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
	)	
and	)	
	)	
CARL E. GAMBLE, et al.,	)	
	)	
Appellants.	)	
	)	

BRIEF *AMICUS CURIAE* OF THE AMERICAN PLANNING ASSOCIATION AND THE OHIO PLANNING CONFERENCE IN SUPPORT OF APPELLEE, CITY OF NORWOOD

LINDNER & WEAVER LLP
Daniel F. Lindner (0063918)
55 Public Square, Suite 1600
Cleveland, Ohio 44113
Telephone: (216) 363-5220
Facsimile: (216) 623-2199
E-mail: daniel@justuslawyers.com
Attorney for Amicus Curiae
American Planning Association and the Ohio Planning Conference

INSTITUTE FOR JUSTICE
Dana Berliner*
Counsel of Record
Scott G. Bullock
William H. Mellor
Robert W. Gall
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Counsel for Appellants
* Admitted Pro Hac Vice

MANLEY BURKE
Timothy M. Burke (0009189)
225 West Court Street
Cincinnati, Ohio 45202
Tel: (513) 721-5525
Fax: (513) 721-4268
Counsel for Appellee City of Norwood

WOOD & LAMPING, LLP
Robert P. Malloy (0012269)
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202-2409
Tel: (513) 852-6043
Fax: (513) 852-6087
Ohio Counsel for Appellants

DINSMORE & SCHOL, LLP
Richard B. Tranter (0031226)
Mark A. Vander Laan (0013297)
Counsel of Record
Bryan E. Pacheco (0068189)
225 East Fifth Street, Suite 1900
Cincinnati, Ohio 45202
Tel: (513) 977-8247
Fax: (513) 977-8141
Counsel for Appellee, Rockwood Partners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRIMARY SOURCES

CONSTITUTIONAL PROVISIONS AND STATUTES

SECONDARY SOURCES

http://www.planning.org/policyguides/pdf/Redevelopment.pdf (Last visited Nov. 23, 2005) 7, 10, 13

Cindi Andrews, *Some in Norwood Fight to Sell Homes*, CINCINNATI ENQUIRER, Oct. 11, 2003, *available at* 2003 WL 62434526 4

Steve Kemme, *Norwood Battle Puts Life on Hold*, CINCINNATI ENQUIRER, July 18, 2004, *available at* 2004 WL 79970802 4

Steve Kemme, *Residents Remain in Limbo*, CINCINNATI ENQUIRER, March 28, 2004, *available at* 2004 WL 72712753 5

Stuart Meck, Gen. Ed., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (Am. Planning Ass'n, 2002 Edition), 7-195 14

Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) 6

Patricia Salkin, *Testimony to the New York State Senate - Retain Eminent Domain Authority,* PLANNING & ENVIRONMENTAL LAW, Vol. 57, No.11, p. 10 (November 2005) 14

Am. Sub. SB 167, signed into law November 16, 2005, *available at* http://www.legislature.state.oh.us/bills.cfm?ID=126_SB_167 ..... 9, 16

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Planning Association (the "APA") is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. It represents more than 37,000 practicing planners, officials, and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations. The APA has 46 regional chapters, including the Ohio Planning Conference, with 1,217 members, which joins in filing this Amicus Brief.

The APA is centrally concerned with the role of planning in promoting proper public purposes, such as redirecting growth and development into the nation's central cities, inner suburbs, and other areas already served by infrastructure and supported by urban services. It is critically important to preserve the ability of local governments to use redevelopment tools and techniques, including eminent domain when appropriate, to achieve well-defined public purposes.

The APA also believes that an open and inclusive public participation process should be part of all redevelopment planning. To the extent possible, the APA believes that communities should use incentives – such as increased development densities and favorable zoning policies – as their primary redevelopment tool, and should resort to eminent domain only as a tool of last resort when incentives are insufficient to implement redevelopment plans.

