use of eminent domain to take property not in a blighted area when the primary purpose for the taking was economic development that will result in the property being transferred to a private party.[138] The penalty for violating the moratorium was loss of state funding.[139]

In addition to the moratorium, Senate Bill 167 created a legislative task force to study the use of eminent domain law within the state, the impact of

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[131] *Kelo*, 545 U.S. at 489.

[132] Cohen, *supra* note 14, at 513 (quoting *Midkiff*, 467 U.S. at 241).

[133] Mahoney, *supra* note 128, at 116–18; *see also* Cohen, *supra* note 14, at 496 ("[T]he faint suggestion in the majority opinion that a 'carefully considered' or 'integrated' development plan would be a strong, or perhaps essential, evidence that a taking was not a pretext for conferring a benefit on a private party.").

[134] GREG SCHWAB, LEGISLATIVE SERVICES COMMISSION, FINAL ANALYSIS OF S.B. 167 9 (2007), http://www.lsc.state.oh.us/analyses126/05-sb167-126.pdf.

[135] Senate Bill 167, *supra* note 4.

[136] *Id.* § 4(A).

[137] *Id.* § 4(B). The moratorium lasted until December 31, 2006, just over a year after the law was enacted on November 16, 2005. *Id.*

[138] *Id.* § 2(A).

[139] *Id.* § 2(B)(1)(c).

the *Kelo* decision, and the overall impact on economic development, residents, and local government.[140] The task force was to submit its findings and recommendations to the general assembly.[141] The task force was comprised of twenty-five members, including representatives from the government, various members of the real estate and property development industries, experts in the field of eminent domain, and advocates for property owners.[142]

A. The Supreme Court of Ohio Takes on Kelo

While the task force was busy studying the effect of eminent domain in Ohio, the Supreme Court of Ohio rendered a decision rejecting the central holding of *Kelo* in *City of Norwood*. Signaling early on how the decision would turn out, the opinion began by stating that appropriations involved more than just a plot of land, "it is the taking of a home—the place where ancestors toiled, where families were raised, where memories were made."[143] In the case, the City of Norwood attempted to condemn properties that were not in a blighted area.[144] Additionally, these takings were not subject to the moratorium because the actions commenced before the passage of Senate Bill 167.[145]

1. The Facts

The City of Norwood entered into an agreement with a private company, Rookwood Partners, Ltd., to redevelop a section of the city.[146] Rookwood had built other shopping centers in the region and approached the City with plans to build a large, mixed-use development.[147] Although buildings in the redevelopment area were in fair or good condition, the construction of a highway through the area in the 1960s had forever changed the neighborhood.[148] Formerly quiet residential streets had become thoroughfares, and neighborhoods were cut in half by the highway, creating numerous dead-end streets.[149] Businesses cropped up where

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[140] *Id.* § 3(A).
[141] *Id.* § 3(C)(2).
[142] *Id.* § 3(A).
[143] City of Norwood v. Horney, 853 N.E.2d 1115, 1122 (Ohio 2006).
[144] *Id.* at 1126.
[145] Senate Bill 167, *supra* note 4.
[146] *City of Norwood*, 853 N.E.2d at 1124.
[147] *See* City of Norwood v. Horney, 830 N.E.2d 381, 384 (Ohio Ct. App. 2005).
[148] *Norwood*, 853 N.E.2d at 1124–25.
[149] *Id.* at 1124.

homes had been, and noise and light pollution had increased.[150] However, because of the highway, the area had commercial value.[151] Rookwood planned on building 200 apartments and over 500,000 feet of office and retail space.[152] Upon redevelopment, the city, millions of dollars in debt, expected increased annual revenues of nearly $2,000,000.[153]

Rookwood was able to purchase the majority of the property in the area through voluntary sales; however, the appellants refused to sell.[154] Pursuant to city code, an urban renewal study needed to be conducted before the City could initiate eminent domain proceedings.[155] The study, funded by Rookwood, concluded that the appellants' property was in a "deteriorating area."[156] The City then began condemnation proceedings.[157]

At trial, the court found that the urban renewal study contained numerous flaws and errors.[158] The study counted factors that should not have been counted, and double counted several other factors.[159] Nevertheless, the trial court held that the city had not abused its discretion in finding the area to be in danger of deteriorating into a blighted area.[160] This danger of deterioration justified the taking.[161]

The appellate court employed the same line of reasoning as the trial court and found the taking lawful.[162] The appellate court relied heavily on the *AAAA Enterprises* decision,[163] holding that the city based the condemnation decision on a sound reasoning process, and that the court was not to substitute its judgment for the legislative body in this area of the law.[164] Further, the court relied on precedent from a very similar case,

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 1124–25. The appellate decision stated that all but five parcels were privately acquired by Rookwood and that "it was apparent that the remaining property could not be assembled . . . ." *City of Norwood*, 830 N.E.2d at 385.

