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INNER CITIES, PRIVATE TO PRIVATE EMINENT DOMAIN TRANSFERS, AND PUBLIC
FINANCING OF STADIUMS

I. INTRODUCTION

The Barclay's Center, part of the Atlantic Yards Arena and Redevelopment Project, was first proposed in December of 2003. Focused primarily in the neighborhoods of Prospect Heights, Boerum Hill, Park Slope, and Fort Greene, the project garnered national attention both for its wealthy and glamorous proponents, including a Russian billionaire, New York real estate mogul, and famous rapper Jay-Z, as well as the series of controversial court cases that resulted from it.

The plaintiffs took the position that the Barclay Center did not qualify as a public use under the meaning of eminent domain requirements. The plaintiffs ultimately lost, both the lawsuits are their homes, but along the way the controversy eventually involved household names like Steve Buscemi, and generated a lot of discussion regarding what is and what is not a public use.

This paper will consider stadiums constructed for professional sports teams, and more specifically, whether they constitute a public use by creating an economic benefit to the local community, ultimately concluding that no, stadiums have never proven themselves to be enough of a boon to the local economy to warrant the public use designation, regardless of what projections and estimates say. Section II briefly discusses the history of eminent domain being used in inner cities, both for purposes of economic benefit and to gentrify blighted areas. Section

III looks at whether we can ever consider a stadium as a public use for purposes of eminent domain, and whether there is any measureable positive economic impact on the local economy resulting from new stadium construction. Section IV discusses the Barclay Center a little more at length, and uses it as a case study for both the economic effects of new stadium construction, and the effects that widespread use of eminent domain for gentrification purposes can have on neighborhood demographics. Finally, Section V will conclude this paper.

II. HISTORY OF EMINENT DOMAIN USED FOR INNER CITIES

A. Development

Both the federal government and the states have the power of eminent domain. The takings clause contains two important limitations: "private property shall not be taken for public use without just compensation."¹ The language of the Fifth Amendment seems to limit the taking of private property to situations in which there is both a public use and just compensation for the property. This of course begs the question, how do we define public use and just compensation. There are typically two types of takings, physical and regulatory.² This paper deals only with the former, or takings in which the government confiscates and physically occupies property, and in the case examined, evicts private individuals from their property.

¹ U.S. CONST. amend. V.

² See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.").

B. Defining Public Use

The Fifth Amendment requires that a taking be for public use,³ however, the Court has adopted a rather broad view of the definition of what constitutes a public use. The Court has determined that a public use is anything that meets the rational basis test, i.e. if the government acts out of a reasonable belief that the taking is of benefit the public, then the public use requirement is satisfied.⁴ This was demonstrated as early as 1954, in *Berman v. Parker*, when the Court allowed the District of Columbia to acquire blighted private property and then resell it to private developers.⁵ In the majority opinion, Justice Douglas found that the police power granted the legislature the ability to declare what the public good is.⁶ He reasoned that the legislature was in a better position to determine what was in the best interest of the public than the judiciary.⁷ He further concluded that once it is within the purview of the legislature to make certain determinations, the legislature has the ability to use the takings power in order to realize the object of those determinations.⁸

The Court had the opportunity to reaffirm these principles in *Hawaii Housing Authority v. Midkiff*.⁹ Rather than confiscate slums, the State of Hawaii confiscated property from comparatively wealthier individuals for the purposes of reselling the property to a much larger number of individuals.¹⁰ In a unanimous opinion, the Court found that the taking was permissible as a justified public use, because the Hawaii legislature's concern regarding too

³ See *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937) ("[O]ne person's property may not be taken for the benefit of another person without a justifying public purpose, even though compensation be paid.").

⁴ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) ("...where the exercise of the eminent domain power is rationally related to a conveyable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

⁵ 348 U.S. 26 (1954).

⁶ *Id.* at 32–33.

⁷ *Id.*

⁸ *Id.* at 33.

⁹ 467 U.S. 229 (1984).

¹⁰ *Id.* at 243.

much property being held by too few people valid legislative judgment that should be afforded great deference by the judiciary.¹¹ The Court reaffirmed that the "public use requirement is thus coterminous with the scope of a sovereign's police powers."¹²

One of the most recent cases to address public use—and one of the most controversial Supreme Court cases of the last decade—was *Kelo v. City of New London*.¹³ In *Kelo*, a Connecticut city sought to bring about economic revitalization by confiscating private property and selling it to a private corporation that planned to build a new economic development project.¹⁴ A far cry from the unanimous *Midkiff* opinion, the Court split 5–4, ruling that the taking satisfied the public use requirement because the city reasonably believed that the new development project would create over 1,000 new jobs.¹⁵ This again reaffirmed the theory that any taking is for public use if the minimal standard of reasonable belief of public benefit is met.

Justice Kennedy, in a concurring opinion, argues that eminent domain was not without limits, and that a taking would not be "rationally related to a conceivable public purpose"¹⁶ if the taking of private property is intended to benefit "particular, favored private entities" and confers no benefit on the public or merely "incidental or pretextual" benefits.¹⁷ Justice Kennedy continues, arguing that courts reviewing plausible accusations of favoritism should approach the issue with "the presumption that the government's actions were reasonable and intended to serve a public purpose."¹⁸ Under this approach, the economic revitalization plan passed constitutional muster because, as the lower courts found, the plan was intended to revitalize the local economy,

¹¹ *Id.* at 241 ("[T]he Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation.").

