Keeping the Public in the Public Use Requirement: Acquisition of Land by Eminent Domain for New Sports Stadiums Should Require More Than Hypothetical Jobs and Tax Revenues to Meet the Public Use Requirement

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"Our cities and states have become like real estate speculators, securing land owned by their own citizens on behalf of politically connected private interests."[1]

I. INTRODUCTION

The Bugryn family lived on their property for over sixty years.[2] They resided in a home built by the owner and put the rest of their acreage to good use as a Christmas tree farm.[3] After decades of being good neighbors, the City of

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1. Ira Carnahan, *Domain Game*, FORBES, Nov. 25, 2002, at 112 (citing Scott Bullock from the Institute for Justice).

2. Robert Gonzalez, *Family Loses Fight to Stay; Court Rules Against Bugryns*, HARTFORD COURANT, Mar. 12, 2003, at B3.

3. Dana Berliner, *Public Power, Private Gain – A Five-Year State by State Report Examining the Abuse of Eminent Domain*, Apr. 2003, at 46 *available at* http://www.castlecoalition.org/publications/report/index.html (last visited Apr. 9, 2006).

Bristol decided that the Bugryn's thirty-two acres of property would generate more revenue as an industrial park.[4] Bristol moved to condemn the property under its eminent domain power.[5] The Bugryns fought the condemnation procedures, but after prolonged litigation, the elderly owners lost and were evicted from their home.[6] In what should have been their golden years, the Bugryns were ordered to vacate their home and watch as a bulldozer razed the fruits of their labor and love.[7] The Bugryns' story is not an anomaly. In fact, their home was just one of over 10,000 properties in the United States that was threatened with condemnation within a five-year period.[8]

Eminent domain is the government's power to take private property "for public use" provided that "just compensation" is paid for the property.[9] This power is articulated in the "takings clause" of the Fifth Amendment.[10] The power of eminent domain is also established in every state by either statute or through a state's constitution.[11]

When the average person thinks about eminent domain, they think of the government's power to take property for the "greater good."[12] This greater good is typically articulated as

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4. *Id.*

5. *Id. See also* Ken Byron, *High Tech Firms Sought; Officials Consider a Zone, Including the Bugryn Property, in which Tax Incentives Would Be Offered*, HARTFORD COURANT, June 4, 2003, at B3 and Ken Byron, *City Applying for Federal Money Bugryn Property,* HARTFORD COURANT, Mar. 19, 2004, at B3 (Because the eviction process took so long, the local metal company that was originally planning to occupy the Bugryn property relocated. The City continued to pursue the condemnation proceeding, planning instead to subdivide the property and create the Southeast Bristol Business Park. The City proposed providing tax abatements for the area to attract new businesses and also applied for federal funding to help redevelop the property for these purposes.).

6. Gonzalez, *supra* note 2.

7. Don Stacom, *Bulldozers Level Family's Homes; Crews Clear Way for Business Park*, HARTFORD COURANT, Oct. 29, 2004, at B3.

8. Berliner, *supra* note 3, at 2 (from 1998 – 2002 there were "10,282+ filed or threatened condemnations for private parties").

9. NICHOLS ON EMINENT DOMAIN, §7.01 (Matthew Bender & Co. eds. 2004).

10. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

11. *See* NICHOLS ON EMINENT DOMAIN *supra* note 9. An example of the typical statutory language is contained in the N.J. Constitution: "Private property shall not be taken for public use without just compensation." N.J. CONST. art. I, § 20.

12. *See* Jack "Miles" Ventimiglia, *Using eminent domain for economic gain under fire; could effect plans for Triangle*, GLADSTONE SUN NEWS, Aug. 19, 2004, *available at* http://www.zwire.com/site/news.cfm?newsid=12714236&BRD=1452&PAG=461&dept_id=448707&rfi=8 (last visited Apr. 6, 2006) (quoting small business owner Todd Crossley,

the need to build hospitals, roads, and other municipal resources.[13] However, most people do not understand how and why the government can take private property from them and convey it to private developers to build such things as office parks, sports arenas, luxury condominiums, and the neighborhood Costco.[14]

The government can take such property under the guise of the public use requirement.[15] All eminent domain condemnations must meet the public use requirement. Over time, the public use requirement has evolved and has come to be construed too broadly, encompassing almost anything that serves a public purpose.[16] Such broad construction of the public use requirement effectively writes the requirement out of the takings clause, because almost any project that forecasts economic growth arguably serves a public purpose.[17] This interpretation puts property owners at the mercy of private parties looking to cash in on municipalities in need of tax revenues and jobs.[18] Like the enticing pot of gold at the end of the rainbow, these so-called economic benefits, typically publicized as new jobs and tax revenues, are alluring but do not provide their promised public benefit.

Sports arena development is one area where cities, developers, and team owners have exploited this broad concept of public use.[19] Since the 1990s, a boom of new

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"Eminent domain makes sense when you're putting in roads and bridges, but to take private property from one citizen and give it to another citizen – just because they're going to make money with it – doesn't seem right to me."); *See also* Marc Ferris, *Main Street vs. the Main Chance*, N.Y. TIMES, July 25, 2004, at 14WC.

13. *Id.*

14. *See* Dana Berliner, *Government Theft: The Top 10 Abuses of Eminent Domain (1998-2002), available at* http://www.castlecoalition.org/publications/top_10_abuses/index.html (last visited Apr. 6, 2006). *See also* Ferris, *supra* note 12.

15. *Id. See also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161-181 (Harvard University Press 1985).

16. *See* EPSTEIN, *supra* note 15, at 170.

17. *Id.* ("But this argument runs too swiftly for its own good, for the account makes it very difficult to identify *any* instance where a taking of private property with full compensation flunks the public use test. ...Some portion of the public will always benefit from the transaction...[t]o allow this form of indirect public *benefit* to satisfy the requirement for a public use is to make the requirement wholly empty.").

18. *See* Carnahan, *supra* note 1.

19. *See* Kevin Corcoran, *Board may call plays to keep Colts in Indy; Appointees would lead charge for new stadium, bigger Convention Center*, INDIANAPOLIS STAR, Aug. 22 2004, at 1A (discussing the ability to obtain land for the stadium and convention center through eminent domain). *But see* Michele McNeil, *Bean Firm Gets A*

stadium development has taken place.[20] This development typically requires the use of eminent domain power to take property from landowners and convey it to teams or stadium developers in order to build new stadiums.[21] The power of eminent domain should not be used in such an arbitrary and abusive manner.

