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KEEPING POSSESSION OF THE BALL: THE USE OF EMINENT DOMAIN TO PREVENT THE RELOCATION OF PROFESSIONAL SPORTS FRANCHISES

INTRODUCTION

During the last two decades the United States has experienced a dramatic proliferation of professional sports teams.¹ As a result, many major cities in the United States host one or more professional sports franchises.² Cities without professional sports teams frequently cajole franchise owners to either relocate their organizations or at least support the expansion of their league to include additional teams.³ When two professional sports franchises recently abandoned their host cities, however, the local governments attempted to prevent their departure.⁴

1. Currently twenty-one professional hockey franchises exist in the National Hockey League, twenty-three professional basketball franchises exist in the National Basketball Association, twenty-eight professional football franchises belong to the National Football League, fourteen professional baseball teams belong to the American League and twelve professional baseball teams exist in the National League. R. WHITTINGHAM, *SPORTS PLACES RATED*, 16-21 (1986). These figures do not include minor league professional teams affiliated with parent franchises.

2. The following cities, for example, host multiple professional sports franchises: Atlanta (football, basketball, baseball); Boston (football, basketball, hockey, baseball); Buffalo (football, hockey); Chicago (football, basketball, hockey, baseball) (2)); Cleveland (football, basketball, baseball); Dallas (football, basketball); Denver (football, basketball); Detroit (football, basketball, hockey, baseball); Houston (football, baseball); Kansas City (football, soccer, baseball); Los Angeles (football, basketball (2), hockey, baseball (2)); Minneapolis/St. Paul (football, hockey, baseball); New York (football (2), hockey (2), baseball (2), basketball (2)); Philadelphia (football, basketball, hockey baseball); Pittsburgh (football, hockey, baseball); St. Louis (football, hockey, baseball); San Diego (football, baseball); San Francisco (football, basketball, baseball). *Id.*

3. See O'Neil, *And If The Cardinals Leave, What Then?*, St. Louis Post-Dispatch, Jan. 18, 1987, at III, col. 1.

4. In 1980 the Oakland Raiders, a professional football franchise, relocated from Oakland, California, to Los Angeles, California. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 63, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982), *cert. denied*, 106 S. Ct. 3300 (1986). In 1984, the Baltimore Colts, a professional football franchise, relocated from Baltimore, Maryland, to Indianapolis, Indiana. *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278, 279 (D. Md. 1985).

The ensuing lawsuits⁵ raised unique issues concerning the use of eminent domain⁶ to prevent the relocation of business enterprises. This Recent Development examines the legal and related policy issues regarding condemnation of a professional sports franchise as a means of preventing its relocation.

Section I of this Recent Development discusses the legal basis for exercising the power of eminent domain to block sports franchise relocations. Section II reviews recent litigation involving local government attempts to prevent the relocation of two professional football teams. Section III identifies characteristics and frequently overlooked policy considerations that distinguish the exercise of eminent domain over a sports franchise from its application to other business entities. Finally, conclusions are drawn concerning the propriety of using condemnation to retain sports teams.

I. THE DOCTRINE OF EMINENT DOMAIN

No federal or state constitution provides explicit authority⁷ for a state to take private property.⁸ States, however, derive implicit authority to condemn private property from the fifth amendment to the United States Constitution.⁹ Governmental bodies thus remain within

5. *City of Oakland v. Oakland Raiders, Ltd.*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673, cert. denied, 106 S. Ct. 3300 (1986); *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278 (D. Md. 1985).

6. Future references to the terms "taking" or "condemnation" in this Recent Development imply the exercise of eminent domain. Both terms signify the power of a governmental entity to lawfully seize tangible or intangible private property for a "public use" upon payment of "just compensation," without the owner's consent. See 1 NICHOLS ON EMINENT DOMAIN § 1.11 (J. Sackman ed. rev. 3d ed. 1985) [hereinafter NICHOLS].

7. Neither the United States Constitution nor any state constitution contains an express grant of the eminent domain power. This explains why courts have spoken of an "inherent power" to take private property. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 560 (1972).

8. Historians speculate that before the evolution of modern eminent domain doctrine, the sovereign, whether an individual or a state, held the power to seize all property on the basis of ownership. See McClain, *Modern Concepts of Police Power and Eminent Domain*, in INSTITUTE ON EMINENT DOMAIN 183, 184 (1969); see also 1 NICHOLS, *supra* note 6, § 2.12 ("There is one limitation upon the power of eminent domain which depends upon no express constitutional provision. The powers of a sovereign state, however vast in their character and searching in their extent, are inherently limited to the subject within the jurisdiction of the state. . . .").

