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Columbia University Expansion into West Harlem, New York City

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Harlem neighborhood, Manhattan, New York @Shutterstock

I. BACKGROUND¹

A. Columbia University's Expansion Proposal

In July 2003, Columbia University announced its thirty-year plan to build an eighteen-acre science and arts complex in West Harlem just north of its historic Morningside Heights campus and two miles south of its uptown medical center.² Columbia's plan would change the physical and socioeconomic layout of the target area. The plan involved massive growth of its existing campus, requiring significant re-zoning of the area targeted for construction. At the time of its announcement, Columbia already had purchased nearly half of the site and expected to acquire the other half through private sales, or from City and State agencies that owned large parcels in the proposed footprint.³ By the time that the plan was approved by the New York City Council in December 2007, Columbia controlled all but a very few properties on the proposed expansion site. Its evolving plan for the new campus had expanded to include a new business school, scientific research facilities (including laboratories), student and staff housing, and an underground gym and pool.

Columbia's announcement set in motion a complex, multi-level legal and political process which ultimately led to the project's approval and commencement. The construction process for Columbia's new campus continues today, as do the local tensions around its expansion into a historically low-income, ethnic minority neighborhood.

¹ Much of the background on Columbia's expansion are contained in Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 Cal. L.Rev.1999 (2007).

² See Charles V. Bagli, *Columbia Buys Sites and Assures Neighbors*, N.Y. Times, Apr. 21, 2004, at B8; Charles V. Bagli, *Columbia, in a Growth Spurt, Is Buying a Swath of Harlem*, N.Y. Times, July 30, 2003, at A1.

³ Bagli, *Columbia in a Growth Spurt*, supra

1. Motivations for Building a New Campus

Columbia's stated goals in embarking on this project were twofold: first, to allow it to "fulfill its role as a leading academic institution" by enabling it to expand and modernize its facilities and, second, to "facilitate the revitalization, improvement, and redevelopment" of a portion of the targeted section of West Harlem by allowing greater density and a wider variety of land uses, within the context of the surrounding neighborhood.⁴ The University wanted to create a campus environment conducive to multidisciplinary collaboration. But it also promised to leave parts of the new campus open to the public, and to promote businesses to move into the area.

The expansion of the University makes sense if one considers the competitive nature of American universities, particularly the most elite. Columbia is in constant competition with the other Ivy League schools such as Cornell, Yale and Harvard universities, as well as its downtown Manhattan rival New York University. These universities compete for students, faculty, staff, funding, media attention, rankings, and much more.⁵ The other Ivy League and top national schools have far more space than Columbia, and Harvard University and the University of Pennsylvania, the two other big city Ivies, had recently completed major expansions. To remain competitive, Columbia had to find a way to increase its campus footprint. Expanding north into more of West Harlem was the obvious and only real option for such growth near the University's existing facilities. Columbia and allied institutions already used the narrow strip of Harlem adjoining the Hudson River and Riverside Park on its west.

2. Details of the Expansion Plan

Designed to fit within the existing street grid on the blocks along Broadway west to 12th Avenue from the triangle where 125th Street crosses 129th Street north to 133rd Street—and on the east side of Broadway from 131st to 134th Street—the campus plan encompasses more than 17 acres with publicly accessible open space, tree-lined sidewalks and innovative buildings whose very transparency encourages shared knowledge and social engagement.⁶

The Final EIS project description described it as:

"[totalling] approximately 6.8 million gross square feet (gsf) above and below ground. Such development would consist primarily of community facility uses serving the University, with street-level retail and other active ground-floor uses. The remaining 18 acres within the Project Area would consist of 9 acres located primarily between Twelfth Avenue and

*Marginal Street and east of Broadway (which are estimated to result in another 329,500 gsf of commercial and residential development); and 9 acres between Marginal Street and the pierhead line, of which 2 acres comprise the area of the new West Harlem Waterfront park and 7 acres comprise City-owned land under water."*⁷

Columbia had accumulated the capital to fund this expansion without direct government financing and, as a nonprofit, it was exempt from paying real property taxes to the city government.⁸ It assembled a high-powered team to plan the new campus, including a world-class architect, Renzo Piano, who developed an open, modern glass design concept. Piano was paired with the top firm of Skidmore Owings and Merrill as architect of record, responsible for construction drawings and administration.⁹

The University also retained top law firms and had well-staffed in-house engineering and facilities departments and the funds to outsource any work that proved beyond the capacity of these departments. To manage relations with Harlem, City officials, and community groups, Columbia appointed as Executive Vice President for Government and Community Affairs Maxine Griffiths, an African American woman with deep roots in Harlem who had served on the City Planning Commission under the City's only Black mayor and who had more recently taught urban planning at the University of Pennsylvania.¹⁰

3. Barriers to the Proposed Plan

Any attempt to clear a major site in the densely residential neighborhoods of Central Harlem to the east or the Upper West Side to the south would involve huge political as well as financial costs. The University was very concerned to keep peace with nearby communities, especially Harlem. It would go to great lengths—short of not expanding—to avoid repeating the traumatic events of Spring 1968, when its plan to build a gymnasium on the hill separating Morningside Heights from Central Harlem sparked angry community protest and a widely publicized, week-long student occupation of main campus buildings.¹¹

The University was aware that its expansion would be seen as yet another force in the larger gentrification of the area, threatening the displacement of longtime residents and businesses. The expansion would certainly lead to the displacement of homes, successful businesses and at least one church.¹² As such, the school promised to take preventative measures, but in the end there was still a very high potential that the project would accelerate gentrification of the historically African American area.

⁴ N.Y. City Dep't of City Planning, Manhattanville in West Harlem Rezoning and Academic Mixed-Use Development Final Environmental Impact Statement Ch. 1 at 161, November 16, 2007 [hereinafter Final EIS], available at <https://www1.nyc.gov/site/planning/applicants/env-review/manhattanville-west-harlem.page>

⁵ By Columbia's calculations, Harvard, Yale, and Princeton each have more than double the square feet of space per student, according to planning documents. Foster and Glick, Integrative Lawyering, at 2008. Its rivals' science research labs and performing arts venues, and their housing, gym and other facilities, are ever more lavish and up-to-date. See Bagli, Columbia in a Growth Spurt, supra.

⁶ Columbia Manhattanville, <http://manhattanville.columbia.edu/campus>

⁷ FINAL EIS Chapter 1, at 1.

⁸ Except that in New York, charitable nonprofit corporations like Columbia University pay neither real property tax nor the "payments in lieu of taxes" required by many jurisdictions. See N.Y. Real Prop. Law §§ 420-a to 420-b.

⁹ See Danielle Wolfe, Planning Ahead for Columbia Expansion, Real Est. Wkly., Nov. 22, 2006, at 23 (describing those involved in the project).

¹⁰ See Foster and Glick, Integrative Lawyering, at 2009.

¹¹ See Daphne Eviatar, The Way We Live Now: 5-21-06: Dispute: The Manhattanville Project, N.Y. Times, May 21, 2006, § 6 (Mag.), at 632. See generally Jerry L. Avorn, Up Against the Ivy Wall: A History of the Columbia Crisis (Robert Friedman ed., 1968) (providing a detailed account of the 1968 uprising and the resulting violence based on the first-hand experiences of students, faculty, administrators, local government representatives and members of the Harlem community).

¹² See Relocation of Local Church Provides More Space to Grow, Columbia University, Manhattanville, News, April 7, 2010 available at: <http://manhattanville.columbia.edu/news/relocation-local-church-provides-more-space-grow>; New Home, Same Dinosaur: Popular West Harlem, Restaurant Moves to West 125th Street, Columbia University Facilities, News & Announcements, available at: <http://facilities.columbia.edu/new-home-same-dinosaur-popular-west-harlem-restaurant-moves-west-125th-street/> [The restaurant's relocation is part of the University's extensive effort to help organizations and businesses in Manhattanville find alternative or improved space within the local community.]; Florida Displaced by Columbia's Manhattanville Expansion Reopens, Hamilton Heights Sugar Hill, West Harlem, News, available at: <http://westharlemcpo.org/news/floridita-displaced-by-columbias-manhattanville-expansion-reopens/>

The area of West Harlem targeted for expansion was only beginning to recover from a steep economic decline. Once a thriving port and business district with small factories, such as Studebaker Auto, dairies and other light industry and shops, it had fallen victim in the mid-twentieth century to the country's first wave of de-industrialization, as capital moved first to the suburbs and Southern states and then offshore to the global South in pursuit of cheaper land and labor. At the time Columbia announced its expansion, the area was currently under-developed, consisting for the most part of auto body shops, self-storage warehouses, meat-cutters, gas stations, fast-food outlets, social-service offices, a bus-maintenance garage, various odds and ends, and a valued supermarket that would not have to be displaced.¹³

Taking all of this into account, Columbia's planners were able to outline a site which would offer adequate expansion while directly displacing at most one hundred forty households and a number of small businesses and service agencies.¹⁴

4. Public Reaction to the Plan

Public officials and the media hailed Columbia's vision of an ultra-modern world-class university research center rising in place of the area's aging warehouses and car shops as a major advance. Some local elected officials voiced cautious support, and some established social agencies accepted Columbia's plans along with its generous financial assistance.

