

# Eminent Domain and Stadium Construction: Why “Just” Compensation Is Insufficient

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## I. INTRODUCTION

In May 2015, the state of New York seized Jerry Campbell’s four-story brick

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home in Brooklyn, New York.<sup>1</sup> The home belonged to Mr. Campbell's family for sixty years starting with his grandfather.<sup>2</sup> After his grandfather's passing, Mr. Campbell came into possession of the home and he and his wife hoped to raise their son in it.<sup>3</sup> Instead, Campbell's decade-long battle with the state and Forest City Ratner (FCR), a private development company, culminated in the state taking the home and razing it to the ground.<sup>4</sup>

The state coveted Mr. Campbell's home for constructing the Atlantic Yard project, a private development plan that built the Barclays Center: an arena for the NBA's Brooklyn Nets and NHL's New York Islanders.<sup>5</sup> After negotiations over compensation between Mr. Campbell and the state stalled, the state responded by taking the home through eminent domain.<sup>6</sup>

Eminent domain allows federal, state, and local governments to take private property for public use as long as the government pays the landowner "just compensation."<sup>7</sup> Countless cities have employed eminent domain to build sports and entertainment venues;<sup>8</sup> including, but not limited to, Brooklyn (Barclays Center),<sup>9</sup> Sacramento (The Golden 1 Center),<sup>10</sup> Atlanta (SunTrust Park)<sup>11</sup>, Dallas (Globe Life Park)<sup>12</sup>, Los Angeles (Dodgers Stadium)<sup>13</sup>, and Washington D.C. (Nationals Park).<sup>14</sup>

This Comment maintains that using fair market value to meet the "just

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1. Michael O'Keefe, *No Place Like Home: Atlantic Yards Project has Jerry Campbell Fighting for his Place in Brooklyn*, N.Y. DAILY NEWS (Apr. 13, 2016), <http://www.nydailynews.com/sports/i-team/atlantic-yards-project-brooklyn-family-fighting-home-article-1.2598611> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. U.S. CONST. amend V; U.S. Const. amend XIV.

8. Ryan Lillis, *Sacramento Kings will Pay \$12 Million for Former Macy's Property under Court Settlement*, SACRAMENTO BEE (Feb. 10, 2015), <https://www.sacbee.com/news/local/news-columns-blogs/city-beat/article9711272.html> (on file with *The University of the Pacific Law Review*); Ilya Somin, *The Bush Family and Eminent Domain*, WASH. POST (Feb. 8, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/08/the-bush-family-and-eminent-domain/?utm\\_term=.7829afddedb5](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/08/the-bush-family-and-eminent-domain/?utm_term=.7829afddedb5) (on file with *The University of the Pacific Law Review*); Evann Gastaldo, *31 Georgia Residents to Have Homes Demolished for Ballpark*, NEWSER (Nov. 18, 2016), <http://www.newser.com/story/234230/31-georgia-residents-to-have-homes-demolished-for-ballpark.html> (on file with *The University of the Pacific Law Review*); David Nakamura, *D.C. Seizes 16 Owners' Property for Stadium*, WASH. POST (Oct. 26, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/10/25/AR2005102501354\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/10/25/AR2005102501354_pf.html) (on file with *The University of the Pacific Law Review*); O'Keefe, *supra* note 1; Elijah Chiland, *The Troubled Past of Dodge Stadium and Chavez Ravine*, L.A. CURBED (Apr. 3, 2016), <https://la.curbed.com/2016/4/3/11358092/dodger-stadium-history-chavez-ravine> (on file with *The University of the Pacific Law Review*).

9. O'Keefe, *supra* note 1.

10. Lillis, *supra* note 8.

11. Gastaldo, *supra* note 8.

12. Somin, *supra* note 8.

13. Chiland, *supra* note 8.

14. Nakamura, *supra* note 8.

compensation” requirement of the Fifth Amendment drastically undercompensates property owners.<sup>15</sup> Paying “just compensation” purports to make former property owners “whole” and the Supreme Court views fair market value as achieving this goal.<sup>16</sup> Fair market value is what a willing buyer would pay for the property at the time of the taking.<sup>17</sup> However, fair market value does not compensate for sentimental value of the home, gains generated by the new development, and other miscellaneous costs such as attorney’s fees, relocation costs, and home replacement costs if the price exceeds the fair market value.<sup>18</sup> Therefore, fair market value severely undercompensates property owners and ultimately fails to make property owners “whole.”<sup>19</sup>

Additionally, this Comment argues that, as a matter of public policy, fair market value is not enough to satisfy the “just compensation” element of the Fifth Amendment.<sup>20</sup> Finally, this Comment proposes that state and local governments employing eminent domain to build stadiums should adequately compensate property owners by paying the condemned property’s fair market value and a share of the stadium’s profits to the property owners.<sup>21</sup>

Part II of this Comment examines the seminal case of *Kelo v. City of New London*.<sup>22</sup> Part III discusses the economic impact stadiums effectuate on cities and provides examples of governments employing eminent domain for sports stadiums, unfettered by the potentially harmful economic consequences of stadium construction.<sup>23</sup> Part IV explores proposed solutions by scholars at rectifying fair market value’s inadequacies.<sup>24</sup> Part V presents this Comment’s proposal – that cities should pay compensation beyond fair market value to owners whose property has been taken through eminent domain to construct stadiums.<sup>25</sup> In particular, this Comment advocates that property owners receive a share of the stadium’s profits and their property’s fair market value.<sup>26</sup>

## II. KELO V. CITY OF NEW LONDON AND “JUST COMPENSATION”

Although much of the conversation surrounding eminent domain concerns the “public use” requirement, the “just compensation” component equally

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15. U.S. CONST. amend V.

16. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 81 (1913).

17. *564.54 Acres of Land*, 441 U.S. at 511.

18. JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* 690–91 (4th ed. 2017).

19. *Infra* Parts V–VI.

20. U.S. CONST. amend V.

21. *Infra* Part VI.

22. *Infra* Part II.

23. *Infra* Part III.

24. *Infra* Part V.

25. *Infra* Part VI.