SUMMARY OF ARGUMENT

While Appellants believe the City of Norwood (the "City") failed to use a "sound reasoning process" and its redevelopment plan was "essentially worthless," their Merit Brief is noticeably silent on the planning process the City used to reach its conclusion that eminent

domain was the appropriate and necessary tool for this project. Indeed, Appellants hardly acknowledge the public meetings, public hearings, public participation, and the City's efforts to use eminent domain only as a last resort.

Appellants focus the Court's attention on the City's planning *document*, while ignoring the City's planning *process* to support its erroneous claim that the City's designation of blight was not based on a "sound reasoning process." Why? Because a planning process, in which members of the community are actively engaged, epitomizes a "sound reasoning process." Ohio law does not require mathematical precision in land use decisions. *Homebuilders Ass'n of Dayton and Miami Valley et al. v. City of Beavercreek* (2000), 89 Ohio St.3d 121, 130, 729 N.E.2d 349. Further, courts have always properly given deference to the land use decisions of local governments. *Hawaii Housing Auth. v. Midkiff* (1984), 467 U.S. 229, 104 S.Ct. 2321; *Eighth & Walnut Corp. v. Public Library of Cincinnati* (1977), 57 Ohio App. 2d 137, 385 N.E.2d 1324 (citing *Bruestle v. Rich* (1953), 159 Ohio St. 13, 110 N.E.2d 778).

Reasonable minds may certainly differ on the merits of any particular planning document and Appellants are banking on another roll of the dice at the appellate level in the hopes of a different decision than the ones they received below. Here, the elected officials fulfilled their responsibility of preparing and adopting a plan that will serve the public interest. This Court should not second guess the wisdom of the elected officials' decision to adopt the plan if the planning process was sound. City officials will certainly hear from their constituents if they adopt a plan that is perceived to be contrary to the public interest, a pretext, or a sham[1].

[1]*State ex rel. Committee for the Proposed Ordinance to Repeal Ordinance No. 146-02, West End*

Amicus Ohio First Suburbs Consortium explains the importance of eminent domain as a tool for economic development. *Amici* Donna Laake, William Pierani and Paul Triance eloquently explain why they participated in the public planning process, why their neighborhood was deteriorating, and why they supported the City's approval of the Edwards Road Corridor Urban Renewal Plan. The APA respectfully requests this Court to consider the following: The legislature and not the judiciary is responsible to adopt further limitations on the use of eminent domain. This Court should hold the course, affirm the well-reasoned opinion of the Court of Appeals and not accept the Appellants' invitation to restrict the power of eminent domain in the absence of a proven constitutional or statutory basis for doing so.

ARGUMENT

Proposition of Law No. I: A municipality's urban renewal designation should not be second guessed by courts where such designation was derived from a planning process that incorporated meaningful public participation evidencing a sound reasoning process.

The Ohio Constitution recognizes the tension between private property rights and the public interest very clearly in Article I §19 - *"Private property shall forever be held inviolate, but subservient to the public welfare."* Appellants would have this Court focus its attention on the first half to the exclusion of the second; but as we know, the courts and the local elected officials, such as those in Norwood, are charged with balancing both private property rights with the interests of the community and the general public. This balance is an important responsibility, one for which our democratically elected officials at the local level are especially well-suited.

Blight Designation, et al. v. City of Lakewood (2003), 100 Ohio St.3d 252, 798 N.E.2d 362.

Through public hearings, public meetings and the public planning process, city officials hear from all sides and weigh all the different views and opinions presented to them. If this Court finds that the City officials engaged in such a process, as we believe it will, then it should defer to the decisions that resulted from that process.

In addition to hearing from the property owners who objected to the City's plans, City leaders also heard from others who supported the plans. Putting ourselves into the shoes of the City officials, they might have heard the following at a public meeting:[2]

> About 70 properties were needed to expand a complex of shops and offices to promote economic growth in the financially strapped city.[3] More than 60 owners agreed to sell voluntarily, but they could not sell because a handful of owners held out, even though they were offered 125% of market value.[4] So outraged were the 60+ landowners that many joined with the city in opposing the holdouts' lawsuit, planting yellow signs in their yards protesting that they were being "Held Hostage" by the holdouts' counsel.[5] Among the landowners held in limbo were the Vogelsongs, who were forced to pay two mortgages and exhausted one of their pension funds and tapped into another until the holdout issue was resolved. Michelle Vogelsong directed her anger not at the city, but at the holdouts' counsel: "It's aggravating. People who aren't even residents here are holding up the best thing that's happened to Norwood in a long while."[6] For Jeanne Dawson, an 83-year-old blind retiree, the delay "meant the loss of three opportunities to

