COMMENTS

TAKING PRIVATE PROPERTY TO BUILD AN URBAN SPORTS ARENA: A VALID EXERCISE OF EMINENT DOMAIN POWERS?

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I. INTRODUCTION

On January 21, 2004, real estate developer Bruce C. Ratner, together with several partners, purchased the New Jersey Nets basketball franchise for $300 million dollars.[1] Mr. Ratner, through his real estate development company, Forest City Ratner Companies, proposes to bring the New Jersey Nets to Brooklyn, New York. He is planning a $3.5 billion dollar development project to construct an 800,000 square foot basketball arena along with a commercial and residential complex in Brooklyn's Atlantic Yards.[2]

This proposal has given rise to significant eminent domain issues because it requires the condemnation of private property to be used

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[1] Richard Sandomir & Charles V. Bagli, *Nets Are Sold for $300 Million, And Dream Grows in Brooklyn*, N.Y. TIMES, Jan. 22, 2004, at A1.

[2] Press Release, Forest City Enters., Forest City Announces Plans for Brooklyn Atlantic Yards (Jan. 23, 2004), *available at* http://ir.forestcity.net/phoenix.zhtml?c=88464&p=IROL-Release_Print&type=NewsRelease&id=487705 [hereinafter Forest City Enters.]; Nicholas Confessore, *Fewer Jobs and More Condos, Ratner's Opponents Complain*, N.Y. TIMES, Nov. 6, 2005, at 41. The arena project discussed in this article was in the proposal stage at the time the article was written and descriptions of the project reflect information current in the spring of 2006. The project is being used to illustrate the important eminent domain issues that arise from attempting to build a sports stadium in an urban area when such a proposal requires the taking of private property for conveyance to a private real estate developer. Regardless of the ultimate fate of this particular project or whether it may be achieved without condemnation, the state of eminent domain law and the issues discussed in this article have been updated and remain current and relevant.

by a private party in a location that has been described as "the crossroad of three handsome neighborhoods where brownstones routinely sell for $1.5 million, restaurants long ago went gourmet, and affordable housing disappears at an alarming rate."[3] There has been significant public outcry against Mr. Ratner's proposal by Brooklyn residents who challenge the constitutionality of the proposed condemnations as being for private rather than public use and who do not want to see the character of their neighborhood changed and commercialized by this redevelopment project.[4]

This article discusses the eminent domain issues arising from this proposal, with a focus on the law in New York. Part II presents an overview of eminent domain law in New York State including what meets the constitutional "public use" requirement. Other issues discussed in Part II include whether the Atlantic Yards area of Brooklyn would qualify as substandard such that this project would fall into the urban renewal context, in which case, the benefit that will accrue to the private real estate developer and sports franchise would be virtually irrelevant. Conversely, if the area is not substandard, it must be determined whether building an arena in Brooklyn serves some other valid public purpose dominant to the private benefit that would accrue. Part III compares the law of eminent domain in New York to that of other states and further evaluates the level of protection New York offers to property owners. Part IV discusses countervailing considerations including environmental conservation issues and an inquiry into the character of the neighborhood and aesthetics. Part V discusses possible remedies available to Brooklyn residents in opposing this proposal including statutory and constitutional challenges and related standing issues.

II. OVERVIEW: THE LAW OF EMINENT DOMAIN IN NEW YORK STATE

A. The Public Use Requirement

The New York State Constitution includes a takings clause providing that "[p]rivate property shall not be taken for public use without just compensation."[5] New York courts have broadly held

[3] Michael Powell, *For Brooklyn, a Celebration or a Curse?; Not Everyone is Pleased With $2.5 Billion Plan to Move NBA's Nets to Borough*, WASH. POST, Jan. 26, 2004, at A3.

[4] *See infra* Part II.D.

[5] N.Y. CONST. art I, § 7(a).

that the power of eminent domain applies to the government's purpose of protecting the "health, safety, and general welfare of the public,"[6] and accordingly, courts have held that a host of uses of private property are "public uses."[7] Courts also defer to the legislature and to state and municipal agencies in determining what constitutes a public use.[8]

1. Public Use vs. Public Purpose

Further broadening the concept of public use in New York, courts and the legislature do not seem to make a distinction between public use and public purpose or benefit despite the plain language of the New York State Constitution which specifies public use alone.[9] Section 204 of the New York Eminent Domain Procedure Law requires the condemnor of private property to specify "the public use, *benefit or purpose* to be served by the proposed public project."[10] Moreover, most New York Court of Appeals cases interchange the terms use, benefit, and purpose without making a distinction between them.[11] Historically, however, this was not always the case.

2. Historical Distinctions Between Public Use and Public Purpose.

The takings clause was first inserted into the New York State Constitution in 1821.[12] There is no indication of the legislative intent behind introducing this clause into the constitution; however, it has been recognized that though the language was based on the

[6] N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 155 (N.Y. 1936).

[7] *See*, *e.g.*, Waldo's, Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 76 (N.Y. 1989) (holding that the condemnation of land to rebuild an intersection to relieve traffic congestion is public use and serves a public purpose); *N.Y. City Hous. Auth.*, 1 N.E.2d at 153–56 (holding that the condemnation of private property to rebuild dwellings to improve slum conditions is a public use); Vitucci v. N.Y. City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (App. Div. 2001) (finding that the condemnation of property for construction of a public school is a public purpose). The New York State legislature has determined that use of private property for urban renewal purposes is also a valid public use. *See infra* Part II.B.

[8] *See*, *e.g.*, *N.Y. City Hous. Auth.*, 1 N.E.2d at 154. "[L]egislative findings and the determination of public use are not conclusive on the courts. But they are entitled at least to great respect, since they relate to public conditions concerning which the Legislature both by necessity and duty must have known." *Id.* (citation omitted).

[9] N.Y. CONST. art I, § 7(a). See also Part III.A for a discussion of the law in states that do make a distinction between public use and public purpose.

[10] N.Y. EM. DOM. PROC. LAW § 204(B)(1) (McKinney 2003) (emphasis added).

[11] *See*, *e.g.*, *Waldo's*, 543 N.E.2d at 76.

[12] N. Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 106 (1938) [hereinafter 1938 CONSTITUTIONAL CONVENTION].

Fifth Amendment to the United States Constitution, its inclusion merely codified existing New York state law.[13] A review of several early eminent domain cases indicates that through the 1920s New York adhered to a strict interpretation of the constitutional public use requirement and made a distinction between public use and, among other things, public benefits, purposes, interests, and improvements.

In 1837, the Court for the Correction of Errors of New York distinguished public use and public interest in a specific use of private property.[14] The court found a public use justifying the exercise of eminent domain to be one in which there was a "necessity, or at least an evident utility on the part of the public."[15] The court illustrated the public use/public interest distinction by comparing a privately owned railroad[16] and a turnpike: each individual is permitted to use public roads to his or her own benefit; however, railways are only available to their proprietors and only they may profit from the railways.[17] Although the court recognized the value of railways to the general public,[18] it cautioned that:

> When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations, upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us.[19]

Similarly, in 1888, the Court of Appeals stated that "[t]he expressions 'public interest' and 'public use' are not synonomous."[20] Examples of public uses included "providing public ways" such as

[13] *Id.*; ROBERT ALLAN CARTER, NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT 6 n.1 (2001).

[14] Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9, 61 (N.Y. 1837).

[15] *Id.* at 14.

[16] This example may be unfortunate because railroads generally are considered to be public uses; however, the court's explanation is useful.

[17] *Bloodgood*, 18 Wend. at 67.

[18] *Id.* at 64.

[19] *Id.* at 60–61.