26. *Infra* Part VI.

requires a closer look.<sup>27</sup> Section A introduces and discusses the case of *Kelo v. City of New London*.<sup>28</sup> Section B examines the “just compensation” requirement of eminent domain.<sup>29</sup> Section C examines the items not included in “just compensation.”<sup>30</sup>

#### A. *Kelo v. City of New London*

The decision in *Kelo v. City of New London* not only sparked national public outrage and protests, but greatly broadened the definition of “public use” and furthered a discussion on “just compensation.”<sup>31</sup> In 2000, the city of New London, Connecticut, an economically depressed city, approved a development plan the city projected would revitalize the city by creating more than 1,000 jobs, increase tax revenue, and construct new homes, restaurants, hotels, and other recreational opportunities.<sup>32</sup> Pfizer Inc., a pharmaceutical company, announced it would build a new research facility in the city, something that local planners hoped would jump-start the city’s revival.<sup>33</sup> The city received funds from the State but needed the land for the project.<sup>34</sup> The city’s development agency bought properties from willing sellers and used eminent domain to acquire the remaining properties from unwilling owners.<sup>35</sup> These unwilling owners sued the city and argued that taking their properties violated the “public use” requirement of the Fifth Amendment.<sup>36</sup> The owners maintained that their properties were not “blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.”<sup>37</sup>

The Supreme Court ruled in favor of the city.<sup>38</sup> Justice Stevens wrote that the redevelopment plan “unquestionably serves as a public purpose” and the taking satisfied the public use requirement.<sup>39</sup> Moreover, since economic development has been “a traditional and long accepted function of government,” taking private property to better an economically depressed area is permissible.<sup>40</sup> Justice Stevens further wrote that this decision does not prevent States from

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27. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (discussing “public use”).

28. *Infra*, Section II.C.

29. *Infra*, Section II.D.

30. *Infra*, Section II.E.

31. JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY A CONTEMPORARY APPROACH* 919–921 (3rd ed. 2015).

32. *Kelo v. City of New London*, 545 U.S. 469, 472–75 (2005); SPRANKLING, *supra* note 18, at 688.

33. *Kelo*, 545 U.S. at 473.

34. *Id.* at 472–73.

35. *Id.* at 472.

36. *Id.* at 475.

37. *Id.*

38. *Id.* at 490.

39. *Kelo*, 545 U.S. at 484; SPRANKLING, *supra* note 18, at 688.

40. *Kelo*, 545 U.S. at 484.

implementing restrictions on their own eminent domain laws.<sup>41</sup> Justice O'Connor disagreed and wrote in her dissent that the Court's decision "wash[es] out any distinction between private and public use of property – and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."<sup>42</sup>

Outrage over *Kelo* further intensified following Pfizer's decision to not to build the facility in New London.<sup>43</sup> As a result, *Kelo* prompted most states to pass legislation that imposed greater restraints on eminent domain.<sup>44</sup> Although the Supreme Court's opinion in *Kelo* focused primarily on the "public use" test, the transcript of the oral arguments in *Kelo* raised questions concerning the determination of "just compensation."<sup>45</sup>

### B. "Just Compensation" and the Fair Market Value Dilemma

The Fifth Amendment mandates the government to pay "just compensation" when it takes private property.<sup>46</sup> The Supreme Court defined "just compensation" as the fair market value of the property.<sup>47</sup> Fair market value is the amount a willing buyer would pay to a willing seller.<sup>48</sup> The purpose of "just compensation" is to make the property owner "whole" by putting them in as good a monetary position as before the government utilized eminent domain.<sup>49</sup>

The Supreme Court in *United States v. 564.54 Acres of Land* noted the limitations of paying just fair market value of the property.<sup>50</sup> As Justice Marshall wrote, "the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property . . . [t]hus, we have held that fair market value does not include the special value of property to the owner arising from its adaptability to his particular use."<sup>51</sup> Fair market value does not compensate for the sentimental value of the home, gains the new development generates, and other miscellaneous costs such as attorney's fees, relocation costs, and home replacement costs if the price exceeds the fair market

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41. *Id.* at 489.

42. *Id.* at 494.

43. SPRANKLING, *supra* note 18, at 688–89.

44. *Id.*

45. Transcript of Oral Argument at 48–51, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04–108) (on file with *The University of the Pacific Law Review*); *Infra* Part II, Section C; Part V.

46. U.S. CONST. amend. V.

47. *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53, 81 (1913) ("the owner must be compensated for what is taken from him; but that is done when he is paid its fair market value for all available uses and purposes.")

48. SPRANKLING, *supra* note 18, at 690.

49. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979); SPRANKLING, *supra* note 18, at 690; Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 252 (2007).

50. *564.54 Acres of Land*, 441 U.S. at 511.

51. *Id.*

value.<sup>52</sup>

In addition, the Supreme Court in *United States v. 50 Acres of Land* further acknowledged situations where fair market value is an inadequate payment to property owners.<sup>53</sup> Concurring in the majorities' opinion, Justice O'Connor wrote:

[W]hen a local governmental entity can prove that the market value of its property deviates significantly from the make-whole remedy intended by the Just Compensation Clause and that a substitute facility must be acquired to continue to provide an essential service, limiting compensation to fair market value in my view would be manifestly unjust.<sup>54</sup>

Even though the purpose of fair market value is to “put the owner of condemned property in as good a position pecuniarily as if his property had not been taken,”<sup>55</sup> fair market value does not always achieve this goal.<sup>56</sup> The oral arguments in *Kelo v. City of New London* highlighted the flaws of the fair market value standard.<sup>57</sup> During the oral arguments in *Kelo*, Justice Breyer posed a hypothetical to New London's counsel where a person, who bought a home for \$50,000 and has lived in it his entire life, is suddenly forced to evict but is given \$500,000 for the home.<sup>58</sup> That person has a \$450,000 profit but he must pay 30% of this profit in taxes and he must find somewhere to live.<sup>59</sup> Justice Breyer continued:

[W]ell, I mean, what's he supposed to do? He now has probably \$350,000 to pay for a house. He gets half a house because that's all he is going to do, all he is going to get for that money after he paid the taxes...is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't sell his house? Or is he inevitably worse off?<sup>60</sup>

New London's counsel admitted that although there were relocation loans available to those forced to leave, it did not make the former owners “whole.”<sup>61</sup> Although “just compensation” was not an issue in *Kelo v. City of New London*, the Supreme Court raised it anyways, fueling the debate of how much compensation is considered “just.”<sup>62</sup> *Kelo*, *United States v. 564.54 Acres of Land*, and *United States v. 50 Acres of Land* illustrate the Supreme Court's consensus that fair market value undercompensates property owners.<sup>63</sup>

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52. Wyman, *supra* note 49, at 254–55; SPRANKLING, *supra* note 18, at 691.

53. *United States v. 50 Acres of Land*, 469 U.S. 24, 37 (1984).

54. *Id.*

55. *564.54 Acres of Land*, 441 U.S. at 510 (internal quotation marks omitted).

56. *Infra* Part V.