[155] *City of Norwood,* 853 N.E.2d at 1125.

[156] *Id.*

[157] *Id.* at 1126.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 1127.

[162] *Norwood*, 830 N.E.2d at 383.

[163] *Id.* at 386–91.

[164] *Id.* at 387–89.

holding that condemning property for an urban renewal project based on a designation that the area was "deteriorating" constituted a valid public use and did not run afoul of the Ohio Constitution.[165] Thus, the court determined that the City of Norwood's plan to redevelop a deteriorating area constituted a valid public use.[166]

2. The Opinion

The Supreme Court of Ohio announced that the State of Ohio is "not bound to follow the United States Supreme Court's determinations of the scope of the Public Use Clause . . . ." [167] Further, the court found the analysis of Justice O'Connor's dissenting opinion in *Kelo* was a better model for interpreting the Ohio Constitution.[168] Although economic factors may be considered, economic or financial benefit by themselves is an insufficient public use under the Ohio Constitution.[169]

Finding that many problems with this case arose due to the lower court's "broad deference and liberal interpretation,"[170] the court stated that judicial scrutiny is critical to ensure the legislature is not acting outside the scope of their authority.[171] Further, when courts review statutes that regulate the use of eminent domain, they are to apply "heightened" or strict scrutiny.[172]

Finally, the court reviewed the "deteriorating area" standard the City of Norwood employed to justify the taking.[173] A taking premised on evidence

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[165] *Id.* at 391 (discussing City of Dayton v. Kuntz, No. 10513, 1988 WL 28104, at *5–7 (Ohio Ct. App. Mar. 3, 1988)). In the case, the area was not a slum or blighted, but met the definition of deteriorating. *Id.* at *6. The Ohio Supreme Court dismissed the case on the grounds of "no substantial constitutional question." Dayton v. Kuntz, 532 N.E.2d 764 (Ohio 1988). The U.S. Supreme Court also denied certiorari. Kuntz v. City of Dayton, 488 U.S. 1008 (1989).

[166] *City of Norwood*, 830 N.E.2d at 391.

[167] *City of Norwood*, 853 N.E.2d at 1136 (citing Wayne County v. Hathcock, 684 N.W.2d 765, 785 (Mich. 2004) (holding that United States Supreme Court decisions do not bind the Supreme Court of Michigan in interpreting the Michigan Constitution's Takings Clause).

[168] *Id.* at 1141.

[169] *Id.* at 1123, 1142.

[170] *Id.* at 1136.

[171] *Id*. at 1138.

[172] *Id.* at 1143 ("[T]he court shall use the heightened standard of review employed for a statute or regulation that implicates a First Amendment or other fundamental constitutional right.").

[173] *Id.* at 1144.

that an area is deteriorating or may become a blighted area is too speculative.[174] Calling it a "standardless standard," the court noted that the City's definition of a deteriorating area describes "almost any city" and was therefore suspect, inviting ad hoc and selective enforcement.[175] To give fair notice to the property owner, the appropriate measure is to focus on the nature of the property and the area at the time of the taking.[176] Condemning a blighted area is constitutionally acceptable because the area poses a threat to the public's health, safety, and welfare.[177] To allow more "would grant an impermissible, unfettered power to the government to appropriate."[178]

3. Analysis of City of Norwood

The *City of Norwood* decision substantially changed eminent domain law in the State of Ohio. The decision effectively reversed the Supreme Court of Ohio's previous holding in *AAAA Enterprises*, which set a low standard of review for courts and advised that blight definitions should be construed liberally.[179]