In June 2005, the United States Supreme Court placed private real estate in a perpetual state of volatility through its holding in *Kelo v. New London*. In *Kelo*, the Court held that economic development alone is enough to meet the public use requirement of the takings clause.[22] Even before *Kelo* was decided, at a time when the public had become increasingly concerned about eminent domain abuse, some state courts began to reverse the many years of judicial rubber-stamping of takings claims.[23] Since *Kelo*, public awareness of the issue has grown immensely, to the point that even the United States Congress and many State legislatures are proposing legislation to curtail the Supreme Court's ruling.[24] As a

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Boost in Its Battle vs Stadium, INDIANAPOLIS STAR, Jan. 10, 2006, at 1A (noting that the introduction of legislation by the Indiana legislature to limit the use of eminent domain for private use may have an effect on using eminent domain for the new Colts stadium); Jim Getz, *Arlington council to vote on stadium: tentative Cowboys deal reached*, DALLAS MORNING NEWS, Aug. 17, 2004, at 1B ("The city will use its powers of eminent domain, if necessary to obtain land for the [Dallas Cowboys] stadium..."); Jim Getz, *Residents open to Cowboys stadium: Arlington homeowners would sell for fair price but wary of being used*, DALLAS MORNING NEWS, July 28, 2004, at 1B (discussing the use of eminent domain to build the Texas Rangers ballpark in Arlington, TX); *The Brooklyn Nets*, N.Y. TIMES, July 4, 2004, at 9 (discussing the use of eminent domain to obtain land to build the new Nets stadium); *see* Tim Lemke, *Landowners Must Yield to Ballpark*, WASH. TIMES, Oct, 6, 2005 at A01 (discussing the District of Columbia's plan to "use eminent domain to acquire parcels of land at the site of the Washington Nationals' new ballpark"). *See also What's Wrong with Ratner's Proposal, available at* www.dddb.net/whatswrong.php (stating "13 acres of the 21-acre [Brooklyn Nets] site would be acquired through eminent domain or through the threat of eminent domain...").

20. *See* John Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSP. 95, 95 (2000) (stating that from 1990 – 1999 "46 major league stadiums and arenas were built or renovated" for baseball, football, basketball, and hockey teams).

21. *See supra* note 19 and accompanying text.

22. Kelo v. New London, 125 S. Ct. 2655, 2655 (2005).

23. *See* Carnahan, *supra* note 1. *See also* Daniel Fisher, *Robbing Peter to Deed Paul*, FORBES, July 26, 2004, at 60; Ventimiglia, *supra* note 12.

24. Since the *Kelo* ruling, Alabama, Delaware, and Texas have signed legislation limiting the use of eminent domain, but note that the Texas law makes an explicit exemption for the use of eminent domain for the new Cowboys stadium in Arlington. *See Current Proposed State Legislation on Eminent Domain, available at*

result, the public use requirement is in a state of flux, and its definition varies from jurisdiction to jurisdiction.[25] This article discusses the need to narrow the definition of public use so local governments are no longer unrestrained in their condemnations of private property for private gain. This article proposes that courts should institute a balancing test to determine if a condemnation meets the public use requirement.

Such a change in the public use requirement will have a profound effect on the development of sports arenas. Land taken for new arenas currently satisfies the public use requirement through the economic stimulus the arena provides.[26] Under the balancing test proposed here, stadium developers will have a harder time proving that a stadium really constitutes a public use. As a result, sports franchises would no longer be able to exploit their influence on municipalities to acquire the property they need for new stadiums. Instead, sports teams would need to demonstrate a valid public use, or simply acquire land through the open real estate market.

Part II of this article details the major cases interpreting the public use requirement including the *Kelo* decision.[27] Part III discusses the various approaches the Supreme Court could have taken in *Kelo* and suggests that a balancing test should be adopted by courts to determine if a project fulfills the public use requirement under their state's constitution. Part IV discusses current stadium development and the necessary changes that would have to be put in place should a general economic benefit no longer satisfy the public use requirement, and instead, something like the balancing test proposed in this article were applied.

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http://www.castlecoalition.org/legislation/states/index.asp; *see also* 2005 TX S.B. 7B. Overall, "[l]egislation [limiting the use of eminent domain] has been introduced in 27 states..." Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y TIMES, Jan. 18, 2006 at C5. Congress has also introduced similar legislation, one such bill stating that the "term 'public use' shall not be construed to include economic development." Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005). *See also* Current Proposed Federal Legislation on Eminent Domain, *available at* http://www.castlecoalition.org/legislation/federal/index.asp.

25. *See supra* notes 23 & 24.

26. *See supra* note 19 and accompanying text.

27. Kelo v. City of New London, 125 S. Ct. 2655 (2005).

II. THE EVOLUTION OF THE PUBLIC USE REQUIREMENT: FROM BLIGHT TO REDEVELOPMENT

The definition of what constitutes a public use has evolved over time.[28] Originally, eminent domain was a tool the government used to obtain property to provide public services for a burgeoning nation.[29] Such services included hospitals, schools, and roads.[30] As time progressed, some states began to construe the public use requirement more broadly.[31] States determined that property taken by eminent domain did not have to be used by the public to qualify as a public use.[32] Instead, states construed the language to mean that so long as a "public purpose" was being served, the government could take property from private landowners and give it to private developers.[33] This definition of public use has made the application of eminent domain prevalent in many contexts, including the development of sports arenas in cities and towns across the United States.[34]

Cities first began to use this articulation of public use to obtain property in what were designated "blighted" areas.[35] These were typically slum areas that a city needed to clear in order to attempt revitalization.[36] This approach was challenged in *Berman v. Parker* when the District of Columbia utilized the blight designation device to redevelop the slum areas of Washington D.C.[37] In *Berman*, the plaintiff's department store was condemned because it was located within the blighted area that Congress sought to redevelop.[38]

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28. *See* NICHOLS ON EMINENT DOMAIN *supra* note 9, at §7.02.

29. *See* MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 106-109 (Pacific Research Institute for Public Policy, 1991).

30. *See id.*

31. *See id.* at 110.

32. *See id.* at 110-112; *see also* EPSTEIN, *supra* note 15, at 168.

33. *See* POLLOT, *supra* note 29, at 110; *see also* EPSTEIN, *supra* note 15, at 169-170

34. *See supra* note 19 and accompanying text.

35. *See e.g.* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Blight Definition*, 31 FORDHAM URB. L.J. 305 (2004).

36. Berman v. Parker, 348 U.S. 26, 28 (1954)

37. *Id.* (Though there was no definition of slum in the Congressional Act at issue in *Berman*, the type of area that was sought to be condemned was extremely impoverished and decrepit. The facts describe that much of the existing housing within the redevelopment area was "beyond repair." For example, over 50% of the living quarters did not have indoor plumbing for bathing or bathroom facilities and over 80% of the dwellings lacked central heat.).

38. *Id.* at 31.