[20] *In re* Niagara Falls & Whirlpool Ry. Co., 15 N.E. 429, 432 (N.Y. 1888).

railroads, turnpikes, and canals; building public parks; and those instances where "the government is supplying its own needs, or is furnishing facilities for its citizens in regard to . . . matters of public necessity, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise."[21] The court acknowledged that it is easier to define public use by what it is not than by what it is.[22] In this case, the court held that an attempt to take private property to build a private railroad that would serve only tourists visiting Niagara Falls was not sufficient to justify condemnation.[23]

The Court of Appeals further articulated this distinction in 1892 in *In re Mayor of New York*.[24] In this dispute over land to be taken for use as a wharf, the court stated that there is a difference between what is in the public interest and what is properly considered a public use and that eminent domain may only be used in the case of a public use.[25] The court required that for a use to be public "the public must . . . have the right to resort to the land or property for the use for which it was acquired, independently of the mere will or caprice of any private person or corporation in whom the title to the property would vest upon condemnation."[26] In other words, if the public could not use the land but for "the arbitrary will of the company," then the use was not public.[27] Here, the court held that the wharf was a public use because it would allow commercial shippers to "fulfill[] their obligations to the general public" by creating a mechanism through which they could make use of New York's ports.[28]

Finally, in *Holmes Electric Protective Co. v. Williams*, a case involving a dispute over the placement of power lines for use by a privately owned burglar alarm company, Justices Andrews and Cardozo, in their respective concurring and dissenting opinions,

[21] *Id.* at 432–33 (internal quotations omitted). The final category on this list is one of the three requirements for a finding of public use in Michigan pursuant to its recent decision in *Count of Wayne v. Hathcock*. *See infra* Part III.A.1.

[22] *In re Niagara Falls*, 15 N.E. at 433.

[23] *Id.* at 432.

[24] 31 N.E. 1043 (N.Y. 1892).

[25] *Id.* at 1044.

[26] *Id.* This is also the distinction between public use and public purpose recognized by the Supreme Court of Illinois. *See infra* Part III.A.2.

[27] *In re Mayor of N.Y.*, 31 N.E. at 1044.

[28] *Id.* at 1046. This holding is also consistent with the definition of public use articulated in *In re Niagara Falls* that includes public functions that may be impossible to achieve without the exercise of eminent domain. *See* 15 N.E. at 432.

addressed the definition of public use.[29] Justice Andrews stated that in order for a use to be public, "'[i]t must be for the benefit and advantage of all the public and in which all have a right to share—a use which the public have a right to freely enter upon under terms common to all. Public use necessarily implies the right of use by the public.'"[30] Further, it "must be one in which the public has a right to share impartially and one generally recognized by the settled practice as a fit purpose for the exercise of the power of condemnation."[31] Similarly, Justice Cardozo argued against the exercise of eminent domain in this situation because the burglar alarm company was "organized for the conveyance of a particular form of intelligence to a particular member of the public, i.e., to itself, in aid of a particular and private business."[32] Because the company was operated for a private purpose, the taking could not be for a public use despite its possible public utility.[33]

The New York State Constitutional Convention Committee of 1938 also considered the public use requirement in its *Problems Relating to Bill of Rights and General Welfare*.[34] The Committee noted that while takings of private property must be for a public use to be a valid exercise of eminent domain,

> [t]he term 'public use' as used in connection with the right of eminent domain, is not easily defined. The Legislature has no right to take the property of one individual and pass it over to another, unless the use to which it is to be applied is for the public benefit. . . . It is doubtless true that in order to make the use public, a duty must devolve upon the person or corporation holding the property to furnish the public with the use intended. The term implies the 'use of many' or 'by the public' but it may also be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual.[35]

The Committee listed examples of public uses such as public parks; a public market; providing electricity or water; building

[29] 127 N.E. 315, 320, 326 (N.Y. 1920) (Andrews, J., concurring; Cardozo, J., dissenting).

[30] *Id.* at 320 (Andrews, J., concurring) (quoting Bradley v. Degnon Contracting Co., 120 N.E. 89, 93 (N.Y. 1918)).

[31] *Id.*

[32] *Id.* at 326 (Cardozo, J., dissenting).

[33] *Id.*

[34] 1938 CONSTITUTIONAL CONVENTION, *supra* note 12, at 111–12.

[35] *Id.* at 111 (quoting Pocantico Water-Works Co. v. Bird, 29 N.E. 246, 248 (N.Y. 1891)).

public streets, subways, or railroads; and eliminating slums.[36] No substantive changes were made after the 1938 Convention with respect to the takings clause or the public use requirement in general.

Almost thirty years later at the Constitutional Convention of 1967,[37] two propositions, which were adopted for inclusion in the proposed constitution, reflected a change in attitudes regarding eminent domain. The proposed constitution was ultimately defeated when submitted to the people;[38] however, these propositions are relevant to this article and to the evolution of a broader understanding of when it is appropriate to take private property by eminent domain.

First, the takings clause of the bill of rights was to be amended from "[n]or shall private property be taken for public use without just compensation"[39] to "[n]o private property may be taken or damaged by condemnation except after a public hearing and upon the payment of just compensation, including the fair value of the good will of retail businesses, as defined by law."[40] This would have removed the public use requirement from the bill of rights.

Second, a miscellaneous amendment was proposed that, among other things, "authorize[d] the state or any local government or public corporation to acquire by purchase, gift or eminent domain such property as may be necessary for economic and community development."[41] "Economic and community development," defined elsewhere in the proposed constitution, "include[d] the renewal and rebuilding of communities, the development of new communities, and programs and facilities to enhance the physical environment, health and social well-being of, and to encourage the expansion of economic opportunity for, the people of the state."[42] This broad language would have effectively allowed any government taking of private property that would have "development" as its purpose without requiring a finding of blight or any other traditionally recognized public use.

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[36] *Id.* at 111–12.

[37] The 1967 Convention is the most recent New York Constitutional Convention. NEW YORK STATE CONSTITUTION: AMENDED TO JANUARY 1, 1986 (1986).

[38] *Id.*

[39] 1938 CONSTITUTIONAL CONVENTION, *supra* note 12, at 106.

[40] 1967 NEW YORK CONSTITUTIONAL CONVENTION RECORD AND INDEX 286 (1967) [hereinafter 1967 CONSTITUTIONAL CONVENTION].

[41] *Id.* at 291.

[42] *Id.* at 289.

The 1967 proposed constitution was defeated, and the original public use requirement remains. Further, no laws have been enacted to date which explicitly allow takings for broad "economic and community development." However, as will be discussed throughout this article, because the law in New York now encompasses a more expansive understanding of public use, as well as a broad definition of blight for urban renewal purposes, the effect of the law could result in condemnation of private property for conveyance to a private party for loosely defined economic development purposes.

3. Modern Treatment of the Public Use Requirement

While there is a historical foundation for strict treatment of the public use requirement, a broader reading of public use has evolved. As noted above, when interpreting the New York State Constitution today, most Court of Appeals cases interchange the terms use, benefit, and purpose without making a distinction between them.[43] This is consistent with the fact that the United States Supreme Court does not recognize a distinction between public use and public purpose under the Federal Constitution.[44] In *Hawaii Housing Authority v. Midkiff*, the United States Supreme Court stated that "where the exercise of the eminent domain power is rationally related to a conceivable public *purpose*, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[45] The Court recently reaffirmed *Midkiff* in June 2005 when it decided *Kelo v. City of New London*.[46] The Court applied what it classified as the "broader and more natural interpretation of public use as [being synonymous with] 'public purpose'" to hold that taking private property in an area the legislature determined to be in need of "economic rejuvenation" was valid under the Fifth Amendment.[47]

Although the United States Supreme Court has adopted this broad rational basis standard to determine whether an exercise of eminent domain power is valid, the New York Court of Appeals has applied a heightened level of review.[48] For example, in *Jackson v.*

[43] *See*, *e.g.*, Waldo's, Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 76 (N.Y. 1989).

[44] *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984).

[45] *Id.* at 241 (emphasis added).

[46] 125 S. Ct. 2655 (2005), *reh'g denied*, 126 S. Ct. 24 (2005).

[47] *Id.* at 2662, 2665. The *Kelo* decision is discussed in further detail at Part V.B.II below.

[48] The only New York State Court of Appeals case to cite *Midkiff* is *Jackson v. N.Y. State Urban Development Corp.*, 494 N.E.2d 429, 441 (N.Y. 1986), and the court indicated that New

New York State Urban Development Corp., the court quoted the above language in *Midkiff* as the law under the Federal Constitution but then stated that "[t]he [Eminent Domain Procedure Law] requires even more: upon challenge [to its findings regarding the quality of land to be condemned], an agency must present to a court 'an adequate basis upon which it concluded that the land was substandard.'"[49] Despite this language, there seems to be some discrepancy in the appellate departments of New York. Both the First and Fourth Departments of the Appellate Division have followed *Jackson* but have adopted and quoted only the federal rational basis language, ignoring the subsequent qualifying language with respect to the Eminent Domain Procedure Law.[50]

The Court of Appeals used rational basis language in 1936 in *New York City Housing Authority v. Muller*, but it required something more and stated:

> Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it. . . . . [I]f the menace is serious enough to the public to warrant public action and the power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers [here, eminent domain] is employed.[51]

Significantly, the Court of Appeals rested its opinion on an underlying finding of blight as well as unsanitary, substandard, and

York offers even greater protection under the Eminent Domain Procedure Law. *Id.*

[49] *Id.* (quoting Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 334 (N.Y. 1975)); *see infra* Part II.B (noting that the Court of Appeals requires agencies to lay out a factual basis for a finding of substandard conditions).