¹² *Id.* at 240. For a broader discussion of takings and the police power, see Joseph Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964).

¹³ 545 U.S. 469 (2005).

¹⁴ *Id.* at 477.

¹⁵ *Id.* at 472.

¹⁶ *Id.* at 490 (Kennedy, J., concurring) (quoting *Midkiff*, 467 U.S. at 241).

¹⁷ *Id.* at 490.

¹⁸ *Id.* at 491.

and not merely to serve the interests of Pfizer, one of the main beneficiaries of the taking.¹⁹

According to Kennedy, a presumption of invalidity—like the one argued for by the homeowners whose properties were confiscated—is not warranted by the mere fact that the purpose of the taking was economic development.²⁰

In dissent, Justice O'Connor argues that while the legislature should be afforded considerable deference regarding what governmental activities will advantage the public, the question of what constitutes a public use is a judicial one.²¹ According to Justice O'Connor, the takings in *Berman* and *Midkiff* remained true to underlying principles regarding legitimate public purposes, but the *Kelo* taking does not.²² The distinction exists in the "precondemnation use of the targeted property," which "afflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth."²³

In both cases, the respective legislatures determined that the best way to eliminate the affirmative societal harm was to confiscate the property, "[t]hus a public use was realized when the harmful use was eliminated."²⁴ By this reasoning, the fact that the confiscated property was subsequently sold to private individuals is beside the point, since the taking itself directly achieved a public benefit.²⁵ This is in sharp contrast to the *Kelo* taking, wherein the City of New London never claimed that Ms. Kelo's home was the source of social harm, only that it could be used differently by a new private owner in a manner that could produce some secondary benefit

¹⁹ *Kelo*, 545 U.S. at 492.

²⁰ *Id.* at 493.

²¹ *Id.* at 497 (O'Connor, J., dissenting) (citing *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930)).

²² *Id.* at 500.

²³ *Id.*

²⁴ *Id.*

²⁵ *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

for the public.²⁶ Justice O'Connor also objects to two implied limitations in the majority opinion, albeit not to their intended purpose, but to their effectiveness. Also in dissent, Justice Thomas asserts that the Court's rulings have resulted in the Public Use Clause being essentially nullified.²⁷

C. Blight Exception

Eminent domain in the context of inner cities is often justified by declaring the properties to be condemned as blighted. Definitions for blight include everything from traditional criteria such as abandoned and deteriorating buildings²⁸ to modern criteria that include "too-small side yards, diverse ownership (different people own properties next to each other), inadequate planning, and lack of a two-car attached garaged."²⁹ Blight determinations can doom whole neighborhoods even if the neighborhood contains both blighted and non-blighted properties.³⁰

One theory of what should constitute blight focuses on taking an economic approach, i.e. that a blighted property is one which produces a negative externality on neighboring properties.³¹ The premise here is that properties that are dilapidated or in great disrepair deter businesses from investing in the community and increase the likelihood of criminal activity.³²

²⁶ *Id.* at 501.

²⁷ *Id.* at 506 (Thomas, J., dissenting).

²⁸ Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 55 (2006) (citing Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1034 (2005) ("Early blight cases in the 1940s and 1950s upheld condemnations in areas that closely fit the layperson's intuitive notion of 'blight': dilapidated, dangerous, disease-ridden neighborhoods.")).

²⁹ *Id.* at 55.

³⁰ *See, e.g., Berman*, 348 U.S. at 34–35 (Berman's department store while not itself blighted, was in a neighborhood in which over 60% of properties were beyond repair. The Court made a determination that it would not question the legislature's decision to treat the neighborhood as a whole rather than make determinations for each individual property.).

³¹ Kelly, *supra* note 28, at 55.

³² *Id.* at 55–56 (citing William T. Nachbaur, *Empty Houses: Abandoned Residential Buildings in the Inner City*, 17 HOW. L.J. 3 (1971); and citing *Berman*, 348 U.S. at 32 ("[m]iserable and disreputable housing conditions . . . spread disease and crime").

There is little argument against blight being used as a proper justification for eminent domain.³³ However, concern exists over when and why blight determinations are made, and whether the legislature could abuse the judicial deference that a blight determination warrants by using a finding of neighborhood blight "as a pretext for using eminent domain for economic development."³⁴ This type of eminent domain abuse can condemn "productive businesses and inhabited homes with no obvious characteristics of blight."³⁵

Indeed, this is one of the concerns in the Barclay Center case, discussed below.³⁶ These concerns for abuse are especially prevalent in inner city eminent domain use, where there is always at least the suspicion that "blight" is just code for "black," and that legislatures simply find it easier to declare an area blighted and sell it to private developers rather than address the root causes of the alleged blight.

