

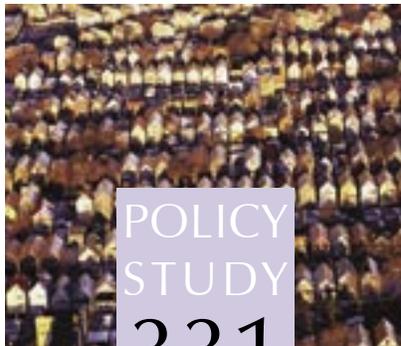


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EMINENT DOMAIN, PRIVATE PROPERTY, AND REDEVELOPMENT AN ECONOMIC DEVELOPMENT ANALYSIS

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Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis

By Samuel R. Staley, Ph.D. and John P. Blair, Ph.D

Executive Summary

Eminent domain is the power governments have to confiscate, or take, private property as long as it is for a legitimate “public use” and property owners receive “just compensation.” Whereas eminent domain was initially intended to ensure that public services, such as roads and highways, were available to the public, local and state governments often use eminent domain for any project that is considered economically beneficial. Public use, as a practical matter, has morphed into a more ambiguous “public benefit.”

An estimated 10,000 cases between 1998 and 2002 involved projects where private parties benefit substantially from government seizures of property under the banner of economic development or urban redevelopment.

The result of this broadening discretion may be exemplified by *Kelo v. City of New London*, a case before the U.S. Supreme Court in which property owners are challenging the decision of New London, Connecticut to seize their homes because the city decided redevelopment for commercial purposes would generate higher property values and taxes.

Eminent domain in urban development projects tends to be:

1. **Arbitrary**, driven by local politics rather than standards and objective criteria;
2. **Inequitable**, giving large and well-connected property developers an advantage over existing homeowners and businesses;
3. **Serving private purposes**, effectively becoming a legal way private developers can circumvent the conventional real estate market and force other property owners to sell their property to developers while reaping substantial financial gains; and

4. **Without substantive limits**, because statutory criteria for blight determinations are so broad they fail to constrain eminent domain's use for redevelopment purposes.

Economic development planners and city officials claim that redevelopment could not happen without an ability to consolidate property and comprehensively redevelop it. They also claim that eminent domain is only used as a last resort after less intrusive and aggressive approaches have failed.

Two Case Studies: Mesa and Lakewood

The two cases studied here—Mesa, Arizona and Lakewood, Ohio—show that eminent domain is not treated as a last resort, but as just another strategy in the redevelopment tool box.

In Mesa, Arizona, eminent domain was used by the city to promote downtown redevelopment. A detailed analysis of city procedures involving a redevelopment project intended to encourage the expansion of a local hardware store revealed:

- Eminent domain was a tool of first resort, not last resort.
- Properties targeted for redevelopment were identified by potential private investors, and the city then proceeded to condemn the properties in order to sell them to the private developers.
- The city's redevelopment agreement with private developers would have amounted to effective subsidies ranging from \$176,000 to \$592,000 dollars.
- Existing small business owners and homeowners were effectively shut out of the negotiations and redevelopment decisions.
- Many properties seized were viable and growing. Property values in the neighborhood increased by 19.3 percent between 2000 and 2002.

In Lakewood, Ohio, the city's redevelopment plan for the area estimated that the total tax value of real estate in the West End could increase from \$31.3 million to \$131.1 million by transforming the area from an older, affordable residential neighborhood to a mixed-use "lifestyle center" with offices, high-end restaurants, luxury apartments, and movie theaters. To use eminent domain the City had to declare the entire West End neighborhood "blighted" or "deteriorating." An analysis of trends in the neighborhood found:

- Property values in some parts of the West End were increasing faster than for the city as a whole, suggesting a strong real estate market.
- Residential vacancy rates for homeowners were falling faster in the West End neighborhood than for the city as a whole.
- Homeownership rates had increased in the West End neighborhood between 1990 and 2000.
- The West End neighborhood was healthy, growing, and stable using standard criteria of neighborhood development.

Policy Implications

The study recommends urban policymakers refocus urban redevelopment policy by:

1. **Focusing on the achievable**, not grand visions for change, transformation and redevelopment;
2. **Using the private sector whenever possible**, but ensuring projects with local government involvement serve a legitimate public purpose (not net fiscal benefit);
3. **Focusing on core competencies**, such as providing key public services well to lay a foundation for broad-based investment and economic development;
4. **Creating sustainable economies through private investment**;
5. **Providing leadership that is focused and transparent** to create accountability;
6. **Respecting the rights of all citizens**, not just those able to access the political process;
7. **Encouraging voluntary and incremental redevelopment** to build a strong foundation for future development by securing property rights for a broad-based citizenry and business community, not those with political access to economic development initiatives; and
8. **Rigorously evaluating blight determinations** to limit the arbitrary and often capricious use of eminent domain to serve narrow public and private interests.

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Part 1

Introduction

In 1981, General Motors decided it needed to build a new factory. It did what most businesses do when trying to stay competitive: it examined its internal resources and determined the most cost-effective strategy for achieving its goals. In this case, General Motors needed land.

General Motors decided that an ideal location would be in the city of Detroit. The only problem was the land was owned by someone else—1,000 people in a distinct neighborhood called Poletown. Rather than buy the property, the world's largest automobile company used its ace in the hole: the city of Detroit.

The city condemned the homes and seized the property using eminent domain. It then handed over the land to General Motors.

Residents of Poletown thought this was an abuse of local government power, so they sued. The Michigan Supreme Court ruled in favor of the city of Detroit and General Motors, arguing that the goal of economic development outweighed the rights of its residents to live in their homes as long as they were compensated by the government.

The Poletown case was a state court decision, but the implications were substantial. Building on federal law that granted increasingly broad scope to state and local governments, cities and states across the nation began using eminent domain to seize private property and hand it over to other private property owners using economic development as a justification. The beneficiaries didn't have to be big corporations:

- Randall Bailey's Brake Service was condemned by the city of Mesa, Arizona after the owner of a local hardware store decided Bailey's property would be a better location for his expanded operation.
- Carol Pappas's apartment building was condemned to make way for a parking garage for eight privately owned and operated casinos in Las Vegas.
- New Rochelle, New York offered to condemn 15 acres of land housing 200 residents to the Swedish furniture giant IKEA to boost retail development in the city.
- The city of Lakewood, Ohio wanted to condemn the entire West End neighborhood of well-kept, moderately priced homes because planners and the city council decided a complex of private retail and commercial businesses was more suitable for the site.

The *Poletown* case was reversed by the Michigan Supreme Court last year. This may signal the start of a change in thinking about eminent domain. Right now, however, eminent remains a key and widely used ingredient of urban redevelopment projects. City and planning officials acknowledge as much. "The recent decision by the U.S. Supreme Court to review a case involving a local government's use of eminent domain

threatens to unravel more than 50 years of constitutional precedent that provides broad judicial latitude to municipalities carrying out economic development plans,” wrote officials with the National League of Cities last fall.¹ The Institute for Justice, a Washington D.C.-based public interest law firm that defends property owners in eminent domain cases, estimates that eminent domain was used to threaten or “take” more than 10,200 properties nationwide between 1998 and 2002.²

Without a doubt, the economic vitality of the nation’s urban areas is a pressing issue. Major cities continue to lose population and businesses, and high poverty and crime rates put urban tax bases at risk. Persistent economic decline has prompted local public officials to make economic development a centerpiece of state and local public policy. Local officials, not surprisingly, have embraced as many tools as possible to promote revitalization, job growth, and reinvestment in declining areas.

Economic development tools and strategies, however, are not equal in their impact or political legitimacy. While many agree that local governments should pursue public policies that encourage reinvestment and a climate supportive of economic development and growth, many would not support economic development initiatives that undermine private initiative, neighborhood development, and democratic governance. Eminent domain has the potential to wreak this kind of destructive impact on cities.³ In more and more cases, eminent domain is effectively putting government interests ahead of private rights. Some cities have in effect made private property rights a privilege granted by the local government through their arbitrary and unrestrained use of eminent domain.

Eminent domain is the legal authority vested in government to seize private property as long as it serves a public use. The Fifth Amendment to the U.S. Constitution says “nor shall private property be taken for public use, without just compensation.” Most state constitutions have similar provisions. Traditionally, public use has meant activities for *public* use such as roads, canals, or parks. These are services and programs offered by cities for the use of the public at large with equal access. The power was reserved for government, under specific circumstances, and was not intended as a tool for private individuals and businesses to dispense with private markets and compel others to sell their land to them. Yet, as the cases below demonstrate, this is often what happens. Within the last fifty years, “public use” has been interpreted more broadly to be “public purpose,” which is subsequently reinterpreted by public officials as “public benefit” and has now become a primary vehicle for transferring property rights and ownership from one private owner to another.

Whether this is beneficial is the subject of substantial debate, and the U.S. Supreme Court has indicated its willingness to consider the issue by agreeing to review *Kelo v. City of New London* discussed in the box below.

This report looks at eminent domain through the lens of urban economic development and revitalization, and questions whether its application in cities justifies its use. Even local development officials acknowledge that eminent domain should be used “wisely, and with considerable caution.”⁴ Substantial evidence exists to question whether officials are practicing what they preach. Indeed, as Part 3 demonstrates, in some cases eminent domain has become a tool of first resort (and sometimes the only tool).

While the legal context is important, the role of the private sector in economic development bears examining. If eminent domain’s broad use has made property rights less certain and investment less predictable, further unrestrained use will hamper redevelopment efforts. Moreover, the “wise” use of eminent domain depends crucially on the ability of local officials to adequately and accurately assess its potential effects and impacts.

As the two case studies in Sections 3 and 4 suggest, local officials often fail at this endeavor. In fact, data and evidence often directly contradict the assertions made by public officials about the properties, businesses, and neighborhoods targeted for eminent domain.

The analysis is particularly important given the context for *Kelo v. City of New London*. In *Kelo*, the city of New London, Connecticut is using its eminent domain powers to seize an entire neighborhood based on the potential fiscal benefits of redeveloping the property to a higher-valued use. The traditional constitutional restraints—that eminent domain be used sparingly and under limited conditions—are largely absent.

While *Poletown* was reversed in 2004, the effects of the original decision were broadly felt and embraced largely because it provided intellectual support for more active government-driven redevelopment efforts. The reversal will not likely have the same effect absent support from the U.S. Supreme Court because eminent domain is such an entrenched part of the redevelopment process. Regardless, while the broader effects of the *Poletown* reversal are difficult to predict, the ruling is only binding on projects in Michigan.

As the cases below show, and as in *Poletown*, eminent domain's primary effect is often to forcibly transfer property among private parties and interests. The practice of eminent domain has nullified individual property rights, leaving land, home, and business ownership to be transferred at the discretion of the political majority on city councils.

Kelo v. City of New London

The Fort Trumbull neighborhood of New London, Connecticut consisted of 115 properties. The neighborhood was a stable, mixed-income area. The city, however, determined that the property would have a higher and "best" economic use as a mixed retail and commercial use complex complemented a new, nearby office complex developed by Pfizer, Inc. The city condemned the neighborhood, intending to raze the homes to make way for the new development through the New London Development Corporation. The NLDC is a private corporation.

Pfizer had decided in 1998 that it would build a major research facility in New London. The Fort Trumbull redevelopment plan intended to complement this investment by razing 90 acres. Eminent domain proceedings began in 2000.

While the trial court ruled against the city's use of eminent domain, saying that the future uses were not specified clearly, the appeals court upheld New London. The court said that the public use clauses of the U.S. and state constitutions allow the use of eminent domain for economic development purposes, even if the only public benefit is an increase in tax revenues and a general improvement in the local economy.

Part 2

Eminent Domain and Urban Redevelopment

Reliable and consistent empirical evidence about the extent of eminent domain's use in the furtherance of private development is not available. The Institute for Justice, however, surveyed newspapers and state court records between 1998 through 2002 to determine how active states were in using eminent domain to seize property for private development. Their results, while incomplete, identified 10,282 cases where eminent domain was used to seize private property, either by legally condemning the property or threatening to use eminent domain as a tactic for getting homeowners to “voluntarily” sell their homes.⁵ This likely underestimates its use. Only Connecticut, the Institute notes, actually records the number of condemnations for private parties. Between 1998 and 2002, the court recorded 543 redevelopment condemnations.⁶ This number was 17.5 percent higher than the number of cases the Institute's researchers found reported in the local newspapers.

Importantly, the availability of the tool does not necessarily imply states and cities use it. States vary significantly in their willingness to use eminent domain, the Institute found (Table 1). North Carolina cities, for example, have the power to use eminent domain but generally refrain from using it.⁷ On the other extreme, Florida has threatened 2,055 properties with condemnation for eight redevelopment projects.⁸

These variations are important. While highly urbanized states such as Florida, Pennsylvania, Ohio, and New Jersey appear to use eminent domain extensively, other states with many large urban areas such as New York, North Carolina, and Texas are much less active. Even California, while one of the most active users of eminent domain, invokes the process less often than Florida and Pennsylvania.