In Harlem, however, and in the uptown Dominican community that surrounds Columbia's medical center and has spread south toward the expansion site, residents met the news with a mixed response. Some residents and community members urged all out mobilization to stop Columbia. Still others advocated collective bargaining with the University to gain a binding contract that guarantees substantial benefits for local residents in exchange for their support of (or at least acquiescence in) an expansion that—in the view of those activists—they could not stop but only marginally reshape.

B. Potential Impacts from the Proposed Expansion

The University's plans raised several environmental, physical, social, cultural and economic issues.

1. Environmental Impacts

For example, thirty years of construction would spew a huge volume of dust and particulate matter into neighborhoods whose residents already suffered extraordinary concentrations of asthma and other respiratory ailments.¹⁵ The gas stations, block-long diesel bus maintenance garage, car shops, and similar ground-polluting uses scattered throughout the expansion footprint would require thorough remediation (which might, in turn, exacerbate air pollution).¹⁶

The University also planned to build a major bio-research facility to experiment with "Level 3" substances, including contagious airborne viruses, such as SARS (as well as HIV/AIDS, which is not contagious and has killed thousands of Harlem residents), and many in the community distrusted its promise to eschew work with dreaded "Level 4" substances, such as Ebola and anthrax.¹⁷

2. Built Environment/Housing Impacts

The potential harms from Columbia's expansion extended far beyond traditional environmental and open space issues. Columbia is converting what was once affordable housing (among other things) into university space, and plans to draw in more students and professors with this expansion.¹⁸ This influx of people, along with the reutilization of space, means that there will be less affordable housing in the area, regardless of whatever mitigating measures Columbia has decided to implement.

The expansion would demolish five apartment buildings that initially housed some one hundred thirty-two to one hundred forty low income households. While two of those buildings had been emptied temporarily for renovation, the other three were fully occupied. One had completed publicly-funded renovation and now housed formerly homeless families who received supportive services on site. Two others had been designated for publicly-funded renovation and transfer to resident co-operative ownership through the City's Tenant Interim Lease (TIL) program.¹⁹

¹³ See Timothy Williams, *Land Dispute Pits Columbia vs. Residents in West Harlem*, N.Y. Times, Nov. 20, 2006, at B1 (noting that the area has been dominated by industrial uses since the Industrial Revolution).

¹⁴ One hundred forty apartments is the figure that was used by expansion opponents. Columbia, however, claimed that it would directly eliminate only one hundred thirty two residential units. See Final EIS. The small businesses were estimated to have about 1200 employees. See, e.g., Bob Roberts, *Open University, City Limits*, Dec. 2004.

¹⁵ See Final EIS, Ch. 22.

¹⁶ Final EIS Ch. 22.

¹⁷ Final EIS Ch. 22.

¹⁸ See Final FEIS Chapter 1.

¹⁹ Although in the course of the public process evaluating the proposal, there were clarifications of how much TIL tenants were impacted. In its final Environmental Impact statement, Columbia reported that although previous estimates were that 84 residents were participating in city's TIL program, that estimate was erroneous. In fact, 11 of the 38 city run units were not currently participating in the TIL program." Final EIS Ch. 4.

²⁰ Foster and Glick, *Integrative Lawyering*, supra, at 2013.

Though it promised to find the tenants “comparable” housing nearby, these tenants were excluded from the negotiations and skeptical of the outcome.²⁰

3. Social, Cultural and Economic Impacts

With much of Central Harlem already gentrifying, housing demand from Columbia students and staff, other middle-upper income people, and bio-tech businesses attracted by access to the University threatened substantial “secondary displacement” by driving nearby rents well beyond the means of the working poor Dominican and African American households living near the proposed expansion site.²¹

In 2008, the United States Census found that for the first time since the 1930’s, less than half of Harlem residents were black, and black residents only counted for 40% of the population.²² While this cannot be solely attributed to Columbia, it is clear that the racial makeup of the area is changing and to say that the University’s expansion has nothing to do with this change is to turn a blind eye to the impact it would, and is, having on Harlem.

Jobs and local small businesses were also at issue. A number of businesses and social agencies would be displaced. The University estimated that twelve hundred workers would be affected, but argued that many would remain employed at new locations and that the expansion would create far more jobs than it eliminated.²³ Community activists, however, questioned how many and what types of new jobs would really be available to local residents. Indeed, to date various local restaurants have also been forced to relocate.²⁴

II. THE LEGAL AND REGULATORY FRAMEWORK

At the local municipal level, the expansion plan moved through the city government’s environmental and land use review processes. The land review process ensures that the developer’s application for approval of the project is complete and technically accurate. The environmental review’s purpose is to disclose and analyze potential impacts that the development proposal may trigger. Combined, both processes ensure a thorough review of the impacts of project approval on the neighborhood, on various stakeholders, and on the overall urban environment.

Upon completion of these two reviews, the public review of the application begins. These processes provided opportunities for public hearings, written comments, and an opportunity to mitigate the impacts of the proposed expansion plan. As such,

various stakeholders as well as organized community interests directly impacted by the plan are provided an opportunity for education, advocacy, and bargaining.

At the same time that these local administrative processes were proceeding, Columbia initiated New York State’s process for exercising its power of eminent domain—the constitutional power that entitles state and local governments to “take” private property for a public purpose. Alongside these two formal legal procedures, the community and Columbia also prepared to negotiate a community benefit agreement (CBA). What happened on one level could affect dynamics on other levels.

A. The Land Use Review Process (ULURP)

To move forward with even the first phase of its planned expansion, Columbia needed the entire area to be re-zoned to allow increased density and “academic mixed use.” In New York City, re-zoning, like many other major municipal land use decisions, requires approval through the City Charter’s Urban Land Use Review Procedure (ULURP).²⁵ Key participants in the ULURP process are the Department of City Planning (DCP) and the City Planning Commission (CPC), the relevant Community Board (CB), the Borough President (BP), the Borough Board (BB), the City Council (Council) and the Mayor.

The ULURP process entails the following steps: the filing of an application, certification, community board review, borough president review, CPC review, City Council review, and finally mayoral review.²⁶ The procedure begins with an application to, and pre-certification by, the DCP. While this step has no specified time limit, applicants may appeal to CPC for certification after six months.²⁷ After this initial step the community board notifies the public, holds hearings, submits recommendations to CPC. This second step takes 60 days. The application then goes to the borough president and borough board, wherein both have 30 days to act on the application, and to hold a public hearing if desired. This brings the ULURP process up to 90 days. After review by the BP and BB, the CPC holds a public hearing, approves or disapproves applications, this step also takes 60 days.

In total, the ULURP process takes at least 150 days before CPC approval. At this stage city council also has the opportunity to review the application for 50 days. If the council does not act, the CPC decision is final. After City Council review, the application is then passed to the Mayor who has 5 days to act on Council approval. If this happens, The Mayor sends it back to the city council, which has 10 days to override the mayor’s action (e.g. veto) by a 2/3 vote.

²¹ See also Robin Pogrebin, A Man About Town, In Glass and Steel, N.Y. Times, Jan. 5, 2005, at E1; David Osborne, Welcome to Harlem, NYC; Ten Years Ago It Was the No-Hope Ghetto—Now Everybody Wants a Piece of It, The Indep. (London), Feb. 13, 2000, at 1

²² See Sam Roberts, No Longer The Majority Black, Harlem Is in Transition, N.Y. Times, Jan. 5, 2010

²³ See Final EIS Chpt 22.

²⁴ Relocation of Local Church Provides More Space to Grow, Columbia University, Manhattanville, News, April 7, 2010 available at: <http://manhattanville.columbia.edu/news/relocation-local-church-provides-more-space-grow>; New Home, Same Dinosaur: Popular West Harlem, Restaurant Moves to West 125th Street, Columbia University Facilities, News & Announcements, available at: <http://facilities.columbia.edu/new-home-same-dinosaur-popular-west-harlem-restaurant-moves-west-125th-street/> (“The restaurant’s relocation is part of the University’s extensive effort to help organizations and businesses in Manhattanville find alternative or improved space within the local community.”); Florida Displaced by Columbia’s Manhattanville Expansion Reopens, Hamilton Heights Sugar Hill, West Harlem, News, available at: <http://westharlemcpo.org/news/floridita-displaced-by-columbias-manhattanville-expansion-reopens/>

²⁵ See N.Y. City, N.Y., City Charter § 197-c.

