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Forced Turnovers: Using Eminent Domain to Build Professional Sports Venues

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FORCED TURNOVERS: USING EMINENT DOMAIN TO BUILD PROFESSIONAL SPORTS VENUES

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ABSTRACT

If a city wants to keep a professional sports team within its borders, can that city use the power of eminent domain to do so? Although cities have not been able to successfully condemn the actual sports franchises within their respective cities, they have been successful in condemning land for the development of new sports venues intended to entice their teams to stay. In 2005, the City of Arlington, Texas invoked the power of eminent domain to condemn and destroy houses to make room for the Dallas Cowboys' new stadium. In 2006, New York City used eminent domain on land belonging to private businesses in order to make room for construction of a new arena for the New Jersey Nets.

Recently, three other major American cities (Sacramento, Atlanta, and Washington, D.C.) announced that they are prepared to use eminent domain to build new sports stadiums for their local professional sports teams. While there are a few strategies that property owners could hypothetically use to stop these takings, courts have yet to stop a city from using eminent domain to condemn land for sports stadiums. However, if property owners are willing to settle, these same strategies can help prolong

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condemnation negotiations, thereby increasing the owners' potential remunerations.

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INTRODUCTION

In order to convince their local sports teams to stay, cities have turned to the power of eminent domain to provide land for the development of new sports venues.[1] Arlington, Texas, and New York City have used eminent domain in the past eight years to build new venues for their respective professional sports

[1] Daniel McGraw, *Demolishing Sports Welfare*, REASON.COM (May 2005), http://reason.com/archives/2005/05/01/demolishing-sports-welfare ("Sports owners have long used eminent domain as a way to acquire property cheaply. Sports economists estimate that half of the post-1990 stadium and arena construction has involved eminent domain--and even when it wasn't invoked, it was understood that condemnation could be a last resort if the teams encountered stubborn landowners.").

franchises. Courts upheld challenges to Arlington's use of eminent domain in *Cascott, L.L.C. v. City of Arlington*,[2] and New York City's use in *Goldstein v. Pataki*.[3] Within the last year, three more cities—Sacramento, Washington, D.C., and Atlanta—have all announced their readiness to use eminent domain to build new venues for their own professional sports franchises.[4] So far, courts have consistently agreed that condemning land for new sports venues is a valid use of the power of eminent domain. This Article will first examine the power of eminent domain, its origins, and its contemporary usage. Next, this Article will discuss how eminent domain law has been applied in sports venue cases and other related cases, and in doing so demonstrate that using eminent domain to build a new sports venue is a difficult process to fight. Finally, this Article will provide practical suggestions for how attorneys can prevent their cities from using this power to seize their clients' property, or in the alternative, help their clients receive more compensation for the property taken. In dicta, courts have noted that the use of eminent domain to develop sports venues would be improper in cases where the venue would not be for a public purpose, the eminent domain proceedings were faulty, or an area set for redevelopment was not actually blighted. Even though courts have made it difficult to show that any of these circumstances exist, these are the best arguments that practitioners have to oppose these condemnations. If a client does not wish to keep their property but merely wants to increase their compensation, then employing these challenges could promote negotiation of greater remuneration.

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[2] 278 S.W.3d 523, 525 (Tex. App. 2009).

[3] 516 F.3d 50, 53 (2d Cir. 2008).

[4] Ilya Somin, *Sacramento and Washington, DC Threaten to Use Eminent Domain to Take Property to Build Sports Stadiums*, THE VOLOKH CONSPIRACY (Aug. 23, 2013, 2:10 PM), http://www.volokh.com/2013/08/23/sacramento-washington-dc-threaten-use-eminent-domain-take-property-build-sports-stadiums/; Craig Lucie, *Eminent domain could be used to build Falcons stadium*, WSB-TV ATLANTA (Sept. 25, 2013, 7:33 PM), http://www.wsbtv.com/news/news/local/eminent-domain-could-be-used-build-stadium/nZ7bX/.

