Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project

Amy Lavine* and Norman Oder**

Plans for the highly contested atlantic yards project were unveiled on December 10, 2003.[1] The public-private development—or perhaps more accurately the private-public development[2]—is planned for a twenty-two-acre site near downtown Brooklyn that encompasses an 8.5-acre below-grade railyard, various types of dwellings, buildings used (or once used) for light manufacturing, retail and other commercial uses, and some vacant lots.[3] The project is being developed by Forest

*Amy Lavine is a staff attorney at the Government Law Center at Albany Law School. She provided limited research for Develop Don't Destroy Brooklyn's state eminent domain and MTA lawsuits, and she has more recently advised New York State Senator Bill Perkins on eminent domain reform. Thanks are due to Tracy Collins and Jonathan Barkey, whose photographs are included in the figures that accompany this article.

**Journalist Norman Oder has studied or covered Atlantic Yards since July 2005 and has written the watchdog blog Atlantic Yards Report (http://AtlanticYardsReport.com) since March 2006. He has a Master of Studies in Law degree earned on a one-year journalism fellowship at Yale Law School.

1. *See* Charles V. Bagli, *A Grand Plan in Brooklyn For the Nets' Arena Complex*, N.Y. Times, Dec. 11, 2003, at B1; Herbert Muschamp, *Courtside Seats to an Urban Garden*, N.Y. Times, Dec. 11, 2003, at B1.

2. We liken this project to a private-public development, rather than a public-private development, because it was devised by a private developer, it has significant private components and special private benefits, and because the public partner's role has been more of an enabler than a policy-maker or supervisor. Moreover, there is no settled definition for the term "public-private partnership." *See* Peter V. Schaeffer & Scott Loveridge, *Toward an Understanding of Types of Public-Private Cooperation*, 26 Pub. Performance & Mgmt. Rev. 169 (2002).

3. Atlantic Yards is often erroneously referred to as a Downtown Brooklyn project. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/04/times-finally-corrects-downtown.html (Apr. 27, 2006, 10:25 EST). Rather, the project site is in the northwest corner of Prospect Heights, closely bordering the neighborhoods of Park Slope, Fort Greene, and Boerum Hill. *See* figs.1- 2. (Editor's note: The figures referred to in this article are available at http://new.abanet.org/sections/statelocal/PublishingImages/42-2Lavine&OderFigApp.pdf. It is bounded primarily by Atlantic Avenue to the north, Vanderbilt Avenue to the east, Dean Street to the south, and Flatbush Avenue to the west. *Id*. A small spur of the project footprint extends west of Flatbush Avenue to 4th Avenue—technically the northwest tip of Park Slope. *Id*. Despite the name, less than forty percent of the project site is a railyard; the other blocks include light manufacturing, retail, and residential buildings, as well as some vacant lots. Some of the buildings

City Ratner ("FCR" or "FCRC"),[4] in conjunction with the Empire State Development Corporation (ESDC), a quasi-public entity with significant redevelopment powers.[5] Together, they intend to build a new arena for the New Jersey Nets NBA team, which was purchased in 2004 by an ownership group led by FCR CEO Bruce Ratner.[6] In addition to the arena, the project plans feature sixteen high rises with thousands of housing units, both market rate and subsidized, as well as office and retail space. The railyards, which are owned by the Metropolitan Transportation Authority (MTA), would be improved and decked over, thereby facilitating more efficient operations and hiding the unsightly tracks from view.[7]

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were empty when the project was announced and some later were deteriorated, though the extent and cause of the deterioration were in dispute, with no independent engineer permitted to evaluate the structures before they were demolished. Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2006/02/demolitions-timeline-what-do-emergency.html (Feb. 20, 2006, 7:08 EST). It should also be pointed out that the railyards are technically known as Vanderbilt Yard; "Atlantic Yards" is not an existing place in Brooklyn, but a project. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/01/some-common-and-less-common-mistakes-in.html (Jan. 12, 2009, 2:33 EST).

4. Forest City Ratner is a subsidiary of Forest City Enterprises, "one of the largest publicly traded real estate firms in the U.S." Forest City Ratner Companies, http://www.fcrc.com/ (last visited Mar. 18, 2010); *see also* Forest City: New York, http://www.forestcity.net/offices/new_york/Pages/default.aspx (last visited Mar. 18, 2010) (showing the New York branch of Forest City Enterprises).

5. ESDC is actually an alias for two separate public authorities, the Urban Development Corporation (UDC) and the mostly defunct Jobs Development Authority (JDA). The UDC was created by the New York state legislature in 1968 primarily to build low income housing and to improve blighted areas. Urban Development Corporation Act, N.Y. UNCONSOL. LAW, ch. 252, § 2 (Consol. 2010). Joseph P. Fried, *Goodbye, Slum Razing; Hello, Grand Hyatt*, N.Y. TIMES, July 15, 1979, at E6. To avoid the bureaucratic red tape and exclusionary zoning laws that had bogged down and prevented housing projects in the past, the UDC was given "truly amazing powers," including the authority to use eminent domain, override local laws, and issue tax exempt bonds. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/02/planner-garvin-udc-esdc-has-truly.html (Feb. 7, 2007, 6:26 EST). Despite these powers, it became apparent by the early 1970s that the UDC's housing projects alone were not sufficiently profitable to support the agency, and in order to provide needed revenues, the UDC began to focus on commercial and industrial projects. MORELAND ACT COMM'N ON THE URBAN DEV. CORP., RESTORING CREDIT AND CONFIDENCE 1 (1976), http://www.publicauthority.org/files/Restoring_Credit_&_Confidence.pdf. ESDC's other component entity, the JDA, was created in 1961 to provide funding for industrial development, but was absorbed into the UDC in the mid 1990s. *See* STATE OF N.Y. OFFICE OF THE STATE COMPTROLLER, URBAN DEVELOPMENT CORPORATION AND JOB DEVELOPMENT AUTHORITY STAFF STUDY: CONSOLIDATION OF THE STATE'S ECONOMIC DEVELOPMENT ENTITIES AND PROGRAMS, REPORT 96-D-19 6 (1997), http://osc.state.ny.us/audits/audits/9798/96d19.pdf.

6. *See* Richard Sandomir & Charles V. Bagli, *Ratner's Path To Buy Nets Had Pitfalls And Promise*, N.Y. TIMES, Jan. 25, 2004, § 8, at 1.

7. *See* Empire State Development Corporation, Atlantic Yards Arena & Redevelopment Project, http://www.empire.state.ny.us/Subsidiaries_Projects/AtlanticYards.html (last visited Mar. 18, 2010). *See* fig.3.

In 2003, the project was announced amid fanfare and excitement.[8] Since then, concerns have been raised about eminent domain, the project's impacts on surrounding neighborhoods, improprieties in the development approval process, a steadily lengthening buildout timeline, unreliable projections, broken promises, and misleading media and promotional materials.[9] Litigation surrounding these issues has been brought by an array of community organizations, public interest groups, condemnees, and elected officials, although most of the lawsuits have been organized and funded by the opposition group Develop Don't Destroy Brooklyn (DDDB).[10] Meanwhile, increased subsidies and project costs have generated questions about the fiscal benefits that Atlantic Yards will (or will not) bring to the city and state, and the economic crisis has darkened forecasts for mega-developments like Atlantic Yards. The succession of architects and architectural plans, and leading public officials' refusal to ask meaningful questions about the project's oversight have given project opponents and critics additional reasons to doubt that the entire project will be completed on schedule, if ever.[11]

Many of the concerns about Atlantic Yards might be classified as NIMBYist (not in my backyard), but many of the concerns are also well-founded, and project supporters' attempts to paint critics as reactionary and frivolous are overstated and plainly incorrect. The planning process, or lack thereof, raises serious concerns about transparency and

8. *See, e.g.*, Muschamp, *supra* note 1. Buzz about the project began even before it was formally unveiled. *See, e.g.*, Bill Farrell, *Boro Courting the Nets; Beep Says 500M Stadium Focus of Talks With Owners*, N.Y. DAILY NEWS, July 24, 2003, at 1.

9. *See generally* Amy Lavine, *An Arena for Brooklyn? The Controversy and Litigation Concerning the Atlantic Yards Project*, N.Y ZONING L. & PRAC. REP., Nov.-Dec. 2008*, available at* 9 NO. 3 NYZONING-R 1 (discussing the opposition's concerns for the project).

10. *See* Develop Don't Destroy Brooklyn, About DDDB, http://dddb.net/php/about dddb.php (last visited Mar. 18, 2010). DDDB was cofounded by Daniel Goldstein, who served as the lead plaintiff in the Atlantic Yards eminent domain litigation. *See* The Huffington Post, Bio of Daniel Goldstein, http://www.huffingtonpost.com/daniel-gold stein (last visited Mar. 18, 2010).

11. In April 2009, ESDC CEO Marisa Lago acknowledged that the project could take "decades" to build. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/04/esdc-ceo-lago-admits-obvious-atlantic.html (Apr. 9, 2009, 2:14 EST). Similar statements have been made by FCE CEO Chuck Ratner; Laurie Olin, the project's former landscape architect; and Kathryn Wylde, president and CEO of the Partnership for New York City. *See* Norman Oder, Atlantic Yards Report, http://atlantic yardsreport.blogspot.com/2007/03/cleveland-ratner-offers-timeline_08.html (March 8, 2007, 6:31 EST); *see also* Matthew Schuerman, *This Guy Wants You to Love Atlantic Yards*, N.Y. OBSERVER, Feb. 25, 2007, at 40 (describing Laurie Olin's thoughts on the project); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/12/atlantic-yards-2026-business-leader.html (Dec. 08, 2006, 6:06 EST) (describing an interview with Kathryn Wylde).

public accountability in the planning process, and the lawsuits have sought vindication of important constitutional and statutory rights. For those familiar with Atlantic Yards' long and complex history, it is likely that a good deal of the conflict could have been reduced had FCR and ESDC pursued a more open and inclusive process from the outset, and had they been willing to fairly consider and incorporate public input in the development of the project's plans.

The purpose of this article is not solely to criticize Atlantic Yards, but to show how lack of public accountability, procedural transparency and thorough governmental oversight have all contributed to an unsustainable framework for project development. Urban redevelopment is a demanding process that can rarely if ever satisfy all stakeholders, but the Atlantic Yards story privileges process and the appearance of a fair forum over actual public input. It has also exposed serious inadequacies in the legislation governing redevelopment in New York, including a legal framework that allows the interests of the public to be subverted to the often-intertwined interests of development agencies and their favored private-sector partners, and a statutory structure that makes it nearly impossible for property owners to mount a successful challenge against economic development and blighted area takings, even when there is a strong appearance of pretext.[12] The Atlantic Yards litigation,[13] moreover, has demonstrated that the courts cannot be relied on to rein in rogue development agencies, even when they acknowledge that the public process is inadequate.[14] The courts have repeatedly used the principle of legislative deference to pass on the difficult issues—such as

12. The libertarian Institute for Justice calls New York "one of the worst states in the nation" for eminent domain abuse. John Kramer, News Report Documents Widespread Eminent Domain Abuse Across New York State (Oct. 7, 2009), http://www.ij.org/index.php?option=com_content&task=view&id=2881&Itemid=165. Liberals like Norman Siegel, former executive director of the New York Civil Liberties Union, have also raised issues of eminent domain abuse in New York. New Yorkers for Norman Siegel, Bio, http://normansiegel.com/bio (last visited Mar. 18, 2010). In his 2009 campaign for New York City Public Advocate, Siegel said New York goes further than any other state in tilting the balance toward the condemnor. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/09/in-public-advocate-debate-siegel-again.html (Sept. 9, 2009, 9:21 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/12/battle-of-brooklyn-film-prompts.html (Dec. 11, 2009, 9:07 EST).

13. *See infra* Parts II-VI.

14. *See* Develop Don't Destroy Brooklyn v. Urban Dev. Corp. 874 N.Y.S.2d 414, 425–30 (App. Div. 2009) (Catterson, J., concurring); Goldstein v. N.Y. State Urban Dev. Corp., No. 178, slip op. at 10 (N.Y. Nov. 24, 2009)

> It may be that the bar has now been set too low—that what will now pass as 'blight,' as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted

whether an arena is really a public good, whether private developers should be able to dictate that public good, the meaning of "blight," and when a project changes so much as to require reapproval.

By showing how Atlantic Yards has so far failed to live up to its grand ambitions, and how its promoters have managed to elude any form of thorough government oversight, we hope to show how the redevelopment process can be improved. The first part of this article will discuss several of the most important aspects of the project, including issues related to architecture and urban design, the planning process, economic impacts, affordable housing, eminent domain, and the project's general trend of diminishing public purposes. Parts III through VI will discuss in more detail the litigation associated with Atlantic Yards, which can be broken into four basic lines: eminent domain; environmental review; public authority governance; and tenants' cases. The article's final part is forward-looking, addressing questions that have been raised about the project's future, and offering some speculation as to how Atlantic Yards may affect various legislative reforms and best practices for economic development.

I. The Atlantic Yards Project

A. *Architecture and Urban Planning*

The neighborhoods surrounding the Atlantic Yards site are predominantly (although not entirely) low and midrise, with some high-rise buildings across broad Atlantic Avenue.[15] The site, at its western border, is adjacent to Brooklyn's biggest transit hub, which has ten subway lines and serves as the Brooklyn terminus of the Long Island Rail Road. The site is near—but, crucially, not at (despite regular journalistic miscues)—the site sought by Brooklyn Dodgers owner Walter O'Malley for a new Ebbets Field before moving the team to Los Angeles in 1957.[16] And while the railyards are located in a more than forty-

to constitute a predicate for the invasion of property rights and the razing of homes and businesses;

Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/despite-citing-esdcs-deplorable-lack-of.html (Mar. 10, 2010, 19:30 EST) ("the court cannot ignore the deplorable lack of transparency that characterized ESDC's review of the 2009 MGPP"); Goldstein v. Pataki, 516 F.3d 50, 65 (2d Cir. 2008) ("we can well understand why the affected property owners would take this opportunity to air their complaints").

15. *See* fig.2 (aerial view).

16. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/02/will-times-correct-same-site-error-not.html (Feb. 17, 2008, 7:20 EST).

year-old urban renewal area that extends to the north,[17] the site abuts or is in close proximity to several historic districts[18] and vibrant residential neighborhoods.[19] Since the project's inception, concerns have been voiced about the project's density,[20] the results of the state's override of city zoning,[21] and the project's effects on traffic, congestion, noise, shadows, blocked views, and historic preservation.[22] Others have char-

17. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/03/behind-empty-railyards-40-years-of.html (Mar. 17, 2006, 7:01 EST); *Develop Don't Destroy Brooklyn*, 874 N.Y.S.2d at 416; *see also* fig.4 (designating the project site).

18. *See* fig.4. The site contains (or contained) several historical buildings suitable for adaptive reuse. *See* Tovah Pentelovitch, *Brooklyn Objects to 1910 Bakery Demolition for Development*, PRESERVATION MAG., Apr. 17, 2007, *available at* http://www.preservationnation.org/magazine/2007/todays-news-2007/brooklyn-objects-to-1910.html. ESDC determined that rehabilitation would be unfeasible. EMPIRE STATE DEVELOPMENT, ATLANTIC YARDS FINAL ENVIRONMENTAL IMPACT STATEMENT 7–31 (2006) [hereinafter FEIS], *available at* http://www.empire.state.ny.us/Subsidiaries_Projects/Data/AtlanticYards/AdditionalResources/AYFEIS/AYFEIS.html. Rehabilitating the historic Ward Bakery, according to the EIS, would have cost $30 more per square foot; more significantly, it would have conflicted with the project's need for open space and parking. *Id.; see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/03/forest-city-embraces-historic.html (March 23, 2007, 8:05 EST) (discussing FCE's approach to rehabilitation and adaptive reuse at other sites and the factors that led it to reject rehabilitation options for the historic buildings in the Atlantic Yards footprint); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/03/how-omission-in-leed-formula-helped-fcr.html (March 12, 2008, 6:00 EST) (explaining that "Had the cost and value of embodied energy been factored in, it might have changed the equation the Empire State Development Corporation calculated when it asserted that the cost of development at the Ward Bakery site would be an additional $30 per square foot."); Schuerman, *supra* note 11 (explaining that the project's superblocks were necessary because de-mapping the streets provided extra land for open space).

19.

> Brooklyn has always been different and better because it's been closer to the ground. That's a significant thing to lose. And "in close," to use Jim Stuckey's dismissive description of Prospect Heights, Fort Greene, Clinton Hill, and Boerum Hill, we'll feel the impact like a punch to the head. The small, warm neighborhoods around Atlantic Yards will become moons orbiting a cold planet.

Chris Smith, *Mr. Ratner's Neighborhood*, N.Y. MAGAZINE, Aug. 6, 2006, *available at* http://nymag.com/news/features/18862/.

20. *See, e.g.*, Scott M. X. Turner, Letter, *Preserving Brooklyn*, NEWSDAY, Dec. 28, 2003, at A25. While some initial opponents maintained that they wanted to keep Brooklyn low-rise, many project opponents respond that they are not anti-development or anti-density. *See, e.g.*, Develop Don't Destroy Brooklyn, About DDDB, http://dddb.net/php/aboutdddb.php (last visited Mar. 19, 2010); UNITY Plan, Understanding, Imagining & Transforming the Yards, http://www.unityplan.org/ (last visited Mar. 19, 2010).

21. *See infra* Part I.C.3.

22. *See, e.g.*, Andy Newman, *Raucous Meeting on Atlantic Yards Plan Hints at Hardening Stances*, N.Y. TIMES, Aug. 24, 2006, at B1; Julie Satow, *Arena Project Causes Concern Among Neighbors*, N.Y. SUN, Oct. 21, 2004, at 12; Municipal Arts Society, *Atlantic Yards: Brooklyn Deserves A Better Plan*, Jun. 20, 2006, http://mas.org/atlantic-yards-brooklyn-deserves-a-better-plan/; *see also* fig.6.

acterized these concerns as NIMBYism[23] and extended great accolades for the project. One op-ed described the arena as "a transformative, visionary project that would make Brooklyn the preeminent business center and tourist destination between Manhattan and Boston."[24] The New York Times' architecture critic Herbert Muschamp, a noted fan of architect Frank Gehry,[25] asserted that it would be a "Garden of Eden" in Brooklyn and a "well-equipped urban paradise."[26]

Originally, the project was to be designed by Gehry and the highly acclaimed landscape architect Laurie Olin. Gehry promised to bring urbanism to sports-facility architecture by cloaking the arena with several towers and installing glass walls at the concourse level.[27] Pedestrians would also benefit from ground level retail and numerous public and open spaces, including a soaring "Urban Room" connected to the flagship tower at the western end of the site that would serve as an entrance to the arena and the subway.[28] Because the western portion of the project site is located very close to one of New York City's largest transit hubs,[29] project supporters depicted it as a model of transit oriented development.[30] Environmental sustainability was incorporated in the

23. *See, e.g.*, Steve Cuozzo, *Progress Wins!—Nets Plan Could Be Next of Many Triumphs*, N.Y. POST, Feb. 10, 2004, at 33 (referring to opponents as "[s]tatus quo ideologues"); Smith, *supra* note 19 (quoting Jim Stuckey, then-Forest City Ratner executive, as dismissing opponents as "some people close in who don't like tall buildings"); Nicholas Confessore, *Developer Defends Atlantic Yards, Saying Towers Won't Corrupt the Feel of Brooklyn*, N.Y. TIMES, May 12, 2006, at B5 (" 'They should've been picketing Henry Ford,' Mr. Gehry said yesterday. . . ."). *See generally* Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29 (2006).

24. Richard Schwartz, Editorial, *The Plan's A Net Plus Homes, Offices, Jobs, NBA Team: It's a Winner for Brooklyn*, N.Y. DAILY NEWS, Feb. 10, 2004, at 35.

25. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/06/rereading-muschamp-on-ay-and-gehry.html (June 1, 2006, 7:10 EST).

26. *See* Muschamp, *supra* note 1. *But see* Oder, *supra* note 25.

27. *See* Bagli, *supra* note 1; figs.7–9.

28. ATLANTIC YARDS LAND USE IMPROVEMENT AND CIVIC PROJECT MODIFIED GENERAL PROJECT PLAN 9–10, 16–17 (2006) [hereinafter 2006 MGPP], *available at* http://www.scribd.com/doc/28363111/Atlantic-Yards-Modified-General-Project-Plan-12–06-Part-1.

29. *See* Press Release, MTA Long Island Rail Road, New LIRR Atlantic Terminal Pavilion Opens to the Public (Jan. 5, 2010), http://mta.info/mta/news/releases/?en=100105-LIRR2; MTA New York City Transit, 2008 Subway Ridership, http://www.mta.info/nyct/facts/ridership/ridership_sub.htm (last visited Mar. 19, 2010) (listing the Atlantic Avenue/Pacific Street station, with ten subway lines, as the 29th busiest subway station in New York, out of 422, and the second-busiest in Brooklyn (after the Court Street/Borough Hall station, which ranks 26th)).

30. *See, e.g.*, Schuerman *supra* note 11; New York State Urban Development Corporation Hearing on Atlantic Yards Development, Testimony of Kathryn Wilde: President

project plans through green building requirements,[31] and amenities such as a health care center and an intergenerational facility suggested that Atlantic Yards' developers aimed it to be socially sustainable as well.[32]

But the Atlantic Yards plans, from the outset, have suffered from serious urban design flaws. The project will be made up of superblocks—a largely discredited planning concept most commonly associated with the brutalist architecture of the 1950s and 1960s.[33] According to Ron Shiffman, cofounder of the Pratt Center for Community and Environmental Development and a DDDB board member,[34] the problem with this kind of development is that

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and CEO of Partnership for New York City (Aug. 23, 2006), *available at* http://www.pfnyc.org/testimonies/2006/tst_082306_AtlanticYards.pdf. However, Tom Angotti, an urban planning professor at Hunter College, rejected the project's description as "transit-oriented." *See* Tom Angotti, *Atlantic Yards and the Sustainability Test*, GOTHAM GAZETTE, June 2007, http://www.gothamgazette.com/article/landuse/20070605/12/2197.

> If Atlantic Yards becomes a model for transit-oriented development in the city then just about any major project near a transit hub will be able to wear the mantle of sustainability, even if it ends up encouraging more, rather than less, driving. In the U.S. city where mass transit is everywhere, transit-oriented development could well lose its meaning unless there is a clear and direct connection between land use development and mass transit improvements. Transit-oriented development should include transit improvements.

Id.

31. 2006 MGPP, *supra* note 28, at 7–8. However, adaptive reuse of existing buildings, rather than new construction, would arguably be more sustainable. *See* Roberta Brandes Gratz, *Urban Virtues*, METROPOLIS MAG., Mar. 19, 2008, http://www.metropolismag.com/story/20080319/urban-virtues; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/03/how-omission-in-leed-formula-helped-fcr.html (Mar. 12, 2008, 6:00 EST).

32. 2006 MGPP, *supra* note 28, at 5.

33. *See e,g.*, Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 732–35 (1993) (discussing the historical development of superblock modernism); American Planning Association Policy Guide on Smart Growth, http://www.planning.org/policy/guides/adopted/smartgrowth.htm (last visted Mar. 19, 2010) (stating that the APA "supports policies and plans that place street connection as a high priority in the development of transportation systems."); Alex Marshall, StreetsBlog, http://www.streetsblog.org/2008/02/22/lets-chop-up-superblocks/ (Feb. 22, 2008); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/05/superblock-that-dares-not-speak-its.html (July 26, 2006, 7:31 EST); Norman Oder, Atlantic Yards Report http://atlanticyardsreport.blogspot.com/2006/11/building-better-superblock-feis.html (Nov. 15, 2006, 18:40 EST); Matthew Schuerman, *At W.T.C. and Brooklyn Arena, Death and Life of the Superblock*, N.Y. OBSERVER, Sept. 26, 2005, at 13. *But see* Schuerman *supra* note 11 (explaining why Laurie Olin, the project's former landscape architect, believes that superblocks can be a positive planning device: "When people say 'superblock'—what's wrong with what this is? Because I don't see how adding one car in here is going to make it a better space. I think space on streets is actually useless space.").

34. *See* The Pratt Center Story, http://prattcenter.net/pratt-center-story (last visited Mar. 19, 2010); About DDDB, *supra* note 10.

> the street is nothing more than square footage added to permit greater building heights and densities. Streets in these developments divide rather than integrate neighborhoods. Traffic lights are recalibrated, for instance, to facilitate the flow of traffic and hinder pedestrian movement by reducing crossing times. Perversely, these measures are dubbed "mitigation" in the environmental review process. Without them, the development would not be allowed to proceed. . . .
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> This runs against the principles of good urbanism and drains the life out of the city. The street is the common denominator of every neighborhood in New York. Streets, more than buildings, make up the city's patrimony—its "genius loci."[35]

Atlantic Yards' single-developer model has also been criticized. New York City Comptroller Bill Thompson, attempting to distinguish himself in his 2009 challenge to incumbent Mayor Mike Bloomberg, juxtaposed it with Battery Park City and suggested that staged developments involving multiple private developers are more resistant to bad economies and result in "better-planned growth."[36] The project's open space designs also raise environmental justice concerns: with the added residential density, the project would actually decrease the amount of open space per capita; it would cast shadows over existing public spaces around the Atlantic Terminal subsidized housing complex; and much of what open space is created would be cut off from the street—and effectively privatized—by the high rise towers.[37] Responding to these problems, a consortium of designers and planners proposed their own, competing plan for the area, the Unity Plan.[38] They claimed it would better enhance the streetscape by retaining the existing street network, connecting neighborhoods, and

35. Ron Shiffman, StreetsBlog, http://www.streetsblog.org/2009/11/19/in-third-term-bloomberg-must-align-all-agencies-with-planyc/ (Nov. 19, 2009); *see also* Jason Varone, StreetsBlog, http://www.streetsblog.org/2007/02/22/atlantic-yards-planner-space-on-streets-is-useless-space/ (Feb. 22, 2007); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/05/superblock-that-dares-not-speak-its.html (July 26, 2006, 7:31 EST); Alec Appelbaum, StreetsBlog, http://www.streetsblog.org/2006/08/29/dead-ball/ (Aug. 29, 2006).

36. Eliot Brown, *Thompson on Mega-Development: Look to Battery Park City*, N.Y. OBSERVER, Oct. 15, 2009, *available at* http://www.observer.com/2009/real-estate/mega-development-thompson-goes-retro-plays-battery-park-city-card. Battery Park City is a ninety-two-acre area in lower Manhattan that is managed by the quasi-public Battery Park City Authority. *See* Battery Park City Authority, http://www.batteryparkcity.org/ (last visited Mar. 19, 2010); *see also* MARSHALL BROWN, RONALD SHIFFMAN & TOM ANGOTTI, UNITY: UNDERSTANDING, IMAGINING, & TRANSFERRING THE YARDS 24 (2007), http://www.unityplan.org/UnityPlanDoc_v6.pdf (discussing alternative plan for the Vanderbilt rail yards).

37. *See* Anne Schwartz, *Open Space in the Atlantic Yards Development*, GOTHAM GAZETTE, Aug. 2006, http://www.gothamgazette.com/article/parks/20060817/14/1938; *see also* Appelbaum, *supra* note 35 (discussing the effect the project will have on city streets); South Oxford Street Block Association, Our Gloomy Future, Straight from the DEIS Report, http://www.southoxford.com/pages/shadows.html (last visited Mar. 19, 2010) (showing the shadow that would be cast by the proposed towers).

38. *See* BROWN ET AL., *supra* note 36; *see also* fig.12.

allowing multiple developers and community groups to build up the area in a more organic way, albeit without an arena.[39]

In addition to its urbanist failings, the quality of the project's architecture has steadily eroded.[40] The green roof was eliminated due to project costs,[41] and the Urban Room, which was initially incorporated into the flagship building,[42] is to be replaced by an "urban plaza," also known as an "urban experience."[43] Marquee architect Frank Gehry was removed from the project in the summer of 2009,[44] only to have his plans replaced by a design that echoed an arena in Indianapolis, from Ellerbe Becket, one of the most popular architects for NBA arenas.[45] Leaked renderings, which were immediately panned by architectural critics, depicted an arena that looked remarkably like an airplane hangar,[46] lead-

39. *See* BROWN ET. AL., *supra* note 36, at 6, 24; Julie Satow, *Nets Arena Foes Offer Alternative For Ratner Site*, N.Y. SUN, Jan. 31, 2005, at 1; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/05/unity-2007-plan-for-railyards-gets.html (May 3, 2007, 7:44 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/09/unity-2007-new-jacobsian-plan-for.html (Sept. 25, 2007, 8:35 EST).

40. *See* Nicolai Ouroussoff, *What Will Be Left of Gehry's Vision for Brooklyn?*, N.Y. TIMES, Mar. 21, 2008, *available at* http://www.nytimes.com/2008/03/21/arts/design/21atla.html?_r=1.

41. *See* Audio recording: Matthew Schuerman, Atlantic Yards Loses Green Roof for Arena, 2016 Completion Date (May 6, 2008), *available at* http://www.wnyc.org/news/articles/98266 (audio at 3:07). Renderings released in 2010 depicted the arena with a giant illuminated sign on its roof, even though this would seemingly violate the project's design guidelines. ESDC maintains that the image is used for "promotional purposes" and that any rooftop signs will comply with the guidelines. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/esdc-say-arena-rooftop-signage-must.html (Mar. 8, 2010, 2:20 EST).

42. The flagship building was originally called "Miss Brooklyn." Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/05/gehry-starchitect-liberal-do-gooder.html (May 12, 2006, 7:15 EST). It was inspired by a bride Frank Gehry saw one day in a flowing veil, and Gehry called it "my ego trip." Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/05/decoding-fcr-press-release-on-site-5.html (May 6, 2008, 5:48 EST). Miss Brooklyn was later redesigned and lost her moniker, being referred to thereafter by only the building's technical designation, Building 1. *Id*.

43. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/12/at-entrance-to-arena-urban-room-becomes.html (Dec. 3, 2009, 14:14 EST). The outdoor plaza called the Urban Experience is intended to be temporary and will eventually be replaced by some sort of more permanent urban plaza or room. *Id*.