[50] *See* Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency, 750 N.Y.S.2d 212, 220 (App. Div. 4th Dep't 2002); W. 41st St. Realty LLC v. N.Y. State Urb. Dev. Corp., 744 N.Y.S.2d 121, 125 (App. Div. 1st Dep't 2002); *In re* Fisher, 730 N.Y.S.2d 516, 516–17 (App. Div. 1st Dep't 2001). Of note is that the court in *West 41st Street Realty* premised its decision on a finding of blight in the area to be condemned and that eradicating this blight was the public purpose to which the condemnation was rationally related. 744 N.Y.S.2d at 125. *In re Fisher* involved condemnation of private property for the purpose of expanding the New York Stock Exchange which would allow it to continue in its location in the Wall Street area of Manhattan. 730 N.Y.S.2d at 516–17. The function of the New York Stock Exchange in providing "increased tax revenues, economic development and job opportunities" as well as its role in preserving "New York's prestigious position as a worldwide financial center" was sufficient to justify the condemnations. *Id.* at 517.

[51] 1 N.E.2d 153, 155 (N.Y. 1936).

slum conditions in the area to be condemned.[52] Further, the condemnation proceedings were initiated under a statute, now codified under the New York State General Municipal Law, that recognizes renewal of substandard conditions as a valid public use.[53]

In the sports and recreation context, the major conflict is between the broad reading of public use and purpose that includes fostering recreation as a valid public purpose[54] and comprises a broad reading of blight, and the settled law in New York that states, aside from urban renewal, where there is benefit to a private entity, the public purpose must be "dominant" over the private benefit.[55]

B. Urban Renewal

Historically, courts have held that condemning private property for use in alleviating slum-like conditions is a valid public use warranting the exercise of eminent domain. The New York State Legislature also has explicitly stated that urban renewal is a valid public purpose and use of land for which a municipality may extend its takings power.[56] The legislature found that many areas in New York State

> are slum or blighted, or . . . are becoming slum or blighted areas because of substandard, insanitary, deteriorated or deteriorating conditions, factors, and characteristics . . . . [and that] [t]he existence of such areas constitutes a serious and growing menace, is injurious to the public safety, health, morals and welfare, contributes increasingly to the spread of crime, juvenile delinquency and disease, necessitates excessive and disproportionate expenditures of public funds for all forms of public service and constitutes a negative influence on adjacent properties impairing their economic soundness and stability, thereby threatening the source of public revenues.[57]

The primary focus of urban renewal is on the safety, health, and

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[52] *See id.* at 154–55.

[53] *See id.* at 153–54; N.Y. GEN. MUN. LAW § 501 (McKinney 1999); *see also infra* Part II.B.

[54] *See* Murphy v. Erie County, 268 N.E.2d 771, 774 (N.Y. 1971); *infra* Part II.C.

[55] Waldo's, Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 76 (N.Y. 1989) ("[A]n incidental private benefit will not invalidate an agency's determination so long as the public purpose is dominant."); *see also* Denihan Enters., Inc. v. O'Dwyer, 99 N.E.2d 235, 238 (N.Y. 1951); *infra* Part II.C.

[56] N.Y. GEN. MUN. LAW § 501 (setting forth policy and purposes of Article 15, Urban Renewal).

[57] *Id.*

welfare of the people of New York while at the same time promoting economic growth of municipalities.[58] Section 501 of the New York State General Municipal Law suggests that these dual goals can be accomplished in slum-like areas through active restoration and rehabilitation improvement programs initiated by both the public and private sectors.[59] The statute specifically encourages and favors the involvement of private entities in such programs.[60]

Section 503 of the General Municipal Law grants municipalities all powers "necessary or convenient" to accomplish urban renewal projects.[61] Section 501 explicitly sets forth that the use of these powers to accomplish the goals of urban renewal constitutes a valid public use and purpose for which public funds can be spent.[62] A municipality's power includes the power to condemn private property when the municipality is unable to come to an agreement for the property's purchase.[63]

As set forth above, urban renewal has historically applied to "blighted areas" where municipalities had an interest in "remov[ing] 'substandard and insanitary' conditions which threatened the health and welfare of the public."[64] The Court of Appeals in *Cannata v. City of New York* held that "an area does not have to be a 'slum' to make its redevelopment a public use."[65] In *Yonkers Community Development Agency v. Morris*, the Court of Appeals further instructed that the term "blighted" is to be liberally construed and set forth several factors to be considered in determining whether an area is substandard for urban renewal purposes.[66] These factors include, among others, "economic

[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* § 503.
[62] *Id.* § 501.
[63] *Id.* § 74.
[64] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 330 (N.Y. 1975) (quoting N.Y. CONST. art. XVIII, § 1).
[65] 182 N.E.2d 395, 397 (N.Y. 1962) (upholding a planning board's decision to condemn residential property in furtherance of an industrial redevelopment initiative when area was found to be "predominately vacant, poorly developed and organized").
[66] 335 N.E.2d at 332. Adopting a broad reading of blight is consistent with the United States Supreme Court case of *Berman v. Parker* wherein the Court held that redevelopment of slum and blighted areas falls into a "concept of the public welfare [that] is broad and inclusive" such that the government's exercise of eminent domain in this context is clear. 348 U.S. 26, 33 (1954). The Court validated the District of Columbia's condemnation of plaintiff's property on which stood a department store, despite the fact that the store itself was not insanitary nor "slum housing." *Id.* at 31, 36. Since the redevelopment plan was necessary for the public welfare, the Court deferred to the legislature's finding that it was necessary to

underdevelopment and stagnation[,]" crime, unsanitary conditions, an "incompatib[le] . . . mixture of residential and industrial property," traffic problems, poorly planned zoning, and various other threats to public health and safety.[67] The court reiterated that to be considered substandard for these purposes, it was not necessary for an area to be considered a "slum."[68]

In the urban renewal context, so long as an urban redevelopment agency has shown the area to be substandard, condemnation of private property for urban renewal is a valid public purpose even if there is some benefit to a private entity.[69] Thus, in *Yonkers Community Development Agency*, that the condemned private property was to be turned over for the expansion of a private elevator company which employed a significant number of residents did not negate the valid public purpose of the company's expansion in facilitating urban renewal.[70] However, the court emphasized the requirement that the urban redevelopment agency lay out the factual basis for finding the area was substandard and therefore qualified for urban renewal at the outset.[71]

The Appellate Division, Second Department in *Vitucci v. New York City School Construction Authority* similarly held that using an owner's condemned property for the expansion of a food production business was valid in the urban renewal context.[72] The plaintiff's property had been properly condemned for use in constructing a public school[73] but when the school project was later abandoned, Vitucci challenged his property's condemnation for the expansion of the food production business.[74] Vitucci argued that under section 406(A) of the New York Eminent Domain Procedure Law, New York City could not dispose of his condemned property for private use without first offering him the opportunity to buy back the property since the project had been abandoned within ten years of the city's acquisition of the property.[75]

The Second Department reiterated the principle that, in the

"redesign the whole area so as to eliminate the conditions that cause slums" which included the condemnation of plaintiff's property. *Id.* at 34.

[67] *Yonkers Cmty. Dev. Agency*, 335 N.E.2d at 330, 332.

[68] *Id.* at 330.

[69] *Id.* at 331.

[70] *Id.* at 330–31.

[71] *Id.* at 332.

[72] 735 N.Y.S.2d 560, 560–62 (App. Div. 2001).

[73] *Id.* at 561.

