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spotlight

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A Threat to Private Property

N.C.'s Broad and Subjective Urban Redevelopment Law

SUMMARY: **North Carolina's Urban Redevelopment Law is a major threat to private property rights. It is so broad that it would permit the government to seize private property that is not blighted and even to take property for economic-development purposes. Any urban redevelopment law should only permit the government to seize private property if it meets a narrow and common sense definition of blight.**

North Carolina's Urban Redevelopment Law[1] should be a major concern for anyone interested in private property rights in the state. It permits governmental seizure of private property in far more situations than most people would expect. There is a common misperception that this law only permits private property to be taken if it is blighted. In fact, the law specifically creates scenarios by which non-blighted property can be taken under the guise of vaguely defined urban redevelopment areas.

The United States Supreme Court's decision in *Kelo v City of New London*[2] set off a firestorm of protest against the government taking private property for economic development. The Court said that the government can seize non-blighted private property for economic-development reasons alone (economic-development takings). Some North Carolina leaders have argued that these types of economic-development takings cannot occur in North Carolina.[3] However, North Carolina's vague and ambiguously worded urban redevelopment law does permit non-blighted property to be taken for economic-development purposes, with some limited conditions.

This *Spotlight* explains the ways government can take private property under the urban redevelopment law and identifies problems with the law.

Takings under the Urban Redevelopment Law

According to North Carolina's Urban Redevelopment Law, the government can take private property in what are called "redevelopment areas." There are three types of redevelopment areas: "blighted areas," "nonresidential redevelopment areas," and "rehabilitation, conservation, and reconditioning areas." A redevelopment area also can be a combination of any of these three areas.[4]

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The statute's primary focus is on "redevelopment areas," and as a result, terms in the law are defined in relation to an area, not in relation to a specific piece of property. For example, the law does not define "blight," but it does define a "blighted area." For purposes of this *Spotlight* and common sense, properties meeting the conditions required for "blighted areas" will be inferred to be "blighted" properties (and vice-versa).

'Blighted Areas'

The first type of redevelopment area deals with blight. Ideally, a narrow definition of a blighted property would require that the property pose a real harm and be a danger to public health and safety. The government should only be allowed to take private property based on "blight" in these narrow situations. Justice O'Connor, in her *Kelo* dissent, argued that the taking of a blighted property itself should directly fix a harm.[5]

According to the North Carolina statute, a "blighted area" shall contain properties that "by reason of" even one factor such as "dilapidation, deterioration, age or obsolescence," … "substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime, and is detrimental to the public health, safety, morals, or welfare."[6]

At first glance, the definition of "blighted area" seems fairly narrow. However, one has to pull back the curtain and see what lies behind it.

When the text is carefully analyzed, it becomes clear that the standard is quite subjective. How does the age of a building alone cause these harms? Is it simply because bad conditions exist in the area and, since the homes are old, age can be justified as the cause? Is it because new development would solve these problems? Neither the law nor court decisions have answered these questions.

Impairing Sound Economic Growth: An area could be experiencing economic growth, and still be impairing the sound growth of the community. What is *sound* growth? If a community is "underperforming" economically, compared to other communities, is this evidence of the properties impairing sound growth??

Conducive to Ill Health, Transmission of Disease, etc.: The law provides a long list of health and safety issues. The problem is the provision simply says that the properties must be *conducive* to ill health, etc. It does not require that any of these conditions *actually* exist. It does not even require that those conditions are likely to exist soon. Instead, it simply says the properties are *conducive* to these conditions, whatever that means.

Public Health, Safety, Morals, **or** *Welfare:* The key word is "or." This provision shows the power of conjunctions — if "or" was replaced with "and," this truly would be a narrow definition of blight. Instead, as long as something is detrimental to the public welfare, which is both very broad and vague, this provision can be met.

There is one more requirement for an area to be a "blighted area." At least two-thirds of the properties in the area must be blighted, according to the inclusive and subjective definitions discussed. Unfortunately, this also means that up to one-third of the properties in a "blighted area" can be in pristine condition and yet still be seized by the government.[7]

'Nonresidental Redevelopment Areas'

The second type of redevelopment area is a "nonresidential redevelopment area." These areas are not blighted, but property can still be seized for redevelopment. Despite the name, these areas can have a significant residential component, as long as the buildings are "predominantly" nonresidential.

These areas shall contain properties, which by reason of a factor such as age or obsolescence, "significantly impair[] the sound growth of the community, have serious adverse effects on surrounding development, and is detrimental to the public health, safety, morals or welfare."[8] These problems can be purely economic (no health or safety issues have to exist)—in other words, these areas allow for economic-development takings. To make matters worse, only 50% of the properties have to meet those requirements.

Consider any low-income neighborhood in North Carolina. If it had older buildings, which would be likely, and the

area was both predominantly nonresidential and underperforming economically (maybe it has high unemployment and low growth), those factors alone could suffice to meet the minimal definition of a "nonresidential redevelopment area."

'Rehabilitation, Conservation, and Reconditioning Areas'

Finally, the third type of redevelopment area is a "rehabilitation, conservation, and reconditioning area." The power of eminent domain can be used even if there is no current economic development problem or any 'blight." This provision requires there to be a "clear and present danger" that in the reasonably foreseeable future an area will be a "blighted area" or a "nonresidential redevelopment area."[9] Somehow, there must be some undefined current factor that would lead the government to believe that in the future, problems will arise. North Carolinians, because of this statute, not only have to let the government take property that is not blighted, but also rely on the fortunetelling skills of planning commissions.