III. STADIUMS AS PUBLIC USE

A. *Previous Instances of Eminent Domain Condemnations for Stadium Construction*

Eminent domain has been involved with sports stadiums since at least as early as 1959, when Los Angeles promised the Brooklyn Dodgers³⁷ that the city would guarantee the team some amount of land that it already possessed and promised to use its best efforts to obtain additional acreage if the team moved west.³⁸ When the contract was challenged, the California

³³ See *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting) (noting that the extreme blight present in *Berman* made for a clear and affirmative social harm, which warranted judicial deference to how the legislature felt it best to remedy said harm).

³⁴ Kelly, *supra* note 28, at 57; see also Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305 (2004).

³⁵ *Id.*

³⁶ See *infra*, Section IV.

³⁷ The Brooklyn Dodgers, now the Los Angeles Dodgers, are a Major League Baseball franchise.

³⁸ *City of Los Angeles v. Superior Court of Los Angeles*, 333 P.2d 745 (Cal. 1959).

Supreme Court held that the use of eminent domain for the purpose of immediately transferring the land to the Dodgers was a valid public purpose in the sense that it allowed the city to have the ability to enter into a contract which it deemed advantageous to the public interest.³⁹ This however, did not settle the eminent domain question, as the court decided the case on principles of contract law, since the contract in question did not require that the city use eminent domain, only that it attempt to acquire the properties (which could also include voluntary purchase contracts), and thus the court did not feel the need to reach the question of whether this would have been a valid use of eminent domain.⁴⁰

California later came much closer to directly addressing the relationship between stadiums and eminent domain when a California appeals court determined that the City of Anaheim could condemn land surrounding the existing stadium of the Anaheim Angels, another MLB franchise, in order to build a parking lot.⁴¹ The appeals court framed the public use as "reliev[ing] congestion and reduc[ing] traffic hazards," which is a valid public purpose.⁴²

The Arlington City Council, on behalf of another professional baseball team in need of a parking lot, the Texas Rangers, condemned land around the existing stadium.⁴³ Citing deference to the legislature, the Fifth Circuit Court of Appeals upheld the taking as a proper use of eminent domain.⁴⁴

³⁹ *Id.* at 752.

⁴⁰ *Id.* at 753.

⁴¹ *City of Anaheim v. Michel*, 259 Cal. App. 2d 835, 839 (Cal. Ct. App. 1968).

⁴² *Id.*

⁴³ *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1994).

⁴⁴ *Id.* at 966.

B. The Measurable Economic Benefit Debate

One of the most cited justifications for public subsidies for new arena construction is that the local economy will get a boost from construction, increased spending, and more jobs (which in turn is how cities and states satisfy the rational basis test.⁴⁵ As this section will demonstrate, this is rarely, if ever, the case. The economists Robert Baade and Allen Sanderson have done extensive work focusing on stadium financing and effects, and one of the major problems they encounter that is not addressed by stadium construction proponents, is what type of industry professional sports is.⁴⁶

Professional sports are not like manufacturing or other "export" industries, but rather are more comparable to the service and entertainment industries.⁴⁷ New positive economic benefits are created when industries and businesses export a product to another region, which brings in "new" money to the local economy.⁴⁸ This is in contrast to non-export industries, like entertainment, that attract mostly local spending, and tend to make money at the expense of another entertainment option.⁴⁹ That is, a local economy has a finite number of entertainment dollars to spend in a given time period, and new forms of available entertainment compete with existing ones for those entertainment dollars.

The overall effect of this is that any spending at a new stadium is not necessarily "new" spending, but is merely the same spending in a new location. The impact of this is that rather

⁴⁵ Robert Baade, *Professional Sports as Catalysts for Metropolitan Economic Development*, 18 J. OF URBAN AFFAIRS 1 (1996) ("Taxpayers are told that professional sports stadiums and teams will enrich rather than deplete local treasuries and that paying for professional sports now will mitigate future tax burdens by stimulating local job creation and incomes.").

⁴⁶ Robert A. Baade & Allen R. Sanderson, *The Employment Effects of Teams and Sports Facilities*, in SPORTS, JOBS AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS, 92, 101 (Roger G. Noll & Andrew Zimbalist, eds., 1997).

⁴⁷ *Id.*

⁴⁸ Roger G. Noll & Andrew Zimbalist, *The Economic Impact of Sports Teams and Facilities*, in SPORTS, JOBS AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS, *supra* note 46, at 65.

⁴⁹ *Id.*

than producing new spending in a local economy, stadiums often have the effect of taking away spending from other local businesses, i.e. people might now spend their entertainment dollars at the sporting event rather than at the local mall or restaurant. In fact, in a 1987 study, seven of the nine cities examined after stadium construction or renovation, received a reduced share of regional income.⁵⁰ In none of the nine cities studied was a positive correlation found between "stadiums, professional sports, and city income as a fraction of regional income."⁵¹ New entertainment choices can be a good thing, but should not be mistaken for something that creates new value when it only serves to dilute the already-existing entertainment market.