Considering the holding in *AAAA Enterprises*, it is understandable that the lower courts in *City of Norwood* gave the City of Norwood broad deference and construed the law liberally. In fact, this is exactly what the Supreme Court of Ohio had previously advised the lower courts to do. The *City of Norwood* court effectively ignored its own precedent, and the fact that it previously found that condemning a deteriorating area did not present a constitutional question. Perhaps after the *Kelo* decision, the court saw how far broad deference and liberal interpretations could go. The court could have decided the case as they did without explicitly rejecting *Kelo*.[180] The *Kelo* decision left sufficient room for the court to rule in favor of the property owners within the confines of the decision. For instance, the court could have decided that Rookwood approached the city with the redevelopment proposal, which implied that the taking was under

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[174] *Id.* at 1146.

[175] *Id.* at 1144–45.

[176] *Id.* at 1145–46.

[177] *Id.* at 1145.

[178] *Id.* at 1146.

[179] AAAA Enter., Inc., v. River Place Cmty. Urban Redev. Corp., 553 N.E.2d 597, 600–01 (Ohio 1990).

[180] *City of Norwood*, 853 N.E.2d at 1141 ("[W]e find that the analysis . . . by the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution.").

a mere pretext of public purpose "adopted to benefit a particular class of identifiable individuals."[181] Thus, it appears that the Supreme Court of Ohio wanted to send a strong message that eminent domain would not be the preferred method for development in the state by holding that the Ohio Constitution provides property owners greater protection than the United States Constitution.

Although the general public hailed the decision as a decisive win for property owners,[182] some scholars questioned the usefulness of the holding, as it does not provide lower courts with guidance to assess takings claims.[183] One argument is that lower courts could liberally construe the other factors that must be found along with economic benefit to legitimize a taking.[184] Still, others argue that a city could avoid challenges by eliminating blight standards altogether and enacting a simplified eminent domain statute.[185]

Under *City of Norwood*, what constitutes a permissible taking is still unclear. Although economic development by itself does not constitute a valid public use, it is conceivable that had the developer included a small community center or public park, the taking would have been lawful. Arguably, these "extras" are the "something more" the court was alluding to, as either would provide a direct benefit to the public. Although the decision set a strident tone for future condemnations in Ohio, much more was needed to clarify what constituted a permissible taking.[186]

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[181] *Kelo*, 545 U.S. at 478 (quoting *Midkiff*, 467 U.S. at 245).

[182] *See* James Nash, *Score One for Ohio Property Owners*, COLUMBUS DISPATCH, July 27, 2006, at A1; *see also* Charles E. Cohen, Op-Ed., *Tightening Eminent Domain Reins Was Wise*, COLUMBUS DISPATCH, August 5, 2006, at A8.

[183] Andrew S. Han, *From* New London *to* Norwood: *A Year in the Life of Eminent Domain,* 57 DUKE L.J. 1449, 1449 (2007) (calling *City of Norwood*'s holding "incoherent"); Marshall T. Kizner, *State Constitutional Law-Economic Benefit Alone Does Not Constitute A Public Use for Eminent Domain Takings*, 38 RUTGERS L.J. 1379, 1390–92 (2006) (arguing that the court left to lower courts the role of defining the role of economic benefit in takings claims).

[184] Kizner, *supra* note 183, at 1392.

[185] Sarah Sparks, *Deteriorated vs. Deteriorating: The Void-For-Vagueness Doctrine and Blight Takings* Norwood v. Horney, 75 U. CIN. L. REV. 1769, 1792 (2006).

[186] As an epilogue, the last owner in the area sold his small home for $1.25 million in 2008, which was purchased in 1991 for $63,900. Steve Kemme, *Eminent Domain Holdout Sells for $1.25M,* CINCINNATI ENQUIRER, Sept. 4, 2008, at A1.

B. The Ohio Legislature Weighs in on the Matter

Just days after the *City of Norwood* decision, the Eminent Domain Task Force issued its final report to the Ohio General Assembly.[187] The report incorporated the holdings of the *City of Norwood* decision.[188] It made many recommendations for changes to the current eminent domain laws: increased disclosure and public input into the process, initial judicial determinations of the necessity of the taking, additional compensation requirements including attorney's fees in some instances, and substantive changes to blight definitions.[189] The majority of these recommendations were later incorporated into Senate Bill 7, a major overhaul of Ohio's eminent domain laws.[190] The bill amended eighteen sections of the Ohio Revised Code and enacted six additional sections.[191] This discussion will highlight the changes to the public use requirement, changes to the state's blight definitions, major procedural enhancements, and additional costs imposed on the government body attempting to take private property. The changes reflect the new uniformity and transparency in the process, as well as the increased costs and compensation due to the property owner, which will serve to discourage state agencies from using its powers of eminent domain in the future.