57. Transcript of Oral Argument, *supra* note 45, at 48–51.

58. Transcript of Oral Argument, *supra* note 45, at 48.

59. Transcript of Oral Argument, *supra* note 45, at 48.

60. Transcript of Oral Argument, *supra* note 45, at 48.

61. Transcript of Oral Argument, *supra* note 45, at 49.

62. Transcript of Oral Argument, *supra* note 45, at 49.

63. *See* *United States v. 50 Acres of Land*, 469 U.S. 24, 37 (1984); *See also* *United States v. 564.54*

C. Items Not Subject to Compensation

Subjective premiums on property the government seizes through eminent domain do not use the fair market value standard for compensation.<sup>64</sup> “Subjective” premiums imply not only sentimental value but out-of-pocket costs of moving (relocation expenses), search of shops and services for new locations, and site improvements that assist the owner’s uses but do not increase the fair market value.<sup>65</sup> Moreover, the cost of replacing the condemned property is not compensated.<sup>66</sup> Likewise, renters are at risk of harm because leased property taken through eminent domain terminates the lease, “rendering the remaining portion of the tenant’s lease valueless.”<sup>67</sup> Further, property owners cannot share in the benefits the new economic development generates “because fair market value is calculated before those benefits accrue.”<sup>68</sup>

The government wipes out sentimental value, personal attachments to one’s home, place of business, or community in favor of fair market value.<sup>69</sup> Additionally, subjective premiums are personal and cannot be transferred.<sup>70</sup> Subjective premiums die with the person.<sup>71</sup>

To make matters worse, property owners are not compensated for surpluses or gains generated that a market transfer might generate.<sup>72</sup> Sometimes, the property has a higher value when it is transferred to a private party than the government.<sup>73</sup> However, if faced with eminent domain, the original property owner only receives fair market value for the property.<sup>74</sup> The government retains the surplus.<sup>75</sup> In addition, property owners are also not compensated for the autonomy to sell when they desire.<sup>76</sup> A property owner may wish to sell later for

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Acres of Land, 441 U.S. 506, 511 (1979);

Transcript of Oral Argument, *supra* note 45, at 48.

64. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 956957956, 963 (2004).).

65. *Id.*

66. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106 (2006).).

67. *Id.* at 107.

68. *Id.* at 110.

69. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (showing that Poletown’s residents lost community premium stemming from the neighborhood after Detroit seized one thousand residential properties to build a new General Motors facility); Abraham Bell and Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 886–87 (2007); Fennell, *supra* note 64, at 963.

70. Fennell, *supra* note 64, at 964.

71. *Id.*

72. Fennell, *supra* note 64, at 965; Garnett, *supra* note 66, at 107.

73. Fennell, *supra* note 64, at 966.

74. *Id.*

75. *Id.*

76. *Id.* at 967.

a higher or lower price, but loses this choice through eminent domain.<sup>77</sup>

Property owners may also suffer from “dignitary harms,” triggered by the loss of security.<sup>78</sup> Property owners may feel “unsettled and vulnerable when they learn that the government plans to take their property.”<sup>79</sup> In line with the loss of autonomy, property owners will feel they cannot exclude others from their property.<sup>80</sup> Unsurprisingly, the government does not compensate for “dignitary harms.”<sup>81</sup>

Furthermore, under-compensation issues often arise as a result of the government’s superior bargaining power in negotiations with property owners.<sup>82</sup> Government abuse of bargaining power often leads to various negative results, leaving property owners unfairly disadvantaged.<sup>83</sup>

Although the government does not compensate for subjective value and community premiums, scholars have suggested that a combination of subjective value, community premiums, and political influence may deter governments from taking private property and entirely avoiding under-compensation.<sup>84</sup>

### III. EMINENT DOMAIN AND STADIUM CONSTRUCTIONS

Governments have used eminent domain to construct stadiums since 1958 and it continues to be a popular option for governments to lure sports franchises, despite overwhelming evidence that stadiums are bad investments.<sup>85</sup> Initially, stadiums did not receive widespread government support.<sup>86</sup> Teams used private funds to subsidize historically well-known stadiums such as Yankee Stadium, Fenway Park, and Wrigley Field.<sup>87</sup> After World War II, professional sports became a big business and sparked the use of eminent domain to build stadiums.<sup>88</sup> Dodgers Stadium became “a watershed moment” for using eminent

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77. *Id.*

78. Garnett, *supra* note 66, at 109.

79. *Id.*

80. *Id.*

81. *Id.*

82. Bell & Parchomovsky, *supra* note 69, at 887.

83. *Id.* (noting “For years, the Minnesota Department of Transportation has taken private land for road projects and offered the owners substantially less than the land was worth”).

84. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (showing a religious leader leading the protests against eminent domain and having partial success; General Motors offered to spend millions to move the pastor’s church); Garnett, *supra* note 66, at 119.

85. See Chiland, *supra* note 8 (explaining the use of eminent domain to build the Los Angeles Dodgers stadium); Alex Garcia, *Sports Stadiums are Bad Public Investments. So Why are Cities Still Paying for Them?*, REASON, (Mar. 17, 2015), <https://reason.com/reasontv/2015/03/17/sports-stadiums-are-bad-public-investmen> (on file with *The University of the Pacific Law Review*).

86. Philip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?*, 35 ENVTL. L. 311, 314 (2005) (on file with *The University of the Pacific Law Review*).

87. *Id.*

88. *Id.*



domain to build stadiums.<sup>89</sup>

In 1958, the Brooklyn Dodgers moved to Los Angeles after Brooklyn refused to finance a stadium.<sup>90</sup> Los Angeles picked Chavez Ravine as the location to build a new stadium.<sup>91</sup> Chavez Ravine had a history as the home to a Mexican-American community made up of hundreds of families.<sup>92</sup> Years earlier in 1950, the city had originally picked Chavez Ravine for a new housing development project called Elysian Park Heights.<sup>93</sup> The city used its eminent domain power to buy out residents of Chavez Ravine, promising the citizens first choice to the new housing project.<sup>94</sup> The housing project never came into fruition, leaving the ravine mostly abandoned.<sup>95</sup> In 1957, only 20 families remained on the property and in 1958, city voters approved giving the land to the Dodgers.<sup>96</sup> Police forcibly evicted the remaining residents.<sup>97</sup>

Since the construction of Dodgers' Stadium, cities began searching for teams.<sup>98</sup> Two cases, *City of Oakland v. Oakland Raiders* and *Cascott LLC v. City of Arlington* illustrate how courts in different jurisdictions consistently approve government's use of eminent domain for sports franchises and stadiums.<sup>99</sup> Section A presents Oakland, California's pursuit in keeping the Raiders in Oakland and Section B discusses Arlington, Texas' attempt at securing land for the Cowboys stadium.<sup>100</sup> Section C illustrates how stadiums are not good investments.<sup>101</sup>

#### A. City of Oakland v. Oakland Raiders

Since 1966, the Raiders football team played at the Oakland-Alameda County Coliseum in Oakland, California.<sup>102</sup> Following three renewals of the three-year lease on the stadium, the Raiders decided to end the lease.<sup>103</sup> In 1980, the Raiders announced their intentions to move to Los Angeles.<sup>104</sup> The City of Oakland responded and commenced an eminent domain action against the

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89. *Id.*

90. *Id.*

91. Chiland, *supra* note 8.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Chiland, *supra* note 8.

97. *Id.*

98. Weinberg, *supra* note 86, at 315.

99. *Cascott, L.L.C. v. City of Arlington*, 278 S.W.3d 525 (Tex. App. 2009); *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60 (1982).