I. CONDEMNING LAND FOR THE DEVELOPMENT OF NEW SPORTS STADIUMS IS A VALID USE OF EMINENT DOMAIN

Eminent domain is "[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking."[5] The Fifth Amendment to the United States Constitution limits the power of eminent domain: "a person cannot be . . . deprived of private property for public use without just compensation."[6] This limitation is "made applicable to the States through the Fourteenth Amendment."[7]

The United States Supreme Court has defined many of the elements of eminent domain. The Supreme Court has held that the federal government may use the power of eminent domain to condemn both tangible and intangible property.[8] It has also defined "public use" broadly.[9] Finally, the Court has found that the property owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken."[10] However, states can impose greater restrictions on their powers of eminent domain; indeed, the public response to the Supreme Court's decision in *Kelo v. City of New London* was so strong that many states have substantially reformed their powers of eminent domain.[11]

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[5] BLACK'S LAW DICTIONARY 562 (9th ed. 2009).

[6] U.S. CONST. amend. V.

[7] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984).

[8] *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 11 (1949) ("Since the Fifth Amendment requires compensation for the [tangible property], [intangible property], if shown to be present and to have been 'taken,' should also be compensable.").

[9] *See* Kelo v. City of New London, 545 U.S. 469, 480 (2005) ("Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."); Berman v. Parker, 348 U.S. 26, 33 (1954) ("The concept of the public welfare is broad and inclusive."); *Midkiff*, 467 U.S. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

[10] Olson v. United States, 292 U.S. 246, 255 (1934); *see also* Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) ("And the question is, What has the owner lost? not, What has the taker gained?").

[11] *See* Citizens Fighting Eminent Domain Abuse, *50 State Report Card:*

Courts have regularly allowed cities to use eminent domain to develop new public sports venues. Arlington and New York City were both successful in their uses of eminent domain to condemn land for new sports venues. Both of these projects were met with heavy resistance from the local communities, yet were upheld by courts as legitimate uses of eminent domain.[12] This contrasts sharply with the difficulties cities have had in the past when attempting to use eminent domain to acquire the sports franchises themselves. Both Oakland and Baltimore attempted to condemn their city's sports teams through eminent domain but were barred by courts from doing so. The differences between the uses of eminent domain for the development of new sports venues and the control of sports franchises can help practitioners advise property owners on ways to prevent the taking of their clients' property, or increase the amounts they receive as just compensation for their property.

A. The City of Arlington Built AT&T Stadium for a Legitimate Public Purpose

In 2004, Arlington announced its plans to build a new stadium for the Dallas Cowboys football team, and the Court of Appeals of Texas allowed this use in *Cascott, L.L.C. v. City of Arlington*.[13] The City purchased some of the properties in the proposed location and began eminent domain proceedings against properties when their owners would not negotiate.[14] A special commissioner issued monetary awards to all the resisting property owners in order to satisfy the just compensation requirement.[15] These property

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Tracking Eminent Domain Reform Legislation since Kelo, CASTLE COALITION, http://castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129.

[12] Cascott, L.L.C. v. City of Arlington, 278 S.W.3d 523, 525 (Tex. App. 2009); Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008).

[13] 278 S.W.3d 523, 525 (Tex. App. 2009).

[14] *See* James Joyner, *Eminent Domain Ruling Affects Dallas Cowboys Stadium*, OUTSIDE THE BELTWAY (June 25, 2005), http://www.outsidethebeltway.com/eminent_domain_ruling_affects_dallas_cowboys_stadium/.

[15] *Cascott*, 278 S.W.3d at 526.

owners appealed their awards and the City's use of eminent domain to the local Texas County Court at Law.[16] The trial court granted summary judgment to the City and the property owners appealed.[17]

The property owners' main argument was that the City's use of eminent domain violated the Texas Constitution because it failed to satisfy the "public purpose" requirement.[18] On this issue, the court noted that "[t]he mere fact that a private actor will benefit from a taking of property for public use . . . does not transform the purpose of the taking of the property, or the means used to implement that purpose, from a public to a private use."[19] Because the stadium was to be used for a public purpose, the City's condemnation did not violate the Texas Constitution.[20] The AT&T Stadium was to be built on the land condemned by the City with the permission of the court.

