Environmental Law & Property Rights

Berman and Beyond: The Misuse of Blight Laws and Eminent Domain

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Introduction

One of the primary methods used by government to take property through eminent domain for redevelopment projects is to declare a particular area to be blighted. In blight cases, the purported purpose of the condemnation is the elimination of blight—the removal of a public harm. The U.S. Supreme Court in *Berman v. Parker*, 348 U.S. 26, 31 (1954), held that the condemned properties at issue were "injurious to the public." Thus, the *Berman* Court decided that the properties could, consistent with the Constitution, be transferred to private parties because the public purpose of the condemnation was the elimination of blight.

Berman established blight elimination as a justification for using eminent domain, and the removal of blight has been used to justify the taking of property for private redevelopment for almost a half a century. However, what constitutes a blighted neighborhood has been vastly expanded since *Berman*. As a result, neighborhoods that have very little in common with the one at issue in *Berman* are being condemned. Indeed, it seems that several governments merely use blight as a pretext for their real goal—the removal of existing homes and businesses and the transfer of the land to a private developer so that the government can obtain more tax revenue. Courts, however, are starting to become more skeptical of the misuse of blight designations.

The Blight at Issue in *Berman*

Berman concerned the question of whether the government could condemn property necessary to clear "slums" and subsequently transfer the cleared or improved property to another private party. A slum was defined as "the existence of conditions injurious to the public health, safety, morals and welfare." *Berman*, 348 U.S at 31. In the nearly 50 years since *Berman*, the Court has not addressed the Fifth Amendment's Public Use Clause in a "slum clearance," or more politely "urban redevelopment," case. Although the terminology has changed from slums to blight, the rationale remains. Property may be condemned to eliminate conditions injurious to the public welfare. In *Berman*, the Court cited surveys finding that "64% of the dwellings were beyond repair . . . 57% of the dwellings had outside toilets . . . 83% lacked central heating." *Id.* at 30.

The district court was even more specific in detailing the conditions of the area. In *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (D.D.C. 1953), the district court case resulting in *Berman*, the court found that the death rate for the subject area was 50% higher than in the remainder of the District of Columbia. Moreover, the death rate from tuberculosis was two and a half times greater and the death rate from syphilis infection was more than six times than the general rate in the District of Columbia. *Id.* at 709. This was the factual situation that confronted the Court in *Berman*.

The condition of the area at issue in *Berman* is in contrast to many modern blight cases. Indeed, the modern-day blight cases seem to confirm the Court's anxiety in *Schneider* when it upheld the use of eminent domain for slum clearance:

> These extensions of the concept of eminent domain, to encompass public purpose apart from public use, *are potentially dangerous to basic principles of our system of government*. And it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights. . . . [T]hat the government may do whatever it deems to be for the good of the people is *not* a principle of our system of government. Nor can it be . . . . [I]t is universally held that the taking of private property of one person for the private use of another violates the due process clauses of the Fifth and Fourteenth Amendments.
> *Id*. at 716. (emphasis added).

Two Modern Case Studies in the Abuse of Blight Laws

1. Norwood Ohio

Carl and Joy Gamble worked hard their entire lives. Their oasis for more than 34 years has been their well-kept home, with a huge backyard, on Atlantic Avenue in Norwood, Ohio (a city surrounded by Cincinnati). They raised two kids there. When they sold their small, family-owned grocery store in November 2001 and retired, they looked forward to quiet days gardening in their yard and enjoying visits from their now-grown children.

But Cincinnati developer Jeffrey Anderson has different plans for the Gambles and their neighbors. He wants to build Rookwood Exchange, a follow-up to the adjacent Rookwood Commons. The project is expected to contain private offices, condos, chain stores and a parking garage on a triangular piece of property bounded by Interstate 71, and Edmondson and Edwards roads in Norwood.

Anderson bought many of the properties in this neighborhood, but he met stiff resistance from a group of home and business owners that do not wish to sell their

properties or be forced out through eminent domain. So in December 2002, the developers asked the Norwood city council to pursue an urban renewal study. The developers admitted that the "study's findings are key only if they can't get the property owners to sell."[1] Anderson knew that with a finding of blight and a declaration that the area was an urban renewal zone, the City would be able to use eminent domain to force out those who refused to sell. Anderson brazenly offered to pay for the urban renewal study, and the Norwood City council accepted his offer.