[2]The following description was prepared by the Community Rights Counsel http://www.communityrights.org/

[3]*See* Cindi Andrews, *Some in Norwood fight to sell homes*, Cincinnati Enquirer, Oct. 11, 2003, *available at* 2003 WL 62434526.

[4]Steve Kemme, *Norwood battle puts life on hold*, Cincinnati Enquirer, July 18, 2004, *available at* 2004 WL 79970802.

[5]*See* Cindi Andrews, *supra* note 3.

[6]Steve Kemme, *supra* note 4.

move into a retirement home."[7]

The public planning process can be, and many times is, filled with very emotional and contentious testimony. It also includes an examination of the future of the community, balancing the needs of the present with future goals. The process must be open, transparent, inclusive and encourage meaningful public participation.

In his decision for the *Kelo* majority, declining to ban the use of eminent domain for local economic development projects, Justice Stevens mentioned "planning," "plans," and "planner" more than 30 times. He certainly recognized the importance of the planning process in the context of redevelopment and eminent domain. The United States Supreme Court refused to examine the merits of the adopted redevelopment plan on a parcel by parcel basis, but rather acknowledged the importance of looking at the big picture, including the deliberation underlying the planning documents. The *Kelo* court reasoned that:

> "Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review," he concluded, "it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." *Kelo v. City of New London* (2005), 125 S.Ct. 2655, 2665.

Perhaps the most constructive contribution courts can make in protecting against misuse or overuse of eminent domain is to insist that the procedural requirements associated with the exercise of eminent domain be faithfully followed.

These requirements not only provide valuable protections *ex post* for individual property

[7]Steve Kemme, *Residents remain in limbo*, Cincinnati Enquirer, March 28, 2004, *available* at 2004 WL 72712753.

owners when they have been singled out for condemnation, but they provide important protection *ex ante* to all property owners by creating a powerful incentive for authorities with condemnation authority to use market transactions wherever possible.

Strict enforcement of procedural requirements, in other words, makes eminent domain largely self-regulating, in the sense that it will only be used in situations where the costs of negotiated exchange are prohibitive.

Distrusting the public planning process and the local elected officials responsible for executing the plans, the Appellants invite this Court to adopt, as a matter of state constitutional law, the restrictive definition of public use adopted as a matter of Michigan constitutional law in *County of Wayne v. Hathcock* (2004), 471 Mich. 445, 684 N.W.2d 765. (Appellants Brief, p. 32) They made the same invitation to the U.S. Supreme Court this year in *Kelo* which the majority declined to accept. *Kelo v. City of New London* (2005), 125 S.Ct. 2655, 2665. We urge this Court also reject such invitation.

There are a number of reasons not to follow the *Hathcock* decision. First, *Hathcock* rests on an interpretative method unique to Michigan constitutional law. Second, *Hathcock's* attempt to limit the use of eminent domain for economic development to cases where property is "blighted" would generate undesirable consequences. Such a limitation could work to the disadvantage of poor and minority communities, which could be more readily subject to condemnation based on a finding of blight than middle class communities.[8] More broadly, it

[8]Scholars have concluded that traditional urban renewal as practiced from the 1940s through the 1960s tended to have a disproportionate impact on minority communities. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent*

would seriously distort the process of development planning, by skewing economic development projects toward locations most plausibly characterized as blighted. Proper economic development planning relies on a wide range of factors, including not just the conditions of existing properties, but also the potential for future economic activity in the area, population densities, proximity to transportation facilities, the presence or absence of public amenities, and other variables.[9] The straitjacket *Hathcock* seeks to impose on eminent domain could undermine the quality of planning for economic development, to the detriment of the entire community.