²⁶ The ULURP process is outlined on the city’s website. NYC Planning, Applicant Portal, Application Process Overview, available at: <http://www1.nyc.gov/site/planning/applicants/applicant-portal/application-process.page>

²⁷ NYC ULURP Chart <https://www1.nyc.gov/assets/planning/download/pdf/applicants/applicant-portal/lur.pdf>

²⁸ See N.Y. City, N.Y., City Charter § 192-e; 62 R.C.N.Y. § 5-01 (describing the rules of procedure for City Environmental Quality Review (CEQR)); Cyane Gresham, Note, Improving Public Trust Protections of Municipal Parkland in New York, 13 Fordham Envtl. L.J. 259, 285-86 (2002) (explaining that where a ULURP application is necessary, it “will not go through without the necessary environmental review,” which, in the New York City, is CEQR).

B. The Environmental Impact Assessment Review Process

Before starting ULURP, a proposal of any significant potential environmental impact must first move well along in the City Environmental Quality Review (CEQR) process.²⁸ The CEQR process is a local implementation of the State of New York's environmental impact assessment process. The state process, contained in the NY State Environmental Quality Review Act (SEQRA), is designed to incorporate the consideration of environmental factors into the existing planning review and decision making processes of state, regional and local government agencies at the earliest possible time. Although, the statute is clear that "it is not the intention of SEQRA that environmental factors be the sole consideration in decision making."²⁹

At various points in the process, individuals and groups are allowed to submit written comments after public hearings on both the draft scope (scoping document) of the project's impact and the draft of the environmental impact statement (EIS) itself. The project sponsor, Columbia, then must respond in writing to each comment and these comments can influence local officials as well as increase disclosure of the impacts of the project.

1. The State and City Environmental Review Processes

There are three types of actions that start SEQRA/CEQR inquiry—type I, type II, and unlisted actions.³⁰ Type I activities are those that will have a significant impact on the environment and require completion of a long "environmental impact assessment form" (EAF) which is evaluated by the lead agency to determine if a full environmental impact assessment statement (EIS) is required. Type II activities are pre-determined to not have a significant impact on the environment.³¹ Environmental impact statements are required when it is determined the existence of adverse impacts which will be significant enough to warrant a heightened level of analysis, or closer look.³² If there is a finding of "no adverse" impacts or no "significant" adverse impacts, then there is no need to prepare an EIS.

Under SEQRA/CEQR, most discretionary land use actions considered by the City Planning Commission (CPC) are subject to the full environmental impact assessment process. That is, they require a full EIS and a process with public input and mitigation measures. In implementing the SEQRA/CEQR process, City agencies are thus required to "assess, disclose, and mitigate to the greatest extent practicable the significant environmental consequences of their decision to fund, directly undertake, or approve a project."³³

2. Opportunities for Public Participation

The environmental review process involves a number of steps, which allow for public review and comment, and are synchronized with the ULURP timetable. Combined, the ULURP and the SEQRA/CEQR processes offer several opportunities for community input and for legal intervention.

Public hearings, with opportunity to submit written comments, occur at various junctures. These start early on with a DCP hearing in the community on the developer's draft scope of its Environmental Impact Statement (EIS). Subsequent public hearings are held at several stages of ULURP, which starts when the City Planning Commission (CPC) certifies that the developer's draft EIS is ready for public release (in that it includes adequate disclosure of risks from the project and adequate plans to mitigate those risks). The community board then has 60 days to hold hearings and render an advisory opinion.

The process repeats, with shorter and longer time limits, at the Borough President's office, the CPC, and the City Council. The Council and Mayor (who holds no hearings) have ultimate authority to approve or reject the process. Though much of the testimony and comments focus on the overall project plan, the vote is on the specific proposal triggering ULURP—in this case, the University's application to re-zone West Harlem to accommodate its expansion plan—and both the CPC and the Council have authority to amend that proposal.

3. The Potential for (and Limits of) Community Leverage

Given the opportunities for public comment and input, it was possible for community groups and neighbors concerned about Columbia's expansion plans to obtain some leverage through this process to bargain with the city and the University to mitigate impacts. However, it is highly unlikely that these land use review processes can be utilized to stop the project all together for a number of reasons. First, the courts will not consider a legal challenge to the proposal until the entire process is completed, including the issuance of the final EIS (which occurs shortly before the final phase of the ULURP process). By that point, the project is a *fait accompli*.

Second, even when a legal challenge is brought, courts will not second-guess approval of a land use proposal, or the approval of a an EIS, so long as the reviewing government body (here the city) provides a "reasonable basis" for its conclusion. In other words, courts give considerable deference to the final judgment of the reviewing agency or official decision maker.

Finally, Columbia, as a nonprofit institution, was in a position to wait for the process to play itself out, and to withstand any delays that result from public opposition, without hemorrhaging money. The threat of delay was not so serious for Columbia,

²⁸ 6 NYCRR § 617.1 (c).

²⁹ 6 NYCRR § 617.4, 617.5, 617.6

³⁰ Unlisted activities either don't exceed the threshold for type I actions (significant impact), or are not classified as either Type I or Type II activities.

³¹ 6 NYCRR § 617.7(a). "To require an EIS for a proposed action the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact. . . . To determine that an EIS will not be required for an action , the lead agency must determine that either there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant."

³² NYC, CEQR Technical Manual, March 2014, at 67.

as it would be for a for-profit developer seeking to build in the City. In fact, because of its proposed expansion, it was likely able to attract more money from its alumni and other private donors invested in strengthening the reputation of the University through this expansion.

C. Eminent Domain

1. Condemning Private Property

As Columbia moved slowly through the municipal land use review process, it simultaneously contracted with New York State’s Empire State Development Corporation (ESDC) to trigger the agency’s powers to “take” private property, against the wishes of the landowners, in support of the University’s expansion. The Fifth Amendment to the U.S. Constitution gives states (and by extension, local governments) the power to expropriate private property so long as it furthers a “public use” and the state pays “just compensation” to the property owner (usually the fair market value of the property). This is referred to as the state’s eminent domain power. The power of eminent domain is not limited to the government; private entities can also use eminent domain if allowed by the law and if used for a project deemed to be for public use.

The University needed to invoke the legal process of “condemnation” in order to exercise the state’s eminent domain power to acquire any properties it could not purchase on the open market, because the owners refused to sell. This process, to obtain eminent domain authority, provided an additional opportunity for community participation and Community Board comment at the separate public hearings ESDC must hold before approving the “general project plan” for any development that it assists by invoking its eminent domain power.³⁴

Under a quirk of New York law, the University also needed to use eminent domain to acquire full title to the physical infrastructure/area under the prospective site for a major part of its new campus. Specifically, Columbia’s draft EIS discussed the potential use of eminent domain to acquire the land from holdouts and the land under the streets for the underground part of their campus.³⁵

2. The Scope of Public Use

Some months after Columbia contracted with the State agency, ESDC, the Supreme

Court of the United States ruled in *Kelo v. City of New London*³⁶ that the power of eminent domain can be used to seize private property for transfer to developers for purely economic development purposes. Previous Supreme Courts cases interpreting the Fifth Amendment’s taking clause had upheld the use of eminent domain mostly in cases where property was acquired for public infrastructure (such as roads or railroads) or when property was located in an area deemed “blighted” (such as urban slums). *Kelo*’s expansive interpretation of “public use” to include taking of private property for economic development projects proved highly controversial and ignited a firestorm of public opposition to the use (or abuse) of eminent domain by cities and localities.³⁷

Federal constitutional law is simply a floor of constitutional protection, above which individual states can go to protect fundamental rights—including private property rights. Thus, in the wake of *Kelo*, many states passed laws making clear that private property within their borders could not be taken strictly for economic development projects.

However, there was no post-*Kelo* groundswell of opposition in New York, and no major legislative effort to restrict eminent domain by outlawing economic development takings in the state. It would also be difficult to appeal to state lawmakers to change the law in New York State, as other states had done to limit the reach of *Kelo*. Recent efforts in other parts of the City to stop the State from using eminent domain on behalf of private developers had fallen flat.³⁸ Nor did New York state courts offer any better prospect of success under the State constitution.³⁹

As such, under *Kelo*, any chance of stopping Columbia’s use of eminent domain would likely fail in federal court.⁴⁰ Moreover, the University’s strong support among City and State political, economic and cultural elites made it highly unlikely those leaders would seriously consider blocking Columbia’s expansion by withholding the State’s power of eminent domain.

D. Bargaining with Developers

1. Extracting Public Benefits

Given that neither the City Planning Commission (CPC) nor the City Council seemed inclined to block Columbia’s rezoning proposal, a major community effort could persuade them to exercise their City Charter authority to “approve with modifications” the project.⁴¹ Under New York City’s interpretation of the U.S. Supreme Court’s

³⁴ See N.Y. Em. Dom. Proc. Law § 201 (describing the necessity of public hearings in the eminent domain process).