The plaintiff challenged the condemnation claiming that it was unconstitutional for the government to take his land and give it to a private developer.[39] The United States Supreme Court upheld the condemnation on the grounds that "public ownership is [not] the sole method of promoting the public purposes of community development."[40] The removal of the blighted area served a public purpose, and the means used by the legislature to achieve that purpose were constitutional and given deference.[41]

Building on *Berman*, municipalities began to apply this public purpose doctrine to acquire land for private parties in areas that were not blighted.[42] These municipalities claimed redevelopment would bring new jobs and increase the community's tax revenue. The government maintained that these economic benefits fulfilled the public use requirement.[43] Thus, if a private party went to a municipality with a plan to construct a sports arena, the municipality could condemn the property if the stadium would stimulate the local economy through the addition of jobs and tax revenues.[44] In jurisdictions like New York, Kansas, and Connecticut, which recognize this economic benefit rationale, the potential to increase revenue or add jobs is enough to meet the public use requirement.[45]

Although the Michigan Supreme Court overturned the case last year, *Poletown v. City of Detroit* is still the most infamous example of a court upholding a taking based upon the economic benefit rationale.[46] In *Poletown,* the City of

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39. *Id.*

40. Berman v. Parker, 348 U.S. 26, 34 (1954).

41. *Id.* (The court specified deference would be given to the legislature on the determination that the entire area needed to be cleared and "planned as a whole" in order to ensure the best chances of creating a healthy community.)

42. *See* POLLOT, *supra* note 29, at 110- 112; Ferris, *supra* note 12.

43. See NICHOLS, *supra* note 9, at § 7.02.

44. *See* Jung Kim & Gustav Peebles, *Estimated Fiscal Impact of Forest City Ratner's Brooklyn Arena and 17 High Rise Developments on NYC and NYS Treasuries*, at iii, *available at* http://www.nolandgrab.org/report/EconReport.pdf (last vistied Apr. 9, 2006).

45. *See* Bugryn v. City of Bristol, 2000 Conn. Super. LEXIS 311, *33-34 (2000) (holding that the taking of a residence for industrial park constituted a public use); Tomasic v. Unified Gov't of Wyandotte County, 962 P.2d 543, 554 (Kan. 1998) (holding that public use requirement was met for taking to build an auto racetrack). See *also* Ferris, *supra* note 12.

46. *See* Ralph Nader, *Foreword* to JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED ix-xii (University of Illinois Press 1989).

Detroit agreed to condemn "1400 homes, 144 business, 16 churches, 2 schools, and a hospital" to make room for a General Motors ("GM") car manufacturing plant.[47] The city agreed to convey title of the condemned property to GM, and to pay all the condemnation, zoning, and permit costs.[48] GM also received a twelve year fifty-percent tax abatement for the plant.[49] Detroit justified the condemnation as a public use because of the jobs the plant would bring to the area.[50]

Some of the affected landowners sued the city claiming that Detroit was taking their property and transferring it to private persons for a private use.[51] Unlike the blighted areas described in *Berman*, Poletown was a racially integrated, working class neighborhood of Detroit. Here, the city was taking a fully functioning, vibrant community and destroying it for the benefit of a private corporation.[52] *Poletown* eventually made its way to the Michigan Supreme Court. The Michigan Supreme Court upheld the condemnations, explaining that "alleviating unemployment and revitalizing the economic base of the community" constituted a public use.[53]

Although the Michigan Supreme Court eventually overruled *Poletown* in 2004, states like New York, Connecticut, and Kansas have used the precedent to justify takings by private persons for private gain.[54] For example, in East Harlem, New York, a seventy-year-old family business was condemned in order to build a Costco and a Home

47. *Id.* at 52.

48. *Id.*

49. *Id.*

50. WYLIE, *supra* note 46, at 49.

51. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 458 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

52. *See* Nader, *Foreword* to WYLIE, *supra* note 46, at ix-xi.

53. Poletown, 304 N.W.2d at 459 ("The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.").

54. *See e.g.* Kelo v. City of New London, 843 A.2d 500, 531 n.39 (Conn. 2002) ("The Michigan Supreme Court's decision in *Poletown Neighborhood Council* is a landmark case in the use of eminent domain. We conclude that it warrants further discussion because it illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit."); *see also* Nichols, *supra* note 9, at §8-SA (noting that *Poletown* was "major legal precedent cited in many jurisdictions across the United States to support the use of eminent domain for economic development purposes").

Depot.[55] In another case in New York, St. Luke's Pentecostal Church acquired land and variances to build a church in North Hempstead.[56] After the church was granted title to the property and successfully petitioned for the necessary variances, the church was told the property was condemned to make room for "private retail development."[57] In yet another instance, the Kansas Supreme Court upheld the condemnation of "property belonging to 150 families" in order to build a racetrack.[58]

In those states that do not allow economic development alone to constitute a public use, courts question whether the benefit conveyed to the public justifies the taking when title is given to a private person to undertake a private endeavor.[59] In these jurisdictions, the courts recognize that the realization of tangible economic benefits to the community is questionable at best.[60] For example, the agreement for developing an auto racetrack in *Tomasic v. Unified Gov't of Wyandotte County* included that the racetrack receive real and personal property tax exemptions for a period of thirty years.[61] In *Poletown*, the agreement between the City of Detroit and GM provided for a twelve-year fifty percent tax abatement for the GM plant.[62] Tax abatements and other

55. Berliner, *supra* note 3, at 145 (Although the family had operated the business for over 70 years, the building at issue had only housed the family business since 1981. The family no longer operates the business as a direct result of the threatened condemnation.).

56. *Id.* at 150.

57. *Id.*

58. *Id.* at 79. *See also* Tomasic v. Unified Gov't of Wyandotte County, 962 P.2d 543, 553-54 (Kan. 1998) (*citing* Fatzer v. Urban Renewal Agency, 296 P.2d 656 (Kan. 1956), "In our opinion the concept of the terms public purpose, public use, and public welfare, as applied to matters of this kind, must be broad and inclusive...the mere fact that though the ultimate operation of the law the possibility exists that some individual or private corporation might make a profit does not, in and of itself, divest the act of its public use and purpose.").

59. *See* S.W. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 10-11 (Ill. 2002) ("While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone cannot justify an improper and unacceptable expansion of the eminent domain power of the government.").

60. *See id; see generally* County of Wayne v. Hathcock, 684 N.W.2d 765, 786-88 (Mich. 2004); Bailey v. Myers, 76 P.3d 898, 903 (Ariz. Ct. App. 2003).

61. *Tomasic*, 962 P.2d at 550.

62. WYLIE, *supra* note 46, at 52. "Almost unmentioned in the discourse over the Poletown controversy was the fact that taxpayers inside and outside that enclave were also paying for the direct and indirect subsidies woven together by the mayor and

subsidies are also part of an agreement to build a new Nets stadium between developer Bruce Ratner and the City of New York.[63] To help support the development project, New York City plans to use its power of eminent domain to condemn four city blocks.[64]

Many of these projects also maintain they will bring new jobs to the area. These projections are very malleable and can sometimes be discredited. In Indianapolis, a project to build a new stadium and convention center purports to create "9,100 new jobs region-wide."[65] Of these positions, "[m]ore than half are temporary construction jobs and would likely have been created elsewhere in the metropolitan area."[66] In addition, though the 9,100 figure may seem significant on its face, in context, the amount of "'new' permanent jobs represent less than 1/2 of 1 percent of the economic base."[67] In *Poletown*, the GM plant was semi-automated and ended up providing "less than half [the jobs] promised by the company."[68] So although new businesses may bring new tax revenue and jobs to an area, it is important to be skeptical of the estimates put forth during the project planning stages, as the actual benefits can be quite less when the project comes to fruition.