Nevertheless, the data clearly show that eminent domain is prevalent throughout most of the states. The reasoning is pretty straightforward, particularly in the context of urban redevelopment. Land assembly is a costly activity. Many builders and developers can buy large swaths of vacant land outside the large city. Cities fear that the demolition costs, fragmented land ownership, and high regulatory costs may discourage reinvestment. So, they offer to assemble land for developers to streamline the process. Edward Blakely, a regional planner, notes:

Land is one of the most important factors in local economic development. Without control of land, local development is essentially impossible. A local or community development plan will be thwarted by its inability to furnish suitable sites and/or buildings for selected projects.⁹

Table 1: State-by-State Use of Eminent Domain:1998-2002							
State	Filed	Threatened	Total	State	Filed	Threatened	Total
AL	8	n/av	8	MT	0	0	0
AK	0	0	0	NE	1	11	12
AZ	11	10	21	NV	3	15	18
AR	1	40	41	NH	0	0	0
CA	223	635	858	NJ	51	589	640
CO	23	114	137	NM	0	0	0
CT	31	61	92	NY	57	89	146
DE	0	0	0	NC	1	0	1
FL	67	2,055	2,122	ND	1	0	1
GA	0	0	0	OH	90	331	421
HI	0	5	5	OK	23	0	23
ID	0	0	0	OR	0	2	2
IL	8	9	17	PA	2,517	108	2,625
IN	4	51	55	RI	12	65	77
IO	4	n/av	4	SC	0	7	7
KS	155	7	162	SD	0	0	0
KY	7	161	168	TN	29	37	66
LA	5	n/av	5	TX	11	118	129
ME	2	n/av	2	UT	0	167	167
MD	127	1,110	1,237	VT	0	15	15
MA	5	4	9	VA	58	27	85
MI	138	173	311	WA	11	n/av	11
MN	9	83	92	WV	8	12	20
MS	3	n/av	3	WI	0	12	12
MO	18	437	455	WY	0	0	0

Source: Dana Berliner, *Public Power, Private Gain* (Washington, D.C.: Institute for Justice, April 2003), http://www.castlecoalition.org/report/pdf/ED_report.pdf

This logic is complemented by a general view among economic development specialists that the free market cannot meet the economic challenges of the global economy. Competitive pressures are sufficiently great that professional planners must develop an economic vision and implement a comprehensive economic development plan. This view is neatly summed up by Blakely in his leading textbook on economic development policy: “The rationale for developing land management and control systems should not be to *prevent the worst things from happening* but rather to get the right things to happen.”¹⁰ Thus, planners are much more active in economic development, and even describe their roles as “entrepreneurial.”¹¹

This shift in view is important from the perspective of eminent domain. Eminent domain is not seen as a constitutionally limited power of government. Rather, it is another tool needed to ensure a city revitalizes its economy and can position itself to be competitive in the global economy. In some ways, eminent domain takes on a more important role than industry-targeted subsidies of the past such as loans, grants, and tax abatement. The chapter on economic development in *The Practice of Local Government Planning* published by the International City/County Management Association concludes:

This chapter explains why raw materials and land can no longer be regarded as the critical ingredients of local wealth creation and why local economic development no longer means using tax breaks and other incentives to attract factories from one location to another. Economic development planning requires the development of new institutions and tools to stimulate place-based activities to start new firms, nurture promising enterprises, create new public-private partnerships, and increase the human capital of the locality to be competitive in the global economy.¹²

Eminent domain has become one of the more important tools in this process. “The ability of local leaders to reenergize communities through economic development demands local and regional self-sufficiency,” wrote the executive directors of the national and North Carolina chapters of the National League of Cities, “not naïve reliance on a continuous and sufficient flow of state and federal dollars.”¹³

A. Eminent Domain and Economic Development

The rhetoric surrounding the *Kelo* case may give the impression that eminent domain is the most important tool for revitalizing and redeveloping cities. In fact, dozens of other tools exist, including:¹⁴

- Upgrading roads, sewers, public transit and other infrastructure;
- Implementing zoning regulations that restrict land uses to certain types and densities;
- Employing tax rates, tax abatements, and tax incentives to promote certain types of development;
- Reforming zoning codes to allow faster and streamlined project approvals;
- Incentive zoning to encourage private sector development of specific types of projects;
- Landscaping and streetscaping;
- Offering loans, grants, and direct subsidies to developers and builders; and
- Voluntarily purchasing land.

Moreover, several economic development textbooks do not even index eminent domain as an economic development tool.¹⁵

The Role of Redevelopment Agencies

City redevelopment agencies undertake many redevelopment initiatives. These agencies are quasi-public—they have been established by the city but usually operate as technically private, nonprofit organizations. Originally, redevelopment corporations were created to facilitate private sector revitalization efforts by providing loans to businesses investing in inner city areas, identifying potentially lucrative projects, and streamlining the development approval process.¹⁶ Redevelopment agencies have also become widespread. California, for example, has 477 cities and 381 have redevelopment agencies.¹⁷ The New London Redevelopment Commission was the primary instrument used to condemn properties in the Fort Trumbull neighborhood in the *Kelo* eminent domain case.

The Legal Context

While this report is not intended to provide an overview of the legal issues surrounding eminent domain, its role in economic development is rooted in how the U.S. and state courts have interpreted the Fifth Amendment. Indeed, the National League of Cities referenced “50 years of constitutional precedent” when it justified its intervention on behalf of broadly interpreted powers to apply eminent domain.

The expansion of eminent domain to redevelopment began in earnest when the U.S. Supreme Court upheld its use for “urban renewal” in *Berman v. Parker* in 1954. Prior to this decision, the courts largely limited eminent domain to a traditional view of “public use”—goods and services government provided with general access from the public. *Berman v. Parker* involved urban renewal. Urban renewal was a slum clearance program funded by the federal government. Governments would condemn and clear privately owned urban land so that it could be sold to other private parties for redevelopment purposes. Because slums had certain pathologies—high crime, disease, and dilapidated housing—policymakers and planners believed they could revitalize neighborhoods by clearing urban land to encourage private reinvestment. The U.S. Supreme Court upheld urban renewal by broadening the term “public use” to mean “public purpose.” While the redeveloped property was not for public use, it served a public purpose—the elimination of blight. Although most planners and urban policymakers now recognize that these policies were unsuccessful, the Court’s decision greatly expanded the potential uses of eminent domain for urban redevelopment purposes.¹⁸ It also established the legal framework for determining when areas could be condemned in redevelopment to alleviate “urban blight.”

Later, in *Hawaii vs. Midkiff*, the U.S. Supreme Court upheld the redistribution of property for what in effect was a policy preference. Legal scholar Ellen Frankel Paul observes that this decision significantly narrowed the Court’s willingness to review state and local government decisions over takings and eminent domain. In essence, “whatever legislatures can regulate, they can also take.”¹⁹

Another major boost to eminent domain came in the early 1980s, when the Michigan Supreme Court ruled that an entire neighborhood could be seized for the sole purpose of economic development. In *Poletown* the city of Detroit offered to seize and clear an entire neighborhood so General Motors could build an automobile factory on the site. Since economic development—the creation of jobs—was the sole purpose for taking private property, cities quickly learned that this could be a powerful tool and new incentive for encouraging redevelopment.

The *Poletown* case was reversed in 2004 when the Michigan Supreme Court ruled against a taking for a Commerce and Office Park in *County of Wayne v. Edward Hathcock*. This will likely change the use of eminent domain in Michigan. Whether this decision will have any broader effect on economic development projects elsewhere has yet to be seen and may depend critically on the U.S. Supreme Court’s decision in *Kelo*

Given the evolution of the legal definition of “public use” and the unwillingness of the courts to question local discretion over its use, eminent domain’s place as a standard tool for development should not be surprising. Moreover, as eminent domain has become more widespread, local use and dependence on it has increased as well.

Jeff Finkle, president of the International Economic Development Council, a trade association representing development and redevelopment organizations and agencies, believes eminent domain is critical to the

revitalization of cities. “Lose eminent domain in urban settings,” Finkle said recently, “and the only land that will be developed is green space on the edge of cities.”²⁰

Restraint is effectively left to the discretion of local public officials, and local officials believe they have the skills, information, and restraint necessary to be trusted with this discretion. Taking private property, Finkle said recently, “should be the last possible tool. If negotiations fail, if the bully pulpit fails, then you go to a takings case.”²¹ A recent textbook on economic development policy recently noted that eminent domain is an important tool, but describes its use as “the right of government to purchase property if its use is needed for a public purpose such as a road or a park.”²²

As the cases in the next section suggest, however, this restraint and perspective appears in theory but not in practice.

B. From Public Use to Fiscal Benefit

A change in attitudes toward property rights among urban policymakers has corresponded with the changing legal definition of public use and the scope of activities that could fall under eminent domain. Property ownership (or rights) is (are) no longer considered fundamental and protected in urban governance, and as such are no longer given the same status or respect as speech, religion or even gun ownership.

Even though governments are still responsible for paying “just” compensation when private property is seized, they often don’t.²³ Local officials often attempt to minimize payment for the property. Cities have been found to:

- hire appraisers that will low-ball property valuations;
- use the threat of eminent domain to intimidate property owners to sell at below-market rates;
- compensate property owners at assessed valuation even though market values are significantly higher;
- avoid paying relocation costs for businesses and homeowners;
- ignore the value of “good will” and other intangible value implicit in a business’s reputation or location; and/or
- underestimate start-up and marketing costs involved after a business moves.

Garden Grove, California condemned the property owned by Joseph and Yae Hong, Korean immigrants who built a thriving car brokerage and rental agency. The city offered the Hong’s \$16,000 for their business, arguing that the property was leased. Eventually, the city agreed to pay them \$950,000 under the threat of a lawsuit.²⁴ Another family-owned car rental business in Garden Grove was offered \$640,000 for their business and a court eventually forced the city to pay \$1.07 million.²⁵ Garden Grove officials justified their negotiating tactics as a strategy for being fiscally conservative with public funds.²⁶ This behavior is not new. Steven Greenhut, a journalist and author of *Abuse of Power: How the Government Misuses Eminent Domain*, traces undervaluation of businesses back to the 1940s.

During a redevelopment project in the mid-1980s in Dayton, Ohio, the city condemned a city block that sent 32 of the 40 retailers in the redevelopment area out of downtown or out of business.²⁷ One of those

businesses, a dry cleaner, was offered \$67,000. He was the only business to challenge the city's use of eminent domain, and the court awarded compensation of \$235,000.²⁸

Having implicitly been given the green light from the *Poletown* case and the unwillingness of federal courts to look more carefully at the substance of eminent domain cases, economic development programs have adopted a less principled and more utilitarian approach to redevelopment policy, evaluating it purely in terms of costs and benefits. Since the courts have failed to protect property ownership within cities, officials have naturally attempted to minimize costs by adopting the most efficient (and least property-rights-friendly) approach to redevelopment. In many cases, as long as the redevelopment project is consistent with an adopted land-use or development plan, the hearings and deliberations were open to the public, and a legal vote of the city council was approved, courts uphold eminent domain. Notre Dame law professor Nicole Garnett notes that many states and cities see eminent domain as simply another tool in a menu of strategies.²⁹ In fact, many states explicitly allow economic development as a justification for condemning private property.

This policy shift reflects a fundamental difference in the way the judiciary views property rights and public policy. Around the turn of the 20th century, federal law began to de-emphasize rights grounded in property ownership.³⁰ This increasingly supported the use of the cost-benefit analysis. Indeed, this is the rhetoric used most often to publicly justify taking personal property—the benefits of a particular project outweigh the rights of property owners to keep their homes. Professor Garnett notes that eminent domain does not get “means-ends” scrutiny where a compelling government interest must be shown to justify the action. The courts “don’t even bother to check to see if the government is advancing a public use,” she notes. “They don’t ask if economic development could be done another way.”³¹

The judicial standards for weighing property rights, as a result, have become far more arbitrary. Nineteenth century law gave property rights equal status with other rights (e.g., rights to speech, religious freedom, due process). The utilitarian position rooted in cost-benefit analysis does not. On the contrary. Property rights are subject to cost-benefit analysis or, more accurately, net fiscal impact.

Eminent domain decisions are in actuality more arbitrary than this discussion suggests. As the cases of Mesa and Lakewood demonstrate, even when the city commissions or engages in fiscal impact analysis, ultimately the decision to move forward is political and not grounded in objective analysis of the data or any principle of “considerable caution.” An example of this utilitarian and procedural approach to eminent domain and takings may be exemplified by the lower state court ruling in *Mesa v. Bailey* (the subject of the case study in the next part). Judge Robert Myers ruled in 2002 that Mesa could seize Bailey’s business and land even though the city’s “findings may be reasonably doubtful and fairly debatable.”³² Under this reasoning, property rights are only as safe as the next political majority on the city council.

Part 3

Redevelopment Case Study: Mesa, Arizona

The city of Mesa, Arizona provides a particularly useful lens through which to evaluate eminent domain and urban redevelopment policy. The city, like most throughout the nation, has increasingly focused its efforts on revitalizing declining neighborhoods. The city's primary attention, however, has been on its downtown.

As a suburb of Phoenix, Mesa lacks the concentration of offices and residences that give traditional cities a downtown with distinctive physical attributes despite a population of 288,091 in 1990 (2000 pop. 448,555). Beginning in the early 1990s, the city embarked on a planning and visioning process to change that.

What is unique about Mesa is its reliance on the private sector to drive its redevelopment process. Like most cities, however, in its zeal to encourage redevelopment, the private property rights of its citizens have taken a back seat. Property ownership has ceased to hedge against the arbitrary actions of political will.

A. Revitalizing Downtown Mesa

The current wave of redevelopment efforts began in 1992 when the city sponsored a planning process focused on revitalizing its downtown (then defined as a one-mile square area of the city).³³ The *Vision Plan for Downtown Mesa*, adopted by the city council in 1994, proposed a 20-year plan for the downtown. A companion report adopted in 1995, *Connections: Restoring Town Center's Place*, outlined specific strategies. In 1996, the city updated its downtown development plan, laying out specific objectives and activities for accomplishing its goals. Among the key features were:

- An aggressive approach to involving the private sector in redevelopment efforts, and
- The use of eminent domain as a cornerstone of public sector involvement in these redevelopment efforts.