Given the desires of Anderson for this neighborhood and the fact that he paid for the urban renewal study, it was perhaps not surprising that the study concluded that a perfectly fine, middle-class neighborhood of 99 homes and small businesses (in addition to some vacant properties) was in fact "blighted," "deteriorated," and "deteriorating." Following through on Anderson's wishes, the urban renewal study was adopted by the Norwood city council on August 26, 2003.

The so-called Urban Renewal Plan for the Edwards Road Corridor Area was a study specifically designed to the reach a pre-determined result: to declare blighted an attractive, well-maintained neighborhood of homes and businesses.

The key to understanding the entire study is the third paragraph of the Introduction, which concedes "Private development interests, including the developers of the adjacent *Rookwood* projects, have proposed developing two separate mixed-use commercial projects on separate sites on opposite sides of the interstate north of Edmondson and west of Edwards Roads," the very area declared an urban renewal zone by the City. Thus the urban renewal plan is the direct result of the desire of private developers to have this land.

The study put the cart before the horse. First, private developers came up with a plan, and then the City commissioned a study that declares the neighborhood to be an urban renewal area, with the ability of the City to use eminent domain to remove those who do not sell to the developer. This is a blatant misuse of the urban renewal law.

Even though the study was fueled by a desire to obtain land for a private development project, it had to concede a number of remarkable things. In direct contrast to the bad neighborhood conditions at issue in *Berman* and traditional blight cases, the study found there is not one home, business or other building that is dilapidated. *Not one*. Moreover, there is not one property that is delinquent on taxes. Genuine concern for and evidence of serious problems with the conditions of the structures or signs that properties have been neglected or abandoned lie at the very core of urban renewal laws and the Court's decision in *Berman*. And yet these fundamental urban renewal factors are completely non-existent in the Edwards Road area.

Given the fine condition of the homes and businesses, the urban renewal study instead had to rely on several factors, such as broken pavement along sidewalks, standing water on roads, and poorly designed streets, over which the property owners have no control whatsoever. Indeed, if these supposed blighting characteristics exist, it is the City itself that has created them. The City thus creates these blighting factors—or at least permits them to exist—and then uses them as a basis to take the homes and businesses in the area.

The inclusion of such factors in the blighting categories as weeds and cars parked in front of houses are absurd. No court would permit homes to be torn down because of some weeds in a yard or a car out front. Moreover, in order to beef up the blighting categories, the study illegitimately counts certain supposed problems numerous times. For instance, rather than zoning problems being counted in one category, they are counted in at least five separate blighting categories. Supposed problems with the street layout in the area are counted three times. Factors such as "lack of required safety rails, hand railings, or landings" are repeated verbatim in two separate blighting categories.

This double, triple, and even quintuple counting is clearly used to achieve the desired result: the declaration that this area is blighted. They are also an indication of the very real problems that plague this report. Indeed, problems with the study itself and the extremely thin reed upon which it advocates declaring this neighborhood blighted virtually invited a legal challenge. And currently, the Institute for Justice, where we are attorneys, is challenging Norwood's blight designation and the ability of the City to use eminent domain to implement the urban renewal plan. We also recently filed a lawsuit challenging a blight designation in Lakewood, Ohio.

2.Lakewood, Ohio

Jim and JoAnn Saleet first saw their dream home in 1965. The house on Gridley Street in Lakewood, Ohio, was perfect for the couple. It was in a cozy neighborhood and had a sweeping view of the Rocky River and valley. Jim and JoAnn wanted that home the moment they first stepped into the yard and saw the breathtaking view of fall foliage aglow in the valley. Standing together in that yard back in 1965, they decided that they would buy the place and never move again. This was where they would raise their children and stay for the rest of their lives. Over the next 38 years, they made many improvements to the house and continued to enjoy their beautiful view as they gardened. They promised their daughter, Judy, who lives nearby and loves her childhood home, that they would leave the house to her and her family.