The stadium advocate will respond that unlike local malls and restaurants, stadiums can increase tourism, thus acting as a quasi-export business by bringing in truly new money. The estimations of increased tourism are often greatly exaggerated, and in fact the large majority of people who attend sporting events are locals.⁵² For sake of covering all of our bases, it should also be noted that the "non-attendance-based revenue," which includes things like broadcasting, television deals, and merchandise sales, have also not been shown to generate enough of an impact on local economies to offset the loss of revenue to other local entertainment options.⁵³ Evidently, this is due in large part to the bulk of professional sports team revenues being used to fund continued operations of the team, e.g. paying for staff, coaches, and players.⁵⁴ In addition, coaches and players, the biggest beneficiaries of team revenues aside from owners, tend to not

⁵⁰ ROBERT A. BAADE, THE HEARTLAND INST., IS THERE AN ECONOMIC RATIONALE FOR SUBSIDIZING SPORTS STADIUMS? 15 (1987), *available at* http://news.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/17280.pdf (Note that Baade included a population variable in each regression model in his study, in order to control for the possibility that economic performance dropped as a result of factors better ascribed to "general urban malaise" or urban income contraction. Therefore, to complete lack of positive correlation should be entirely attributable to the construction of the stadium(s), and should not be the fault of being wrapped up in an otherwise poor economy.).

⁵¹ *Id.* at 16.

⁵² Noll, *supra* note 48, at 69.

⁵³ *Id.*

⁵⁴ *Id.* at 72.

live in the neighborhoods in which their respective stadiums are located, and therefore much of the team revenue does not stay in the local economy.⁵⁵

The second response of the stadium advocate is that regardless of increased spending claims, at least the stadium will bring in new jobs. This too tends to be greatly exaggerated.⁵⁶ Studies commissioned by teams when submitting their construction proposals tend to not take into account already-existing jobs at the facilities that the new stadiums will be replacing.⁵⁷ These studies fail to differentiate between "net" and "gross" gains in employment.⁵⁸ In order for all of the jobs "created" by the new stadium to be new ones, the city would have to have no professional athletic team before the stadium was constructed.⁵⁹

Another important thing to note regarding job creation is that the vast majority of the jobs are low-paying seasonal employments.⁶⁰ According to Baade and Sanderson, roughly 2% of the jobs counted as being created by the stadium are full-time and high-paying—this 2% of course being the players, coaching staff, and team management.⁶¹ So even if a stadium can be said to create new jobs at all, approximately 98% of those "new" jobs are seasonal service industry jobs that offer irregular hours, low pay, and likely little to no benefits.

Finally, in case one might think that having a dozen to several dozen new multimillionaires in the form of professional athletes spending money in the local economy might be a good thing, Baade and Sanderson put that theory to rest as well. In contrast to the image of high-rolling athletes portrayed by the media, players and coaches tend to save and

⁵⁵ *Id.* at 73.

⁵⁶ Baade & Sanderson, *supra* note 46, at 92.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 94.

⁶⁰ *Id.* at 99.

⁶¹ *Id.*

invest a higher percentage of their income relative to comparable earners.⁶² This could be because of the highly volatile nature of sports, in that careers of players are often very short, and coaching turnover is often very high.⁶³

IV. THE CASE OF THE BARCLAY'S CENTER

A. Background

The Barclay's Center, part of the Atlantic Yards Arena and Redevelopment Project, was first proposed in December of 2003.⁶⁴ The plans called for 22 acres of new development in Brooklyn, New York, in the center of the Prospect Heights, Boerum Hill, Park Slope, and Fort Greene neighborhoods.⁶⁵ In order to acquire 22 acres of developable land in an area as densely built up as Brooklyn, the Empire State Development Corporation (hereinafter "ESDC") planned to use eminent domain.⁶⁶ Opponents of the plan claimed that the confiscation of 53 properties, displacing 330 residents and 33 businesses, was too high of a price to pay for the land to be sold off to private developers for a new sports arena and skyscrapers.⁶⁷

The development project was slated to "extend eastward from the junction of Atlantic and Flatbush Avenues, and include blocks [then] occupied by the subgrade Vanderbilt rail and MTA bus yards as well as certain blocks bordering the yards to the south."⁶⁸ Set to be completed in phases, the Barclay's Center was the first project on the docket.⁶⁹ Throughout various other phases, the project includes infrastructure upgrades to the Vanderbilt Yards rail facilities, a mix

⁶² Baade & Sanderson, *supra* note 46, at 102.

⁶³ *Id.*

⁶⁴ Mark Berkey-Gerard, *Eminent Domain Revisited*, GOTHAM GAZETTE, Dec. 12, 2005, <http://old.gothamgazette.com/article/iotw/20051212/200/1678>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 165 (N.Y. 2009).

⁶⁹ *Id.*

of commercial and residential high rise structures, and some eight acres of publicly accessible open space.⁷⁰

One of the most prevalent objections to this type of eminent domain use was the determination of blight.⁷¹ One such objection came from Dan Goldstein.⁷² Mr. Goldstein argues that the ESDC's blight designation for his neighborhood is misleading.⁷³ As evidence, Mr. Goldstein points to the fact that he paid nearly \$600,000 for his newly renovated condominium in the Prospect Heights neighborhood in 2003.⁷⁴ The blight declaration was based on a 2006 report commissioned by the ESDC.⁷⁵ The report pointed to several factors when making its determination, including below-grade railways of the Metropolitan Transportation Authority (hereinafter "MTA"), weeds and graffiti, and the economic "underutilization" of the soon-to-be-confiscated land.⁷⁶