Jurisdictions that take a narrower view of the public use requirement do so because they foresee that a broad definition of public use creates a dangerous precedent. [69] There will always be a business that can bring more economic stimulus to an area.[70] Therefore, allowing economic benefit alone to constitute a public use puts landowners under a constant threat of a taking under eminent domain. Third parties will attempt to circumvent the open real estate market under the

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handed to the giant automaker." *Id.* at xi.

63. Kim & Peebles, *supra* note 44, at iii (noting "the city and state will subsidize [Bruce Ratner's] development in the form of tax abatements and infrastructure provisions such as schools, fire and police..."). *Id.*

64. *New York Voices: The Brooklyn Nets?*, *at* http://www.thirteen.org/nyvoices/features/brooklyn_bounce.html.

65. Samuel Staley, *Questionable Benefits of a New Stadium,* INDIANAPOLIS STAR, January 2, 2005 at 4E.

66. *Id.*

67. *Id.*

68. WYLIE, *supra* note 46, at xi.

69. *Hathcock*, 684 N.W.2d at 786 ("After all if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened...").

70. *See id.*

guise that their venture can bring more economic benefits to a community.[71]

The Michigan Supreme Court articulated this reasoning and explained it was part of its motivation for overruling *Poletown* in July 2004.[72] In *County of Wayne v. Hathcock*, the County of Wayne undertook condemnation proceedings to "condemn nineteen parcels of land."[73] The county planned to convey the land to a developer to build a retail and technology park known as the Pinnacle Project.[74] The Michigan trial court and Michigan Court of Appeals approved the condemnations based upon the reasoning set forth in *Poletown*.[75] The proposed office and technology park was touted to bring new jobs to the area and to increase tax revenues.[76] According to the lower court, these were economic benefits that fit squarely within the reasoning of *Poletown*.[77] The Michigan Supreme Court explicitly overruled *Poletown* and gave their decision a retroactive effect.[78] The court articulated that the reasoning advanced in *Poletown* essentially wrote the public use requirement out of the eminent domain clause of Michigan's Constitution and put Michigan property in an infinite state of flux.[79]

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71. *See* S.W. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 10-11 (Ill. 2002) (The court determined the private party was using the government's power of eminent domain to circumvent the real estate market. In response to this scheme, the court notes that, "While we do not question the legislature's discretion in allowing for the exercise of eminent domain power, the government does not have unlimited power to redefine property rights.").

72. *See Hathcock*, 684 N.W.2d at 786-87. Note that in 2005 a joint resolution for a proposed amendment to the Michigan Constitution stopping the use of eminent domain for "economic development or enhancement of tax revenues" was passed by the Michigan legislature. 2005 MI S.J.R.E., *available at* http://www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/htm/2005-SNJR-E.htm.

73. *Hathcock*, 684 N.W.2d at 770.

74. *Id.*

75. *Hathcock*, 684 N.W.2d at 771-72.

76. *Id.* at 770-71.

77. *Id.*

78. *See id.* at 787-88.

79. *See Hathcock*, 684 N.W.2d at 786.

> "Every business, every productive unit in society, does...contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown's* 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's

The Michigan Supreme Court looked at several factors to determine whether the Pinnacle Project met the standards of public use.[80] The court asked whether the Pinnacle Park project required the use of eminent domain, whether the project was going to be used by the city after it was conveyed to the private developer, and whether the "*act* of condemning . . . serves a public good in this case."[81] The court answered each question in the negative. As a result, the court held this was not a valid exercise of the eminent domain power.[82] The Supreme Court of Illinois took a similar stance on the public use requirement when it recognized that private parties were using eminent domain to circumvent the "open real estate market."[83] The Illinois Supreme Court held that mere "revenue expansion" in a private business that "could potentially trickle down and bring corresponding revenue increases to the region" was an abuse of the eminent domain power.[84]

Other jurisdictions continued to accept a broad economic benefit rationale.[85] The United States Supreme Court agreed that this jurisdictional split warranted review. In June 2005, the United States Supreme Court decided *Kelo v. City of New London* where it upheld the rational that economic development alone is enough to satisfy the public use requirement.[86] In *Kelo*, the City of New London, in conjunction with the New London Development Corporation, condemned fifteen properties owned by nine people.[87] The condemned land was part of a larger redevelopment plan to bring offices, a hotel, and other buildings to the area.[88] The Connecticut Supreme Court upheld the taking because the new development would bring much needed economic revenue

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ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened...." (emphasis in original). *Id.*

80. *Id.* at 783-84.

81. *Id.*

82. *Id.* at 788.

83. *See S.W. Ill. Dev. Auth.*, 768 N.E.2d at 10-11.

84. *Id.*

85. *See cases cited supra* note 45 and accompanying text; *see* discussion *infra* p. 108-110.; *see also* Berliner, *supra* note 3.

86. *Kelo*, 125 S. Ct. at 2655.

87. *Id.* at 2660.

88. *Id.* at 2659.

to the city.[89] The United States Supreme Court affirmed the Connecticut Supreme Court's ruling stating that the "promot[ion of] economic development is a traditional and long accepted function of government."[90]

III: KEEPING THE PUBLIC IN THE PUBLIC USE REQUIREMENT

The United States Supreme Court's decision to allow a general economic benefit rationale to satisfy the public use requirement endorses further *"Poletown"* scenarios. Under the majority's reasoning, elusive and vague promises of jobs or tax growth are enough to satisfy the requirement. The Court was amiss to choose such an option. Property rights are a key part of our autonomous society. The public use requirement should be interpreted to protect those property rights by curtailing abuse of the eminent domain power. This includes abuse that has clearly occurred in states that have construed the public use requirement so broadly.[91]

Instead of taking such an expansive view of public use, the United States Supreme Court could have chosen to eliminate all eminent domain condemnations that convey land to private parties for private benefit except when the blight requirements of *Berman* are satisfied. Not surprisingly, given the Court's prior decisions in this area, it chose not to interpret the public use requirement in this manner.[92] For example, in *Hawaii Housing Authority v. Midkiff*, the Court considered the state's passage of the Land Reform Act of 1967.[93] The Act gave the Hawaii Housing Authority the ability to condemn tracts of land owned by private landowners.[94] The Hawaii Housing Authority then conveyed

89. Kelo v. City of New London, 843 A.2d 500, 520 ("We conclude that economic development projects...that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.").