9. The fifth amendment states, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

their authority only if the taking satisfies the fifth amendment's broadly interpreted requisites of "public use" and "just compensation."¹⁰ Because of the highly varied use of eminent domain, courts reviewing governmental condemnation extend great deference to legislative determinations regarding these two concepts.¹¹

The "public use" requisite of eminent domain was originally interpreted to require actual public use of the condemned property. The modern "public benefit" standard¹² permits a governmental entity to take private property if the taking will result in some public benefit or advantage.¹³

The "just compensation" requirement under a proper exercise of eminent domain generates less controversy than the "public use" requirement,¹⁴ because just compensation is measured under relatively objective standards. Most governmental bodies and reviewing courts

10. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). In *Midkiff* the state used its power of eminent domain to carry out a legislative mandate to redistribute ownership of land held by a minority of residents. The court reviewed the plan and held that "[j]udicial deference is required because in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power" *Id.* at 244.

11. *Id.*

12. The modern doctrine actually existed prior to 1840. Beginning around 1840, however, courts began to adopt a narrow view of public use and required actual use by the public. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 626 (1940). By 1900 the courts began to revert to the broader view of public use, which requires only that a public benefit or advantage occur from the taking of property. Note, *City of Oakland v. Oakland Raiders: Defining the Parameters of Limitless Power*, 1983 UTAH L. REV. 397, 404-05. In a recent decision the United States Supreme Court specifically rejected the narrow view. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). The *Midkiff* court stated, "[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order to constitute a public use." *Id.* at 244.

13. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954) (private commercial establishment condemned and given to private developer pursuant to District of Columbia plan to encourage redevelopment of blighted areas in city); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (state condemned large plots of privately owned land and divided them into smaller units in order to dilute the concentration of ownership). Some state legislatures have enacted legislation that designates specific takings as satisfying the public use requirement. See generally Comment, *The Public Use Doctrine: Advance Requiem Revisited*, 1969 LAW & SOC. ORD. 688. In the absence of legislation, courts perform a balancing test and weigh the public benefit against the individual harm. See, e.g., *Nash v. Clark*, 198 U.S. 361 (1905).

14. The fifth amendment's just compensation requirement applies to state taking through the fourteenth amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

rely on the property's fair market value when determining just compensation.¹⁵

The unique characteristics inherent in professional sports franchises distinguish them from traditional business enterprises under eminent domain analysis, making the application of traditional eminent domain doctrine inappropriate.¹⁶ Consequently, governmental bodies encounter unusual policy issues when contemplating condemnation, and re-viewing courts lack significant precedential authority for guidance.¹⁷

15. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 509 (1979); *see also* 4 NICHOLS, *supra* note 6, § 12.2[1] ("fair market value [means] the amount of money which a purchaser willing but not obligated to buy the property would pay to an owner willing but not obliged to sell it . . ."); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § VII.E at 495-96 (2d ed. 1983).

16. The value of a professional sports team lies in the intangible property interest conveyed in the franchise agreement. Courts have held that the doctrine of eminent domain applies to intangible property interests. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-05 (1984) (trade secrets); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 44 (1909) (franchises); *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607-08, 619 P.2d 122, 125-26 (1980) (easements), *cert. denied*, 451 U.S. 912 (1983); *Meredith v. Washoe County School Dist.*, 84 Nev. 15, 435 P.2d 750, 752 (1968) (restrictive covenants); *see also* 1 NICHOLS, *supra* note 6 § 2.1[2] (like land or other tangible property, intangible property, such as chose in action, patent rights, franchises, charters, or any other form of contract, are subject to the sovereign's eminent domain powers); 26 AM. JUR. 2D *Eminent Domain* § 73(1966) ("Unless restricted by constitutional or statutory provisions, the right of eminent domain encompasses property of every kind and character, whether real or personal, or tangible or intangible . . .").

Like traditional commercial enterprises, a franchise represents a direct source of tax revenue. Unlike small traditional businesses, however, the franchise is capable of attracting large numbers of visitors and publicity to the host city. Additionally, a franchise provides entertainment for the entire community. A winning professional sports team serves as a catalyst of civic pride and captivates a city as few other commercial or political events. *See* S. 287, 99th Cong., 1st Sess. § 101(a)(1), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985); *see also* S.172, 99th Cong., 1st Sess. § 2(a)(1), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985).