Third, *Hathcock's* restrictive definition of public use could limit the options of government in solving important social problems in a variety of areas, such as restricting efforts to combat urban sprawl. Developers of new shopping centers, townhouse complexes, and business centers need large tracts of land to configure their projects in ways that will attract customers. The easiest way to acquire large tracts of land is to buy up greenfields at the outer fringes of urban areas. Large sites in existing urban centers are hard to come by because of the high transaction costs of land assembly because it takes time to negotiate with 40-50 property owners and, as we have seen in the City of Norwood, it can be difficult to get all the property owners to agree. In those cases, eminent domain is a necessary tool to ensure that land assembly can ultimately occur. Without it, some projects are doomed because the land is not available, regardless of cost.

One way to reduce the advantage developers currently see in greenfield development is to

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Domain, 21 Yale L. & Pol'y Rev. 1 (2003).

[9]The American Planning Association policy guide on redevelopment, ratified in April 2004, provides a summary of the principles that planning professionals follow in designing urban redevelopment projects. See http://www.planning.org/policyguides/redevelopment.htm

use eminent domain to assemble tracts of land in high density urban areas. But *Hathcock* seems to say that, outside the context of property found to be blighted, this will be possible only if the government retains title to the property. *Hathcock* observes dismissively that "the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce." 471 Mich. at 477, 684 N.W.2d at 783. What it fails to observe is that these are mostly located along arterial highways at the perimeter of urban areas. The only meaningful land assembly option *Hathcock* leaves for fighting sprawl is state ownership of shopping centers, townhouse complexes or business centers – not a very appealing idea.

The primary effect of *Hathcock's* complex and poorly defined test would simply be to transfer discretion over the exercise of eminent domain from politically accountable bodies to courts. This Court should decline Appellants' invitation to subject Ohio to this unjustifiable and unauthorized exercise of judicial power, particularly in the absence of a constitutional or statutory basis that Courts must defer to the legislative use of justifying such action. A "sound reasoning process" flows from a sound planning process that includes meaningful public participation, not from a more stringent test for judicial review.

Proposition of Law No. II: Heightened Judicial Review is Not the Answer to Misuse or Overuse of Eminent Domain - Recommendations for Statutory Reform.[10]

Eminent domain is admittedly an unsettling power. To be wrenched from one's home or business by order of the government is a deeply disruptive experience – even with the payment

[10]The recommendations are drawn from the APA Policy Guide on Public Redevelopment as well as the APA *amicus curiae* brief submitted to the U.S. Supreme Court in *Kelo v. City of New London*, *available at* 2005 WL 166929.

of compensation. Such coercive power should be used sparingly. However, heightened judicial review, as Appellants and many of their *amici* advocate, would provide a poor mechanism for protecting property owners against the misuse or overuse of eminent domain. What is needed are more general mechanisms that will assure that eminent domain is used as a last resort, not a first resort, and that mitigate the harshness of eminent domain for all who experience it. Constructive solutions to address current concerns about eminent domain abuse or overuse should be adopted by the legislature, and not created by the judiciary. Communities and local elected officials in Ohio will be better-served by a careful and thoughtful examination of the State laws governing the use of eminent domain, as proposed in the legislation recently signed by Governor Taft,[11] rather than by a radical departure from long-standing precedent as Appellants have proposed. The Courts have recognized that the judiciary is ill-equipped to second guess local planning and land use decisions, including the ability to predict the outcome of complex economic undertakings. Legislatures have the resources and time to engage in complex fact-finding and economic analysis and such decisions "are not wisely required of courts." *Pegram v. Herdrich*, 530 U.S. 211, 221 (2000); *accord Midkiff*, 467 U.S. *at* 243 ("[E]mpirical debates over the wisdom of takings - no less than debates over the wisdom of other kinds of socioeconomic legislation - are not to be carried out in the federal courts."). Heightened scrutiny, as Appellants seek, would transform the courts into super-legislatures or boards of land use appeal, inundating them with requests by holdouts to review the details of economic development projects across