[74] *Id.*

[75] *Id.*; *see* N.Y. EM. DOM. PROC. LAW § 406(A) (McKinney 2003).

urban renewal context, a municipality may condemn private property for public use and to stimulate commercial and economic growth in the community even though the acquisition may benefit a private entity as well.[76] Here, using Vitucci's property for the expansion of "the facilities of a major employer and economic force in the area" was a valid public use in the urban renewal context and therefore did not trigger the "right of first refusal" under section 406(A).[77]

Once in the urban renewal context, the burden on the municipality is relatively low because as long as the agency sets out sufficient facts for a showing that the area is substandard, this finding is given great deference by the courts,[78] and there is no need to consider the extent or nature of the private benefit.[79] However, if the area is not substandard so as to qualify for urban renewal, the burden on the municipality is higher because it must show "that its taking was for another public purpose and, *if there was also a private benefit involved, that the public purpose was dominant*."[80]

C. Outside of Urban Renewal: When is Public Benefit Only Incidental to Private Benefit?

Outside of the urban renewal context, condemnation of private property theoretically should not be a valid exercise of a municipality's eminent domain powers if the public use of the land is "only incidental and in large measure subordinate to the private benefit to be conferred" on the private development company.[81] In *Denihan Enterprises, Inc. v. O'Dwyer*, the City of New York made a contract with New York Life Insurance Company to condemn private property that would then be leased to New York Life for the purposes of constructing a parking garage including storage facilities for tenants of an apartment building the company owned across the street.[82] The plaintiff alleged that the condemnation was illegal because it served a private, not public, purpose.[83]

With respect to the parking garage, the Court of Appeals

[76] 735 N.Y.S.2d at 562.
[77] *Id.*
[78] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975).
[79] *Id.* at 331.
[80] *Id.* (emphasis added).
[81] Denihan Enters., Inc. v. O'Dwyer, 99 N.E.2d 235, 238 (N.Y. 1951).
[82] *Id.* at 237.
[83] *Id.*

acknowledged that condemning private property for parking serves a valid public purpose of relieving traffic problems.[84] However, the plaintiffs survived summary judgment by pleading sufficient facts indicating that any public use was minor and substantially subordinate to the private benefit New York Life would receive.[85] Specifically, when the 308 existing parking spaces were condemned to accommodate the parking garage and storage facilities were provided for all of New York Life's tenants, the effect would be that only seventeen parking spaces would be available for public use.[86] Additional evidence that the parking garage served a primarily private purpose included its low height requirement for a light and air easement for the apartment's tenants and the requirement that half of the garage's roof would be landscaped into a park for the tenants' private use.[87] Each of these requirements diminished the number of parking spaces that could have been used by the public to relieve traffic congestion, the company's purported public purpose.[88]

The Court of Appeals in *Murphy v. Erie County* distinguished *Denihan Enterprises* in the stadium context.[89] In this case, the plaintiffs challenged a management contract with a private company, rather than the condemnation of private property.[90] Here, the court acknowledged that the stadium "'provid[ed] for the benefit of, *the people of the county of Erie*, recreation, entertainment, amusement, education, enlightenment, [and] cultural enrichment.'"[91] However, the plaintiffs argued that "the county converted the stadium into a private use for [the company's] benefit" when it entered a forty-year lease agreement and a twenty-year management contract with the private entity.[92] The court held that the stadium served a primarily public purpose to which the company's benefit was merely incidental.[93] Quoting its language in *Denihan Enterprises*, the court went on to say that "'[a]n incidental private benefit' . . . 'is not enough to invalidate a project which has for its primary object a public purpose.'"[94] So long as the primary

[84] *See id.* at 238.
[85] *Id.*
[86] *Id.* at 239.
[87] *Id.*
[88] *Id.* at 238.
[89] 268 N.E.2d 771, 774 (N.Y. 1971).
[90] *Id.*
[91] *Id.* (quoting 1968 N.Y. Laws 421).
[92] *Id.*
[93] *Id.*
[94] *Id.* (quoting Denihan Enters., Inc. v. O'Dwyer, 99 N.E.2d 235, 238 (N.Y. 1951)).

purpose of the stadium was for the public's recreational use, the contracts were valid.[95]

This case reveals that the outcome might be different if a distinction between public use and public purpose was made. For example, if, for the public use requirement to be met, the public must be allowed entry to the facility by right, the fact that the public would have to pay to use the privately-owned stadium could change the outcome. As discussed above, this distinction was historically recognized in New York.[96] Further, as will be discussed in Part III.A *infra*, this distinction has recently been articulated by the Supreme Court of Illinois where a public use requires the public entering a facility "by right" in contrast to the public experiencing a benefit that may incidentally flow from the facility, such as recreation, safety, or economic growth.[97]

D. Where Does Brooklyn's Atlantic Yards Fit in?

The Brooklyn Atlantic Yards site is adjacent to the Atlantic Terminal, which is one of New York City's largest transportation centers, servicing nine different subway lines and the Long Island Railroad.[98] The arena project would begin at the intersection of Flatbush and Atlantic Avenues and spill into the Prospect Heights neighborhood of Brooklyn.[99] The community has protested the proposal to develop the area adjacent to the actual rail yards. This area includes neighborhoods that have been developing on their own as part of Brooklyn's transformation in recent years into a desirable, trendy, residential area with beautiful brownstones and chic restaurants and cafes.[100] Opponents of the project fear that a huge arena will "overwhelm[] two thriving, low-rise neighborhoods"[101] which have been described as being "in the heart of historic Brownstone Brooklyn."[102]

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[95] *Id.*

[96] *See supra* Part II.A.2.

[97] *See* Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002).

[98] *See* Forest City Enters., *supra* note 2.

[99] *See* Deborah Kolben, *Bulldozed,* BROOKLYN PAPERS, Dec. 22, 2003, *available at* http://www.brooklynpapers.com/html/issues/_vol26/26_51/26_51nets1.html.

[100] *See*, *e.g.*, *"Welcome to the Neighborhoods": Beyond the Slope*, N.Y. MAG., Mar. 10, 2003, *available at* http://www.newyorkmetro.com/nymetro/realestate/features/realestate2003/n_8427/index22.html [hereinafter *Welcome to the Neighborhoods*].

[101] Press Kit, Develop—don't destroy. Brooklyn, Choice, *available at* http://developdontdestroy.org/public/dddb-kit042504.pdf (last visited July 30, 2006) [hereinafter Choice].

[102] Develop—don't destroy. Brooklyn, *What's Wrong with Ratner's Proposal?*,

The Prospect Heights neighborhood has in recent years grown into a desirable place to live and socialize, particularly for young professionals, and gained some recognition alongside the bordering Park Slope neighborhood.[103] Between 2001 and 2003, property values in Prospect Heights increased from a range of $350,000 to $600,000 for a townhouse to a range of $500,000 to $1.3 million.[104] Increases have also been reported in the purchase prices and rental rates of studios and one and two bedroom apartments.[105] While the arena project will not physically encroach upon a substantial segment of the Prospect Heights neighborhood, it will require condemnation of some housing on the outskirts. Further, the arena's commercial character and size are not consistent with the spirit of the surrounding neighborhoods and the direction in which Brooklyn has been moving as a whole.

Based on these facts, it is doubtful that the residential area that would be affected by the proposed arena project is blighted in the common sense of the word nor would it be characterized as such under a more liberal reading of blight recognized by the Court of Appeals in *Yonkers Community Development Agency*.[106] However, because the Court of Appeals has emphasized that blight is to be construed liberally and that courts are to give deference to agency and municipal determinations regarding blight,[107] the question of whether this project will fall into the urban renewal context is left open. Ultimately, the outcome will depend upon agency findings, discussed at Parts IV.C and V.A *infra*, and the courts' final review of the facts supporting these agency determinations.

III. HOW SHOULD THE COURTS TREAT PRIVATE REAL ESTATE DEVELOPMENT PROJECTS IN AREAS THAT DO NOT FALL INTO THE URBAN RENEWAL CONTEXT?

As discussed in Part II.C. *supra*, when an area is not blighted, one must consider whether the public use is only incidental to private benefit. Thus, while the New York courts have held a variety of functions valid public uses, whether a public purpose or use is sufficiently being served is a more difficult question in the context of

http://www.developdontdestroy.org/whatswrong.php (last visited July 30, 2006).

[103] *See Welcome to the Neighborhoods*, *supra* note 100.

[104] *Id.*

[105] *Id.*

[106] *See* 335 N.E.2d 327, 332 (N.Y. 1975); *supra* Part II.B.

[107] *Yonkers Cmty. Dev. Agency*, 335 N.E.2d at 332.

a private real estate development project at a location that is not considered blighted. This section will examine how other state courts have treated takings for private development projects, both generally and in the sports stadium context, and compare the level of protection offered to that in New York State. This section will also propose that since sports stadiums seem to provide a dominant public benefit primarily when they are developed in blighted areas, New York should require a finding of blight, taking into consideration existing neighborhood and community character, before a private sports stadium development project is approved.