44. Charles V. Bagli, *Gehry Is Out as Designer of Project in Brooklyn*, N.Y. TIMES, June 11, 2009, at A27; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/09/faq-reason-for-new-architect-curiously.html (Sept. 9, 2009, 20:47 EST).

45. Bagli, *supra* note 44, at A27; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/06/nyt-gehry-as-predicted-is-gone-from.html (June 4, 2009, 16:25 EST).

46. *See, e.g.*, Nicolai Ouroussoff, *Battle Between Budget and Beauty, Which Budget Won*, N.Y. TIMES, June 8, 2009, *available at* http://www.nytimes.com/2009/06/09/arts/design/09arena.html (showing a rendering of Ellerbe Becket's design); fig.10.

ing FCR to hire a boutique "façade architect," SHoP, to design a "skin" for the same structure.[47] The new renderings, while somewhat better received,[48] did not depict any of the other sixteen buildings to be included in the project. As sports facilities expert Neil deMause described the images: "the surrounding condo and office towers still appear to be made of some sort of translucent plastic—either the developers realized they didn't look so hot filled in, or it's an oblique admission that they're really vaportecture."[49] When asked for renderings of the entire project, FCR CEO Bruce Ratner refused: "Why should people get to see plans? This isn't a public project. We'll follow the guidelines."[50]

Supporters and opponents alike can point to aspects of the project's design to confirm their opinions. Only time will tell whether it will become this generation's Rockefeller Center[51]—a much praised urban ensemble (albeit with housing in the case of Atlantic Yards rather than commercial space)[52]—or this generation's Penn Station—the treatment of which galvanized citizen outrage (albeit in relation to development reform in the case of Atlantic Yards rather than historic preservation).[53]

47. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/12/just-to-be-clear-ellerbe-becket-is.html (Dec. 4, 2009, 2:34 EST); *see also*, Ellerbe Becket, Ellerbe Becket and SHoP Architects to Collaborate on Barclays Center at Atlantic Yards (Sept. 9, 2009); http://www.ellerbebecket.com/success/newsitem/475/Ellerbe_Becket_and_SHoP_Architects_to_Collaborate_on_Barclays_Center_at_Atlantic_Yards.html (providing images of design).

48. *See, e.g.*, Aaron Betsky, Architect, http://www.architectmagazine.com/blogs/postdetails.aspx?=BlogId=beyondbuildingsblog&PostId=88980 (Sept. 10, 2009, 9:20 EST) (stating the Barclays arena building is "not half-bad"); Nicolai Ouroussoff, *New Yards Design Draws From the Old*, N.Y. TIMES, Sept. 9, 2009, at C1. While the June 2009 arena design was likened to an airplane hangar, the September version was compared to "a Claes Oldenburg handbag," a "giant eyeball," "a steamed clam," and "a cross between a baleen whale and a George Foreman Grill." Neil deMause, *New Atlantic Yards arena designs! Collect 'em all!*, FIELD OF SCHEMES, Sept. 9, 2009, http://www.fieldofschemes.com/news/archives/2009/09/3822_new_atlantic_ya.html; *see* fig.11.

49. *See* deMause, *supra* note 48. Neil deMause coauthored *Field of Schemes*, a book about the subsidy game played by cities and sports franchises, and the negative impact that it has on taxpayers, urban residents, and sports fans. NEIL DEMAUSE & JOANNA CAGAN, FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT (rev. expanded ed., 2008).

50. Theresa Agovino, *Ratner Faces Atlantic Yards hurdles*, CRAIN'S N.Y. BUS., Nov. 8, 2009, http://www.crainsnewyork.com/article/20091108/FREE/311089987.

51. As Laurie Olin explained early on, "One of the things that is hard for us to get across is that everything is an experiment[.]" Schuerman, *supra* note 11.

52. Muschamp, *supra* note 1 ("Those who have been wondering whether it will ever be possible to create another Rockefeller Center can stop waiting for the answer. Here it is.").

53. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/06/atlantic-yards-this-generations-penn.html (June 23, 2008, 5:01 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/12/will-absurd-process-make-atlantic-yards.html (Dec. 3, 2007, 6:31 EST).

B. *Blight*

One of the most contentious aspects of the Atlantic Yards project has been ESDC's decision to declare the project footprint blighted,[54] a determination that was made "a full 31 months after [the project] was unveiled and a full 17 months after the City and State of New York signed a Memorandum of Understanding . . . with Forest City Ratner. . . ."[55] Although the railyards are certainly unsightly,[56] the rest of the site encompasses various properties that were undergoing gentrification and revitalization prior to the project's announcement and that were, arguably, not blighted.[57] Given the timing of the blight determination, DDDB and other project opponents have argued that calling the area blighted was just a post-hoc rationalization for the use of eminent domain.[58] The blight study itself was prepared by the environmental consultant Allee, King, Rosen & Fleming (AKRF),[59] which has recently received extensive criticism,[60] and it relied on vague criteria such as

54. For an excellent discussion of the origin of the concept of blight, see Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003).

55. DDDB, RESPONSE TO THE ATLANTIC YARDS ARENA AND REDEV. PROJECT BLIGHT STUDY 3 (2006); http://www.dddb.net/documents/environmental/DEIS/testimony/DDDBBlightResponse.pdf. However, blight was considered by ESDC and FCR earlier in the process. *See* Online News Hour, Developing Brooklyn (Nov. 3, 2005), http://www.pbs.org/newshour/bb/law/july-dec05/brooklyn_11–03.html.

56. *See supra* note 18 and accompanying text. It has been suggested that the railyards are not even blighted. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/07/it-is-after-all-america-fcrs-stuckey.html (July 20, 2006, 6:43 EST) (reporting statements of Jeff Baker, counsel to DDDB); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/on-brian-lehrer-manhattan-institutes.html (Mar. 13, 2010, 7:24 EST) (reporting statements of Nicole Gelinas of the Manhattan Institute); figs.13–15.

57. *See, e.g.*, Nicholas Confessore, *Blight, Like Beauty, Can be in the Eye of the Beholder*, N.Y. TIMES, July 25, 2006, *available at* http://www.nytimes.com/2006/07/25/nyregion/25blight.html; Complaint at 14, Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (No. 06-CV-), *available at* http://dddb.net/documents/legal/eminentdomain/EDcomplaint061026.pdf; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/11/atlantic-yards-site-blighted-some.html (Nov. 27, 2009, 2:55 EST) (quoting statements of Philip Weinberg); Ariella Cohen, *Atlantic Yards 'Is Not Blighted' Says Green, Assemblyman Speaks Against Eminent Domain*, BROOKLYN PAPER, Nov. 11, 2005, http://brooklynpaper.com/stories/28/44/28_44nets1.html; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/on-brian-lehrer-manhattan-institutes.html (Mar. 13, 2010, 7:24 EST).

58. *See, e.g.*, Brief of Petitioner-Appellant at 64, Goldstein v. N.Y. State Urban Dev. Corp., No. 2008–07064 (N.Y. July 31, 2009), *available at* http://dddb.net/eminentdomain/papers/appeal/AppellantBrief.pdf.

59. For background on AKRF, see Matthew Schuerman, *The Enviro-Consultants Everyone Calls*, N.Y. OBSERVER, Aug. 7, 2007, http://www.observer.com/2007/enviro-consultants-everyone-calls#.

60. *See infra* Part I.C.5; Atlantic Yards Blight Study, http://www.empire.state.ny.us/Subsidiaries%5FProjects/Data/AtlanticYards/Blight%5FStudy/Blight%5FStudy/ (last

underutilization,[61] cracked sidewalks, and overgrown weeds.[62] (The question of whether the government should have been responsible for the maintaining the sidewalks and managing the weeds was not considered.[63]) On one lot, a mural protesting the use of eminent domain was even considered to be evidence of blight.[64] Technically, of course, blight is determined by the ESDC board, and not by its consultants,[65] but ESDC's counsel has admitted that the board has no objective standards for blight and has never reached a conclusion not already reached by its consultant.[66]

visited Mar. 25, 2010) (follow each hyperlink to view PDF images of sections of the study).

61. Underutilization can be understood as a synonym for economic development. As a lawyer for DDDB explained to the court of appeals at oral arguments for the eminent domain case,

> If you look at the blight justification, it's the other side of the economic development coin. What they're saying is that there's a below-grade open railyard that is unsightly, that there are properties that are underutilized, that's the fundamental basis for the blight determination . . . and at the end of the blight study, it's all about whether we should revitalize this particular area, which is another way of saying, should we take these properties for economic development purposes. . . .

Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/at-eminent-domain-oral-argument-judges.html (Oct. 15, 2009, 7:20 EST); *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/11/gelinas-how-ay-blight-study-is-about.html (Nov. 13, 2009, 21:41 EST) (quoting Nicole Gelinas of the Manhattan Institute: "the report pointed to 'underutilization' of the land. . . . But that means the Atlantic Yards is really an economic-development project—and that the politicians along with Mr. Ratner want to manage Brooklyn's economy rather than let competitive forces continue to improve the neighborhood.").

62. *See* figs.14–16; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/flashback-are-mta-or-nyc-responsible.html (Oct. 14, 2009, 2:21 EST); *see also* Pritchett *supra* note 54, at 15–17 (discussing the origin of blight "standards" similar to those referred to in ESDC's enabling legislation (N.Y. UNCONSOL. LAW ch. 252, § 2 (Consol. 2010))). In 2009, in a case in many ways similar to Atlantic Yards, a New York appellate judge determined that ESDC's blight standards were unconstitutionally vague. This conclusion was consistent with recent holdings from other states. *See* cases cited *infra* note 356.

63. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/11/are-mta-or-nyc-responsible-for-upkeep.html (Nov. 16, 2006, 23:10 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/01/esdcs-blight-dodge-living-among-but-not.html (Jan. 18, 2008, 6:01 EST).

64. *See* fig.18. Whether a blight determination could violate the First Amendment is an interesting question.

65. The condemnor (not the consultant) is responsible for preparing a determination and findings, which must specify the public use to be served by the project. N.Y. EM. DOM. PROC. § 204 (McKinney 2005).

66. ESDC's enabling legislation does contain a definition for "substandard and insanitary," but the definition is circular. N.Y. UNCONSOL. LAW ch. 252, § 3(12). Clues as to what blight is supposed to mean are included in the statute's purposes section. *Id*. at § 2. At a public hearing in 2010, counsel to ESDC acknowledged that the board does not have any checklist of criteria for blight, and that board members have no special

C. *The Planning Process and Community Participation*

Some of the most objectionable aspects of Atlantic Yards involve the development approval process, which failed to provide anything more than token opportunities for public competition, meaningful public involvement, or even review by local elected officials. While FCR and ESDC may not have violated any procedural laws or regulations, their actions were inconsistent with recommended best practices in the planning and redevelopment field.[67] They also created the appearance of a backroom, sweetheart deal, although this perception has not been validated by courts.

1. PUBLIC BIDDING: 2005

Atlantic Yards was (according to the official story) conceived in 2002, when Brooklyn Borough President Marty Markowitz approached FCR CEO Bruce Ratner with news that the New Jersey Nets were for sale. Markowitz invited Ratner to come up with a plan to move the Nets to Brooklyn, and by the end of 2003, Ratner was ready to unveil his proposal.[68] Already having developed two malls across the street, FCR had long been aware of the availability of at least the railyard component of the project site.[69]

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qualifications regarding the determination of blight. Eliot Brown, *Who Has the Right to Say What's Blight? Bill Perkins vs. ESDC Darling*, N.Y. OBSERVER, Jan. 6, 2010, http://www.observer.com/2010/real-estate/bill-perkins-no-fan-blight-consultant-akrf-esdc; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/does-esdc-board-determine-blight-on.html (Jan. 11, 2010, 6:56 EST); Youtube.com, Perkins ESDC on Blight Standards, http://www.youtube.com/watch?v=a_xYGGYt_4E& (last visited Mar. 19, 2010); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/at-hearing-esdc-representatives-defend.html (Jan. 7, 2010, 8:25 EST); Youtube.com, Perkins ESDC on AKRF Blight, http://www.youtube.com/watch?v=7QuAEx8k7YQ& (last visited Mar. 19, 2010) (discussing relevant portion at 7:52). For the full Perkins hearing video, see Youtube.com, NYS Senate Committee on Corporations, Authorities and Commissions Public Hearing, (Jan. 5, 2010), http://www.youtube.com/watch?v=X0GXCDQ3kF8.

67. *See generally* AMERICAN PLANNING ASS'N, POLICY GUIDE ON REDEVELOPMENT (2003) (defining planning best practices), *available at* www.planning.org/policy/guides/adopted/redevelopment.htm; Emily Fisher, *Sustainable Development and Environmental Justice: Same Planet, Different Worlds?* 26 ENVIRONS ENVTL. L. & POL'Y J. 201 (2003) (discussing the widely acclaimed Dudley Street Neighborhood Initiative).

68. Smith, *supra* note 19; Bagli*, supra* note 1. Also see Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/04/lifting-markowitz-fig-leaf-from.html (April 18, 2007, 6:10 EST).

69. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/05/more-evidence-about-ay-as-developer.html (May 19, 2008, 5:01 EST).

Although there was some question as to whether Ratner would be able to purchase the Nets,[70] Atlantic Yards was presented as a *fait accompli* when it was announced in 2003.[71] Ratner explained that "this was always the site,"[72] and New York City Mayor Bloomberg enthusiastically endorsed the project.[73] Other influential officials, including New York's Governor George Pataki and Senator Charles Schumer joined in the cheerleading and helped to lend an air of inevitability to the project.[74] As the New York Times reported, "From the moment the mayor heard about it, . . . he ordered everyone to get in line."[75]

As explained in one of the court decisions regarding Atlantic Yards:

> The first memorialization of the cooperation between the entities was a Memorandum of Understanding executed on February 18, 2005 between New York City, the ESDC and FCRC. That same day, and without first issuing a request for proposals, the MTA entered into an agreement with FCRC giving FCRC rights to develop above the MTA's Vanderbilt Yards. Three months later, the MTA belatedly issued a Request for Proposals. . . . Three months after that, the MTA accepted FCRC's bid.[76]

While the MTA bidding process may have been anemic, no bids were ever solicited by ESDC for alternative redevelopment plans for the project as a whole.[77]

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70. *See* Charles V. Bagli, *Corzine in Bid to Buy Nets and Block Potential Move*, N.Y. TIMES, Aug. 19, 2003, at D1.

71. Ezra Goldstein, Streetsblog, http://www.streetsblog.org/2006/11/29/what-went-wrong-at-atlantic-yards/ (Nov. 29, 2006).

72. Bagli, *supra* note 1.

73. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/01/flashback-to-2004-bloomberg-asserts.html (Jan. 23, 2007, 6:25 EST); City of New York Webcast, *Mayor's Weekly Radio Show*, Jan. 23, 2004, http://www.nyc.gov/html/om/html/2004a/abcrs012304.asx (discussing the Nets coming to Brooklyn beginning at 12:05).

74. *See* Mike Lupica, *Arena Foes Smell a Ratner*, N.Y. DAILY NEWS, June 27, 2004, at 52; Brian Heyman, *Battle for Brooklyn*, J. NEWS, June 18, 2004, at 3C; Russell Berman, *Arena Opponents Call for Strict Review*, N.Y. SUN, July 16, 2004, at 12; Hugh Son, *Flyer Blitz Ripped by Arena Foes*, N.Y. DAILY NEWS, June 3, 2004, at 1; Michael O'Keeffe & David Saltonstall, *Nets Need Full-Court Press*, N.Y. DAILY NEWS, Jan. 25, 2004, at 26. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/team-hype-pomp-and-questionable.html (Mar. 12, 2010, 9:38 EST).

75. Richard Sandomir & Charles V. Bagli, *Ratner's Path to Buy Nets Had Pitfalls and Promise*, N.Y. TIMES, Jan. 25, 2004, § 8, at 1; *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/team-hype-pomp-and-questionable.html (Mar. 12, 2010, 9:38 EST) (quoting Ratner at groundbreaking: "And Mr. Mayor, in July 2003, I remember presenting this project to you. After listening, you said, 'Let's get this done.' Design reviews, transportation issues, infrastructure, housing programs, water, sewer, building department, DEP. Your agencies responded and you responded. You met that commitment.").

76. Develop Don't Destroy Brooklyn v. Urban Dev. Corp. 874 N.Y.S.2d 414, 426 (2009) (Catterson, J., concurring).

77. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/03/rfps-rfeis-but-not-for-atlantic-yards.html (Mar. 9, 2006, 6:51 EST). ESDC usually does solicit multiple bids for large projects, since market competition usually

Extell Development Company was the only other bidder to respond to the MTA's token Request for Proposals (RFP), after DDDB, of its own volition, solicited developers.[78] Its proposal did not include an arena, but it did offer a higher cash payment, was less dense, and pledged not to use eminent domain.[79] Determining which of the bids was more valuable would be difficult. FCR contended that additional components of its bid, such as the arena and a new subway entrance, made it a better deal,[80] and that analysis was thoroughly endorsed by the MTA.[81] Develop Don't Destroy Brooklyn (DDDB), on the other hand, claimed that Extell's bid was three times as valuable.[82] While DDDB's analysis could be challenged, it is clear that Extell and other developers were at a disadvantage given FCR's huge head start, its political entrenchment, and the short time frame for bidding.[83] Matthew Schuerman of the New York Observer remarked on Extell's audacity in even submitting a plan, asking "who else but a lone wolf would dare upset the apple cart of prearranged subsidies and Mayoral endorsements to actually respond to the MTA's RFP?"[84] The dearth of responses to the RFP was certainly

results in improved project designs and public savings. Charles Gargano, former ESDC chairman, explained in a 2005 radio interview that "The reason why we [issue requests for expressions of interest] is we want to pick the brains of the private sector, and see what kind of ideas they have, and after all, they're the ones with the resources who are going to build these projects, so we want their ideas." *Id.*; *see also* Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2006_02_01_archive.html (Feb. 16, 2006, 7:19 EST). For audio, see The Brian Lehrer Show (Nov. 15, 2005), http://www.wnyc.org/shows/bl/episodes/2005/11/15 (interviewing Gargano at 2:15). Nevertheless, ESDC is not required to bid out redevelopment projects. N.Y. UNCONSOL. LAW ch. 252, § 6 (Consol. 2010).

78. Press Release, DDDB, DDDB Calls for Apology from NYC District Council Carpenters Political Director Stephen McInnis Should Apologize for Insensitive Remarks (Aug. 29, 2006), *available at* http://www.nolandgrab.org/archives/2006/08/dddb_press_rele_41.html.

79. *See* Develop Don't Destroy Brooklyn, The Extell Plan, http://dddb.net/php/community/extell.php (last visited Mar. 19, 2010).

80. *Compare* Memorandum of Law of ESDC Defendants in Support of Their Motion to Dismiss the Amended Complaint at *21, Goldstein v. Pataki, 2007 U.S. Dist. LEXIS 44491 (E.D.N.Y. 2007) (No. CV 06 5827), 2006 U.S. Dist. Ct. Motions 923893, *with* Develop Don't Destroy Brooklyn, How the Bids Stack Up, http://dddb.net/php/reading/mtabid.php (last visited Mar. 19, 2010).

81. *See* Affidavit of Gary Dellaverson at 2, Montgomery vs. Metro. Transp. Auth., No. 09/114304 (N.Y. Sup. Ct. 2009), *available at* http://dddb.net/MTAsuit/mta/DellaversonAffidavit.pdf.

82. *See* How the Bids Stack Up, *supra* note 80.

83. *See* Complaint at 17–18, Goldstein v. Pataki, No. 06-CV- (E.D.N.Y 2006), *available at* http://dddb.net/documents/legal/eminentdomain/EDcomplaint061026.pdf; The Extell Plan, *supra* note 79; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/08/state-eminent-domain-suit-filed-raises.html (Aug. 5, 2008, 4:00 EST).

84. Matthew Schuerman, *Dark-Horse Brooklyn Bidder No Rookie in N.Y. Real Estate*, N.Y. OBSERVER, July 31, 2005, *available at* http://www.observer.com/node/37387.

not a reflection of the site's marketability—Forest City Enterprises CEO Chuck Ratner[85] even called the site "a great piece of real estate."[86]

Despite its questionable timing, the bidding process was perfectly legal.[87] The MTA and ESDC, at the time, had the power to dispose of property and enter into development contracts without issuing any RFP or even appraising the property.[88] Even if it had required public bidding, case law clearly establishes that public authorities have wide latitude to select bids based on criteria other than cost. Factors such as the firm's experience or the development's potential may be prioritized, and authority decisions are accorded deference by the courts.[89]

Andrew Alper, then-president of the New York City Economic Development Corporation (NYC EDC), refused to acknowledge that there

85. Chuck Ratner is Bruce Ratner's cousin. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/07/who-wrote-that-pro-bruce-letter-to.html (Dec. 27, 2009, 6:04 EST).

86. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/03/cleveland-ratner-offers-timeline_08.html (Mar. 8, 2007, 6:31 EST). *See also* Satow, *supra* note 39 (describing other developers interested in the site).

87. Given the evidence, many people believe that FCR was the preordained winner of the MTA's RFP and, indeed an MTA spokesman in February 2004 said there was no plan even for an RFP. *See* Deborah Kolben, *Ratner Site is 'Up For Grabs,'* BROOKLYN PAPER, Feb. 14, 2004, *available at* http://www.brooklynpaper.com/stories/27/6/27_06nets1.html. If this was the case, the MTA board may have violated the Open Meetings Law by privately meeting and agreeing to support FCR's bid before formally accepting it. N.Y. PUB. OFF. LAW §§ 103–104 (McKinney 2000). Such a claim has never been filed, however, and proving it would be nearly impossible. *See generally* Patricia A. Crowder, *"Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623 (2007) (discussing the difficulties of applying open meetings acts in the context of redevelopment projects).

88. N.Y. PUB. AUTH. LAW § 1267 (McKinney 2000) (MTA); N.Y. UNCONSOL. LAW ch. 252, § 6 (Consol. 2009) (UDC). Shortly after the bid was awarded, and partly in response to the MTA's 2005 below-market sale of the West Side Railyard for a later-abandoned stadium project (*see* Legislative Update from the NYS Assembly Committee on Corporations, Authorities and Commission, Message from the Chair (Apr. 2006), http://assembly.state.ny.us/comm/Corp/20060330; Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth., 19 A.D.3d 284 (N.Y. 2005)) the legislature passed the Public Authorities Accountability Act of 2005 (PAAA). The legislation established regulations for the disposal of authority property, including appraisal requirements and public bidding rules. N.Y. PUB. AUTH. LAW § 2897. Compliance with the PAAA was the subject of DDDB's suit against the MTA, discussed *infra* Part IV. Additional limitations on public authorities contracts were enacted as part of the Public Authorities Reform Act of 2009.

89. *See, e.g.*, AWL Indus., Inc. v. Triborough Bridge & Tunnel Auth., 837 N.Y.S.2d 126, 127 (App. Div. 2007) (holding court must only ascertain if there is a rational basis); Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth., 799 N.Y.S.2d 186, 188 (App. Div. 2005) (holding MTA does not have to accept the best cash bid); Lancaster Dev., Inc. v. Power Auth., 535 N.Y.S.2d 654, 655 (App. Div. 1988) (holding that the public authority was not subject to competitive bidding provisions applicable to state agencies); Tri-State Aggregates Corp. v. Metro. Transp. Auth., 485 N.Y.S.2d 754 (App. Div. 1985) (noting that "The MTA does not have to bid at all on public contracts.").

was anything amiss about the bidding process, explaining at a city council hearing that "we were not out soliciting a professional sports franchise for Downtown Brooklyn. . . . they came to us, we did not come to them. And it is not really up to us then to go out and try to find a better deal."[90] While the bidding process may have been lawful, it was certainly not above reproach. Urban planning professor Tom Angotti echoed Justice Kennedy's concurring opinion in *Kelo v. New London*,[91] calling the process "backwards." As he explained, "[n]ormally, government does a plan for the area, then looks at the potential environmental impacts of the plan, decides what to do, and then either does it or puts it out to private developers to bid on. In Atlantic Yards. . . it is just the reverse."[92] In early 2010, a deal for a video casino at Aqueduct Racetrack that was in many ways similar to the Vanderbilt Yard bidding process drew much more media and political criticism, leading to both state and federal investigations.[93] Ironically, on the day of the arena groundbreaking, the governor's office responded to criticism of the Aqueduct deal and announced that the chosen winner would not be awarded the contract.[94]

2. PUBLIC BIDDING: 2009

Questions about the bidding process were revived in the summer of 2009, when the MTA revised the deal it had made with FCR for the development rights to the railyards.[95] The 2009 agreement provided less money upfront ($20 million instead of $100 million, with the balance

90. City Council of the City of New York, Transcript of the Minutes of the Committee on Economic Development 47 (May 4, 2004), *available at* http://www.dddb.net/documents/transcripts/ED050404_Transcript.pdf.

91. 545 U.S. 469, 492 (2005) (Kennedy, J., concurring); *see infra* Part II.A. (discussing *Kelo*).

92. Tom Angotti, *Atlantic Yards: Through the Looking Glass*, GOTHAM GAZETTE, Nov. 2005, *available at* http://www.gothamgazette.com/article/landuse/20051115/12/1654; *see also* Bettina Damiani, Project Director, Good Jobs New York, Public Hearing of the New York City Council Committee on Economic Development on the Proposed Brooklyn Atlantic Yards Project (May 26, 2005), *available at* http://goodjobsny.org/testimony_bay_5_05.htm (stating other developers were marginalized). *See generally* POLICY GUIDE ON REDEVELOPMENT, *supra* note 67 (defining the appropriate process).

93. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/despite-eerie-parallels-more-outrage.html (Mar. 4, 2010, 3:21 EST); *Assembly Speaker Sheldon Silver Wants Revive of Aqueduct Deal*, N.Y. POLITICS (Feb. 11, 2010), *available at* http://www.nypolitics.com/2010/02/11/assembly-speaker-sheldon-silver-wants-review-of-aqueduct-deal/; Fredic Dicker, *Feds Wade Into the Aque-Muck: Graft Probers Seize State Info on Slots Award*, N.Y. POST, Feb. 12, 2010, *available at* http://www.nypost.com/p/news/local/feds_wade_into_tPF7mtx8CmRHLsrxuu76SK.

94. *See* Russ Buettner & Charles Bagli, *Slot Machines at Aqueduct? No, Not Yet*, N.Y. TIMES, Mar. 11, 2010, at A19.

95. *See* BOARDS OF THE METROPOLITAN TRANSPORTATION AUTHORITY, LONG ISLAND RAIL ROAD, AND NEW YORK CITY TRANSIT AUTHORITY, RESOLUTION June 24, 2009, *available at* http://mta.info/mta/pdf/ay_resolution.pdf.

to be paid over twenty-two years at a generous 6.5% interest rate), a smaller and less valuable railyard (with room for fifty-six cars, rather than seventy-six), and a longer timeframe for the temporary yard (up to eighty months from thirty-two months).[96] The deal was approved by the MTA board after having only two days to review the details, apparently to aid FCR in securing final project approval before the end of 2009, when an IRS rule change would preclude the issuance of tax-exempt bonds for the arena.[97] Daniel Goldstein, the spokesperson for DDDB and the captioned plaintiff in the eminent domain cases, attempted to sway the board members by announcing a last-minute bid from DDDB of $120 million, but the board was unmoved.[98]

If there had previously been doubts about whether FCR was getting a sweetheart deal, the revised agreement offered more evidence in the affirmative,[99] as the MTA's choice to approve the renegotiation came on the heels of fares increases, service cuts,[100] and a state-approved bailout package for the cash-strapped and debt-ridden authority.[101] As owners of a major stake in the money-losing Nets, FCR and its parent company were under pressure to move the team to a new arena before the end-of-2009 IRS rule change regarding tax exempt bonds.[102] FCR had

96. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/12/as-challenge-to-mta-deal-awaits-judge.html (Dec. 9, 2009, 9:05 EST). FCR's purchase of the MTA's development rights was rated one of the fifteen best deals in New York City since the onset of the recession. Sarah Ryley, *The Best and Worst Deals*, REAL DEAL, Jul. 31, 2009, http://therealdeal.com/newyork/articles/the-best-and-worst-deals. As explained by one real estate professional, "the built-in financing over a 20-year period, at a time when there is an absolute absence of construction and land financing, makes this a real coup." *Id*.

97. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/06/video-mta-official-say-fcrs-arena-plans.html (June 29, 2009, 2:19 EST).

98. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/06/mta-approves-deal-10–2-despite-warnings.html (June 25, 2009, 6:09 EST). Former MTA board chair Dale Hemmerdinger called the DDDB offer a political stunt. *See* Affidavit of Dale Hemmerdinger at 5, Montgomery v. Metro. Transp. Auth., No. 09/114304 (N.Y. Sup. Ct. 2009), *available at* http://dddb.net/MTAsuit/mta/HemmerdingerAffidavit.pdf.

99. *See* Rich Calder, *Bid to Derail MTA-Ratner*, N.Y. POST, Oct. 14, 2009, at 2.

100. *See* William Neuman & Jennifer 8. Lee., New York Times City Room Blog, http://cityroom.blogs.nytimes.com/2009/03/25/mta-board-meets-to-vote-on-fare-hikes/ (Mar. 25, 2009, 9:38 EST).

101. *See* Pete Donohue & Glenn Blain, *Albany to the Rescue: Legislators Derail 'Doomsday,' Pass MTA Bailout*, N.Y. DAILY NEWS, May 7, 2009, *available at* http://www.nydailynews.com/ny_local/2009/05/06/2009–05–06_albany_to_the_rescue_legistlators_pass_.html.

102. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/feeling-pressure-fcr-vp-in-april-said-i.html (Oct. 13, 2009, 2:34 EST); Charles V. Bagli, *Atlantic Yards Developer Races a Court Hearing, a Bond Deadline, and Opponents*, N.Y. TIMES, Aug. 9, 2009, at A11, *available at* http://www.nytimes.com/2009/08/10/nyregion/10yards.html.

also made significant investments in the project by the summer of 2009, making it unlikely that the company would walk away from the project if the MTA drove a hard bargain.[103] But the MTA refused to acknowledge the inconsistency in imposing new costs on the public and simultaneously cutting costs for FCR. It claimed that "the evolution of the negotiations"[104] did not substantially alter the original deal,[105] and that it was necessary because it had underestimated the cost of decking over the railyards and because of the difficulty of finding alternative developers during the recession.[106] FCR was even more adamant, describing the changes as "insubstantial modifications to the 2005–06 business terms" that "did not change the essential nature of the MTA's transaction with FCRC."[107]

3. PUBLIC PARTICIPATION AND ACCOUNTABILITY: ESDC'S OVERRIDE OF LOCAL ZONING AND PLANNING REGULATIONS

The lack of robust competition for the project site might have been mitigated by comprehensive public and municipal involvement in the planning process, but ESDC chose instead (with the city's acquiescence) to preempt New York City's zoning and land use regulations, thereby circumventing the democratic process and precluding any possibility that FCR's plans might be modified or rejected by the city council.

ESDC overrode city zoning regulations, including mass and density restrictions, the requirement that sports facilities be set back 200 feet

103. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/07/esdc-fcr-face-answer-evade-tough.html (July 23, 2009, 7:03 EST).

104. *See* Affidavit of Helena E. Williams at 19, Montgomery v. Metro. Transp. Auth., No. 09/114304 (N.Y. Sup. Ct. 2009), *available at* http://dddb.net/MTAsuit/mta/WilliamsAffidavit.pdf.

105. *Id*. at 14. An overlooked indication of how even the original deal may have been skewed in favor of FCR was that Ratner, in 2003, wanted the MTA to "donate the land." Charles V. Bagli, *Corzine in Bid to Buy Nets And Block Potential Move*, N.Y. TIMES, Aug. 19, 2003, at D1. Similarly, under a financing plan proposed just after the project was announced, FCR would have asked the city for about $28 million a year. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/andrew-zimbalist-2005-thus-ultimate.html (Oct. 10, 2009, 6:27 EST). "But $28 million a year times 30 years would've added up to $840 million—a total that never appeared in print and that likely would have given Ratner the arena for nothing." *Id*.

106. Memorandum of Law of Respondent Metropolitan Transportation Authority in Opposition to the Petition at 26–27, Montgomery v. Metro. Transp. Auth., No. 09/114304 (N.Y. Sup. Ct. 2009), *available at* http://dddb.net/MTAsuit/mta/MTA_MOL.pdf; *see* Affidavit of Helena E. Willaims, *supra* note 104, at 13; Affidavit of Gary Dellaverson, *supra* note 81.

107. Memorandum of Law of Respondent Forest City Ratner Companies, LLC, In Opposition to the Petition at 14, Montgomery v. Metro. Transp. Auth., No. 09/114304 (N.Y. Sup. Ct. 2009), *available at* http://dddb.net/MTAsuit/fcr/FCR_MOLopposition.pdf.

from residences, and various signage laws.[108] It also invoked its vast authority to condemn public streets—property that is considered to be held in trust for the public and that has historically been impressed with strong protections against alienation.[109] And in a much criticized step,[110] the city and ESDC agreed to remove the project from the New York City Urban Land Use Review Procedure (ULURP),[111] a multi-step review process that involves neighborhood community boards,[112] borough presidents, the planning commission, and the city council.[113] ULURP is by no means a perfect process,[114] but it provides a formal

108. 2006 MGPP, *supra* note 28, at 41–43; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/08/whos-nimby-city-planning-commission-on.html (Aug. 22, 2006, 6:36 EST).

109. *See, e.g.*, McCoy v. Apgar, 241 N.Y. 71 (1925); People of N.Y. v. N.Y. Rys. Co., 217 N.Y. 310 (1916); Baker v. Village of Elmsford, 891 N.Y.S.2d 133 (App. Div. 2009). Under the UDC Act, ESDC has the power to plan, replan, open, regrade, or close streets, and so its sale of the streets most likely did not violate the public trust doctrine. N.Y. UNCONSOL. LAW ch. 252, § 5 (Consol. 2010). The only case concerning ESDC's ability to alienate public trust land was decided on the basis that the park property was not being used for private purposes. Brooklyn Bridge Park Legal Defense Fund, Inc. v. N.Y. State Urban Dev. Corp., 856 N.Y.S.2d 235 (App. Div. 2008).

110. *See* Shirley McRae, Jerry Armer & Robert Matthews, Letter to the Editor, *Atlantic Yards Needs Neighborhood Input*, CRAIN'S N.Y. BUS., Jan. 31, 2005, at 10; Satow, *supra* note 39; Assem. B. 6804, 2009–2010 Reg. Sess. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?bn=A06804.

111. ESDC ET AL., BROOKLYN ARENA/MIXED USE DEVELOPMENT PROJECT MEMORANDUM OF UNDERSTANDING 3 (2005), http://www.dddb.net/documents/mou/MOU1.pdf [hereinafter 2005 MOU].

112. Community boards play a significant role in the ULURP process, although their vote on projects is only advisory. In the case of Atlantic Yards, the three community boards that share pieces of the site all expressed opposition to the project or had major questions about it. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/10/cb-2-calls-for-halving-of-ay-density.html (Oct. 3, 2006, 6:54 EST); *see also* McRae et al., *supra* note 110.

113. New York City Dept. of City Planning, Uniform Land Use Review Procedure, http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml#review (last visited Mar. 20, 2010). The city planning commission did hold one public meeting regarding Atlantic Yards, although it is unclear how much power it actually had to alter the project. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/09/at-city-planning-8-scaleback-surfaces.html (Sept. 26, 2006, 6:27 EST). Regardless of the community forums and advisory role of the planning commission, there is still evidence that ESDC did not always seek out public participation or advice from city officials. The chairperson of Community Board 8, for example, claimed that ESDC did not give it adequate notice and urged the authority to "seek to address this inequity in the future." Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/10/cb-8-sends-esdc-committee-and.html (Oct. 1, 2006, 17:33 EST).

114. *See, e.g.*, Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/08/catching-up-with-coney-island-how-cba.html (Aug. 7, 2009, 2:47 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/02/flashback-2005-roger-green-says-ay-area.html (Feb. 19, 2009, 2:25 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/11/hpd-official-says-development-trade.html (Nov. 7, 2008, 1:59 EST).

role for local elected officials and "in project after project, the end result has proven far superior to the initial concept."[115] In contrast, ESDC's actions are controlled by a board of gubernatorial appointees who are only tangentially affected at the ballot box.[116] Additionally, unlike ESDC board members, the council members must be city residents,[117] and they presumably have better knowledge of the city's planning goals and development policies.[118] ULURP also allows more opportunities for meaningful public input than the top-down ESDC framework.[119]

ESDC was given the authority to insulate itself from political and community opposition so that local concerns would not interfere with projects of statewide significance, either by delaying them with red tape or by prohibiting them altogether.[120] Although neither the court of appeals nor the legislature has made any attempt to limit those instances in which ESDC can use its override authority,[121] we believe, based on statutory guidance and general planning policies, that Atlantic Yards is not the type of project that should implicate such extensive powers. ESDC's enabling legislation itself limits its ability to override local laws to cases where "compliance is not feasible or practicable,"[122] and given ESDC's compliance with ULURP for other large redevelopment projects, it is unclear why it would have been unfeasible or impracticable for Atlantic Yards.[123] Moreover, ESDC's enabling legislation also

115. Goldstein, *supra* note 71; *see* McRae et al., *supra* note 110.

116. N.Y. UNCONSOL. LAW ch. 252, § 4 (Consol. 2010); *see Government Alert: Business Issues Left Alone at Recess; Work Comp, Liablity Matters Pending as Lawmakers Break; Overseeing Nets Plan*, CRAIN'S N.Y. BUS., June 28, 2004, at 10.

117. *See* The New York City Council, About the City Council, http://council.nyc.gov/html/about/about.shtml (last visited Mar. 20, 2010).

118. The city's planning goals and policies are expressed in PlaNYC 2030. The Plan, http://www.nyc.gov/html/planyc2030/html/plan/plan.shtml (last visited Mar. 20, 2010); *see also* NYC.gov, Zoning Resolution of the City of New York (Mar. 3, 2010), *http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml* (providing the city's zoning amendments).

119. *See* NYC.gov, Community-Based Planning: The 197-a Plan, http://www.nyc.gov/html/dcp/html/community_planning/197a.shtml (last visited Mar. 20, 2010). Kent Barwick, president of the Municipal Art Society, claimed that this type of community participation "could have vastly improved the plans for Atlantic Yards." Goldstein, *supra* note 71; *see also* Fisher, *supra* note 67, at 212 (discussing how local governments and the legal community may make sustainable development more available).

120. *See* Waybro Corp. v. Bd. of Estimate, 67 N.Y.2d 349 (1986) (holding the UDC can bypass local laws or City Charter provisions for projects of statewide significance).

121. *Id*.

122. N.Y. UNCONSOL. LAW ch. 252, § 16 (3) (Consol. 2010).

123. *See, e.g.*, David Giles, *Community Board Reform and the Columbia Process*, CITY LIMITS, Oct. 8, 2007, *avaible at* http://www.citylimits.org/news/article.cfm?article_id=3416.

directs it to "give primary consideration to local needs and desires and [to] foster local initiative and participation in connection with the planning and development of its projects."[124] ULURP could have helped it to achieve these goals.

New York's strong tradition of home rule also suggests that local overrides should be reserved for those cases where such action is truly necessary to advance the health and welfare of the state's citizens.[125] As Chief Judge Cardozo explained in the seminal home rule case *Adler v. Deegan*,[126]

> *A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values. . . . A different question would be here if the city were restrained from increasing the restriction in respect of height and area as well as from reducing it*. . . . The city may lay out its districts as it pleases. It may make the height of its tenements even lower, and their courtyards even larger [than standards required by the state statute].[127]

Even if housing, in general (and not just affordable housing), can be considered a matter of state-wide concern sufficient to outweigh a city's interest in its own zoning laws, as has been conceded by the courts,[128] it would be questionable to say the same thing for a commercial basketball arena, which is, in our opinion, unnecessary to ensure the health, safety and welfare of the people of New York State. In contrast, the zoning ordinance that requires arenas to be set back 200 feet from residential districts is specifically intended to safeguard the health and welfare of residents who would otherwise be burdened by the attendant noise, congestion, litter, and crime that follow such developments.[129] ESDC's

124. N.Y. UNCONSOL. LAW, ch. 252, § 16(1).

125. *See* N.Y. STATE MORELAND ACT COMM'N ON THE URBAN DEV. CORP. & OTHER STATE FINANCING AGENCIES, RESTORING CREDIT AND CONFIDENCE 118 (1976), *available at* http://www.publicauthority.org/files/Restoring_Credit_&_Confidence.pdf (explaining that the provision of the UDC Act allowing zoning overrides was "the most controversial and received the most comment from local officials throughout the State. Mayor John V. Lindsay of New York City, for one, argued strongly that it represented an unconscionable infringement of home rule and would allow the Corporation to ride rough-shod over local communities.").

126. 167 N.E. 705 (1929).

127. *Id*. at 711–12 (Cardozo, J., concurring) (emphasis added).

128. Floyd v. N.Y. State Urban Dev. Corp., 300 N.E.2d 704, 706 (N.Y. 1973) (upholding the UDC's power to override local zoning laws for an affordable housing project).

129. N.Y. CITY, N.Y., ZONING ORDINANCE, art. VII. ch. 4, § 74–41(c) (2009), *available at* http://www.nyc.gov/html/dcp/pdf/zone/art07c04.pdf. In order to grant a special permit for an arena, the planning commission must find "that the hazards or disadvantages to the community at large through the location of such use at the particular site are outweighed by the advantages to be derived by the community from the grant of such special permit use." § 74–31(a).

override of New York City's signage laws to allow large (up to 150 feet high), illuminated signs for the arena may have similarly burdensome effects on residents.[130] To suggest that ESDC's mandate to create jobs—certainly an important matter of state-wide concern—grants it the ability to override any local zoning law in order to construct any type of project, without reference to actual health and welfare concerns, eviscerates the meaning of home rule.

Finally, limiting ESDC's ability to override local zoning and planning laws is warranted because best practices in urban planning have changed dramatically since 1968, when ESDC was created. The importance of local comprehensive planning has been increasingly recognized[131] and support for community-based planning (like that facilitated by ULURP) has grown in tandem with the smart growth, environmental justice, and sustainability movements.[132] These planning considerations are not the sort of bureaucratic red tape intended to be avoided by ESDC's creators.

4. PUBLIC PARTICIPATION AND ACCOUNTABILITY: STATE ENVIRONMENTAL QUALITY REVIEW ACT

ESDC may be able to override local laws, but it is still required to comply with state law, including the State Environmental Quality Review Act (SEQRA).[133] Under this statute, if the lead agency determines that the project may have significant adverse impacts, it must prepare an environmental impact statement (EIS). This EIS is not limited to environmental issues like pollution and endangered species, but also addresses impacts on the human environment, like traffic, historic preservation, noise, and displacement.[134] The EIS must also consider mitigation measures and possible alternatives, including a "no action" alternative.[135]

130. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/12/new-warnings-ay-would-overwhelm.html (Dec. 6, 2006, 6:58 EST).

131. *See* Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 40 URB. LAW 549 (2008).

132. *See, e.g.*, Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 578 (2006); *see also* James Jennings, *Urban Planning, Community Participation, and the Roxbury Master Plan in Boston*, 594 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13–14 (2004); *infra* Salkin & Lavine, note 167.

133. *See* N.Y ENVTL. CONSERV. LAW § 8–0101 (McKinney 2009).

134. *See* CITY OF NEW YORK, CEQR TECHNICAL MANUAL (2001), *available at* http://www.nyc.gov/html/oec/html/ceqr/ceqrpub.shtml. The City Environmental Quality Review (CEQR) law is very similar to SEQRA. AKRF wrote the manual. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/08/first-in-depth-but-partial-look-at-akrf.html (Aug. 8, 2007, 6:34 EST).

135. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(v) (2010).

Public hearings are not always required, but they are generally held for large projects, and the lead agency must in any case guarantee an opportunity to submit written public comments.[136] Substantive comments, in turn, must be addressed in the final EIS.[137] Before making a final agency decision on the project, the lead agency must take a "hard look" at the adverse impacts addressed in the EIS and then balance those impacts against social and economic concerns.[138] The agency then must provide a rationale for its decision, and it must certify that the action "avoids or minimizes adverse environmental impacts to the maximum extent practicable."[139]

SEQRA was intended to provide a "vital fulcrum from which the public can participate in . . . decisions inflicting environmental impacts on local communities."[140] Unfortunately, the statute is something of a paper tiger. It is an expensive and lengthy process, and it can be manipulated to exclude meaningful public participation and serious reviews of negative project impacts.[141] This occurs all too frequently, as "officials often treat public participation as if it obstructs or provides only marginal benefits to the decision process, rather than embracing it as an essential element of decisionmaking."[142] SEQRA reviews can be particularly inadequate for projects like Atlantic Yards that are governed by negotiated bilateral contracts, rather than by fixed zoning and planning laws. In these cases, extensive negotiations between the public partner and the developer occur long before members of the public have the

136. *See* N.Y. ENVTL. CONSERV. LAW § 8–0109(4) (2010); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(4).

137. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(8); Chester L. Mirsky & David Porter, *Ambushing the Public: The Sociopolitical and Legal Consequences of SEQRA Decision-Making*, 6 ALB. L. ENVTL. OUTLOOK J. 1, 19 (2002).

138. *See generally* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9 (stating the procedures for an environmental impact statement).

139. § 617.11(d)(5).

140. Philip Weinberg, *SEQRA: Effective Weapon—If Used as Directed*, 65 ALB. L. REV. 315, 315 (2001); *see* Develop Don't Destroy Brooklyn v. Urban Dev. Corp., No. 104597, 2008 N.Y. Misc. LEXIS 551 (Sup. Ct. 2008).

141. *See* Mirsky & Porter, *supra* note 137, *See generally* MANHATTAN INSTITUTE FOR POLICY RESEARCH, RETHINKING ENVIRONMENTAL REVIEW: A HANDBOOK ON WHAT CAN BE DONE (2007) [hereinafter RETHINKING ENVIRONMENTAL REVIEW], *available at* http://www.manhattan-institute.org/pdf/rethinking_environmental_review.pdf (focusing on New York City's environmental review process, which is in many ways similar to SEQRA review); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/05/start-on-trading-cumbersome-city.html (May 18, 2007, 7:26 EST) (discussing Rethinking Environmental Review).

142. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3, 38 (2005).

opportunity to offer comment. With decisions already made, public participation may become mostly ceremonial in nature.[143] Unsurprising

SEQRA's malleability, in the case of Atlantic Yards, resulted in poorly managed public hearings and time periods that were too short for lay members of the public (let alone experts) to thoroughly review the massive and jargon-filled project documents.[144] For those people who could get through the EIS,[145] there was a fair likelihood that their substantive comments would be met with evasive or conclusory responses.[146]

5. CONFLICTS

One of the most troubling aspect of the Atlantic Yards approval process concerns the possible conflicts of interest involving the consulting firm AKRF, which began working for FCR in June 2003 and then accepted a no-bid contract from ESDC in September 2005 to produce the EIS and blight study.[147] AKRF technically terminated its relationship with FCR before this point, but FCR was still responsible for paying its bills.[148] In a Freedom of Information Law case involving the Columbia University expansion project, which has a number of parallels to Atlantic Yards, a state appellate court found a conflict of interest due to AKRF's simultaneous representation of both Columbia and ESDC.[149] Atlantic Yards escaped this fate because the representation was (at least theoretically) staggered.[150] Whether or not the relationships among ESDC, FCR, and

143. *Id*. at 37–41.

144. *See, e.g.*, Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/10/esdc-hears-critics-on-scale-scope-and.html (Oct. 19, 2005, 8:11 EST); Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/12/environmental-impact-challenges-abound.html (Dec. 15, 2005, 8:50 EST); Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2006/01/muncipal-art-society-consider.html (Jan. 31, 2006, 10:50 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/08/ay-supporters-out-in-force-at-epic.html (Aug. 24, 2006, 6:29 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/09/ay-forum-on-election-day-brief-and-low.html (Sept. 13, 2006, 6:48 EST).

145. *See* RETHINKING ENVIRONMENTAL REVIEW, *supra* note 141, at 11, 19.

146. *See, e.g*., Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/11/are-mta-or-nyc-responsible-for-upkeep.html (Nov. 15, 2006, 23:10 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/01/did-esdc-address-post-feis-comments.html (Jan. 16, 2007, 6:12 EST); Anderson v. N.Y. State Urban Dev. Corp., 846 N.Y.S.2d 218 (App. Div. 2007).

147. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/08/was-akrfs-work-for-ratner-hindrance-to.html (Aug. 15, 2008, 3:28 EST).

148. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/07/revolving-door-consultants-akrf-and.html (July 17, 2007, 6:56 EST).

149. Tuck-It-Away Assoc. v. Empire State Dev. Corp., 861 N.Y.S.2d 51, 60 (App. Div. 2008).

150. Similarly, one of FCR's environmental review attorneys took a consecutive position with ESDC. He was held not to be conflicted because the representation was not

AKRF amounted to actionable conflicts of interest, it is apparent that their interests were inexorably commingled.[151]

ESDC has defended its relationship with AKRF on the basis that, having a head start, AKRF would be able to complete the project documents faster and at less expense than other consultants.[152] AKRF, according to ESDC, is also the most qualified consultant in New York City for large urban development projects.[153] These may be legally sufficient reasons for ESDC to award a multi-million dollar no-bid contract to AKRF for Atlantic Yards,[154] but they raise enormous doubts regarding the integrity of their relationship.[155]

Aside from the cozy relationship between AKRF and FCR—which, it has been suggested, carries "an implicit warranty that travels with the work"[156]—ESDC officials have acknowledged that AKRF, its "perennial environmental consultant,"[157] always produces studies that are in

simultaneous and the "appearance of impropriety," by itself, is not enough to disqualify an attorney. Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 816 N.Y.S.2d 424, 430 (App. Div. 2006).

151. Professors Peter V. Schaeffer and Scott Loveridge have noted that this sort of conflict is often inherent to the public-private development model:

> the potential for significant conflicts of interest in economic development is great. For example, a government that enters into a PPC with a private firm and makes a significant financial investment (or invests significant political capital) may be reluctant to pursue suspected violations of rules and regulations by its private 'partner' if this would endanger the success of the cooperative project.

Peter V. Schaeffer & Scott Loveridge, *Toward an Understanding of Types of Public-Private Cooperation*, 26 PUB. PERFORMANCE & MGMT. REV. No. 2, at 170–71 (2002).

152. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/at-hearing-esdc-representatives-defend.html (Jan. 7, 2010, 8:35 EST).

153. *Id*.

154. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/08/was-akrfs-work-for-ratner-hindrance-to.html (Aug. 15, 2008, 3:28 EST).

155. Following significant criticism of these conflicts by New York State Senator Bill Perkins, AKRF answered press questions via a public relations consultant who spoke in generalities: "Any suggestion that the firm—widely recognized as a trusted industry leader—would compromise the quality of its work is incorrect." Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/in-times-article-on-blight-reform-city.html (Jan. 20, 2010, 7:32 EST).

156. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/08/was-akrfs-work-for-ratner-hindrance-to.html (Aug. 15, 2008, 3:28 EST) (quoting Michael D.D. White, who is a real estate attorney, urban planner, former New York State Housing Finance Agency official, and author of the blog Noticing New York, http://noticingnewyork.blogspot.com); *see also* RETHINKING ENVIRONMENTAL REVIEW, *supra* note 141, at 10 (suggesting many in the legal profession believe "the more paper you have, the more protected you are").

157. Develop Don't Destroy Brooklyn v. Urban Dev. Corp., 874 N.Y.S.2d 414, 426 (App. Div. 2009) (Catterson, J., concurring); *see also* Schuerman *supra* note 59 (describing AKRF's continued relationship with the ESDC).

accord with the agency's plans.[158] ESDC's defense—that AKRF merely provides factual data, leaving the board to make the final decision—is weak. An EIS may be factual, but the manner in which data are (or are not) collected and reported can have a decisive impact on ultimate conclusions. And a supposedly independent consultant could easily be biased by a desire to maintain its go-to status for lucrative state contracts.[159]

6. PUBLIC PARTICIPATION AND ACCOUNTABILITY: PR STRATEGIES AND THE COMMUNITY BENEFITS AGREEMENT

Many other instances of opacity, disingenuity and hostility to public concerns have occurred during the Atlantic Yards approval process, on the part of city and state officials as well as FCR. Some early community meetings, for example, were held at times and places not conducive to public attendance;[160] ESDC failed to hold promised meetings with local elected officials;[161] and both the MTA and ESDC have resisted requests for information about the project.[162] Oversight of the hearing on the draft EIS—possibly the most important public hearing during the development process—was dismal: "No crowd control. Atlantic Yards supporters allowed to cut the line. Failure to allow those waiting to enter the hearing room in a timely manner. Verbal abuse and racially inflammatory references."[163] Property owners in the project footprint who sold

158. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/at-hearing-esdc-representatives-defend.html (Jan. 7, 2010, 8:35 EST).

159. *See, e.g.*, Brian W. Mayhew & Joel E. Pike, *Does Investor Selection of Auditors Enhance Auditor Independence?*, 79 ACCOUNTING REV. No. 3, at 799 (2004).

160. *See* Deborah Kolben, *Council Fouls Out*, BROOKLYN PAPERS, May 8, 2004, at 1, *available at* http://www.brooklynpaper.com/assets/pdf/27_18bp.pdf; Jess Wisloski, *Council Won't Listen: Public Barred From Hearing on Ratner Plan*, BROOKLYN PAPERS, June 4, 2005, *available at* http://www.brooklynpaper.com/stories/28/23/28_23nets1.html.

161. *See* BrooklynSpeaks, Principle 4: Be Truly Accountable to the Public (Dec. 11, 2009), http://www.brooklynspeaks.net/node/8.

162. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/10/foil-follies-ii-brennans-request-for.html (Oct. 25, 2006, 6:58 EST); *see also* Letter from Daniel Goldstein, Spokesperson for DDDB, to Peter S. Kalilow, Chairman of Metropolitan Transportation Authority, (Sept. 9, 2005), *available at* http://www.dddb.net/mta/proforma/ (requesting release of bid information); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/05/question-for-oversight-hearing-what.html (May 7, 2009, 2:10 EST) (discussing ESDC's refusal to release information).

163. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/09/cbn-cb-reps-slam-ay-hearing-oversight.html (Sept. 9, 2006, 7:59 EST) (citing a letter sent by the Council of Brooklyn Neighborhoods to ESDC).

to FCR were coerced into signing gag orders preventing them from criticizing the project,[164] and FCR repeatedly relied on dubious marketing tactics ranging from magazine-like publications with fake "letters to the editor" to direct mail campaigns soliciting support with offers of free Nets paraphernalia.[165] The list could go on.[166]

Of particular concern, however, FCR attempted to portray the project as community-vetted by signing a community benefits agreement (CBA). The agreement, which was purportedly modeled on the much-acclaimed Staples Center CBA, was (and still is) described as "historic." The Staples Center agreement was negotiated within a progressive framework emphasizing enforceability, accountability, transparency, and inclusiveness.[167] The Atlantic Yards CBA diverged from these principles in several important ways. According to Bettina Damiani, project director of Good Jobs New York:

> most striking is that elsewhere CBAs are negotiated by one broad coalition of groups that would otherwise oppose a project, a coalition that includes labor and community organizations representing a variety of interests. The coalition hammers out its points of unity in advance and then each member holds out on settling on its particular issue until the issues of the other members are addressed. This way, the bargaining power of each group is used for the benefit of the coalition as a whole. In the [Brooklyn Atlantic Yards] case, several groups, all of which have publicly supported the project already, have each engaged in what seem to be separate negotiations on particular issues.[168]

164. Patrick Gallahue, *Tout of Bounds: Ratner Forces Apt. Sellers to Hype Nets Arena*, N.Y. POST, June 16, 2004, http://www.nypost.com/p/news/tout_arena_bounds_ratner_forces_6zCiUGB00DNwiG4tyobdgL; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/04/fcr-buyouts-one-time-waiver-on-gag.html (Apr. 10, 2006, 8:18 EST).

165. *See, e.g.*, Flier, Atlantic Yards: Live. Work. Play., *available at* http://www.dddb.net/documents/times/flier2.gif; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/05/where-are-towers-fcrs-curious-new.html (May 3, 2006, 7:55 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/05/covering-ratners-brochure-why-not.html (May 10, 2006, 16:00 EST); Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/10/dissecting-fall-2005-issue-of-brooklyn.html (Oct. 16, 2005, 23:38 EST).

166. Develop Don't Destroy Brooklyn, Atlantic Yards: 20 Court Decisions v. 20-ish Lies (June 25, 2008), http://www.dddb.net/php/latestnews_Linked.php?id=1534.

167. *See generally* Partnership for Working Families, Community Benefits Agreements (CBAs), http://www.communitybenefits.org/article.php?list=type&type=155 (last visited Mar. 20, 2010) (providing a description of CBAs); JULIAN GROSS, GREG LEROY, & MADELINE JANIS-APARICIO, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE (2005), *available at* http://www.communitybenefits.org/downloads/CBA%20Handbook%202005%20final.pdf (discussing the purpose of CBAs and specific experiences); Patricia Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113 (2008) (analyzing CBA case studies).

168. Damiani, *supra* note 92.

Of the eight groups that participated in negotiations, most had been formed primarily for the purpose of negotiating the CBA.[169] Local organizations with proven track records of community advocacy, on the other hand, were excluded.[170] And in contrast with best practices,[171] all of the signatories have received significant funding from FCR.[172] The CBA also includes relatively weak oversight and enforcement measures.[173]

169. Matthew Schuerman, *Ratner Sends Gehry To Drawing Board*, N.Y. OBSERVER, Dec. 4, 2005, at 16. The CBA, moreover, was finalized on June 27, 2005, well before the project's draft environmental impact statement was issued on July 18, 2006. As a result, it is likely that CBA signatories were unaware of the full extent of the project's impacts. Bertha Lewis, then executive director of New York ACORN, has admitted that she was not interested in using the CBA to address environmental issues, but said she could only focus on housing. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/03/acorns-lewis-gets-fiery-as-affordable.html (Mar. 1, 2006, 10:11 EST).

170. Granted, "few very established organizations wanted in." Schuerman, *supra* note 169; *see also*, Affidavit of Gib Veconi at 2, Prospect Heights Neighborhood Council v. Empire State Dev. Corp., No. /2009 (N.Y. Sup. Ct. 2009), *available at* http://www.brooklynspeaks.net/sites/default/files/affidavit.pdf (stating that local organizations were excluded).

171. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/03/more-criticism-of-atlantic-yards.html (Mar. 30, 2009, 2:09 EST) (quoting John Goldstein).

172. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/08/ay-cba-witness-bloomberg-blasts-cbas-as.html (Aug. 26, 2009, 21:57 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/12/with-15m-grantloan-fcr-bails-out.html (Dec. 2, 2008, 14:40 EST); Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/10/modern-blueprint-evidence-points-to.html (Oct. 18, 2005, 9:35 EST); Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/09/irs-documents-show-build-relies-on.html (Sept. 29, 2005, 22:18 EST); Nicholas Confessore, *The People Speak (Shout, Actually) on Brooklyn Arena Project*, N.Y. TIMES, Oct. 19, 2005, at B1; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/06/conflict-of-interest-350k-to-cba.html (June 8, 2006, 6:48 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/09/nearly-silent-hunley-adossa-receives.html (Sept. 13, 2009, 6:55 EST).

173. ATLANTIC YARDS DEVELOPMENT CO. CBA § III.D (2005) [hereinafter ATLANTIC YARDS CBA], *available at* http://scribd.com/doc/31432536/Atlantic-Yards-Community-Benefits-Agreement-CBA (independent compliance monitor to be paid $100,000 annual salary from FCR); § IV.B.1.b. (liquidated damages, not specific enforcement). *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/02/substantial-legally-enforceable.html (Feb. 19, 2008, 6:04 EST); Damiani, *supra* note 92. Some of the promises made in the CBA are illusory, because FCR will need government approval to go forward with them. The CBA's proposed schools, for example, will need Department of Education approval and construction of a school onsite is up to the department. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/02/esdc-amends-mitigation-memo-on-timing.html (Feb. 12, 2010, 2:39 EST). The CBA, in a piece of circular logic, also states that the developer will be in compliance with environmental mitigation measures by following the state mandated policies. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/08/cba-accountability-where-are-reports.html (Aug. 31, 2006, 6:26 EST).