17. When confronted with a challenge to the exercise of eminent domain over a professional sports franchise, courts choose one of two options. First, the court can follow the traditional approach and defer to the legislature's determination of public use. Recent United States Supreme Court decisions narrowed the scope in which a court may review such legislative determinations. *See, e.g., Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26, 32 (1954). Federal courts, in particular, exhibit a reluctance to become entangled in local land use matters. *Note, Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 411-12 (1983). Typically, courts defer to a legislative determination of public use if the taking appears "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241. If the court does not defer to the legislative determination, it may employ a stricter standard. Under the more strict standard, courts can prevent condemnation if the legislative determination of public use stands "palpably without reasonable foundation." *Id.* (quoting *United States v. Gettysburg Elec. R.R.*, 160 U.S. 668, 680

II. RECENT ATTEMPTS TO "TAKE" A PROFESSIONAL SPORTS FRANCHISE

A. *The Oakland Raiders*

Two municipal attempts to condemn professional football franchises under the power of eminent domain, and thereby prevent their relocation, resulted in litigation. The Oakland Raiders, Ltd., a limited partnership,¹⁸ owned and managed the Oakland Raiders professional football team. After the team played in Oakland for nearly two decades,¹⁹ the general partnership decided to relocate in Los Angeles.²⁰ The City of Oakland sought to prevent the relocation through the condemnation of property interests in the franchise.²¹

The Monterey County Superior Court granted summary judgment for the Oakland Raiders and dismissed the city's action with prejudice.²² The court's unpublished opinion states that the city's action lacked the requisite public use.²³ On appeal, the summary judgment

(1896)). Courts may also prevent condemnation if the legislative determination of public use represents an impossibility. *Id.* (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

18. Allan Davis and Edward W. McGah served as the general partners of the Oakland Raiders professional football franchise. *City of Oakland v. Oakland Raiders, Ltd.*, 32 Cal. 3d 60, 63, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1986).

19. In 1966 the Oakland Raiders, Ltd., executed an agreement with the National Football League to operate a professional football franchise in Oakland, California. *City of Oakland v. Oakland Raiders, Ltd.*, 123 Cal. App. 3d 422, 425-26, 176 Cal. Rptr. 646, 647 (1981). Oakland Raiders, Ltd., then entered into a license agreement with the Oakland-Alameda County Coliseum, Inc., a nonprofit California corporation, for one five-year term and five three-year renewal options. The Oakland Raiders played in the Oakland-Alameda County Coliseum during the initial five-year term and renewed their lease for the optional three-year terms in 1970, 1973, and 1976. The partnership failed to reach an agreement, however, concerning the three-year term commencing with the 1980 season. *Id.*

20. The decision of the Los Angeles Rams professional football team to vacate the Los Angeles Coliseum made the relocation of the Oakland Raiders franchise possible. *California Supreme Court Survey*, 10 PEPPERDINE L. REV. 167, 238 n.16 (1982-83). A relocation to southern California offered the Oakland Raiders an opportunity for increased revenues from television contracts for the broadcast of home games. 307 *Sports News*, Variety, July 14, 1982, at 42. The Los Angeles Coliseum offered the Oakland Raiders inducements potentially worth \$25 million. The inducements included the expansion of stadium luxury suites, which represented a significant source of revenue. Kohn, *Luring a Franchise, The Big Score*, St. Louis Post-Dispatch, Jan. 18, 1987, at 3, col. 1.

21. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

22. *Id.*

23. The court stated that "no 'public use' essential to an eminent domain action

was affirmed.²⁴ The California Supreme Court, sitting en banc, reversed the summary judgment and remanded the case to the superior court,²⁵ instructing the court to fully adjudicate the public use issue.²⁶ On remand, the superior court again found for the Oakland Raiders.²⁷ The California Court of Appeal reversed the decision and remanded the case.²⁸ The superior court found for the Oakland Raiders on this remand and dismissed the city's action on the basis of impossibility.²⁹ The court reasoned that the National Football League Constitution and Bylaws³⁰ precluded the city from owning the franchise.³¹ The

could be found, and [that the city] lacked the authority to exercise eminent domain for the purpose of retaining the Raiders' franchise in Oakland." *Id.* (quoting Monterey County Superior Court's unpublished opinion).

24. The court held that it lacked statutory authorization to permit the "condemnation of the diverse contract rights necessary to operation of the Raiders' business enterprise." *City of Oakland v. Oakland Raiders, Ltd.*, 123 Cal. App. 3d 422, 430, 176 Cal. Rptr. 646, 650 (1981).

25. The California Supreme Court held that a material issue of fact concerning the public use issue precluded the lower courts' granting of summary judgment. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

26. *Id.* The California Supreme Court applied a broad interpretation of condemnable property that included both tangible and intangible property. The court also adopted a broad view of public use. The court reasoned that the expansive role and scope of government required greater flexibility in defining public use. In cautious language, the court stated that the city's "operation of a sports franchise may be an appropriate municipal function." *Id.* at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681.

27. *City of Oakland v. Superior Court of Monterey*, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983). The court articulated five reasons in finding for the partnership. First, the court found that the intangible property was not located in the city of Oakland, citing the non-Oakland residences of the organization's general partners, players, and staff. The court also explained that the franchise area included an area exceeding the city limits of Oakland and concluded that the "economic and recreational influence" of the team was not restricted to the city. Second, the court found it reasonably probable that the city would not meet the statutory proscription of converting the condemned property to public use in seven years. The court reasoned that the probable litigation following a taking would consume the statutory time period. Third, the court held that the franchise was not subject to acquisition by the power of eminent domain for the stated purpose. Fourth, the court found that the city had violated procedural proscriptions prior to commencement of the eminent domain action. Finally, the court concluded that the proposed taking did not advance a public interest or necessity. *Id.* at 273-79, 197 Cal. Rptr. at 732-36.