A. Treatment of the Public Use-Public Purpose Issue in Other States

1. Michigan: Potential Move Toward a General Requirement of Blight

In July 2004, in *County of Wayne v. Hathcock*,[108] the Supreme Court of Michigan revisited its 1981 holding in *Poletown Neighborhood Council v. City of Detroit*.[109] *Poletown* was a case of national significance in the context of mutual public and private benefits.[110] Before addressing the implications of the *Hathcock* decision, it is necessary to review the court's decision in *Poletown* as well as the underlying facts.

Poletown arose out of the Detroit Economic Development Corporation's plan to condemn private property that would then be conveyed to General Motors for use in construction of a plant.[111] The plaintiff property owners challenged this exercise of eminent domain as "a taking of private property for private use."[112] The city's contended public purpose in condemning plaintiffs' property for conveyance to General Motors was to improve the city's economy by increasing industrial development.[113] The plaintiffs, on the other hand, argued that the public benefit was only incidental to the primary private benefit of profit to General Motors.[114] Whether the

[108] 684 N.W.2d 765 (Mich. 2004).

[109] 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[110] *See* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 418–21 (1983).

[111] 304 N.W.2d at 457.

[112] *Id.*

[113] *Id.* at 459.

[114] *Id.* at 458.

private benefit was in fact dominant to the public benefit and the taking therefore invalid was the dispositive issue before the court.[115]

The court stated that where there is a "public need" an individual's private property rights must come second to the rights of the community.[116] Here, the "public need" was to rejuvenate the community's economic character which included increasing employment rates.[117] The court held that the benefit to General Motors was "merely incidental" to the "clear and significant" (as opposed to "speculative or marginal") public need such that condemning the plaintiff's property for conveyance to General Motors was a valid exercise of eminent domain.[118]

The Supreme Court of Michigan revisited this issue in 2004 and reconsidered the *Poletown* holding in *Hathcock*.[119] In this case, the defendant property owners in a condemnation action challenged the taking of their property for use in building a 1,300 acre business and technology complex.[120] Wayne County initiated condemnation actions against the defendants with the intention of constructing the business and technology park.[121] The alleged public purpose was to "reinvigorate the struggling economy of southeastern Michigan by attracting businesses, particularly those involved in developing new technologies, to the area."[122] One of the main issues before the court was whether *Poletown's* "public purpose" test was constitutional under article 10, section 2 of the Michigan Constitution which provides that "'[p]rivate property shall not be taken for public use without just compensation.'"[123]

Relying extensively on Justice Ryan's dissent in *Poletown*, the *Hathcock* court set forth three characteristics of condemnations, any of which would be a constitutional public use of private property.[124] The first was a condemnation "involv[ing] 'public necessity of the extreme sort otherwise impracticable [without government condemnation].'"[125] For example, condemning private property so

[115] *See id.*
[116] *Id.* at 459.
[117] *Id.*
[118] *Id.* at 459–60.
[119] 684 N.W.2d 765 (Mich. 2004).
[120] *Id.* at 770.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 772, 779 (quoting MICH. CONST. art. X, § 2). Michigan relied exclusively on its state constitution for its analysis. *See id.* at 770.
[124] 684 N.W.2d at 781.
[125] *Id.* (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

that railroad track may be laid in a straight line.[126] Second, a condemnation will meet the public use requirement "when the private entity remains accountable to the public in its use of that property."[127] For instance, when private land is taken for conveyance to a private water company, the company must provide its services to the public, and the public interest is protected by governmental oversight.[128] Finally, the condemnation is constitutional when it is, in itself, a public use of land.[129] The quintessential example of this type of use is condemning property to alleviate blighted or slum conditions.[130] The court referred to its prior decision in *In re Slum Clearance*, when the court permitted the city of Detroit to condemn blighted housing where the city's "controlling purpose" was to advance public health and safety by removing unfit housing.[131]

Applying this three-part inquiry to Wayne County's business and technology complex proposal, the court held the condemnations unconstitutional.[132] First, the project was not one "'whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.'"[133] Obviously, a business and technology complex can exist absent the government's condemnation of private property.[134] Second, the complex would not be subject to public control as its units would be conveyed to private, self-interested parties seeking their own financial gain.[135] Third, the condemnation of the defendant's private property would provide no public benefit at the outset.[136] Only after the land was condemned and conveyed to private parties might any public benefit accrue.[137]

In overturning the *Poletown* test, the Michigan Supreme Court made a significant distinction between a "public use" and a "public purpose."[138] The Hathcock court held that there must be "facts of

[126] *Id.* at 781–82.
[127] *Id.* at 782.
[128] *See id.*
[129] *Id.* at 782–83.
[130] *Id.* at 783.
[131] *Id.* (emphasis omitted).
[132] *Id.* at 783–84.
[133] *Id.* at 783 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).
[134] *See id.* at 783–84.
[135] *Id.* at 784.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 784–85, 787.

independent public significance (such as the need to promote health and safety) that might justify the condemnation" of private property.[139] This means that the focus of the inquiry should be on whether the condemnation is a public use of the land in and of itself (by, for example, removing blight), as opposed to whether the subsequent use of the land would serve some public purpose.[140] The implication of this distinction seems to be the court adopting a general requirement of blight or substandard conditions when the first two factors are not met.

2. Illinois: Distinguishing Between Public Use and Public Purpose

The Supreme Court of Illinois addressed the question of whether taking private property that was not blighted to expand the parking facilities of a privately-owned racetrack was a valid public use under the Illinois Constitution in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*[141] The Illinois Constitution limits the state's "inherent right to condemn property" by requiring that the taking be for public use and with just compensation.[142]

The Southwestern Illinois Development Authority (SWIDA) argued that the taking would accomplish a public purpose by encouraging economic development and public safety as well as preventing or abolishing blight.[143] In holding the taking invalid, the Supreme Court of Illinois made a distinction between "public purpose" and "public use" and rejected SWIDA's argument that the terms have merged and that the necessary test revolved around whether the taking achieved a public purpose.[144] Relying heavily on its 1903 decision in *Gaylord v. Sanitary District of Chicago*, the court defined a public use as one where "'[t]he public must be to some extent entitled to use or enjoy the property, not as a mere

[139] *Id.* at 784.

[140] *See id.* Thus, in *Poletown*, the court should have looked at whether condemning the plaintiff property owner's land itself served the public rather than whether the subsequent conveyance of that land to General Motors would serve a public purpose in stimulating the economy.

[141] 768 N.E.2d 1, 3, 9 (Ill. 2002). The court articulated the issue as being "whether this taking achieves a legitimate public use . . . and, therefore, whether eminent domain powers authorized by the State of Illinois were improperly exercised in the taking of private property from one private entity for the benefit and use of another private entity." *Id.* at 7 (citation omitted).

[142] *Id.* at 7.

[143] *Id.* at 8. The court found that the area was not blighted. *Id.* at 9.

[144] *Id.* at 8.

favor or by permission of the owner, but by right.'"[145] The court acknowledged that a new parking facility would serve some public purposes, provide a great benefit by alleviating long lines of traffic, and foster public safety through safer access to the racetrack from the parking area.[146] However, in light of the fact that the public would have to pay for the use of the parking area, these benefits alone were not sufficient to meet the public use requirement.[147] Further, while increased parking might allow for more spectators and consequently contribute to economic growth in the area, every business accomplishes this goal; therefore, the court stated that more than a simple public benefit must result from the proposed improvement.[148]

In this case, where the public would have to pay for the use of the proposed parking facility, the court found that the "racetrack may be open to the public, but not 'by right.' It is a private venture designed to result not in a public use, but in private profits."[149] Moreover, the court opined that the taking was not predominantly intended to benefit the public; rather, such a taking was intended only to assist the developer in his own economic goals.[150] The court also put significant weight on the fact that the developer had access and means to obtain other property on which to build the parking facility but that it was more economical to petition SWIDA to condemn the property at issue.[151]

B. Other States' Treatment of Takings for Sports Stadium Purposes

1. Massachusetts

Before an athletic stadium that will be "primarily or substantially" used by a private, professional sports team can be built or acquired with public monies, Massachusetts requires legislative standards to protect the public interest.[152] These