The Court of Appeals exhibited great deference to the trial court's determination that a new sports stadium constituted a legitimate public use. The court acknowledged that the Dallas Cowboys, a private organization, would benefit from the new stadium.[21] However, this would not prevent the stadium from also being used by the public.[22] The court posed that "[t]he question here is not whether the Dallas Cowboys will benefit from the Lease, but whether the Lease furthers and promotes the public purpose of the venue project for which the condemnation proceedings were instituted."[23] In the end, the court found that the taking did further such a public purpose because the stadium was

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[16] *Id.*

[17] *Id.*

[18] *See* Dustin Sachs, *Dallas Cowboys and eminent domain*, EXAMINER.COM (June 19, 2009), http://www.examiner.com/article/dallas-cowboys-and-eminent-domain.

[19] *Cascott*, 278 S.W.3d at 529.

[20] *Id.*; *see also* TEX. CONST. art. I, § 17 (a) ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . .").

[21] *Cascott*, 278 S.W.3d at 529.

[22] *Id.*

[23] *Id.*

to be used as a "sports and community venue project,"[24] and so allowed the City's use of eminent domain.

B. New York City Built the Barclays Center as Part of the Redevelopment of a Blighted Area

New York City was the next city to employ a large-scale use of eminent domain to develop a new sports venue. The United States District Court for the Eastern District of New York approved such use in *Goldstein v. Pataki*.[25] In 2006 the Empire State Development Corporation, also known as the New York State Urban Development Corporation, announced that it intended to use eminent domain to condemn private land in Brooklyn, New York, for the Atlantic Yards Arena and Redevelopment Project.[26] This project included the construction of high-rise apartment towers and office towers, but the centerpiece of Atlantic Yards was the Barclays Center, a new basketball arena for the New Jersey Nets.[27] Fifteen parties who owned property in the proposed development area filed suit against the project developer (who was also the owner of the Nets) and against the City and State of New York, claiming that this use of eminent domain was improper.[28] The court found that there was no violation of the public use requirement of the Fifth Amendment, the Equal Protection Clause, or the Due Process Clause, and dismissed the suit without prejudice. The plaintiffs appealed to the United States Court of Appeals for the Second Circuit.[29]

The property owners' main argument on appeal was that "the district court overlooked substantial and specific allegations that [the developer] is the sole beneficiary of the Project and that the public uses invoked by appellees are 'pretexts' advanced by corrupt and coopted state officials."[30] However, the Second Circuit

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[24] *Id.* at 528 (quoting Tex. Local Gov't Code Ann. § 334.001(5)).
[25] 516 F.3d 50 (2d Cir. 2008).
[26] *Id.* at 53.
[27] *Id.*
[28] *Id.* at 53-55.
[29] *Id* at 55.
[30] *See* Malcolm Gladwell, *The Nets and NBA Economics*, GRANTLAND

reaffirmed an earlier holding that "the redevelopment of a blighted area, even standing alone, represents a 'classic example of a taking for a public use.'"[31] Since a large portion of the condemned area had been classified as blighted for nearly 40 years,[32] the taking was for a public use. The court also found that Atlantic Yards catered to "several well-established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements."[33] The court reiterated that a public use is not defeated merely because a private party stands to gain from the taking.[34] In the end, the court was satisfied that this eminent domain proceeding was for a public purpose and therefore was constitutional.

The Second Circuit declined to exercise supplemental jurisdiction over the issue of the "blight" determination by the Empire State Development Corporation, and the appellants brought this issue to state court.[35] But the Court of Appeals of New York refused to second-guess the determination, saying, "[t]his is not a record that affords the purchase necessary for judicial intrusion."[36] Since the classification of "blight" was subject to a "reasonable difference of opinion,"[37] the Court of Appeals felt it was improper to intervene. Although Goldstein, the last hold-out owner, eventually gave up his property, he settled for an outsized sum. Therefore, it is difficult to argue that he truly "lost" his battle.[38]

(Sept. 26, 2011), http://www.grantland.com/story/_/id/7021031/the-nets-nba-economics.