100. *Infra* Sections III.A–B.

101. *Infra* Section III.C.

102. *Raiders*, 32 Cal.3d at 63.

103. *Id.*

104. *Id.*

team.<sup>105</sup>

The California Supreme Court ruled in favor of the City of Oakland.<sup>106</sup> The Court approved the City's use of eminent domain referencing Candlestick Park in San Francisco, California and Anaheim Stadium in Anaheim, California.<sup>107</sup> As Justice Richardson wrote, "both [referring to Candlestick Park and Anaheim Stadium] owned and operated by municipalities, further suggest the acceptance of the general principles that providing access to recreation to its residents in the form of spectator sports is an appropriate function of city government."<sup>108</sup>

Justice Richardson also mentioned and agreed with courts in New Jersey, Pennsylvania, and Ohio that eminent domain is a viable option to erect stadiums.<sup>109</sup> Justice Richardson noted, "a sports stadium is for the recreation of the public and is hence for a public purpose; for public projects are not confined to providing only the bare bones of municipal life, such as police protection, streets, sewers, light, and water; they may provide gardens, parks, monuments, fountains, libraries, [and] museums ...."<sup>110</sup> Therefore, the California Supreme Court held that if a city proves a sports franchise to be a valid public use, the city may use eminent domain on property "necessary to accomplish that use."<sup>111</sup>

#### B. *Cascott LLC v. City of Arlington*

In 2004, the Dallas Cowboys negotiated a "Master Agreement" with the City of Arlington, Texas to build a new stadium complex in Arlington.<sup>112</sup> The "Master Agreement" included a lease that outlined the terms of the Cowboy's use of the stadium.<sup>113</sup> The City and the Cowboys identified the location for the project and the City Council passed a resolution allowing City representatives to purchase property within this location.<sup>114</sup> However, some property owners could not reach an agreement with the City.<sup>115</sup> Consequently, the City initiated condemnation proceedings against those property owners.<sup>116</sup>

The property owners argued that the stadium was not for a public purpose because the Cowboys' lease granted them "exclusive use and rights to manage and control the condemned property for ... at least thirty (30) years."<sup>117</sup> The court

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105. *Id.*

106. *Id.* at 72.

107. *Id.* at 71.

108. *Id.*

109. *Id.*

110. *Id.* (citing *Martin v. Philadelphia*, 420 Pa. 14, 215 (1966)).

111. *Id.* at 72.

112. *Cascott, L.L.C. v. City of Arlington*, 278 S.W.3d 525, 525 (Tex. App. 2009).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 529.

conceded that the Cowboys would “reap substantial benefits from the project, including the Lease,” but a private benefactor does not solely change the purpose of taking the property.<sup>118</sup> The court held in favor of the City because the Cowboys’ lease the public purpose of the stadium project.<sup>119</sup>

### *C. Impact of Stadiums on Local Economies*

The most prominent argument proponents use to validate building a new stadium for professional sports teams is that the stadium will boost the local economy.<sup>120</sup> Proponents often claim that stadiums will produce economic revenue and jobs for the city.<sup>121</sup> However, these “promises are rarely realized.”<sup>122</sup> Stadiums are bad public investments because most jobs stadiums create only produce “temporary, low-paying, or out-of-state contracting jobs—none of which contribute greatly to the local economy.”<sup>123</sup> In addition, stadium costs often exceed estimated amounts as maintenance costs, municipal services, and capital improvements cause the city’s total investment to skyrocket.<sup>124</sup>

Modern stadiums cost over \$1 billion to construct.<sup>125</sup> For example, Los Angeles Stadium, the new home of the Los Angeles Rams and Chargers football teams, will cost \$2.66 billion to build.<sup>126</sup> The Mercedes Benz Stadium in Atlanta, Georgia cost \$1.6 billion and the Las Vegas Raiders Stadium will cost an estimated \$2.4 billion to construct.<sup>127</sup> Out of the ten most expensive stadiums built, seven are for NFL franchises.<sup>128</sup> Football stadiums tend to provide the least economic benefit, as they are used so infrequently.<sup>129</sup> Football stadiums only host two preseason games, eight regular season games, and if they are fortunate, a few playoff games.<sup>130</sup> Thus, stadiums must be constructed for multi-purpose use to host other events like concerts, college football games, soccer games, and hockey

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118. *Id.*

119. *Id.*

120. Clifton B. Parker, *Sports Stadiums Do Not Generate Significant Local Economic Growth*, *Stanford Expert Says*, STAN. NEWS (July 30, 2015), <https://news.stanford.edu/2015/07/30/stadium-economics-noll-073015/> (on file with *The University of the Pacific Law Review*).

121. Garcia, *supra* note 85.

122. *Id.*

123. Aaron Gordon, *America has a Stadium Problem*, PACIFIC STANDARD (July 17, 2013), <https://psmag.com/economics/america-has-a-stadium-problem-62665> (on file with *The University of the Pacific Law Review*).

124. *Id.*

125. SeatGeek, *The 10 Most Expensive Stadiums in Sports*, SEATGEEK.COM (Aug. 7, 2017), <https://seatgeek.com/tba/sports/the-top-ten-most-expensive-sports-stadiums/> (on file with *The University of the Pacific Law Review*).