90. *Kelo*, 125 S. Ct. at 2665.

91. *See cases cited supra* note 45 and accompanying text; *see* discussion *infra* p. 108-110; *see also* Berliner, *supra* note 3.

92. Aside from *Berman*, the Court upheld eminent domain condemnations in Hawaii Hous. Auth. v, Midkiff, 467 U.S. 229, 243-244 (1984). The Court has also shown deference to the legislature in regulatory takings cases. *See generally* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) and Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

93. Hawaii Hous. Auth. v, Midkiff, 467 U.S. 229, 233 (1984).

94. *Id.* at 233-34.

title to this land in fee simple to lessees living on the land.[95] The purpose of the regulation was to put an end to the "concentrated land ownership" which distorted the state's residential real estate market.[96] The United States Supreme Court upheld the regulation claiming that the takings were "rationally related to a conceivable public purpose."[97] *Midkiff* was extremely deferential to the legislature, stating "deference to the legislature's 'public use' determination is required until it is shown to involve an impossibility."[98] The Court also made clear that a private party obtaining title to the land did not automatically destroy the public use exception.[99] In *Kelo*, the Court reiterated this position by maintaining that "[q]uite simply, the government's pursuit of a public purpose will often benefit individual private parties."[100]

By acknowledging a middle ground between these two positions, the Court could have chosen to impose a balancing test that compares the amount of community benefit to the amount of private gain. This approach allows meaningful economic development alone to satisfy the public use clause, while at the same time acknowledging the potential for takings clause abuse as cautioned by Justice Kennedy's concurrence in *Kelo*.[101] The Arizona Court of Appeals in *Bailey v. Myers* has already adopted this approach.[102] In *Bailey*, the City of Mesa used their eminent domain power to condemn a family owned brake service business.[103] The city planned to take the property from the Bailey family and convey it to a private developer to build a retail center.[104] The City of Mesa claimed the economic benefits of the new retail

95. *Id.*
96. *Id.* at 232.
97. *Midkiff*, 467 U.S. at 241.
98. *Id.* at 240.
99. *Id.* at 243-44 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public.")
100. *Kelo*, 125 S. Ct. at 2666.
101. *See id.* at 2670 (Kennedy, J., concurring) ("There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.").
102. Bailey v. Myers, 76 P.3d 898, 904 (Ariz. Ct. App. 2003).
103. *Id.* at 899.
104. *Id* at 901.

space fulfilled the public use requirement.[105] The Arizona Court of Appeals held this did not constitute a valid public use because "the public characteristics or benefits of the intended use [did not] substantially outweigh the private nature of that use."[106]

In *Bailey*, the court adopted a balancing test to determine when the public use requirement was satisfied in such private development cases.[107] The court held "the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is 'really' public."[108] The court suggested a list of factors be taken into account when determining the character of the property.[109] Such factors included examining who would hold title to the land, what kind of control the government entity performing the condemnation would ultimately have over the land, what end use the property served, who in the community gained most from the project, and what kind of harm would occur to the members of the community were the condemnation to take place.[110]

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105. *Id.* (The City of Mesa claimed that "the public will benefit from this redevelopment because a portion of the downtown area will be revitalized, creating an attractive 'gateway' to downtown Mesa; substantial aesthetic enhancement will be achieved; property values will increase; jobs will be created; and tax and utility revenues will increase.").

106. *Bailey*, 76 P.3d at 904.

107. *Id.* at 904.

108. *Id.*

109. *Id.*

110. *Bailey*, 76 P.3d at 904 (presenting a list of factors meant to be "illustrative but not exhaustive"). This list included the following questions:

"For what purpose or purposes will the property be used?"
"Will title to the property be held by a public entity?"
"If one or more private parties will own or lease the property, will the property be used for private profit, non-profit or public purposes?"
"Will the end use of the property provide needed public services?"
"What degree of control will the condemning authority retain over the use of the property?"
"What are the anticipated public uses or benefits?"
"What is the ratio of public to private funds to be expended for the redevelopment?"
"Will the community as a whole benefit or only a few of its members?"
"Who stands to gain most by the taking, private parties or the public?"
"Are private developers the driving force behind the redevelopment project?"
"Is profit the overriding motivation?"
"Are there public health or safety issues involved?"
"Is there a true slum or blight to be removed?"
"Is the property to be taken unique?"

The Arizona Court of Appeals based its analysis on the public use requirement within Arizona's Constitution.[111] Although the Arizona Constitution provides greater eminent domain protections to its citizens than the United States Constitution[112], the Court should still have accepted the underlying reasoning for adopting this balancing test. The balancing test employed in *Bailey* provides a compromise position that allows some condemnations for private development to occur, but limits them to those that provide real, tangible economic benefits.

The United States Supreme Court has imposed balancing tests in the context of regulatory takings.[113] Some scholars have criticized these decisions suggesting that balancing tests only "muddle" regulatory takings.[114] Such scholars argue that balancing tests are "ambiguous and uncertain" and lead to "ad hoc" results because they can easily be manipulated to reach a desired result.[115] While balancing tests are criticized, in the context of the public use requirement, the ramifications of implementing a bright-line rule are too great. A bright-line rule injures the public as it allows only two extremes: accept

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"To what extent, if any, will the proposed taking result in loss, detriment, or harm to members of the community?"

"How necessary is the property to the achievement of the public purposes?

"Do the anticipated public purposes or benefits outweigh the private purposes or benefits of taking the property?" *Id.*

111. *Id.* at 903.

112. *Bailey*, 76 P.3d at 903 (discussing that the Arizona Constitution provides greater eminent domain safeguards to its citizens than the Federal Constitution).

113. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136-38 (1978) (To determine if the government regulation in question amounts to a taking, the Court looks at several factors: "the interference with investment-backed expectations," the character of the government action, and the nature and extent of the regulations' impact on the private property owner.).

114. *See, e.g.* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (May 1984) ("Courts apply the 'test' but actually decide cases on the basis of undisclosed, ad hoc judgments of the kind and extent of diminution that constitutes a taking. The absence of principal reasoning in these judgments suggests that the test itself is deeply flawed."); James E. Krier, *Institute of Bill of Rights Law Symposium Defining Takings: Private Property and the Future of Government Regulation: The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1144 (Mar. 1997); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 608-09 (1991) (recognizing that balancing tests can be manipulated to reach a specific outcome based upon how broad or narrow certain requirements are interpreted by a court). *But see generally* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (May 2004).

115. *Id.*

the exploits of unbridled economic benefit or exclude private development and eliminate projects that benefit the community. Balancing tests justly preserve the rights of landowners, while still enabling the government to condemn property and convey it to a private party for private gain when the community is benefited.[116]

The following analysis of *Poletown* and *Kelo* illustrate the balancing test in a takings scenario.