After several years of litigation, *Goldstein v. N.Y. State Urban Dev. Corp.* visited the New York Court of Appeals for the last time.⁷⁷ Primarily at issue was the determination issued by the New York State Urban Development Corporation, d/b/a ESDC, that it should confiscate the properties contained within the 22 acre area.⁷⁸ The project was termed a "land use improvement project."⁷⁹ The petitioners in *Goldstein* do not dispute that the "blight" designation for more than 50% of the confiscated property is appropriate.⁸⁰ Where the dispute did arise, however, was in a roughly three-block area wherein there had been no previous blight-

⁷⁰ *Id.*

⁷¹ See Nicole Gelinas, *The Empire State and Eminent Domain*, THE WALL STREET J., Nov. 13, 2009, <http://online.wsj.com/article/SB10001424052748704576204574530161194721796.html>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ AKRF, INC., ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT: BLIGHT STUDY (2006).

⁷⁶ *Id.* at A-1.

⁷⁷ *Goldstein*, 921 N.E.2d at 164.

⁷⁸ *Id.* at 165.

⁷⁹ *Id.* at 166.

⁸⁰ *Id.*

designation prior to the Atlantic Yards Project.⁸¹ The Forest City Ratner Companies (hereinafter "FCRC"), the main private developer associated with the project, had already successfully acquired many of the properties in the area, but petitioners either refused to sell, felt they were entitled to more money, or argued that the state did not have the right to confiscate their property if it was not blighted.⁸² The ESDC claimed that the report "made findings that the blocks in which [the petitioners] are situated possess sufficient indicia of actual or impending blight to warrant their condemnation for clearance and redevelopment" in accordance with the land use improvement plan.⁸³ It was the position of the ESDC that, by "removing blight" and instituting the proposed redevelopment plan in its place, the "public use, benefit or purpose" requirement under New York State law would be satisfied.⁸⁴

A federal court had already rejected the claims made by the petitioners regarding the Fifth Amendment and whether the proposed land use improvement plan was properly considered public use, however, the federal district court declined to exercise supplemental jurisdiction over the New York State constitutional claims.⁸⁵ The Court of Appeals rejects the petitioners' assertion that their property was not being condemned for public use as the state constitution required, but rather was being condemned to "enable a private commercial entity to use their properties for private economic gain with, perhaps, some incidental public benefit."⁸⁶ The court emphatically rejects this, writing that it is "indisputable that the removal of urban blight is a proper and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain."⁸⁷

⁸¹ *Id.*

⁸² *Goldstein*, 921 N.E.2d at 166.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 166–67 (citing *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008)).

⁸⁶ *Id.* at 170.

⁸⁷ *Id.* at 170–71.

In response to petitioners' biggest gripe—that while the rail yards and other areas were blighted, the three-block area wherein petitioners lived or worked, were not—the court gives in to an extent, saying that "[t]hey are doubtless correct that the conditions cited in support of the blight finding at issue do not begin to approach in severity the dire circumstances of urban slum dwelling."⁸⁸ But the court reasons its way around this: "We, however, have never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions replicating those" of the 1936 case that spawned the "substandard and insanitary" definition of urban blight in New York.⁸⁹

As early as the 1950s, the Court of Appeals found that "[o]f course, none of the buildings are as noisome or dilapidated as those described in Dickens' novels . . . but there is ample in this record to justify the determination of the city planning commission that a substantial part of the area is 'substandard and insanitary' by modern tests."⁹⁰ The court goes on to explain that while historically, slums were the primary target of the substandard and insanitary language, as the complexities of modern urban societies have become better understood, it is clear that condemnation for the public welfare is not limited to slums, and instead also includes areas of economic underdevelopment and stagnation.⁹¹

Perhaps most frustrating for the petitioners, the Court of Appeals contends that it would be quite easy to disagree with the blight findings of the ESDC, but that such a contention would merely be another reasonable view of the evidence, and since this is something that is left to legislative prerogative, the petitioners are without recourse.⁹² Indeed, the court goes on:

⁸⁸ *Goldstein*, 921 N.E.2d at 171.

⁸⁹ *Id.* (citing 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 6, part 2, at 636–639).

⁹⁰ *Id.* (quoting *Kaskel v. Impellitteri*, 115 N.E.2d 659 (N.Y. 1953)).

⁹¹ *Id.* at 171–72 (quoting *Yonkers Community Dev. Agency v. Morris*, 335 N.E.2d 327 (1975)).

⁹² *Id.* at 172.

It may be that the bar has not been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.⁹³

The court even admits that the concept of public use has been "sapped" of its limiting power.⁹⁴

Regardless, the project was deemed a public use, and the next section will consider if one exists at all, and what the consequences of the project have been so far.

B. Consequences of the Project

1. Dueling Reports: Economic Impact

The first consideration is whether there will indeed be a measureable economic benefit from the construction of the Barclay Center. Perhaps not surprisingly, given the amazing historical ability of stadium projects to garner incredible amounts of public funding, the Barclay Center and related phases of the Atlantic Yards Project were the beneficiaries of large public subsidization.⁹⁵ Even leaving aside the use of eminent domain powers on its behalf, Mr. Ratner's development project received an additional \$300 million in city rent subsidies, \$114 million in tax exempt Liberty Bonds despite not actually being located in Lower Manhattan,⁹⁶ and then another \$400 million in Liberty Bonds once Mr. Ratner could not find enough tenants to fill all of the office space planned.⁹⁷ All of this was warranted, according to Mr. Ratner, because any

⁹³ *Id.* at 172–73.