1. Changes to the Public Use Requirements

Previously, Ohio statutes did not define the term "public use" as it applied to eminent domain. Senate Bill 7 incorporated and expanded the central holding of *City of Norwood*, banning economic development takings.[192] The bill specifically stated that takings for conveyance to a private party, for economic development, or solely for increasing revenue were not valid public uses.[193] Public utilities and port authorities were

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[187] DAVID M. GOLD, FINAL ANALYSIS OF AM. SUB. S.B. 7, OHIO LEGISLATIVE SERV. COMM'N 6 (2007), *available at* http://www.lsc.state.oh.us/analyses127/07-sb7-127.pdf.

[188] *Id.*

[189] TASK FORCE TO STUDY EMINENT DOMAIN, FINAL REPORT OF THE TASK FORCE TO STUDY EMINENT DOMAIN 6–13 (2006) [hereinafter, FINAL REPORT], *available at* http://www.ccao.org/LinkClick.aspx?link=Downloads%2fEminent+Domain+Task+Force+Report.pdf&tabid=150&mid=482&language=en-US.

[190] Senate Bill 7, *supra* note 6.

[191] *Id.* (Amending sections 163.01, 163.02, 163.04, 163.05, 163.06, 163.09, 163.12, 163.14, 163.15, 163.19, 163.21, 163.53, 163.62, 303.26, 719.012, 1728.01, 2505.02, and 3735.40. Enacting sections 1.08, 163.021, 163.041, 163.051, 163.211, and 163.63).

[192] *Id.* § 1.08(H).

[193] *Id.*

exempted.[194] Also, if it was established by a preponderance of the evidence that the property was blighted or within a blighted area, transfers to private entities were exempt.[195] To strengthen the prohibition on economic development takings, the bill prohibited consideration of whether the property could be put to some "better use" or would generate more tax revenue when making determinations of whether a property is a blighted parcel or within a blighted area.[196]

Further, the bill created a list of presumed public uses. These include utilities, water and sewer lines, public schools, parks, port authorities, and government buildings.[197] These are all defined public uses,[198] consistent with the notion of providing direct benefit to the public and promoting the general welfare.[199] In addition, these all fall under the traditional state police powers of health, welfare, and safety.[200]

2. Cleaning up Blight Definitions

Previously, the definition of "blight" or "slum" varied widely throughout the Ohio Revised Code.[201] A county conducting a renewal project worked under a different definition than a community urban redevelopment corporation, and still another definition for a metropolitan housing authority.[202] One author characterized the definitions of blight as "broad" and "murky," stating that "blight" was whatever the local

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[194] *Id.*

[195] *Id.*

[196] *Id.* § 1.08(C).

[197] *Id.* § 1.08(H)(2).

[198] *Id.*

[199] City of Norwood v. Horney, 853 N.E.2d 1115, 1131 (Ohio 2006) (discussing historical use of takings: "Typically, the appropriation was of obvious necessity and had clear, palpable benefits to the public, as in cases in which the property was taken for roadways, and navigable canals, government buildings, or other uses related to the protection and defense of the people.").

[200] *See, e.g.*, *id.* at 1145.

[201] *Compare* OHIO REV. CODE ANN. § 303.26(D)–(E) (West 2005 & Supp. 2009) (generalizing prior definitions of "blight" and "slum"), *with* OHIO REV. CODE ANN. § 1.08(A) (West 2004 & Supp. 2009) (showing the revised and generalized definitions).