[11]SB 167, sponsored by State Senator Timothy Grendall, signed into law November 16, 2005, *available at* http://www.legislature.state.oh.us/bills.cfm?ID=126_SB_167

the board.[12]

Recognizing that redevelopment practices vary widely from State to State, the American Planning Association adopted a Policy Guide on Public Redevelopment in 2004 with recommendations for legislative reform. The policy guide represents the collective thinking of its membership on both positions of principle and practice. The policy guide was developed over time, through a strenuous process that involves examination and review by many professional planners in both the chapters and divisions of APA.[13] Planners believe that well-written enabling legislation governing redevelopment authorities and the practice of effective, equitable redevelopment should include:

- A clearly defined process for determining eligibility of designating areas in which the municipality or other governments have the authority to engage in redevelopment projects including both prevention and elimination of blight and provision of public/private partnerships.[14]

- A means of choosing partners that is fair, open, equitable, transparent (while protective of trade secrets or other proprietary data), and demonstrated to be the best choice for the public interest.[15]

- Mechanisms to prevent the use of partnerships to subvert the

[12]Excerpted from *Brief amici curiae* of National League of Cities, et al., *Kelo v. City of New London*, No. 04-108, *available at* 2005 WL 166931.

[13]The recommendations for legislative reform are excerpted from APA's Policy Guide on Public Redevelopment available at http://www.planning.org/policyguides/pdf/Redevelopment.pdf (*Last visited* Nov. 23, 2005); as well as from APA's *amicus curiae* brief to the U.S. Supreme Court in *Kelo v. City of New London*, *available at* 2005 WL 166929.

[14]AMERICAN PLANNING ASSOCIATION, *Policy Guide on Public Redevelopment* (2004), Policy #2.

[15]*Id.*

responsibilities that are imposed on the public agency through enabling legislation or case law to provide due process, demonstrate public purpose, and establish a nexus between the public purpose for redevelopment and the means to achieve that purpose.[16]

- ❖ Assurance that public/private partnerships adhere to the adopted plans of the jurisdiction.[17]

- ❖ Requirements for clearly defined responsibilities and liabilities of public and private partners.[18]

Planners and communities are concerned not simply with the elimination of blight, but also the prevention of blight. As such, it is recommended that any state enabling legislation define those conditions that lead to blight (or characterize the state of a "district" which may become blighted if left unchecked) and, perhaps separately, those conditions that can characterize blight. The APA believes that proper *planning* is an answer to the harshness of the use of eminent domain, particularly if that use is *ad hoc* in nature. If proper planning is used, as it was here, then courts should limit their review to whether a proper planning process was followed. Courts should not second guess whether the ends, and the means by which those ends were achieved, were what local legislative bodies would have chosen.

Recently in *Chevron, Inc. v. Lingle* (2005), 125 S.Ct. 2074, the United States Supreme Court rejected a "takings" test it adopted 25 years earlier in *Agins v. Tiberon* (1980), 447 U.S. 255, which suggested that if a policy failed "to substantially advance" a legitimate state interest,

[16]*Id.*

[17]*Id.*

[18]*Id.*

it would be seen as a violation of the Takings Clause of the Fifth Amendment. The Court observed in rejecting the *Agins* test:

> The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations–a task for which courts are not well suited. Moreover, it would empower–and might often require–courts to substitute their predictive judgments for those of elected legislatures and expert agencies. *Id.*

If that is now the test for takings claims, which by definition does not involve the award of "just compensation," the rule should be no different when just compensation is awarded as part of the process.

Effective enabling legislation will empower public agencies with authority to intervene to prevent those conditions that may lead to blight and to eliminate blight with a measured response that reflects the degree of potential or existing blight. Furthermore, the legislation may also indicate the requirement for a direct correlation between the degree of public intervention and the degree of public involvement and public notice of the planning and implementation processes.