The city now operates from a Concept Plan for the town center, which provides an overview of the fundamental concepts underlying the downtown plan, and an Action Plan³⁴ that identifies specific strategies and timelines. The city of Mesa actively assisted more than 14 redevelopment projects, ranging from a major streetscape along Main Street to a sprawling \$60 million Mesa Verde resort. Creating visual gateways into downtown Mesa was a strategy of the Action Plan that would unfold over five or more years, and these gateways became the center of Mesa's dispute over eminent domain and redevelopment policy.

Redevelopment in Mesa: The Theory

Mesa's redevelopment process is described in a way that befits a rational, objective approach to urban redevelopment and is typical of how cities approach urban redevelopment. The city lays out its goals through the community visioning process, identifies the tools it needs to accomplish these goals, and then sets out to accomplish these goals using the tools. City officials characterize redevelopment as a four-step process:

1. Decide whether to redevelop,
2. Designate a redevelopment area,
3. Issue a request for proposal, and
4. Implement.³⁵

The city claims that a decision to redevelop an area occurs when a "need" is identified, although what determines a need is not explicit. The city then "researches the potential project area to determine if it warrants redevelopment." If the city then decides redevelopment is desirable, it asks "interested companies for their plans" and then selects the "best plan" to redevelop the site. The city, then, positions itself as the land developer, using the private sector, in effect, as a contracted builder.

Practical Adjustments to the Redevelopment Process

While the city presented its redevelopment strategy as a public-sector-driven initiative, in practice the city took its cues from the private sector. The city acknowledged it was having difficulty developing effective plans for specific redevelopment projects. The city redevelopment director proposed streamlining the process by giving private developers more influence over redevelopment planning.

Private sector interest in redevelopment became a formal part of city redevelopment policy in 1996. City officials received numerous inquiries about redevelopment opportunities in Mesa in 1996, but *all* the sites were outside the Town Center Redevelopment Area.³⁶ "In order to undertake any of these projects it will be necessary for us to first expand our Redevelopment Area," wrote the city's community development director in a memo to the city manager.³⁷ Few close followers of redevelopment in Mesa would have been surprised, then, when Mesa's downtown redevelopment area was amended in 1999 to add properties on the south and west sides of the city when private developers expressed interest in the land.³⁸

City staff then prepared a general development plan for the entire Town Center area (including the new land to accommodate specific private interests). This was necessary so Mesa could exercise its redevelopment authority and serve these investment interests. Arizona statutes limited eminent domain for economic development purposes to areas that were blighted and part of a formal redevelopment area.

Site 24, the subject of the case study below, was one of the areas included in the expansion of the downtown redevelopment area during this revision. "This is the area [Site 24] where we have interest from several possible developers who have expressed interest in doing development projects," noted key economic development officials at the time.³⁹ This interest was used by the city as an indication that the market would support investment in the targeted areas. Following conventional economic development practice, the city would amend the redevelopment plan to include them and then draft a request for proposals for the sites.

Once accepted, the city would then draw up a development agreement assigning duties and obligations of the city and private developer, including which parcels would need to be condemned and transferred to the private developer.⁴⁰

The city then re-designated the entire one-square mile town center plus the additional properties a redevelopment area on October 7, 1996.

B. How Eminent Domain Subsidizes Development

The advantages of eminent domain are often described in terms of what economists call “public goods” or “transaction costs,” particularly when eminent domain is used for urban redevelopment purposes. Redevelopment specialists argue that land is so fragmented in older urban neighborhoods that the costs of assembling land are too high for the private sector to do on its own. Combined with the higher costs of demolition, private investors need the assistance of public officials to identify the owners of each parcel of land and negotiate a price. Land acquisition is presented as if it is a service provided by local governments to facilitate redevelopment.

In fact, if this were the extent of public involvement, land assembly through local government could be accurately characterized as a service. Presumably, local governments could provide a fee for this service as well (although few would because they want to encourage redevelopment by reducing, not increasing, the costs of investing in these neighborhoods). By charging a fee, the city would also reflect the actual costs of providing assistance to developers.

If land assembly were as simple and straightforward as this—the local government identifies property, property owners, and facilitates the sales—local government redevelopment efforts would generate little controversy. Many, if not most, of these land assembly programs, however, involve at least the threat of eminent domain to negotiate favorable sales terms.

Economists recognize this as a subsidy, but it understates the subsidies considerably. Site 24 is a case in point and provides a unique opportunity to see how the development process itself generates substantial subsidies to private businesses, and how eminent domain facilitates and encourages these subsidies. Site 24 consisted of several privately owned lots. These lots included ongoing businesses, vacant land, and homes.

The private interest in using Mesa’s power of eminent domain to acquire property for private investment was expressed as early as 1998. The owner of Lenhart’s ACE Hardware asked the city of Mesa to purchase ten separate lots and sell him the city-acquired property at \$4 per square foot to facilitate a major expansion of his hardware store.⁴¹ At the time, the full cash value for these properties averaged more than \$8 per square foot according to the Maricopa County assessor’s office.⁴² If the city had acquired these properties for their full cash value and sold them to Lenhart at \$4 per square foot, the transfer would have amounted to a direct subsidy of \$278,948.⁴³ The Mesa city council approved resolutions allowing the use of eminent domain to condemn private property on Site 24 not already owned by the private developers in March 1999, including Bailey’s Brake Service as part of its West End project.⁴⁴

The developers negotiated an average price per square foot they would pay the city for the acquired property. The negotiated sales prices would have resulted in a significant subsidy for both developers based on the approved development agreements (Table 2). Lenhart agreed to purchase the land from the city of Mesa for

\$11.74 per square foot, a slight premium over the full-cash value reported by the Maricopa County Assessor.⁴⁵ On the surface, this suggests that Lenhart was subsidizing the city of Mesa. However, Lenhart's agreement allowed him to swap his existing store and property for the newly acquired property instead of pay cash. In addition, the full cash value of the property did not reflect actual market values.

An analysis of residential properties comparable to the ones that would be seized suggested the actual market value could be 25 percent to 30 percent higher than the value on file with the county tax assessor.⁴⁶ If a market adjustment was added to the full cash value, the development agreement would represent a significant direct subsidy to Lenhart and Redstone Development. Redstone Investments represents Lenhart's ACE Hardware, and another developer, Palm Court Investment, represents another business interested in Site 24 called Mesa Discount. Palm Court's subsidy based on the full cash value according to the county assessor already exceeded \$200,000 without the market adjustment. Thus, the direct subsidy based on land acquisition for Site 24 could range from \$176,000 to \$592,000.

Table 2: Estimated Direct Subsidy to Private Developers of Site 24		
	Lenhart	Palm Court
<i>Square Footage</i>	51,510	91,960
<i>Full Cash Value (Maricopa County)</i>	\$10.80 ^a	\$9.06
▪ Memo. Of Understanding (MOU)	\$11.74 ^b	\$6.62
▪ Difference	-\$0.94	\$2.44
▪ Est. Subsidy to Private Sector	-\$48,581	\$224,599
<i>Actual Value 25% over FCV^c</i>	\$13.50	\$11.33
▪ MOU	\$11.74	\$6.62
▪ Difference	\$1.76	\$4.71
▪ Est. Subsidy	\$90,455	\$432,942
<i>Actual Value 30% over FCV^c</i>	\$14.04	\$11.78
▪ MOU	\$11.74	\$6.62
▪ Difference	\$2.30	\$5.16
▪ Est. Subsidy	\$118,262	\$474,611

Notes:

^a Excludes parcels 73C, 83, 84A. These parcels were reclassified by the assessor, resulting in a significantly lower estimate of full cash value. This was not true of the other properties.

^b The developer would not pay the city cash. Rather, Lenhart would trade Lenhart's existing building, valued by the city of Mesa at \$900,000, for the land.

^c Based on average sales prices of comparable housing units for land acquired via eminent domain on Site 24.

Source: Full Cash Value from Maricopa County assessor's office. MOU represents the contract price for land stipulated in the Memoranda of Understanding between the city of Mesa, Lenhart's ACE Hardware, and Palm Court Investments. Market premiums estimated by author based on actual sales data for twelve comparable properties for residential site located in Site 24 provided by the Maricopa County assessor.

Selecting Developers for Redevelopment Projects

Eventually, the city of Mesa selected Redstone Investment and Palm Court Investment as the redevelopers for the site. Their selection is instructive because it illustrates the ways redevelopment projects are steered toward specific clients and developers.

Redstone Investments, LLC represented Lenhart's ACE Hardware, the private business owner that initially expressed interest in Site 24 and, by implication, Bailey's Brake Service. Palm Court Investments, LLC represents the interests of Mesa Discount, another private business interested in expanding in Mesa. Their interest in Site 24 was driven by their desire to expand their businesses. Their current locations in downtown Mesa prevented them from physically expanding, and they needed to expand to remain competitive.

As Lenhart's proposal made clear, the acquisition of the property would have allowed the hardware store to more than double its customer base by giving it the land to physically expand its store.⁴⁷ The newly acquired property would expand parking for customers and increase storage space. For Mesa Discount, the new building would allow it to greatly expand its showroom.⁴⁸

Only three developers submitted redevelopment proposals. Redstone and Palm Court submitted proposals for developing only part of the site. The other submission was provided by Watt Commercial Properties, an out-of-town developer. Watt proposed a comprehensive redevelopment of the site using one-story frame structures containing 50,000 square feet of retail and office space.⁴⁹ The city rejected Watt Commercial Properties and accepted Redstone and Palm Court's proposal after it combined them into one.

Effects on Small Businesses

By issuing an RFP that covered a large, contiguous section of land, the process gave a competitive advantage to large developers. Smaller property owners have little ability or opportunity to significantly influence the redevelopment process since:

- Smaller property owners have neither the experience nor resources to finance multimillion dollar redevelopment, or negotiate with the city at the level of detail required to comply with the redevelopment plan.
- The nature of the process pits private parties against each other. The RFP process creates a zero-sum game—one property owner will “win” by gaining control over another property owner's land. In fact, previous redevelopment experience was considered an asset when the city reviewed development proposals for Site 24. Lenhart's proposal cited redevelopment experience with the city in 1983 (with the construction of the current store) and subsequent expansions between 1984 and 1999.⁵⁰

The city council's actions effectively disenfranchised small property owners during the redevelopment process and created substantial private gains for wealthier and more politically connected property owners. They also effectively redefined the redevelopment policy toward condemning private land for the exclusive or almost exclusive benefit of another private party.

C. Eminent Domain, Public Use, and Bailey's Brake Service

If the primary purpose of the land condemnation was to transfer private land into the public realm for a clear public purpose, as in the case of a jail or community center, the project might constitute a public use in the traditional sense the term is used—a project with public benefits and access that would not be provided by the private sector at a sufficient scale or level to meet the public need. In the case of Site 24, however, the city became merely a pass-through for private parties to use eminent domain to satisfy their own need to expand and become more profitable in a competitive market. Easy access to eminent domain became a tool for achieving a competitive advantage over other free market players by reducing development costs. How this occurred is important to understanding the practical consequences of allowing eminent domain to be used in the redevelopment process.

Bailey's Brake Service provides a case in point. Randall Bailey had been operating his family-owned and operated business on Site 24 for decades. He remained the principal tenant (and landowner) even after Redstone Development began purchasing the businesses and land around him. As other buildings were purchased by Redstone and left vacant, Bailey kept his business open and thriving at the location. His business thrived based on references, reputation, and an intergenerational client base. Lenhart or Redstone Development did not even approach Randall Bailey about purchasing the property. In fact, when Randall Bailey approached Redstone Development to discuss the possibility of incorporating his business into the redevelopment plan, representatives showed no interest in discussing this proposal.⁵¹ Instead, they referred Bailey to the city of Mesa, which was acquiring property for the redevelopment project.

The memorandum of understanding (MOU) for Lenhart's ACE Hardware stipulates that the city of Mesa will acquire 12 lots constituting about two-thirds of the proposed site. In the case of Palm Court, the city's MOU calls for acquiring nine lots. Of the 26 lots in Site 24, the city was using eminent domain to acquire 21.

The total assessed value of Site 24 was almost \$3 million in 2002 (Table 3). Together, Palm Court and Redstone acquired only about half of the assessed value of the property. While Redstone Investments has acquired six parcels in its proposed project area, or about 41 percent of the proposed project area, these properties comprised only about one-third of the total value of the property. Thus, Redstone was using the city of Mesa to forcibly acquire property worth two-thirds the value of land needed for its portion of the project.

Table 3: Assessed Value For Site 24 in Mesa, Arizona			
	2000	2001	2002
Total Assessed Value (Site 24)	\$2,511,302	\$2,517,733	\$2,996,952
Total Value Redstone Project	\$909,838	\$794,178	\$936,056
Redstone Owned	\$244,559	\$244,612	\$313,410
Independently Owned	\$665,279	\$549,566	\$622,646
Share Independently Owned	73.1%	69.2%	65.5%
Assessed Value—Redstone & Palm Court	\$1,134,559	\$1,209,252	\$1,540,932
Independently Owned (Total Site 24)	\$1,276,743	\$1,308,481	\$1,456,0202
Share Independently Owned	54.8%	52.0%	48.6%

Source: Maricopa County Assessor's Office, www.maricopa.gov.