[145] *Id.* at 9 (quoting Gaylord v. Sanitary Dist. of Chicago, 68 N.E. 522, 524 (Ill. 1903)).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* (citation omitted) (quoting *Gaylord*, 68 N.E. at 524).
[150] *Id.* at 10.
[151] *Id.*
[152] City of Springfield v. Dreison Invs., Inc., Nos. 19991318, 991230, 000014, 2000 WL 782971, at *41 (Mass. Super. Ct. Feb. 25, 2000). For other states that have upheld municipal takings and public financing for the purposes of building a sports stadium when legislation has been enacted to protect the public's interests, see City of Anaheim v. Michel, 66 Cal. Rptr.

statutory controls must be

> designed "to protect whatever public interest there may be in having the facilities available to a diversity of users on a fair basis, and not, for example, placed so exclusively at the disposal of one or more particular users that an equitable amount of use by others will be unduly restricted."[153]

The Superior Court of Massachusetts applied this principal in striking down the City of Springfield's taking, by eminent domain, of land which was to be leased to a private minor league baseball team for the purpose of building a stadium.[154] Because no statutory scheme was in place with regard to this particular project, the court found that the public's interests were not sufficiently protected to warrant a taking that would primarily benefit a private entity.[155]

2. Pennsylvania

The Supreme Court of Pennsylvania adopted the view that a stadium has an inherently public nature.[156] In *Martin v. Philadelphia*, which involved a dispute over public financing of a sports stadium, the court cited the lower court's rationale that public purposes are not limited to municipal purposes such as streets, water, sewers, and police protection. Instead, public purposes encompass anything relating to public education, recreation, or pleasure including museums, parks, libraries, and gardens; a sports stadium also falls under this umbrella because it is public recreation.[157] Similarly, Justice Musmanno, in his concurring opinion in *Conrad v. City of Pittsburgh*, observed that

> [t]here is need today to provide the public with facilities for

543, 545–46 (Ct. App. 1968) (allowing condemnation of private property for expansion of stadium's parking facilities based upon statutory authority that operation of "public assembly facilities" is a public use); Libertarian Party of Wis. v. State, 546 N.W.2d 424, 428, 440 (Wis. 1996) (upholding Wisconsin Stadium Act based upon legislative findings regarding the public purposes to be served by professional baseball stadium); Lifteau v. Metro. Sports Facilities Comm'n, 270 N.W.2d 749, 751–52, 757 (Minn. 1978) (affirming public financing of the reconstruction of baseball and football stadium when Minnesota legislation adequately protected public's interests and imposed conditions to be met before public monies could be expended).

[153] *Dreison Invs.*, 2000 WL 782971, at *42 (quoting Opinion of the Justices, 250 N.E.2d 547, 560 (Mass. 1969)).

[154] *Id.* at *1, *50.

[155] *Id.* at *46–47.

[156] *See* Martin v. City of Phila., 215 A.2d 894, 896 (Pa. 1966); Conrad v. City of Pittsburgh, 218 A.2d 906, 908 (Pa. 1966).

[157] *Martin*, 215 A.2d at 896.

> recreation, sports and enjoyment of outdoor athletic competition. Even passive participation as an onlooker in competitive sports stimulates a desire for physical exercise. In any event it takes the spectator into the open air and provides him with exuberant escape from the cares of the day and arms him with recharged energy to meet responsibilities as a citizen. All this helps to build up a healthy community.[158]

The court in *Martin* further found that even if the stadium's primary use were to be by privately owned clubs, this would not conflict with the stadium's public nature.[159] The city would be leasing the stadium to provide for the public's recreation and pleasure, rather than a situation where the city was privately leasing buildings or promoting sporting events, which might not be a public use.[160]

C. How Should New York Treat This Issue?

The New York Court of Appeals and the New York State Legislature do not currently interpret the New York Constitution as making a distinction between public use and public purpose.[161] The current state of the law, therefore, does not seem to point in the same direction of the Illinois Supreme Court which makes such a distinction and requires that for a use to be public, the public must be allowed to enter and use the property by right.[162] The Michigan Supreme Court's decision in *Hathcock* likewise rests on a crucial distinction between public use and public purpose.[163] Further, unlike many of the states discussed above, New York has neither passed legislation with regard to sports stadiums and arenas, either generally or with respect to this proposal, nor has it made any findings on the public use or purpose served by such facilities.[164] If

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[158] *Conrad*, 218 A.2d at 914 (Musmanno, J., concurring).

[159] *Martin*, 215 A.2d at 896.

[160] *Id.*

[161] *See supra* Part II.A.

[162] *See supra* Part III.A.2

[163] *See supra* Part III.A.1.

[164] However, the New York State Legislature has made findings with respect to other sports related economic development projects. For example, the Olympic Games Facilitation Act, codified at article 16, sections 340 through 348 of the Economic Development Law, was designed to ensure that New York would meet the Olympic committee's requirements to host the 2012 summer Olympic Games. N.Y. ECON. DEV. LAW § 341 (McKinney Supp. 2006). New York City Mayor Michael Bloomberg indicated that the proposed arena in Brooklyn's Atlantic Yards would be used for Olympic Games purposes should New York City be chosen. Deborah

and when New York passes such legislation, the case law indicates that the courts will give substantial deference to legislative findings, so long as they comply with article 1, section 7 of the New York State Constitution.[165]

Currently, in New York, if the proposed development site is blighted or substandard, the project will fall into the urban renewal context and taking private property with compensation for redevelopment will be a valid public use. If the area is not blighted, there must be another valid public use or purpose for the taking and it must be dominant to the benefit accrued by the private developer.[166] In the sports stadium context, studies have shown that unless an area is blighted, "net economic benefits to cities subsidizing sports facilities are rare."[167] This would indicate that outside of the urban renewal context, the public benefit flowing from the stadium project is likely to be inferior to the private benefit and profits accrued by the private developers.

This Article proposes that New York's broad reading of blight together with its failure to recognize a distinction between public use and public purpose does not offer substantial protection to property owners. First, a court is likely to find that a slightly economically-depressed area or even an up-and-coming area would be substandard under a liberal reading of blight. Second, even if an area were to survive that analysis and fall outside of the urban renewal context, New York's failure to make a distinction between public use and public purpose also works against property owners in the public use versus private benefit analysis. The *Hathcock* test, on the other hand, provides for more protection by requiring a finding of blight when the taking is not for inherently public

Kolben, *Mayor Ties Ratner Arena to Olympics*, BROOKLYN PAPERS, Aug. 7, 2004, *available at* http://www.brooklynpapers.com/html/issues/_vol27/27_31/27_31nets1.html. Nonetheless, the Economic Development Law and the Olympic Games Facilitation Act thereunder did not mention the exercise of the municipality's condemnation powers with respect to the Olympic Games. In fact, the Economic Development Law does not mention condemnation at all. Ultimately, however, New York City was not chosen as the site of the 2012 Olympic Games.

[165] *See*, *e.g.*, N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153, 153–54 (N.Y. 1936). *Muller* refers to the former eminent domain provision in article 1, section 6 of the New York State Constitution. *Id.* at 153.

[166] *See* Waldo's, Inc. v. Vill. of Johnson City, 543 N.E.2d 74, 76 (N.Y. 1989); Denihan Enters., Inc. v. O'Dwyer, 99 N.E.2d 235, 238 (N.Y. 1951); *supra* Part II.C. Further, as discussed above, the Court of Appeals has in the past deferred to legislative findings, aimed at a particular project, that recreation is a valid public purpose.

[167] Mildred Wigfall Robinson, *Public Finance of Sports Stadia: Controversial but Permissible . . . Time for Federal Income Tax Relief for State and Local Taxpayers*, 1 VA. SPORTS & ENT. L.J. 135, 139 (2002).

purposes.[168] Acknowledging that the *Hathcock* decision rested on Michigan constitutional interpretation and is unique to that state, this article nonetheless proposes that the *Hathcock* test is a better standard for reviewing proposed takings that will benefit private parties. Because New York does not make the public use/public purpose distinction essential to the *Hathcock* test, this article alternatively suggests that where a neighborhood has been developing and improving economically on its own and where there is a significant community and neighborhood character to be preserved, the definition of blight should be applied narrowly in order to provide greater protection to property owners.

IV. ENVIRONMENTAL CONSIDERATIONS: IF THE COURTS FIND THE ARENA PROJECT TO BE A VALID PUBLIC USE, ARE THERE COUNTERVAILING CONSIDERATIONS THAT MAY OVERCOME SUCH A FINDING?