Another source of protection for all property owners is to assure, to the extent possible, that eminent domain is exercised only in conjunction with a process of land use planning that includes broad public participation and a careful consideration of alternatives to eminent domain. Integrating the decision to use eminent domain into a sound planning process has a number of desirable consequences. Such a process can help minimize the use of eminent domain by identifying alternatives to proposed development projects, such as relocating or re-sizing projects, or perhaps foregoing them altogether. It can also reduce public concerns about the use of eminent domain, by providing a forum in which the reasons for opposition can be considered,

offering explanations for the proposed course of action and possible alternatives, and perhaps instilling a greater degree of understanding on the part of both the proponents and opponents of the proposed project. To the extent the need to undertake a planning process including public participation magnifies the cost differential between eminent domain and market transactions, these processes also provide a further disincentive to use eminent domain.

State legislation should require that a redevelopment area be established only if the local government has adopted a comprehensive plan and the redevelopment area plan conforms to the comprehensive plan applicable requirements. Additionally, the State legislature should recognize the importance of intergovernmental cooperation to ensure that actions of single purpose agencies are not inconsistent with the local redevelopment plans.[19] A local comprehensive plan based on an understanding of the wide range of social, economic, and environmental issues and conditions that affect a community will provide a sound framework for rational decisions regarding long-term physical development. Like specific plans and neighborhood plans, a plan for a redevelopment area should be consistent with the overall plan for the jurisdiction. Redevelopment should also be recognized as a tool that local governments can use to implement their comprehensive plans. Requiring that, as a prerequisite to redevelopment, a redevelopment area plan be consistent with the community's comprehensive plan ensures that the selection of redevelopment approaches and resources will help to implement and not conflict with the comprehensive plan's goals and objectives for the entire community. Where there is no comprehensive plan, the redevelopment plan itself must be

[19] AMERICAN PLANNING ASSOCIATION, *Policy Guide on Public Redevelopment* (2004) - Policy #1.

comprehensive, long-range, contemporary, and formulated with public input to achieve the larger vision for the entire community.[20]

Without a doubt, State legislation must require an inclusive and informative public notice and public participation process to ensure open and participatory redevelopment programs. Proper public planning is founded upon the underlying belief that better decisions will emerge as communities enable joint thinking among a diverse group of people, thus encouraging greater creativity and a larger number of options.[21]

Finally, the Ohio General Assembly should consider providing additional compensation for takings of occupied structures and small businesses.[22] The default standard for determining just compensation is fair market value - what a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker. *See, e.g., United States v. 564.54 Acres* (1979), 441 U.S. 506, 511-12; *United States v. Miller* (1943), 317 U.S. 369, 374. This legal standard, however, may sometimes fail as a matter of public policy to provide full indemnification to all property owners whose property is taken by eminent domain. The most obvious shortfall is the subjective value that individual owners attach to their properties. Subjective value has many sources. Owners may have made modifications to the property to suit their individual needs and preferences; they

[20]*See Id.*

[21]*See*, Stuart Meck, Gen. Ed., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (Am. Planning Ass'n, 2002 Edition), 7-191 *et seq.* [model statutes for redevelopment area plan; public participation procedures and public hearing].

[22]Patricia Salkin, *Testimony to the New York State Senate - Retain Eminent Domain Authority,* PLANNING & ENVIRONMENTAL LAW, Vol. 57, No.11, p. 10 (November 2005).

may treasure friendships they have formed in the neighborhood; they may simply enjoy the security that comes from being in familiar surroundings. These values are ignored under the fair market value test. Another important shortfall involves consequential damages caused by a taking of property, including moving expenses, attorneys fees, loss or damage to tangible personal property, and loss of business good will. The constitutional formula does not provide any compensation for any of these values either. These systematic shortfalls in compensation help account for the intensity of opposition many homeowners and small business owners express even to compensated takings.

Additional compensation would reduce the burden imposed on particular individuals by the imposition of uncompensated residual losses. It would provide a further incentive for cities to forego eminent domain, if at all possible, in favor of market exchange. And it would provide a targeted and calibrated remedy for the concerns about uncompensated losses suffered by certain property owners, homeowners in particular, without erecting an unnecessary general barrier to the use of the eminent domain power as a tool for redevelopment and economic development.