[31] *Goldstein*, 516 F.3d at 59 (quoting Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985)).

[32] *Id.*

[33] *Id.* at 58-59.

[34] *Id.* at 64.

[35] Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 518, 921 N.E.2d 164 (2009).

[36] *Id.* at 527.

[37] *Id.*

[38] Eliot Brown, *Final Atlantic Yards Holdout, Daniel Goldstein, Sells to Ratner for $3 M.*, NEW YORK OBSERVER (Apr. 21, 2010, 9:07pm), http://observer.com/2010/04/final-atlantic-yards-holdout-daniel-goldstein-sells-to-ratner-for-3-m/ (noting that Goldstein received $3,000,000 for his property, which he bought for $590,000 and was appraised at $510,000).

C. Condemning Sports Franchises is Harder than Condemning Land for New Sports Venues

Although the power of eminent domain seems well-suited to condemning land for new stadiums, it is poorly suited to condemning actual sports franchises. The cities of Oakland and Baltimore both tried to condemn their cities' respective sports franchises in order to keep them from relocating. The cities' strategies failed, each for its own particular reasons. Although the peculiarities of these failures do not necessarily exclude the theoretical possibility of this use, they do show that eminent domain is well suited for acquiring a sports franchise. However, the discussions in these attempted uses of eminent domain can help attorneys better understand why condemnations of land for new sports venues have been so successful.

The City of Oakland's attempt to condemn the Oakland Raiders football team failed in *City of Oakland v. Oakland Raiders*.[39] The underlying issue arose when, in 1980, contract negotiations between the Oakland Raiders and representatives of the Oakland-Alameda County Coliseum failed.[40] The Raiders announced their intention to move to Los Angeles, and Oakland began eminent domain proceedings to take ownership of the team.[41] The City's attempt to condemn the Raiders eventually failed because the California Court of Appeals for the First District found that the taking was barred by the Commerce Clause of the United States Constitution.[42] The court reasoned that, since all of the teams in the NFL are part of a "joint venture,"[43] interfering with the administration of one team would affect all of the teams and therefore would have interstate economic impacts. However, in previous litigation, the California Supreme Court suggested that owning and operating a sports venue for a professional sports team

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[39] 32 Cal. 3d 60 (1982).

[40] *Id.*

[41] *Id.*

[42] City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 422 (Cal. Ct. App. 1985).

[43] *Id.* at 420.

could be "an appropriate function of city government."[44]

In posing the question of whether a city can condemn a sports team, the California Supreme Court compared owning a sports team to owning a sports venue.[45] The court discussed that other jurisdictions had upheld the ability of cities to own and operate stadiums, finding that these functions fit under the wide definition of a public purpose.[46] The court then questioned whether the difference between a stadium and a team was "legally substantial."[47] The public purpose issue was never resolved because the case was eventually decided on Commerce Clause grounds,[48] but the California Supreme Court's discussion of sports stadiums foreshadowed the issues in New York City and Arlington.

The City of Baltimore tried the same tactic as Oakland when the Baltimore Colts football team decided to move to Indianapolis. The City failed, just as its California counterpart had, in *Mayor & City Council of Baltimore v. Baltimore Football Club Inc.*,[49] though for different reasons. As in *Oakland Raiders*, the Baltimore Colts were considering relocation after encountering an impasse in negotiations with the owners of their stadium.[50] When the Colts' owner learned that "the Maryland Senate had passed emergency legislation which authorized the City to condemn the Colts' NFL franchise and related properties, [he] immediately decided to move the Colts franchise to Indianapolis."[51]

After the Colts had relocated their team and equipment to Indianapolis, the Maryland General Assembly enacted emergency legislation to condemn the Colts.[52] However, the District Court held that, since the team moved before the Maryland legislature enacted the emergency legislature, "the intangible NFL franchise was outside the jurisdiction and beyond the power of Baltimore

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[44] *Oakland Raiders*, 32 Cal. 3d at 60.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Oakland Raiders*, 174 Cal. App. 3d at 422.
[49] 624 F. Supp. 278 (D. Md. 1985).
[50] *Id.* at 279.
[51] *Id.*
[52] *Id.* at 281.