A. The Balancing Test as Applied to Poletown

The first four factors deal with the use, title, and control of the property.[117] GM used the property to build a manufacturing plant for the assembly of cars.[118] GM held title to the plant, and GM used the plant to reap a profit. [119] The property provided the ancillary benefits of creating jobs for local workers as well as generating property and income tax revenue for the City of Detroit.[120] However, these benefits were tempered by tax subsidies Detroit gave to GM and by the semi-automation of the plant, which reduced the amount of jobs the plant actually created.[121] Detroit retained no control over the property upon completion of the condemnation.[122]

Other factors to consider in the balancing test include who will benefit from the taking, what kind of harm the taking causes, and the overriding motivation for the taking.[123] The City of Detroit claimed they were the driving force behind choosing the Poletown site.[124] However, GM was clearly exerting pressure on Detroit by threatening to leave the area and take precious jobs with them.[125] For Detroit, the

116. *See* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 115 (Nov. 2002) ("This is not to say that balancing tests are empty, for they focus the attention of the decision-maker, as well as of those whom the test governs, on the important elements of the situation.").

117. *See supra* note 110 and accompanying text.

118. WYLIE, *supra* note 46, at 48-49.

119. *Id.* at 48-49.

120. *Id.* at 49.

121. WYLIE, *supra* note 46, at 52.

122. *Id.* at 52.

123. *See supra* note 110 and accompanying text.

124. WYLIE, *supra* note 46, at 52.

125. *Id.* at 49 ("[T]he city[was given] just 10 months to clear the 465-acre site ... if the city of Detroit could not clear the neighborhood off the site by May 1, 1981, they would locate the plant elsewhere.").

overriding factors for condemnation were the much-needed jobs and revenue.[126] These benefits are partially offset by the displacement of the Poletown community, by Detroit's outlay of cash to bring the plant there, and by the plant's negative externalities, like pollution. Poletown was a vibrant community without a blight designation.[127] The taking resulted in great loss and harm to the Poletown community.[128] In addition, the condemnation does not seem to have involved any issue of public welfare or public safety.[129]

The latter factors are equally split between satisfying the public use requirement and being unable to satisfy the requirement. The deciding factor becomes the expenditure of public versus private funds for the project.[130] Detroit was estimated to pay at least $300 million to meet GM's requirements.[131] Thus, the starting ratio of the project equated to "two dollars for every single dollar of public funds."[132] At the time, the "Department of Housing and Urban Development's guidelines for public-private projects . . . indicated a preference for projects where the private interest invested $4 for every $1 invested by the public."[133] Based on these guidelines, Detroit's cash expenditure was twice the recommended ratio.[134] The ratio of funds factor weighs heavily in favor of not satisfying the public use requirement and tips the balancing test in favor of the Poletown residents. Thus, under the balancing test proposed here, the public use requirement is not satisfied and the taking would be unconstitutional.

B. The Balancing Test as Applied to Kelo

The property in *Kelo* was part of an overall plan to redevelop the Fort Trumball area of New London.[135] The plan included building a hotel, office space, and upscale residential

126. *See id.*
127. *See id.* at ix-xi.
128. WYLIE, *supra* note 46, at ix-xi.
129. *See id.* at 50-51.
130. *See supra* note 110 and accompanying text.
131. WYLIE, *supra* note 46, at 52.
132. *Id.*
133. *Id.*
134. *See id.*
135. *Kelo*, 125 S. Ct. at 2659.

buildings.[136] The plan also included creating a state park and updating existing marina facilities.[137] The property at issue in *Kelo* consisted of 1.54 acres that was encompassed by 90 acres, which the redevelopment plan undertook to renovate.[138] Some of petitioners' property was slated to be part of the new office complex while the other litigated properties were designated to be part of the state park.[139]

The New London Development Corporation was to hold title to the property.[140] Although a private entity, the City of New London established the New London Development Corporation, and it was a non-profit corporation.[141] Unlike in *Poletown*, the New London Development Corporation retained title to the property. The development corporation leased the property to developers for $1 per year for a term of 99 years.[142] The developer was responsible for developing the property and leasing it out to tenants.[143] Its private party use consisted of a hotel, office space, residential buildings, and support services.[144] The support services property engendered incidental public benefits, by "providing [an adjacent public park with] parking or retail services."[145] However, these services cannot be categorized as "needed public services," but they do provide incidental public benefit.

There were many anticipated public benefits to the redevelopment plan. New London was designated in 1990 as a "distressed municipality."[146] In 1996, the city lost approximately 1,900 jobs when the United States Naval Undersea Warfare Center moved from New London to Newport, Rhode Island.[147] This contributed to an unemployment rate that was "almost twice as high as the

136. *Id.*
137. *Id.*
138. Brief of Petitioners at 6, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108) *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_04-05/04-108Pet.pdf.
139. *See Kelo*, 125 S. Ct. at 2659-60.
140. *Kelo*, 843 A.2d at 510.
141. *Kelo*, 125 S. Ct. at 2658-59.
142. *Id.* at 2660.
143. *Id.*
144. *Id* at 2659-60.
145. *Kelo*, 125 S. Ct. at 2659-60.
146. *Id.*
147. *Id.*

[average] overall figure for the state."[148] The development plan was predicted to create hundreds of construction jobs and between 1,200 and 2,200 direct and indirect jobs.[149]

Significant tax revenue was also expected from the redevelopment projects. Prior to the projects, the city only generated $325,000 in tax revenue,[150] and 54% of the city's land was tax-exempt.[151] The new projects were expected to produce "between $680,544 and $1,249,843 in property tax revenues for the city."[152] These tax revenues and job opportunities across sectors and educational levels benefit the public as a whole, and the homeowners in *Kelo* did not vehemently dispute these numbers.[153] They only questioned the job creation figures for the industrial park as they related to the development zone where their homes were located.[154]

The homeowners in *Kelo* argued that the private sector, specifically Pfizer and the property developers, stood to gain from the redevelopment plan.[155] However, the Connecticut Supreme Court and the Connecticut trial court found that the purpose of the development plan was not specifically intended to serve Pfizer's interests, but was to "revitalize the local economy."[156] "The primary motivation and effect of the development and its condemnations was to ['take advantage of Pfizer's presence' and] benefit the distressed city, not Pfizer."[157] Unlike GM in *Poletown*, Pfizer is not the driving force behind the redevelopment project. Pfizer's global research facility was under construction when the condemnations began.[158] The development plan was created

148. *Id.*

149. *Kelo*, 843 A.2d at 510.

150. Brief of Respondents at 3, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (no. 04-108) *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_04-05/04-108Resp.pdf.

151. *Kelo*, 843 A.2d at 510.

152. *Id.*

153. *See* Brief of Respondents at 3, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (no. 04-108) *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_04-05/04-108Resp.pdf.

154. *Id.*

155. *Kelo*, 843 A.2d at 537-38 (Homeowners argue that the development of the hotel, upscale residences, and office space are to assist Pfizer's clients, employees, and contractors.).