Although the Atlantic Yards CBA does promise some important community benefits,[174] the unregulated CBA negotiation process cannot replace thorough, transparent, and accountable government planning,[175] nor should it be portrayed as an adequate alternative. In the case of Atlantic Yards, the CBA was used to help legitimize the departure from ULURP and to simulate a measure of community involvement.[176] As a result, decisions concerning development amenities were made secretly, and by a select group of project proponents, while critics were shut out of the process.[177] Columbia University urban planning professor Lance Freeman commented:

> While the [Atlantic Yards] CBA does at least give some of the most disenfranchised residents an opportunity to reap some benefits from the project. . . . there is no mechanism to insure that the "community" in a CBA is representative of the community. If the signatories to the CBA were simply viewed as another interest group, that might be ok. But the CBA is being presented as illustrative of the development's community input. . . . This is not necessarily the case.
>
> The CBA . . . cannot be viewed as a substitute for a true planning process that includes community input. If a developer is proposing a project that will unduly burden the community, exacting benefits in exchange for tolerating these burdens is [a] fine idea. Ideally, this would be done as part of a democratic planning process. When negotiated by private organizations, however, this is symptomatic of a flawed planning process. When CBAs are used in place of an inclusive planning process they run the risk of legitimating the very process they are supposed to counteract, planning and development that disenfranchises.[178]

Since the Atlantic Yards CBA was signed in 2005, Deputy Mayor Dan Doctoroff softened his statement that there was an "enormous level

174. ATLANTIC YARDS CBA § IV.B.1. (pre-apprentice training); § IV.C.1. (local hiring referral services); § V.B.-V.D (minority and women owned business contracting goals); § V.F. (15% set aside of retail space for small businesses); § VI.B. (affordable housing commitment of 50% low-moderate income); § VI.C. (senior housing commitment of 10%); § VII.B. (health-care center); § VII.C. (intergenerational center); § VII.E. (arena-related community programs).

175. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/on-brian-lehrer-show-nyc-edcs-pinsky.html (Jan. 12, 2010, 2:53 EST).

176. *See* Schuerman, *supra* note 169.

177. *See* Develop Don't Destroy Brooklyn, Where is the Community in "CBA"?, (Apr. 20, 2007), http://www.dddb.net/php/latestnews_Linked.php?id=696; Damiani, *supra* note 92; Jess Wisloski, *Ratner Invites Chosen Few to Draft Agreement*, BROOKLYN PAPER, Oct. 2, 2004, *available at* http://brooklynpaper.com/stories/27/38/27_38nets2.html; Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/10/modern-blueprint-evidence-points-to.html (Oct. 18, 2005, 9:35 EST).

178. Lance Freeman, Planetizen, http://www.planetizen.com/node/24335 (May 7, 2007, 5:57 EST); *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/06/push-for-ay-development-trust-begins.html (June 17, 2008, 4:01 EST) (stating the oversight put in place does not really represent the public); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/03/acorns-lewis-gets-fiery-as-affordable.html (Mar. 1, 2006, 10:11 EST) (discussing some private negotiations).

of community input" regarding Atlantic Yards, noting that "[i]f it happened again, and the state were to ask if I would encourage them to take Atlantic Yards through the ULURP process, I would say yes."[179] The planning commission chairperson, Amanda Burden, expressed similar sentiments, although not directly in relation to Atlantic Yards.[180] And Mayor Bloomberg, who enthusiastically endorsed the CBA in 2005 as a witness,[181] has also come full circle, stating in 2009 that he is "violently opposed to community benefits agreements. . . . A small group of people, to feather their own nests, extort money from the developer? That's just not good government."[182]

D. *Housing*

From the outset, one of Atlantic Yards' strongest selling points has been the developer's promise that half of the 4,500 rental units would be priced for low and moderate income households.[183] The 50/50 affordable housing pledge was memorialized in a memorandum of understanding (MOU) between FCR and the Association of Community Organizations for Reform Now (ACORN), and was attached to the CBA, giving it an air of enforceability.[184]

But the 50/50 promise, to begin with, was invalid, unless you accept the lawyerly explanation that only *half of the units mentioned in the MOU* were intended to be affordable. In fact, just days after the agreement was formalized, FCR announced that the project would incorporate an additional 2000 market rate condos.[185] That number went up to

179. Matthew Schuerman, *The Education of Daniel Doctoroff*, N.Y. OBSERVER, Dec. 11, 2007, *available at* http://www.observer.com/2007/education-daniel-doctoroff?page=0%2C1; *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/04/doctoroffs-discomfort-atlantic-yards-is.html (Apr. 24, 2007, 6:42 EST) (describing Doctoroff's changing demeanor regarding the Atlantic Yards).

180. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/02/spin-city-1-burden-calls-ay-gaping.html (Feb. 15, 2007, 6:45 EST).

181. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/08/ay-cba-witness-bloomberg-blasts-cbas-as.html (Aug. 26, 2009, 21:57 EST) (quoting The Brooklyn Paper).

182. *Id*.

183. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/06/income-mix-for-ay-affordable-units.html (June 11, 2007, 6:59 EST).

184. MEMORANDUM OF UNDERSTANDING BETWEEN FCR AND THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN) (2005), *available at* http://www.nolandgrab.org/docs/HousingMOU.pdf; ATLANTIC YARDS CBA, *supra* note 173, exhibit D.

185. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/08/bait-and-switch-another-look-at-5050.html (Aug. 2, 2006, 7:03 EST).

2800, then after strategic reductions, went down to 1930.[186] Given this set of figures, the project, as approved, would encompass 6430 dwelling units, of which 2250, or thirty-five percent would be subsidized.[187]

Another question is just how affordable the affordable units will be. The project, employing standard industry practice, uses area median income (AMI) figures for the New York City metropolitan area, rather than for the borough of Brooklyn.[188] By including wealthy parts of Manhattan and some suburbs in the calculation, the effect is to inflate the local meaning of "low income." According to one calculation, the difference between the two measures was broad: $74,600 for the metropolitan area, as compared to just $46,990 for Brooklyn.[189] As a practical result, many of the units that are labeled affordable will in fact be at or above market rate for Brooklyn, and out of the price range of many existing residents.[190] City Council Member Charles Barron called this result "instant gentrification."[191]

The EIS, however, assumed that housing values and income levels would rise in the three-fourths-of-a-mile project study area even in the

186. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/01/short-history-of-atlantic-yards.html (Jan. 20, 2009, 2:05 EST).

187. *See* TECHNICAL MEMORANDUM, ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT 2 (2009), *available at* http://esd.ny.gov/Subsidiaries_Projects/Data/AtlanticYards/AdditionalResources/Technical_Memo_text.pdf. According to the Development Agreement, but not the General Project Plan, 200 of the for-sale units were aimed to be subsidized. They would be part of 600 to 1000 for-sale units in the Housing MOU, but not mentioned in the GPP. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/12/last-minute-ratner-goodies-3m-for.html (Dec. 20, 2006, 18:32 EST); ATLANTIC YARDS DEVELOPMENT AGREEMENT § 8, 22 (2009), *available at* http://www.scribd.com/doc/25972101/Atlantic-Yards-Development-Agreement-Section-8; *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/10/decoding-fcrs-gilmartin-on-beekman.html (Oct. 31, 2008, 2:52 EST).

188. *See* FEIS *supra* note 18, at 4–50.

189. *See* NEW YORK STATE DEP'T OF HOUSING & COMMUNITY RENEWAL, MARKET STUDY 2 (2009), *available at* http://www.dhcr.state.ny.us/Funding/Awards/UnifiedFunding/2009/20096098/Submitted%20Application/Attachment/20096098%20-%20Attachment%20-%20Attach%20C2%20Market%20Demand%20-%2020091.pdf (referring to Kings County, which is symonymous with Brooklyn). It is unclear whether this calculation takes into account household size.

190. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/acorns-talking-points-vs-acorns-reality.html (Oct. 2, 2009, 2:20 EST).

191. Nicholas Confessore, *Perspectives on the Atlantic Yards Development Through the Prism of Race*, N.Y. TIMES, Nov. 12, 2006, *available at* http://www.nytimes.com/2006/11/12/nyregion/12yards.html?pagewanted=2&_r=1; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/07/instant-gentrification-deis-says-no.html (July 25, 2006, 7:09 EST); *see also* Jane Jacobs, Noticing New York, http://noticingnewyork.blogspot.com/2009/04/jane-jacobs-atlantic-yards-report-card.html (April 2, 2009, 12:01 EST) (suggesting large projects like Atlantic Yards destroy diversity).

absence of the project and its new population.[192] Based on the conclusion that the distribution of affordability levels in the project would be similar to the existing distribution, the EIS concluded that

> the socioeconomic characteristics of the new population (e.g., in household income and household size) would not be markedly different from the characteristics of the population living in the broader ¾-mile study area. . . . [S]hifts in the distribution of households across income brackets would be small and would not substantially affect the overall socioeconomic character of the study area.[193]

But given the discrepancy between the Brooklyn AMI and the metropolitan area AMI, the EIS ignores the obvious implications of introducing thousands of new housing units scaled to a different affordability level than the existing population.

In addition to these gentrification concerns, the difficulty of obtaining scarce affordable housing bonds has raised speculation that construction of the affordable units could be seriously delayed.[194] Indeed, the availability of affordable housing bonds is somewhat of a condition precedent to completion of the project's housing component, given that FCR can extend project deadlines (through up to eight one-year extensions) on the basis of "affordable housing subsidy unavailability."[195] There are also concerns that relatively few affordable units will be built in the short term, given that FCR is only required to build 300 affordable units in the first phase, which has an outside deadline of twelve years, and many of those units could be priced toward the higher end of the affordability spectrum.[196] In the meantime, hundreds of units of existing housing, some of which were subsidized or rent-regulated, have been or

192. *See* FEIS, *supra* note 18, at 4–51.

193. *Id*. at 4–57.

194. *See, e.g.*, Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/02/ay-affordable-housing-jeopardized-not.html (Feb. 27, 2008, 6:01 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/06/how-forest-city-ratner-deceived-mta-and.html (June 22, 2009, 2:15 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/06/huge-deficit-in-tax-exempt-bonds.html (June 6, 2007, 6:44 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/asked-for-current-atlantic-yards.html (Jan. 15, 2010, 11:29 EST); Matthew Schuerman, *City to D.C: We Need More Housing Bonds*, N.Y. OBSERVER, May 29, 2007, *available at* http://www.observer.com/2007/city-d-c-we-need-more-housing-bonds#.

195. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/despite-promise-of-ten-year-ay-buildout.html (Jan. 27, 2010, 7:51 EST); *see also* Noticing New York, http://noticingnewyork.blogspot.com/2010/02/award-of-no-bid-mega-monopoly-means.html (Feb. 8, 2010, 21:38 EST) (discussing the likely costs of housing).

196. *See, e.g.*, Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/brooklynspeaks-relaxed-deadlines-and.html (Mar. 3, 2010, 6:59 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/esdcs-dubious-delays-release-of-master.html (Mar. 4, 2010, 7:57 EST);

will be demolished.[197] The result of a slow buildout combined with the relatively high cost of many subsidized units is that the enormous interest and need for affordable housing may not be met.[198]

ESDC and various state and city officials have mostly avoided serious consideration of these issues, even though it is fairly obvious that Atlantic Yards, in many respects, is not about affordable housing. So much was confirmed at oral arguments before the New York Court of Appeals in the eminent domain case, when ESDC's counsel essentially conceded that Atlantic Yards is a market-rate housing project.[199] It may be that the project's affordable housing is more of a "Trojan horse," used to secure approvals and rebuff opponents. Julia Vitullo-Martin, then of the Manhattan Institute, explained this tactic, emphasizing that "elected officials become very reluctant to oppose a project, any project, that has a large affordable housing component."[200]

E. *Subsidization and Economic Development*

Because the Atlantic Yards proposal has never been subject to a comprehensive and independent cost-benefit analysis, and because financing information has not been presented transparently,[201] both supporters and opponents have crafted economic arguments to support their posi-

Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/iffy-requirements-for-block-1129.html (Mar. 5, 2010, 3:33 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/new-documents-hint-at-potential.html (Jan. 25, 2010, 21:53 EST).

197. *See* Brooklyn Speaks, Create Affordable Housing that Meets the Community's Needs (Dec. 11, 2009), http://www.brooklynspeaks.net/node/7. The project will displace (or already has displaced) 171 residential units; EIS *supra* note 18, at 4–8. Additionally, "it was estimated that the study area contains approximately 2,929 households that are potentially at risk of indirect residential displacement." *Id*. at 4–3

198. *See, e.g*., Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/07/real-housing-for-real-brooklyn-half-of.html (July 25, 2006, 6:46 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/07/stuckey-lewis-face-restive-skeptical.html (July, 12, 2006, 6:56 EST).

199. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/at-eminent-domain-oral-argument-judges.html (Oct. 15, 2009, 7:20 EST). For video of the oral argument see http://www.nycourts.gov/ctapps/Goldstein.asx, specifically note ESDC attorney Philip Karmel's response to Chief Judge Lippman's questioning at 32:20 in the video, also see Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/ratners-bogus-claim-of-34-lawsuits.html (providing a description of the oral argument).

200. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/01/affordable-housing-trojan-horse.html (Jan. 5, 2007, 6:47 EST).

201. *See, e.g.*, Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/06/privately-financed-court-documents.html (June 6, 2007, 6:34 EST) (explaining that the GPP included "hard numbers regarding the **uses** of project funding but offered only a general outline of the **sources** of such funding."); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/09/from-economic-

tions. In itself, the lack of any such cost-benefit analysis or transparent financing information is a great detriment to the public.

1. SUBSIDIES

The potential for Atlantic Yards to generate economic development benefits cannot be fully assessed without taking into account contributions from the public fisc. Unfortunately, subsidies are often indirect, hidden, or structured in such a way as to be unintelligible to the average taxpayer.[202] And while subsidies can be obscured, project benefits are easily communicated: "jobs, housing, hoops."[203]

In 2003 and 2004, Atlantic Yards was characterized by FCR and Mayor Bloomberg as primarily privately funded, although full disclosure might have added that much of the private funding would be dependent on the availability of public financing.[204] Since then, New York City and New York State have together pledged $305 million in direct capital contributions.[205] (Because some of the city's costs went to infrastructure that likely would be built even without the project, the New York City Independent Budget Office (IBO) estimated the amount of capital contributions to be $260.7 million, measured in present value.[206])

impact-analysis-to.html (Sept. 18, 2009, 5:24 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/09/at-esdc-board-meeting-new-revelations.html (Sept. 18, 2009, 6:51 EST) ("response to comments" section); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/07/esdc-fcr-face-answer-evade-tough.html (July 23, 2009, 7:03 EST) ("economic impact" section, "what about the IBO report?" section); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/esdc-will-make-master-closing-documents.html (Jan. 21, 2010, 3:01 EST).

202. *See* Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/12/courier-lifes-softball-interview-with_04.html (Dec. 4, 2005, 11:03 EST) (quoting Cooper Union professor Fred Siegel, a supporter of FCR's MetroTech project but not Atlantic Yards, saying that Bruce Ratner is a "master of subsidy").

203. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/01/atlantic-yards-lexicon-and-more.html (Jan. 11, 2008, 6:01 EST); Deborah Kolben, *Union Workers and ACORN Rally for 'Jobs, Housing, Hoops,'* BROOKLYN PAPER, June 19, 2004, at 1, *available at* http://www.brooklynpaper.com/stories/27/24/27_24nets2.html.

204. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/01/flashback-to-2004-bloomberg-asserts.html (Jan. 23, 2007, 6:25 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/06/privately-financed-court-documents.html (June 6, 2007, 6:34 EST).

205. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/09/city-finally-responds-to-foil-request.html (Sept. 2, 2008, 3:05 EST).

206. N.Y. CITY INDEP. BUDGET OFFICE, FISCAL BRIEF: THE PROPOSED ARENA AT ATLANTIC YARDS: AN ANALYSIS OF CITY FISCAL GAINS AND LOSSES 3 (2009), *available at* http://www.ibo.nyc.ny.us/iboreports/AtlanticYards091009.pdf [hereinafter 2009 FISCAL BRIEF]. This calculation is in present value, and includes debt servicing. The IBO report was written before it was disclosed that $31 million of future infrastructure subsidies was used for land acquisitions, and as a result the $260.7 million figure may need to be revised upward.

The project will also receive city and state mortgage recording tax exemptions, property tax exemptions, and a sales tax exemption for construction materials.[207] The IBO estimated that these exemptions amount to $205.9 million.[208] Tax exempt bonds for the arena[209] and tax exempt affordable housing bonds[210] will add hundreds of millions of dollars to the federal government's bill. Significantly, the public will also lose out on any portion of the $200 million-plus naming rights deal for the arena, branded as Barclays Center, even though the property will be owned by ESDC and leased to FCR for a nominal $1 per year.[211] As recounted above, FCR also got what many believe to be a very favorable deal on its purchase of the development rights over the railyards.[212]

Some subsidies are more difficult to quantify. ESDC's use of eminent domain is, itself, a subsidy.[213] In addition to the forced condemnations, New York City has also agreed to "friendly condemnation" of the

207. EMPIRE STATE DEV. CORP., ATLANTIC YARDS LAND USE IMPROVEMENT AND CIVIC PROJECT MODIFIED GENERAL PROJECT PLAN 24 (2009), *available at* http://esd.ny.gov/subsidiaries_Projects/Data/AtlanticYards/ModifiedGPP2009.pdf [hereinafter 2009 MGPP].

208. *See* 2009 FISCAL BRIEF, *supra* note 206, at 3 (in millions: 13 for city loss of existing property taxes, 146 for city arena property tax exemption, 13 for city mortgage tax exemption, 10.4 for city sales tax exemption, 2.1 for state mortgage exemption, 9.2 for state sales exemption, 11.3 for MTA mortgage exemption, 0.9 for MTA sales tax exemption).

209. *Id*. The IBO's report was based on an issuance of $678 million of tax exempt bonds, although the initial bond offer was only for $511 million. *Id*. at 8, n.4. Accordingly, its estimate of costs to the federal government, $193.9 million, is inaccurate. *Id*. at 3. The issue of tax exempt bonding for professional sports facilities came under scrutiny in 2006, when IRS officials proposed a rule change that would prohibit such financing techniques. In 2008, federal officials determined that Atlantic Yards would be grandfathered under the old regulations if it met a December 31, 2009 deadline. *See* Charles V. Bagli, *Developer of Nets' Arena Can Use Tax-Exempt Bonds*, N.Y. TIMES, Oct. 21, 2008, at A26. FCR was able to have $511 million of bonds issued just days before the deadline. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/12/project-finance-on-escrow-situation-one.html (Dec. 27, 2009, 6:02 EST).

210. FCR intends to seek $1.4 billion in tax exempt affordable housing bonds, which would not be a direct subsidy but instead a near-monopoly on scarce resources. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/06/privately-financed-court-documents.html (June 6, 2007, 6:34 EST).

211. *See, e.g.*, Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/07/so-why-arent-naming-rights-counted-as.html (July 2, 2008, 4:01 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/09/ibo-responds-to-esdc-critique-of-fiscal.html (Sept. 22, 2009, 2:45 EST) (refuting ESDC's contention that it would pay more than $1 per year because the lease payments are structured as PILOTs (payments in lieu of taxes), which "allow the developer to divert the equivalent of real estate taxes to pay for arena construction").

212. *See infra* Part I.C.2.

213. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/12/whos-in-control-forest-city-and.html (Dec. 24, 2008, 2:17 EST) (discussing the subsidy value of FCR's "entitlement").

streets that must be closed for the project. Some of the city property will be acquired for $1, although its value is obviously much higher.[214] FCR also got a windfall when the city reimbursed it $100 million for land it bought in the project footprint for $103 million, given that the property was likely worth much more after ESDC's zoning override gave FCR the opportunity to build much larger buildings than permitted by the underlying zoning regulations.[215]

In January 2010, it was discovered that the city had advanced an additional $31 million for land purchases. Although the $31 million is "not new money," according to the city, and will be repaid by future FCR infrastructure investments, it gives reason to suspect that additional subsidies will be pursued.[216] In fact, a 2005 Memorandum of Understanding expressly allows additional public funds to be invested in the project for "extraordinary infrastructure costs." DDDB calls this a "blank check."[217]

2. JOBS

The Atlantic Yards job creation figures have fluctuated, and have often been misrepresented. When the project was announced it promised 10,000 permanent jobs in four towers wrapping the arena, although even in 2003 this was an enormously optimistic projection given the lack of market demand for office space in Brooklyn.[218] By June 2005, the number of expected office jobs had dropped to 6000. However, based on the projection of 628,000 square feet of commercial space included in the

214. *See* 2009 MGPP *supra* note 207, at 23; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/12/indirect-subsidies-how-forest-city_19.html (Dec. 19, 2008, 2:27 EST) (estimating its value at around $8 million).

215. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/11/how-forest-city-ratner-quite-possibly.html (Nov. 17, 2008, 2:58 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/12/indirect-subsidies-how-forest-city_19.html (Dec. 19, 2008, 2:27 EST).

216. *See* Erin Durkin, *City Shells Out Another $31 Million to Help Developer Bruce Ratner Buy Land for Atlantic Yards*, N.Y. DAILY NEWS, Jan. 27, 2010, *available at* http://www.nydailynews.com/ny_local/brooklyn/2010/01/27/2010–01–27_atlantic_yards_project_got_extra_31m_from_city_to_buy_land.html; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/did-city-give-forest-city-ratner-31.html (Jan. 27, 2010, 5:21 EST).

217. Press Release, Develop Don't Destroy Brooklyn, Public Cost of 'Atlantic Yards' Continues to Balloon (Jan. 29, 2007), http://dddb.net/php/press/070129200million.php.

218. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/for-record-vastly-overoptimistic-and.html (Mar. 8, 2010, 3:20 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/05/headline-you-never-saw-atlantic-yards.html (May 3, 2006, 6:43 EST); Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2006/01/jobs-at-atlantic-yards-overpromised.html (Jan. 17, 2006, 7:45 EST).

September, 2005 Draft Scope of Analysis, and the standard formula of 250 square feet per job, the number of projected jobs worked out to only 2512.[219]

The project's original promotional materials also promised 15,000 construction jobs.[220] However, because the standard measurement for construction jobs is actually in *job years*, a more accurate promise would have been 1500 jobs every year for ten years. It is a mistake—or a deliberate distortion—that has been made repeatedly.[221] It was recently restated by FCE CEO Chuck Ratner, who claimed in a letter to the Washington Post that the project would create 17,000 construction jobs, instead of 1700 construction jobs for ten years, or 680 construction jobs for twenty-five years.[222] Similar statements were also included in the groundbreaking press release and other media. Chuck Ratner also claimed that the project would create 8000 permanent jobs, a highly unlikely number apparently based on the project's commercial mixed use variation, even though the project's residential mixed use variation has long been the version publicly discussed.[223] (The commercial ver-

219. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/05/headline-you-never-saw-atlantic-yards.html (May 3, 2006, 6:43 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/11/ay-office-jobs-from-10000-to-375.html (Nov. 15, 2006, 17:28 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/12/bait-and-switch-from-start-ratner-knew.html (Dec. 11, 2007, 7:26 EST).

220. *See* Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/10/how-many-construction-jobs-at-atlantic.html (Oct. 26, 2005, 8:08 EST) (noting that in 2005, Mayor Bloomberg stated that 12,000 jobs, not 15,000, were expected).

221. The figures given in the 2006 Modified General Project Plan were somewhat different, estimating 12,568 direct job years, 21,796 total job years (direct, indirect, and induced), and 5065 new permanent jobs. 2006 MGPP, *supra* note 28, at 32. When the MGPP was reapproved in 2009, it contained the same numbers, but a board memo distributed the same day included new job figures: 16,427 direct job years, 25,133 total job years (direct, indirect, and induced), and 4277 new permanent jobs. Dennis Mullen, Request for Affirmation of Modified General Project Plan 5 (Sept. 17, 2009), *available at* http://www.dddb.net/MGPPsuit/EX%20%20E%20%20090917%20ESDC%20Bd%20memo.pdf.

222. Charles Ratner, Letter to the Editor, *Atlantic Yards Project Was Not Properly Presented*, WASHINGTON POST, Jan. 12, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/11/AR2010011103869.html.

223. *Id.; see* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/for-record-faq-about-atlantic-yards.html (Mar. 10, 2010, 7:22 EST) ("The ESDC says 16,427 new direct job years."); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/todays-news-quiz-atlantic-yards-project.html (Jan. 12, 2010, 7:17 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/02/brutally-weird-forest-citys-fantasy-of.html (Feb. 10, 2010, 2:34 EST).

sion, regardless, is likely unfeasible given the weak market for office space.[224])

Estimates of permanent office and retail jobs are inherently somewhat speculative because these jobs are dependent on the particular businesses that lease space in the complex.[225] But developers are known to err on the high side when making job creation projections and to downplay the statistics for "retained jobs" (i.e., jobs transferred to the project from another part of the city or state).[226] ESDC's job creation predictions were also based on a full buildout, even though the development agreement gives FCR significant leeway to build a smaller project than has been promised.[227] That would most likely translate into fewer jobs.[228] For these reasons, and because of the ailing commercial rental market,[229] the jobs promised by FCR may be delayed, or may not be produced at all. Even assuming full buildout, discounting ESDC's most recent projection of 3998 jobs to account for retained jobs suggests that the number of new office jobs would only be about 400.[230]

224. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/02/brutally-weird-forest-citys-fantasy-of.html (Feb. 10, 2010, 2:34 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/12/bait-and-switch-from-start-ratner-knew.html (Dec. 11, 2007, 7:26 EST).

225. For permanent jobs, FCR has based its projections on a formula of one job for every 200 square feet. The standard formula used by the city Economic Development Corporation and FCR's consultant, Andrew Zimbalist, is one job for every 250 square feet. *See* Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/09/now-we-know-luxury-housing-increased.html (Sept. 19, 2005, 23:41 EST).

226. *See* Sherry L. Jarrell, Gary Shoesmith & Neal Robbins, *Law and Economics of Regulating Local Economic Development Incentives*, 41 WAKE FOREST L. REV. 805, 823 (2006); Gideon Kanner, Gideon's Trumpet, http://gideonstrumpet.info/?p=115 (Sept. 13, 2008, 14:23 EST) (describing the jobs projections in the infamous *Poletown* case).

227. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/despite-promise-of-ten-year-ay-buildout.html (Jan. 27, 2010, 7:51 EST).

228. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/02/another-confirmation-of-bait-and-switch.html (Feb. 3, 2010, 7:03 EST).

229. *See* Charles V. Bagli, *Slow Economy Likely to Stall Atlantic Yards*, N.Y. TIMES, Mar. 21, 2008, *available at* http://www.nytimes.com/2008/03/21/nyregion/21yards.html?_r=1. In 2009, Ratner implied in an interview that the first office tower would be built only when the market for office space improves. *See* Theresa Agovino, *Ratner faces Atlantic Yards hurdles*, CRAIN'S N.Y BUS., Nov. 8, 2009, *available at* http://www.crainsnewyork.com/article/20091108/FREE/311089987.

230. *See* Memorandum from Andrew M. Alper to Deputy Mayor Daniel L. Doctoroff 6 (June 27, 2005), *available at* http://www.dddb.net/public/NYEDC_AYardsImpact.pdf [hereinafter Alper Memo] ("The fiscal impact analysis, however, assumes that only 30% of these jobs, or just over 2,000 workers, are new to the New York economy."); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/02/brutally-weird-forest-citys-fantasy-of.html (Feb. 10, 2010, 2:34 EST).

FCR deserves credit for recognizing the salience of a CBA, and entering into one that established minority and women contracting and hiring goals, as well as job training programs, job fairs, a local hiring referral system, and preferences for local businesses.[231] However, FCR's contractors, tenants, and vendors (and successors) are not required to comply with the CBA.[232] The CBA also fails to include any living wage goals, which are one of the mainstays of the national CBA movement.[233] Of course, the CBA was not a gesture of unmitigated generosity, but was intended to help secure public and political support for the project.[234] It also bypassed existing community organizations, and in the case of BUILD, the CBA delegated its job training and local hiring programs to an inexperienced organization that will be in competition with an established job training and employment organization.[235]

As with the Atlantic Yards' housing, jobs have been held out as bait to gain public support for the development—nobody, after all, opposes jobs—but there are no enforceable job creation goals and penalties for delays are modest.[236] Even assuming that the job creation goals are fulfilled, there has been no weighing of the public costs required to create these jobs against less-subsidized project alternatives.

3. TAX REVENUES

The amorphous concept of economic development, in addition to job creation, includes such things as increased tax revenues, increased private investment, and indirect job creation. As for the projected increase in tax revenues, FCR initially claimed that it would create $6 billion in tax revenues over thirty years.[237] That estimate was later lowered to $5.6 billion, which, when subsidies were factored in, came to $4.4 bil-

231. *See* ATLANTIC YARDS CBA, *supra* note 173 (explaining MWBE goals).

232. GROSS ET AL., *supra* note 167, at 71 (explaining the importance of CBA provisions ensuring compliance by tenants and subcontractors). Also see Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/03/more-criticism-of-atlantic-yards.html (Mar. 30, 2009, 2:09 EST) (quoting Ben Beach of the Community Benefits Law Center).

233. *See generally* Partnership for Working Families, Living Wage, http://www.communitybenefits.org/section.php?id=154 (informing about wage policies).

234. *See*, e.g., Norman Oder, Times Ratner Report, http://timesratnerreport.blogspot.com/2005/12/more-on-observers-roger-green-story.html (Dec. 2, 2005, 17:20 EST).

235. *See id*.

236. *See infra* Part I.E.4.

237. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/03/6-billion-lie-why-ratners-fiscal-claim.html (Mar. 28, 2006, 7:22 EST).

lion.[238] The accuracy of FCR's tax revenue projections, however, is an entirely different question. They were based not on ESDC's figures,[239] but on an economic analysis commissioned by FCR[240] that had several major methodological flaws.[241]

A 2005 fiscal analysis conducted by NYC EDC found that Atlantic Yards would generate $524 million in net revenues for the city, but its accuracy was undermined because it did not take costs or subsidies into account.[242] On the other hand, a 2005 IBO report, although it analyzed only the arena, found net benefits of $28.5 million for the city and $107 million for the state.[243] When that report was updated in 2009 to take into account the project's increased costs and subsidies, the IBO concluded that over a thirty year period the arena would provide only a modest benefit of $25 million in new state tax revenues and that it would actually cost the city $40 million.[244] The IBO's conclusions were

238. *See id; see also* Dana Rubenstein, *It's true! Ratner a big liar!*, BROOKLYN PAPER, Feb. 9, 2008, *available at* http://www.brooklynpaper.com/stories/31/6/31_06_its_true_ratner_a_big.html (reporting that a Forest City Ratner attorney admitted to mistakenly attributing this tax revenue projection to state agency documents); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/02/forest-city-ratner-admits-lie-well.html (Feb. 6, 2008, 6:01 EST) (also reporting about the admitted mistake).

239. 2009 MGPP, *supra* note 207, at 33 ("On a present value basis, the Project will generate $652.3 million of City tax revenues and $745.3 million of State tax revenues. Thus the project will generate $944.2 million in net tax revenues in excess of the public contribution to the Project").

240. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/02/forest-city-ratner-admits-lie-well.html (Feb. 6, 2008, 6:01 EST) ("FCR lawyer Jeffrey Braun belatedly admitted his statement was "mistaken," acknowledging that the projection comes not from a government-commissioned analysis but from Andrew Zimbalist, a consultant paid by the developer."; *see generally* ANDREW ZIMBALIST, ESTIMATED FISCAL IMPACT OF THE ATLANTIC YARDS PROJECT ON THE NEW YORK CITY AND NEW YORK STATE TREASURIES (2004), *available at* http://www.dddb.net/public/ZimbalistReport2004.pdf (providing the full commissioned report).

241. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/03/6-billion-lie-why-ratners-fiscal-claim.html (Mar. 28, 2006, 7:22 EST) (explaining, particularly, that FCR's economic analysis was flawed because it used cumulative revenue and household income figures, which other economists eschew).

242. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/06/breaking-down-ay-fiscal-analysis-why-if.html (June 2, 2009, 2:39 EST); *see also* Alper Memo, *supra* note 230 (providing a description of the methodology of the fiscal analysis); N.Y. City Indep. Budget Office, Testimony of George Sweeting before the New York State Senate Standing Committee on Corporations, Authorities, and Commissions (May 29, 2009) (describing changes that were not explored in the first IBO report), *available at* http://www.ibo.nyc.ny.us/iboreports/52909AtlanticYardsTestimony.pdf.

243. N.Y. CITY INDEP. BUDGET OFFICE FISCAL BRIEF, ATLANTIC YARDS: A NET FISCAL BENEFIT FOR THE CITY? (2005), *available at* http://www.ibo.nyc.ny.us/iboreports/atlyards_fbsept2005.pdf.

244. *See* 2009 FISCAL BRIEF, *supra* note 206, at 1.

challenged by ESDC, which criticized the study's exclusion of the non-arena aspects of the project.[245] ESDC instead projected $944.2 million in net state tax revenues, but that projection relied on the unrealistic assumption that full buildout of the project would take only ten years and the office tower would be built as scheduled.[246]

Although blighted area economic development projects are typically intended to encompass spin-off benefits by removing blighting influences, in the case of Atlantic Yards, ESDC found that "[t]he proposed project is not expected to induce additional notable growth outside the project site."[247] This conclusion confirms long standing research[248] and more recent realizations[249] that publicly funded sports facilities, often touted as the key to urban redevelopment, are not the panacea they are represented to be.

4. PENALTIES

What happens if FCR abandons the project before full buildout, leaving the arena adjacent to large "interim" parking lots and little or no affordable housing?[250] It would not be the first time that a developer fell short of job and affordable housing creation projections.[251] In other states, "claw-

245. The IBO's reasoning for this was that "the arena accounts for virtually all of the discretionary benefits flowing to the project" (i.e., subsidies), and because of the "uncertainty about the timetable for the rest of the project." *Id*. at 1–2.

246. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/09/from-economic-impact-analysis-to.html (Sept. 18, 2009, 5:24 EST).

247. EIS, *supra* note 18, at 22–1.

248. *See* David Swindell & Mark S. Rosentraub, *Who Benefits from the Presence of Professional Sports Teams? The Implications for Public Funding of Stadiums and Arenas*, 58 PUB. ADMIN. REV. 13 (Jan./Feb. 1998).

> Placing [sports] facilities in downtown locations to influence overall development patterns seems to have no significant impact. Business location decisions are not made on the basis of the presence of a team. Thus, the *economic* spillovers resulting from a team's presence are minimal and do not provide the return necessary to justify the public's investment.

Id.; Mark S. Rosentraub, *Sports Facilities and Development: Sports Facilities, Redevelopment, and the Centrality of Downtown Areas: Observations and Lessons from Experiences in a Rustbelt and Sunbelt City*, 10 MARQ. SPORTS L.J. 219 (2000). Mark Rosentraub has since written a book offering a more positive outlook on urban pro-sports facilities, at least when coupled with major urban development over large sites—all larger than the Atlantic Yards site. MARK S. ROSENTRAUB, MAJOR LEAGUE WINNERS: USING SPORTS AND CULTURAL CENTERS AS TOOLS FOR ECONOMIC DEVELOPMENT (2009).

249. Ken Belson, *Sports Boom Deepens Municipal Woes*, N.Y. TIMES, Dec. 24, 2009, at B8.

250. *See* fig.16; *see also* Atlantic Yards or Atlantic Lots?, http://www.atlanticlots.com (last visited Mar. 22, 2010) (showing a slideshow of renderings of the project area if the project is left incomplete).

251. Yonkers Cmty. Redevelopment Agency v. Morris, 37 N.Y.2d 478 (1975), is one of the seminal modern New York eminent domain cases. It is rarely mentioned,

back" laws have been passed to cut-off subsidies in the case of project failure, or even to demand subsidy repayment.[252] In New York, however, penalties for project abandonment or failing to meet project goals are limited to any contractual provisions included in the various project agreements.[253] And the Atlantic Yards agreements—supposedly negotiated at arm's length but probably better described as "collaborative" in nature[254]—are light on repercussions and long on accommodations.

Penalties for delay are relatively modest. According to the development agreement between ESDC and FCR, the developer has six years to build the arena, twelve years to build Phase 1, fifteen years to commence construction of the platform over the railyard, and twenty-five years to complete the project.[255] (ESDC and FCR still maintain, however, that buildout will be completed in ten years.[256]) All of these time periods are measured from the "effective date," which is the earlier of either the date when all litigation holding up financing and construction is resolved or the date when ESDC delivers control of the Phase 1 properties to FCR.[257] A three-year delay on the arena would result in only about $10 million in damages for the city and a similar amount for ESDC, while a six-year delay on the rest of Phase 1 would impose

however, that the Otis Elevator Company, after getting the city to condemn it an expansion site, picked up and left in 1982, just seven years after the case was decided. And so after defending Otis' right to demand condemnation on request, the city and the development agency sued Otis, trying to hold the company to an implied promise that it would stay in Yonkers. That case, *Yonkers v. Otis Elevator Co*., 844 F.2d 42 (2d Cir. 1988), was decided in favor of Otis. No consideration was given to the question of whether the condemnation should have been permitted in the first place. *See also Pfizer and Kelo's Ghost Town*, WALL ST. J. Nov. 11, 2009, at A20 (reporting that the intended private anchor of the redevelopment project involved in *Kelo* decided to abandon its New London campus); Kanner, *supra* note 226 (discussing *Poletown*).

252. *See generally* Examples of Clawback Provisions in State Subsidy Programs, http://www.goodjobsfirst.org/pdf/clawbacks_chart.pdf (last visited Mar. 22, 2010) (providing a chart of clawback statutes in about twenty states).

253. NY UNCONSOL. LAW ch. 252, § 5 (Consol. 2010) (giving ESDC the authority to enter into contracts).

254. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/esdc-claims-arms-length-negotiation-of.html (Jan. 26, 2010, 22:08 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/despite-promise-of-ten-year-ay-buildout.html (Jan. 27, 2010, 7:51 EST); *see supra* Part I.C.5.

255. *See* ATLANTIC YARDS DEVELOPMENT AGREEMENT sec. 8, *available at* http://www.scribd.com/doc/25972101/Atlantic-Yards-Development-Agreement-Section-8; ATLANTIC YARDS DEVELOPMENT AGREEMENT sec. 17.1, *available at* http://www.scribd.com/doc/25974817/Atlantic-Yards-Development-Agreement-Section-17–1.

256. *See infra* Part V.

257. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/despite-promise-of-ten-year-ay-buildout.html (Jan. 27, 2010, 7:51 EST).

only $17 million in city penalties and $5 million per delayed building under the development agreement.[258] The development agreement includes additional liquidated damages terms for various scenarios of delay.[259] Extensions for "unavoidable delay," "affordable housing subsidy unavailability," or insufficient "market financing availability," however, could let FCR off the hook for significant delays.[260] FCR also has the option, without penalties, to build a significantly smaller project than has been promised.[261]

II. Eminent Domain Litigation

Atlantic Yards has engendered a significant amount of litigation. The eminent domain cases were particularly important because they offered the possibility of stopping the project entirely.[262] The eminent domain cases also raised significant questions of law—although they were not fully answered by the courts—including the meaning of pretext in the takings context and the extent of convergence between the federal and state public use clauses.

A. *The Federal Public Use Clause*

The Fifth Amendment to the United States Constitution provides that private property may not be taken by the government except for a "public use" and upon "just compensation."[263] While the original understanding of the public use requirement has never been perfectly clear[264] the Supreme Court has long adhered to a broad interpretation that equates "public use" with "public purpose" or "public benefit."[265] In 1954, the

258. *Id*.
259. *Id*.
260. *Id*.
261. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/12/whos-in-control-forest-city-and.html (Dec. 24, 2008, 2:17 EST).
262. The other suits, involving aspects of the environmental review and provisions of the Public Authorities Law, likely would only have delayed the project by requiring procedural steps to be repeated, though project opponents have asserted that annulment of the MTA deal or the MGPP could effectively scotch the project. *See infra* Part IV-V.
263. U.S. CONST. amend. V.
264. For a variety of views on the original meaning of the Fifth Amendment Takings Clause, *see, e.g.*, Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002) (arguing that the public use clause was never intended to be a constitutional limitation on the exercise of eminent domain); Kelo v. New London, 843 A.3d 500 (Conn. 2002) (Zarella, J., dissenting) (discussing the evolution of public use clause jurisprudence).
265. In 1916, for example, Justice Holmes stated that "[t]he inadequacy of use by the general public as a universal test is established." Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916).

Court held that blight removal is a public use for which land may be taken. The case, *Berman v. Parker*, adopted the extremely deferential "rational basis" test and declared that

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[266]

The Supreme Court also held that the specific properties at issue could be condemned, despite the fact that they were not themselves blighted, because the redevelopment agency had determined that they were necessary to rehabilitate the larger blighted area.[267] Again extending deference, the Court refused to question the agency's reasons for drawing the boundaries of the redevelopment area as it did.[268]

Berman v. Parker ushered in an era of urban renewal that impacted cities across the country and ultimately led to the destruction and displacement of hundreds of communities and hundreds of thousands of people.[269] Yet despite the historic failure of urban renewal, in 2005 the Supreme Court upheld its modern equivalent—"economic development"—in *Kelo v. New London*.[270] While economic development projects tend to be smaller and displace fewer people than the urban renewal projects of the *Berman v. Parker* era,[271] their locations often have more to do with the desirability of certain property than with physical conditions that are actually a threat to public health and safety.[272] Such was the case in *Kelo*, where the city determined that eminent domain was needed to revitalize its waterfront. Though the land was not blighted, the

266. Berman v. Parker, 348 U.S. 26, 33 (1954).
267. *Id*. at 35
268. *Id*. at 34–36.
269. For an in depth historical review of *Berman*, see Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010).
270. 545 U.S. 469 (2005). Economic development projects tend to be smaller that their urban renewal counterparts, involve the displacement of fewer people, and "[i]nstead of promising to rebuild cities, they focus on more practical aspects such as job creation." Pritchett, *supra* note 54, at 48; *see also* Nicole Gelinas, *The Empire State and Eminent Domain*, WALL STREET J., Nov. 13, 2009, http://online.wsj.com/article/SB10001424052748704576204574530161194721796.html ("Mainly, however, the [blight] report pointed to 'underutilization' of the land, concluding that the area wasn't being used to the maximum economic benefit allowed by law. But that means the Atlantic Yards is really an economic-development project. . . .").
271. *See* Pritchett, *supra* note 54, at 48.
272. *See, e.g*., Amnon Lehvi, *Essay: Eminent Domain*, 107 COLUM. L. REV. 1704, 1719–21 (2007) (discussing the incentives that local governments have to declare properties blighted and explaining that public choice theory makes it more likely that local governments will be disproportionately influenced by politically powerful developers and business elites).

Supreme Court applied the same rational basis standard of review that it had invoked in *Berman v. Parker* and deferred to New London's plan to rejuvenate the "distressed" community. The Court rejected the argument that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings"[273] and it disagreed with the petitioners' argument that economic development takings should be subject to heightened judicial scrutiny to ensure "that the expected public benefits will actually accrue."[274]

Kelo was decided by a slim majority, however. Justice Kennedy was the swing vote, and his concurring opinion has become nearly as important as the majority's. Kennedy's concurrence suggested that the rational basis test might not be appropriate if the court were presented with "a plausible accusation of impermissible favoritism to private parties."[275] In this regard, Kennedy noted several factors that supported the existence of truly public purposes: public funds were devoted to the New London project before the private developer was identified; the city used a competitive bidding process to select the developer; the taking was made according to a comprehensive redevelopment plan; the city complied with "elaborate procedural requirements"; and the benefits of the project were more than de minimis.[276]

While Justice Kennedy sought to identify the types of circumstances that might warrant stricter review of economic development takings, Justice O'Connor wrote a forceful dissent predicting that the effect of the opinion's "deeply perverse" standard of review would be to duplicate the injustices of urban renewal.[277] O'Connor's dissent, along with the

273. *Kelo*, 545 U.S. at 485.
274. *Id*. at 487.
275. *Id*. at 491.
276. *Id*. at 491–93. Two of these factors—the existence of a plan and the selection of private partners after adoption of that plan—were also mentioned by the majority as possible reasons to rule out pretextual purposes. *Id*. at 478.
277.

> The consequences of today's decision are not difficult to predict, and promise to be harmful. . . . Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms," to victimize the weak.

Kelo, 545 U.S. at 521–22 (O'Connor, J., dissenting).

majority's express acknowledgement of the states' ability to enact more stringent eminent domain laws, fueled a backlash of unforeseen dimensions, with nearly all of the states quickly acting to reform their eminent domain laws.[278] Among these reforms were laws banning the use of eminent domain for "economic development" or limiting eminent domain to specific and enumerated public uses;[279] laws prohibiting the use of eminent domain for blight removal or enacting more-objective blight standards;[280] laws raising the level of judicial review;[281] laws requiring additional compensation for takings of homes and small businesses;[282] laws requiring local government approval of condemnations;[283] laws enacting more stringent procedural requirements;[284] and laws strengthening the redevelopment planning process.[285]

New York, however, did not enact any reforms in response to the *Kelo* decision. Numerous bills were submitted, but they were defeated by opposition from the Bloomberg administration and other sectors invested in the status quo.[286]

278. *See generally* 50 State Report Card: Tracking Eminent Domain Reform Legislation Since *Kelo*, The Castle Coalition, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=57&Itemid=113 (last visited Mar. 22, 2010) (providing information on eminent domain for each state).

279. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12–1136 (2006) (defines public use as general public, government ownership, utilities, public health, abandoned property, not economic development, i.e., tax revenue, employment, "general economic health"); FLA. STAT. ANN. § 73.013 (West 2006) (no transfer to private parties); KAN. STAT. ANN. § 26–501(b) (2009) (transfer to private party allowed only for roads, utilities, abandoned property, unsafe property, by special legislation, or by agreement with the owner); ME. REV. STAT. ANN. tit. 1, § 816 (2005) (no eminent domain for private development or tax revenues, except for blight).

280. *See, e.g.*, ALA. CODE § 24–2-2 (1975); GA. CODE ANN. § 22–1-1 (2006); IND. CODE § 32–24–4.5–7 (2006); IOWA CODE §§ 6A.21-.22 (2008); 26 PA. CONS. STAT. ANN. § 205 (West 2009). Florida is the only state to have banned blighted area takings completely. FLA. STAT. ANN. §§ 73.014, 163.370.

281. *See, e.g.*, COLO. REV. STAT. § 38–1-101 (2007); DEL. CODE ANN. tit. 29 § 9501A (2009); GA. CODE ANN. §§ 22–1-2, -11; IOWA CODE § 6A.23.

282. *See, e.g.*, LA. CONST. art. I, § 4; ARIZ. REV. STAT. § 12–1133; IND. CODE § 32–24–4.5; IOWA CODE §§ 6B.45, .54.

283. *See, e.g.*, CONN. GEN. STAT. §§ 8–193, -127(a), -224 (2007); GA. CODE ANN. § 8–3-31.1.

284. *See, e.g.*, CONN. GEN. STAT. §§ 8–127, 32–224, 8–129 (appraisal by two independent state certified appraisers); GA. CODE ANN. § 22–1-9 (better negotiation requirements, appraisal made before negotiations, owner may accompany appraisers); GA. CODE ANN. § 22–1-10 (better notice requirements, requires public hearings to start after 6pm); IND. CODE § 32–24–1-3 (requires good faith negotiations); § 32–24–4.5 (property owner can demand mediation, to be paid for by the condemnor).

285. *See, e.g.*, CONN. GEN. STAT. §§ 8–125, 8–127, 32–224.

286. Terry Pristin, *Lesson on Limits of Eminent Domain at Columbia*, N.Y. TIMES, Jan. 20, 2010, at B6.

B. *The Federal Lawsuit over Atlantic Yards:* Goldstein v. Pataki[287]

In October, 2006, DDDB spokesman Daniel Goldstein and about a dozen other property owners and tenants in the Atlantic Yards footprint filed a federal lawsuit challenging the use of eminent domain.[288] The choice of venue was made because public use challenges under New York law are heard by the state's appellate courts, where petitioners are limited to oral arguments and do not receive discovery.[289]

The plaintiffs challenged the existence of a public use, contending that the primary beneficiary of the condemnations would be FCR—that, indeed, the motivation for the taking was to confer such a private benefit—and that the public would receive at most only incidental benefits.[290] The plaintiffs supported their position by emphasizing the developer-driven nature of the project, the lag in time between the project's announcement and the blight determination, the lack of meaningful public participation in the planning process, the failure of state and local officials to thoroughly assess alternative proposals in a competitive bidding process, and the lack of assurances that the project would produce its projected public benefits.[291] Moreover, the plaintiffs claimed that any public uses the project would have were merely pretextual because they were "either wildly exaggerated or simply false."[292]

287. 488 F. Supp. 2d 254 (E.D.N.Y. 2007), *cert. denied*, 128 S. Ct. 2964 (2008) (notably, the Supreme Court declined to hear the case on June 23, 2008, the third anniversary of the *Kelo* ruling.); *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/06/supreme-court-denies-ay-eminent-domain.html (June 23, 2008, 11:42 EST) (Justice Alito opines on granting cert.).

288. *See* Complaint at 1–6, Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (No. CV-06–5827), *available at* http://dddb.net/documents/legal/eminentdomain/EDcomplaint061026.pdf. Equal protection and procedural due process claims were also submitted. *Id*. at 32.

289. N.Y. EM. DOM. PROC. LAW § 307(B) (McKinney 2009). Norman Siegel, former Executive Director of the New York Civil Liberties Union and counsel to the property owners in *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8 (App. Div. 2009) has stated that New York is the only state in the country where condemnees do not receive a trial. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/at-senate-hearing-on-eminent-domain.html (Jan. 8, 2010, 8:51 EST). Despite their ultimate failure to get to discovery, the plaintiffs got far more discussion of the issues in federal court than state court, somewhat vindicating their strategy. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/02/public-purpose-enters-uncharted.html (Feb. 8, 2007, 7:20 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/04/another-look-at-eminent-domain-hearing.html (Apr. 10, 2007, 6:27 EST).

290. Complaint, Goldstein v. Pataki, *supra* note 288, at 28.

291. *See id*. at 28–30.

292. *See id*. at 20.

ESDC (with the other defendants)[293] characterized the plaintiffs' arguments as conclusory[294] and emphasized the broad discretion it had to determine the existence of a public use.[295] ESDC also asserted a number of public uses, including not only economic development, but also blight removal and the creation of affordable housing, community facilities, open space, and transit improvements.

In granting Forest City Ratner's motion to dismiss, the district court acknowledged the limited standard of review required under *Kelo*,[296] and it restricted its analysis to whether

> the uses offered to justify [the taking] are "palpably without reasonable foundation," such as if (1) the "sole purpose" of the taking is to transfer property to a private party, or (2) the asserted purpose of the taking is a "mere pretext" for an actual purpose to bestow a private benefit.[297]

As to the "sole purpose" test, the court rejected the plaintiffs' arguments because they "concern[ed] only the measure of a public benefit—as opposed to its existence."[298] Regarding plaintiffs' allegations that the public uses were merely pretextual, the court first noted that the majority opinion in *Kelo*, while acknowledging that pretextual condemnations are unconstitutional, did not offer much guidance on determining when the exercise of eminent domain amounts to mere pretext.[299] For this reason, the court turned to Justice Kennedy's concurring opinion, which included language suggesting application of the *Twombly* standard of pleading. *Twombly*, which was later affirmed by *Ashcroft v. Iqbal*, replaced the historically liberal pleading standard for federal court plaintiffs with a higher "plausibility" standard that requires factual particularity.[300] Applying this standard, the court concluded that

293. The defendants included a number of city and state officials, FCR and FCR-related parties, and ESDC. Goldstein v. Pataki, 488 F. Supp. 2d 254, 256 (E.D.N.Y. 2007).

294. Motion to Dismiss the Complaint at 6, Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (No. CV-07–5827).

295. *Id*. at 8 (quoting Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005) and Berman v. Parker, 348 U.S. 26 (1954)).

296. *Goldstein*, 488 F. Supp. 2d at 283–84.

297. *Id*. at 286.

298. *Id*.

299. *Id*. at 288.

300. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Historically, it was "the accepted rule that a complaint [in federal court] could not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957). *Twombly* raised the pleading standard so that to survive a motion to dismiss, a complaint must set forth "enough facts to state a claim for relief that is plausible on its face." The Supreme Court reaffirmed the new pleading standard in

dismissal was proper because the plaintiffs had not alleged "plausible grounds to infer that the asserted public uses of the Project are 'palpably without reasonable foundation.' "[301]

On appeal, the Second Circuit reemphasized the limited nature of rational basis review in public use cases and the fact that the plaintiffs conceded the existence of at least some public uses. Although it acknowledged that eminent domain is an "immediate and intrusive" power for which "monetary compensation may understandably seem an imperfect substitute," the court explained that its sympathies could not serve as grounds to apply more than minimal scrutiny to ESDC's actions.[302] The court did not agree with the plaintiffs' claim (which, in retrospect was perhaps unwise[303]) that the sole purpose of the project was to provide a private benefit, enumerating instead several public uses, including blight remediation, "construction of a publicly owned (albeit generously leased) stadium," the creation of open space and affordable housing, and construction of various transit improvements.[304]

1. PRETEXT

Both the district and circuit courts were hostile to the plaintiffs' pretext claim, refusing to accord the litigants a chance to seek discovery. This result was due to the application of the *Twombly*/*Iqbal* heightened pleading standard[305] and to the courts' uncertainty as to how *Kelo*'s

Ashcroft v. Iqbal and made clear that it applies in all cases, and not just antitrust cases like *Twombly*. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). The new standard has been criticized for barring plaintiffs with legitimate claims from obtaining discovery (especially in civil rights cases, where discovery may be necessary to prove discriminatory intent), and for clogging the judicial system with frivolous motions. *See, e.g.*, Muhammad Umair Khan, *Tortured Pleadings: The Historical Development and Recent Fall of the Liberal Pleadings Standard*, 3 ALB. GOV'T L. REV. 460, 488 (2010); Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, 35 LITIGATION 1 (2009); Joseph A. Seiner, *The Trouble With* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009); Norm Pattis, Section 1983 Blog, http://www.section1983blog.com/2009/11/iqbal-churning-and-rule-11.html (Nov. 30, 2009, 3:54 EST).

301. *Goldstein*, 488 F. Supp. 2d at 288–90 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

302. Goldstein v. Pataki, 516 F.3d 50, 62 (2d Cir. 2008).

303. Refusing to acknowledge the existence of a public purpose was a sound legal approach for the petitioners, given that such a concession would tend to justify the condemnation. However, a pretext argument inherently contemplates that there is some public purpose, albeit falsely put forward as the project's primary or only purpose. Accordingly, it may have been counterproductive for the petitioners to have maintained that the project had no public use at all.

304. *Goldstein*, 516 F.3d at 64.

305. For a discussion of the pleading standards, see *supra* note 300 and accompanying text.

pretext language should be understood.[306] According to the Second Circuit, the pretext analysis did not demand "a full judicial inquiry into the subjective motivation of every official who supported the Project," as this would have entailed "an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-powers concerns."[307]

But by cutting motivation out of the pretext analysis, the court ignored the heart of the complaint. While a pretext test based solely on motivation would be problematic,[308] the court's characterization of such motivational analysis as having "dubious jurisdictional pedigree" was incorrect.[309] Numerous state courts have invalidated takings with conceded public purposes because of apparently unlawful or hidden motives. The classic example is where a local government purportedly condemns property to create a park or some other *per se* public use, although its true motive is to exclude the owner from introducing a disfavored use, such as a hazardous waste facility,[310] a parking facility,[311] an affordable housing development,[312] or a nursing facility.[313] Other courts have inferred improper motives based on other sorts of circumstantial evidence.[314] While the Second Circuit discussed pretext cases where the

306. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/02/public-purpose-enters-uncharted.html (Feb. 8, 2007, 7:20 EST); *see also* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUPREME CT. ECON. REV. 173 (2009).

307. *Goldstein*, 516 F.3d at 63.

308. *See* Kelly, *supra* note 306.

309. The Second Circuit did not consider the contention that "the difficulty of determining motivation by itself does not seem to be a sufficient reason for rejecting an intent-based test." *Id*.

310. *See* Carroll County v. City of Bremen, 347 S.E.2d 598 (Ga. 1986); Earth Mgmt. Inc. v. Heard County, 283 S.E.2d 455 (Ga. 1981).

311. *See* In re Inc. Hewlett Bay Park, 265 N.Y.S.2d 1006 (Sup. Ct. 1966).

312. *See* Pheasant Ridge Assocs. Ltd. v. Burlington, 506 N.E.2d 1152 (Mass. 1987).

313. *See* Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 673 A.2d 856 (N.J. Super. Ct. Law Div. 1995).

314. *See, e.g.*, Denver West Metro. Dist. v. Geudner, 786 P.2d 434 (Colo. App. 1989) (invalidating a condemnation, ostensibly for flood control purposes, that was actually intended to benefit family members); Aposporos v. Urban Redevelopment Comm'n, 790 A.2d 1167 (Conn. 2001) (prohibiting a taking based on "blight" where condemnation was not considered until local merchants proposed that the property should be taken in order to protect them from competition from a new mall in another part of the city); City of Miami v. Wolfe, 150 So. 2d 489 (Fla. Dist. Ct. App. 1963) (finding bad faith on the part of the city in blocking condemnees acquisition of bay bottom lands so the city itself could acquire and sell the land in fee simple); Twp. of Readington v. Solberg Aviation 976 A.2d 1100 (N.J. Super. 2009) (finding bad faith sufficient to survive summary judgment where the township made no attempt to hide the fact that the real reason it sought to acquire the airport property was not to conserve open space, but

courts questioned the existence of any public use whatsoever,[315] none of the "true motivation" pretext cases were cited in the court's opinion.[316] In the end, the plaintiffs probably would not have been able to prove any unlawful motive,[317] but the bar for obtaining discovery, even under the *Twombly/Iqbal* pleading standard, should not be so high as to preclude any claim not alleging purely private benefits.

2. DEFERENCE

The Second Circuit also took a curious approach to the plaintiffs' argument that ESDC did not deserve the same level of deference accorded to true legislative entities. While the court stated that "the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate,"[318] it did not acknowledge the fact that no elected officials had ever approved Atlantic Yards.[319] Had the court disposed of the fiction that ESDC is accountable to the electorate, it might have put more weight into the plaintiffs' pretext arguments—largely mirroring the factors set out in Justice Kennedy's concurring *Kelo* opinion—based on the developer-driven nature of the project plans, the fishy sequence of the bidding process, the lack of procedural checks, and the incidental-versus-predominant value of the project's asserted public benefits.

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was rather to prevent the airport from expanding); Redevelopment Auth. v. Owners or Parties in Interest, 274 A.2d 244 (Pa. Commw. Ct. 1971) (invalidating the condemnation where it was not intended to remove a blighted building but was really intended to construct a hotel).

315. Goldstein v. Pataki, 516 F.3d 50, 61 (2d Cir. 2008) (citing 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003), Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002)).

316. None of these cases, it should be said, were cited in the plaintiffs' federal court briefs. *Borough of Essex Fells, Carroll County, Miami v. Wolfe, Earth Management, Pheasant Ridge Associates, Redevelopment Auth. v. Owners or Parties in Int.*, were cited in state court papers, although not as pretext cases, but as cases supporting a requirement to balance public and private benefits.

317. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/11/does-ay-eminent-domain-lawsuit-have.html (Nov. 5, 2007, 7:02 EST). Indeed, the existence of a "smoking gun" that the plaintiffs might have been able to produce through discovery is unlikely. As Justice O'Connor remarked in her *Kelo* dissent: "Whatever the details of Justice Kennedy's as-yet-undisclosed test [for pretext], it is difficult to envision anyone but the "stupid staff[er]" failing it." Kelo v. City of New London, 545 U.S. 469, 502 (2005).

318. *Goldstein*, 516 F.3d at 57.