⁹⁴ *Goldstein*, 921 N.E.2d at 173.

⁹⁵ NEIL DEMAUSE & JOANNA CAGAN, *FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT* 282 (2008).

⁹⁶ Liberty Bonds were issued by the federal government in order to help finance the rebuilding of Lower Manhattan after 9/11.

⁹⁷ DEMAUSE, *supra* note 95, at 282–83.

expenditures made by the city on his behalf would be more than repaid by the "surge of resulting tax revenues."⁹⁸

In a report financed by Ratner, an economist⁹⁹ estimated that the Project would generate \$1.5 billion in new revenues, as opposed to \$700 million in new costs.¹⁰⁰ Notable, however, is that even in this pro-project study, the Barclay Center was only estimated to account for approximately \$257 million in new revenues.¹⁰¹ Note that even with this estimate, low relative to the rest of the projections, there are large issues regarding methodology. The study assumes, incorrectly in my opinion, that 30% of fans attending Nets games will be from New Jersey, and therefore represent "new" money in the local economy.¹⁰² While there are no New Jersey-specific figures regarding game attendance yet,¹⁰³ there are three problems with the estimate as formulated by the Ratner report.

The estimates are in part based off of the percentage of non-season ticket holders who attended New York Jets games at the Meadowlands in New Jersey, but who live in New York.¹⁰⁴ There are a few of reasons why the analogy is inapplicable: 1) the more infrequent football schedule makes it more acceptable to be an all day affair; 2) many Jets fans are historically from Queens and Long Island, i.e. there are very strong territorial loyalties to the franchise whereas the Nets do not enjoy such a rabid and loyal fan base; and, 3) a fact of life of living in New York City is that the only professional football around is in New Jersey, which forces fans of both

⁹⁸ *Id.* at 283.

⁹⁹ Andrew Zimbalist, the economist responsible for the report's contents, published a book a year prior to the report coming out, the purpose of which was to argue that public financing for stadium construction is a bad idea that does not see any return on investment. Indeed, his volume is cited in this paper as support for the idea that the Barclay Center financing is ill-advised.

¹⁰⁰ deMause, *supra* note 95, at 283.

¹⁰¹ *Id.*

¹⁰² Norman Oder, *Why Brooklyn arena tax revenues likely would be lower than projected*, ATLANTIC YARDS REPORT (May 2, 2013, 6:23 PM), <http://atlanticyardsreport.blogspot.com/2009/02/why-brooklyn-arena-tax-revenues-likely.html>.

¹⁰³ Since the first full season of basketball in Brooklyn just concluded, I am hopeful that updated estimates will be released some time prior to the start of next season.

¹⁰⁴ Oder, *supra* note 102.

teams to cross state lines every Sunday if they want to see the game live, which is not the case for basketball.¹⁰⁵ This is important because it shows that New York residents are overrepresented at football games compared to basketball games.

By overvaluing the percentage of New Yorkers who travel to New Jersey as a means of estimating how many New Jersey residents would travel to Brooklyn, the report's estimate could be significantly off base.¹⁰⁶ As an opposition report issued by economists from Columbia University and the London School of Economics in response to the Ratner report documents, the overvaluing of New York football attendees leads to the undervaluing of the number of New Jersey fans that attended Nets games while they were in New Jersey.¹⁰⁷ The crux of this mistake is that there were fewer New York-based Nets fans prior to the move to Brooklyn than Ratner estimated, which is important in the sense that this "places a greater burden on NY-based fans in terms of fan attendance."¹⁰⁸

This is a serious concern, given that the out of state attendance numbers counted for much of the report's lofty revenue projections. "In revenue terms, a greater share will be diverted from existing sales taxable expenditure in New York,"¹⁰⁹ which means that we are taken back to the discussion regarding whether or not stadium spending is "new" spending, or whether it is simply taking entertainment dollars from other local businesses. This is a huge blow to the Barclay Center project, which was relying on sales tax revenues to account for 60% of its projected new tax revenues.¹¹⁰ The opposition report goes on to discuss the arena's effects on the

¹⁰⁵ *Id.*

¹⁰⁶ JUNG KIM & GUSTAV PEEBLES, ESTIMATED FISCAL IMPACT OF FOREST CITY RATNER'S BROOKLYN AREAN AND 17 HIGH RISE DEVELOPMENT ON NYC AND NYS TREASURIES 6 (2004), *available at* <http://www.dddb.net/public/KimPeebles.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Oder, *supra* note 102.

local economy specifically. Indeed, it shows that the total gain to the city is \$257.5 million, but the cost of the arena to the city and state is \$261 million.¹¹¹

Given that we are operating without the benefit of economic data or hindsight, the smart money appears to be on either no economic impact, or a negative economic impact. The next section will turn to the social side of the project, namely, the consequences of the use of eminent domain on the ethnic profile of the affected neighborhoods.