The land proposed for condemnation by Lenhart were anchors in the neighborhood and were the homes to several thriving businesses. A fast-food restaurant on Country Club Drive, for example, generated a full cash value of \$31.12 per square foot, almost three times the average for the entire site and almost five times more than the average for Lenhart’s property (Table 4). Bailey’s Brake Service generated a full cash value of \$9.73, about one third higher than the average for the properties already acquired by Lenhart. Overall, the full cash value of the independently owned properties subject to condemnation to make way for Lenhart’s project is almost \$9.00 per square feet, more than 25 percent higher than the property already acquired.

Table 4: Assessed Value Per Square Foot for Site 24	
	Assessed Price/Sq. Ft.
Average Site 24	\$11.04
Owned by Redstone Investments	\$6.47
Independently Owned—Redstone portion	\$8.93
Owned by Palm Court	\$20.01
Independently Owned—Palm Court portion	\$9.06

Source: Maricopa County Assessor, www.maricopa.gov.

D. Site 24 and Urban Blight

Usually, in order for a site to be considered a candidate for redevelopment, it must be identified as urban blight, impairing or arresting the economic and social progress of the area. In Mesa’s case, Site 24 should have constituted blight that impaired the progress of the entire Town Center because the entire downtown should have been determined “blighted” by city council. Moreover, Arizona statutes are explicit about the kinds of criteria that can be used to identify redevelopment areas. They must constitute a public “menace,” contribute to or “arrest” the economic and social development of the community, and redevelopment must not be possible without direct public sector involvement.

Several key indicators suggest the property at Site 24 is not blighted as defined by Arizona statute. First, the businesses and properties at the intersection of Country Club and Main Street are providing significant economic and social benefits to the city of Mesa. On average, the Site 24 properties increased in value by about 10 percent per year according to data from the Maricopa County Assessor (Table 5). Only three properties declined in value, and their change in value was likely the result of their reclassification on the assessor’s tax records. While the properties owned by Redstone Development and Palm Court increased substantially, the independently owned properties increased as well. The full cash value of Bailey’s Brake Service property increased 41 percent since 2000. Clearly, these properties retain significant economic value. Thus, based on trends in property values for Site 24, the land and the businesses on them are not impairing or arresting the economic or social progress of the community. In fact, several viable businesses—Bailey’s Brake Service, Maaco, and a fast-food restaurant—may be stabilizing forces in this neighborhood.

Table 5: Change in Assessed Value in Site 24 by Ownership			
	2000	2002	% Chg
All Site 24 Properties	\$2,511,301	\$2,996,952	19.3%
Redstone & Palm Court	\$1,134,556	\$1,540,932	35.8%
All Independent Properties	\$1,376,743	\$1,456,020	5.8%
(Excluding parcels 73C, 83, 84A)	\$1,175,739	\$1,389,520	18.2%
Redstone Develop. Properties	\$2,445,559	\$313,410	28.2%
Independent (Redstone project)	\$665,279	\$622,646	-6.4%
(Excluding parcels 73C, 83, 84A)	\$464,275	\$556,146	19.8%
Palm Court Investments	\$890,000	\$1,227,522	37.9%
Independent (Palm Court project)	\$711,464	\$833,374	17.1%

NOTE: Five parcels were reclassified by the tax assessor, but only three reclassifications impacted the assessed value of the property. Parcels 73C, 83, and 84A were reclassified, resulting in a significant reduction in the assessed value of the property. Parcels 73C and 84A are vacant. Parcel 83 carries a designated land use of commercial.

Source: Maricopa County Assessor, <http://www.maricopa.gov>.

In addition, most of the jobs in the proposed redevelopment project would likely be low-wage retail jobs, or high-end jobs that would be simply redistributed from other parts of the city. Lenhart's ACE Hardware, for example, expected to add 31 new jobs because of its expansion.⁵² These jobs were likely to be part-time and relatively low wage, suggesting that the overall benefit was likely to be smaller than anticipated. Jobs provided by firms such as Bailey's Brake Service earned 40 percent to 100 percent more than retail establishment's because of their skilled and semi-skilled nature (Table 6).

Table 6: Estimated Median Wage Rates for Selected Occupation, Phoenix-Mesa Metropolitan Area (2000)				
SOC Code	Description	Hourly Median	Hourly Average	Annual Average
41-2011	Cashiers (retail)	\$7.58	\$8.05	\$16,750
41-2022	Parts Salespersons	\$12.76	\$13.80	\$28,700
41-2031	Retail Salespersons	\$8.48	\$10.59	\$22,022
49-2096	Electronic Equipment, Motor Vehicles	\$15.58	\$16.38	\$34,000
49-3021	Auto Body & Related Repairers	\$14.33	\$16.79	\$34,910
49-3023	Auto Service Technicians & Mechanics	\$12.80	\$14.68	\$30,540

Source: U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, February 2, 2002, http://stats.bls.gov/oes/2000/oes_6200.htm.

Third, fiscal impact was used as a justification for redeveloping Site 24. According to the city's "cost/benefit" analysis, the city would contribute \$1.3 million to the project.⁵³ The total projected cost was estimated to be \$9.7 million. Thus, the city was "leveraging" 6.5 private dollars for every public dollar.⁵⁴ Sales tax revenues and impact fees would generate sufficient revenues, according to the city's analysis, to enable the city of Mesa to recover its portion of the project cost in seven to nine years.⁵⁵

The analysis assumed that neither Mesa Discount, Spencer TV and Appliance (represented by Palm Court), nor Lenhart's ACE Hardware would locate elsewhere in the city of Mesa. In fact, these businesses would likely find alternate locations within the city (although outside the immediate downtown area), allowing the city to capture the sales tax revenues even without the redevelopment of Site 24. The city of Mesa's approach to redevelopment, however, precluded an adequate assessment of alternate locations for these investments, and the city did not appear to have explored this possibility.

The analysis of the fiscal impacts of the Site 24 redevelopment project was misleading and should not have been labeled a "cost/benefit analysis."⁵⁶ In fact the city performed a narrowly targeted net fiscal impact analysis. The criteria used to evaluate the fiscal impact were the city's direct expenditures for assisting Lenhart's ACE Hardware and Palm Court Investments in their redevelopment plans. As such, they addressed revenues going to the city and its relationship to extending city services. The analysis did not tie these revenues to broader redevelopment goals or community benefits and costs. In fact, net fiscal impact was not listed as a goal of the redevelopment process or the redevelopment plan. Rather, the goal of redeveloping the Town Center was to create a vibrant, economically successful area of the city that was central to economic, social and political life in the city of Mesa.

A true cost/benefit analysis, in contrast, would have included other obvious and measurable costs and benefits such as the positive impact of the current businesses on the neighborhood and the costs to the community of removing them, the nature of the jobs retained, added, or lost, or the impact of lost housing on the neighborhood compared to a mixed-use project.

A thorough cost-benefit analysis would have also considered the loss of affordable housing as a cost of the project. This oversight is particularly glaring because housing affordability is a key goal of redevelopment. The city council's decision to amend the Town Center redevelopment plan to include Site 24 specifically cited the need to maintain and develop affordable housing.⁵⁷ Yet, none of the proposals submitted to redevelop Site 24 included a residential component even though at least eight residential parcels and homes would be eliminated by the project.

E. Summary

The case of Site 24 provides a unique glimpse into the internal workings of the redevelopment process and the role eminent domain plays in subsidizing private developers. It also shows how increasingly broad definitions of public use and blight have significantly weakened private property rights.

As long as Mesa had an approved development plan, and had adhered to procedures for determining blight, the city could effectively seize one person's property and transfer it to someone else. In the process, the beneficiary of Mesa's redevelopment process would receive substantial benefits in the form of subsidies to the project.

In 2003, the Arizona Court of Appeals ruled in favor of Randall Bailey, striking down Mesa's use of eminent domain on the grounds it constituted a direct transfer to another private party with few plausible public benefits. The Court did not question the city's use of eminent domain for redevelopment purposes, the validity of the state's redevelopment statutes, or determinations of blight. Thus, the case's effect is narrow. Indeed, the Court of Appeals noted that eminent domain challenges must be determined case-by-case, based on the facts of individual circumstances and challenges. The Arizona Supreme Court did not rule on the case,

and state precedent gives wide discretion to cities in their use of eminent domain for redevelopment purposes. Thus, while Randall Bailey's brake service is safe, the planning tools and strategies used by Mesa, including the use of eminent domain for redevelopment purposes, are still very much in play.

In the case of Mesa, land assembly through eminent domain was the primary, and perhaps only practical, redevelopment tool. The city took advantage of the broad discretion given to it by statute to condemn private property and transfer it to other private developers even though the evidence showed clearly:

- The properties being seized were viable and growing;
- Private investors relied on the city to acquire and negotiate the sale of land; and
- Direct subsidies to private developers could be substantial because the city agreed to sell the properties to developers at rates substantially below the market price.

Mesa's case may be unique in that the city relied almost exclusively on eminent domain to achieve its redevelopment objectives. The mechanisms used, however, are common in the redevelopment community. In fact, the statutory requirements for using eminent domain—initiate a planning process, adopt a redevelopment plan, acquire the property, then transfer the property to a private developer—could serve as a template for other communities across the nation.

Part 4

Eminent Domain Case Study: Lakewood, Ohio

The city of Lakewood, Ohio, a “first tier” suburb immediately adjacent to Cleveland, provides another telling example of how eminent domain has become a cornerstone of city redevelopment initiatives.

Lakewood, like Mesa, isn’t one of the suburban communities mired in decline. On the contrary, the average home sells for \$146,605, 15.9 percent higher than Cuyahoga County and almost on par with suburban Cleveland communities.⁵⁸ The city’s assessed valuation increased by 15 percent between 1994 and 2000 according to the Cuyahoga County Auditor, significantly faster than the average for Cleveland’s suburbs.⁵⁹ Despite being boxed in by surrounding communities, the city managed to issue 1,645 residential building permits between 1999 and 2000 as well. By all significant indicators, Lakewood has a robust economy.

Nevertheless, like most cities, not all neighborhoods fare equally well. The West End is one neighborhood like that. The West End consists of 31 acres on the western edge of Lakewood. The area has substantial scenic value, looking over the Rocky River protected by the Cleveland park system. Almost 3,000 people lived in the neighborhood in 2000, occupying more than 1,700 housing units (Table 7).⁶⁰

Table 7: Comparison of West End Neighborhood to City of Lakewood			
		West End Neighborhood	
	City of Lakewood	Census Tract 1607	Census Tract 1608
Population	56,646	1,705	1,137
Housing Units	28,416	1,138	605
Vacancy Rate	6.1%	8.0%	4.6%
Avg. Size of Household (owners)	2.5	2.6	2.7
Avg. Size of Hshld (renter)	1.7	1.5	1.5
Median Household Income	\$40,527	\$31,477	\$34,554
Percent of Families Below Poverty Level	6.1%	7.4%	8.1%
Minority Population	6.9%	7.0%	40%

Source: U.S. Bureau of the Census.

The West End neighborhood was developed primarily in the decades spanning the turn of the 20th century. Almost all the non-apartment residential and commercial buildings were built between 1897 and 1925.⁶¹ Five large apartment buildings and three smaller, three-story apartment buildings were built during the 1960s and 1970s, replacing barns used to house streetcars.⁶²

During the summer of 2002, planning consultant D.B. Hartt and architectural consultant Square One, Inc. conducted surveys of the buildings in the West End. Surveys of the buildings and city records led them to conclude that the West End neighborhood had “sufficient deficiencies...which together are detrimental to the public health, safety and welfare and which impeded the sound growth, planning and economic development of the City of Lakewood” and “that substantial portions of the” community development area met the definitions of blight as defined in the city’s ordinances.⁶³ The consultants also believed that these conditions had deteriorated to the point where the city could use eminent domain to declare the area blighted.

The key criteria were:⁶⁴

- **Blighted or Deteriorated.** An area, according to Chapter 153 of the city’s codified ordinances, that is “conducive to the ill health, transmission of disease, infant mortality, juvenile delinquency, and crime, and are detrimental to the public health, safety, morals, and general welfare.”
- **Deteriorating Area.** An area that is “detrimental” to the public welfare because 1) it “will deteriorate, or is in danger of deteriorating, into a blighted or deteriorated area,” or 2) consists of land uses such as highways or railway tracks that will “have a blighting influence on the surrounding area and over which air right sites can be developed thereby eliminating such blighting influence.”
- **Functional obsolescence** of individual buildings or sites such as overcapacity, inadequacy or inefficiencies in floor area or layout. “Functional obsolescence is the inability of a structure to perform adequately for the function for which it is currently employed.”
- **Economic obsolescence**, whereby the site or building is “impaired” because “external forces or environmental changes” influence “supply-demand relationships in the market.”

What is striking about these criteria is their breadth. The West End neighborhood had higher incidences of crime, traffic accidents, and lower housing values, but these factors in and of themselves do not constitute blight as the next section discusses in more detail.

Moreover, even if an area is considered blighted, deteriorating, or obsolete, local policymakers have a range of options available to them. Indeed, the comprehensive development plan identifies a number of policies less draconian than forcibly taking private property and transferring it to private developers, including:

- Using loan and grant programs to help existing business and homeowners improve their homes and facades;
- Improving traffic flow and upgrading road infrastructure;
- Increasing building code enforcement to increase compliance; and
- Changing zoning regulations to facilitate redevelopment.