City to condemn on that date."[53] Baltimore could not use its power of eminent domain to keep the Colts from relocating because the team was already outside of its reach.

Although both Oakland and Baltimore failed to exercise eminent domain over their football teams, this does not necessarily mean that future attempts would meet with similar failure. Oakland's attempt was ultimately barred by the Court of Appeals for violating the Commerce Clause, but the court mentioned that the balancing of interstate commerce against eminent domain could potentially come out differently.[54] In *Baltimore Football Club*, the District Court's decision was solely based on the fact that, by the time the condemnation proceedings were initiated, the team was outside of the state's jurisdiction.[55] With different factual scenarios, it is possible to envision other franchise condemnation actions being allowed. However, based on the successful stadium projects of New York City and Arlington and the recent statements made by Atlanta, Sacramento, and Washington, D.C., it seems that cities prefer to use eminent domain to build stadiums and convince their teams to stay rather than to condemn their teams and force them to stay.

II. STRATEGIES FOR CHALLENGING A CITY'S USE OF EMINENT DOMAIN TO DEVELOP A NEW PROFESSIONAL SPORTS VENUE

There are only a few strategies available for challenging a city's use of eminent domain to condemn land for the development of a new sports venue. However, a practitioner could at least use these strategies to gain leverage for greater compensation for their client. Courts have so far taken a deferential stance towards cities' uses of eminent domain to build sports venues and have only mentioned a few ways to challenge these uses. The three ways an attorney could potentially oppose a city's use of eminent domain to condemn land to build a sports venue are: (1) to challenge the stadium's public use; (2) to challenge the legitimacy of the eminent

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[53] *Id.* at 287.

[54] City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 422 (Ct. App. 1985).

[55] *Baltimore Football Club*, 624 F. Supp. at 289.

domain proceedings; or (3) to challenge the blighted status of the property being condemned. However, these options present significant difficulties. Outside the options listed, a property owner's best chance to stop their city's eminent domain proceedings is to challenge them in the legislative sphere. Although certainly not a guarantee, appealing to the legislature could be a property owner's last hope of avoiding condemnation or extending negotiations.

A. Dispute the Sports Venue's Actual Public Use

One way to challenge a city's use of eminent domain is to question whether the taking is for a public purpose. If a court believes that an exercise of eminent domain is not intended for a public benefit, then it will not allow that exercise to occur.[56] However, the Supreme Court has made it clear that the definition of "public use" is broad and deferential: "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[57] Therefore, in order to be successful, a practitioner needs to show that there is no public use at all from the proposed taking. This is a high burden to surmount, and is even harder to achieve when applied to professional sports venues.

In *Cascott*, the Texas Court of Appeals noted that the development of a "sports and community venue project" was specifically listed as a power of the City in the Local Government Code.[58] This meant that "the legislature's declaration . . . that such a sports venue project is for a public purpose is correct."[59] Similar reasoning was used to justify building the Barclays Center. In *Goldstein*, the District Court for the Eastern District of New York

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[56] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

[57] *Id.* at 234-44.

[58] Cascott, L.L.C. v. City of Arlington, 278 S.W.3d 523, 528 (Tex. App. 2009).

[59] *Id.*

found that the Atlantic Yards project "would serve several well-established public uses such as the redress of blight, the construction of a sporting arena, and the creation of new housing . . . ."[60] Not only was the sporting arena itself considered a public use, but the other aspects of the Atlantic Yards project added to the overall public benefit. And in *Oakland Raiders*, the Supreme Court of California cited to multiple courts' decisions[61] which held that a sports stadium was a legitimate public use.

The trend among courts strongly suggests that the development of a stadium or sports venue serves a public purpose, and is therefore a legitimate objective of an eminent domain taking. In order to challenge this, a practitioner should investigate whether their state's constitution or code lists a stadium as a public use, and whether the state courts have previously considered the issue. If a stadium is not enumerated in the state constitution as presumptively serving a public purpose, or if previous state cases hold that it does not serve such a purpose, then an attorney could use these findings to show a lack of public purpose and thereby support a case against a condemnation. Otherwise, the public use element is a difficult one to contest. Thankfully, there are other potential options to challenge a city's use of eminent domain to build a sports venue.

