

The Condemned

In Ohio, and across the country, homeowners are battling cities and developers conspiring to seize their property.

By Gary Greenberg | January/February 2005 Issue

From his office at the top of Rookwood Tower, the seven-story, glass-and-steel building that his family's real estate company built, Jeffrey Robert Anderson Jr., or J.R. as he is known here in Norwood, Ohio, can easily survey his empire. Directly below the tower and its 185,000 square feet of professional and financial services offices is Rookwood Pavilion, 23 acres of shopping and eating. A little farther to the left is Rookwood Commons -- not, Anderson advises me, a shopping plaza, but a "lifestyle center" containing a Gap, Ann Taylor, and 46 of the other usual suspects. This former brownfield, abandoned when a machine tool factory left Norwood, is now the premier shopping destination in Greater Cincinnati, if not all of Ohio, according to anyone around here that you ask. It's an impressive sight, and perched high up in his well-appointed office with its sculptures and paintings and enormous glass-topped table, you might believe that this tall and fit 32-year-old with flaxen hair and bright blue eyes rules over all that he sees, or at least all that lies this side of the interstate.

And he would, were it not for the 13-acre, triangular spit of land directly below the tower. There, under the spruce and maple trees, are the asphalt-shingled roofs of a tidy neighborhood of modest houses. Bounded by the Cincinnati city line to the east and Rookwood to the south, and cut off from the rest of Norwood by an interstate highway, these 97 homes and small businesses are glaringly out of place, a mid-20th-century remnant amid all this 21st-century glitz. They're also in Anderson's way. He wants to expand the Rookwood complex, but he has to buy and raze all these houses first, and while most property owners have eagerly accepted his offer to buy their houses at a premium price, five have refused. And so the \$125 million-plus project, known as Rookwood Exchange, slated to be under construction by now, is at a dead standstill.

But Anderson has an ace up his sleeve. At his behest, and using his money, the city of Norwood has invoked its powers of eminent domain -- the right, granted by the Takings Clause of the Fifth Amendment to the Constitution, of a government to seize private property and turn it to public use -- to condemn a neighborhood and order residents out of their homes. Norwood is not the first city to act as a real estate broker whose offer can't be refused, nor is Anderson the first businessman to benefit from this kind of largesse. A 1954 Supreme Court decision stating that the economic benefits of private development are a legitimate "public use" has forged an unholy alliance between cities strapped for cash and entrepreneurs promising economic bounty. (Anderson, for example, forecasts that Rookwood Exchange will net Norwood, a city with an annual budget of \$18 million, between \$1.5 and \$3 million in annual taxes.) Struggling cities have placed their urban renewal hopes in the hands of developers like Anderson, who in turn rely on governments to assemble the parcels for their projects.

According to the Institute for Justice (IJ), a public-interest law firm, this is a growing trend. The institute analyzed eminent domain cases between 1998 and 2002 and found more than 10,000 instances where local governments had attempted to use a power once reserved for indisputably

public projects like highways and railroads to obtain properties for private development projects such as box stores and golf courses.

No properties are off-limits -- working-class communities, ski chalets, and one-tenth of San Jose, California, have all been targets of condemnation proceedings on behalf of enterprises as varied as casinos, Costco, and the New York Times -- and no one has yet been able to thwart this newly privatized version of eminent domain. But by litigating against what it calls "eminent domain abuse," the IJ has succeeded in creating enough disarray in state courts to achieve its ultimate goal: convincing the Supreme Court to revisit the issue. This spring, for the first time in 50 years, the court will address the parameters of eminent domain, and the institute hopes the justices will rein in the private use of what the court itself once called government's "despotic power."

"It was the day before Mother's Day in 2002," Joy Gamble says. "They said they were going to build this fabulous project, and we were going to be gone. The roof fell in." The Gambles, who have lived in Norwood their entire lives, made an immediate decision. They weren't selling, no matter what price Anderson was paying. "And start life all over again?" Carl adds. "We started here, we raised two kids here, we finish up here."