319. The closest thing to approval by a legislative body was the vote of the Public Authorities Control Board (PACB), which at the time included Senate Majority leader Joseph Bruno and Assembly Speaker Sheldon Silver. However, the PACB's subject matter jurisdiction is strictly limited to financial concerns. Develop Don't Destroy Brooklyn v. Urban Dev. Corp. 874 N.Y.S.2d 414, 417 (2009).

C. *Eminent Domain under the New York Constitution*

Article 1, section 7 of the New York State Constitution includes language mostly identical to the Fifth Amendment, requiring both a public use and just compensation.[320] Although the New York courts invalidated a number of takings on private use grounds during the nineteenth century,[321] by the early twentieth century the broad definition of public use had become standard.[322] In 1936, the New York Court of Appeals became one of the first state high courts in the country to conclude that slum clearance was a public use.[323] That case was followed by a 1938 constitutional amendment that authorized the taking of land for slum clearance purposes,[324] and in 1943, the court of appeals held that slum clearance, in itself, is a public use, making it irrelevant whether the project was undertaken by private or public developers.[325]

During the latter half of the twentieth century, the New York courts developed a public use jurisprudence that largely mirrored the Supreme Court's case law. They applied a very deferential standard of review, requiring only that some plausible public use exist, and they allowed

320. N.Y. CONST. art. I, § 7. The provision was enacted in 1821 and was amended over the years to allow condemnations for private roads (in 1846) and for swamp drainage systems (in 1894).

321. *See, e.g.*, Bradley v. Degnon Constr. Co., 120 N.E. 89 (N.Y. 1918) (invalidating taking for private tramway); In re Niagara Falls & W. Ry. Co., 15 N.E. 429 (N.Y. 1888) (invalidating taking for tourist attraction); In re Eureka Basin Warehouse & Mfg. Co., 96 N.Y. 42 (1884) (invalidating taking for privately owned wharves subject to the corporation's "absolute control"); In re Deansville Cemetery Ass'n, 66 N.Y. 569 (1876) (invalidating taking for private cemetery); Pulman v. Henion, 19 N.Y.S. 488 (Gen. Term 1892) (invalidating statute that allowed takings for drainage); Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843) (invalidating taking for private road). The strict public use test, although applied in these cases to invalidate takings, could hardly be said to be black letter law in the nineteenth century. Indeed, numerous New York cases from the time period allowed takings that benefited private parties, so long as there was an overriding public purpose. *See, e.g.*, Bloodgood v. Mohawk & Hudson R.R. Co.,18 Wend. 9 (N.Y. 1837) (upholding use of eminent domain for railroads); In re Malone Waterworks Co., 15 N.Y.S. 649 (Sup. Ct. 1890) (holding that a private water company could appropriate property, including springs and streams, in order to supply water to a municipality).

322. *See, e.g.*, Bd. of Hudson River Regulating Dist. v. Fonda, Johnstown & Gloversville R.R. Co., 164 N.E. 541 (N.Y. 1928) (rejecting a claim that a dam claimed to be needed for flood control purposes was actually intended to benefit private power producers; even if there was a profit motive, the public use was sufficient); Holmes Elec. Protective Co. v. Williams, 127 N.E. 315 (N.Y. 1920) (upholding taking for telegraph company).

323. *See* Lavine, *supra* note 269 (listing state cases upholding slum clearance takings).

324. N.Y. CONST. art. XVIII, § 9. Although the amendment expressly authorized the use of eminent domain for slum clearance purposes, it did not modify article I, section 7, suggesting that slum clearance, in some cases, might still be found to be a private use.

325. Murray v. La Guardia, 52 N.E.2d 884, 887 (N.Y. 1943).

the definition of blight to grow to encompass vacant land and land that could be put to more valuable uses.[326] After *Kelo* was decided, however, an intermediate appellate court disallowed a taking to benefit a private developer on the basis that it had only illusory public benefits.[327] Moreover, the court of appeals indicated in a 2009 case that the New York Constitution *might* be more protective of private property rights than the Fifth Amendment.[328]

D. *The State Court Lawsuit:* Goldstein v. New York State Urban Development Corp.

After the United States Supreme Court refused to grant certiorari in *Goldstein v. Pataki*, the plaintiffs took their case to the New York court system. The plaintiffs, now called petitioners in state court, mostly restated the allegations that they made in federal court.[329] They also argued, however, that the public use clause in the New York Constitution is more protective of property rights than the Fifth Amendment. Specifically, they argued that the state constitution should be interpreted to require actual public use or government ownership, or, in the alter-

326. *See, e.g.*, Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429 (N.Y. 1986) (upholding condemnations for redevelopment of Times Square); Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327 (N.Y. 1975) (upholding a taking in order to improve "substandard" land and to retain a major employer); Cannata v. City of N.Y., 182 N.E.2d 395 (N.Y. 1962) (holding that vacant property could be condemned for an industrial development project); Kaskel v. Impellitteri, 115 N.E.2d 659 (N.Y. 1953) (deferring to the city's blight determination because no allegations of fraud or corruption were made); W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (App. Div. 2002) (upholding a condemnation for the new New York Times building, even though Times Square redevelopment area had been established 20 years earlier); In re Fisher, 730 N.Y.S.2d 516 (App. Div. 2001) (upholding a condemnation intended to persuade the New York Stock Exchange to remain in Manhattan because it would "result in substantial public benefits, among them increased tax revenues, economic development and job opportunities as well as preservation and enhancement of New York's prestigious position as a worldwide financial center."); In re Glen Cove Cmty. Dev. Agency, 712 N.Y.S.2d 553 (App. Div. 1999) (holding a former shopping mall owned by a developer could be condemned and transferred to a different company that wanted to start a department store).

327. 49 WB, LLC v. Village of Haverstraw, 839 N.Y.S.2d 127, 139 (App. Div. 2007) (holding the public use was pretextual because the condemnation would actually result in the creation of fewer units of affordable housing than without the condemnation).

328. *See* Aspen Creek Estates, Ltd. v. Town of Brookhaven, 904 N.E.2d 816 (N.Y. 2009).

329. *See* Petition, Goldstein v. N.Y. Urban Dev. Corp., No. 2008–7064 (N.Y. App. Div. Aug. 1, 2008), *available at* http://dddb.net/eminentdomain/papers/EDpetition080801.pdf. Several changes were made to the parties in the case. First, two additional plaintiffs dropped out of the litigation, bringing the total to nine. Second, the only named defendant was ESDC, due to state law requirements. N.Y. EM. DOM. PROC. LAW § 207 (McKinney 2010).

native, that the state constitution requires the public use to be more than incidental to the private benefits.[330] In its opposition papers, ESDC raised procedural[331] as well as substantive grounds for dismissal.

Initially, the Appellate Division, Second Department unanimously rejected the petitioners' contention that the New York public use clause must be read narrowly.[332] The petitioners' argument was premised on a body of nineteenth-century case law requiring actual use by the public to satisfy the public use requirement, and the contention that more recent cases adhering to a liberal interpretation were somehow "infected" by federal jurisprudence. Although it was an interesting and perhaps plausible argument, bolstered by a 1918 case applying the narrow interpretation,[333] the court predictably refused to breathe new life into the antiquated cases cited by the petitioners. Rather, the court relied on

330. The plaintiffs added a claim under Article XVIII, section 6 of the New York State Constitution, which was added by 1938 amendments that permitted, and restricted, government actions regarding slum clearance. The wording of section 6 prohibits the state from subsidizing residential slum clearance projects unless they are limited to low income housing, but as a matter of first impression, it was unclear how that language would be applied to a project like Atlantic Yards. *See* Petition, *supra* note 329, at 24. For information about article 18, section 6, see Mike McLaughlin, *Yards 'Domain' Case Has Some Eminence*, BROOKLYN PAPER, Aug. 14, 2008, http://www.brooklynpaper.com/stories/31/32/31_32_mm_yards_case.html. Both the Second Department and the court of appeals rejected this argument. Goldstein v. N.Y. State Urban Dev. Corp., 879 N.Y.S.2d 524 (App. Div. 2009); Goldstein v. N.Y. State Urban Dev. Corp. 13 N.Y.3d 511 (2009).

331. The procedural arguments revolved around N.Y.C.P.L.R. 205(a) (McKinney 2009), which gives a litigant a six-month time period to commence an action after the case has been dismissed without prejudice on grounds other than voluntary discontinuance, lack of personal jurisdiction, or neglect to prosecute. ESDC argued that N.Y. EM. DOM. PROC. LAW § 207(A), which requires an action challenging a condemnation to be filed within thirty days of the filing of the determination and findings, acted to bar the longer toll provided for under N.Y.C.P.L.R. 205. Both the second department and the court of appeals rejected this argument. Goldstein v. Pataki, 516 F.3d 50, 176–77 (2d Cir. 2008).

332. Goldstein v. N.Y. State Urban Dev. Corp., 879 N.Y.S.2d 524 (App. Div. 2009).

333. *Bradley v. Degnon*, 120 N.E. 89 (N.Y. 1918) is the last New York case adopting anything close to a restrictive view of the public use clause. In the case, the Degnon Construction Company installed a temporary tramway in the street abutting Bradley's house, with the purpose of facilitating construction of a subway line. *Id*. at 90. The court held that there was no public use, because the tramway merely benefited the construction company by making it easier to transport materials. *Id*. at 93. *Bradley* was decided after a number of U.S. Supreme Court opinions expanding the meaning of public use. *See, e.g.*, Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co., 243 U.S. 563 (1917); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30 (1916); Union Lime Co. v. Chi. & N.W. Ry. Co., 233 U.S. 211 (1914); Hairston v. Danville & W. Ry. Co., 208 U.S. 598 (1908); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896). This would seem to indicate that the court of appeals in *Bradley* consciously adopted the narrow public use interpretation, and the case, in fact, was never expressly overruled. Nevertheless, *Muller v. New York State Housing Authority* and a long line of later cases used the more liberal public use standard,

the broad public use interpretation set out in *Muller v. New York City Housing Authority*, the 1936 court of appeals case that foreshadowed the Supreme Court's *Berman v. Parker* decision.[334] In addition to blight (the low standard for which the court discussed in some detail), the court pointed out that the project would serve the "public purposes of creating an arena, publicly accessible open space, affordable housing, improvements to public transit, and new job opportunities."[335] Like the federal courts, the second department rejected the petitioners' argument that these benefits were not sufficiently guaranteed, calling their claims "conclusory and speculative."[336] The court also rejected the petitioners' argument that the project's public benefits were merely incidental to its private benefits, holding that blight removal provided an overriding public purpose,[337] and it dismissed their pretext claim because the petitioners did not allege that the public use was "illusory."[338]

The court of appeals affirmed in a 6–1 decision.[339] In doing so, the court firmly established that the term "public use" encompasses "public purposes" under the New York State Constitution[340] and that blight removal is a sufficient public purpose to satisfy the constitutional mandate—even when it aims to alleviate only "relatively mild conditions of urban blight."[341] Whether or not the petitioners' property was truly blighted was the subject of extensive discussion during oral arguments,

demonstrating a certain level of entrenchment and supporting a finding that the case was overruled by implication. It should also be pointed out that *Bradley* may not have been a true condemnation case. The cause of action, which is not specified in the opinions, seems to be based partly on nuisance and partly on the public trust doctrine. *See* Bradley v. Degnon Construction Co., 140 N.Y.S. 825 (Sup. Ct. 1913). Additionally, the lower court characterized the damages sought by the plaintiffs not as just compensation, but as arising from trespass. *Id*.

334. Goldstein v. N.Y. State Urban Dev. Corp., 879 N.Y.S.2d 524, 535 (App. Div. 2009) (citing N.Y. City Hous. Auth. v. Muller, 270 N.Y. 333 (1936)). The court also supported its broad interpretation by referencing the Eminent Domain Procedure Law, which speaks not only of public "uses," but also of public "benefits" and public "purposes." *Id*. However, reliance on statutory language for constitutional interpretation is misguided.

335. *Id*.

336. *Id*.

337. *Id*.

338. *Goldstein*, 879 N.Y.S.2d at 535. The court's discussion of pretext relied on *49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226 (2007). While this reliance was not misplaced in itself, the court failed to grasp the meaning of the pretext argument by limiting a finding of pretext to those cases where the public purposes are "illusory." *See infra* Part II.B.1 (discussing the federal courts' treatment of pretext).

339. Goldstein v. N.Y. State Urban Dev. Corp., 13 N.Y.3d 511 (2009). Two concurring judges would have dismissed the case on procedural grounds. *Id*. at 530–46.

340. *Id*. The dissenting judge, however, did not read the majority's opinion to go this far. *Id*. at 552 (Smith, J., dissenting).

341. *Id*. at 530.

and it was the only public purpose that was analyzed in the majority's opinion. At oral arguments,[342] the petitioners' attorney argued that the footprint was deemed blighted mostly because of "underutilization," and because it presented a valuable development opportunity for FCR.[343] Despite insistence that much of the property in the footprint was physically deteriorated, ESDC's counsel strained to suggest that a February 2005 Memorandum of Understanding mentioning the Atlantic Terminal Urban Renewal Area justified the blight determination for a project announced in December 2003.[344] The discussion clearly recalled Justice O'Connor's warning in her *Kelo* dissent that the economic development rationale would allow government to replace "any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[345] The majority opinion, however, agreed with the *Kelo* majority and reaffirmed the validity of the court of appeals' far-reaching 1975 decision *Yonkers Community Redevelopment Agency v. Morris*.[346] Quoting from that opinion, and emphasizing the importance of deferring to legislative and quasi-legislative blight determinations, the court explained: "Gradually . . . it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose."[347]

A strong dissent written by Judge Robert Smith emphasized the adage that "courts are required to be more than rubber stamps in the determination of the existence of substandard conditions" and suggested that the state constitution should be interpreted "to afford broader pro-

342. *See* Video of *Goldstein v. N.Y. State Urban Dev. Corp*. Oral Argument, http://www.nycourts.gov/ctapps/Goldstein.asx (last visited Mar. 9, 2010); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/at-eminent-domain-oral-argument-judges.html (Oct. 15, 2009, 7:20 EST).

343. Video of *Goldstein v. N.Y. State Urban Dev. Corp*. Oral Argument, http://www.nycourts.gov/ctapps/Goldstein.asx (last visited Mar. 9, 2010).

344. ESDC's counsel referred to one of the two Memoranda of Understanding signed in February 2005; however, the one mentioning the urban renewal area was not publicly released but emerged only in August 2005 following a Freedom of Information Law request by DDDB. *See* 2005 MOU, *supra* note 111; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/ratners-bogus-claim-of-34-lawsuits.html (Mar. 24, 2010, 2:34 EST).

345. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/from-2005-kelo-case-to-2009-goldstein.html (Oct. 16, 2009, 18:31 EST) (quoting Justice O'Connor's dissent).

346. Yonkers Cmty. Redevelopment Agency v. Morris, 335 N.E.3d 327 (N.Y. 1975).

347. Goldstein v. N.Y. State Urban Dev. Corp. 13 N.Y.3d 511, 526–27 (2009) (quoting Yonkers Cmty. Redevelopment Agency v. Morris, 335 N.E.3d 327, 330 (N.Y. 1975)).

tection to individual rights and liberties than the federal Constitution does."[348] Smith opined that ESDC's blight determination was a fiction and chastised the majority for deferring to ESDC to such an extent as to "render the constitutional protections impotent. . . . To let the agency itself determine when the public use requirement is satisfied is to make the agency a judge in its own cause."[349]

As in the federal court litigation, the second department and the court of appeals basically ignored the petitioners' pretext arguments, giving no consideration to the actual motivations of ESDC. More significantly, given the low probability that the petitioners would have been able to prove bad faith intent on ESDC's part,[350] the court of appeals also failed to discuss the petitioners' argument that the New York constitution requires the public use of a condemnation to be predominant, or more than incidental. New York case law actually contains fairly significant support for the existence of such a balancing requirement. In addition to the 1951 case *Denihan Enterprises, Inc. v. O'Dwyer*,[351] which invalidated a taking using this reasoning, numerous cases over the years have made use of the predominant/incidental dichotomy.[352] Such a balancing

348. Goldstein, 13 N.Y.3d 511, 550 (Smith, J., dissenting) (quoting Yonkers Cmty. Redevelopment Agency v. Morris, 335 N.E.3d 327, 333 (N.Y. 1975)).

349. *Id*. at 552.

350. *See infra* Part II.B.1.

351. *See* Denihan Enter., Inc. v. O'Dwyer, 99 N.E.2d 235, 238 (N.Y. 1951) (holding that commercial development and parking garage were not a public use, even though the roof would be landscaped and open to the public, because "sufficient facts are alleged purporting to show that the public use here may be only incidental and in large measure subordinate to the private benefit").

352. *See, e.g.*, Waldo's, Inc. v. Johnson City, 543 N.E.2d 74, 76 (N.Y. 1989); Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975); Courtesy Sandwich Shop, Inc. v. Port Auth, 190 N.E.2d 402 (N.Y. 1964); Kaskel v. Impelliteri, 115 N.E.2d 659 (N.Y. 1953); N.Y. City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936); In re Application of Ryers, 72 N.Y. 1 (1878). Cases from other states use the same theory. *See, e.g.*, Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975); Bozeman v. Vaniman, 898 P.2d 1208 (Mont. 1995); Middletown Twp. v. Lands of Stone, 939 A.2d 331 (Pa. 2007); In re Petition of Seattle, 638 P.2d 549 (Wash. 1981); Bailey v. Myers, 76 P.3d 898 (Ariz. App. Div. 2003). However, it should be pointed out that it is not clear what the threshold for predominance is. In a case discussing the public use requirement for taxation, but not for eminent domain, the court of appeals explained that

> [p]roperty held by an agency of the State is ordinarily immune from taxation only while it is used for a public purpose. Property used primarily to obtain revenue or profit is not held for a public use and is not ordinarily immune from taxation, but property held by a State agency primarily for a public use does not lose immunity because the State agency incidentally derives income from the property.

Bush Terminal Co. v. City of N.Y., 26 N.E.2d 269, 276 (N.Y. 1940). "*The term 'incidental' as thus used, does not mean that the public use must, as the court below indicated, outweigh the private use to which the facility is put*." Hotel Dorset Co. v. Trust for Cultural Res., 385 N.E.2d 1284, 1290 (N.Y. 1978) (emphasis added).

test would be subject to the same high level of deference accorded to ESDC in other contexts, especially given the subjective nature of many public and private benefits. Nevertheless, ESDC failed to require FCR to submit any sort of profit projection, and it also failed to conduct a market study reviewing real estate trends in the project footprint, even though one had been specified in the contract for the blight study.[353] These sorts of calculations, while not necessarily outcome-determinative, would seem to be basic components necessary to *any* weighing of public and private benefits for a project like Atlantic Yards. Although the petitioners could have better presented this argument by focusing less on the strict public use interpretation in their briefs—indeed, the comparison of public and private benefits only briefly came up during oral arguments[354]—their overemphasis on a losing argument did not excuse the court from addressing the predominant/incidental argument.

The Atlantic Yards petitioners also would have been well-advised to argue that the definition of "blight" used by ESDC is unconstitutionally vague.[355] Blight definitions similar to the one contained in ESDC's enabling legislation have recently been struck down by the high courts of Ohio and New Jersey.[356] This vagueness challenge, moreover, was

353. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/08/missing-from-blight-study-documentation.html (Aug. 15, 2008, 8:11 EST).

354. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/10/at-eminent-domain-oral-argument-judges.html (Oct. 15, 2009, 7:20 EST).

355. The term "blight," is not defined in the statutes, but "substandard and insanitary area" is defined in ESDC's enabling legislation. Unfortunately the definition is not particularly helpful, as it defines a substandard and insanitary area as one "which has a blighting influence on the surrounding area. . . ." N.Y. UNCONSOL. LAW ch. 252, § 3(12) (Consol. 2010). Additional clues as to the meaning of "substandard and insanitary" are found in the statute's purposes section. ch. 252, § 2.

356. City of Norwood v. Horney, 853 N.E.2d 1115, 1120 (Ohio 2006) (holding that the "deteriorating area" standard was void for vagueness because "the term inherently incorporates speculation as to the future condition of the property to be appropriated rather than the condition of the property at the time of the taking."); Gallenthin Realty Dev. Inc. v. Borough of Paulsboro, 924 A.2d 447, 449 (N.J. 2007) (holding that land may not be condemned for redevelopment solely on the basis that it is "not fully productive"; rather, the blight designation "applies only to areas that, as a whole, are stagnant and unproductive *because* of issues of title, diversity of ownership, or other similar conditions."). *See also* 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (holding that there is no such thing as "future blight"); Sweetwater Valley Civic Assoc. v. Nat'l City, 18 Cal. 3d 270, 274 (1976) (requiring a blighted area to be characterized by "either social or economic liabilities"); Sw. Ill. Dev. Auth. v. Nat'l City Envtl, 768 N.E.2d 1, 25 (Ill. 2002) (concluding that what was essentially an economic development taking had no basis in blight remediation); Bailey v. Myers, 76 P.3d 898, 902 (Ariz. Ct. App. 2003) (**"**we cannot conclude that. . .any property within a designated slum or blighted area is automatically subject to being taken for redevelopment without the constitutionally required judicial determination that the property is being taken for a use that is 'really public.' "); In re Condemnation by the Redevelopment

made successfully in *Kaur v. Urban Development Corp*. (the Columbia University eminent domain suit),[357] a case in many ways similar to Atlantic Yards that was decided by the appellate division, first department just days after the court of appeals issued its opinion in *Goldstein v. Urban Development Corp*.[358] It must be pointed out that the first department's *Kaur* opinion ignored the court of appeals' earlier (and binding) opinion in the Atlantic Yards case and may well be overturned. Still, the argument went further than any of the contentions raised by the *Goldstein* petitioners. The petitioners also could have provided better refutations of ESDC's blight study, similar to the "No-Blight Study" that was prepared by the *Kaur* petitioners,[359] or by contesting the dubious crime statistics that ESDC used in finding blight.[360]

Auth., 962 A.2d 1257 (Pa. Commw. Ct. 2008) (interpreting the blight definition to require a relationship to health and safety, not just anticipated future economic benefit).

357. 892 N.Y.S.2d 8 (App. Div. 2009). In the wake of the *Kaur* decision, the *Goldstein* petitioners submitted a motion to reargue, (*See* N.Y. C.P.L.R. 2221(e) (McKinney 2009) (requiring motion to reargue to be "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and to "contain reasonable justification for the failure to present such facts on the prior motion,") contending that

> *Kaur* presents compelling evidence that the ESDC's willingness to play fast and loose with blight findings is a pattern, and not just an isolated occurrence. . . . Given *Kaur*'s conclusion that the tipping point has been reached, and given this Court's obligation to review that conclusion open-mindedly, fundamental fairness requires that the Court preserve its ability to provide Appellants with redress by holding this motion in abeyance until *Kaur* is decided.

Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal of Petitioner-Appellant at 3, Goldstein v. N.Y. State Urban Dev. Corp., No. 2008–07064 (N.Y. Dec. 10, 2009). The motion was denied without comment. Decision List 7 (Feb. 18, 2010), *available at* http://www.nycourts.gov/ctapps/decisions/2010/feb10/DecisionList021810.pdf.

358. The *Kaur* petitioners also alleged bad faith, which was an underlying but unstated element in the Atlantic Yards case. Raising bad faith outright might have triggered a somewhat more rigorous review in the Atlantic Yards case, but the *Kaur* petitioners also benefited from the fact that a court had already found a conflict of interest to exist among ESDC, Columbia University, and the consultant that prepared the blight study. *See supra* note 155 and accompanying text. Moreover, while the *Goldstein* petitioners used the Freedom of Information Law (FOIL), N.Y. PUB. OFF. LAW § 84 (McKinney 2009), to obtain some documents, the *Kaur* petitioners used FOIL extensively to amass what they might have obtained through discovery. In hindsight, the *Goldstein* petitioners may regret that they parted ways with Norman Siegel, who advised DDDB before the cases it organized and funded were filed and who went on to pursue these more effective arguments and tactics in the *Kaur* case, albeit with one well-heeled client. If the *Kaur* decision is overturned on appeal, however, Seigel's tactics may prove to be as ineffective as the approach taken by DDDB's counsel.

359. *See* Norman Siegel et al., No Blight: A Study of Neighborhood Conditions in Manhattanville (Oct. 30, 2008) (on file with author Lavine).

360. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/01/dubious-crime-statistics-and-missing.html (Jan. 14, 2008, 6:01 EST).

Shortly after condemnation papers were served on the footprint property owners and tenants, DDDB filed a new suit seeking to compel ESDC to issue a new determination and findings (D&F), although the petition in that suit was basically identical to the petitioners' response to the condemnation papers.[361] The property owners claimed that the 2006 determination and findings should have been invalidated because "materially significant events that transpired after the 2006 D&F, particularly Respondent's adoption of the 2009 Modified General Project Plan . . . fatally undermined the public use finding contained in the old and stale 2006 D&F."[362] According to the property owners, they should have been permitted to raise the changed circumstances of the case because the court of appeals refused to consider any facts not in existence when the 2006 determination and findings was issued.[363] In other words, they argued that they should "be able to raise this somewhere."[364]

ESDC claimed during oral arguments in the condemnation action that the project's public uses had not changed, and that it was, in any case, not required to issue a new determination and findings.[365] The case relied on by ESDC, *Leichter v. N.Y.S. Urban Development Corp*.[366] does indeed hold that even significant project changes do not necessitate a new determination and findings.[367] It also specifically applied this holding to a change in the phasing of condemnations, which was one of the materially changed circumstances cited by the property owners. The footprint property owners, however, raised additional changes, including increased subsidies and the IBO's conclusion that the arena would

361. *Compare* Notice of Petition, In re N.Y. State Urban Dev. Corp., No-32741/09 (N.Y. Sup. Ct. Dec. 23, 2009), *available at* http://dddb.net/eminentdomain/article4/ESDCArticle4Petition.pdf, *with* Verified Petition, Peter Williams Enters., Inc. v. N.Y. State Urban Dev. Corp. (N.Y. Sup. Ct. Jan. 19, 2009), *available at* http://dddb.net/eminentdomain/article78/091219Petition.pdf. Bearing out the expectation that it would result in a different outcome than the suit challenging condemnation, the Article 4 petition in *In re N.Y. State Urban Dev. Corp*. was subject to a brief oral argument on venue, and moved back to the condemnation judge.

362. Verified Petition, Peter Williams Enterprises, *supra* note 361, at 8.

363. Verified Answer, Defenses, Affirmative Defenses, Objections in Point of Law and Counterclaims for the Respondent, In re N.Y. State Urban Dev. Corp., No. 32741/09 (N.Y. Sup. Ct. Jan 27, 2010), *available at* http://dddb.net/eminentdomain/article4/Answer100127.pdf.

364. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/condemnation-on-hold-after-judge.html (Jan. 30, 2010, 7:38 EST).

365. *Id*.

366. 546 N.Y.S.2d 351, 352–53 (App. Div. 1989).

367. *Id*.

be a net money loser for the city, as well as the restructured MTA deal and the likely long-extended project timeline.[368]

These arguments were rejected in March 2010, in an opinion by Supreme Court Justice Abraham Gerges. The decision rejected the condemnees' technical arguments, as well as their claim that the project's public use was substantially changed.[369] In line with *Leichter*, Gerges also explained that "to the extent that the Project has changed. . . [ESDC] is not obligated to begin a de novo review proceeding."[370] The decision also rejected the condemnees' arguments relating to guarantees for project financing, noting that "even if [ESDC] is unable to complete the Project after having acquired title to the property[,] '[T]he fact that a project may not ultimately come to fruition does not negate the power of eminent domain. . . .' "[371]

III. Environmental Review Litigation: *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*

DDDB and twenty-five other community groups initiated SEQRA litigation in April 2007,[372] challenging the actions of ESDC, the

368. Verified Answer, Defenses, Affirmative Defenses, Objections in Point of Law and Counterclaims for the Respondent at 22, In re N.Y. State Urban Dev. Corp., No. 32741/09 (N.Y. Sup. Ct. Jan 27, 2010), *available at* http://dddb.net/eminentdomain/article4/Answer100127.pdf.

369. In re N.Y. State Urban Dev. Corp., No. 32741/09, slip op. at 40 (N.Y. Sup. Ct. Mar. 1, 2010), *available at* http://www.scribd.com/doc/27686399/Gerges-Decision-on-Atlantic-Yards-condemnation-3–1-10. Gerges alternatively explained that he was required to accept the court of appeals' decision as preclusive and reject any attempt by the condemnees to reopen their public use challenge. *Id*. at 43, 47.

370. *Id*. at 40. Despite *Leichter*'s clear application to the case, Gerges went on to hold, unnecessarily and incorrectly, that the condemnees' argument that ESDC should have issued a new determination and findings was time barred because it was not filed within thirty days of ESDC's approval of the 2009 MGPP. *Id*. at 40–41. N.Y. EM. DOM. PROC. LAW § 207 clearly states that the thirty-day time period begins to run "after the condemnor's completion of its publication of its determination and findings," not its publication of other project-related documents. Because no amended determination and findings was ever made, the thirty-day period was clearly inapplicable to the condemnees' argument. *See also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/in-decision-by-gerges-allowing.html (Mar. 2, 2010, 3:33 EST) (quoting DDDB attorney Matthew Brinkerhoff).

371. In re N.Y. State Urban Dev. Corp., No. 32741/09, slip op. at 57 (N.Y. Sup. Ct. Mar. 1, 2010) (quoting Vitucci v. N.Y. City School Constr. Auth., 735 N.Y.S.2d 560 (App. Div. 2001)), *available at* http://www.scribd.com/doc/27686399/Gerges-Decision-on-Atlantic-Yards-condemnation-3–1-10.

372. SEQRA litigation is rarely successful unless based on clear procedural defects, as the "hard look" standard of review is roughly equivalent to the minimal scrutiny of rational basis review. As the court of appeals has explained:

> Our inquiry is tempered in two respects. First, an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. "Not every conceivable

PACB,[373] and the MTA.[374] The heart of the complaint, much like the eminent domain litigation, was that "ESDC effectively approved the Project long before it underwent environmental review, depriving that review of any semblance of objectivity."[375]

The environmental review claims were first decided in a trial court opinion issued in January 2008.[376] After holding that ESDC had complied with its statutory public participation requirements,[377] Supreme

environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA". . . . Second, the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives. Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence.

Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429, 436 (N.Y. 1986). Nevertheless, environmental review litigation is often pursued against large land use projects, as pending litigation can be used as leverage to obtain developer concessions. *See* Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 578–79 (1997).

373. The PACB is a three-member board charged with supervising certain financial activities undertaken by the state's largest public authorities. N.Y. PUB. AUTH. LAW §§ 50–51 (McKinney 2009). The petitioners raised the issue of whether the PACB's resolution approving the project and its funding mechanisms constituted a state agency "action" subject to the SEQRA requirements. Finding that "PACB's authority in approving a proposed project is limited to financial considerations[,]" and does not involve any assessment of environmental concerns, the court held that SEQRA was not applicable. This holding was affirmed on appeal, Develop Don't Destroy Brooklyn v. Urban Dev. Corp., 874 N.Y.S.2d 414 (App. Div. 2009).

374. On the issue of whether the MTA violated SEQRA by failing to adopt a findings statement and take a "hard look" at the project's environmental impacts, the court held against the petitioners because the MTA had prepared its own environmental findings statement that considered the project's likely effects on land use, socioeconomic conditions, traffic, transit and neighborhood character, among other things. *Develop Don't Destroy Brooklyn*, 874 N.Y.S.2d at 417–18.

375. Verified Petition and Complaint, at 10, Develop Don't Destroy Brooklyn v. Urban Dev. Corp. 874 N.Y.S.2d 414 (App. Div. 2009) (No. 4206), *available at* http://dddb.net/FEIS/PetitionComplaint.pdf. In addition to claims based on the adequacy of the EIS, the suit also alleged that ESDC surpassed its authority under its enabling legislation, the UDC Act. Although the petitioners understood that the case was a longshot, their hopes were raised after Justice Joan Madden "seemed skeptical" of ESDC's defenses during oral arguments. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/01/after-eight-months-state-judge.html (Jan. 12, 2008, 6:05 EST). About two weeks after the environmental review case was filed, the court denied a temporary restraining order that would have enjoined demolition activities pending resolution of the litigation.

376. Develop Don't Destroy Brooklyn v. Urban Dev. Corp., No. 104597, 2008 N.Y. Misc. LEXIS 551 (Sup. Ct. 2008). The decision came eight months after extensive oral arguments, which was a stretch of time far longer than the judge had originally predicted. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/01/after-eight-months-state-judge.html (Jan. 12, 2008, 6:05 EST).

377. Whether ESDC provided the minimum thirty-day written comment period following its public hearing depended on the date from which the time period should have begun to accrue. ESDC claimed that it was properly August 23, 2006, the date of its

Court Justice Joan Madden found that arena development qualified as a "civic project" and other parts of the development qualified as a "land use improvement project." These distinctions are meaningful because ESDC is only authorized to conduct limited types of development projects under its enabling legislation—it does not have the authority to engage in any and all activities that qualify as "public uses."[378] Justice Madden's analysis of whether an arena qualifies as a "civic project"—defined by the statute as a "project . . . providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes"—was questionable, even accepting the low standard of review. The statute contains separate definitions for commercial-type projects,[379] and her explanation that

formal public hearing, but the petitioners claimed that two subsequent "community forums" hosted by ESDC effectively extended the close of the public hearing until September 12, 2006. ESDC claimed that the statutory purposes of the public comment period were more than satisfied by the additional community forums and argued that the forums could not be considered public hearings because they did not include any formal presentation of information. While Justice Madden recognized that extending the public comment period "would have increased public scrutiny and participation in the process," Develop Don't Destroy Brooklyn v. Urban Dev. Corp., No. 104597, 2008 N.Y. Misc. LEXIS 551, at *36–37 (Sup. Ct. 2008), she agreed with ESDC that it had exceeded its statutory requirements by holding the additional meetings. *Id*. at *34–35. The related claim concerned the Community Advisory Committee (CAC), a committee that is required to be created under ESDC's enabling legislation. The petitioners argued that the CAC created for Atlantic Yards was ineffective because half of its six members were "unabashed supporters of the Project," and because the CAC did not meet until the summer of 2006, well into the project's approval process. Despite the CAC's deficiencies and its possible inability to provide meaningful advice to ESDC, Justice Madden found that it fully complied with the statute and did not represent any actionable violation. *Id*. at *38–40

378. N.Y. UNCONSOL. LAW ch. 252, §§ 3, 10 (Consol. 2010). ESDC could not, for example, condemn property in order to widen a road or obtain an easement for power lines, as these uses, while "public uses," do not fall within any of the project types authorized under the UDC Act. On appeal to the first department, the court failed to recognize the distinction between "public uses" and uses authorized by the admittedly broad UDC Act, relying on a case establishing that a professional sports arena is a "public use." The majority also did not consider that the case it relied on dealt with a municipally owned stadium questioned under constitutional provisions, rather than an ESDC project, limited by its more specific enabling legislation. Although the exact difference between the two concepts is unclear, the UDC Act's use of the separately defined term "civic purposes" indicates that the legislature intended a narrower definition. *See also* Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8 (App. Div. 2009) (holding that the Columbia expansion did not qualify as a "civic" use, but not expressly deciding whether it could be considered a "public" use).

379. The UDC Act refers frequently to "commercial" projects. Combined with the fact that "recreational" projects are grouped with "cultural" and "educational" projects, while "commercial" projects are discussed with "industrial" and "manufacturing" projects, it would seem more appropriate to classify a professional sports arena as a profit-making, "commercial" facility. *See* N.Y. UNCONSOL. LAW ch. 253, §§ 2–3 (purposes, definition of "industrial project").

being a spectator at a sports facility is essentially equivalent to participating in the sports activities themselves was not satisfying.[380] She stood on firmer ground in determining that the project was a "land use improvement project," as the classification is similar to a blight determination. Because the petitioners conceded that those portions of the project area located in the Atlantic Terminal Urban Renewal Area (ATURA) were blighted, Justice Madden extended the typical deference to ESDC to include within the project footprint whatever property it deemed necessary.[381]

Regarding the EIS, Justice Madden found sufficient ESDC's assessment (or non-assessment) of impacts relating to terrorism threats,[382]

380. During oral arguments, one of the more heavily debated questions was whether a for-profit professional sports arena providing only nominal opportunities for community events could honestly be considered a "civic project." Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/05/esdc-grilled-over-blight-civic-project.html (May 4, 2007, 7:21 EST). Justice Madden looked to the dictionary definition of "recreational" and came to the (questionable) determination that attending sports events is a form of civic recreation. Develop Don't Destroy Brooklyn v. Urban Dev. Corp., No. 104597, 2008 N.Y. Misc. LEXIS 551, at *46 (Sup. Ct. 2008); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/04/are-sports-facilities-public-recreation.html (Apr. 9, 2009, 6:55 EST).

381. Madden was not persuaded by the petitioners' arguments that the non-ATURA properties were not blighted because they were "in the midst of a residential real estate boom" or that any blight that did exist was a result of FCR's acquisition and poor maintenance of properties within the project site. Nor did she find any legal authority to support the claim that FCR's *post hoc* blight determination was unlawful. Develop Don't Destroy Brooklyn, v. Urban Dev. Corp., No. 104597, 2008 N.Y. Misc. LEXIS 551, at *56–58, 62–65 (Sup. Ct. 2008); *see* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/05/esdc-grilled-over-blight-civic-project.html (May 4, 2007, 7:21 EST).

382. The issue of terrorism threats was especially contested, given the history of a planned terrorist attack at the Atlantic Avenue subway station and the potential for the arena to become a target. *See* Christina Cope & Alan M. Rosner, Terrorism, Security and the Proposed Brooklyn Atlantic Yards High Rise Arena Development Project (Jan. 6, 2005), http://www.developdontdestroy.org/php/reading/security.php. Nevertheless, Justice Madden considered the arena more akin to a shopping mall or a residential subdivision than to facilities acknowledged by SEQRA regulations to present public safety threats, such as hazardous waste facilities, oil tanker ports, and gas storage facilities. Develop Don't Destroy Brooklyn v. Urban Dev. Corp, 874 N.Y.S.2d 414 (App. Ct. 2009). This determination was affirmed on appeal, with the appellate court explaining that even in the context of

> a major urban development situated at a pre-existing transit hub, [the project does] not so clearly increase the risk of terrorism, much less of terror-induced environmental harm, as to render the lead agency's determination not to address terrorism as an environmental impact of the proposed action unreasonable as a matter of law. *Id*. at 418.

See Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/11/state-secret-esdc-stonewalls-on-arena.html (Nov. 13, 2007, 6:10 EST).

open space, traffic, transit, wind, public services, and project alternatives.[383] She also rejected the petitioners' claim that the ten-year timetable for completion of the project had been intentionally underestimated so as to limit the analysis of cumulative development impacts. Despite pointing to a statement by FCE CEO Chuck Ratner that the project would take fifteen years to build, and a statement from the project's landscape architect that it could possibly take twenty years, Justice Madden held that the petitioners failed to make a sufficient showing that the timetable was inaccurate. She also found no legal authority for the contention that this problem amounted to a violation of the SEQRA process.[384]

On appeal, the appellate division, first department, affirmed and dismissed the case.[385] The majority, like Justice Madden below, emphasized its limited role in reviewing substantive SEQRA claims. It pointed out that the final EIS included 3500 pages of analysis and suggested that it would be a stretch to consider it inadequate.[386] Like Justice Madden, the majority considered it appropriate for ESDC to rely on FCR's estimation of the project's build years, explaining that "reliance on a particular build date, even if inaccurate, will not affect the validity of the basic data utilized in an EIS."[387] In making this statement, however, the court did not acknowledge the petitioners' claim (although stated only in a footnote) that one of the project's funding agreements demonstrated the inaccuracy of the timeline by giving the developer more time to build Phase 1 and imposing no deadline for the completion of Phase 2.[388]

383. *Develop Don't Destroy Brooklyn*, 2008 N.Y. Misc. LEXIS 551, at *66–72, 82–119. On the issue of project alternatives, the petitioners pointed to new development in the area as evidence that ESDC falsely assumed that the railyards' blighting influence would continue to inhibit growth. Justice Madden, however, explained that "as previously determined herein, that fact alone is insufficient to outweigh the ample evidence of blight conditions documented in the Blight Study, which provided a rational basis for the ESDC's conclusion that continued new development on the project site was unlikely." *Id*. at 102. The first department, on appeal, was particularly critical of the petitioners' argument that the EIS's discussion of alternatives was inadequate. *See* Develop Don't Destroy Brooklyn v. Urban Dev. Corp., 874 N.Y.S.2d 414, 419 (App. Ct. 2009).

384. *Develop Don't Destroy Brooklyn*, 2008 N.Y. Misc. LEXIS 551, at *78–82.

385. Develop Don't Destroy Brooklyn v. Urban Dev. Corp., 874 N.Y.S.2d 414 (App. Ct. 2009); *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/02/appellate-court-despite-some-misgivings.html (Feb. 26, 2009, 3:08 EST).

386. *Develop Don't Destroy Brooklyn*, 874 N.Y.S.2d at 417–18.

387. *Id*. at 418–19.

388. Brief of Petitioner-Appellant at 51 n.14, Develop Don't Destroy Brooklyn v. Urban Dev. Corp (Apr. 4, 2007), *available at* http://dddb.net/FEIS/appeal/Appeal_Brief_Final.pdf.

Unsurprisingly, the first department applied a mostly toothless rational basis test and decided to defer to ESDC's determinations regarding the "civic use" and "land use improvement" project classifications.[389] Judge Catterson, however, wrote a separate concurrence that was very skeptical about ESDC's blight finding. Catterson explained that he felt constrained by precedent to join the majority, but stated, off the bat, "that the [UDC Act] is ultimately being used as a tool of the developer to displace and destroy neighborhoods that are 'underutilized.' " Unlike the majority, he recounted evidence demonstrating the developer-driven nature of the project and he acknowledged that the MTA was responsible for the blighted condition of the railyards.[390] Judge Catterson also recognized that the timing of the blight study was crucial:

> In my view, any determination that these [non-ATURA] blocks were substandard or insanitary should properly be based on a snapshot of the conditions that prevailed at the time that the Project was announced by FCRC in 2003. Any blight study that does not reflect this temporal limitation would necessarily allow the mere announcement of the massive project to predetermine the outcome of the study. On this point, I believe that the petitioners argue persuasively that any proposed or intended development in these blocks such as the Project would curtail any other private development; and that no new development would occur on property that might be subject to the broad powers of condemnation as wielded by a coalition of the ESDC and FCRC.[391]

After recounting the various items that ESDC commissioned as part of the blight study (which, he noted, was prepared by its "perennial consultant," AKRF[392]), Catterson pointed out that "the blight study failed to comport with the majority of the specific criteria set out in AKRF's contract. Furthermore, ESDC's contention that 'as a matter of law,' ESDC could only look at conditions contemporaneous with the study, which was conducted years after the announcement, is ludi-

389. Summing up its opinion, the court explained with typically broad deference that:

> While it is possible to disagree with the agency's conclusion that the area at issue is blighted, and to argue that the blight designation is not warranted by the area's character and potential, on this record, all that is involved is a difference of opinion. In such a case, it does not matter whether we would be inclined to agree with petitioners; we are bound to defer to the agency to which the determination has been legislatively committed. . . . the issue posed is not which of the parties has more persuasively characterized the area in question, but whether there was any basis at all for the exercise by the agency of the legislatively conferred power to make a blight finding, and plainly there was.

Develop Don't Destroy Brooklyn, 874 N.Y.S.2d at 422–25.

390. *Id*. at 427.

391. *Id*. at *428*.

392. *See* Schuerman, *supra* note 59.

crous on several levels." Catterson's opinion was the first clear judicial pronouncement—although others would follow[393]—partly validating the petitioners' cause. Even this minor victory was bittersweet, emphasizing as it did just how difficult it would be for the petitioners to overcome ESDC's apparent immunity to judicial review.

IV. The MTA Litigation: *Montgomery v. MTA*

When the MTA renegotiated its deal with FCR for the sale of the development rights over the railyards in June 2009, it resulted in an arguably less favorable compensation package for the MTA. A few weeks prior to the board's acceptance of the revised terms, New York State Assemblyman Richard Brodsky raised the prospect that finalizing the deal would amount to a breach of the board's fiduciary duty.[394] Given that Brodsky sponsored reforms of public authority laws in 2005 and 2009, his opinion on the matter carried some heft.[395]

Rather than challenge the renegotiated deal as a fiduciary breach, however, DDDB, along with several elected officials and two other public interest groups, brought procedural challenges under the Public Authorities Accountability Act (PAAA).[396] Specifically, the petitioners argued that the MTA failed to comply with a statutory appraisal requirement because, although the railyards were appraised in 2005, they were not reappraised prior to the 2009 deal.[397] The petitioners also claimed that the MTA failed to dispose of the railyards "subject to obtaining such competition as is feasible under the circumstances."[398] Even though the MTA was not required to issue a new RFP, the petitioners argued that

393. Goldstein v. N.Y. State Urban Dev. Corp., 13 N.Y.3d 511, 526 (2009).

> It may be that the bar has now been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses.

Id.; see also Id. at 546. (Smith, J., dissenting).

394. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/06/brodsky-mta-boards-acceptance-of.html (June 8, 2009, 2:24 EST).

395. Despite his involvement in public authority reforms and his criticism of the Yankee Stadium project, Assemblyman Brodsky has shied away from taking action regarding Atlantic Yards. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/brodsky-seeks-investigation-of-shady.html (Jan. 15, 2010, 2:41 EST).

396. Montgomery v. Metro. Transp. Auth., No. 114304, 2009 N.Y. Misc. LEXIS 3382, at *19 (Sup. Ct. 2009).

397. N.Y. PUB. AUTH. LAW § 2897(3) (McKinney 2009).

398. § 2897(6)(c).

it should have solicited a new bid from Extell and that it should have considered the last minute offer made by DDDB.[399]

The MTA, in response, contended that the petitioners had no standing to bring the suit, because none of them could satisfy the injury in fact requirement.[400] In the alternative, the MTA contended that it complied with the PAAA by appraising and putting the property out to bid in 2005. The 2009 deal, according to the MTA, was merely a "modification" of the proposal it had already accepted, requiring no rebidding or reappraisal.[401] Moreover, the MTA considered the 2009 terms to be the most advantageous that it could have obtained,[402] and it claimed that it was not required to seek out a bid from Extell, the only other company to submit a bid in 2005, in order to "obtain such competition as is feasible under the circumstances."[403] It characterized DDDB's last minute, informal bid as nothing more than "grandstanding" and refused to consider DDDB a "responsible bidder."[404]

The New York County Supreme Court dismissed the MTA case on standing grounds in December 2009. Were ESDC a state agency, the petitioners would have gained standing easily under the State Finance Law.[405] The taxpayer standing statute, however, does not apply to public authorities, which according to the court of appeals are separate and distinct from the state.[406] Due to this fiction (acknowledged as "gimmickry" by the court of appeals[407]), the petitioners had two ways to achieve standing: they could prove injury in fact or demonstrate that there was an insurmountable barrier to judicial review. Justice Michael Stallman found no injury in fact because none of the petitioners had any

399. *See* Petitioners' Memorandum of Law in Support of Their Verified Petition, Montgomery v. Metro. Transp. Auth., 2009 N.Y. Misc. LEXIS 3382 (Sup. Ct. 2009) (No. 114304), *available at* http://dddb.net/MTAsuit/MOL_MontvMTA.pdf; Verified Petition, Montgomery v. Metro. Transp. Auth., 2009 N.Y. Misc. LEXIS 3382, (Sup. Ct. 2009) (No. 114304), *available at* http://dddb.net/MTAsuit/Petition_MontvMTA.pdf.

400. *See* Memorandum of Law of Respondent Metropolitan Transportation Authority in Opposition to the Petition at 6–18, Montgomery v. Metro. Transp. Auth., 2009 N.Y. Misc. LEXIS 3382, (Sup. Ct. 2009) (No. 114304), *available at* http://dddb.net/MTAsuit/mta/MTA_MOL.pdf.

401. *Id*. at 23–25 (calling the changes "minor").

402. *Id*. at 25.

403. *Id*. at 30–31.

404. *Id*. at 33.

405. N.Y. STATE FIN. LAW § 123-b (McKinney 2002).

406. *See, e.g.*, Schulz v. State, 84 N.Y.2d 231 (1994) (holding that authority debt is not "state" debt, even if the state provides annual appropriations for the authority's debt service).

407. *Id*.

injury distinct from that of the public in general.[408] He did not clearly address the petitioners' claim that "standing should be extended wherever necessary 'to prevent the erection of an impenetrable barrier to judicial review of unlawful official action[,]' "[409] but rather resolved the argument by explaining that standing "has not, and should not be extended to substitute judicial oversight for the discretionary management of public business by public officials."[410] Despite his decision on standing, to avoid delay, he went on to rule for the MTA on the merits too.

Justice Stallman generally agreed with the MTA that it did not need to secure a new appraisal in 2009, especially considering that a revised appraisal would likely be lower because of the recession.[411] Somewhat dubiously, Stallman concluded that the 2009 deal was more valuable to the MTA than the 2005 terms—he did not mention the generous 6.5% interest rate on what was essentially an $80 million loan or discuss the fact that the "value engineered" replacement railyard was much smaller than the one originally promised by FCR[412]—but his ultimate determination that the petitioners failed to prove that the MTA acted arbitrarily or capriciously was more sound. The rational basis standard of review, after all, gives the MTA vast leeway to make decisions based on its assessment of what is in the best interests of the public.[413] Although Stallman discussed the fact that property disposed of in furtherance of an economic development project need not be sold for fair market value under the PAAA,[414] he did not comment on the MTA's debatable contention that it could not have bargained for a better deal, or waited for the market to adjust, because FCR had it over a barrel due to the recession.[415]

408. The New York Public Interest Group Straphangers Campaign had no actionable injury because the injury to its constituents was no different than millions of transit riders in general; the elected officials could not assert standing to sue on behalf of constituents or challenge their interpretation of legislation; DDDB members' interests were "so broad and vacuous" as to erase the concept of injury in fact; and DDDB itself could not prove that it was a "responsible bidder" specially aggrieved by the award of the bid to FCR. Montgomery v. Metro. Transp. Auth., No. 114304, 2009 N.Y. Misc. LEXIS 3382, at *3–10 (Sup. Ct. 2009).

409. Petitioners Reply Memorandum of Law in Further Support of Their Verified Petition at 7–8, Montgomery v. Metro. Transp. Auth., 2009 N.Y. Misc. LEXIS 3382 (Sup. Ct. 2009) (No. 114304) (quoting Abrams v. N.Y. City Transit Auth., 39 N.Y.2d 990 (1976)), *available at* http://dddb.net/MTAsuit/ReplyBrief1117.pdf.

410. *Id*. at 5 (citation omitted)

411. Montgomery v. Metro. Transp. Auth., No. 114304, 2009 N.Y. Misc. LEXIS 3382, at *19 (Sup. Ct. 2009).

412. *Id*.

413. *See* Madison Square Garden, LP v. N.Y. Metro. Transp. Auth., 801 N.Y.S.2d 236 (Sup. Ct. 2005).

414. *Montgomery*, 2009 N.Y. Misc. LEXIS 3382, at *25–26.

415. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/12/as-challenge-to-mta-deal-awaits-judge.html (Dec. 9, 2009, 9:05 EST).

Regarding the question of whether the MTA secured as much competition as feasible, Stallman correctly emphasized that his focus was on the 2009 agreement, and not on the 2005 bidding process, for which the statute of limitations had run years before. He then concluded, especially in light of the economic downturn, that "[g]iven the paucity of bidders for this project—unusual in scope and complexity, and speculative as to ultimate profitability for the private developer—the process was as competitive as was feasible."[416] He rejected the petitioners' assertion that the MTA should have been required to solicit a new bid from Extell or any other developer, and agreed with the MTA that it was rational to ignore DDDB's bid because "it lacked any experience for this kind of project and. . .had no reasonable expectation of obtaining financing."[417]

V. The MGPP Litigation

The last major case (at least so far) challenging Atlantic Yards centers on ESDC's reapproval of the project's Modified General Project Plan (MGPP) in September 2009. The combined challenge, made up of separate suits filed by community groups organized by (and including) DDDB and also by members of the community coalition BrooklynSpeaks,[418] alleged that ESDC: (1) violated SEQRA by failing to prepare a supplemental EIS to address the project's extended build-out timeline; (2) violated the UDC Act because "there is no meaningful plan or assurances in place that the majority of the project, contained in Phase 2, will be built for decades if at all" and thus the project could

416. *Montgomery*, 2009 N.Y. Misc. LEXIS 3382, at *25–26. This point was contradicted by ESDC in papers filed in relation to the MGPP lawsuit, discussed *infra* Part V. ESDC explained there that

> another major developer responded to the Request for Proposals issued by MTA in connection with the sale of the air rights over the Vanderbilt Yard. . ., and there is no reason to believe that the attractiveness of this development opportunity would be diminished by the partial completion of the Project [if FCR were to abandon it].

Memorandum of Law of Respondent Empire State Development Corp. In Opposition to Article 78 Petition at 41, Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., No. 114631/09 (N.Y. Sup. Ct. Nov. 12, 2009), *available at* http://dddb.net/MGPPsuit/ESDC/ESDCMOL.pdf [hereinafter Memorandum of Empire State Dev. Corp.].

417. *Montgomery*, 2009 N.Y. Misc. LEXIS 3382, at *27.

418. Memorandum of Law of Respondent Empire State Development Corp. In Opposition to Article 78 Petition at 41, Prospect Heights Neighborhood v. Empire State Dev. Corp., No. 116323/09 (N.Y. Sup. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/28429914. The second claim is asserted only in the DDDB suit; the third claim only in the BrooklynSpeaks suit.

actually exacerbate blight instead of removing it;[419] and (3) violated the UDC Act by unlawfully delegating to FCR the authority to determine the schedule and components of the project.[420] Both suits focused on the renegotiated MTA deal, which gave FCR twenty-two years to complete its purchase of the railyard development rights—a time period much longer than the ten-year buildout specified in the MGPP.

The core arguments in the MGPP case involved the need for a supplemental EIS, a claim that in many ways mirrored arguments made in DDDB's first EIS suit regarding the project timeline, arguments that were dismissed because "reliance on a particular build date, even if inaccurate, will not affect the validity of the basic data utilized in an EIS."[421] DDDB sought to overcome this bar in the MGPP case by relying on the renegotiated MTA deal,[422] but ESDC countered this argument by explaining that the MTA deal merely permitted but did not mandate a twenty-two year purchase timeline, and that regardless, the 2009 MGPP required ESDC and FCR to reach an agreement that FCR would use

419. In the second claim, DDDB conceded that parts of the project site were blighted, and then argued that the extended buildout period violated the UDC Act by failing to adequately assure remediation of the site's blighted conditions. The weight of authority on this issue lay with ESDC, as the statute requires only that the authority have a "plan" for blight remediation, not that it have sufficient guarantees of the plan's success. Memorandum of Empire State Dev. Corp., *supra* note 416, at 13–17. Moreover, a basic understanding of economic development statutes in other states, many of which contain clawback guarantees, suggests that the legislature could require ESDC to obtain these sorts of guarantees if it so chose. *See* Amy Lavine, *Getting Past the Prisoners' Dilemma: Transparency and Accountability Reforms to Improve New York's Industrial Development Agency*, 11 GOV'T L. & POL'Y J. No. 75 (2009), *available at* http://www.publicauthority.org/files/lavine.pdf.

420. The unlawful delegation claim asserted by BrooklynSpeaks went directly to the fundamental criticism that Atlantic Yards is a developer-driven project with overriding private purposes. Petitioners' Memorandum of Law at 28–32, Prospect Heights Neighborhood v. Empire State Dev. Corp. (N.Y. Sup. Ct. 2009), *available at* http://66.39.72.204/brooklynspeaks/memo_of_law.pdf. ESDC, however, characterized FCR's high level of control over the project as "developer flexibility" and claimed that the arrangement furthered the UDC Act's goal of maximizing the participation of private enterprise in redevelopment. ESDC also contended that FCR is indeed limited by the project's design guidelines, and that the allowance of flexibility was reasonably extended so as to accommodate market forces. However, the concept of "maximum private participation" initially did not contemplate such private-public development projects. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/04/from-udc-rebuilding-slums-to-esdc.html (May 2, 2007, 6:20 EST).

421. *See supra* Part III; Develop Don't Destroy Brooklyn v. Urban Dev. Corp., 874 N.Y.S.2d 414, 419 (App. Div. 2009). The standard of review of an agency's decision not to prepare a supplemental EIS is arguably even more deferential than actions regarding the initial EIS. *See* Memorandum of Empire State Dev. Corp., *supra* note 416, at 36–37 (comparing *Jackson* and *Riverkeeper*).

422. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/in-court-argument-over-esdc-project.html (Jan. 20, 2010, 2:40 EST).

"commercially reasonable efforts" to complete the work in ten years.[423] ESDC also pointed out that it included an analysis of the impacts of an extended construction schedule in its Technical Memorandum, and had as such taken the required "hard look" at any environmental impacts that might be caused by delayed completion.[424]

The MGPP suit was dismissed on March 10, 2010, the day before the arena groundbreaking.[425] State Supreme Court Justice Marcy Friedman, despite criticizing ESDC's "deplorable lack of transparency," rejected the petitioners' UDC Act[426] and unlawful delegation claims,[427] and deferred to ESDC's decision to reapprove the MGPP in 2009 without first completing a supplemental EIS.[428]

Friedman's analysis was not especially nuanced, however.[429] While she conceded that "ESDC's continuing use of the 10 year build-out was supported. . . only minimally," she determined that it was rational for ESDC to rely on the future existence of a ten-year provision in the development agreement[430] despite the fact that the MGPP contained only an "agreement to agree" to this condition.[431] Such contracts are

423. *See* Memorandum of Empire State Dev. Corp., *supra* note 416, at 40.

424. *Id. at* 48–51.

425. Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., No. 116323/09, (N.Y. Sup. Ct. Mar. 10, 2010), *available at* http://www.dddb.net/MGPPsuit/100310FriedmanRuling.pdf.

426. *Id*. at 5. Friedman also rejected DDDB's claim that ESDC "illegally condition[ed] the development of affordable housing on the availability of public subsidies[,]" an argument that was pleaded as part of the UDC Act claim. *Id*. at 15–16.

427. *Id*. at 5.

428. *Id*. at 6.

429. Had Friedman clearly accepted as rational ESDC's determination in the Technical Memorandum that the impacts of an extended buildout were not significant enough to warrant an SEIS, the hard look standard of review would have been satisfied. Friedman did acknowledge this analysis, but her decision that the 2009 MGPP approval was rational relied heavily on the rationality of ESDC's continuing adherence to the original ten-year construction schedule. She explained that this was reasonable because market data suggested that then-ten year schedule was "not unreasonable," FCR had an incentive to build the project quickly because it had already invested a significant amount of money in the project, and the MGPP required FCR to agree in a separate contract to use commercially reasonable efforts to complete the project in ten years. *Develop Don't Destroy Brooklyn*, No. 116323/09, at 11.

430. *Id*. at 13.

431. The 2009 MGPP states

> [t]he Project documentation to be negotiated between ESDC and the Project Sponsor will require the Project Sponsors to use commercially reasonable efforts to achieve this schedule and to complete the entire Project by 2019. The failure to commence construction of each building would result in, *inter alia*, monetary penalties being imposed upon the Project Sponsors.

2009 MGPP, *supra* note 207, at 9–10.

enforceable only if they leave no material terms for later negotiation,[432] and we submit that the development agreement's provisions regarding extensions and penalties are material terms affecting FCR's promise to comply with the ten-year timeline.[433] Although ESDC could probably rely solely on its consultant's market analysis to support the rationality of the 2009 MGPP approval, Friedman still should have taken into consideration the lack of any binding ten-year timeline at the time the plan was reapproved.

Justice Friedman concluded her opinion with criticism of ESDC's process, stating that

> Although ESDC articulated reasons for its continued use of the 10 year buildout that are marginally sufficient . . . , ESDC's consideration of the modification of the plan lacked the candor that the public was entitled to expect, particularly in light of the scale of the Project and its impact on the community.