B. Question the Legitimacy of the Eminent Domain Proceedings

If a city's use of eminent domain to build a sports venue is deemed a "public use," then a practitioner could challenge the taking by contesting the legitimacy of the condemnation proceedings themselves. However, this is also a difficult claim to

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[60] Goldstein v. Pataki, 516 F.3d 50, 55 (2d Cir. 2008) (citing Goldstein v. Pataki, 488 F. Supp. 2d 254, 286-87 (E.D.N.Y. 2007)).

[61] *See* City of Anaheim v. Michel, 259 Cal. App. 2d 835, 839 (1968) ("[T]he acquisition, construction, and operation of a stadium by a county or city represents a legitimate public purpose."); N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 15-16 (1972) ("[T]he sports and exposition complex as described and authorized in the statute is a public project and serves a public purpose."); Martin v. City of Philadelphia, 420 Pa. 14, 17 (1966) ("A sports stadium is for the recreation of the public and is hence for a public purpose . . . .").

sustain because courts have established a high bar for showing faulty proceedings. A court only needs to find that the project is rationally related to the public use[62] and that the city did not act "fraudulently, arbitrarily, or capriciously."[63] As long as these requirements are met, a court will be unwilling to question a municipal decision to use eminent domain. "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[64]

The task of showing that eminent domain proceedings were fundamentally flawed is difficult, but could give leverage in negotiations, putting more pressure on the city to settle. In *Goldstein*, the property owners claimed that the Nets' owner exerted undue influence on the motivations behind the condemnation.[65] But, because they were unable "to allege any specific examples of illegality in the elaborate process by which the Project was approved,"[66] the court dismissed this argument. The court in *Oakland Raiders* similarly held that "the wisdom of the City's decision . . . may not be successfully challenged in the courts unless it can be shown that the municipality acted in an arbitrary or capricious fashion, or its act represent[ed] a 'gross abuse of discretion.'"[67] Although that taking was ultimately barred, the court did not find any suspect motivations behind the proceedings.

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[62] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242-243 (1984) ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.").

[63] Cascott, L.L.C. v. City of Arlington, 278 S.W.3d 523, 528 (Tex. App. 2009).

[64] Kelo v. City of New London, 545 U.S. 469, 483 (2005).

[65] Goldstein v. Pataki, 516 F.3d 50, 62 (2d Cir. 2008) ("The plaintiffs . . . contend that [the Project] is constitutionally impermissible nonetheless because one or more of the government officials who approved it was actually-and improperly-motivated by a desire to confer a private benefit on Mr. Ratner.").

[66] *Id.* at 64.

[67] City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 79 (1982).

Courts will only question a city's motivations for using eminent domain if the taking is done in an arbitrary or capricious manner. Short of this standard, courts are unwilling to divine the process of the municipality.[68] An attorney questioning a city's use of eminent domain would need to be able to show that the condemnation proceedings constituted a gross abuse of discretion. Otherwise, the court will be unlikely to question the legislative process and will allow the proposed condemnation to continue.

C. Contest the Proposed Area's "Blighted" Classification

If a city is planning on redeveloping a "blighted" area into a professional sports venue through use of eminent domain, an attorney could challenge that use by challenging the "blighted" classification of the area. However, the area in question doesn't have to be completely blighted, or even mostly blighted, in order to be condemned. The actual properties seized can be "innocuous and unoffending,"[69] as long as they are part of a larger "blighted" area. Therefore, an attorney challenging such an action would need to show that the "blighted" classification was wholly improper for the majority or entirety of the targeted area.

The property owners in *Goldstein* challenged the "blight" classification as applied to their properties. The Court of Appeals conceded that the term "blight" was deliberately imprecise,[70] but noted that other such inquiries have looked to whether "a substantial part of the area is 'substandard and insanitary' by modern tests,"[71] or whether there is a presence of "economic

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[68] *Goldstein*, 516 F.3d at 63 ("We do not read *Kelo*'s reference to 'pretext' as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns.").