³⁵ Columbia can acquire the land under the streets from the city only if that land ceases to be used as a public space. See N.Y. City, N.Y., City Charter § 383 (“The rights of the city in and to its . . . streets, avenues, highways, . . . and all other public places are hereby declared to be inalienable; but upon the closing or discontinuance of any street, avenue, . . . or other public place, the property may be sold or otherwise disposed of as may be provided by law. . . . Nothing herein contained shall prevent the granting of franchises, permits, and licenses in respect to inalienable property.”); N.Y. Gen. City Law § 20(2) (“Subject to the constitution and general laws of this state, every city is empowered . . . to acquire real and personal property within the limits of the city, for any public or municipal purpose, and to sell and convey the same, but the rights of a city in and to its waterfront, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section.”) (emphasis added).

³⁶ 545 U.S. 469 (2005)

³⁷ See e.g. Marc Milhaly and Turner Smith, *Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 Ecology Law Quarterly 703 (2011)

³⁸ See Charles V. Bagli and Robin Shulman, *Transforming Bronx Terminal Market, But At a Steep Price*, N.Y. Times, Oct. 24, 2005, at B1 (describing opposition to the Bronx Terminal Market plan); Nicholas Confessore, *Another Step For Downtown Brooklyn Project*, N.Y. Times, Dec. 16, 2005, at B10 (describing opposition to Atlantic Yards plan).

³⁹ See Giovanna D’Orazio, Comment, *Taking Private Property to Build an Urban Sports Arena: A Valid Exercise of Eminent Domain Powers?*, 69 Alb. L. Rev. 1135, 1136-44 (2006) (describing New York state law allowing the taking of private property for public purposes or benefit rather than public use).

⁴⁰ For this project, Columbia invoked both the classic justification of “blight,” see *Berman v. Parker*, 348 U.S. 26 (1954), and an expansive version of the alternative justification accepted in *Kelo*. Columbia’s expansion offers not only economic development (within and near the site, and for the City as a whole), which satisfied the Court in *Kelo*, but also improvement of the City’s cultural, education, intellectual and scientific life. The University’s September 2006 draft submission to ESDC, obtained by the Columbia Spectator under the NYS Freedom of Information Law, makes both arguments: that the area is blighted and that Columbia’s planned use is a “civic project.” See *Manhattanville in West Harlem: Land Use Improvement and Civic Project General Project Plan*, Columbia University (Sept. 2006) (on file with authors); see also Erin Durkin & Anna Phillips, *Draft Plan Provides for Eminent Domain*, Colum. Daily Spectator, Jan. 31, 2007, at A1.

decision in *Nollan v. California Coastal Commission*,⁴² the City can impose only those requirements or modifications that can reasonably be viewed as addressing needs directly created by the project.⁴³ Project modifications beyond those with a “reasonable nexus” to the public impact of the proposed project and those “roughly proportional to the size of the project impact” would be unconstitutional under the Supreme Court’s opinion in *Nollan* and its companion case *Dolan v. City of Tigard*⁴⁴ (“the *Nollan/Dolan* standard”).

The *Nollan/Dolan* standard allows a great deal of leeway for the city to extract from project developers a number of concessions or conditions before project approval (again, so long as those conditions have a reasonable nexus to the project and are proportional to the project impacts). For example, the CPC or Council could reduce building height limits, prohibit certain types of bio-research, require enhanced public transit, and increase environmental and public health safeguards. Most significantly, the report that the City Law Department invokes to guide City action under *Nollan* expressly authorizes measures “needed to deal with ‘secondary displacement’” caused by a project.⁴⁵

2. Community Benefit Agreements

Another legal tool that all parties were aware of once Columbia introduced its expansion proposal was the use of Community Benefit Agreements (CBAs) in highly contested urban development projects in other American cities. Pioneered in Los Angeles at the start of this century, CBAs stand outside of the normal government process as private, legally binding contracts between community groups and developers.⁴⁶ It has become “standard practice” in cities around the country for developers of major projects to negotiate with neighborhood and other groups to negotiate these CBAs.

CBAs are contracts that “almost always contain wage and hiring goals and may also include a grab bag of concessions, like a day care center, a new park, free tickets to sports events and cash outlays to be administered by the groups themselves.”⁴⁷ City officials often play important background roles in the bargaining process, and the City is sometimes made an additional party to strengthen capacity to monitor and enforce compliance.

A CBA could pin down Columbia’s promises and commit it to specific measures to mitigate secondary displacement and other harms from its expansion. Beyond that, a CBA could require the University to provide substantial funds, resources and staff for better schools, health centers, and other urgently needed community services and facilities. These could be viewed as compensation (or even reparation) for the University’s annexation of an area that might otherwise have been developed

to the greater benefit of the surrounding communities, especially since the area’s prospects were beginning to pick up with the coming of the food market, two new restaurants and the waterfront park along with the economic development of nearby Central Harlem.

III. THE COMPETING INTERESTS AND STAKEHOLDERS

There were a number of local and state interests with an important, or potentially important, stake in the process and outcome of Columbia’s proposed expansion. Among the relevant stakeholders, the City administration, the City Council, and possibly a New York State agency would all have to cooperate in and approve Columbia’s expansion. Within West Harlem, the local community board, local elected officials, and an array of other community interests were mobilizing to intervene in the development process. This section briefly discusses each of these stakeholders in turn.

A. The Mayor and City Administration

Then Mayor Michael Bloomberg dealt with development largely through his powerful Deputy Mayor for Development, Daniel Doctoroff. Doctoroff oversaw the Department of City Planning (DCP) and other municipal agencies which deal with land use and development. He also helped the Mayor pick the majority of the City Planning Commission (CPC), including its chair.⁴⁸ Columbia’s expansion fit well with Bloomberg and Doctoroff’s articulated vision for the City.⁴⁹ Importantly, neither man, both of whom came from the private sector before entering city government, viewed manufacturing as an engine of economic growth. They were committed to increasing the City’s affordable housing supply, but mostly outside of Manhattan. They seemed comfortable with exiling the City’s working class and poor from Manhattan and reserving the island’s more costly land for corporate and financial offices, museums, universities, medical, bio-tech and related research facilities, cultural institutions, and high-end hotels restaurants and residences.

While Columbia could expect its plans to receive a generally warm reception from the City administration, their interests were not precisely aligned. The Mayor sought to ensure that the resentment of Columbia’s expansion would not rub off on him in Harlem or in the uptown Dominican community.⁵⁰ To that end, his administration would push for—and maybe help fashion and fund—a “community benefits agreement” (CBA) designed to secure social peace. DCP technocrats might also negotiate marginal improvements, and the CPC might impose some limited modifications, within parameters set by Bloomberg and Doctoroff.

⁴¹ N.Y. City, N.Y., City Charter §§ 197-c(h), 197-d(c)

⁴² 483 U.S. 825 (1987).

⁴³ The City Law Department relies upon *The Role of Amenities in the Land Use Process*, Special Comm. of the Ass’n of Bar of N.Y. City (1988), available at <http://www.abcnyc.org/pdf/report/RoleofAmenitiesintheLandUseProcess.pdf>

⁴⁴ 512 U.S. 374 (1994)

⁴⁵ *Id.* at 30.

⁴⁶ See, e.g., Julian Gross, with Greg LeRoy and Madeline Janis-Aparicio, *Good Jobs First, Community Benefits Agreements: Making Development Projects Accountable* 9 (2005), available at <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf>

⁴⁷ See Terry Pristin, *Square Feet: In Major Projects, Agreeing Not to Disagree*, N.Y. Times, June 14, 2006, at C6.

⁴⁸ The Mayor appoints the chair (who also directs the DCP) and six members. The five elected borough presidents each select one member, as does the elected city-wide “Public Advocate,” a kind of ombudsperson. See N.Y. City, N.Y., City Charter § 192(a).

⁴⁹ See Adam Brodsky, *Gotham Gets Grand*, N.Y. Post, May 16, 2004, at 29 (“And now—because Deputy Mayor Dan Doctoroff fantasizes about hosting the Olympics and Mayor Mike needs a legacy—[New York] is headed for hyper-change with a dazzling array of giant new projects. If even a fraction get built, it’ll be hard to recognize much of the city in 10 or 20 years.”); Jonathan Mahler, *The Bloomberg Vista*, N.Y. Times, Sept. 10, 2006, § 6, at 66 (“[T]o continue to grow, the city was going to have to undergo a period of hyperactive development.”); Sam Roberts, *Wave of Development, Cleared for Takeoff*, N.Y. Times, Jan. 1, 2007, at B3 (describing the mayor’s plans to initiate growth and development in a number of fora, including subway expansions, the Atlantic Yards complex, and low-income housing, as having a “pro-growth, long-range theme”) (quoting Robert D. Yaro, the president of the Regional Plan Association).

B. The City Council

In addition to the mayor's office, the Columbia expansion plan also implicated the City Council. If the City Council views a project as essentially local, it routinely accedes to the wishes of the neighborhood or area's Council member. In this case, the City Council member for West Harlem, Robert Jackson, had initially endorsed the expansion, but he pulled back in response to community opposition.⁵¹ If the Council, however, viewed Columbia's expansion to be of City-wide significance, its response would depend upon the stance of the Council speaker and the intensity of pressure from the Mayor's office.