2. Changing Landscapes: Neighborhood Profiles Pre- and Post-Barclay Center

The Barclay Center sits at the nexus of Prospect Heights, Fort Greene, Park Slope, and Boerum Hill. As would be expected, these neighborhoods were the most affected by the Atlantic Yards Project. In order to see if any ethnic groups were more affected by the redevelopment than others, I examined census data and measured neighborhood population changes between 2000 and 2010.

Brooklyn as a whole increased its population by less than 40,000 residents, at the same time losing its relative share of New York City's total residents, from 30.8% to 30.6%.¹¹² The rest of the city outpaced Brooklyn's population growth, with the city as a whole averaging 2.2% growth.¹¹³ Interesting, the Barclay Center neighborhoods correlate with either zero or negative population growth: Prospect Heights and Park Slope both saw approximately no change, while the Boerum Hill and Fort Greene neighborhoods both saw losses of 1,000–5,000 (equating to losses of 5–10%).¹¹⁴

¹¹¹ *Id.* at 7.

¹¹² DEPT OF CITY PLANNING, NYC2010: POPULATION GROWTH AND RACE/HISPANIC COMPOSITION 2 (2010).

¹¹³ *Id.* at 3.

¹¹⁴ *Id.* at 10.

While NYC as a whole saw a net loss of nonhispanic whites of -2.8%, Brooklyn saw a 4.5% increase in the number of nonhispanic whites.¹¹⁵ Concurrently, and perhaps relatedly, Brooklyn had a larger percent decrease of black populations than the city as a whole: -5.8% and -5.1%, respectively.¹¹⁶ Where black and white nonhispanics were in roughly equal proportions in 2000, by 2010 there was a 5% advantage to whites. Brooklyn also had enormous relative losses of Pacific Islander (-21.2%), other race nonhispanics (-33.8%), and mixed race nonhispanics (41.8%).

Tellingly, the Boerum Hill-Downtown area saw a 55% increase in white nonhispanics.¹¹⁷ Prospect Heights saw a 60+% gain in nonhispanic whites, while Fort Greene and Park Slope had a more humble 10–20% increase.¹¹⁸ As should be becoming clear, there is growing evidence that as the Barclay Center drove up real estate values, it began pricing economically disadvantaged minorities out of the market. The vast majority of Brooklyn neighborhoods had either no growth or negative growth in nonhispanic whites, but all of the neighborhoods surrounding the arena had significant positive growth as a percentage of their populations.

As we expand our gaze to other ethnic groups, the pattern becomes even more apparent. Park Slope and Fort Greene both lost the most Hispanics of any neighborhood in New York City, between -20 and -40%.¹¹⁹ Boerum Hill also lost 10–19%. Fort Greene's black nonhispanic population plummeted 32%, with Prospect Hill and Park Slope experiencing similar losses, and Boerum Hill seeing a slightly less drastic but still undeniable 10–19% drop.¹²⁰ Asian

¹¹⁵ *Id.* at 16.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 18.

¹¹⁸ DEPT OF CITY PLANNING, *supra* note 112, at 19.

¹¹⁹ *Id.* at 21.

¹²⁰ *Id.* at 23.

populations actually grew by an amazing amount from 2000 to 2010, increasing by 40%, but little to none of those gains were made in any of the four Barclay neighborhoods.¹²¹

In sum: each of the four Barclay neighborhoods lost at least 11% of Hispanics (with Park Slope setting the high mark of -32%, the most in all of New York City); with the exception of Boerum Hill, which lost a still significant 18%, each of the neighborhoods lost at least 31% of black nonhispanics (with Prospect Heights losing the most at -38%, good for the third highest change in the city). Meanwhile, Park Slope added just under a 20% increase in nonhispanic whites, and each of the other three neighborhoods saw more than a 55% increase (with Fort Greene at an unbelievable 82%). While the numbers standing alone speak for themselves, they are even starker in the context of Brooklyn as a whole.

While this probably is not the intent of the project, fixing "blight" has long been understood to refer to gentrifying an area. With gentrification there are natural side effects, including increased property values. In an area like Brooklyn, with property values already quite high, the new arena likely just pushed low income earners over the edge and they were forced to look for more affordable housing elsewhere. Obviously it should be a goal of cities to improve the quality of their neighborhoods, but doing it in such a way as to almost guarantee breaking up neighborhoods with cultural ties seems problematic.

Perhaps we could even look past this ugly side effect if stadiums really were the white knight of inner cities, and brought significant and lasting economic improvement, but the evidence is very much against that proposition. Everything we know about inner city stadiums leads us to believe that they do not measurably improve economic quality or performance in a city. In fact, they often reduce economic performance relative to the rest of the region, largely due to the fact that stadiums encourage the development of service industry laborers, as opposed

¹²¹ *Id.* at 25.

to more skilled and thus higher paid manufacturing workers that are present in a healthy export industry. Despite this, cities use stadiums again and again in an attempt to "upzone" their poorer districts.¹²²

C. Might the Barclay Center be Different?

If ever there were a project for the pro-stadium advocate to hang his hat on, the Atlantic Yards Project just might be it. There are several characteristics about it that could potentially prove to be the difference maker in the public use argument: 1) the Barclay Center is a new stadium, rather than merely replacing or upgrading an older one; 2) the Barclay Center is immediately adjacent to a major transportation hub; 3) that transportation hub underwent major renovations as a part of the Atlantic Yards Project; 4) the complex is smack dab in the middle of one of the most densely populated residential areas in the country; and 5) as the city generally prides itself on, there is always a chance that the New York City market will be different.