[69] Berman v. Parker, 348 U.S. 26, 35 (1954).

[70] *Goldstein*, 13 N.Y.3d at 526 ("It is important to stress that lending precise content to these general terms has not been, and may not be, primarily a judicial exercise.").

[71] Kaskel v. Impellitteri, 306 N.Y. 73, 78, 115 N.E.2d 659 (1953), *cert. denied* 347 U.S. 934 (1954).

underdevelopment and stagnation."[72] The Second Circuit also pointed out that the property owners "do not dispute the presence of significant blight in the Takings Area and even greater blight in the adjacent Renewal Area."[73] Therefore, the court found that it didn't matter whether a particular piece of property was itself blighted.[74] In this case, the blighted area took up "more than half"[75] of the total development area, which was enough to condemn the entire site. Any attorney who wishes to contest the redevelopment of a blighted area would likely need to show, at least, that the actual blighted property takes up less than half the total condemned property, and potentially that none of the property was actually blighted. This is yet another difficult standard to overcome.

D. Take Legislative Action

The United States Supreme Court has emphasized that courts are to "give considerable deference to legislatures' determinations about what governmental activities will advantage the public."[76] Once a legislature has decided that developing a new sports venue is a public purpose, courts are unlikely to question this decision. Therefore, a practitioner should encourage their clients to take legislative action before their city begins its eminent domain action by contacting their representatives or lobbying organizations.

The two cities that have used eminent domain to develop sports stadiums were successful in their takings, and the only ways to prevent such takings are difficult to establish. Perhaps, then, the only way to influence such a decision is to approach it through the legislature, effectively preventing the proceedings or tilting them in a client's favor before they begin. If a client's property is in an area projected for redevelopment, an attorney should encourage the

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[72] Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 330 (1975).

[73] *Goldstein*, 516 F.3d at 60.

[74] *Id.* ("[W]e are without authority to provide the appellants the relief they seek based on the fact that their individual lots are not blighted, notwithstanding the understandable frustration this must cause them.").

[75] *Id.* at 59.

[76] Kelo v. City of New London, 545 U.S. 469, 497 (2005).

client to contact his or her representatives and ask them to take early action. The property owner should also contact public interest groups skilled in lobbying against this kind of action.[77] These might be property owners' only realistic options to stop or slow their city's condemnation plans.

CONCLUSION

Courts have upheld cities' use of eminent domain to build professional sports venues. Courts are deferential to legislative decisions on this matter and typically classify stadiums as having presumptive public purposes. In their opinions, however, courts have mentioned some ways that these takings could be stopped. If an attorney representing property owners could show that the taking is not for a public purpose, is the result of faulty eminent domain proceedings, or is not aimed at a blighted area, then he or she could potentially establish that the taking is invalid. Practitioners should make all of these arguments but must also recognize the difficulty of success. Outside of these approaches, property owners can take legislative action. If they can prevent the actual condemnation proceedings, then a court will have nothing to which it can defer. Even with these options, it will be very hard for practitioners in Atlanta, Sacramento, Washington, D.C., or other cities in the future, to stop their city from using eminent domain to condemn their clients' property for the development of a new professional sports venue. Their best recourse, then, is to use the challenges mentioned above to gain leverage in settlement negotiations, thereby incentivizing the city to increase the amount of compensation given to the property owner.

[77] For an example of such a group, see THE CASTLE COALITION, http://www.castlecoalition.org/.

PRACTICE POINTERS

- Property owners and their attorneys should recognize that courts are deferential to legislative decisions to use eminent domain for the development of new sports venues.
- An attorney trying to prevent such a taking should challenge the public purpose of the new stadium, the legitimacy of the eminent domain proceedings, and the "blight" classification of the targeted property.
- Practitioners should encourage clients with property in danger of condemnation to take legislative action and contact their representatives in order to prevent the taking from occurring in the first place.
- Clients willing to settle but looking for better compensation for their property can use these same challenges in order to extend settlement negotiations and litigation. This will put pressure on the city to offer greater remuneration for the property in order to finalize the condemnation.