The Council had recently approved, over the vehement opposition of a local Council member (and other local elected officials), a proposal, heavily promoted by Bloomberg and Doctoroff, to level residential neighborhoods to build a Football/Olympic stadium and large, upscale office and apartment buildings on the west side of mid-town Manhattan.⁵² With West Harlem's council member not even in opposition, there was no indication that the Council would resist Columbia's plan to displace mainly low-end small businesses in order to build world-class research, educational, and cultural facilities. Still, major public protest in Harlem and uptown or strong opposition from Black and Latino Council members might lead the Council to seek some trade-offs or impose some modifications.

C. The State Government

Columbia also would need cooperation (mainly to exercise the state's eminent domain power) from the New York State Empire State Development Corporation (ESDC), governed by a board that is controlled by New York State Governor (at the time Elliot Spitzer).⁵³ Then Governor Spitzer, the scion of a wealthy real estate family, was expected to be friendly to the expansion plan and to Columbia's interests more generally. At the same time, however, Spitzer had built his reputation on exposing and fighting corporate abuse and had campaigned as a strong proponent of affordable housing.⁵⁴

Moreover, his Lieutenant Governor, David Patterson, had long served as State Senator from West and Central Harlem, where he had been a vocal critic of gentrification. While not likely to block expansion altogether, the State administration under Spitzer and Patterson was expected to press Columbia to provide affordable housing and otherwise address the problem of secondary displacement.

ESDC action in support of Columbia's expansion might require approval from the State's Public Authorities Control Board (PACB), which includes a representative of the Governor, State Senate Majority Leader, and State Assembly Speaker and can act only with their unanimous agreement.⁵⁵ It was the Speaker's refusal to approve State funding that stopped the Football/Olympic stadium project after the City Council, Mayor, and ESDC had all approved it.⁵⁶ However, Since neither the considerations said to underlie that veto nor any others seemed to apply in Columbia's case, there was no reason to anticipate trouble from the PACB.

D. Other Elected Officials

In addition to Robert Jackson, eight other elected officials represented at the time some part of West Harlem. One of those, the recently elected Manhattan Borough President Scott Stringer, appoints Manhattan community boards and has an advisory role in the City's land use review process. Although Stringer is a liberal Democrat and had no vote in the land review process he seemed to lack the political clout to make a significant impact on Columbia's plan.

Foremost among the local elected officials is Upper Manhattan's representative in the U.S. Congress, Charles Rangel. As Harlem's acknowledged political leader and chair of the U.S. House Ways and Means Committee, which controls funding important to Columbia and the City and State governments, Rangel wields great influence. Consequently, no one wants to cross him.

Soon after Columbia disclosed its plans, Rangel told community activists that he and Jackson would spearhead a community bargaining process with Columbia. At the first meeting between Columbia and community representatives, Rangel insisted that he and other Harlem elected officials have a major role in any negotiation between Columbia and the community.⁵⁷ His and other officials' goals and plans, however, remained a mystery, though they did obtain seats on the Local Development Corporation (LDC) formed to negotiate a CBA and some provided the LDC with helpful staff support.

E. The Community Board

New York City established Community Boards as part of liberal efforts to address the upheavals of the 1960s through decentralization and opportunity for grassroots

⁵⁰ James Traub, Bloomberg's City, N.Y. Times, Oct. 2, 2005, § 6 (Magazine), at 21 (describing the mayor's effort to gain support in Harlem).

⁵¹ In subsequent public discussions of Columbia's expansion, he urged the University and community to "reach a consensus" so he would not have "to vote on this particular matter." Dalton Walker, Columbia Rules Out Evictions in Expansion Plan, N.Y. Times July 23, 2007 at B2.

⁵² See Charles V. Bagli, The Jets Miss a Deadline For a West Side Property, N.Y. Times, July 23, 2005, at B3 (discussing the proposed complex); Mike McIntire & Jim Rutenberg, After Stadium Bid Fails, a Disheartened Bloomberg Worries for City, N.Y. Times, June 8, 2005, at B6 (discussing the failure of the plan).

⁵³ The Empire State Development Corporation is the umbrella organization for the Urban Development Corporation, which is its biggest component and which handles mostly publicly oriented companies. The ESDC was created by the Urban Development Corporation Act, passed initially in 1968, and amended in 1975. This Act states that the nine directors of the corporation are to be the superintendent of banks (appointed by the Governor) the chairman of the New York State science and technology foundation, and seven directors to be appointed by the governor with the advice and consent of the state senate. The governor is to choose the chairman and two others, who serve at his pleasure, and the four remaining are to serve terms of four years each from their appointment (and these directors may be removed by the governor only for cause). The governor may also appoint a president of the corporation with the advice and consent of the state senate who shall serve at the pleasure of the governor, and he has the power to "appoint a business advisory council for urban development, to advise and make recommendations to the corporation with respect to development policies and programs and to encourage maximum participation in projects of the corporation by the private sector of the economy." McKinney Unconsolidated Laws § 6254 (2000).

⁵⁴ See Charles V. Bagli, Spitzer Signals Desire to Keep Starrett City Affordable to the Middle Class, N.Y. Times, Feb. 2, 2007, at B1 [hereinafter Bagli, Spitzer Signals Desire]; Christopher Grimes & David Wighton, The "People's Lawyer" Who Took on Big Business and Is Now Wooing the Voters, Fin. Times (London), Dec. 24, 2004, at 11 (discussing Spitzer's wranglings with big corporations and executives).

⁵⁵ Section 51 of the New York Public Authorities Law requires PACB "approval of the financing and construction of any project proposed by . . . [the] New York state urban development corporation [the Empire State Development Corporation]." N.Y. Pub. Auth. Law § 51 (McKinney 2004). Columbia had indicated that it interprets Section 51 as requiring PACB approval for ESDC cooperation even though it seeks no state assistance in financing or construction of its expansion.

⁵⁶ See Mike McIntire & Jim Rutenberg, After Stadium Bid Fails, A Disheartened Bloomberg Worries for City, N.Y. Times, June 8, 2005 at B6.

participation in municipal decision-making.⁵⁸ Appointed by each Borough President (from Manhattan, Brooklyn, Bronx, Queens, Staten Island) in consultation with local City Council members, and provided with modest City-funded staff and office space, the fifty-member boards serve as the official voices of their communities. They have a formal advisory and public hearing role in the City's land use regulatory process (described below) and the right to propose a local master plan with official advisory status if adopted by the City Planning Commission (CPC) and City Council.⁵⁹

The City is divided into fifty-nine (59) community districts, each with a population of roughly one hundred thousand. Manhattan Community District 9 (CB9), which encompasses Columbia's expansion site, is more or less equally divided among African Americans on the east and northeast, Dominicans to the north, and Whites to the south, yielding an ethnically fragmented district with a divided and relatively weak community board. The Black population in District 9, moreover, is split along class lines between low-income tenants in the public housing projects and well-off owners of high-end brownstones and river view condominiums.

Over the years, the better off and more politically connected Black professional and business people have predominated on the Board, along with white property owners and the white graduate students concentrated in the southern end of the district near Columbia's main campus. At the time that Columbia proposed its expansion plan, and through the approval process for the plan, the Manhattan Community Board included only two representatives of the growing, mainly working poor Dominican community that is the most vulnerable to gentrification.⁶⁰

Despite its varied demographic base, District 9's community board (CB9) had labored for years to put together its own unified master plan for the area. The West Harlem section of CB9's plan calls for mixed light manufacturing, commercial and affordable residential use plus waterfront development, improved schools and services, a CBA with any outside developer, and no eminent domain.⁶¹ Pursuant to these guidelines, Columbia could expand piecemeal on the land and buildings it already owned, but would be unable to construct an integrated new campus with anywhere near the capacity and facilities it claimed to need. CB9 was committed to fighting for its vision of neighborhood development.

F. Other Community Players

In addition to the formal community voice channeled through the community board, an array of community groups within and around CB9 actively responded to

Columbia's planned expansion. The main community group which represented the low-income, ethnic minority communities most impacted by the proposal was the West Harlem Environmental Action (WE ACT). WE ACT was thrust into the center of the development proposal given its long history of work in the community and its ability to influence local elected officials.