The Saleets, however, are not the only ones who want to enjoy that beautiful view. After nearly 40 years happily ensconced in their home, the Saleets were stunned

when Lakewood Mayor Madeline Cain announced that, to increase the city's tax base, the City was helping a developer replace their home and neighborhood with high-end shopping and upscale condos. Interestingly, the same developer who is behind the project in Norwood described above is one of the two developers who stand to gain from the Lakewood project. Suddenly, the Saleets faced the prospect of losing their home through eminent domain abuse, where government takes one person's private property only to hand it over to another private party.

The news shocked many other residents of Lakewood's West End. Julie and Hal Wiltse's home and business is slated to be destroyed. They have lived there for more than 40 years. Sandeep Dixit and his family had moved to the neighborhood only a few years ago. He chose it as a safe, comfortable neighborhood to raise his two young children. Christa Eckert Blum moved to the neighborhood eight years ago with her husband.

As these and other home and business owners look around, they cannot understand it. They keep up their colonial homes, invest money in them and make improvements. The West End has a vibrant business community, without a single commercial vacancy—compared to more than 100 commercial vacancies in the rest of Lakewood. Why does the City want West End homeowners and businesspeople to leave?

After eight months of living in stress and uncertainty following Mayor Cain's announcement, the Saleets and other West End residents watched their worst nightmares come true. In December 2002, the City officially approved a "community development plan," along with a finding that the Saleets' neighborhood was "blighted" under Lakewood law. A "blight study" alleged that the neighborhood had a disproportionate number of police and fire department calls and was "functionally and economically obsolete." The homeowners knew this was impossible. Not only did their neighborhood look just like all the homes in Lakewood, but there had been no major crimes or fires.

With further investigation, it turns out the owners were right. There had been only one major crime (a robbery) in the preceding two-and-a-half years. The other police calls had been minor. Even more perplexing, while many police calls were related to several bars on a commercial street,[2] the City's development plan will actually increase the number of bars. And most of the calls to the fire department had in fact been medical emergencies.[3]

The homes do not have major structural deficiencies, so the study had to use something else to find "blight." The study's "blighting factors" include:

- lack of a two-car attached garage,
- less than two full bathrooms,
- less than three bedrooms,
- too-small homes (less than 1,400 square feet), and
- too-small yards (less than 5,000 square feet of lot size).

The study counted weeds and sidewalk cracks as site condition deficiencies. And it found homes "economically obsolete" if they were valued at less than $75 per square foot.[4]

Of course, such "blighting factors" do not distinguish the West End from any other part of Lakewood. Almost no home in Lakewood has a two-car attached garage. A large majority have less than two full bathrooms. More than half are valued at less than $75 per square foot. Indeed, as it turns out, the homes of the Mayor and all of the City Council members (along with the vast majority of all Lakewood homes) would be blighted under the standards the "blight study" and the City applied to the West End homes.[5] The Saleets' neighborhood really is like every other neighborhood in Lakewood.

No one could honestly say the area is blighted. It's far too attractive. Even Mayor Madeline Cain described it as a "cute neighborhood."[6] But it's a cute little neighborhood with a beautiful view. Richer people might pay for that view and thus generate more tax dollars—at least that's what the City is hoping.

Norwood and Lakewood are not the first to stretch the definition of "blight" to justify taking perfectly fine property and handing it over to a private developer. In Kentucky, a neighborhood with $200,000 homes has been declared blighted. Englewood, N.J., termed blighted a thriving industrial park that had one unoccupied building out of 37 and generated $1.2 million per year in property taxes. Richfield, Minn., labeled buildings blighted that did not have insulation that met Minnesota's rules for energy-efficient construction of new buildings. And various California cities have tried to label neighborhoods blighted for peeling paint and uncut lawns.[7]

Although city officials will usually tell citizens that blight and urban renewal designations are useful for funding and tax abatement, in fact a blight designation places all properties in the area at the mercy of both government officials and developers. Residents should therefore view any blight designation as the first move in a coming eminent domain action.

The Tide is Turning in the Courts

While blight designations and the use of eminent domain in urban renewal areas has traditionally been given broad deference by the courts, the expansion of the understanding of blight has caused several courts to give more vigorous review of urban renewal plans.