126. *Id.*

127. *Id.*

128. *Id.*

129. Parker, *supra* note 120.

130. *Id.*

games to generate economic benefit.<sup>131</sup>

Although stadiums receive private and public funding, the public bears most of the costs.<sup>132</sup> Taxpayer money primarily funds stadium construction. Moreover, the public provides the location and, most significantly, absorbs any debts from financing the stadium.<sup>133</sup> Oakland, California and St. Louis, Missouri are still making substantial annual payments on the debts incurred by the “now-obsolete stadiums that were built to lure the Oakland Raiders and St. Louis Rams away from Los Angeles in the 1990s.”<sup>134</sup> The Cities’ residents are still paying for a stadium that no team plays in.<sup>135</sup>

City governments continue using eminent domain to obtain land for stadium constructions, betting on economic prosperity.<sup>136</sup> The following are two contrasting effects stadium construction can have over Cities.<sup>137</sup> Part 1 discusses the Barclays Center and the negative effects a City typically encounters, whereas Part 2 examines a rare case in the Golden 1 Center which has tentatively produced economic growth.<sup>138</sup>

### 1. *The Barclays Center*

The Barclays Center is a key example of the problems stadium construction can have on a community.<sup>139</sup> Organizers promised affordable housing, but it has not yet materialized.<sup>140</sup> Current constructions of affordable housing face structural and engineering problems.<sup>141</sup> While the businesses surrounding the Barclays Center profited due to their existence prior to the arena’s construction—mainly because of the rising popularity of the area—the arena itself lost \$9

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131. *Id.*

132. Garrett Johnson, *The Economic Impact of New Stadiums and Arenas on Cities*, 10 U. DENV. SPORTS & ENT. L.J. 1, 22 (2011) (on file with *The University of the Pacific Law Review*).

133. Clifton B. Parker, *Sports Stadiums Do Not Generate Significant Local Economic Growth*, *Stanford Expert Says*, STAN. NEWS (July 30, 2015), <https://news.stanford.edu/2015/07/30/stadium-economics-noll-073015/> (on file with *The University of the Pacific Law Review*).

134. Clifton B. Parker, *Sports Stadiums Do Not Generate Significant Local Economic Growth*, *Stanford Expert Says*, STAN. NEWS (July 30, 2015), <https://news.stanford.edu/2015/07/30/stadium-economics-noll-073015/> (on file with *The University of the Pacific Law Review*).

135. Clifton B. Parker, *Sports Stadiums Do Not Generate Significant Local Economic Growth*, *Stanford Expert Says*, STAN. NEWS (July 30, 2015), <https://news.stanford.edu/2015/07/30/stadium-economics-noll-073015/> (on file with *The University of the Pacific Law Review*).

136. Gordon, *supra* note 123.

137. *Infra* Sections III.C.1–2.

138. Anthony L. Fisher, *Brooklyn’s Barclays Center is an Eminent Domain-Created Failure*, REASON (Jan. 12, 2016), <https://reason.com/blog/2016/01/12/barclays-center-eminant-domain-fail> (on file with *The University of the Pacific Law Review*); Keith Schneider, *Welcome to the Neighborhood: America’s Sports Stadiums Are Moving Downtown*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/business/sports-arena-development.html> (on file with *The University of the Pacific Law Review*).

139. Fisher, *supra* note 138.

140. *Id.*

141. *Id.*

million in its third year of operation.<sup>142</sup> Additionally, operating expenses of the Barclays Center remain high, but the arena's net operation income fell behind expectations.<sup>143</sup>

## 2. *The Golden 1 Center*

The Golden 1 Center in Sacramento, California produced the opposite effect of the Barclays Center.<sup>144</sup> The Golden 1 Center replaced a nearly empty shopping mall in downtown Sacramento.<sup>145</sup> The stadium's construction spurred a 38% increase in jobs in the downtown region, and twenty-seven stores opened in 2017, with twenty-three more scheduled to open in 2018.<sup>146</sup> Additionally, the vast amount of construction caused the city to "hire two dozen new employees to process applications and building permits."<sup>147</sup>

As the Golden 1 Center illustrates, employing eminent domain to build a sports stadium may have positive effects on the local economy.<sup>148</sup> However, in most cases, stadiums do not produce this anticipated economic growth.<sup>149</sup> Yet, local government officials continue to recklessly push for eminent domain to build stadiums.<sup>150</sup> One way to curtail government's use of eminent domain to build stadiums is the "just compensation" element.<sup>151</sup> To counter the rash decision-making of government, property owners who suffer from an eminent domain taking should receive higher compensation.<sup>152</sup>

## IV. PROPOSED REFORMS TO "JUST COMPENSATION"

Scholars generally agree that fair market value is "practically a euphemism, in the sense that it generally does not fairly compensate landowners."<sup>153</sup> As a result, many scholars proposed alternative measures to calculate "just compensation," eschewing fair market value.<sup>154</sup> One proposal involves

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142. *Id.*

143. *Id.*

144. Schneider, *supra* note 138.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Garcia, *supra* note 85.

150. See Dennis Lynch, *The Fate of the Forum in Inglewood has James Dolan Crying Foul in Court*, THE REAL DEAL (Mar. 6, 2018), <https://therealdeal.com/la/2018/03/06/fate-of-the-forum-in-inglewood-has-james-dolan-crying-foul/> (on file with *The University of the Pacific Law Review*) (revealing the Los Angeles Clipper's proposed plans for an stadium in Inglewood, CA require eminent domain to be built).

151. *Infra* Part V.

152. *Infra* Part V.

153. Amnon Lehari & Amir N. Licht, *Eminent Domain Inc.*, 107 COLUM. L. REV. 1704, 1718 (2007); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 56 (6th ed. 2003).

154. *Infra* Sections V.A, B, C.

incorporating the “publicly-expressed expected benefits of the project” into compensation by modifying “just compensation” to reflect the current value by including economic development of the condemned land to the amount of compensation.<sup>155</sup> Another proposal recommends awarding 150% of the fair market value to former property owners when there are “suspect” conditions in the eminent domain process, i.e., high subjective value.<sup>156</sup>

Section A discusses Professor Katrina Wyman’s objective approach to takings compensation.<sup>157</sup> Section B explores Professors Amnon Lehari and Amir Licht’s special-purpose development corporation approach.<sup>158</sup> Section C analyzes Professors Abraham Bell and Gideon Parchomovsky’s self-assessment proposition.<sup>159</sup>

#### *A. Objective Measure to Takings Compensation*

Professor Wyman’s approach to takings compensation employs an objective metric for determining “just compensation.”<sup>160</sup> Under an objective metric, people are made “whole” by receiving items that are broadly accepted by society as items that make people “whole.”<sup>161</sup> Professor Wyman acknowledged that applying an objective measure to takings compensation is difficult because “there are many different conceptions of what is important in life.”<sup>162</sup> However, an objective measure to takings compensation fits the Supreme Court’s desire to put “the owner of condemned property in as good a position pecuniarily as if his property had not been taken,” better than fair market value can.<sup>163</sup> Furthermore, an objective approach avoids the problems that a subjective measure encounters.<sup>164</sup> Professor Wyman’s proposal relies on two possible bases; an objective list theory of “well-being” and a capabilities theory.<sup>165</sup>

The objective list theory does not define “well-being” as fulfilling individual preferences but lists what goods are “worth having.”<sup>166</sup> Thus, an objective list

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155. Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 21 (2005)).

156. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 90 (1986)).

157. *Infra* Section V.A.

158. *Infra* Section V.B.

159. *Infra* Section V.C.

160. Wyman, *supra* note 49, at 274.

161. *Id.*

162. *Id.*

163. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510-511 (1979); Wyman, *supra* note 49, at 252–53.

164. Wyman, *supra* note 49, at 268–69 (Professor Wyman provides three objections to subjective measures to takings compensation; (1) some individual preferences are objectionable, i.e. racist, (2) preferences of some people may be more expensive to satisfy than others, and (3) preferences based on circumstances, such as societal inequalities, will pay poorer people less and wealthier people more).

165. *Id.* at 275.

166. Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1701 (2003) (noting that “autonomy and liberty, understanding, accomplishment, deep and meaningful social relationships and enjoyment” are goods that are deemed worth having).

theory of “well-being” may measure takings compensation as the amount necessary to enable former property owners “to enjoy the goods on the list of desirable things, at the same level that they enjoyed these goods before the taking.”<sup>167</sup> Under a capability theory, compensation for takings is measured by “the amount required to ensure that former property owners enjoy the same capabilities that we as a society deem valuable, before and after the taking.”<sup>168</sup>

Following the identification of what it means to make a person “whole” by applying either theories, Professor Wyman presents three ways of calculating compensation: (1) a single standard payment that all former property owners receive for the taking of their property, (2) compensation based on schedules (categorizations) created by legislation or regulation, or (3) case-by-case determinations (which is the preferred method).<sup>169</sup>

Professor Wyman acknowledges that her proposal encounters problems.<sup>170</sup> For example, implementing a case-by-case objective approach to measuring compensation will increase litigation, as a list of what is considered valuable to society will likely be too general and necessitate court intervention and interpretation.<sup>171</sup> In addition, her proposal rests on a lofty assumption that society can agree on a list enumerating what everyone believes is necessary.<sup>172</sup>

Although Professor Wyman’s objective approach may adequately compensate takings for traditional public uses, e.g., parks, freeways, etc., it does not necessarily work for takings related to private, for-profit business enterprises.<sup>173</sup> Professor Wyman’s proposal relies on either the objective list theory or the capabilities theory to produce a list detailing what items society deems should be compensable.<sup>174</sup> Using the land for traditional public purposes would result in generic items society would deem to be compensable for the taking, like housing and possibly sentimental value.<sup>175</sup> Since the land is being used for the public, it wouldn’t necessarily garner strong reactions, given that everyone in the public can use the land.<sup>176</sup> However, once society learns that the land will be used for a profit-making enterprise that isn’t necessarily open to the general public, what constitutes as valuable to society becomes difficult to pinpoint.<sup>177</sup> The side that opposes stadium construction may demand more

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167. Wyman, *supra* note 49, at 275.

168. *Id.*

169. *Id.* at 279–80.

170. *Id.* at 282–83.

171. *Id.*

172. *Id.* at 279–80.

173. *See id.* (explaining that a case-by-case basis will lead to an increase in litigation).

174. *Id.* at 275.

175. *Id.* at 275–76 (explaining objective list theory of “well-being” and capability theory).

176. *See Kelo v. City of New London*, 545 U.S. 469 (2005) (describing public outrage after Pfizer decided to not to build a facility in New London, CT and implementation of stricter state statutes concerning “public use”).

177. *See* Wyman, *supra* note 49, at 279–80. (showing the issues that arise out of her proposal).

compensation and more things to compensate, while the side that supports stadium construction will demand less compensation and less items to compensate.<sup>178</sup> Both sides—who are a part of the same society—must receive consideration, resulting in a standstill.<sup>179</sup> Ultimately, a general list cannot be formed under either theory.<sup>180</sup>

*B. The Special-Purpose Development Corporation (SPDC)*

Professors Lehari and Licht base their proposal on “a corporate finance perspective.”<sup>181</sup> They argue that the two phases of eminent domain-taking and “just compensation”—should be separated.<sup>182</sup> They characterize a taking as resembling an incorporation of a firm.<sup>183</sup> Compensation is viewed as “market driven” and be given through “a special-purpose corporation whose securities would be offered to condemnees (former property owners whose land was taken by the use of eminent domain).”<sup>184</sup> Ultimately, Lehari and Licht believed their approach limits opportunistic landowners and private developers from taking advantage of eminent domain.<sup>185</sup>

Lehari and Licht propose that a public authority, typically a municipal agency employing eminent domain, create a special-purpose development corporation (SPDC).<sup>186</sup> The SPDC may be established as a subsidiary of the municipality and be delegated powers by the municipality.<sup>187</sup> The municipality may exercise eminent domain to take private property and then grant certain rights to the land to the SPDC.<sup>188</sup> Property owners, who have had their lands condemned, are presented two compensation options: (1) “just compensation” based on pre-project fair market value; or (2) securities in the SPDC “in proportion to the landowner’s contribution.”<sup>189</sup> The SPDC would have “several—possibly numerous—shareholders.”<sup>190</sup> The SPDC would negotiate with the private developers who began the project or auction the land off.<sup>191</sup> After selling the land, the SPDC would distribute the net proceeds from the sale as dividends to the shareholders.<sup>192</sup> The SPDC dissolves when it finishes its duties.<sup>193</sup>

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178. *See id.* (explaining the lack of uniformity that her proposal may cause).

179. *Id.*

180. *Id.*

181. Lehari & Licht, *supra* note 153, at 1732.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1731–32.

186. *Id.* at 1734.

187. *Id.* at 1732.

188. *Id.* at 1734.

189. *Id.* at 1735.