The case of traffic flow is one example. High motor vehicle accident rates were identified as an indicator of a deteriorating or deteriorated area in the development plan for the West End: “The West End police reporting district has twice as many motor vehicle accidents than for the surrounding area reporting districts,” notes the report, “indicating that there are inefficient traffic patterns and conditions.”⁶⁵ The accident rate could be related to heavy traffic flow, not blight or deteriorated conditions. If the cause is an inefficient traffic flow, identifying the intersections and correcting the problems directly could address the problem rather than seizing private property and comprehensively redeveloping the area. Area-wide redevelopment may or may

not help alleviate this problem. Indeed, redeveloping the area as a lifestyle center, as proposed by the city of Lakewood, could increase the number of traffic accidents by increasing traffic flow and densities.

Nevertheless, based on the consultants' findings, the city of Lakewood passed a resolution on December 16, 2002 approving a comprehensive development plan for the West End District that, in effect, required acquiring the land through voluntary purchase or eminent domain. On June 16, 2003, it approved a development agreement between the city and Lakewood Shoppes, LLC, the private developer of the property.

A. The West End and Urban Blight

One of the primary reasons given for the desire to condemn what is known as the West End section is the claim that it meets either criteria for blighted and deteriorated and deteriorating areas consistent with the standards set forth in Chapter 153 of the city of Lakewood, Codified Ordinances. The city's definition is important because the criteria for "blighted or deteriorated" cannot be supported by objective data, as this section shows. "Deteriorating," on the other hand, is a more subjective standard. Indeed, substantial evidence indicates the area is not deteriorating.

The standard for blighted and deteriorated includes that "*the majority of structures or other improvements*" which for various specified reasons are "conducive to ill health, transmission of disease, infant morality, juvenile delinquency and crime, and are detrimental to the public health, safety, morals and general welfare." The use of the phrase "majority of structures" is important because it implies over half of all structures in the development area must have deteriorating conditions. Therefore, the city of Lakewood cannot simply draw a line around an area that has some below-par structures and declare the entire area "deteriorated." This should be a strong protection for persons living in non-deteriorated structures from having their property condemned by association with a few deteriorated properties.

Yet, the consultants' report examined only a sample of structures to make a determination for the entire area. The consultants, for example, examined the interior of 12 buildings to determine their condition, 13 buildings for fire code violations.⁶⁶

More troubling, perhaps, was that the planning consultants rely primarily on determinations of economic and functional obsolescence to support the city's proposal to comprehensively redevelop the West End neighborhood. In an era where increasing emphasis is placed on rehabilitation and renovation activities, many of the criteria used appear arbitrary and subjective. For example, the study notes that 62 percent of the parcels in the West End neighborhood have a real estate appraised value that is 40 percent less than the comparable value of *new* construction.⁶⁷

Seventy-eight percent of the parcels did not conform to zoning regulations.⁶⁸ They were either a nonforming use, lot sizes were smaller than code minimums (or prevented expansion), or did not have a sufficient number of parking spaces. These limitations, in the view of the consultants, "impairs the economic and residential growth of the community."⁶⁹ In short, homes and buildings built in the early 20th century did not conform to the city of Lakewood zoning code in 2002, and these discrepancies became evidence that the homes and businesses should be razed and redeveloped according to plans created by the city.

Importantly, the consultants' report does not provide evidence that the majority of structures in the West End neighborhood meet the criteria for blight. The conclusions rest on inferences from small samples of buildings

and a fundamental belief that older buildings are inherently inferior to new, comprehensive development. The comprehensive development plan discusses area-wide concerns without linking those concerns to properties in general, let alone to a majority of properties.

In fact, there is virtually no evidence presented regarding ill health, transmission of disease, infant mortality, and juvenile delinquency, or moral hazard in the West End. Almost all the evidence presented highlights features of buildings and sites typical of neighborhoods eighty years old outside the primary growth path of a region. While crime appears to be higher in the West End, the data were not adjusted for the mix of land uses (commercial areas normally have more crime) or for population densities (higher density areas typically have more crime per acre).

Indeed, as the evidence below shows, significant differences appear to exist in different areas of the West End. These differences would be expected where some areas are characterized by very high densities and others by lower densities. Moreover, this kind of diversity is part of the natural evolution of neighborhoods.⁷⁰

Of course, higher crime rates can be due to a variety of factors besides the conditions of the buildings and infrastructure. The statute requires that the crime be attributable to building conditions, but there is no link between the two in the development plan. Specifically, demographic factors such as poverty, single family households, and education could account for the higher police and fire responses in the area, but poverty and low education attainment are not evidence of blight.

Some academic evidence suggests the local physical environment may contribute to higher urban pathology rates, but these studies tend to focus on very distressed areas, mostly public housing projects. There is no evidence that the physical environment described in the West End area is conducive to the various pathologies mentioned in Chapter 153.

In sum, the bulk of the evidence the city relies on to justify the comprehensive redevelopment of the West End points out truisms of older urban neighborhoods:

- They are demographically diverse.
- They have older housing stock and commercial buildings.
- They have older infrastructure.
- They have the attendant social problems associated with older, more diverse neighborhoods with mixed incomes and land uses.

Thus, it appears that the city of Lakewood was trying to kill two birds with one stone: get rid of the poorer section of town and raise its tax base with more commercial ventures. This is in direct contradiction to the stated goals of redevelopment and in defiance of the accepted criteria for use of eminent domain.

B. Is the West End Deteriorating?

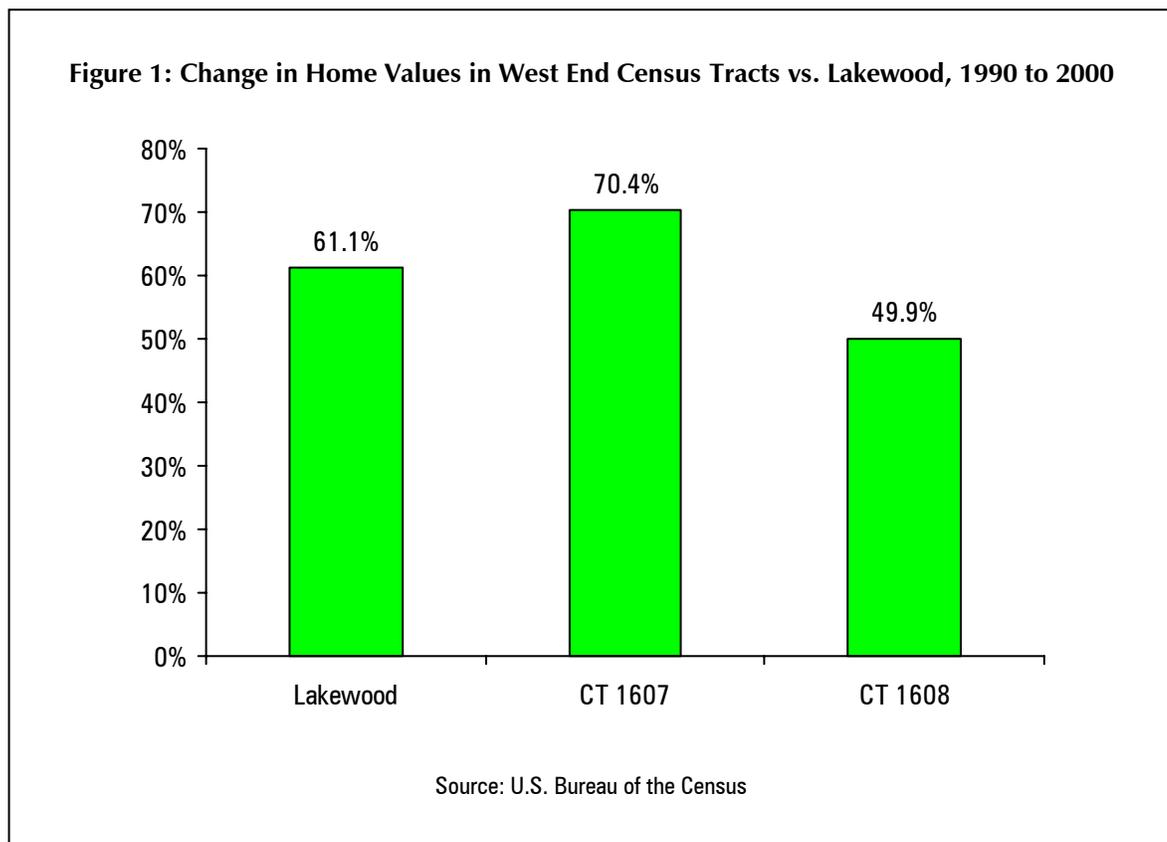
Although not made explicit in the community development plan, any claim to use Chapter 153 to condemn the West End must rely on the concept of “deteriorating” rather than “blighted or deteriorated.” Even a casual stroll through the neighborhood reveals dozens of houses that are well kept and pleasantly landscaped as well as stable blocks of residential housing. In order to show an area to be deteriorating, a trend over time

must be established. Oddly, this was not provided in the comprehensive development plan; all the data represent is a snapshot of conditions at a given point in time.

In order to examine trends, census tract data between 1990 and 2000 were used. Census tracts are particularly well-suited for this kind of analysis because they most closely resemble the size of neighborhoods. For this analysis, we used census tract 1607 and 1608 to represent the West End. Combined, these census tracts include more than the West End neighborhood, but we believe this difference will not significantly influence the trends. Census tracts represent small geographic areas, particularly in dense urban areas such as Lakewood. Because the positive and negative effects of land uses tend to influence properties physically close together, we believe a broader measure will still capture the effects of neighborhood trends.⁷¹ Moreover, little evidence suggests that the West End is unique compared to other nearby neighborhoods on the west side of Lakewood or east side of Rocky River (the immediately adjacent suburb on the west).

Perhaps the most universally accepted measure of deterioration is property values. Property values reflect not only the condition of the house, but of the environment surrounding the house. A neighborhood that is deteriorating would experience declining home values. In fact, homes in the West End are appreciating at very rapid rates.

Home values in the city of Lakewood increased 61.1 percent between 1990 and 2000, rising to a median of \$117,900 (Figure 1). Home values were lower in the West End census tracts than for the city as a whole, but appreciation was significant. Median home values in tract 1607 rose faster than for the city as a whole, rising to \$103,800 in 2000 (an increase of 70.4 percent). Inflation during this period was 31.8 percent.⁷² *Thus, home values in parts of the West End were increasing at twice the inflation rate.*



Vacancy rates can be another indicator of deteriorating neighborhoods. If vacancies grow because properties cannot be sold or rented at prevailing rates, they are at risk for deterioration as property owners attempt to maintain unsustainable rents and low revenues prevent maintenance and renovation. Occupancy and vacancy trends in the West End, however, mirror those for the city as a whole.

While the vacancy rate for rented housing increased, vacancy rates for owner-occupied housing fell dramatically (Table 8). Owner-occupied housing vacancy rates actually fell twice as fast as for the city of Lakewood. This is consistent with home value trends—tight real estate markets put upward pressure on home values and allow vacant homes to be sold more quickly.

Table 8: Vacancy Rates in Lakewood and West End Neighborhood			
	1990	2000	% Chg
Lakewood			
▪ Owner-occupied	1.2%	0.9%	-25.0%
▪ Renter-occupied	4.9%	6.4%	30.6%
West End-Census Tract 1607			
▪ Owner-occupied	1.1%	0.6%	-45.5%
▪ Renter-occupied	5.7%	8.4%	47.4%
West End-Census Tract 1608			
▪ Owner-occupied	1.0%	0.5%	-50.0%
▪ Renter-occupied	3.5%	5.5%	57.1%

Source: U.S. Census Bureau

NOTE: Vacancy rates for the city of Lakewood exclude the West End.

The similarities in vacancy rates between the West End census tracts and Lakewood are striking. While vacancy rates for renter-occupied units increase faster in the West End census tracts, the differences are probably not large enough to suggest that the West End neighborhood is significantly different from the rest of the city.

Yet another conventional indicator of neighborhood deterioration is the rate of homeownership. Neighborhoods with a large share of homeowners are typically more stable than those with high shares of renters (and thus transient populations). When owners leave the area and rent their housing units, physical standards may also drop. This finding applies to stand-alone units as well as to multi-family housing units.

In Lakewood, the rate of owner occupancy has remained steady although the city seemed to experience a small decline in the overall rate (Figure 2). Homeownership rates increased in the West End census tracts.

Finally changes in rent can be an indicator of deteriorating neighborhoods. If rents fall, owners may find it difficult to maintain rental units, or deterioration may lead to the process of rent decline. In Lakewood and the West End census tracts the increases in rents were positive, but significantly slower than housing prices. While the rent increases are a contra-indicator of a deteriorating area, the performance of CT 1608 was below the rate of inflation and so real rents did decline.