WE ACT had established its reputation by building community power to improve environmental protection, health policy, and quality of life in African American and Latino/a communities. Its main focus for many years had been the location of environmental hazards, especially the concentration in Northern Manhattan of asthma- and cancer-inducing diesel bus depots.⁶² It also led successful efforts to have New York State's Department of Conservation adopt an agency-wide environmental justice policy.⁶³ In the process, WE ACT had grown to a full-time paid staff of fourteen and developed a sophisticated "inside-outside" strategy involving work with elected officials, foundations, and Columbia University public health researchers as well as community residents and activists. Gaining national and even global prominence, WE ACT began to expand its vision of environmental justice to encompass sustainable and equitable development.⁶⁴

Economically well-off, White commercial property owners formed the "West Harlem Business Group" and retained a prominent liberal lawyer to stop Columbia from using eminent domain. Largely White, anti-gentrification activists who had long battled with the University over land use organized against this latest expansion through a new "Coalition to Preserve Community." The remaining TIL tenants fought to save their buildings or, at the very least, stay together nearby in other buildings that they could cooperatively own through the same City program. The uptown Hispanic, Dominican political leadership, including Manhattan Community Board 12, the site of Columbia's medical campus, offered to join forces to bargain with Columbia over its expansion plans in both areas, but CB9 leaders rebuffed these offers.

IV. THE COLUMBIA EXPANSION PROJECT PROCESS AND APPROVAL

The local community board, CB9, unsuccessfully sought to have the City Planning Commission (CPC) approve its own master plan for the community first and to disqualify any part of Columbia's plan that conflicted with the community board's plan. Instead the CPC agreed to certify the two plans simultaneously, so that the

⁵⁷ Foster and Glick, *Integrative Lawyering*, supra, at 2032.

⁵⁸ Community boards were established by the New York City Charter. See N.Y. City, N.Y., City Charter § 2800. Amy Widman, *Replacing Politics With Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & Pol'y 135, 144 (2002).

⁵⁹ See N.Y. City, N.Y., City Charter § 197-a. This is known as a "197-a Plan," named after the city charter section that authorizes a community board to propose such a plan for adoption by the City Planning Commission and City Council as an advisory guideline for future development of the area. Community boards or others who propose any such plan "shall submit the plan together with a written recommendation to the city planning commission for determinations" after a public hearing. *Id.* The City Planning Commission is then to determine whether it approves the plan and, if so, is to prepare the environmental analysis for the plan. See N.Y. City, N.Y., City Charter § 197(b). Whenever a plan is proposed that would affect a particular community board, the plan must be referred to those community boards, and then a public hearing is to be held. See *id.* § 197(c). The approval of the community boards, or lack thereof, does not actually regulate development—it is seen as a form of advisory opinion.

⁶⁰ Dominicans have moved south from uptown to occupy most of the area due north of the expansion site, including many units of the formerly state subsidized Riverside Park Community Houses. They live mostly in rental units, many in buildings too small to be protected under New York's rent regulation laws. See N.Y. Comp. Codes R. & Regs. tit. 9 § 2100.2(f). The other neighborhoods surrounding the expansion site are not at serious risk for secondary displacement. Due east and south east of the expansion site are federal low-income public housing projects which will remain. To the northeast and northwest are expensive homeowner brownstones and riverfront condos. To the south are housing and facilities largely owned by Columbia and other institutions; for example, Union Theological Seminary, the Riverside Church, and The Jewish Theological Seminary. See Columbia Final EIS, Ch. 10.

⁶¹ See Community Board 9 197-a Plan, Pratt Inst. Ctr. For Cmty. & Envtl. Dev. (June 17, 2005).

⁶² See Michael Specter, *Harlem Groups File Suit to Fight Sewage Odors*, N.Y. Times, June 22, 1992, at B3; WE ACT, WE ACT History, <http://www.WEACT.org/history.html>

⁶³ See Erin M. Crotty, *Comm'r, N.Y. Dep't of Envtl. Conservation, Commissioner Policy 29: Environmental Justice and Permitting*, (Mar. 19, 2003), <http://www.dec.ny.gov/regulations/36951.html>

⁶⁴ When the only remaining accessible section of Harlem's Hudson River waterfront was slated in the late 1990s for development into high-end condos and hotels, WE ACT initiated a "community visioning" process and political campaign that saved the area for community recreational and educational use. It continued to lead community efforts to monitor and facilitate public development of the waterfront park, including piers into the Hudson and closing of an adjacent street. See *West Harlem: Master Plan Toward a New Waterfront—125th St. to 137th St., Broadway to the River*, W. Harlem Plan Update (N.Y. City Econ. Dev. Corp.), Summer 2002, http://neighbors.columbia.edu/pages/manplanning/pdf-files/Harlem_Piers.pdf

community board's plan would be taken into consideration, though not necessarily followed, by CPC and the City Council in their deliberations over Columbia's rezoning proposal.⁶⁵

CPC certified both Columbia's and CB9's plans on June 18, 2007. West Harlem activists protested that the University and City were trying to slip Columbia's plan through during summer months when many people are on vacation and the community board does not regularly meet.⁶⁶ The Board quickly approved its own plan and scheduled a public hearing on Columbia's proposal for August 15, 2007.

Community advocates and their legal team explored several modes of intervention in this ULURP process, ranging from written comments and litigation to community education, organizing, testimony, lobbying, and other efforts to put pressure on decision makers.⁶⁷

A. Public Testimony and Comments

The main obstacle to CPC or City Council modification of Columbia's plan was not legal authority but political will. The CPC commissioners were political appointees, though some had years left on their terms and histories that suggested potential for sympathy with the community's needs. They and most City Council members harbored grander political ambitions leaving them loathe to step out of line. To have any chance of winning real gains in the ULURP processes, community residents would have to mobilize to wield political power. Towards that end, the main community group leading the effort was WE ACT, the environmental justice organization mentioned earlier.

WE ACT's organizing, program and legal teams launched an ambitious program of community education, organizing and action. They encouraged and helped residents to take maximum advantage of opportunities for public participation in ULURP hearings. They also proposed a "lobbying" campaign via postcards, faxes, emails, letters, personal visits, and—if need be—other potentially more media-attracting, creative and confrontational modes of dialogue. The goal was to deepen residents' understanding of the multi-level decision processes, to prepare them to intervene in ULURP through testimony, written comments, a postcard campaign, and other direct efforts to influence key decision makers, and to elicit their CBA suggestions and encourage their involvement in formulating the community's CBA platform.

The public hearing on the draft scope of Columbia's EIS in mid-November 2005 offered the first official forum for the community to express its views on Columbia's expansion plans. Subsequent ULURP hearings, including on the Draft EIS, offered other opportunities. WE ACT devoted major legal resources to these events. They and their legal team prepared bi-lingual community handouts on the ULURP and CEQR procedures, CBAs, examples of what other universities had done for adjacent

communities, and the main issues raised by Columbia's plan, including housing, jobs, and the environment.

WE ACT organizing staff set up pre-hearing workshops in the African-American and Dominican neighborhoods near the site to help residents understand the multi-level processes and prepare to testify at the hearing. More than eighty residents, plus local elected officials, WE ACT staff, other community activists and even some Columbia students offered testimony critical of the expansion plan. The hearings dragged on for hours, with Columbia and elected officials allowed to speak first, while residents who had waited patiently were allowed only three minutes apiece before being cut off curtly, and many had to leave before they had the opportunity to speak.

B. The Final Impact Assessment Statement and Mitigation Measures

In the end, WE ACT was able to shape the contents of both the Draft and Final EIS through its organized efforts to ensure public input at various points in the process. In this way the needs of the community were taken into account including the potential socioeconomic and physical impacts of the project, most of which were catalogued in the Draft EIS along with additional impacts on historic resources in the area. Importantly, the Final EIS specifically addressed the community concerns and comments made on the Draft EIS including two major issues that had not been raised in the draft: the environmental justice implications of the expansion and the lack of community outreach by the university. The Final EIS also was required to, and did, set out specific ways to mitigate the impacts identified in the EIS.

Perhaps the biggest concession made by Columbia was the promise to include measures to mitigate the social and physical impacts from gentrification, or displacement, of residents and businesses from the area. Although it is notable that between the Draft and Final EIS, many businesses within the project area had already moved.⁶⁸ Moreover, the Final EIS was able to settle issues regarding mitigation of impacts on traffic flow patterns in the area, on stormwater systems, transit and pedestrian conditions. It also found that there would be very few significant pollution impacts but identified changes in construction activity during the expansion development to mitigate negative air quality impacts⁶⁹ and potential cumulative environmental impacts given the density and proximity of the expansion site to other neighborhoods and populations.⁷⁰ The main environmental concern seemed to be particulate air pollution from construction, while the impact on climate change was deemed minimal despite the potential of greenhouse gas emissions over the 30 year expansion timeline.⁷¹

Regarding some of the more significant mitigation measures for the socioeconomic impacts identified, Columbia made the following concessions in the Final EIS:

⁶⁵ If CB9's plan were approved, the City Planning Commission and City Council would have only to "consider" that plan before approving the University's plan under ULURP. See N.Y. City, N.Y., City Charter § 197-a.

⁶⁶ Josh Hirschland, *Protestors Decry Timing of Environmental Impact Statement*, Colum. Daily Spectator, June 1, 2007.