A. Neighborhood Character

The State Environmental Quality Review Act (SEQRA), codified at article 8 of the New York Environmental Conservation Law, requires an environmental impact statement (EIS) to be prepared by any state or local agency when an action with a potentially significant environmental effect is proposed or approved.[169] SEQRA defines the "environment" to include "existing community or neighborhood character" as well as "objects of historic or aesthetic significance."[170]

In *Chinese Staff & Workers Ass'n v. City of New York*, the Court of Appeals held that an agency must consider "existing community or neighborhood character" in determining whether the requirement of an EIS is triggered.[171] This case involved a proposal to build a residential luxury condominium in the Chinatown area of Manhattan.[172] The Departments of City Planning and Environmental Protection submitted to the city that there would be no "significant effect on the environment" which would trigger the

[168] *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 782–83 (Mich. 2004).
[169] N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2005).
[170] *Id.* § 8-0105(6).
[171] 502 N.E.2d 176, 179–80 (N.Y. 1986) (quoting N.Y. ENVTL. CONSERV. LAW § 8-0105(6)) (emphasis omitted).
[172] *Id.* at 177.

requirement of an EIS; the city apparently agreed and issued a permit for the condominium's building without an EIS.[173] While the court declined to make a determination about the environmental consequences that might occur from the development project, it emphasized the importance of considering "existing community or neighborhood character."[174] Since the developer failed to make a comprehensive investigation into each statutory area comprising the term "environment," the court held that the decision that the EIS was not required was premature.[175]

The court also remarked that the community in general is impacted by land development and stated that developers must consider the possible effects of development on the surrounding community in addition to the impact on a particular parcel.[176] As discussed above, residents of Brooklyn have a strong interest in the character of their community; much of the public outcry against the arena proposal flows from a fear that a huge commercial complex will jeopardize the residential character of the neighborhood.[177]

B. Standing and Scope of Judicial Review

Unlike the Eminent Domain Procedure Law, SEQRA does not include a provision regarding judicial review.[178] Therefore, the standard of review when an individual has challenged an agency's findings is that which is "applicable to administrative proceedings generally: 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'"[179] In the context of SEQRA, the court will determine whether the agency procedures were lawful. Then, the court may examine the record to see whether the relevant areas of environmental concern were properly identified and scrutinized and whether the agency adequately explained the reasons for its determination.[180]

Standing under SEQRA is limited to those persons who can show that "1) they have suffered injury in fact; 2) that the alleged injury

[173] *Id.* at 177–78.
[174] *Id.* at 181.
[175] *Id.*
[176] *Id.*
[177] *See supra* Part II.D.
[178] Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 435 (N.Y. 1986).
[179] *Id.* (quoting N.Y. C.P.L.R. 7803(3) (McKinney 1994)).
[180] *Id.* at 436.

falls within the zone of interest[181] that the statute covers; and, finally (3) that the injury asserted is different from that suffered by the public at large."[182] These requirements protect against the use of the courts by groups seeking to further their own interests.[183] Further, the courts have noted that the possibility of challenges unrelated to environmental concerns indefinitely delaying vital governmental projects makes this especially meaningful in SEQRA litigation.[184]

V. WHAT REMEDIES ARE AVAILABLE TO BROOKLYN RESIDENTS WHO WANT TO CHALLENGE THE PROPOSED ARENA PROJECT?

A. Standing Under the Eminent Domain Procedure Law

Section 207 of the New York State Eminent Domain Procedure Law grants "[a]ny person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to section two hundred four" the right to "seek judicial review thereof by the appellate division of the supreme court."[185] The condemnees themselves clearly have standing under this definition. The issue is whether noncondemnees aggrieved by a neighboring development project likewise have standing to challenge the condemnor's findings.

Section 204 requires the condemnor to make findings regarding

> (1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality; [and] (4) such

[181] The phrase "zone of interest" refers to the "petitioner's injury fall[ing] within the concerns the Legislature sought to advance or protect by the statute." Soc'y of Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1041 (N.Y. 1991).

[182] Cmty. Pres. Corp. v. Miller, 781 N.Y.S.2d 603, 607 (Sup. Ct. 2004), *aff'd*, 788 N.Y.S.2d 609 (App. Div. 2005). The final requirement is referred to as the "special harm" requirement. For a discussion of this SEQRA standing issue, see generally Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement Under SEQRA*, 65 ALB. L. REV. 421 (2001) (discussing SEQRA standing, particularly the *Society of Plastics* decision, and proposing that the "special harm" requirement be removed because it favors property owners and is harmful to the general public).

[183] *Soc'y of Plastics Indus.*, 573 N.E.2d at 1041.

[184] *Id.*

[185] N.Y. EM. DOM. PROC. LAW § 207(A) (McKinney 2003).

other factors as it considers relevant.[186]

Section 207 limits judicial scope of review to whether

> (1) the proceeding was in conformity with the federal and state constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law,[187] and (4) a public use, benefit or purpose will be served by the proposed acquisition.[188]

The Court of Appeals in *East Thirteenth Street Community Ass'n v. New York State Urban Development Corp.* interpreted the Eminent Domain Procedure Law to limit standing to bring a proceeding under section 207 to the condemnees alone with one exception.[189] In this case, the noncondemnee petitioners were building residents, tenants, and condominium boards near an area to be condemned to construct low-income housing.[190] The court, in rejecting the petitioners' attempt to challenge the Urban Development Corporation's findings with respect to the project, noted that "[h]istorically, the parties and issues in condemnation proceedings have been limited. Persons having some proprietary interest in property could challenge a governmental taking."[191] The court distinguished eminent domain issues from zoning statues that aim to safeguard the interests of the entire community.[192] On the other hand, the primary purpose of eminent domain statutes is to protect the interests of property owners and guarantee that they receive just compensation in accordance with proper procedures if their property is taken.[193]

Against this backdrop and with respect to actions brought under section 207 subsection (c) parts (1), (2), and (4), the court construed the language of section 207 limiting judicial review to those persons "'*aggrieved* by the condemnor's determination and findings'" to apply only to the condemnees themselves.[194] The court found

[186] *Id.* § 204(B).
[187] *See supra* Part IV.A.
[188] N.Y. EM. DOM. PROC. LAW § 207(C).
[189] 641 N.E.2d 1368, 1372 (N.Y. 1994).
[190] *Id.* at 1368–69.
[191] *Id.* at 1369.
[192] *Id.* at 1371.
[193] *Id.*
[194] *Id.* at 1370–71 (quoting N.Y. EM. DOM. PROC. LAW § 207(A) (McKinney 2003)).

nothing in the legislative history to suggest that noncondemnees were afforded standing by the statute in these types of challenges.[195] Further, the court found that the only entitlement the petitioners had with respect to this project was notice and a hearing pursuant to sections 201 through 204 of the Eminent Domain Procedure Law.[196]

The court outlined one narrow exception to the standing requirement: when a challenge is brought under section 207 subsection (C) part (3) and the issue is whether the condemnor's findings and determinations are in compliance with SEQRA.[197] In this situation, if a noncondemnee could first establish that he or she is an "aggrieved person" as defined by the Eminent Domain Procedure Law and, second, establish that he or she has standing to challenge a SEQRA finding, the noncondemnee would have standing with regard to the SEQRA issue only.[198]

B. State and Federal Constitutional Challenges

1. The New York State Constitution

As discussed above, a condemnee who wishes to challenge the constitutionality of a proposed condemnation may bring an action under section 207 of the Eminent Domain Procedure Law challenging the findings of the condemnor including findings with respect to the public use, benefit, or purpose of the proposed project.[199] In conducting such a review, it is not certain whether, in interpreting their own constitution, the courts of New York would apply the federal rational basis test of *Midkiff* or a more stringent test under the Eminent Domain Procedure Law.[200] The Court of

[195] *Id.* at 1371. The court relied in part on the 1974 Report of the State Commission on Eminent Domain and Real Property Tax Assessment Review which noted that standing under section 207 was limited to plaintiffs who had in fact suffered injury, "'economic or otherwise.'" *Id.* at 1371. Whether or not petitioners could have fallen under the "or otherwise" language was not addressed by the court.

[196] *Id.* at 1370; *see* N.Y. EM. DOM. PROC. LAW § 201 (McKinney 2003) (requiring the condemnor to hold a public hearing "in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed"); *id.* § 202 (requiring notice of such hearing).

[197] *E. Thirteenth St. Cmty. Ass'n.*, 641 N.E.2d at 1372.