156. *See Kelo*, 125 S. Ct. at 2662.

157. *Kelo*, 843 A.2d at 540.

158. *Id.* at 508-09.

in consideration of their presence.[159]

Unlike *Poletown*, where the community harm was great and the public benefits were few, in *Kelo*, the harm to the community was isolated to the persons whose properties were being condemned. The rest of the community stood to benefit through jobs, tax revenues, park space, and overall revitalization. In *Kelo*, the community was not dependent on just one private company to ensure the public benefits. For these reasons, the public use requirement would be met by the City of New London and the taking would be constitutional under the proposed balancing test.

IV. WOULD USE OF EMINENT DOMAIN TO BUILD SPORTS STADIUMS PASS THE BALANCING TEST?

In the past fifteen years, over forty-six professional sports arenas were built or refurbished.[160] Countless other cities have proposed building sports stadiums in an attempt to lure sports teams and their potential revenues from a team's current home city.[161] Building new stadiums is so common that in Major League Baseball's National League, eleven of the sixteen teams have constructed new stadiums within the past ten years.[162] In some cases, municipalities promise new stadiums to stop existing franchises from leaving the city.[163] Additionally, hosting minor league franchises, specifically in baseball, is a booming business.[164]

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159. *Id.*

160. Siegfried & Zimbalist, *supra* note 20, at 95.

161. In the baseball context alone, Las Vegas, Charlotte, Washington D.C., and even Hialeah, FL have all promised new ballparks would be built if MLB awarded them a franchise. *See Relocation Tour: Marlins Considering Hialeah, Charlotte, Vegas*, Jan. 19, 2006, *available at* http://sportsillustrated.cnn.com/2006/baseball/mlb/01/19/marlins.charlotte.ap/.

162. *See* National League teams and ballparks, *available at* www.ballparks.com/baseball/general/facts/national.htm (last visited Apr. 6, 2006). In addition, the Washington Nationals have plans to construct a new stadium and the Florida Marlins are seeking to relocate to a city that can provide a new ballpark. *See Relocation Tour: Marlins Considering Hialeah, Charlotte, Vegas, supra* note 161. The Florida Marlins are currently seeking relocation from Dolphins Stadium after "fail[ing] repeatedly in their quest for a baseball-only stadium in South Florida." Tim Whitmire, *Plan to Lure Marlins to North Carolina a Long Shot, Experts Say*, HERALD-SUN, Jan. 19, 2006.

163. *See supra* notes 19 and 20 and accompanying text.

164. Siegfried & Zimbalist, *supra* note 20, at 95 ("80 new minor league ballparks built in 1990s").

There has been an explosion of new stadium development for several reasons. Due to monopoly power, the demand for sports teams in the four major sports leagues outweighs supply.[165] Franchise owners leverage this imbalance to negotiate a new stadium for their team.[166] Owners desire new stadiums, as a source of additional revenue, through luxury boxes and other amenities.[167] A shift from dual-use facilities to single-use facilities is another impetus for stadium development.[168] Sports franchises no longer desire to share arenas with another team.[169] This change in philosophy has caused cities that might have used one facility to host a baseball and a football team to now build two stadiums to accommodate these teams.[170] Refusal to build a new stadium is usually countered by a team's threat to leave.[171] In many cities, new stadiums require "new land,"[172] which must typically be acquired from private owners for stadium use.[173] A private landowner's refusal to sell is often negated because a city will use its eminent domain power to acquire the necessary land.[174]

If an area where a sports arena is to be constructed is not given a blight designation, municipalities cite economic benefits as the source of the public use.[175] If the balancing test from *Bailey* or the one proposed in this article was used to define the public use requirement, stadium developers might

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165. Roger G. Noll & Andrew Zimbalist, *"Build the Stadium – Create the Jobs," in* SPORTS, JOBS & TAXES 26-28 (Brookings Institution Press 1997) [hereinafter *"Build the Stadium"*].

166. *Id.*

167. Siegfried & Zimbalist, *supra* note 20, at 102-03.

168. *Id.* at 95–97.

169. *Id.*

170. *Id.* (The Atlanta Braves and Atlanta Falcons once shared a stadium. In the 1990s each was given a separate stadium. The San Francisco Giants once shared Candlestick Park with the San Francisco 49ers. In 2000, Pac Bell Park (now AT&T Park) was opened solely for the Giants use.). The Florida Marlins are currently seeking relocation from Dolphins Stadium after "fail[ing] repeatedly in their quest for a baseball-only stadium in South Florida." Tim Whitmire, *Plan to Lure Marlins to North Carolina a Long Shot, Experts Say*, HERALD-SUN, Jan. 19, 2006.

171. *See* Siegfried & Zimbalist, *supra* note 20, at 95-97.

172. *See supra* notes 19 and 20 and accompanying text.

173. *See id.*

174. *See id.*

175. *See* Noll & Zimbalist, *The Economic Impact of Sports Teams and Facilities, in* SPORTS, JOBS & TAXES 58 (Brookings Institution Press 1997) [hereinafter *Economic Impact of Sports Teams and Facilities*] (discussing the creation of new jobs and the tax revenue as the reasoning teams give for cities to subsidize a new stadium).

have to purchase property on the open real estate market. This is because the economic benefits of a stadium are typically minimal and do not exceed the franchise's private gain.[176]

Stadium proponents generally promise that a new arena will bring numerous new jobs and tax revenues to the area.[177] In actuality, sports teams do not create many new full-time positions.[178] Instead, stadiums tend to create part-time, low-skill minimum wage jobs that have little impact on the local economy.[179] For instance, an NFL stadium generates part-time, low wage positions that equate to about "20-30 full-time, year-round jobs."[180] Given the low skill and relatively small number of full-time jobs these stadiums create, these jobs have little impact on the local economy.[181]

During this stadium boom, owners have developed creative ways to generate new income for themselves. Teams now sell naming rights, pouring rights, and personal seat licenses to generate revenue.[182] All of these rights produce income to the owner and are typically used to help finance the construction of a new stadium.[183] These rights do not provide any tangible economic benefit to the community.[184] In fact, they may hurt the community at large as they produce unwanted advertising, reduce the amount of spending on local products, reduce the amount of tickets available to the community, and decrease the consumption choices at the game.[185]

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176. *See id.* at 59-63 (Typical deals for new stadiums give teams tax incentives, favorable lease terms, and other benefits that contribute to the well being of the franchise owners and players, but do not significantly trickle down to the public.).

177. *See* Siegfried & Zimbalist, *supra* note 20, at 103-04.

178. Robert A. Baade & Allen R. Sanderson, *Employment Effect of Teams and Sports Facilities, in* SPORTS, JOBS & TAXES 113 (Brookings Institution Press 1997) (Finding that for jobs to be created there must be an "increase in aggregate spending" within the community, which typically does not happen. Instead, a substitution effect is more likely to occur where persons in the community replace consumption of one leisure item for another.).