⁶⁷ See Foster and Glick, *Integrative Lawyering*, at 2035-2053

⁶⁸ "Since the issuance of the DEIS, several Project Area businesses-- including U-Haul, Admiral Electric Corp., storage for Architectural Antiques, and Pathways to Housing-- have vacated the Project Area sites on which they operated. For purposes of the FEIS analysis, they are identified as existing businesses that would be directly displaced by the Proposed Actions." FEIS Ch. 4 pg 8 fn 1

⁶⁹ For example, The Final EIS indicates that an emission reduction program would be instituted for any construction on some project sites, implemented through E-designations. The program would include early electrification to ensure that large generators are not used on the sites, the use of particular controls for all diesel engines, and the use of Tier 2 certified engines or cleaner equipped with particular tailpipe controls. With these measures in place, the EIS found no significant adverse PM2.5 impact would occur as a result of construction on those sites. FEIS Ch 21 pg 6

- Since the issuance of the Draft EIS, Columbia acquired control of three sites outside of the project area to provide relocation for new, permanent, and affordable replacement housing for tenants currently living in buildings in the project area. The tenants would voluntarily relocate from project area units when their new replacement housing is constructed. By 2030, it is anticipated that all residents in the project area would be directly displaced from the project area and relocated to new housing within the study areas.⁷²
- Under a “socioeconomic reasonable worst-case development scenario,” the Draft EIS had identified the maximum unmet demand for Columbia students and faculty within the project area to be estimated at 839 units. Columbia proposed a \$20 million fund to develop or preserve affordable housing to mitigate this impact.
- In addition, in the Final EIS Columbia proposed three additional measures to reduce the potential demand for housing in the project area by its employees and graduate students. These include:
 - converting its current stock of housing for retired faculty to available housing for new faculty members
 - developing a graduate student residence outside of the project area to accommodate graduate students and post-doctoral researchers
 - launching a residential loan assistance program for faculty to encourage ownership by faculty outside of the project area.

Each of these additional programs would mitigate the impact of new faculty and students seeking to use existing housing stock in the area, reducing the potential displacement of existing residents.⁷³

- Efforts to mitigate the adverse impact on open space and existing historical/cultural resources included:
 - Creation of publicly accessible space and development of additional community facilities in the area
 - Relocation of the historic “Cotton Club,” the site or proposed new commercial and retail space, within the immediate area

C. The Eminent Domain Fight

In West Harlem, the few remaining holdout commercial property owners attempted to ride the wave of rising resentment against the Supreme Court’s recent Kelo decision authorizing the use of eminent domain for purely economic development purposes. Their West Harlem Business Group (WHBG), led and financed by two non-resident White owners of multiple commercial buildings in the expansion site,

mounted a major campaign to focus community struggle on opposing eminent domain in the context of the Columbia expansion project. Their lawyer, a prominent local civil liberties lawyer, framed the group’s position as a populist opposition to Columbia’s bullying, and the owners gathered support from the Coalition to Preserve Community and local tenants associations to insist that Columbia “take eminent domain off the table” as a pre-condition to any negotiations.

Nevertheless, the Empire State Development Co. (ESDC) in 2008 voted to use eminent domain to acquire the remaining parcels of land necessary for this project. While their argument that the project served the public was initially rejected by the lower court, the NY Court of Appeals eventually agreed to allow the ESDC to utilize eminent domain for the project. ESDC had argued that the area being taken over by Columbia was blighted—meaning that it was in substantial decline—and thus consistent both with the Supreme Court’s previous cases on eminent domain and with Kelo’s even broader interpretation of public use or purpose. These findings were challenged under New York’s economic development law and a plurality of the state’s lower court concluded that “ESDC’s determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent.”⁷⁴

The New York Court of Appeals reversed, however, finding that Columbia’s project is “at least as compelling in its civic dimension” as the private development in a similar case in Brooklyn, New York involving a new stadium. Unlike the Nets basketball franchise, Columbia University, though private, operates as a nonprofit educational corporation. Thus, the court held that concern that a private enterprise will be profiting through eminent domain is not present.⁷⁵ Furthermore, the Appellate court agreed with ESDC that the area was blighted, citing multiple studies.⁷⁶ Since there was a record to support that the Project site was blighted before Columbia began to acquire property in the area, the court deferred to ESDC’s finding and indicated that the issue was beyond further judicial review.

D. Community Benefits Agreement

Alongside the municipal and state processes, a third expansion decision process unfolded within the community and between it and the University. During the first phase of this third process, the community was determining what it wanted from the University in terms of funds, services, facilities, modification of expansion plans, and access to facilities on the new campus. In the second phase, the community would negotiate with the University to hammer out a binding contract by which it agreed to accept and possibly support expansion in exchange for specific benefits. Given that there is no real possibility of stopping the expansion, and only small hope of modifying it through the land use review and environmental impact assessment processes, the CBA negotiation process offered the community its main opportunity to protect and advance its interests.

⁷⁰ Some mitigation could not be identified, for instance, to reduce the “loss of sunlight on the playground” in the area.

⁷¹ Climate change did not, however, appear to be a significant area of public concern, nor activism or lobbying.

⁷² FEIS Ch4 pg 14

⁷³ FEIS Ch. 23, 4-5.

⁷⁴ Matter of Kaur v. N.Y. State Urban Dev. Corp., 15 N.Y.3d 235, 248 (2010)

⁷⁵ Matter of Kaur v. N.Y. State Urban Dev. Corp at 258.

⁷⁶ Citing a study which unequivocally concluded that there was “ample evidence of deterioration of the building stock in the study area” and that “[s]ubstandard and unsanitary conditions were detected in the study area.” Moreover, it found that, since 1961, the neighborhood has suffered from a long-standing lack of investment interest. Matter of Kaur v. N.Y. State Urban Dev. Corp at 257.

1. Negotiating the Agreement

Columbia was under intense pressure to enter into such a community benefits agreement. Deputy Mayor Doctoroff and other City leaders insisted it. Doctoroff moved behind the scenes to orchestrate bargaining between the University and the community. He allocated \$250,000 in City funds to support community participation in CBA negotiations, and he worked to prod and assist the parties to reach an agreement which enabled Columbia to expand without major community protest. When the community took longer than expected to build the trust and capacity required for effective bargaining with Columbia, the Deputy Mayor slowed down the municipal review process in the hope that a CBA could be negotiated before the expansion plan reached the City Council.

Columbia and Doctoroff quickly moved to undermine an effort to negotiate with the community more broadly through community based groups and other interests. They insisted instead on negotiating only through Community Board 9. CB9, however, obtained a persuasive legal opinion that it could not act effectively as a CBA coalition because, as an agency of the City, it did not have statutory authorization to negotiate with Columbia and lacked independent capacity to sue to enforce a contract.⁷⁷ It therefore formed a separate nonprofit tax exempt corporation, “D9 Local Development Corporation” (LDC), to negotiate and contract with the university.⁷⁸ Creating a nonprofit corporation in New York takes only a week or two. The political struggle over how to structure the new LDC, who would be represented and who would control, lasted more than a year.⁷⁹

In July 2007, with the ULURP land review process already underway, the LDC was only beginning to assemble a team of experts, complete community consultation, formulate a CBA platform and negotiate with Columbia. Late in 2006 the LDC and University exchanged letters that indicated interest in addressing the same basic issues: housing, education, health, jobs, environment, etc., though not in the same manner or scope. By that time the LDC had organized itself into eleven working groups ranging from housing, business and economic development, employment and jobs, education, historic preservation, transportation, environmental stewardship, research and laboratory activities, and green spaces.⁸⁰ The goal was to assess what the community most needs—within and beyond the expansion site—and what Columbia is in position to provide.

2. The Final Agreement

The CBA, finalized on May 18, 2009, is a 49 page document reflected the negotiated agreement between Columbia and the “West Harlem Local Development Corporation” (the LDC). The CBA promises a total of \$160 million to the community.⁸¹ The University committed to a package of community benefits and mitigations in connection with the expansion project in exchange for a promise by the community not to bring a lawsuit or litigation against it. The benefit package includes:

- a Benefits Fund of \$76 million
- an Affordable Housing Fund of \$20 million (to provide a range of flexible and affordable financing products to community-based and private developers)
- up to \$4 million for related legal assistance benefits (attorneys who would assist local tenants with anti-eviction/anti-harassment legal assistance)
- in-kind benefits of up to \$20 million in access to University facilities, services and amenities
- a \$30 million commitment to establish a Community Public School in conjunction with its Teachers College.

The CBA promises to provide West Harlem residents with “new local jobs and economic opportunities” for the “benefit of the local community.” It promises to use “good faith efforts” to utilize up to 50% of Minority, Women-Owned, and Local (MWL) businesses as part of its construction workforce. The University also promises to undertake efforts to expand other employment opportunities for local residents, including helping them to obtain apprenticeship positions and Union membership in the construction trade association, an important entry point into the construction industry.

In addition, the University agreed in the CBA not to ask the State’s ESDC to exercise its power of eminent domain to “acquire residential properties or churches” in the project areas. And the University accepts that the ESDC will monitor its activities relating to residential relocations from the project area (part of the mitigation efforts in the final EIS).