The Connecticut Supreme Court recently rejected an attempt to expand an older blight designation to allow

condemnation of a local diner for additional commercial development. *See Aposporos v. Urban Redev. Commission*, 259 Conn. 563, 565-68 (2002). The original blight designation dated from 1963. In 1988, the city amended the plan to include additional property for a new project that would compete with a mall that had been constructed in another part of Stamford in the 1980s. The 1963 redevelopment plan was due to expire in 1993, but the city extended it to 2000. 259 Conn. at 565-68. The city finally began condemnations in the new area at the end of 1999. The Connecticut Supreme Court held that a new finding of blight *was* required when new property was added to the project area or when the agency sought to conduct a new project, not originally contemplated. To hold otherwise, the Court found, "would confer on redevelopment agencies an unrestricted and unreviewable power to condemn properties for purposes not authorized by the enabling statute and to convert redevelopment areas into their perpetual fiefdoms." *Id*. at 577.

California courts have been examining blight designations with greater attention and rejecting designations not supported by the evidence. For example, in *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 398 (Ct. App. 2000), the court rejected a blight designation where there was insufficient evidence of physical blight. "[T]here is no evidence that any of the affected parcels contains a building in which it is unsafe or unhealthy for persons to live or work." *Id*. The court in *Graber v. City of Upland*, 2002 Cal. App. Lexis 4296 (Jun. 18, 2002) rejected a similar attempt to designate an area as blighted based on such factors as peeling paint and sagging screens. *Id*. at *31-35.

A Minnesota appellate court similarly rejected a redevelopment area designation, although the Minnesota courts have left the case in a procedural mess. In *Walser Auto Sales v. City of Richfield*, 635 N.W.2d 391 (Minn. App. 2001), *aff'd on divided court*, 2002 Minn. Lexis 353 (May 23, 2002) (*Walser II*), the city found that the buildings in the redevelopment district were structurally substandard because they were not insulated in conformance with the energy conservation standards for new construction. Other errors included extrapolating data about the homes from a small subset and extrapolating negative data but not extrapolating positive data.[8]

Finally, the reinstated opinion in *Henn v. City of Highland Heights*, No. 98-95 (E.D. Ky. March 23, 2001) also finds that a city improperly designated an area as blighted. The case was originally decided by the district court in 1999. *See Henn v. City of Highland Heights*, 69 F. Supp.2d 908 (E.D. Ky. 1999). That decision was then vacated and remanded for certain jurisdictional findings. *See Henn v. City of Highland Heights*, 2001 U.S. App. Lexis 2490 (6th Cir. Feb. 8, 2001). The district court made additional jurisdictional findings and reinstated the original opinion on March 23, 2001. Although the municipality at first appealed the reinstated decision, it voluntarily dismissed the appeal in November 2001, so the *Henn* opinion is now final. In the opinion, the court found that there was no disease, high crime, or poverty in the area but that it was a "normal real estate market of moderately priced housing." The court therefore rejected the blight designation as arbitrary and capricious.

Conclusion

Across the country, local governments are labeling thriving neighborhoods "blighted" as an excuse for transferring property to private developers. Keeping cities honest about blight is vital to preserving the rights of ordinary citizens to enjoy their property and their neighborhood in peace.

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Footnotes

[1] Susan Vela, *Norwood may ok blight study of development area*, The Cincinnati Enquirer, March 25, 2003.
[2] Data from Lakewood Police Department.
[3] Data from Lakewood Fire Department.
[4] *See* D.B. Hartt, Inc., *Community Development Plan for the West End District* (July 29, 2002).
[5] Data from Cuyahoga County Auditor.
[6] V. David Sartin, *West End deal going to Lakewood council*, The Plain Dealer, Apr. 21, 2003, at B1.
[7] Dana Berliner, *Public Power, Private Gain*, at 159-68 (Institute for Justice April 2003) (available at www.castlecoalition.org/report).
[8] This decision stands in conflict with Housing & Redev. Auth. v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. App. 2001), *aff'd on divided court*, 641 N.W.2d 885 (Minn. 2002) (*Walser I*), which was also affirmed by a divided court. *Walser I* held that the condemnation was for the public purpose of eliminating blight, while *Walser II* held that there was no blight.