"Here" is the Gambles' two-story stucco home a few doors up tree-lined Atlantic Avenue from its terminus at the I-71 off-ramp. An American flag is planted by the brick front stairs, next to a hand-lettered sign that says, "IF YOU WANT THIS PROPERTY YOU SHOULD HAVE BOUGHT IT IN 1969." Inside, a hunting supply catalog sits on the coffee table, a Ronald Reagan calendar hangs from the kitchen wall, and vivid tapestries and paintings of stags and partridges give the overall effect of *Field & Stream* on acid. The Gambles, who won't give their ages ("I forgot," says Carl; "I don't tell," says Joy), appear to be in their 70s, and they speak in clipped sentences inflected with the local twang. "The first time we had contact with these people," Joy tells me, "[Anderson] wanted to meet with us. I said, 'We don't want to sell.' He said, 'Thank you.' I said, 'You're welcome.' I hung up. Very nice." Joy goes on to list several other unsuccessful attempts, noting that Anderson's people were always extremely polite.

But what the Gambles didn't know was that in January 2002, before he called them or any of their neighbors, Anderson had asked the City Council to undertake an urban renewal study, the prerequisite to condemning properties. "I figured we wouldn't have to go through with it," Anderson says. "Just pass the urban renewal study and get things rolling." When he built Rookwood Tower back in 1997, Anderson had easily convinced the city to authorize such a study -- although he was ultimately able to assemble the necessary properties on his own. But in 2003, three years after he was indicted for corruption, the longtime mayor -- whom Anderson had given \$23,000 in campaign contributions ("an astronomical sum around here," says one city official) and an undisclosed amount toward legal fees -- resigned. The council, perhaps eager to seem less cozy with its largest private taxpayer, had earlier told Anderson "to go out and pound the doors, go assemble as many houses as possible," he says. "Once I'm completely at a stalemate, then come back and discuss urban renewal."

While Anderson was going door to door in the early summer of 2002, so was Joe Horney, a 35-year-old construction manager. Sitting on the Gambles' couch, bouncing his two-year-old daughter on his lap, Horney proudly recounts how he used an inheritance to buy a two-family house across from the Gambles when he was 21. When he heard the news, he says, "I decided to go out and meet the neighbors. I found out from a lot of people that they were perfectly happy

here, they'd like to stay. So we started a petition." At first, about half of the homeowners vowed not to sell. But in September, Anderson and his partners announced their terms: They'd buy everyone's house at a 35 percent premium over its fair market value, but only if they had all the neighbors under contract. If any residents held out, the developers would ask the city to condemn those properties, and a jury would decide the price. Throughout the fall, many of Horney's erstwhile allies signed contracts. In the meantime, Anderson eliminated from his plans a 28-house section of the neighborhood in which resistance was most concentrated, and by year's end, with 5 of the remaining 69 owners still refusing to sell, Anderson had his stalemate -- in no small part, as it turns out, because condemnation had been in the air all along. "Where I made my decision is when eminent domain was threatened from day one," says Horney. "Once they threatened my rights, my decision was made."

The City Council authorized the urban renewal study, which Anderson paid for, in April 2003. Citing certain facts -- small driveways, narrow streets, lots that don't conform to current zoning regulations, houses that are more than 40 years old, a neighborhood subject to all the light and noise and traffic that progress (much of it Rookwood-related) has brought -- the study declared the neighborhood blighted and thus eligible to be seized, emptied, and razed.

Standing in the Gambles' tranquil back yard, with its lilacs and bird feeders, it's hard to understand how anyone could think this property was blighted. Horney points out that by the study's criteria, nearly anyone's home could be taken by the government. "You could call the White House blighted because it's over 40 years old, it's got a lack of parking, it's surrounded by commercial development. I'm sure there is noise. If you tore it down and put in a big office building, certainly it would generate more taxes than Mr. Bush living there." The City Council proceeded to condemn the five properties not under contract with Anderson. According to Mayor Tom Williams, they took this action reluctantly, partly to secure tax revenues for the city. "I was a cop for 34 years, got shot once and shot people twice," Williams says. "It's the same with this thing. You hate to pull the trigger, but sometimes it's a necessity."

When Institute for Justice lawyers Scott Bullock and Dana Berliner first visited Norwood in December 2002, they were pleased with what they saw: "a classic mixed-use neighborhood, in perfectly fine condition," as Bullock puts it. That boded well for the institute -- which Bullock describes as an "unabashedly libertarian" organization and which gets much of its funding from wealthy opponents of big government like energy magnates David and Charles Koch -- and its overall goal of reversing what it sees as a disastrous half-century of eminent domain jurisprudence.