The Constitution requires "just compensation," not fair market value, and it is possible that constitutional compensation standards could be modified in ways that would provide more complete compensation for persons who experience uncompensated subjective losses and consequential damages. Courts have been reluctant to endorse deviations from the market value standard, however, because differentiating between claimants who experience such losses and those who do not would create administrative problems for courts. *See, e.g.*, *564.54 Acres of Land*, 441 U.S. at 511-13; 516-17. Legislatures are in a much better position to identify categories of claimants who may, as a matter of public policy, deserve additional compensation,

and to develop administrative mechanisms for providing such compensation. Congress has shown the way, through the landmark Uniform Relocation Assistance Act of 1970, 42 U.S.C. § 4601 *et seq.*[23]

CONCLUSION

The *Kelo* Court declined to second-guess the City of New London's "considered judgments about the efficacy of its development plan" and, furthermore, declined to "second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project." *Kelo*, *supra*. We ask this Court to do the same. Reforms, if needed, should properly be recommended by the current Task Force to Study Eminent Domain.[24] The decision of the Court of Appeals, upholding the City of Norwood's urban renewal plan and the condemnations made pursuant to that plan, should be affirmed.

[23]The Relocation Act requires that all real property condemnations undertaken by the federal government provide, in addition to compensation for the fair market value of the property taken, additional compensation for moving expenses, direct losses of tangible personal property, reasonable expenses of searching for a substitute business or farm, and certain other incidental expenses. *Id.,* §§ 4622(a), 4653.

[24]SB 167, sponsored by State Senator Timothy Grendall, signed into law November 16, 2005, *available at* http://www.legislature.state.oh.us/bills.cfm?ID=126_SB_167

Respectfully submitted,

LINDNER & WEAVER LLP

Daniel F. Lindner (#0063918)
55 Public Square, Suite 1600
Cleveland, Ohio 44113
Telephone: (216) 363-5220
Facsimile: (216) 623-2199
E-mail: daniel@justuslawyers.com

Attorney for *Amicus Curiae*
American Planning Association and the Ohio Planning Conference

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief *Amicus Curiae* of the American Planning Association and the Ohio Planning Conference was sent via Regular U.S. Mail on this 29th day of November, 2005, upon the following:

Robert P. Malloy
Wood & Lamping, LLP
600 Vine Street, Suite 2500
Cincinnati, OH 45202-2409
Ohio Counsel for Appellants

Dana Berliner
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
Counsel for Appellants

Timothy M. Burke
Manley Burke
225 West Court Street
Cincinnati, OH 45202

Richard B. Tranter
Mark Vander Laan
Dinshore & Shohl, LLP
255 East Fifth Street, Suite 1900
Cincinnati, OH 45202

Lawrence C. Baron
230 East Ninth Street, Suite 400
Cincinnati, OH 45202

Rich G. Gibson City of Norwood Law Director
Theodore E. Kiser
Assistant Law Director
City of Norwood
4645 Montgomery Road
Norwood, OH 45212

State of Ohio
c/o Ohio Attorney General's Office
Cincinnati Regional Office
1700 Carew Tower, 411 Vine Street
Cincinnati 45202

Rachel Lynne Zwolinski
Gibson, Dunn & Crutcher
1050 Connecticut Ave.
Washington, DC 20036

David C. Tryon
Patrick Thomas Lewis
Jeffrey James Weber
Porter, Wright, Morris & Arthur
925 Euclid Avenue Huntington Building
Cleveland, OH 44115-2560

William George Batchelder III
435 East Smith Road
Medina, OH 44256-2635

Donald Michael Gallick
14837 Detroit Avenue #242
Lakewood, OH 44107

Douglas Marr Mansfield
Chad Andrew Readler
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017

Richard Francis Meyer
Browning & Meyer Co., L.P.A.
8101 North High Street Suite 370
Columbus, OH 43235

John Hamrick Burtch
Marcella Louise Lape
David Charles Levine
Baker & Hostetler, LLP
65 East State Street
Columbus, OH 43215-4260

Daniel F. Lindner (#0063918)

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