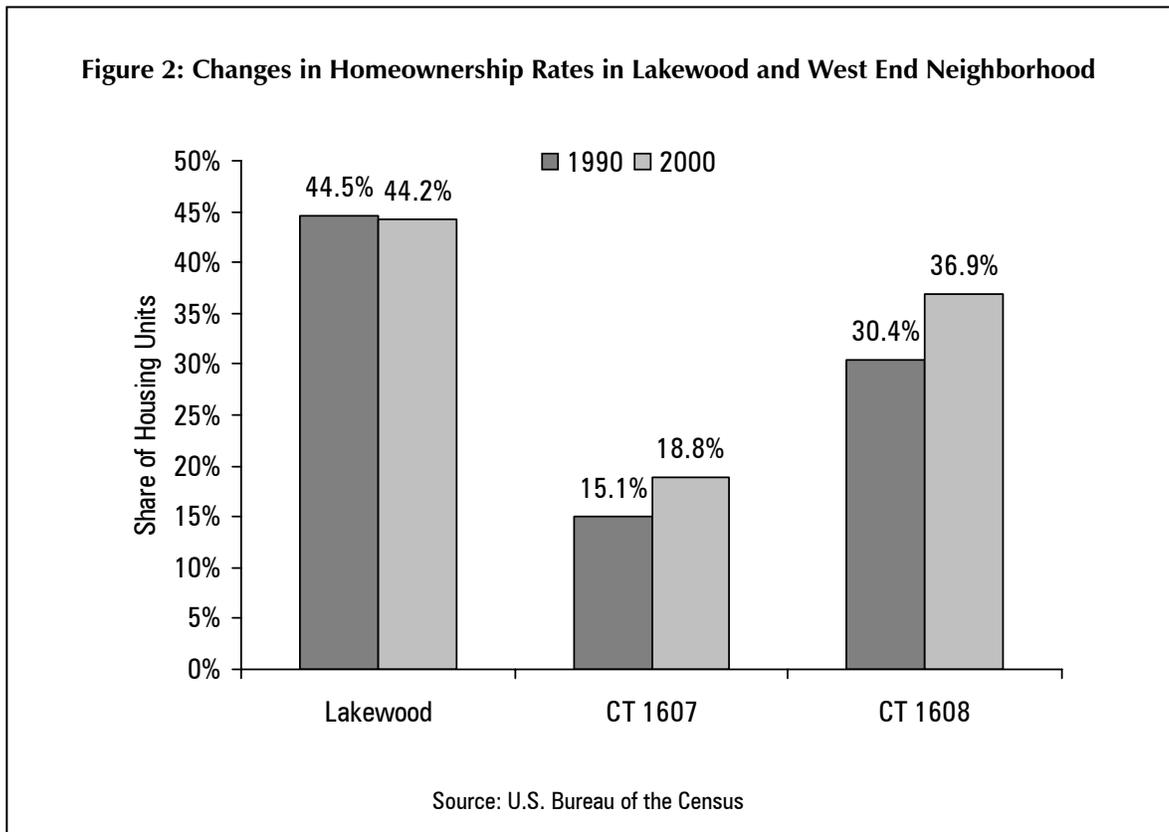


Table 9: Median Gross Rents		
	1990	2000
Lakewood	409	549
West End-Census Tract 1607	391	522
West End-Census Tract 1608	379	461

Source: U.S. Bureau of the Census

Overall, little objective evidence suggests that the West End neighborhood is in decline. In fact, the evidence from the Census Bureau suggests the neighborhood was experiencing a rebound—home values were increasing faster than for the city as a whole, vacancy rates were declining, homeownership was increasing, and rents were stable. Clearly, the West End neighborhood was not in imminent danger of “deteriorating into a blighted or deteriorated area.”

C. The Fiscal Benefits of Redevelopment

The key rationale for using eminent domain was to eliminate blight and prevent “the further development and spread of blight.”⁷³ Yet, the West End was clearly not blighted or deteriorating based on conventional measures.

Nevertheless, with a finding of blight, the city was free to pursue whatever economic development strategy it felt was necessary to redevelopment the property. In this case, the redevelopment plan called for a

comprehensive approach and emphasized replacing the existing neighborhood with a mix of upscale apartments and commercial uses.

According to the agreement eventually signed by the city of Lakewood, the city would acquire all the necessary land (funded through public debt) and the developer would then purchase the land from the city. In fact, the city committed to acquiring all the remaining property within 90 days of signing the development agreement.⁷⁴ The city also capped the developer's exposure to land acquisition costs at \$28.5 million.⁷⁵

The agreement is instructive in that it lays out the content of the development and provides an important contrast to land uses in the current neighborhood. The West End currently consists of small homes on small yards with a scattering of neighborhood businesses and cheap office space. The city intended to develop the neighborhood as an open-air "lifestyle center"—a commercial destination that would draw from throughout the region. Few of the businesses would target the everyday needs of the neighborhood. In fact, the agreement prevented neighborhood businesses such as inexpensive restaurants, conventional fast food, convenience stores, or discount pharmacies. The agreement between the developer and city stipulates that the center will consist of

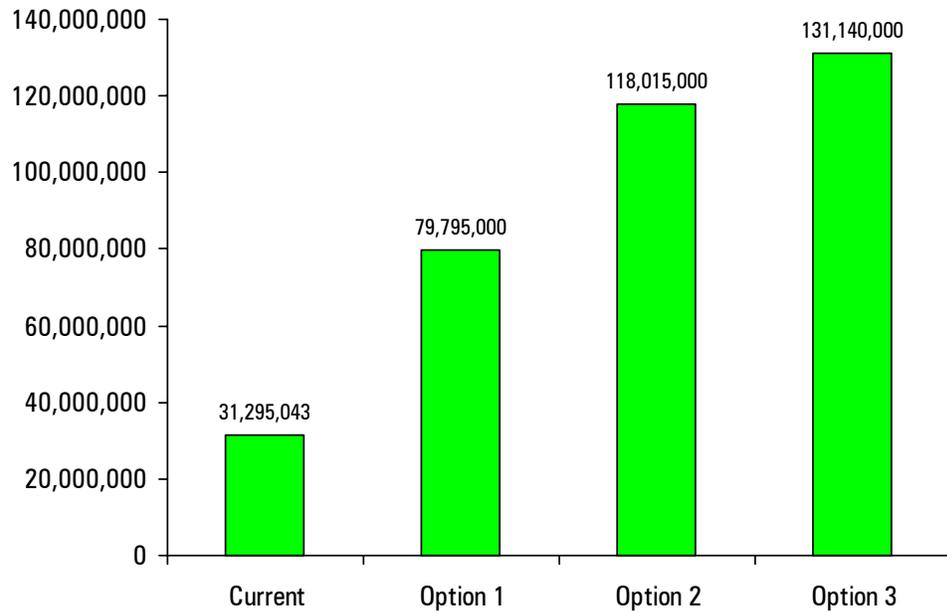
- Mid and upscale specialty stores;
- A book store as an anchor tenant;
- Full-service sit down restaurants;
- High end carryout restaurants such as a Starbucks;
- A multi-screen movie theater;
- Home furnishing stores, and at least 25,000 square feet of general office space.

The agreement explicitly prohibits convenience stores, "big box" tenants, or discount drug stores.

In short, the city was fundamentally changing the character of the neighborhood, shifting it from an affordable residential neighborhood to an upscale commercial mixed-use area. One reason for this change may be the expected fiscal benefits from the proposed redevelopment. The value of all real estate in the current West End neighborhood amounts to \$31.3 million.⁷⁶ Significantly expanding the commercial mix of the land and replacing the existing affordable homes with upscale housing would increase the total value of real estate to between \$79.8 million and \$131.1 million dollars (Figure 3). Redevelopment could boost city tax revenues from just \$638,694 to as much as \$1,657,733.⁷⁷ Real estate taxes would triple and income taxes would double. Importantly, no public evidence was presented that the proposed units would in fact generate the value. Moreover, the area was surrounded by physically larger homes selling for significantly less (about \$80,000), which would likely dampen the market price for higher end condominiums.

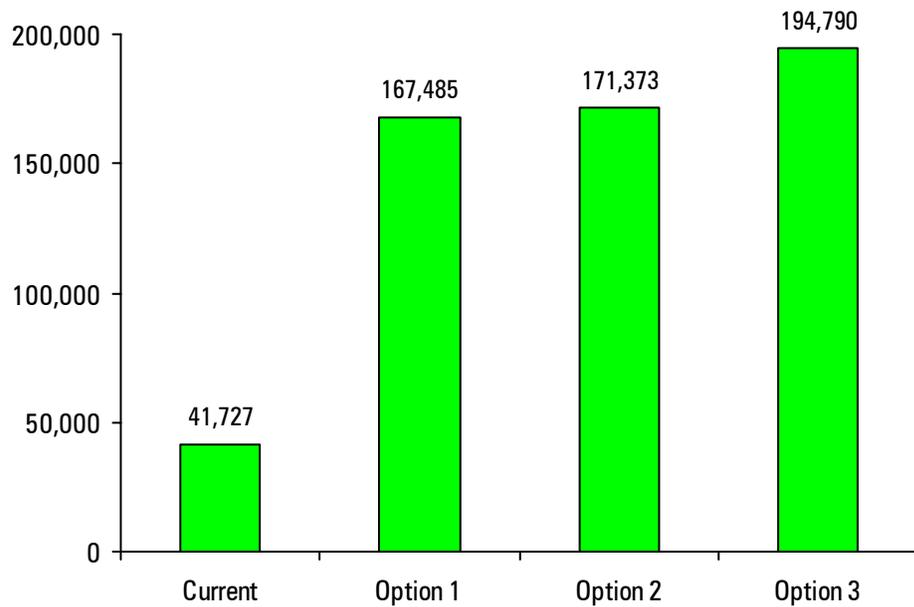
The effects on the residential market would be substantial. Although the proposed redevelopment schemes would reduce the number of homes in the neighborhood by half, the average value of homes would increase dramatically (Figure 4). Current homes average \$41,727. The most intensive redevelopment proposal was expected to boost the average home value to almost \$200,000. Thus, the real estate market would fundamentally shift from an affordable, mixed-income community to an exclusive, high-end residential community.

Figure 3: Real Estate Value of West End Under Alternate Development Proposals



Source: U.S. Bureau of the Census

Figure 4: Value of West End Residential Real Estate Per Housing Unit Under Different Development Proposals



Source: U.S. Bureau of the Census

D. Local Planners and Knowledge

Projected tax revenues were the only evidence presented that the Lakewood Community Action Plan would, according to the Ohio Revised Code (P719.01.1 and 719.011), generate economic development and “in order to create or preserve jobs and employment opportunities and to improve the economic welfare of the people of such impacted city, may appropriate, enter upon and hold real estate within its corporate limits.” The benefits of assumed higher property values and assumed employment increases were valued according to their contribution to the fiscal health of the community. Cost-benefit studies were not conducted to determine whether citizens as a group would benefit from the project.⁷⁸ A more rigorous and complete methodology should have been conducted to determine whether “economic development” actually occurred in projects that employed eminent domain. By using only a fiscal approach, a project that generated extra tax dollars could be said to be beneficial even if the extra tax revenues were wasted on inappropriate or low-valued uses. Unfortunately, in the absence of a rigorous definition and methodology for analyzing the impact of these projects, the courts have let communities decide what constitutes economic development.

The Lakewood case illustrates another weakness in the analytic process. The future value of both the new development as well as the evolution of existing land uses are highly speculative and malleable. For instance, the Lakewood Shoppes are a relatively new “community center” model for shopping center development. Whether the development will actually be able to generate the consumer spending in the stores envisioned to sufficiently support the projected value of those shops is problematic, particularly when one considers that the revenue streams are valued over a 30-year period. Different assumptions about how much revenue will be generated over different time periods can significantly influence the outcomes. And the basis for selecting one assumption over another is unknown. The Community Development Plan used in the Lakewood case provided no data on likely spending, consumer preferences, regional buying power or comparable shopping sites to support the value (and hence the tax revenue) of the proposed center.

Similarly, the suggestion that the existing land uses would not change without the use of eminent domain is inaccurate. The land market is driven by improvements that occur without the use of coercion. If the West Side area were well-suited for expensive housing and specialty shopping because of the location near a major artery into Downtown Cleveland, water, and a recreational area, there are many reasons to believe that market forces would provide incentives to move the neighborhood in that direction over time without public subsidy.

E. Conclusion

Like Mesa, eminent domain was a crucial tool for promoting redevelopment within the city. Like Mesa, Lakewood used a very conventional, almost textbook approach to redevelopment—it identified a “problem,” it “studied” the problem, then adopted a redevelopment plan to provide a framework for revitalizing the area. Eminent domain became a crucial component for implementing the redevelopment plan. The city’s efforts, however, followed more of an outline of the redevelopment process than a substantive investment in information gathering, cost-benefit analysis, and evaluation of alternate scenarios. Of course, the property rights of existing property owners were not even factored into the process except possibly as a line item where their compensation was considered a cost of development.

Lakewood's approach was substantially different from Mesa's, but an increasingly more common approach, in that the city adopted the primary role of developer. The city, in effect, determined what the "highest and best" economic use for the land would be. It then asked for proposals from private developers to redevelop the neighborhood. In this case, the city determined that a higher and better use for the West End District was as a Lifestyle Center rather than a neighborhood dominated by older, affordable homes and businesses. It conformed to Blakely's vision of economic development strategy discussed in Part 2 of this report.

As a practical matter, Lakewood stretched the definition of blight to the point where it had little substantive meaning or content. Indeed, the objective data on trends showed clearly that the neighborhood could not be considered blighted or deteriorating. The standards for determining blight were sufficiently broad and subjective that the city would be able to condemn any property for its redevelopment purposes.

Grass roots political activism killed the West End redevelopment project before important questions of property rights could be evaluating in the Ohio courts. Once the plight of West End homeowners was given public visibility through a lawsuit by the Institute for Justice, a public debate emerged over the appropriateness of city council's actions. In November 2003 Lakewood citizens rejected the proposed West End Project in a citywide vote. The vote did not rescind the city's blight designation, however, giving public officials the authority to condemn and tear down the neighborhood. On March 2, 2004, Lakewood voters repealed the blight label in another citywide vote. Subsequently, the Institute for Justice and Lakewood homeowners dropped the law suit.

Nevertheless, the Lakewood case serves as an important example of how cities and redevelopment authorities use the discretion and ambiguity of state redevelopment statutes to seize private property for revitalization projects. Lakewood, in context and goals, is very similar to *Kelo v. City of New London*."