[202] OHIO REV. CODE ANN. § 303.26 (West 2005 & Supp. 2009) (county conducting a renewal project); OHIO REV. CODE ANN. § 1728.01(E) (West 2009) (community urban redevelopment corporation); OHIO REV. CODE ANN. § 3735.40(B) (West 2006 & Supp. 2009) (metropolitan housing authority).

government or agency wanted it to be.[203] The Eminent Domain Task Force warned the general assembly that the statutory language allowed abuse, thus advising that the blight definition should be "rewritten and tightened" and a consistent definition of blight throughout the Code was imperative.[204] The Task Force concluded that the term "blight" as used in Ohio was too subjective, and "can be interpreted to include property that some may not perceive to be blighted."[205]

Thus, Senate Bill 7 thoroughly defined "blight" by providing a rubric of conditions that must be found to qualify a property as blighted, as well as defining what constitutes a "blighted area." To start, the bill defined a "blighted area" as an area in which at least 70% of the parcels are considered blighted.[206] In addition, the blighted parcels must substantially impair or arrest the sound growth of the state, constitute an economic or social liability, or operate as a menace to the public health, safety, morals, or welfare in their present condition.[207] Of interest is the fact that the Eminent Domain Task Force recommended only requiring 50% of the parcels be blighted.[208] However, the bill as presented to the Senate proposed requiring 90% of the parcels in an area be blighted.[209] The House version adopted the 50% standard recommended by the Task Force,[210] perhaps creating a compromise in the final bill at 70%.

Next, the bill laid out specific requirements for evaluating whether a particular parcel is blighted.[211] The bill provides a rubric for evaluating the parcel. If a parcel has one or more of the following it is blighted:

1. A structure that is unsafe and been designated unfit for human habitation by the agency responsible for the enforcement of housing, building or fire codes;

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[203] Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of "Blight" in Ohio*, 73 U. CIN. L. REV. 207, 208 (2005).

[204] FINAL REPORT, *supra* note 189, at 12–13.

[205] *Id.* at 12.

[206] Senate Bill 7, *supra* note 6, § 1.08(A)–(B).

[207] *Id.*

[208] FINAL REPORT, *supra* note 189, at 12.

[209] SUZANNE LINDAMOOD, BILL ANALYSIS OF SUB. S. B. 7, OHIO LEGISLATIVE SERV. COMM'N (2007).

[210] Sub. H.B. 5, 127th Gen. Ass., Reg. Sess., (Ohio 2007), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=127_HB_0005; Senate Bill 7, *supra* note 6, § 1.08(A).

[211] Senate Bill 7, *supra* note 6, § 1.08(A).

2. Because of environmentally hazardous conditions, solid waste pollution or contamination, the property poses a direct threat to public health or safety;

3. Unpaid taxes that exceed the fair market value of the land.[212]

If none of those conditions are appropriate, a parcel may still be considered blighted if two or more of the following conditions are found:

(a) Dilapidation or deterioration;
(b) Age and obsolescence;
(c) Inadequate provision for ventilation, light, air, sanitation, or open spaces;
(d) Unsafe and unsanitary conditions;
(e) Hazards that endanger lives or properties by fire or other causes;
(f) Noncompliance with building, housing, or other codes;
(g) Nonworking or disconnected utilities;
(h) Is vacant or contains an abandoned structure;
(i) Excessive dwelling unit density;
(j) Is located in an area of defective or inadequate street layout;
(k) Overcrowding of buildings on the land;
(l) Faulty lot layout . . . ;
(m) Vermin infestation;
(n) Extensive damage or destruction caused by a major disaster when the damage has not been remediated within a reasonable time;
(o) Identified hazards to health and safety that are conducive to ill health, transmission or disease, juvenile delinquency, or crime;
(p) Ownership . . . of a . . . parcel when the owner [or owners] . . . cannot be located.[213]

In determining whether a parcel is blighted, it is strictly prohibited to consider if the property could be put to a better use or if the property could generate more tax revenue if used in a different manner.[214]

The law is now more objective because it requires that specific conditions be found before determining a parcel is blighted. The definition is quantifiable, providing property owners and neighborhood associations more notice. Now communities can look to a specific list of characteristics that constitute blight, possibly preventing neighborhoods from deteriorating to that point.

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[212] *Id.* § 1.08(B)(1)(c).
[213] *Id.* § 1.08(B)(2).
[214] *Id.* § 1.08(C).

3. Time and Money

Not only did Senate Bill 7 create firm definitions of what constitutes a lawful taking, but also it added a number of procedures meant to slow down the condemnation process.[215] This alone adds cost to the taking. The bill also added several procedures that make a taking more expensive.