179. *See* Siegfried & Zimbalist, *supra* note 20, at 104.

180. *Id.*

181. *See id.*

182. *See Build the Stadium*, *supra* note 165, at 8-9 (Naming rights sell the rights to name the stadium. Pouring rights give vendors exclusive rights to sell in the stadium. Personal seat licenses give people the right to buy tickets in a specific location of the stadium.).

183. *Id.*

184. *See id.*

185. *See Economic Impact of Sports Teams and Facilities, supra* note 175, at 65-69 (Exclusive rights like these actually diminish the economic benefit to the local

The local community where a stadium is located is not likely to see a large boost in revenue spending from players and fans.[186] A large portion of the gross revenue a team generates goes to its players and personnel.[187] If those persons do not live in the community, their income is not reinvested in the local community.[188] In addition to the lack of actual consumption within the community by the team, fans visiting the stadium are less likely than in previous decades to visit businesses outside the stadium.[189] Today's stadiums are built for a fan to have a full-entertainment experience within the park.[190] The goal is for fans not to have to leave the park to satisfy their entertainment needs.[191]

Sports teams also provide indirect benefits to the community.[192] Such benefits include the prestige of being part of a city that is associated with a sports franchise.[193] Proponents of such a theory suggest this association attracts new businesses to a city.[194] However, this theory has been discredited by little evidence of substantial job growth or increased revenue to communities where stadiums are located.[195]

In order to meet a heightened public use standard, a franchise must provide additional benefits and support to the community. To do this, franchises and municipalities must

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community because exclusive deals for pouring rights and licensing of products are typically given to national retailers. The income generated by sales of these products goes to the national corporations and is not invested in the local community.).

186. *See id.*

187. *Id.*

188. *See id.* (Players are not likely to live in the community where the stadium is located. Players may live in suburbs and may have several homes. Where they live may also depend on the time of year and the location of a training facility.).

189. *See Economic Impact of Sports Teams and Facilities*, *supra* note 175, at 66 (suggesting the "neighborhood effect from fans...is greatly diminished by the modern tendency to enclose all commercial activities within the ballpark arena").

190. *See id.*

191. New ballparks include children's play areas, gourmet food, and even small swimming pools.

192. *See* Dennis Coates & Brad R. Humphreys, *The Growth Effect of Sport Franchises, Stadia, and Arena*, 18 J. POL'Y ANALYSIS & MGMT. 601, 614 (1999).

193. *See Economic Impact of Sports Teams and Facilities*, *supra* note 175, at 73; MARK S. ROSENTRAUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT CH. 3 (BasicBooks 1997).

194. *See Economic Impact of Sports Teams and Facilities*, *supra* note 175, at 73 (suggesting that there is no "systematic evidence that this assertion is true, and some even indicates otherwise").

195. *See id.*

negotiate ways for the community to receive more tangible benefits from stadiums. For example, a team could agree to provide a certain percentage of their pouring rights exclusively to local merchants. This would provide the merchants with greater exposure and an increased customer base. Such a plan would provide a tangible multiplier to the local economy because the revenues would be reinvested in the community. Stadiums might also be required to provide tickets at discounted prices to community members. Such a device might alleviate some of the leisure substitution effect that occurs in these communities.[196] It is this type of negotiation that will be needed if teams and municipalities want to meet a meaningful public use requirement.

Municipalities negotiating these deals have to be cognizant of the incentive packages they promise to teams and stadium developers. As tax subsidies and public money siphoned into these projects increase, the ratio of private funds to public funds expended on these projects decreases.[197] Municipalities should also attempt to negotiate deals where the property is owned by the city or state and then leased to the sports team. This allows the government to keep title to the property, and the city can host public events at the venue.

In order for the surrounding community to benefit from new stadiums, owners and developers need to be mindful of the local community and their needs. When concessions are made to benefit the local community, the sports team and the community have a symbiotic relationship. Stadium developers and sports franchise owners should use Oriole Park at Camden Yards ("Camden Yards") in Baltimore, Maryland as a blueprint for a stadium that meets the suggested balancing test. Opened in 1992, Camden Yards was built to complement the ongoing revitalization of the City of Baltimore.[198] Camden Yards was built within walking distance of "Baltimore's Inner Harbor and downtown business district."[199] The stadium is also located close to mass

196. The leisure substitution effect is a concept that people have a fixed amount of money to spend on leisure activities, so when a new leisure activity is introduced into the community, those who choose to participate in it, choose to participate at the expense of another leisure activity. Baade & Sanderson, *supra* note 178, at 110.

197. *See* Kim & Peebles, *supra* note 44.

198. See DAVID C. PETERSON, SPORTS, CONVENTION, AND ENTERTAINMENT FACILITIES 99 (Urban Land Institute 1996) (1997 ed.).

199. *Id.* at 228.

transportation and major highways.[200] Unlike some stadiums, Camden Yards was built in recognition of a larger development plan.[201]

The Maryland Stadium Authority owns and operates Camden Yards.[202] Though the stadium's costs were financed by the state, the state offset this obligation through "a general obligation bond issue financed by a cash 'sports' lottery operated statewide, using $1 scratch-off tickets."[203] The Maryland Stadium Authority also incorporated office space into the stadium design, which it leases to private persons.[204] Since it opened, Camden Yards has been an outstanding success with ballpark attendance exceeding expectations.[205] It has helped Baltimore's economy, serving as a tourist destination for fans and foes alike.[206] As seen in the Camden Yards case study, when a city acts with foresight and the willingness to integrate a stadium with its surroundings, a stadium can meet a public use requirement, with teeth.

V. CONCLUSION

Allowing an economic benefit rationale to meet the public use requirement effectively writes the requirement out of the takings clause. It allows big businesses and major developers to exploit cash-strapped municipalities. It puts private property owners at the mercy of the latest development project. Since the United States Supreme Court failed to curtail takings abuse, it is time for state courts to step in and stop this exploitation by giving effect to the public use requirement. By implementing a middle ground approach, like the balancing test described in this article, private individuals can gain from takings so long as the public truly

200. *Id.*

201. Prior to playing at Camden Yards, the Baltimore Orioles played at Memorial Stadium. This stadium was located in an outlying suburb of Maryland. *Id.*

202. PETERSON, *supra* note 198, at 99-100.

203. *Id.* at 100 ("This is a special, additional [lottery] series dedicated to the Maryland Stadium Authority solely for the development of Camden Yards baseball and football stadium.").

204. *Id.* at 229 (The design of Camden Yards included refurbishing an existing building on the B&O Railroad site. This building, known as The Warehouse, "extends the entire length of the right-field side of the stadium." It has become prime office space.).

205. *Id.* at 230.

206. PETERSON, *supra* note 198, at 230.

gains as well. This approach benefits both individual landowners and the community at large and puts an end to takings abuse.