Part 5

Policy Implications

Eminent domain has become part of the lexicon of economic development policy. As the courts have tolerated increasingly broad definitions of the public use clause of the Fifth Amendment, state and local governments have seized on opportunities to expand their own power of land and property within their jurisdictions. As a result, property rights no longer serve as a meaningful check on government authority in land.

For some, most notably planners and economic development officials, this change represents an opportunity. They are not bound by legal or substantive constraints as they promote redevelopment plans and projects. The ability to define virtually any action by government as a public purpose gives policymakers and redevelopment officials discretion unavailable when they were unable to seize property except for clear public uses. Moreover, the willingness of the courts to allow private parties to benefit directly from this relaxed approach to property rights has allowed community officials to focus on the needs of specific clients, such as Costco, WalMart, IKEA, General Motors, or even ACE Hardware.

A. How Eminent Domain Corrupts Economic Development Policy

The redevelopment cases of both Mesa and Lakewood provide important insights into the urban redevelopment process, the role eminent domain plays, and the ways both public officials and private interests game the system at the expense of small landowners. In both cases, redevelopment policies were characterized by

- **Arbitrariness.** While both cities had approved redevelopment plans, the areas were sufficiently broad and general that any property could be subject to eminent domain at any time whether it was blighted or economically robust. In Mesa's case the timing of redevelopment was determined by private sector interest in the project area and was not keyed into a sequence established by the general redevelopment plan. Lakewood pursued a more conventional and common approach where the city assumed the role of land developer. Because a largely unconstrained political process drives these redevelopment efforts, they tend to be subjective, arbitrary and ad hoc. Mesa was most obvious: in the case of Site 24, the area was added to the Town Center Redevelopment area only after private investors expressed interest in the site. But the more conventional case of Lakewood also exemplifies this process: the city decided that property should be developed at a higher economic use and initiated the process of condemning property to achieve that goal.
- **Inequities.** Smaller property owners have virtually no chance to participate in the process. Site 24 is an excellent example. Bailey's Brake Service has been a viable business in the city of Mesa and an

economic anchor at the intersection of Country Club and Main Street. Yet, the owners had neither the financial capacity nor sufficient understanding of the redevelopment process to realistically submit a proposal. In Lakewood, most homeowners were faced with the daunting task of challenging the city's planning department and legal counsel. Only when the case became public and political were they able to check the authority of the city.

- **Eminent Domain Serving a Private Purpose.** Eminent domain has become a standard tool for redevelopment used by private investors to avoid the normal costs of business expansion. In Mesa, potential developers effectively ignored existing property owners and refused to consider incorporating their businesses into their redevelopment plans even though they were compatible with existing zoning. The city's redevelopment process allowed for private-to-private transfers for property in direct violation of the intent of the Arizona Constitution. In Lakewood, the effect was the same but included at least one more step: the city acquired the property and then transferred the property to private developers afterward.
- **Substantive Limits Such as Determinations of Blight Not Effectively Limiting Eminent Domain.** Little evidence suggested either site "impairs or arrests" economic growth in their respective areas of the city. Moreover, these properties did not constitute a "menace" to the community. Both cities adopted such broad criteria for what constituted a redevelopment area or blight that private ownership of property had no substantive restraining power on local government's authority to seize property. As a result, private property owners have virtually no ability to check abuses of eminent domain, including the ability of private investors to seize private property for personal gain.
- **Eminent Domain Serving Private Gain.** Since the public planning process is subordinate to facilitating the expansion of a select set of private companies, the primary benefits of redevelopment accrue to the private investors selected during the RFP process. In Mesa's case, the public benefits were small. The city justified its role in the redevelopment process based on sales tax revenue, not whether the project achieves the basic goals of the redevelopment plan. In the case of Lakewood, the benefits were potentially large to the scale of the project. The fiscal benefits to the city were substantial as well.

The implications for urban development are much broader than the impact on the property owners targeted in these cases. Economic development policy is essentially an ongoing stream of negotiations between public officials and private developers. In the long run, this approach undermines the climate for private investment in urban areas.

Private investment requires a reasonable expectation of return on investment. This expectation can only occur in a business climate with established and respected rules for investment. Planners and economic development specialists understand that uncertainty erodes a healthy business climate. In fact, one of the justifications for using eminent domain is to allow local officials to reduce uncertainty for their client.

Yet, public officials following this line of reasoning are missing the forest for the trees. Cities develop as a result of hundreds, and often thousands, of investment decisions, not just the chosen few selected to participate in a development project. The decisions are made by small and big businesses alike. Eminent domain destabilizes the investment climate for everyone except those negotiating directly with the city for a piece of the development project. Even in these cases, investors cannot be certain their investment and property are safe. If the neighborhood or commercial area continues to decline, or fails to achieve the investment objectives established by the redevelopment plan, their property rights will be at risk as well. In fact, based on the conventional wisdom in the economic development community, cities would be obligated to reinitiate the redevelopment process, putting each property at risk again. Few people will invest in homes

or small businesses if they are unsure if they will be in the home or neighborhood for long. Yet, this is the climate the broad-based use of eminent domain for redevelopment purposes creates.

Cities increasingly think of redevelopment as large-scale, comprehensive projects. Under this framework, an incremental approach to redevelopment is discouraged even when a project's timetable for completion (build out) may be 10 or 15 years. An alternate approach is to look for more incremental and property-rights-friendly approaches to redevelopment.

B. Eight Principles for Urban Redevelopment Policy

Citizens and local policymakers must take a fresh look at how the economy repositions itself in an information-driven, globally competitive world market and what, if anything, public policy can do to influence these shifts. The following key observations and principles may help redefine how public officials approach redevelopment in urban areas.

1. Focus on the Achievable. Any elected official's first inclination is to create and implement a positive program for change. Unfortunately, reality, political and economic, often gets in the way of grand plans, and elected officials need to factor this into their policy recommendations. Vision is not enough. Cities must focus on what they can achieve, not on hopes or aspirations that are no longer within reach or impossible to achieve under the best of circumstances. While vision can provide a general context, it cannot provide a workable action plan. Thus, a practical key to successful economic development policy is the ability of local leaders to be realistic in their expectations and in the programs they create to achieve them.

2. Learn from the Private Sector. In the late 20th century, many elected officials believed that government could create jobs by investing directly in projects, or seeding projects that would create a catalyst for long-term investment and growth. Most of these plans have achieved results far below expectations.

Over the past two decades, economic development specialists have recognized that good projects almost always have a significant private sector component because entrepreneurs have a better grasp of market conditions and the long-term viability of certain kinds of projects. In short, the private sector does a better job of leading and managing projects and leveraging public dollars than does the public sector investing on its own.

Mesa was moving along in the right direction here. Public officials, however, must make sure that economic development policy is, in fact, serving a public purpose, not providing a mechanism for private interests to circumvent market processes. In Mesa, the zeal to close a deal caused officials to obscure the private nature of the redevelopment project.

3. Provide Core Services Efficiently for Long-Term Success. Local governments must not lose sight of their core competencies — the services and products local governments provide that no one else can (or will) provide. These core competencies include local infrastructure, certain kinds of regional planning, law enforcement, criminal justice, the quality of public education and other services. Ignoring these core services risks compromising economic development in the short and long run. A core service, however, should not be using the public process to nullify core principles of governance such as the protection of private property.

4. Create Sustainable Economies Through Private Investors. Government investment does not create long-term job growth. Certain types of investments, such as road and sewer infrastructure, help lay a broad-based foundation for private investment. Their job creation and impact on local wages, however, are relatively small. Public works projects may provide a short-term infusion of cash that increases the number of jobs in the short run but they don't provide a foundation for sustained investment.

The vast majority of jobs come from local small businesses starting up, expanding and diversifying over time. These are the businesses hurt the most by eminent domain proceedings and large-scale redevelopment plans catering to the wants of large developers. Local officials rarely can pick and choose among those private businesses to determine which will be successful. Indeed, the history of economic development is rife with examples of companies that became successful as a by-product of their efforts in their core competencies. Indeed, the General Motors plant that was used to justify razing Poletown never achieved the employment or wealth impacts projected by planners or the private sector. Wealth creation, from a public official's perspective, is largely a spontaneous process where the logic and rationale of the success of a particular business can be determined only in retrospect.

5. Lead with Focus, Drive and Simplicity. Sometimes, policymakers tend to take a shotgun approach to economic development policy that captures this philosophy: Try as many ideas as you can and hope two or three have an impact. This approach tends to diffuse accountability in the process, and often sets in motion initiatives that work at cross-purposes. A more effective strategy has been for local leaders to identify two or three key areas and goals, and then develop a timed, phased action plan to achieve them. The results are easier to measure, and implementation is clearly and more likely to succeed.

6. Respect the Rights of All Citizens. Eminent domain and large-scale redevelopment projects provide narrow, not broad-based benefits. Virtually all investment has a public benefit—raising property values, higher employment—but public benefits are not public uses. Government should focus on providing core services that serve the broad-based citizenry and avoid the trap of believing the biggest or wealthiest citizen has more rights or more to offer than the hundreds of homeowners and businessmen that make up the city's foundation.

7. Encourage Voluntary Investment and Redevelopment. This might be hard, but the Institute for Justice's survey of eminent domain nationwide suggests it can be achieved. Some states—North Carolina and New Hampshire for example—rarely use eminent domain to achieve their economic development objectives. Most redevelopment projects are implemented in phases, and few projects depend on all properties being acquired in order for them to be successful. Cities should work with developers to accommodate property rights protections rather than provide ways for them to circumvent them. In the long run, this will create a business climate more supportive of property rights, greater investment certainty, and a more cohesive community than allowing livelihoods and residents to be subjected to the whims of political expediency and majority politics.

8. Employ a Rigorous Flow to the Evaluation Process. There may be instances when the use of eminent domain for economic development purposes is appropriate. An instance where an isolated, deteriorated property, prevents an important community economic development project can be imagined. However, eminent domain is a powerful tool that impinges on other values important to a property-rights-based economic system. As long as key concepts remain ambiguous, the economic development community will stretch the limits of the use of this power. Courts will be reluctant to second-guess substantive decisions made by public officials. Interpreting the concepts of “public purpose” more rigorously would reduce potential abuses. It is beyond our scope to write legislation, but requiring clarification of the project community benefit (not just the treasury) would be one step. A more rigorous definition of “blight” or “deteriorating” would also provide guidance to identify which neighborhoods do indeed degrade community welfare. Public officials should also be required to consider the feasibility of accomplishing the project’s goals by less aggressive means.

Appendix

Legal Context for Redevelopment Policy in Arizona

A redevelopment area, according to Arizona’s Revised Statutes, must have one of two characteristics:

- An area in which the majority of the structures are “conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime, and is detrimental to the public health, safety, morals or welfare”⁷⁹ or
- Be a place that “substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals or welfare in its present conditions and use.”⁸⁰

Arizona cities and local governments, like those in other states, are permitted to use a variety of activities to encourage redevelopment to avoid these conditions. One of the more common approaches is to identify a redevelopment area, develop and approve a redevelopment plan, and then facilitate the redevelopment of that area through specific redevelopment projects.

Arizona law is fairly specific about what a redevelopment project is and what efforts can be undertaken to encourage redevelopment, particularly with respect to land development and property rights. Arizona municipalities are permitted to acquire land (or a building) if its acquisition “is necessary or incidental to the proper clearance or redevelopment of these areas or to the prevention of the spread or recurrence of slum conditions or conditions of blight in the area.”⁸¹ The city can also remove or demolish buildings and structures if it is “essential to the preparation of sites for uses in accordance with the redevelopment plan.”⁸² If necessary, cities can make available land for private uses through sale or lease.⁸³

While this enabling language is broad, Arizona statutes provide important limits on government activity. If an area is not impairing or is not arresting the sound growth of a community or is not a “menace” to the public health and welfare, it shouldn’t qualify as a redevelopment area. More importantly, perhaps, state statutes implicitly establish a hierarchy in which these tools can be used.

- Land acquisition, for example, is permitted only if it is necessary for the “proper” clearance and redevelopment of these areas and prevents the spread of blight or slum conditions.
- The removal or demolition of buildings is permitted only if it is “essential” to fulfilling the redevelopment plan.

Thus, the proposed tools need to be considered in relation to the intended goal of the program.⁸⁴

Arizona Revised Statutes also require cities to adopt a legislative finding and declaration of necessity when they create redevelopment areas. The statutes, in fact, are explicit. The local governing body must adopt a resolution that finds the redevelopment of that area “is necessary in the interest of the public health, safety, morals or welfare of the residents of the municipality.”⁸⁵ In this declaration, the city must find, among other things, that

- the redevelopment area constitutes “a serious and growing menace, injurious and inimical to the public health, safety, morals and welfare of the residents of the state,”⁸⁶
- the existence of these areas “contributes substantially and increasingly to the spread of disease and crime,”
- these areas constitute “an economic and social liability, substantially impairs or arrests” sound growth,
- the designated area “retards the provision of housing accommodations,”⁸⁷ and
- the “menace is beyond the remedy and control solely by regulatory process...and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids provided by this article.”⁸⁸

In short, the city must make two determinations. First, the redevelopment area is significantly impeding the economic and social progress of the city. Second, the private sector cannot achieve redevelopment on its own. *This implies that cooperative and voluntary approaches have been reasonably exhausted, therefore allowing the city to use eminent domain to acquire property and jumpstart redevelopment.* If these conditions do not exist, then the use of forced acquisition of private property is not warranted.