One major change to the law requires the adoption of a comprehensive development plan for takings premised on the parcel being in a blighted area.[216] This plan must describe the public need for the property and include a publicly funded study documenting the public need.[217] The addition of the comprehensive development plan seems to comport with the holding of *Kelo*; however, this aspect adds both cost and time to any development project.

Next, at least thirty days before filing a petition to appropriate a parcel, the government agency must present the owner with notice of the agency's intent to acquire the property and present the owner with a good faith offer based on an appraisal of the property.[218] To provide further uniformity to the process, a sample "Notice of Intent to Acquire" and a summary of property owners' rights were provided in the bill, which requires agencies to substantially follow the form.[219] An agency may file a petition to appropriate a property only after it fails to agree with the property owner on a conveyance or terms of a conveyance.[220] After a petition is filed, either party can then request non-binding mediation to be paid for by the agency.[221]

In terms of compensation, Senate Bill 7 added provisions for compensating property owners for more than the fair market value of their property.[222] For property owners, and commercial or residential tenants, a bevy of additional compensation is now required.[223] This compensation goes beyond what is required by the Fifth Amendment of the United States Constitution, essentially "no frills compensation."[224] The additional

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[215] *Id.* §§ 163.02, 163.021.
[216] *Id.* § 163.021(B).
[217] *Id.*
[218] *Id.* § 163.04(B).
[219] *Id.* § 163.041.
[220] *Id.* § 163.05.
[221] *Id.* § 163.051.
[222] *See id.* § 163.14.
[223] *Id.* § 163.15(B).
[224] SKOURAS, *supra* note 13, at 43.

compensation provided in the bill includes compensation for actual, reasonable moving expenses incurred in moving a person and their family (in the case of residential property), or moving a business.[225] It also includes compensation for actual expenses incurred in searching for a replacement property[226] and actual expenses to reestablish a business in a new location.[227] In addition, business owners will be compensated for loss of goodwill,[228] and any actual economic loss, up to a year's net profit, that resulted from being forced to relocate the business.[229]

Finally, the bill punishes agencies that offer property owners substantially less than the property is worth, or attempts to appropriate property that is not necessary for the public use, by awarding property owners their attorney's fees and costs.[230] If a property owner is awarded more than 125% of an agency's good faith offer, the court is to award all costs and expenses actually incurred.[231] Similarly, if a court decides an agency's appropriation was not necessary, or not within the scope of public use, a property owner is entitled to all reasonable fees and expenses incurred.[232]

A fiscal impact statement created by the Ohio Legislative Services Commission noted that the economic impact on the state was difficult to quantify; however, there was a potential for increased compensation costs to appropriate private property.[233] The statement cited the Department of Transportation as the state agency most likely affected by the changes in the law, noting that the agency invoked its powers of eminent domain to appropriate roughly 12% of the parcels it acquired during a two-year period.[234]

The impact statement also noted potential indirect effects on state and local agencies.[235] This includes loss in revenues from foregone property

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[225] Senate Bill 7, *supra* note 6, § 165.15(B)(1)(a).

[226] *Id.* § 165.15(B)(1)(c) (stating reimbursement is not to exceed $2,500).

[227] *Id.* § 165.15(B)(1)(d) (stating reimbursement is not to exceed at $10,000).

[228] *Id.* § 165.14(C) (capping loss of goodwill damages at $10,000).

[229] *Id.* § 165.15(B)(3).

[230] *Id.* § 1.08(G).

[231] *Id.* § 163.21(C).

[232] *Id.*

[233] OHIO LEGISLATIVE SERV. COMM'N, FISCAL NOTE AND LOCAL IMPACT STATEMENT: AM. SUB. S.B 1 1 (June 27, 2001).

[234] *Id.* at 4.

[235] *Id.*

taxes and revenue from economic development of an area.[236] The statement noted that these indirect effects could be significant; however, exact amounts were incalculable.[237]

Contrary to the state's fiscal impact statement, which cites a *potential* increase in costs,[238] the cost to appropriate property will increase dramatically. Granted, each of the additional measures provided in the legislation, by themselves, may amount to little. However, cumulatively, the studies, appraisals and procedural requirements, the additional compensation requirements, and relocation expenses all add tens of thousands of dollars to each parcel needed to be appropriated for a project.