190. *Id.*

191. *Id.*

192. *Id.*



Professors Lehavi and Licht's proposal doesn't necessarily change or stray from fair market value as the standard measure of "just compensation."<sup>194</sup> The SPDC's negotiations may fail and lead to property owners receiving only the fair market value for their property or nothing if the private developers no longer want the land in question.<sup>195</sup> Additionally, questions of impartiality of the SPDC remain because local governments provide the SPDC with power.<sup>196</sup> Governmental interest in developing a stadium may push the SPDC to negotiate quickly and in a manner favorable to the developers.<sup>197</sup> Furthermore, Lehavi and Licht's proposal does not compensate for potential post-project fair market value.<sup>198</sup> Land becomes more valuable if businesses are placed on it.<sup>199</sup> Former property owners should receive compensation when their land transforms into something profitable.<sup>200</sup> Thus, Lehavi and Licht's proposal would not necessarily be beneficial for altering compensation for property owners that lose their land to stadium construction.<sup>201</sup>

### *C. Self-Assessment Method and Economic Development Theory*

Professors Bell and Parchomovsky contend that fully compensating landowners requires knowledge of the value owners attach to their property.<sup>202</sup> However, relying on the landowner's testimony about the value they place on their property is generally not advised because landowners typically exaggerate their compensation awards.<sup>203</sup> Thus, fair market value typically disregards subjective value, although it is required to fully compensate landowners.<sup>204</sup> To solve this dilemma, Bell and Parchomovsky advocate a self-reporting system—similar to filing taxes—to attach a value to the landowner's property.<sup>205</sup> Bell and Parchomovsky admit the problem is over-reporting, rather than under-reporting.<sup>206</sup>

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193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See id.* (explaining that their proposal would allow municipalities discretion to empower the SPDC).

198. *Id.*

199. Sukriti Yaduwanshi, *What Increases the Market Value of your Property*, MSN (Apr. 26, 2016), <https://www.msn.com/en-in/news/real-estate/what-increases-the-market-value-of-your-property/ar-AAgzFHP#page=2> (on file with *The University of the Pacific Law Review*).

200. *Infra* Part V.

201. Lehavi & Licht, *supra* note 153, at 1735 (former property owners are only presented either payments of pre-project fair market value or securities).

202. Bell & Parchomovsky, *supra* note 69, at 891.

203. *Id.*

204. *Id.*

205. *Id.* at 892.

206. *Id.*

Bell and Parchomovsky's proposal appear in three phases.<sup>207</sup> The first is that the government will show its intent to condemn a certain lot or set of lots.<sup>208</sup> Once the government's declaration has been made, the landowners report the value she attaches to the property.<sup>209</sup> After the government receives the report, it can either seize the property or decide not to.<sup>210</sup> Following the government's decision, if the government declines to take the property, the government will impose two restrictions on them.<sup>211</sup> First, the landowner cannot transfer the property for less than the self-reported value, or a partial inalienability restraint.<sup>212</sup> Second, the landowner's property tax liability will be based on the self-reported valuation.<sup>213</sup>

The partial inability restraint remains in force for the life of the owner and can be overcome by paying a redemption fee to the government for transferring the property beyond the self-reported value.<sup>214</sup> If a landowner wants to transfer property less than the self-reported value, she can pay the government a fee "equal to the difference between the sale price and the self-reported value."<sup>215</sup> Concerning the tax restraint, the property tax assessor must keep track of the government-assessed value, and the self-reported value.<sup>216</sup> The government-assessed value will be used for regular property tax bill purposes and the self-reported value will only come into effect when the government decides to condemn the property.<sup>217</sup> Bell and Parchomovsky maintain that the tax landowners pay will be on the difference between self-reported value and market value, and further discounted by the ratio between government assessed value and market value.<sup>218</sup> Both of the inalienability and tax restraints must be adjusted yearly to reflect inflation and fluctuations in the real estate market.<sup>219</sup>

Bell and Parchomovsky's proposal is not without flaws, as objections to their proposal include abuses by the government and the landowners.<sup>220</sup> Governments might abuse the self-reporting system by declaring its use of eminent domain on a piece of property without actually intending to take the land.<sup>221</sup> The government's declaration will prompt property owners to report their value on

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207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 892–93.

215. *Id.* at 893.

216. *Id.*

217. *Id.*

218. *Id.* at 893–94.

219. *Id.* at 894.

220. *Id.* at 900.

221. *Id.* at 900–01.

the property.<sup>222</sup> Most property owners will attach a high valuation for their property and their property tax liability will reflect this self-reported valuation.<sup>223</sup> Consequently, the government enjoys benefits from increased tax revenue, as property owners' property taxes will be based on a higher self-reported land valuation than it did before the government's eminent domain proclamation.<sup>224</sup> This empty threat may affect elderly landowners greatly because they are more motivated to overstate their property's value as they have no realistic expectation of a sale while they are living.<sup>225</sup> However, Bell and Parchomovsky's proposal would guarantee elderly landowners full compensation at their subjective value if there were a taking, eliminating any motivation to hold out.<sup>226</sup>

Furthermore, changed circumstances may hamper their proposal by altering the subjective value landowners attach to their property.<sup>227</sup> Bell and Parchomovsky can only assume that landowners will anticipate changed circumstances when they self-report their property's value, but that appears to be unrealistic.<sup>228</sup>

#### V. PROPOSAL: SALES AND PROPERTY TAX APPROACH

Despite its inadequacies, fair market value remains the controlling standard for measuring "just compensation."<sup>229</sup> This Comment's proposal reinforces and fills in the deficiencies left by the fair market value standard by fully compensating property owners and leaving them "subjectively indifferent to whether [the taking] ... took place or not."<sup>230</sup> This Comment argues that when the government takes privately-owned land using eminent domain to construct stadiums, the government should pay the former land owners the fair market value of their property and a share to the profits generated by the stadium.<sup>231</sup>

This proposal generates two policy outcomes: first, that fair market value simply undercompensates property owners and second, changes to "just compensation" will "have the effect of requiring local officials to pay more for the land, which should restrict their willingness to make highly speculative uses of eminent domain."<sup>232</sup>

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222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 901–02.

226. *Id.* at 902.

227. *Id.*

228. *Id.* at 903.

229. *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53, 81 (1913).

230. *Wyman*, *supra* note 49, at 243–44.

231. *Supra* Part I.

232. Garnett, *supra* note 66, at 106; Gillette, *supra* note 155, at 21. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106 (2006) (on file with *The University of the Pacific Law Review*); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 21 (2005)).

This proposal begins with a process identical to other eminent domain proceedings; the property owners will be approached by local government officials and told that their land will be condemned (taken) to build a stadium.<sup>233</sup> The local government will condemn the property and pay the property owners the fair market value of the property.<sup>234</sup>

Subsequently, the government negotiates or informs stadium or sports team officials that they will be levying a sales and property tax on the stadium.<sup>235</sup> Local governments may implement a local property tax of 2.44%, based on New Jersey's property tax rates, and a sales tax of 7.25%, based on California's basic statewide sales and use tax.<sup>236</sup> The sales tax could be imposed on concession items and other goods sold at the stadium such as jerseys, memorabilia, hats, food, drinks, etc.<sup>237</sup> The local government can collect this tax and distribute it to the property owners for a number of years.<sup>238</sup> The number of years will equal the length of time the property owners lived in or possessed the property.<sup>239</sup> If the property owner passes away, the government's tax distribution will be given to the property owner's spouse or children for the remaining years the property owner was to be paid.<sup>240</sup> For example, if the property owner passed away after receiving tax distributions for 15 of the 30 years that he or she owned the property, his or her spouse or children will receive 15 years of tax

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233. *Supra* Part I.