Governments have always taken land on behalf of private interests; owners of mines and railroads relied heavily on condemnations for their rights of way, which were granted because, as one Pennsylvania court put it, "the necessities of a great public industry, which although in the hands of a private corporation, [serve] a great public interest." But in *Berman v. Parker*, a 1954 case, the Supreme Court ruled that the District of Columbia could seize a fully functional store in a blighted neighborhood on the grounds that, as Justice William O. Douglas wrote in the unanimous opinion, "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." It was not up to the courts to insist "that public ownership is the sole method of promoting the public purposes of community redevelopment projects." Legislatures, in other words, were free to determine -- as the Norwood City Council did -- that one private use of a property was better for the overall community than another, and to use eminent domain to enforce this finding.

According to the IJ's Berliner, the *Berman* decision has devolved into a license for cities to "rent out" their eminent domain powers to private developers, with bogus blight designations providing the legal cover. But Jason Jordan, a government affairs director at the American Planning Association, sees the decision as underpinning the "hottest" trend in urban renewal: replacing economically obsolete neighborhoods with large-scale, tax-generating developments like Rookwood Exchange. "Eminent domain is an important tool for communities interested in revitalizing themselves," Jordan told me, and, according to Jeffrey Finkle, head of the International Economic Development Council, it's also a needed tool for reducing sprawl. "Unless we want to pave over all the land outside cities, we have to be able to do these projects inside the urban ring. How can we reposition cities if they don't have the power to acquire private land?" The ability to team up with developers is indispensable to this agenda, Finkle adds. "Communities have to respond to market opportunities," he says. "If you have a developer willing to invest millions of dollars, it's important to make that happen."

Rick Dettmer, who runs Norwood's one-man municipal development office out of the basement of City Hall, says this is precisely why Norwood couldn't turn Anderson away. "The reality is that you need to rely on developer interest in order to facilitate projects. We're not paying for this party." If he were, Dettmer says he might throw it elsewhere -- perhaps in Norwood's decaying downtown, less than a mile from the Rookwood complex. But Norwood, which has suffered two decades of factory closings, and which has a \$1.5 million budget deficit, desperately needs this party, wherever it is held.

Many American cities are in a similar predicament, and in the wake of *Berman* and related state and federal court decisions, cities and entrepreneurs have worked out an elaborate courting ritual in which local governments offer up their eminent domain authority while developers tout the economic benefits of their projects to the electorate. "All the developer has to do," says the IJ's Bullock, "is to convince the city that it's good for them and that he will pay for it, and the city will start taking away people's property." He adds that cities often offer more than condemnations. "Eminent domain is part of a whole set of incentives -- tax breaks and deferrals and other public subsidies -- that add up to massive corporate welfare. Often the numbers fail to live up to expectations. Jobs don't materialize or the economic benefits don't outweigh the subsidies or the drain on public services that the development creates." When this happens, Bullock says, cities are left holding the bag.

The IJ took on its first eminent domain case in 1996, winning a favorable ruling for an elderly homeowner who refused to sell her Atlantic City property for a Donald Trump casino. "After that decision, we were swamped with phone calls," Bullock recalls, "and we started to think that courts might be willing to revisit this issue." The IJ has since taken on several cases nationwide, and saw Norwood -- with its unblighted neighborhood, its developer-driven condemnations, and its questionable public use -- as another opportunity to illustrate to a court how wrongheaded the private use of eminent domain is. An Ohio judge, however, was unswayed, ruling in June that although the neighborhood was not blighted, it was "deteriorating," and on these grounds, Norwood could go ahead and condemn the holdouts' properties; they are appealing.

In the meantime, a series of jury trials will decide the value of the five condemned properties. (In September, in the first of these trials, Horney's house was valued at \$233,000, money that, he says, "I hope I never see.") But developments elsewhere might make these trials irrelevant. In August 2004, the Michigan Supreme Court invalidated its 1981 landmark *Poletown v. Detroit* decision, which had determined that "one entity's profit maximization contributed to the health of the general economy." Stating that "*Poletown's* 'economic benefit' rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity," the court

refused to allow Wayne County to condemn land for an industrial park. "State courts from Nevada to Connecticut have relied on *Poletown* in upholding condemnations," Berliner said. "Now the same case will work for our side."