C. City of Norwood *and Senate Bill 7 Work Together to Enhance Protection to Private Property*

The *City of Norwood* decision and Senate Bill 7 work together to provide greater protections to Ohio property owners. The Supreme Court of Ohio set the tone for Ohio's reaction to the *Kelo* decision. The decision cleared up any constitutional confusion by holding that the Ohio Constitution does not allow takings predicated only on economic development. The legislation passed subsequent to the decision worked to fill in any procedural gaps.

Post *City of Norwood*, artfully drafted redevelopment plans could navigate around the Ohio Constitution's prohibition on economic development takings. Senate Bill 7 combated this issue by adding substantial procedural and compensation requirements. These additional measures are what will actually stop takings premised on economic development, as any developer could incorporate a town square, jogging trail, or public park into its development plan. Arguably, this would strengthen the link between the taking and the direct public benefit sufficiently to meet the public use requirement of the Ohio Constitution.

By adding cost to the condemnation process, the legislation creates an incentive to purchase property directly from the property owners, thereby avoiding the taking altogether. Adding thousands of dollars of procedural and compensatory costs creates an incentive for a higher initial offer, encouraging parties to pay more than fair market value for a property in

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[236] *Id.*

[237] *Id.*

[238] *Id.* (emphasis added).

order to avoid the appropriations process. This is noted as a problem by at least one commentator.[239]

While more expensive, the added cost and procedure take into account the "subjective value" attached to each parcel.[240] This amount is not typically accounted for when the government pays the fair market value of a property, leading to inefficiency and possibly lower overall societal wealth.[241] Thus, when government must take into account the true cost of appropriating property, the more likely the taking will truly benefit the community.

Senate Bill 7 also works in coordination with *City of Norwood* by providing concrete definitions and ways to quantify blight. The legislative process removed responsibility from the judiciary to define and refine what is a taking justified as for the public use.[242] Instead, the legislature provided what the "something more" espoused in *City of Norwood* needed to be, thereby preventing further adjudication and effectively closing the door the Supreme Court of Ohio left wide open.

D. Limits on the Efficacy of Senate Bill 7

While the reform of Ohio's eminent domain laws has been extensive, the process is not complete. The effectiveness of Senate Bill 7 is limited in two ways: by local government's home-rule powers and an abbreviated appropriation process called a "quick-take."

1. Home Rule Limits the State's Power to Enforce Legislation

Currently, local governments do not have to follow the guidelines set forth in Senate Bill 7. The Ohio Constitution grants municipalities the power of local self-government, called home-rule power.[243] Thus, local governments may shape their own definitions of blight and under some circumstances, are not bound to the same procedural and compensation requirements as state agencies.

A memorandum submitted to the Eminent Domain Task Force notes that a statute passed by the general assembly could not substantively limit a

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[239] Mahoney, *supra* note 128, at 129 (arguing that the process will become so expensive that property owners have an incentive to try to have their property condemned).

[240] *See* Cohen, *supra* note 14, at 538.

[241] *Id.* at 542.

[242] *See, e.g*, Mahoney, *supra* note 128, at 129; Sparks, *supra* note 185, at 1792.

[243] OHIO CONST, art. 18, § 3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.").

municipality's powers of eminent domain.[244] Whether a municipality must follow the procedural aspects of Senate Bill 7 would depend on the municipality's charter. If a municipal charter contains eminent domain procedures inconsistent with state statute, the state statute is unenforceable against the municipality.[245] However, if a municipality had failed to adopt any specific eminent domain procedures, the municipality would be bound to follow the procedures set forth in state statute.[246]

The Ohio legislature has tried to remedy this inconsistency by proposing to amend the Ohio Constitution and bind municipalities to the same eminent domain requirements as the state.[247] Each of the previous legislative sessions has featured a Senate Joint Resolution to this effect; however, these resolutions have failed to pass the general assembly.[248] Even after being passed by the legislature, the proposed amendment would still need to be approved by Ohio voters.[249] As more time passes and voters forget about the *Kelo* decision, the passage of a constitutional amendment altering a municipality's home-rule powers seems less likely.