Eminent domain is one of the powers Arizona law delegates to cities and redevelopment commissions to aid them in their redevelopment efforts.⁸⁹ State and federal constitutions have long recognized the role eminent domain plays in providing necessary public services. In fact, the Fifth Amendment of the U.S. Constitution specifically acknowledges that private property can be seized for legitimate public purposes.⁹⁰

In general, the legitimate use of eminent domain has hinged on two factors: serving a public purpose and providing a general public benefit. In other words, the power of eminent domain should not be used for private-to-private transfers of wealth, or provide a direct subsidy to a private party that will give him an advantage over his competitors. Arizona state statutes seem to be consistent with this interpretation; a taking must be considered necessary for achieving a public purpose as a pre-requisite for condemnation.⁹¹ Moreover, the Arizona Constitution is clear: “Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes.”⁹²

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Endnotes

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- ¹ Donald J. Borut and S. Ellis Hankins, “Eminent Domain Vital to Local Economic Development,” *Nations Cities Weekly*, October 18, 2004.
 - ² Dana Berliner, *Public Power, Private Gain* (Washington, D.C.: Institute for Justice, April 2003), http://www.castlecoalition.org/report/pdf/ED_report.pdf.
 - ³ See the discussion in Sam Staley, *Drug Policy and the Decline of American Cities* (New Brunswick, New Jersey: Transaction Books, 1992), chapters 2-3.
 - ⁴ Borut and Hankins, “Eminent Domain Vital to Local Economic Development.”
 - ⁵ Berliner, *Public Power, Private Gain*, http://www.castlecoalition.org/report/pdf/ED_report.pdf.
 - ⁶ *Ibid.*, p. 2.
 - ⁷ *Ibid.*, pp. 157-8. North Dakota is another state where cities and municipalities rarely use eminent domain. The one case the Institute found was where a private party sued to gain access to water rights on another landowner’s property. This case involves the relatively complex issue of water rights in rural areas that is a unique feature of the western legal environment.
 - ⁸ *Ibid.*
 - ⁹ Edward J. Blakely, *Planning and Local Economic Development: Theory and Practice* (Newbury Park, California: Sage Publications, 1989), p. 140.
 - ¹⁰ Blakely, *Planning and Local Economic Development*, p. 140. Emphasis in original. See also the chapter “Economic Development” authored by Blakely in Charles J. Hoch, Linda C. Dalton, and Frank S. So, *The Practice of Local Government Planning, 3rd Edition* (Washington, D.C.: International City/County Management Association, 2000), pp. 283-305.
 - ¹¹ Blakely, “Economic Development,” p. 286-87.
 - ¹² *Ibid.*, pp. 304-5.
 - ¹³ Borut and Hankins, “Eminent Domain Vital to Local Economic Development.”
 - ¹⁴ See the discussions in Blakely, *Planning and Local Economic Development*, pp. 140-159; John P. Blair, *Local Economic Development: Theory and Practice* (Thousand Oaks, California: Sage Publications, 1995), particularly pp. 168-188.
 - ¹⁵ This is true for Hoch, Dalton, and So, *The Practice of Local Government Planning*, Blakely, *Planning Local Economic Development*; David Slater, *Management of Local Planning* (Washington, D.C.: International City Management Association, 1984); John P. Blair and Laura A. Reese, eds. *Approaches to Economic Development* (Thousand Oaks, California: Sage Publications, 1999); Henry J. Raimondo, *Economics of State and Local Government* (Westport, Connecticut: Praeger Publishers 1992); William Thomas Bogart, *The Economics of Cities and Suburbs* (Upper Saddle River, New Jersey: Prentice-Hall, 1998). John P. Blair, *Local Economic Development: Analysis and Practice* (Thousand Oaks, California: Sage Publications, 1995) references eminent domain but discusses it in a very narrow context.

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- ¹⁶ For a useful overview of this role, see Wim Wiewel and Jeff Weintraub, "Community Development Corporations as a Tool for Economic Development Finance," in Richard D. Bingham, Edward W. Hill, and Sammis B. White, *Financing Economic Development: An Institutional Response*, pp. 160-176 (Newbury Park, California: Sage Publications, 1990).
- ¹⁷ *Redevelopment: The Unknown Government* (Fullerton, California: Municipal Officials for Redevelopment Reform, August 2004), p. 2.
- ¹⁸ The effect, in large measure was to displace poor and minority households and reduce the overall stock of affordable housing. By one estimate, three homes were destroyed for every home built. See the discussion in John P. Blair, *Urban and Regional Economics* (Homewood, Illinois: Richard D. Irwin, 1991) pp. 220-223; John O. Norquist, *The Wealth of Cities* (Reading, Massachusetts: Addison-Wesley, 1998) pp. 109-110.
- ¹⁹ Ellen Frankel Paul, "Public Use: A Vanishing Limitation on Government Takings," in *Economic Liberties and the Judiciary*, ed. James A. Dorn and Henry G. Manne, pp. 357-373 (Fairfax, Virginia: George Mason University Press, 1987), p. 370.
- ²⁰ Quoted in Sam Staley, "Wrecking Property Rights," *Reason* (February 2003), <http://www.reason.com/0302/fe.ss.wrecking.shtml>
- ²¹ *Ibid.*
- ²² Blair, *Local Economic Development: Analysis and Practice*, p. 232.
- ²³ See Steven Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* (Santa Ana, California: Seven Locks Press, 2004), pp. 52-78.
- ²⁴ *Ibid.*, pp. 60-62.
- ²⁵ *Ibid.*, pp. 62-63.
- ²⁶ *Ibid.*, p. 63.
- ²⁷ Sam Staley, "Dayton No Longer User Friendly," *Dayton Daily News*, August 15, 1990, p. 15A.
- ²⁸ *Ibid.*
- ²⁹ Staley, "Wrecking Property Rights," p. 37.
- ³⁰ Eric R. Claeys, "Takings, Regulations, and Natural Property Rights," *Cornell Law Review*, vol. 88, No. 6 (September 2003), 1549-1671
- ³¹ Quoted in Staley, "Wrecking Property Rights," p. 37.
- ³² Quoted in Staley, "Wrecking Property Rights," p. 36.
- ³³ The downtown area was bounded by Country Club Drive to the west, Mesa Drive to the east, Broadway Drive to the south, and University Drive to the north.
- ³⁴ Revised December 2, 1999.
- ³⁵ Description provided by the city of Mesa.
- ³⁶ Memo from Wayne Balmer, Community Development Manager, City of Mesa to Charles Luster, City Manager, City of Mesa, July 24, 1996. (Emphasis was in original.)
- ³⁷ *Ibid.*
- ³⁸ Comments attributed to Greg Marek, Minutes, Downtown Development Committee Meeting, City of Mesa, January 21, 1999.
- ³⁹ Memo from Wayne Balmer, Community Development Manager and Greg Marek, Redevelopment Director, to Charles Luster, City Manager, August 30, 1996. See also the memo from Greg Marek to the Downtown Development Committee, August 8, 1996.

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- 40 Ibid.
- 41 Correspondence from Ken Lenhart, Lenhart's ACE Hardware to Wayne Brown, Mayor, and Deborah Duvall, Chair, Downtown Development Committee, February 20, 1998. See also the correspondence from Ken Lenhart to Greg Market, Redevelopment Director, City of Mesa, September 1, 1998.
- 42 In 2000, the last year data for these properties were listed, the assessed values for the parcels not owned by Redstone Development, the development company representing Lenhart's redevelopment project, averaged \$8.93 per square foot according to the Maricopa County Assessor's office. Actual market value for these properties is likely much higher.
- 43 Lenhart proposes to redevelop 118,160 square feet of Site 24. In 2000, Lenhart/Redstone had acquired 48,423 square feet, leaving 69,737 subject to condemnation and eminent domain proceedings.
- 44 Resolutions 7336 and 7337. Minutes, city council of the city of Mesa, March 15, 1999.
- 45 Based on the Memorandum of Understanding between the city of Mesa and Lenhart's Ace Hardware.
- 46 Comparable sales price data were found for twelve properties via the Maricopa County Assessor. On average, the actual sales price exceeded the full cash value price by 31.2 percent.
- 47 Lenhart's ACE Hardware, Proposal for City of Mesa, Site 24 Redevelopment Project, January 24, 2000.
- 48 Palm Court Investments LLC, Response to Mesa's Redevelopment Project Site #24, January 24, 2000.
- 49 Watt Commercial Properties, Request for Proposals, January 21, 2000.
- 50 Lenhart's ACE Hardware, Proposal for City of Mesa, Site 24 Redevelopment Project, January 24, 2000.
- 51 Interview with Timothy Keller, Attorney, Institute for Justice.
- 52 Lenhart's ACE Hardware, Proposal for City of Mesa, Site 24 Redevelopment Project, January 24, 2000.
- 53 Memo from Bryan Raines, Assistant City Manager, City of Mesa, to the General Development Committee, October 3, 2000, Table 1, p. 7.
- 54 Ibid.
- 55 Ibid., p. 8.
- 56 Ibid., p. 6.
- 57 Mesa City Council Resolution 7337 adopted March 15, 1999. The resolution cites as reasons for the approval of the redevelopment plan the need to address a shortage of housing in the city caused in part by its redevelopment efforts and that the development of predominately residential areas is "an integral part" of the redevelopment policy of the city.
- 58 The Urban Center, Maxine Goodman Levin College of Urban Affairs, Cleveland State University, cited on the city of Lakewood's Web site, <http://ci.lakewood.oh.us/soc local.html>, accessed 1/12/05.
- 59 City of Lakewood Web site, <http://ci.lakewood.oh.us/soc local.html>, accessed 1/12/05.
- 60 Data for the West End neighborhood refer to Census data for census tracts 1607 and 1608. Unfortunately, precise neighborhood data were not available from the Census Bureau.
- 61 *Community Development Plan for the West End District: Volume I Determination and Actions*, prepared for the city of Lakewood by D.B. Hartt, Inc. and Square One, Inc., July 25, 2002, Part I, Section B, p. 9.
- 62 Ibid.
- 63 Ibid., Part II, Section B, p. 14.
- 64 Cited in Ibid, Part II, Section C, pp. 16-17.
- 65 Ibid., p. 19.

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- ⁶⁶ Ibid., Part II, Section D, p. 18.
- ⁶⁷ Ibid.
- ⁶⁸ Ibid.
- ⁶⁹ Ibid.
- ⁷⁰ With regard to safety due to fire, the CDP showed that there were higher rates of fires responses per acre (nearly twice) for the West End compared to Lakewood as a whole. Again, the analysis would be more convincing if the fire calls were expressed on a per capita basis rather than a per acre basis because fire calls are related to population (among other things).
- ⁷¹ Negative indicators in the West End will be reflected in the census tracts for two reasons. First, the West End trends themselves will be reflected in the census tract average. Thus measures of deterioration in the West End will bring the average of the census tracts down. Second, and perhaps more important, problems associated with a distressed neighborhood in the West End can be expected to spill over and affect indicators in the rest of the census tract.
- ⁷² Calculated based on the Consumer Price Index for urban consumers. U.S. Census Bureau, *Statistical Abstract of the United States: 2004-2005* (Washington, D.C.: U.S. Government Printing Office), p. 464. Inflation for housing was also 32 percent.
- ⁷³ Development Agreement between the city of Lakewood and Lakewood Shoppes LLC, adopted June 16, 2003 by the city of Lakewood, Ohio.
- ⁷⁴ Ibid, Section 4, “Acquisition of Property,” subsection B.
- ⁷⁵ Ibid, Section 4, Subsection D, “Right of Developer to Terminate.”
- ⁷⁶ Memorandum from David B. Hartt and Kristin Hopkins to Frank Pietravoia, “Revisions for Consideration—Community Development Plan for the West End District,” December 16, 2002.
- ⁷⁷ Ibid.
- ⁷⁸ The focus on consequences for the local treasury (which naturally is of significant concern to public employees) is reminiscent of the mercantile approach to economic development that Adam Smith rallied against. Smith and his modern-day followers felt the economy should serve the citizens, and therefore local economic development should address the needs of citizens, not simply generate a fiscal surplus.
- ⁷⁹ Arizona Revised Statutes, Section 36-1471(14)a.
- ⁸⁰ Arizona Revised Statutes, Section 36-1471(14)b.
- ⁸¹ Arizona Revised Statutes, 36-1471(17)a.
- ⁸² Arizona Revised Statutes, 36-1471(17)b.
- ⁸³ Arizona Revised Statutes, 36-1471(17)c.
- ⁸⁴ This hierarchy appears to be accepted in the city of Mesa since it emphasizes the policy goal of privately led development.
- ⁸⁵ Arizona Revised Statutes, 3666-1473.
- ⁸⁶ Arizona Revised Statutes, 36-1472.
- ⁸⁷ Ibid.
- ⁸⁸ Ibid.
- ⁸⁹ Arizona Revised Statutes, 36-1478.
- ⁹⁰ Eminent domain is typically justified to prevent “hold outs.” Hold-outs are individual property owners that may be unwilling to sell their property (or grant easements) for projects that have legitimate public

purposes and uses. These hold-outs could prevent the provision of a public service or project that would significantly enhance the community's general welfare. Historically, these projects have focused on major public works programs, such as road building, utilities, or the creation of public spaces or facilities. In the case of roads and utilities, for example, one property owner could prevent a project with substantial regional benefits from proceeding. Thus, to enhance the general community welfare, governments are granted the power of eminent domain to maximize the community welfare.

⁹¹ Arizona Revised Statutes, 12-1112.

⁹² Constitution of the State of Arizona, Article 2, Section 17.