The Problems with Economic Development Takings

One of the major concerns with *Kelo* is that it allows the government to take any private property if a better economic use for the property can be found. While not being applicable to all property, North Carolina's Urban Redevelopment Law could allow a significant amount of private property to suffer the same fate.

Under the Urban Redevelopment Law, there is no way to separate a government's desire to fix property conditions that allegedly cause economic harm and its desire to promote economic development. The government could take property not to fix some perceived problem with the property but because it has identified a better economic use for the property (e.g. increased tax revenue, more jobs, etc.).

A "reverse Robin-Hood effect" will occur. As Hilary O. Shelton, NAACP Washington Bureau Director stated in his recent Senate testimony on private property rights:

> Municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas with low property values with those with higher values.[10]

In this same testimony, he said on the issue of urban renewal:

> Indeed, the displacement of African-Americans and urban renewal projects are so intertwined that "urban renewal" was often referred to as "Black Removal."[11]

Also, it is difficult to determine if a taking is designed to benefit a specific private developer or to fix property conditions. The Ohio Supreme Court is reviewing a case that deals with this specific issue.

A private developer wanted to build some chain stores, offices, and condominiums in Norwood, Ohio. However, he did not own the land where he wanted to build his new development. So he approached the city of Norwood and asked its leaders to conduct a study to determine if the area was blighted or deteriorating. If this declaration could be made, he could try to have properties condemned. According to the study, the area did not meet the definition of blight, but did meet the lower standard of "deteriorating." Norwood then initiated condemnation proceedings.

Norwood clearly decided to designate the area as "deteriorating" to help the private developer. However, even though the study never would have been conducted if it were not for the developer, the Ohio First District Court of Appeals did not think the city's reason for condemning the property was to assist the developer. According to the court, the city was trying to address deteriorating conditions and this rationale was not an excuse for helping the developer (which would be illegal).[12]

This is not some isolated case that could only happen in Ohio. At least in Ohio the property had to be deteriorating. In North Carolina, the property can be condemned even though it is in perfect condition, but because of age, it is hurting economic growth or someday it might hurt economic growth.

Excessive Judicial Deference

North Carolina courts could ensure that the urban redevelopment law is not used subjectively and abused. Unfortunately, the courts have decided to defer to the government on matters related to this law. As a result, there is little oversight.

North Carolinians have reason to be concerned about their private property rights because of court decisions such as *Redevelopment Commission of Greensboro v. Johnson*.[13] In that case, the Greensboro redevelopment commission determined that Andrew and Diane Johnson's property was in a "blighted area." Whether their property was actually blighted was of no concern to the court, only that it was in the "blighted area."

The commission decided not to condemn all the property in the blighted area and instead gave some property owners a chance to redevelop their land. Unfortunately for Mr. and Mrs. Johnson, they were not given this opportunity. They wanted the commission to explain its rationale but the commission refused to provide any answers. The Johnsons decided to take the matter to court. Unfortunately, the North Carolina Court of Appeals did not think the commission had to provide any answers:

> Where the general power to condemn exists, the right of selection as to route, quantity, etc. is left largely to the discretion of the [redevelopment commission], and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith…and manifest abuse of the discretion conferred upon them by law… We therefore conclude the Commission was not required to articulate its reasons for condemning some, but not all, of the property located within the Benjamin Benson Street Area.[14]

In other words, a North Carolinian can wake up one day and learn his house is being condemned, even if it is in perfect shape, while the neighbor with a deteriorating house but good political connections is being left alone. Even worse, the property owner never would know why he was being treated differently under the urban redevelopment law.

Conclusion

A simple question has to be asked: Should North Carolina allow for the taking of non-blighted property under its urban redevelopment law? The answer seems pretty simple across all ideological lines: Absolutely not.

Steven Eagle, a George Mason University law professor, stated in relation to the Norwood case "Every jurisdiction allows condemnation to relieve blight. If blight is going to be vaguely defined, then it could be open season for condemnation for redevelopment."[15] North Carolina not only has a broad definition of blight but also expressly allows the condemnation of *non-blighted* properties — it definitely is open season for condemnation in North Carolina.

The state needs a narrow definition of blight, and this new definition alone should be the means by which property can be taken under an urban redevelopment law. This is not a revolutionary idea, but a way to ensure that government does not have the subjective power to seize private property because it thinks someone else can use it better.

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Notes

1. N.C. Gen. Stat. § 160A-500 et seq., http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_22.html
2. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), http://laws.findlaw.com/us/000/04-108.html
3. Ellis Hankins, "U.S. high court didn't authorize N.C. cities to do anything more," North Carolina League of Municipalities, http://www.nclm.org/A1%20Center%20Page%20News/eminent_domain_hankins.htm
4. *Op. cit.*, note 1.
5. *Kelo*, p. 2674.
6. *Op. cit.*, note 1 at § 106A-503(2).
7. *Ibid.*
8. *Op. cit.*, note 1 at § 106A-503(10).
9. *Op. cit.*, note 1 at § 106A-503(21).
10. "The Kelo Decision: Investigating Takings of Homes and other Private Property," Testimony of Hilary O. Shelton before the United States Senate Committee on the Judiciary, September 20, 2005, http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4660
11. *Ibid.*
12. See the Institute for Justice web page covering the Norwood, Ohio case at http://www.ij.org/private_property/norwood/index.html
13. *Redevelopment Commission of Greensboro v. Johnson*, 129 N.C. App. 630, 500 S.E.2d 118 (1998).
14. *Ibid.*
15. Andrew Welsh-Huggins, "Ohio court hears case on eminent domain," Associated Press, on ABC News web site at http://abcnews.go.com/US/print?id=1494062