[198] *Id.* at 1372. See Part IV.B *supra* for a discussion of standing requirements under SEQRA.

[199] *See supra* Part V.A.

[200] *See supra* Part II.A.3.

Appeals in *Jackson v. New York State Urban Development Corp.* indicated that in determining whether an area is substandard, an agency's findings are subject to an "adequate basis" rather than rational relation test.[201] Finally, as discussed in Part II.A, *supra*, to pass constitutional muster outside of the urban renewal context, the public use, benefit, or purpose of the taking must be dominant to any potential benefit to be accrued by a private entity.

2. The Federal Constitution

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."[202] The Supreme Court in *Midkiff* instructed that proposed takings are subject to rational basis review, meaning that so long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose," it will pass constitutional muster.[203] This is not a difficult standard to meet, as it is hard to imagine when one would be unable to conceive of some public purpose associated with a taking. The Court in *Berman v. Parker* likewise adopted a broad definition of blight finding that redevelopment of slum areas falls into the broad concept of public welfare.[204]

The effect of these decisions, reaffirmed by *Kelo v. City of New London*, discussed below, is such that it would be extremely difficult for a plaintiff to prevail in a suit challenging condemnations associated with the arena project under the Federal Constitution. First, economic stimulation, recreation, and job creation are conceivable public purposes to which taking private property to build a sports arena is rationally related. Second, applying a broad reading of blight to many urban neighborhoods almost ensures that clearing an area for redevelopment will fall into an urban renewal or "public welfare" context.[205]

Recently eminent domain has become a topic of significant

[201] *See* 494 N.E.2d 429, 441 (N.Y. 1986) (quoting Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 334 (N.Y. 1975)).

[202] U.S. CONST. amend. V, § 1; U.S. CONST. amend. XIV, § 1; *see also* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 123–24 (1978).

[203] 467 U.S. 229, 241–42 (1984).

[204] 348 U.S. 26, 33–36 (1954).

[205] In New York, where the legislature has found takings for purposes of urban renewal to be valid public uses, a broad reading of blight helps to create a strong basis for any proposed condemnation. *See supra* Part II.B.

national debate[206] causing many to highly anticipate the United States Supreme Court's decision in the Connecticut case, *Kelo v. City of New London*.[207] The Supreme Court considered whether the exercise of eminent domain powers is justified when the taking fosters general economic development rather than eliminating blight or substandard conditions.[208] Because easily hurdled standards have tended to allow such takings, organizations such as the Institute for Justice called for an end to this so called "abuse of eminent domain."[209] Conversely, the American Planning Association advocated for a broad interpretation of public use which would include economic development.[210]

Ultimately, the United States Supreme Court affirmed the Supreme Court of Connecticut's holding that taking plaintiffs' property for use in implementing a vast development plan was valid under the Federal Constitution.[211] The Court relied heavily on *Berman* and *Midkiff*.[212] In *Kelo*, the proposed ninety acre area would include 90,000 square feet of office space, retail stores, a marina, and a public walkway along the waterfront.[213] Several New London residents who owned property and lived on the proposed sites challenged the takings under the state and federal constitutions.[214] As stated by the Connecticut Supreme Court, their argument rested on the premise that "the condemnation of property for economic development by private parties is [invalid] because: (1) the new owner will not provide a public service or utility; and (2) the condemnation will not remove blight conditions that are, in and of themselves, harmful to the public."[215] The city, on the other hand, argued that "economic development is by itself a public use

[206] For an example of conflicting opinions with regard to a municipality's exercise of eminent domain power, see *'The Abrams Report' for Feb. 3* (MSNBC television broadcast, Feb. 4, 2005), *available at* http://www.msnbc.msn.com/id/6915745 (debating the taking of an elderly couple's home for purposes of building a shopping mall in Norwood, Ohio).

[207] 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

[208] *See* Kelo v. City of New London, 125 S. Ct. 2655, 2660–61 (2005).

[209] *See* INST. FOR JUSTICE, EMINENT DOMAIN WITHOUT LIMITS? U.S. SUPREME COURT ASKED TO CURB NATIONWIDE ABUSES, http://www.ij.org/private_property/connecticut/con_property_backgrounder.html (last visited July 31, 2006). The Institute for Justice litigated the *Kelo* case on behalf of the plaintiff property owners.

[210] Brief for Am. Planning Ass'n et al. as Amici Curiae Supporting Respondents, at 3, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108), *available at* http://www.planning.org/amicusbriefs/pdf/kelo.pdf.

[211] *Kelo*, 125 S. Ct. at 2668.

[212] *Id.* at 2663–64.

[213] *Id.* at 2659.

[214] *See id.* at 2660.

[215] Kelo v. City of New London, 853 A.2d 500, 519–520 (Conn. 2004).

justifying the exercise of the eminent domain power" and that the courts should defer to legislative findings in this regard.[216] The Supreme Court, relying on a reading of "public use" as synonymous with "public purpose," deferred to legislative findings that the area required economic revitalization (a public purpose) and held that the challenged takings were valid under the Fifth Amendment.[217] The effect of this decision is that so long as there is a "state statute that specifically authorizes the use of eminent domain to promote economic development" and the economic development plan is "comprehensive" and preceded by "thorough deliberation,"[218] takings pursuant to such a plan would be valid under the Constitution.

VI. CONCLUSION

Since *Kelo* failed to limit the definition of public use or the application of eminent domain for economic development purposes, the decision does not require adjustments in New York law so as to conform to federal constitutional standards. Rather, it seems that the law in New York State requires something more than the Federal Constitution. First, the Court of Appeals has indicated that the Eminent Domain Procedure Law requires higher scrutiny with respect to a condemnor's findings than does federal law as articulated in *Midkiff*. Further, when a private entity benefits from a taking, outside of the context of urban renewal, New York law requires the public use, benefit, or purpose to be dominant.

Working against property owners, however, is New York's broad definition of blight. Once an area is found to be blighted or substandard, it will fall into the urban renewal context and benefit to private entities will be virtually irrelevant. Under the current broad reading of blight, together with support from the United States Supreme Court's approval of takings for economic development purposes pursuant to a legislative plan, it seems that a well thought out project, such as a sports arena, would pass state constitutional muster under the law today. The possible effects of *Kelo*, however, have spurred a response in the New York State legislature with bills aimed at curbing the use of eminent domain and protecting property owners as well as proposals to appoint a state commission to examine the status and application of eminent

[216] *Id.* at 520.
[217] *Kelo*, 125 S. Ct. at 2665–66, 2668.
[218] *Id.* at 2665.

domain law in New York.[219] It is too early to know what the outcome of these actions will be.

In the context of urban sports stadiums, this article proposes that New York narrowly apply its definition of blight and that existing neighborhood and community character serve as a strong factor in determining whether such blight exists. The Brooklyn arena project will take several years to achieve fruition.[220] Brooklyn has been improving, growing, and evolving on its own for the last several years to the point that it has become a desirable alternative to Manhattan for living, dining, and shopping. While some areas have yet to catch up to neighborhoods like Brooklyn Heights and Park Slope, their potential to evolve and, at the same time, preserve the community, neighborhood, and character of "brownstone Brooklyn" should be afforded significant weight.[221] While the stadium may ultimately be built in some form or another, New York State should not condemn property in areas with significant neighborhood character that are becoming economically prosperous on their own.

[219] There are several post-*Kelo* eminent domain related bills currently pending before the New York State Senate, including S. 6216, 2005-2006 Reg. Sess. (N.Y. 2006) ("[a]n act providing for the creation of a temporary state commission to examine eminent domain laws and make recommendations for reforms thereof"); S. 5936, 2005-2006 Reg. Sess. (N.Y. 2005) (proposing to amend the Eminent Domain Procedure Law such that takings for economic development purposes are only permitted when the area is blighted); S. 5946, 2005-2006 Reg. Sess. (N.Y. 2005) (an act requiring "comprehensive economic development plan[s]" in connection with proposed takings for economic development, as well as municipal approval of such takings). Similar proposals are pending before the state assembly, and are available at http://public.leginfo.state.ny.us/menugetf.cgi.

[220] *See* Press Release, Forest City Ratner Cos., Nets Hire Design Consultant for Arena (May 23, 2005), *available at* http://www.fcrc.com/full_newsrelease.asp?brief=31. The Brooklyn Arena is scheduled to be completed in 2008. *Id.*

[221] *See Welcome to the Neighborhoods*, *supra* note 100; Choice, *supra* note 101.