234. *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53, 81 (1913).

235. California Department of Tax and Fee Administration, *Local and District Taxes*, CA.GOV (last visited Jan. 13, 2019), <http://www.cdtfa.ca.gov/taxes-and-fees/local-and-district-taxes.htm> (on file with *The University of the Pacific Law Review*).

236. See California Department of Tax and Fee Administration, *Local and District Taxes*, CA.GOV (last visited Jan. 13, 2019), <http://www.cdtfa.ca.gov/taxes-and-fees/local-and-district-taxes.htm> (on file with *The University of the Pacific Law Review*) (showing California's basic statewide sales and use tax comprising of 6% state tax, 1% local jurisdiction tax, and a .25% local transportation fund tax); John S. Kiernan, *2019 Property Taxes by State*, WALLETHUB (Feb. 26, 2019), <https://wallethub.com/edu/t/states-with-the-highest-and-lowest-property-taxes/11585/> (on file with *The University of the Pacific Law Review*).

237. See California Department of Tax and Fee Administration, *Sales and Use Tax Regulations*, CA.GOV (last visited Sept. 2, 2019), <https://www.cdtfa.ca.gov/lawguides/vol1/sutr/sales-and-use-tax-regulations-art8-all.html> (on file with *The University of the Pacific Law Review*) (Regulation 1603 provides an example of a tax on certain sales of food products, similar to one implemented in this proposal).

238. See Legislative Analyst's Office, *California's Tax System*, CA.GOV (last visited Sept. 2, 2019), <https://lao.ca.gov/reports/2018/3805/ca-tax-system-041218.pdf#page=3> (on file with *The University of the Pacific Law Review*) (p. 34 outlines the distribution of funds generated by sales and use taxes for the year 2016-2017); Judy Lin, *The Open Secret About California Taxes*, CALMATTERS (May 8, 2018), <https://calmatters.org/explainers/the-open-secret-about-california-taxes/> (on file with *The University of the Pacific Law Review*).

239. See SMARTASSET, *California Property Taxes*, SMARTASSET.COM (last visited Sept. 2, 2019), <https://smartasset.com/taxes/california-property-tax-calculator> (on file with *The University of the Pacific Law Review*) (this proposal parallels how the California property tax system rewards homeowners who've lived in their homes for many years). (

240. See CAL. PROB. CODE §§ 6400-14 (West 1991); see also NOLO, *Intestate Succession*, NOLO (last visited Apr. 14, 2014), <https://www.nolo.com/legal-encyclopedia/intestate-succession> (on file with *The University of the Pacific Law Review*) (this proposal includes elements of intestate succession laws where the court will distribute property to the closest relatives of the deceased family member).

distributions.<sup>241</sup> If the property owner possessed the property but never lived in it, i.e., land for business, the years he or she receives tax distributions will be determined by the years he or she owned the land.<sup>242</sup> If the land was in the property owner's family's possession for many generations, the years would be equivalent to the years the family owned the property up to two generations.<sup>243</sup>

This proposal provides former property owners an immediate payout for their land, and future payments to leave them "subjectively indifferent to whether [the taking] ... took place or not."<sup>244</sup> An issue with this proposal is that a property owner may receive distributions for an extended period of time, especially if the land was owned for many generations.<sup>245</sup> Furthermore, this proposal rests on the assumption that a statute has been passed, or a Supreme Court decision has been rendered, rejecting fair market value as the sole measure of "just compensation."<sup>246</sup> State and local governments would only negotiate with stadium officials if they were compelled by the possibility of lawsuits by property owners arguing for higher compensation.<sup>247</sup> Accordingly, a statute or case dismissing fair market value leaves state and local governments with a decision to make: lose out on the construction of a stadium or pay property owners more than the fair market value of the property.<sup>248</sup>

## VI. CONCLUSION

The oral arguments in *Kelo v. City of New London* indicate that "just compensation" remains an issue that needs to be explored.<sup>249</sup> Although fair market value remains the standard for defining "just compensation" it should be supplemented to avoid under-compensation of property owners.<sup>250</sup> Cities approve

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241. See CAL. PROB. CODE §§ 6400–14 (West 1991); see also NOLO, *Intestate Succession*, NOLO (last visited Apr. 14, 2014).), <https://www.nolo.com/legal-encyclopedia/intestate-succession> (on file with *The University of the Pacific Law Review*) (as note above, this proposal extracts elements of the laws of intestate succession where the court will distribute property to the closest relatives of the deceased family member).

242. See SMARTASSET, *California Property Taxes*, SMARTASSET.COM (last visited Sept. 2, 2019), <https://smartasset.com/taxes/california-property-tax-calculator> (on file with *The University of the Pacific Law Review*) (similar to property taxes, the longer a property owner holds the land, the more beneficial).

243. Fennell, *supra* note 65, at 964; Bell & Parchomovsky, *supra* note 69, at 886–87; O'Keefe, *supra* note 1 (Jerry Campbell's family owned the home since his late grandfather) (this proposal promotes the idea that the longer a family holds a piece of property, the larger the value to that family, justifying a higher compensation rate).

244. Wyman, *supra* note 49, at 243–44.

245. See CAL. PROB. CODE §§ 6400–14 (West 1991); NOLO, *Intestate Succession*, NOLO (last visited Apr. 14, 2014).), <https://www.nolo.com/legal-encyclopedia/intestate-succession> (on file with *The University of the Pacific Law Review*) (this proposal borrows from the laws of intestate succession where the court will distribute property to the closest relatives).

246. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

247. *Id.*

248. Gillette, *supra* note 155, at 21.

249. Transcript of Oral Argument, *supra* note 45, at 48–51.

250. Lehavi & Licht, *supra* note 153, at 1718.

stadium constructions for altruistic purposes and some stadiums have produced positive results.<sup>251</sup> However, most stadium constructions fall short of their intended goal of boosting the local economy.<sup>252</sup> Imposing higher compensation standards will not only avoid under-compensation to property owners, but could curtail sports teams and government officials from indiscriminately employing eminent domain.<sup>253</sup> The hope is that governments will proceed cautiously when considering using eminent domain.<sup>254</sup>

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251. Schneider, *supra* note 138.

252. Parker, *supra* note 120.

253. Gillette, *supra* note 155, at 21.

254. *Id.*