Although not bound to the requirements of Senate Bill 7, municipalities are still bound to the holding of *City of Norwood*. Thus, takings for economic development alone are forbidden, and takings are subject to stricter judicial scrutiny. The strident tone taken by the Supreme Court of Ohio suggests that local governments do not have free reign, even if they are not bound by the constraints of Senate Bill 7.

2. Quick Takes Are Exempt from Legislation

A "quick-take" is a class of takings providing special treatment in the Ohio Constitution.[250] The government may take immediate possession of property in times of war, public exigency, making or repairing roads, implementing rail service, and addressing sewage emergencies.[251] The

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[244] FINAL REPORT, *supra* 189, at Appendix K.

[245] *Id*. at 2–3 (citing N. Ohio Patrolmen's Benevolent Ass'n v. Parma, 402 N.E.2d 519, 521–22 (Ohio 1980)).

[246] *Id*. at 2.

[247] Am. Sub. S.J.R. 1, 127th Gen. Assem., Reg. Sess. (Ohio 2007), *available at* http://www.legislature.state.oh.us/ResolutionText127/127_SJR_1_AS_Y.pdf.

[248] Senate Joint Resolution 1 of the 127th General Assembly failed to pass the House of Representatives. 2008 Ohio Legis. Serv. Ann. SLR-53 (West). Senate Joint Resolution 3 of the 127th General Assembly never moved out of committee. *Id.*

[249] OHIO CONST. art. XVI, § 1.

[250] GOLD, *supra* note 187, at 23.

[251] *Id.* at 23–24.

government need only file a petition of condemnation and pay the property owner what it feels is "just compensation."[252] Unlike other categories of takings, under a quick-take, if a property owner fights the condemnation, and the final compensation determination greatly exceeds the government's initial offer, the property owner cannot recover their attorney's fees and costs.[253]

One member of the Eminent Domain Task Force strenuously objected to this exemption, arguing that quick-takes constitute the majority of takings in Ohio.[254] Further, the property owners involved in a quick-take are the most abused, due to "low ball" offers from the Ohio Department of Transportation.[255]

Although there may be valid concerns about below-market offers from the Ohio Department of Transportation, it is understandable that these types of takings were exempted from Senate Bill 7. The public use connection is much stronger in these cases, as government acquires the property without the intention of selling to third parties, and the public will use the roads and railroads built on the land. In fact, a road is the quintessential public use[256] and arouses less suspicion that the taking is improper. As such, it is understandable that the legislature felt that an added check on the power of eminent domain was unnecessary in these instances.

VI. CONCLUSION

The trend of eminent domain law over the past century has been one of increasing deference to the legislature in determining what constitutes a public use within the constraints of the Fifth Amendment. The State of Ohio had followed this trend of increasing deference.

In response to the landmark case, *Kelo v. City of New London*, many states are changing their laws to afford private property owners greater protections than those granted by the United States Constitution. In

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[252] *Id.* at 23.

[253] Senate Bill 7, *supra* note 6, § 163.21(C)(2).

[254] Letter from Bruce L. Ingram, Attorney at Vorys, Sater, Seymour and Pease LLP, to Task Force Members, The Legislative Task Force to Study Eminent Domain and its Use and Application (Aug. 1, 2006), *available at* http://www.ccao.org/LinkClick.aspx?link=Downloads%2FEminent+Domain+Task+Force+Report.pdf&tabid=150&mid=482&language=en-US.

[255] *Id.*

[256] *Kelo*, 545 U.S. at 512 (2005) (Thomas, J., dissenting).

particular, Ohio has dramatically altered its eminent domain laws in response to the *Kelo* decision.

The Supreme Court of Ohio's *City of Norwood v. Horney* decision rendered takings premised on economic development unconstitutional. After this decision, the Ohio General Assembly passed groundbreaking legislation in the form of Senate Bill 7. This bill provides clear definitions for the types of takings that constitute a valid public use. Further, the definition of "blight" was made objective and quantifiable. Procedural protections were enhanced, allowing property owners greater opportunity to dispute a taking. Finally, the bill provided additional compensation to property owners. This forces the government to pay more of the true cost to the property owner, beyond "just compensation."

While there are some limits to the reform, such as with a local government's home rule powers, and quick-takes, it is hoped that with the additional safeguards implemented by both the Ohio judiciary and legislature, eminent domain abuses can be avoided in the future.