The first point was addressed above,¹²³ in that although the Barclay Center is indeed a new stadium, and therefore can claim to be bringing new jobs into the local economy, any jobs that it does manage to bring will be low-value service seasonal service industry jobs.

Furthermore, without enough data gathered regarding the Brooklyn Nets' move from Newark's Prudential Center to the Barclay Center, is it not clear how the economic figures will be affected since the move was a relatively small one. Finally, as stated above,¹²⁴ it is unlikely that simply building a stadium will bring additional revenue and spending into a local economy, even if it is a brand new stadium and not merely a replacement, because stadiums are simply competing for the finite amount of entertainment dollars. In fact, the argument could be made that this is

¹²² Julie Sze, *Sports and Environmental Justice*, 33 J. OF SPORT & SOCIAL ISSUES 111, 117 (2009).

¹²³ *See supra* Section III.B.1.

¹²⁴ *Id.*

especially the case in a city like New York, where there are an overwhelming number of entertainment options trying to woo dollars away from consumers.

The second and third points, regarding the Barclay Center being immediately adjacent to the Atlantic Avenue station, which services both NYC subway lines as well as the LIRR, is a strong one for the success of the stadium. I will concede that being next to a large transportation hub, especially one that is newly renovated, is a major advantage to winning the entertainment dollar battle. However, again we are left to consider that the economic success promised by Mr. Ratner was promised to Brooklyn as a whole; he did not merely promise that the stadium would be successful. Part of the reason that politicians and the public are both fond of the idea of building new stadiums with public money may well be because many stadiums are very successful—it is very easy to point to Madison Square Garden and talk about the amount of revenue it brings in annually. In reality, the problem is not that stadiums and arenas are not successful, but rather that they are successful at the expense of other local businesses. This is why cities see the drop in relative regional income after they build new stadiums.¹²⁵

As for being in the middle of a residential area, I again concede that this may be helpful to the success of the stadium, however, see above regarding success of the stadium versus success of the city. Furthermore, it is not clear that the Barclay Center will remain at the center of a residential hub. With property prices rising rapidly, it is possible, if not likely, that many of the families currently in the neighborhood will be forced to move farther away, or to a different part of town, in an effort to locate affordable housing. Mr. Ratner may respond by saying that he intended to offset these obvious effects of his development project, and indeed he seemed to imply as much when the Ratner financed report proudly announced that the project would be implementing a "new 50/50" model for the housing units, i.e. half will be rented at below market

¹²⁵ *Id.*

value, and half at market value.¹²⁶ What the report doesn't make mention of is that included in this figure are only half of the 4500 apartments that will be for rent, and none of the 2000 condominiums.¹²⁷ Moreover, many of the "affordable" apartments would cost \$2,000 a month or more, which can hardly be called housing for low to middle income families.¹²⁸ In fact, as much as 84% of the 6800+ planned units of housing would go to households that earn more than the neighborhood's median income.¹²⁹

Finally, as the fifth possibility for the Barclay Center being an exception to the general rule that stadium construction is a drain on the local economy, that of New York City simply being different, this might be true. Although not in the way proponents of the stadium would like. New York City has so many entertainment choices, that the Nets may have to fight tooth and nail to win those entertainment dollars. Of course, they may benefit from being in Brooklyn, which has the population of Manhattan, but not necessarily as many distractions in terms of professional sports-type entertainment alternatives. This is not at all a definite, however,

V. CONCLUSION

Only time will tell if the Atlantic Yards Project is an economic success in terms of increasing spending and general welfare in Brooklyn. At this writing, all I can do is offer speculation. I predict, without reservation, that the Barclay Center will go the way to every other stadium before it, offering either no net change or negative change to Brooklyn taxpayers.

Hopefully, if the Barclay Center proves to be no different from the dozens of other stadiums

¹²⁶ DEMAUSE, *supra* note 95, at 282.

¹²⁷ *Id.* at 288.

¹²⁸ *Id.*

¹²⁹ Norman Oder, *Instant gentrification at AY? The numbers are stark*, ATLANTIC YARDS REPORT (May 2, 2013, 4:13 PM), <http://atlanticyardsreport.blogspot.com/2006/09/instant-gentrification-at-ay-numbers.html>.

before it, this debate will finally put to rest the ever-popular contention that publicly-subsidizing arenas, be it through tax breaks or private to private eminent domain transfers, is not a boon to local taxpayers. If there is no economic benefit to building the arena, and the effect of using eminent domain in private to private transfers is to immediately gentrify an area, which seems to be code for "whiten culturally diverse neighborhoods," then it is difficult to imagine exactly what public use a stadium brings to the table, and therefore how it could satisfy even the minimal rational basis test. Surely though, the next one will be different.