Like Judge Catterson's concurring opinion in the EIS case,[434] Friedman's statement emphasizes just how anemic judicial review of Atlantic Yards has been. The rational basis test is admittedly a low bar, but opinions like these suggest that it is no bar at all. DDDB said it would try to reopen the case, arguing that the details of the development agreement definitively show that the developer would have twenty-five years to complete the project, albeit with some penalties for delays on specific buildings.[435] While the agreement was signed December 23, 2009 it was not released until January 25, 2010, almost a week after oral argument—a delay that provoked suspicion since the state initially promised the document would be released within two weeks of its signing.[436]

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432. *See generally* 91 N.Y. JUR. 2D *Real Property Sales and Exchanges* § 20 (2010); 17 AM. JUR. 2D *Contracts* § 39 (2010) (discussing enforceability). ESDC could not rely on any verbal agreement or understanding in this case because the development agreement was clearly subject to the statute of frauds. *See generally* 22A N.Y. JUR. 2D *Contracts* § 603 (2010) (discussing the statute of frauds).

433. *See* Petitioners' Memorandum of Law, at 14–16 Develop Don't Destroy Brooklyn v. Empire State Dev. Corp. (N.Y. Sup. Ct. Oct. 16, 2009), *available at* http://dddb.net/MGPPsuit/MOL.pdf (claiming that there was no enforceable ten-year term in the MGPP).

434. *See* Develop Don't Destroy Brooklyn v. Urban Dev. Corp. 874 N.Y.S.2d 414, 425 (Ct. App. 2009) (Catterson, J., concurring).

435. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/esdcs-dubious-delays-release-of-master.html (Mar. 4, 2010, 7:57 EST).

436. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/despite-citing-esdcs-deplorable-lack-of.html (Mar. 10, 2010, 19:30 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/esdcs-dubious-delays-release-of-master.html (Mar. 4, 2010, 7:57 EST).

VI. The *Anderson* Litigation

The *Anderson* cases comprise three suits filed by the same lawyer challenging ESDC's authority to condemn certain rent-stabilized housing units. Unlike the *Goldstein* suits, the petitioners in these cases stood to be displaced by the project through the "friendly condemnation" of their buildings, which were owned by Forest City Ratner.[437]

A. Anderson I

In *Anderson I*,[438] the petitioners filed an action in trial court seeking injunctive relief and declarations that their rent-stabilized leases could only be terminated by the New York State Division of Housing and Community Renewal and that jury approval of the condemnation was required under New York's Highway Laws. The court held, however, that the tenants were "condemnees" and were thus required to file suit according to the provisions of the Eminent Domain Procedure Law (EDPL).[439] This finding mandated dismissal from the trial court for want of subject matter jurisdiction because the EDPL grants exclusive jurisdiction over condemnation challenges to the appellate division.[440]

The petitioners appealed this ruling, claiming that they were not "condemnees" under the EDPL because they did not have an ownership interest in the property.[441] The appellate division, first department, held in favor of ESDC in a terse opinion issued on October 16, 2007.

B. Anderson II

Although the petitioners claimed in *Anderson I* that they were not "condemnees" under the EDPL, they nevertheless filed an alternative lawsuit under the EDPL. The Second Department issued its opinion in the case just a few weeks after *Anderson I* was decided, in November 2007.[442]

437. Friendly condemnations are generally used in public-private development projects to cleanse properties already owned by the private sector partner of any title defects, but the Anderson plaintiffs claimed that the true purpose of the friendly condemnations in this case was really to circumvent the protections of their rent-stabilized leases. *See* 27 AM. JUR. 2D *Eminent Domain*. § 421 (2010); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2006/07/friendly-condemnations-but-not-for.html (July 26, 2006, 7:56 EST).

438. Anderson v. N.Y. State Urban Dev. Corp., 842 N.Y.S.2d 909 (App. Div. 2007).

439. *Id*. at 909.

440. N.Y. EM. DOM. PROC. LAW §§ 207(b), 208 (McKinney 2002).

441. Brief for Plaintiffs-Appellants at 4, Anderson v. N.Y. State Urban Dev. Corp., 842 N.Y.S.2d 909 (App. Div. 2007) (No. 2007–01711), 2007 WL 5071991.

442. Anderson v. N.Y. State Urban Dev. Corp., 846 N.Y.S.2d 218 (App. Div. 2007) ("*Anderson II*").

Before the second department, the petitioners claimed that ESDC violated its enabling legislation by using eminent domain to acquire their buildings without first finding that there was

> a feasible method for the relocation of families and individuals displaced from the project area into decent, safe and sanitary dwellings, . . . in the project area or in other areas not generally less desirable . . . , at rents or prices within the financial means of such families, and reasonably accessible to their places of employment[.][443]

ESDC, in response, explained that it had made sufficient findings concerning relocation feasibility because it planned to provide displaced tenants with a relocation consultant to help find alternative housing, real estate brokerage services, moving services and expenses, and a relocation assistance payment of $5000.[444] The petitioners countered that "[l]ow and moderate cost apartment rentals in comparable neighborhoods simply are not available. A real estate broker cannot create comparable replacement housing[.]"[445]

The appellate division ruled against the petitioners, holding that ESDC made sufficient findings that the tenants could be feasibly relocated.[446] The court also rejected the petitioners' claim that ESDC failed to take a "hard look" at the impacts that the project would have on them and other affected tenants. As the court explained, "[w]hile SEQRA review requires a lead agency to take a hard look at the socioeconomic impact of a project on the community as a whole . . ., the agency is not obligated to separately consider the impact on a particular subgroup

443. N.Y. UNCONSOL. LAWS § 6260(g) (McKinney 2010).

444. Brief for Respondent at 11–12, Anderson v. N.Y. State Urban Dev. Corp., 846 N.Y.S.2d 218 (App. Div. 2007) (No. 2007–00372), 2007 WL 4298282.

445. Petitioners' Brief at 11, Anderson v. N.Y. State Urban Dev. Corp., 846 N.Y.S.2d 218 (App. Div. 2007) (No. 2007–00372), 2007 WL 4298281. In fact, ESDC is required only to ensure "there is a feasible method for the relocation of families and individuals displaced from the urban renewal area into decent, safe and sanitary dwellings . . . at rents or prices within the financial means of such families or individuals." N.Y. GEN. MUN. LAW § 505(4)(e) (McKinney 1999). The employment of a real estate broker, under the rational basis standard, could be a "feasible method."

446.

> The petitioners do not challenge the finding . . . that only 146 residents would be displaced by the project, and that this number of residents constitutes less than one-tenth of one percent of the residents within a three-quarter-mile radius of the project. In these circumstances, the petitioners' argument that the respondent was required to conduct an additional study of the availability of housing in the area is without merit, and the plan for services to the displaced residents that the respondent has adopted, including professional relocation consulting, real estate brokerage and moving services, the payment of moving expenses, and an additional monetary payment for other ancillary expenses, provides a sufficient foundation for the respondent's finding that a feasible method for relocation exists[.]

Anderson v. N.Y. State Urban Dev. Corp., 846 N.Y.S.2d 218, 218 (App. Div. 2007).

or upon particular individuals[.]"[447] The record showed that the ESDC had adequately assessed the impact that the project would have on all displaced households within the project area, and the court thus found no reason to disturb the agency's decisions. Review was denied by the court of appeals in May, 2008.[448]

C. Anderson III

The *Anderson* petitioners brought their third case several months following dismissal of the second.[449] The *Anderson III* case, interestingly, involved a standing argument that was somewhat of a sequel to *Anderson I*, where the court rejected the petitioners' claims that the EDPL did not give them standing (the purpose of this argument being to obtain review by the trial court instead of proceeding immediately to the appellate division). In *Anderson III*, the petitioners sought to invoke a provision of the EDPL, and it was ESDC that argued they had no standing. The wording in the two EDPL provisions, however, was very different. In *Anderson I*, the statute granted standing to all persons with a property interest in land sought to be condemned, but in *Anderson III* the statute referred only to "fee owners" and not to "condemnees" or "tenants." The court agreed with ESDC's position on this matter, but nonetheless went on to discuss whether or not the petitioners had stated a valid claim.

The petitioners in *Anderson III* alleged that the projected duration of the development exceeded the time limit contained in EDPL section 406. That section provides that:

> If, after an acquisition in fee pursuant to the provisions of this chapter, the condemnor shall abandon the project for which the property was acquired, and the property has not been materially improved, the condemnor shall not dispose of the property or any portion thereof for private use within ten years of acquisition without first offering the former fee owner of record at the time of acquisition a right of first refusal to purchase the property at the amount of the fair market value of such property at the time of such offer.[450]

The petitioners claimed that a statement made in a funding agreement—to the effect that the developer would complete construction within twelve years—allowed the ESDC to retain title to the acquired property for more than the permitted ten years without material

447. *Id.*
448. Anderson v. N.Y. State Urban Dev. Corp., 889 N.E.2d 82 (N.Y. 2008).
449. Anderson v. N.Y. State Urban Dev. Corp., No. 0106056, 2008 WL 4448668 (N.Y. Sup. Ct. 2008) ("*Anderson III*").
450. N.Y. EM. DOM. PROC. LAW § 406 (McKinney 2002).

improvement, in direct derogation of the statute, and also failed to incorporate a first right of refusal process as required by the law.

Just as the court had looked to the statutory language to resolve the standing issue, so the court emphasized the term "abandon" and explained that:

> The statute is focused on abandonment of the project, and subsequent disposition of the property to a private owner. There simply are neither allegations nor proof in petitioners' papers that the project is or will be abandoned, that the property will not be timely improved or that it is intended to be conveyed to a private user without giving the fee owner a right of first refusal.[451]

The case, accordingly, was dismissed. All of the *Anderson* petitioners eventually settled.[452]

VII. Looking Ahead: The Legacy of Atlantic Yards

In October 2008, as the recession deepened, the Associated Press reported that Atlantic Yards was in serious financial trouble.[453] In the following months, news reports speculated as to possible cutbacks in the project.[454] But even as the arena's inspiration morphed from starchitecture to value-engineering in 2009, the "reversal of the Atlantic Yards inevitability meme" never quite took.[455] Following the court of appeals' ruling in the eminent domain case, bonds for financing the arena were sold in December 2009, and the project's groundbreaking ceremony took place on March 11, 2010.[456] There were no renderings of anything but the arena, though initial iterations of plans showed the whole project, and later versions showed at least the arena block.

Some clouds linger over the project, but have not had an impact. Aside from the recession, questions abound about the Brooklyn Arena Local Development Corporation, which ESDC created to issue bonds for the arena—and to avoid minimal government oversight by the

451. Decision Order Judgment, Anderson v. N.Y. State Urban Dev. Corp., 2008 WL 4448668 (N.Y. Sup. Ct. 2008) (No. 0106056).

452. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/even-before-gerges-decision-footprint.html (Mar. 10, 2010, 2:29 EST).

453. Amy Westfeldt, *Economy, Uncertain Financing Plague Brooklyn Arena*, USA TODAY, Oct. 14, 2008, *available at* http://www.usatoday.com/sports/basketball/2008–10–14–3222935191_x.htm?csp=34.

454. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/02/lets-call-it-ay-downsizing-meme-with.html (Feb. 1, 2009, 7:34 EST).

455. *See id*.

456. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/team-hype-pomp-and-questionable.html (Mar. 12, 2010, 9:38 EST).

PACB.[457] The PILOT agreement between ESDC, BALDC and an FCR entity could also violate the statute requiring PACB review,[458] although it would be a case of first impression were it to be litigated. In January 2010, FCR was enmeshed, although not indicted, in a federal corruption investigation of a project in Yonkers.[459] Requests for a moratorium on eminent domain have also been made to Governor Paterson.[460] Although he supported an eminent domain moratorium when he was a state senator, Paterson has shown little interest in advancing an eminent domain reform agenda since he assumed the role of governor.[461] Indeed, at the arena groundbreaking Bruce Ratner said that Paterson had supported the project from the start of his term.[462] Going forward, the lack of effective oversight has also prompted officials to support the Atlantic Yards Governance Act, which would create an independent public authority with local representatives on its board to advise on the project over the long term.[463]

Whether Atlantic Yards is completed, left as an arena on a larger site featuring more temporary surface parking than development,[464] or whether it is abandoned completely, it will have made an indelible impact on land use and development policy in New York State. The con-

457. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/at-senate-hearing-esdc-general-counsel.html (Jan. 7, 2010, 2:53 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/more-confirmation-that-baldc-is-pretty.html (Mar. 5, 2010, 3:04 EST).

458. N.Y. PUB. AUTH. LAW § 51 (McKinney 2009).

459. Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/forest-city-ratner-unnamedunindicted.html (Jan. 6, 2010, 13:19 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/mystery-of-ridge-hill-however-fcr.html (Mar. 11, 2010, 8:05 EST).

460. Letter from Bill Perkins, 30th District Senator, to David Patterson, Governor of N.Y. (Dec. 8, 2009), *available at* http://www.nysenate.gov/report/letter-governor-paterson-eminent-domain; Daniel Goldstein, *Governor Paterson's New London*, HUFFINGTON POST, Mar. 23, 2010, *available at* http://www.huffingtonpost.com/daniel-goldstein/governor-patersons-new-lo_b_374780.html; Kim Kirschenbaum, *Local Activists Protect Eminent Domain Appeal*, COLUMBIA SPECTATOR, Jan. 29, 2010, *available at* http://www.columbiaspectator.com/2010/01/29/local-activists-protest-eminent-domain-appeal.

461. *See* Goldstein, *supra* note 460.

462. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/team-hype-pomp-and-questionable.html (Mar. 12, 2010, 9:38 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/at-borough-hall-paterson-asserts-hes.html (Mar. 9, 2010, 8:31 EST).

463. Assem. 9012, 2009–2010 Leg., Reg. Sess. (N.Y. 2010), *available at* http://assembly.state.ny.us/leg/?bn=A09012; Brooklyn Speaks, Legislation Introduced to Reform Atlantic Yards' Governance (June 16, 2008), *available at* http://brooklynspeaks.net/node/10; *see, e.g.*, Assem. 5058, 2009–2010 Leg., Reg. Sess. (N.Y. 2010), *available at* http://assembly.state.ny.us/leg/?bn=A05058; Assem. 6804, 2009–2010 Leg., Reg. Sess. (N.Y. 2010), *available at* http://assembly.state.ny.us/leg/?bn=A06804.

464. *See* fig.16.

demnation controversy helped to pave the way for other groups opposed to the use of eminent domain in New York City.[465] The court of appeals decision and the subsequent ruling of the First Department in the *Kaur* case, which prevented ESDC from condemning property for Columbia University, also emphasized the need for legislative action, and some reforms are now on the table.[466] Although entrenched interests will fight the proposals, it seems more likely than it did following *Kelo v. New London* that reforms affecting blight and judicial procedures could be passed.[467]

The MTA development rights debacle, among other instances of public authority mismanagement, has already led to changes in the law. The Public Authorities Reform Act of 2009 made clear, if there was any lingering doubt, that public authority board members have fiduciary responsibilities. It also placed new limitations on the disposal of authority property. No longer will they be able to sell property for less than fair market value when the purpose of the sale is not within the authority's mission, as was alleged with the MTA's sale of the Vanderbilt Yard development rights to FCR.[468] Atlantic Yards may also influence future public authority reforms, which might include providing for taxpayer suits, requiring competitive bidding for more types of authority contracts, and enacting stricter conflict of interest rules.[469]

465. Two current controversial projects involving eminent domain are Columbia University's expansion into West Harlem and Mayor Bloomberg's modern day slum clearance plan for the infrastructure-lacking Willets Point area in Queens. *See generally* Eliot Brown, *Showdown at Willets Point*, N.Y. OBSERVER, Oct. 14, 2008, *available at* http://www.observer.com/2008/real-estate/showdown-willets-point; Matthew Schuerman, *Mr. Bollinger's Battle*, N.Y. OBSERVER Feb. 18, 2007, *available at* http://www.observer.com/node/36744. The Atlantic Yards example has been particularly effective in demonstrating that eminent domain opposition campaigns can be successfully organized and funded without the help of national property rights organizations. It also shows new models of organization in fighting developments; Develop Don't Destroy Brooklyn has placed significant emphasis on its web site, newsletters, and other electronic outreach. The opposition blog NoLandGrab.org, and coauthor Norman Oder's watchdog blog, AtlanticYardsReport.com, also post daily reaction to the project and associated issues.

466. *See* S.B. 6791, 2009–2010 Leg. (N.Y. 2010), *available at* http://open.nysenate.gov/legislation/bill/S6791. Coauthor Amy Lavine advised Senator Perkins on this legislation. *See* Terry Pristin, *Lessons on Limits of Eminent Domain at Columbia*, N.Y TIMES, Jan. 19, 2010, at B6, *available at* http://www.nytimes.com/2010/01/20/realestate/commercial/20eminent.html.

467. Pristin, *supra* note 466.

468. *See* Nicholas Confessore, *Paterson Signs Bill to Reign in State's Free Spending Public Authorities*, N.Y. TIMES, Dec. 11, 2010, at A14; Scott Fein, *The Public Authorities Reform Act of 2009*, 11 GOV'T L. & POL'Y J. No. 102 (2009), *available at* http://www.publicauthority.org/files/fein-PARA.pdf.

469. Support for increased public bidding has already been seen in other New York City projects. *See, e.g.*, Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2009/12/learning-from-willets-point-part-1-open.html (Dec. 12, 2009,

Other reforms could be targeted specifically at ESDC. The UDC Act was enacted in 1968, in the wake of Martin Luther King's assassination and ensuing riots, to build affordable housing and improve conditions in inner city areas that could not attract private investment.[470] Its vast powers were unprecedented, and it was viewed as an experiment, but within ten years it nearly went bankrupt and had to refocus its efforts away from affordable housing and toward more commercial projects. The state's institutional memory is short, however, and the legislature has failed to consider whether the authority should still have such broad powers as the ability to override local laws and to engage in projects with the imprimatur of a "legislative" entity. The UDC Act would benefit immensely from measures increasing transparency, providing more opportunities for public participation, and requiring better planning. It could also be modified to require the incorporation of smart growth, environmental justice, and sustainability principles into its procedures and project decisions.[471]

New York City's planning policies might also be modified in response to Atlantic Yards. The city, perhaps, will hesitate more before allowing ESDC projects to avoid ULURP. And Atlantic Yards certainly changed the perception of CBAs inside and outside New York; if nothing else, it demonstrated that government officials must be prudent before endorsing CBAs that might not be representative of the community.[472] As the project moves forward, it may also lead the city's planners to reevaluate policies regarding mega-developments, superblocks, and sustainable design.[473]

6:11 EST); Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/02/pinsky-hopes-for-ay-groundbreaking-in.html (Feb. 26, 2010, 7:34 EST) (Pinsky statement on RFPs).

470. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/scolding-from-norman-siegel-about.html (Jan. 18, 2010, 6:05 EST)

471. The blight reform legislation submitted by Senator Perkins also modifies the purposes section of the UDC Act to incorporate smart growth, environmental justice and sustainability policies. *See* S.B. 6791, *supra* note 466.

472. *See* Amy Lavine, Community Benefits Agreements, http://communitybenefits.blogspot.com/2010/02/did-you-say-slush-fund.html (Feb. 11, 2010, 6:07 EST) (discussing City Comptroller John Liu's campaign to better control CBAs in New York City); N.Y. City Bar, *The Role of Community Benefits Agreements In New York City's Land Use Process*, Mar. 8, 2010, http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf.

473. *See, e.g.*, Eliot Brown *Thompson on Mega-Development: Look to Battery Park-City*, N.Y. OBSERVER, Oct. 15, 2009, *available at* http://www.observer.com/2009/real-estate/mega-development-thompson-goes-retro-plays-battery-park-city-card; Noah Kazis, StreetsBlog, http://www.streetsblog.org/2010/02/22/the-next-new-york-how-nyc-can-grow-as-a-walkable-city/ (Feb. 22, 2010); Shiffman, *supra* note 35.

Atlantic Yards will leave its mark in journalism too. Most of the New York City newspapers have failed to ask serious questions about the Atlantic Yards project, including the New York Times, which—as coauthor Oder has argued—has a special obligation to be exacting in its coverage of the project given that its parent company partnered with FCR to build its new midtown headquarters, the Times Tower.[474] Some of the most incisive and detailed coverage and commentary has come from independent reporters, engaged citizens, and volunteer photographers, using online publishing formats.[475] Similarly, on the community-organizing front, DDDB created a viable framework for grassroots organizing, marketing, advocacy, and fundraising to support its legal challenges. DDDB's organizing was undoubtedly aided by the proximity of prosperous neighborhoods, and it had trouble attracting the support of diverse interest groups, especially minorities and residents in less well-off neighborhoods. It nevertheless creates the precedent for community organizations to wage development battles independently, rather than relying on support from national organizations that may have different policy agendas.[476] It should be noted that the grassroots support for Atlantic Yards came mostly from groups that received funding from the developer or expected jobs, like construction unions.[477]

474. *See, e.g.*, Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/search/label/New%20York%20Times (Mar. 15, 2010, 20:50 EST).

475. *See, e.g*., NoLandGrab, http://nolandgrab.org/ (last visited June 16, 2010); Atlantic Yards Report, http:atlanticyardsreport.blogspot.com (last visited Mar. 23, 2010); Noticing New York, http://noticingnewyork.blogspot.com (last visited Mar. 23, 2010); Footprint Gazette, http://thefootprintgazette.blogspot.com (last visited Mar. 23, 2010); Develop Don't Destroy Brooklyn, http://dddb.net (last visited Mar. 23, 2010); Atlantic Yards: [De]Construction of the Neighborhood, http://atlanticyardsphotobook.com (last visited Mar. 23, 2010). Also see Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2008/05/so-whos-77-on-observers-100-most.html (May 14, 2008, 6:10 EST).

476. *Kelo v. New London* and various state eminent domain lawsuits have been spearheaded by the Institute for Justice (IJ), a national libertarian public interest group. Although IJ filed an amicus brief in the state eminent domain case, it was not extensively involved in the litigation. Because of IJ's fairly extreme stance on some private property rights issues (for example, its support of statutes providing compensation for regulatory measures, see Jeff Rowes, *OREGON: Where Property Rights Are Gone*, INST. FOR JUST., Feb. 2006, *available at* http://www.instituteforjustice.org/index.php?option=com_content&task=view&id=1948&Itemid=245), the ability to mount an independent campaign, as DDDB did, may be seen as beneficial in some cases.

477. *See supra* Part I.C.6; *see also* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2007/04/ay-supporter-herbert-announces-for.html (Apr. 7, 2007, 6:08 EST) ("This is a variant of an observation the late columnist Murray Kempton made a long time ago, quoted in Robert Caro's biography of Robert Moses, *The Power Broker:* A construction worker would pave over his grandmother if the job paid $3.50 an hour.").

However the Atlantic Yards endgame ultimately plays out, its impacts will persist for years to come. Indeed, it likely will be a construction site for decades, with an arena, plus a parking lot, and a building or three or sixteen gradually materializing. If the project is completed, Atlantic Yards might turn out to be a boon for Brooklyn, or at least an operational arena and gargantuan housing complex somewhat akin to Stuyvesant Town and Peter Cooper Village;[478] on the other hand, its legacy—spurring reforms as delineated below—might be more akin to that of Penn Station, the demolition of which spurred the city's landmark preservation law.[479] If Atlantic Yards is not completed, it might become something like the *Poletown* of New York,[480] or the struggle to prevent the use of eminent domain for private gain might fade from the collective consciousness, as has happened with other failed urban renewal projects in New York.[481]

Atlantic Yards, whether completed or not, could also help to show that the iniquities of the urban renewal era have not been fully overcome.[482]

478. *See* Charles V. Bagli, *Megadeal: Inside a New York Real Estate Coup*, N.Y. TIMES, Dec. 31, 2006, at BU1, Stuyvesant Town and Peter Cooper Village was the end result of another urban renewal project involving eminent domain. It was the subject of *Murray v. La Guardia*, 52 N.E.2d 884, 887 (N.Y. 1943), which was one of the first cases in the United States to approve the use of eminent domain to transfer slum properties to a private redeveloper. *See also* Lavine, *supra* note 269 (describing the history of urban renewal).

479. *See, e.g.*, David W. Dunlap, *A Quest for Fragments of the Past; Calling Penn Station's Scattered Remains Back Home*, N.Y. TIMES, Aug. 16, 1998, *available at* http://www.nytimes.com/1998/08/16/nyregion/quest-for-fragments-past-calling-penn-station-s-scattered-remains-back-home.html; LORRAINE B. DIEHL, THE LATE, GREAT PENNSYLVANIA STATION (Basic Books 1996). While the Atlantic Yards site does not have the architectural splendor of the old Penn Station, the massive scale of Atlantic Yards will undoubtedly affect the many historic "Brownstone Brooklyn" neighborhoods that surround the site. *See* fig.4.

480. *See* Kanner *supra* note 226; Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/even-before-gerges-decision-footprint.html (Mar. 10, 2010, 2:29 EST) (quoting David Sheets, a footprint renter: "I think it's going to be very likely that this is similar to [the Michigan eminent domain case known as] *Poletown*. . . Give it 20 years: they'll look back at this and they'll say, none of this should've happened anyway. It was wrong then and it was wrong now."). It should be noted, however, that there are significant differences between Atlantic Yards and *Poletown*, not the least of which is that the Michigan case involved an extensive neighborhood covering more than 400 acres.

481. *Yonkers Cmty. Dev. Agency v. Morris*, 37 N.Y.2d 478 (1975) is one of the seminal modern New York eminent domain cases. Otis Elevator Co., after getting the city to condemn it an expansion site, picked up and left in 1982, just seven years after the case was decided. And so after defending Otis' right to demand condemnation on request, the city and the Yonkers Community Development Agency sued Otis, trying to hold the company to an implied promise that it would stay in Yonkers. City of Yonkers v. Otis Elevator Co., 844 F.2d 42 (2d Cir. 1988). *Yonkers v. Otis Elevator* was decided by a federal court in favor of Otis. No consideration was given to the question of whether the condemnation should have been permitted in the first place.

482. *See* Lavine, *supra* note 269.

Economic development condemnations may not be as extensive today as urban renewal takings were in the 1960s and 1970s, the process afforded to condemnees may be much improved, and the demographic breakdown of displaced residents may not be as obviously discriminatory in terms of race and class, but redevelopment projects like Atlantic Yards remain patently unjust. At its heart, it is a project that will rely on public funding despite the lack of a truly public process, that will let private interests capture the political process in the name of chimerical goals, and that will turn land over from the less powerful to political and business elites. In New York, at least, where the process is so skewed toward the condemnors, it is notable that a civil rights attorney like Norman Siegel, who ordinarily has little truck with conservatives, declares eminent domain reform "a civil rights issue for the twenty-first century."[483]

Legislators and other elected officials should take note of the contradictions posed by Atlantic Yards. After all, Governor Paterson and Justice Friedman recently passed the buck, with the governor claiming that he could not intervene after the court of appeals' decision and Friedman directing the petitioners to seek redress from the legislature, not the courts.[484] Aside from its echoes of urban renewal, Atlantic Yards raises myriad issues that should be addressed before other development projects have the opportunity to become, essentially, too big to fail. Among them:

- nonexistent standards for blight or procedures for determining its existence;
- the lack of a trial for condemnees, with discovery and the opportunity to question witnesses;
- judicial deference to unelected public authorities on quasi-judicial determinations;
- conflicts of interest in the redevelopment process and the failure of redevelopment agencies to honestly advocate for condemnees, neighborhood residents, and the public interest;
- inadequate redevelopment planning that ignores existing long-term comprehensive plans, established land use policies, zoning, and community-based plans;

483. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/01/scolding-from-norman-siegel-about.html (Jan. 18, 2010, 6:05 EST).

484. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/when-it-comes-to-atlantic-yards-elected.html (Mar. 11. 2010, 6:35 EST)

- inadequate requirements for full cost-benefit analyses of all proposed projects, to be undertaken by neutral government agencies;
- inadequate opportunities for meaningful public participation in the redevelopment planning process, especially in the earliest stages of redevelopment planning;
- reliance on unregulated CBAs to determine projects' public benefits or to substitute for inadequate public planning;
- inadequate mechanisms to measure the effectiveness of redevelopment policies and reevaluate programs that fail to meet their goals;
- the lack of full and understandable subsidy disclosure;
- the lack of objective redevelopment project goals, meaningful penalties for noncompliance, and clawbacks for abandonment;
- inadequate competitive bidding policies for redevelopment projects;
- redevelopment authorities' unchecked power to override local laws;
- the lack of a taxpayer standing statute applicable to public authorities;
- the lack of qualifications or training requirements for redevelopment agency board members and high level employees;
- inadequate disclosure of conduit financing arrangements, both in terms of disclosing such arrangements before they are finalized and the use of legal loopholes to avoid disclosure;
- condemnee harassment from developer-condemnors;
- inadequate procedural mechanisms to safeguard the legal rights of tenants, low income condemnees and non-English speaking condemnees;
- condemnation procedures that neither prevent condemnation blight nor require it to be taken into account in fixing valuations;
- the lack of redevelopment policies that minimize displacement and maximize rehabilitation and infill over clearance;
- inadequate legal mechanisms to require the reevaluation of changed redevelopment plans;
- the lack of inclusionary housing requirements for all residential redevelopment projects;

Whatever else happens in Brooklyn, if Atlantic Yards helps to engage New York State legislators to take a hard look and reform eminent domain and redevelopment laws, or if it persuades judges to apply even a slightly stronger rational basis test, it will have had a legacy beyond the bricks and mortar, and bitterness, that surely will endure. At the ceremonial groundbreaking for the arena on March 11, 2010, Governor

Paterson and Mayor Bloomberg spoke enthusiastically about the project and happily wielded shovels for the inevitable photo opportunity. Meanwhile, only a handful of legislators from New York's most populous borough attended, with none from the neighborhoods closest to the project. That likely was a response to a process, if not a project, that left disempowered local legislators uneasy.[485]

485. *See* Norman Oder, Atlantic Yards Report, http://atlanticyardsreport.blogspot.com/2010/03/team-hype-pomp-and-questionable.html (Mar. 12, 2010, 9:38 EST).