Add this case to those roiling communities across the country (see "Doing Developers' Dirty Work," page 44), and you have the kind of confusion in lower courts that begs for clarification from the U.S. Supreme Court. And indeed, shortly after the *Poletown* decision, the court agreed to hear another IJ case, in which the city of New London, Connecticut, condemned an unblighted neighborhood in order to make way for a hotel and condominium complex. Bullock hopes the Supreme Court will revisit the scope of the *Berman* decision, and rein in the privatization of eminent domain.

Out here on Edwards road, yellow signs bearing messages like "HELD HOSTAGE" and "WE SUPPORT ROOKWOOD EXCHANGE" sprout like dandelions from front lawns, and a king-size bedsheet banner hanging from Sandy Dittoe's pink stucco one-story declares, "64 OF 65 RESIDENTS WANT OUT. I AM ONE OF THEM." Dittoe bought her house for \$82,000 seven years ago, and she's almost completely rehabbed it since. In 2002, speculating on Anderson's plans, she bought a house around the corner, which she rents out. When Anderson offered her \$175,000 for each property, "it was a godsend," she told me. "I was thrilled." She began to make plans to move and to pay off the loan for her Northern Kentucky nightclub. But she has to wait for Anderson to make deals with all her neighbors before she'll receive a penny.

In the meantime, Dittoe's in limbo -- a maddening situation that she blames on her holdout neighbors. "Sure I'm pissed. They're screwing everybody. I've been stuck in a house for two years. There's no point in putting any more money into it, but I still have to live here," she says, pointing out the unfinished trim in her kitchen and the place where she left off putting purple paint on a bedroom ceiling. Her neighbor, Bill Pierani, a part-time security guard for the Cincinnati Reds, agrees. "We'd have been out of here years ago if it wasn't for them."

Pierani and Dittoe are glad to show me evidence of "blight": the streaks of grime in eaves; an overgrown back yard, home to rats and snakes; the foundations cracked, they say, by the heavy truck traffic; the "foot traffic" and the "element" it brings in; the guys -- "I won't tell you what color they were," Pierani says -- who broke into someone's house. They point out the oil change place and the muffler shop down the street and describe how they've long wanted to get away from these nuisances -- although there's little evidence that they or their neighbors tried to sell their homes or otherwise flee the neighborhood before Rookwood Exchange came along. Pierani compares the neighborhood, in which he has lived for nearly all of his life, to the cancer he once had. "The job is to go in and cut it off completely. Not to keep hacking at it."

At a meeting the previous night, the residents' impatience turned on Anderson's lawyer, who assured them that the end was in sight. This statement left resident Walter Sims hopping mad. "That lawyer pissed me off because he stood up there and misled these people," Sims, who is settled into his rocker on the front porch, says in his Kentucky drawl. "He knows these people" -- he points to a holdout's house next door -- "ain't gonna ever sell to him. But he's relying on the city to do it for him in court. And he knows that until all these appeals are resolved, they can't do nothing. You know how slow the judicial system is? It takes them months to wipe their ass."

But the residents reserve most of their seething fury for the holdouts, and when Pierani says, "Twenty-five years ago, there would have been a homicide by this point," it's not clear if he's nostalgic or relieved. When Sims says, "I think people are mad and disgusted because they ain't got their money. Why haven't you done something by now to get us the money?" you feel how

ugly things might get. And when a man smoking a cigarette on his porch first refuses to talk to you because "the papers always get this story wrong," and then calls you back to say, "Wait a minute. You can quote me on this. Fuck the Gambles. Yeah. Fuck the Gambles, and throw Joe Horney in there, too," you're pretty sure things already have.

In this kind of atmosphere, it's no surprise that the residents don't believe that the Gambles and the others are standing on principle. Explanations vary -- some think that they're angling for a better price, others that they're just stubborn -- but most people seem to agree with Dittoe's assessment that "this project is going to benefit everyone, all the residents here and the whole city." She adds, "There's more to it than just what these people want." But whatever NIMBY concerns may have motivated the holdouts in the first place, they have become galvanized by the large-scale implications of their battle. "What I want to protect is not just myself, but virtually everyone else in the USA from having their constitutional rights undermined," says Horney. "I mean, this is the land of the free and the home of the brave. We're allowed to go out and buy property, and that's being taken away." As they dig in for the appeals, it's clear that these folks are in it for the long haul, that, even with his rented eminent domain powers, Anderson has a lengthy wait before he can extend his empire into this neighborhood. "He can have the house when we're on our deathbed," says Carl Gamble. "Not a minute before."

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