3. Assessing the Agreement and its Impact

At first glance the CBA is aimed to protect the socioeconomic interests of the residents and most neighborhood businesses and community groups believe that the university has upheld its end of the bargain.⁸² For instance, the University has created the Construction Trades Certificate Mentorship Program, a free program to train local small businesses in construction. According to one report, 42 percent of the total money Columbia spent on construction in the third quarter of 2014 was paid to MWL-owned companies, and 34 percent of the total funds the University spent from August 2008 to September 2014 was paid to MWL companies.⁸³ Additionally, 47 percent of the total workforce hours on the site in the third quarter of 2014 were worked by MWL-owned companies, according to the cited report.

However, many local residents believe that Columbia continues to underserve the neighborhood. Rents have already begun to skyrocket in the area and many local

⁷⁷ Memorandum from the Brennan Center for Justice to Members of the Rezoning Task Force of Community Board 9 (Nov. 12, 2004)

⁷⁸ A Local Development Corporation (LDC) is a special type of New York State nonprofit. N.Y. Not-For-Profit Corp. law § 1411

⁷⁹ CB9 eventually agreed on an LDC board of 13, later expanded to 17, and then to 26 to accommodate representatives of each elected official whose district includes any part of community district 9. Foster and Glick, *supra*, at 205, fn.9

⁸⁰ See Jimmy Vielkind, *How to Mediate Manhattanville: A New Negotiating Partner is Born*, City Limits WKLY., Dec. 4, 2006, at 1 (discussing the formation of working groups for CB9).

⁸¹ See generally West Harlem Community Benefits Agreement, May 2009. available at: <https://gca.columbia.edu/content/community-benefits-agreement-document>

businesses within the project area have stopped operating or vacated the area. These developments and the obvious rapid changes to the area based on the new campus' already imposing footprint in the neighborhood suggest that the CBA may not be as impactful as many had hoped—although it did force Columbia to consider certain factors that may have gone ignored and was successful in getting Columbia to promise significant financial contributions. Of the promised \$160 million investment, \$44 million has already been spent.⁸⁴

In the end analysis, it is clear that the Columbia expansion (which is still ongoing and will be for some time) has had a tremendous impact on the West Harlem community and northern Manhattan more generally. However, it is difficult to objectively measure the discrete impacts of this project given that it is only one of a number of large-scale development projects (Hudson Yards is another⁸⁵) reshaping the social and economic landscape in one of the world's most prominent global cities. One would have to carefully study and then disentangle the independent and interdependent relationships among these projects to isolate Columbia's discreet impacts on the West Harlem community. Such an undertaking is beyond the scope of this study.

What one can say, with certainty, is that Columbia's footprint is intensely palpable by the naked eye and profoundly felt at both the neighborhood and street level. Columbia has significantly contributed to changing face of West Harlem, much as it did decades ago in another part of Harlem where its main campus sits and is popularly referred to as "Morningside Heights." Perhaps the one objective measurement or indication of how much Columbia has contributed to this change is the scope of the CBA and its financial and other promises to mitigate its impact. Beyond that, it may be years and many academic studies before we can truly appreciate the full impact of this development project on the community and the city as a whole.

V. CONCLUSION

Columbia's proposed expansion has brought to the foreground a set of evolving dynamics of the urban political economy and the related legal and regulatory processes involving land use review and environmental impact assessments. As has long been true of American city politics, various local stakeholders compete and sometimes cooperate with city officials to influence urban development decisions in a sort of unbalanced pluralist dance. At least since the 1970s urban development in U.S. cities has become increasingly more decentralized—physically, economically, and politically—and specialized in its upward class transformation and economic conversion of cities. From roughly the 1930s to the 1970s, centralized, top-down management of redevelopment (government) funds characterized much of urban development in central cities. Fueled by the Works Progress Administration (WPA), highway program and so-called "urban renewal" policies, federal funds often flowed

directly through local planning and development agencies into local construction projects. The federal aorta of money that ran from Washington, D.C. into local redevelopment agencies financed local development, especially urban renewal, and enabled money to be spent in largely unaccountable ways.

Urban development politics and economics have become even more decentralized and diffuse since the 1970s in no small part due to what urbanist Paul Kantor has called "the exhaustion of urban renewal as a form of urban entrepreneurship." With the loss of federal funding and other public sources of redevelopment money, development in cities has now shifted away from large scale land clearing projects to more piecemeal redevelopment, which requires cities and municipalities to compete for "footloose" investors and industries, who now have enormous power to control and shape redevelopment policies in cities. As cities grow increasingly dependent upon private capital and resources and stymied by competition with other municipalities for those resources, their leverage over developers has seriously declined, as has their ability to control their social and economic destiny. Private investors acquire tremendous bargaining advantages or "rents," including new sports stadiums, operating and tax subsidies, shares in parking garages, and concessions, which diminish the regulatory power, and ultimately the resources, of local governments. In this new political economic environment, the city is now a weaker player in a larger system of political bargaining that drives urban development. Consequently, much of the onus of attending to communities' economic and social welfare has shifted to communities themselves.

The initiating driving force behind this plan was a non-governmental actor, Columbia University, which is not very different in its general role in the development process from any other private business or developer. Columbia brought its own substantial capital and an armada of experts, technicians, and public relations specialists. Though the University was not seeking public subsidies or loans, it would need regulatory approval and other important cooperation from city and state government. At all levels, however, government was in a secondary, reactive position: it could mandate disclosure, set time lines, and ultimately vote the project up or down, but it had only limited capacity to shape the project.

The impacted communities, their organizations, and their leaders were fragmented across lines of race, nationality, class, geography, personal and institutional interest, and political ideology. Different community interests and groups sought to form coalitions to consolidate their power in order to influence the ultimate deal between Columbia and the City, and between themselves and Columbia. Their combined resources and capacity were miniscule in comparison to those of the University. An array of elected officials and business and property owners also attempted to intervene in sporadic efforts to advance their own diverse interests. Even though more formal avenues exist for public participation in development decision, land use decisions primarily respond to individual development projects that often result from the local government striking a bargain with the individual property

⁸² The Ties that Bind: Checking in on the Community Benefits Agreement Six Years Later, available at: <http://features.columbiaspectator.com/eye/2015/03/25/ties-that-bind/> Another report from a consulting firm to the Columbia expansion project reported that about 51.8% (\$31 million) of the total construction spending to date was paid to minority, women, and local businesses (MWL), and a total of 174,454 workforce hours (67.2 percent) were performed by MWLs, excluding special construction services. West Harlem Development Corporation, Update on Progress of Community Benefit Agreement, available at: <http://www.westharlemdc.org/whdc/news/whdc-news/whdc-updates-community-on-progress-of-community-benefits-agreement/>

⁸³ The Ties that Bind, *supra*.

⁸⁴ <https://www.elegran.com/blog/2016/11/-columbia-university-west-harlem-expansion->

⁸⁵ <http://www.hudsonyardsnewyork.com/>

owner or developer. Public hearings, advisory committees, and devolution of land use planning discussion and analysis to smaller units of the urban polis have characterized this era of increased participation in local government.

Nevertheless, the limits of this formal participatory governance are starkly obvious, particularly to those least able to participate in local government decisions because they lack social and economic influence. Even though more formal avenues exist for public participation, land use decisions primarily respond to individual development projects that often result from the local government striking a bargain with the individual property owner or developer. Thus, while public modes of discourse surrounding overall urban land use and specific development projects have remained over time, a form of interest bargaining that reflects the larger political economy of urban development now supplements them. That is, development incentives have lined up such that affected communities now view themselves as potential players in, as opposed to passive recipients of, the “bargain” struck between developers and the city.

The emergence and increasing prominence of community benefit agreements is a potent reflection of the changed political dynamic of urban development. As enforceable agreements between community groups and developers, CBAs represent a fundamental break with the traditional posture of developers and local governments toward low-income communities affected by major projects. Within a

CBA framework, both developers and communities face incentives to participate and negotiate with one another: developers bargain directly with the community as a way to win its backing for the project or, at least, neutralize its opposition, and communities participate out of a desire to mitigate negative development impacts and maximize development benefits. There is an arguably redistributive aim to the community’s willingness to bargain directly with the developer. Projects that are in significant part subsidized by taxpayer funds are now going to finance affordable housing, jobs, environmental, and infrastructure amenities, and other “benefits,” thus returning some of that money to the public/community.

As such, the rise and utility of CBAs render the “game” of urban development highly textured and dependent not only upon the particular constellation of players in the place where development occurs but also upon the particular development project being contested. The costs and benefits of a project are often not fixed but depend upon the choices players make—choices that are shaped throughout the process of land use review (including the environmental impact assessment process), negotiation between the developer and the city, between the city and the interested public, among stakeholders and interests within that public, and between the developer and the interested public. How this game plays out is a crucial factor in determining the opportunities and challenges presented to its participants in different local contexts and along different facets of a development project.