28. *Id.* at 267, 197 Cal. Rptr. at 729. The California Court of Appeal summarily dismissed all five points raised by the Superior Court of Monterey. *Id.*

29. *City of Oakland v. Oakland Raiders, Ltd.*, No. 76044 (Cal. Super. Ct. Monterey County Aug. 10, 1984).

30. "No corporation, association, partnership or other entity not operated for profit nor any charitable organization or entity not presently a member of the League shall be

court of appeal affirmed the superior court's decision.³² The United States Supreme Court denied certiorari.³³

B. *The Baltimore Colts*

In 1984 the owner of the Baltimore Colts professional football franchise considered relocating his team after negotiations to secure a stadium lease agreement faltered.³⁴ Fearing a departure similar to that witnessed in Oakland, the Maryland legislature enacted an emergency measure authorizing the City of Baltimore to acquire professional sports franchises through eminent domain.³⁵ Before the city could enjoin the team from moving,³⁶ however, the franchise removed virtually all of its tangible property³⁷ from the state.³⁸ The city subsequently

eligible for membership." NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BY-LAWS § 3.2(a) (1984).

31. *City of Oakland v. Oakland Raiders, Ltd.*, No. 76044 (Cal. Super. Ct. Monterey County filed July 16, 1984) (Tentative Decision at 7-8, adopted in court's Statement of Decision filed August 10, 1984). The court also based its holding on a violation of California statutory requirements concerning eminent domain procedures, a violation of California's eminent domain law as it applies to transfers of taken property, and a violation of due process guarantees. Finally, the court held that the city's attempt to exercise eminent domain over the Oakland Raiders violated the commerce clause. *Id.*

32. *City of Oakland v. Oakland Raiders, Ltd.*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985).

33. *City of Oakland v. Oakland Raiders, Ltd.*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673, *cert. denied*, 106 S. Ct. 3300 (1986).

34. Negotiations with Colts' owner Robert Irsay for renewal of the stadium lease included extensive interactions between Irsay, Mayor William Schaefer of Baltimore, and Governor Harry Hughes of Maryland. *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. at 279.

35. *Id.* Emergency Bill No. 1042 became effective with the governor's signature on March 29, 1984. *Indianapolis Colts v. Mayor and City Council of Baltimore*, 741 F.2d 954, 955 (7th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). On March 30, the City Council of Baltimore enacted Emergency Ordinance No. 32, which permitted condemnation of the Baltimore Colts. That day, the city filed a condemnation petition in Maryland state court. The state court granted an injunction to prohibit the franchise from relocating outside of Maryland. *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. at 280-81.

36. Irsay ordered the removal of the team's possessions on March 27. During the night of March 28-29, professional movers removed the possessions from the state. On March 29, 1984, Irsay notified the Commissioner of the National Football League that the franchise had relocated to Indianapolis as of the close of business the previous day. *Id.* at 280.

37. The March 28-29 move included the removal of office and athletic equipment from the training complex. After March 29, the only tangible property remaining in Maryland was the training complex. *Id.*

won an injunction prohibiting the team's relocation and filed suit to enforce the injunction.³⁹ In *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*,⁴⁰ a United States District Court held that at the time the City of Baltimore ordered condemnation and obtained the injunction it lacked jurisdiction over the franchise.⁴¹ The court reasoned that moving the team's tangible property from the state also removed the intangible property interests in the franchise.⁴²

38. The franchise relocated to Indianapolis, Indiana, and agreed to play in a stadium constructed in anticipation of luring a sports franchise. The City of Indianapolis offered to rent the stadium facilities for only \$25,000 per game and guaranteed Irsay a minimum of \$7 million revenue from ticket sales, preseason television rights, and radio rights. Additionally, the city agreed to pay any interest accruing in excess of 8% per annum on a 10-year, \$12.5 million loan with a local bank. Kohn, *Indianapolis Enjoys Renaissance*, St. Louis Post-Dispatch, Jan. 18, 1987, at 12I, col. 1.

39. *Id.* After learning of the City of Baltimore's actions in filing a condemnation suit in Maryland state court, the Baltimore Colts organization removed the suit to federal court. The organization then filed an action in federal court in Indiana seeking injunctive relief to enjoin the condemnation proceedings in Maryland. 741 F.2d 954, 956 (7th Cir. 1984). The United States Court of Appeals for the Seventh Circuit subsequently dismissed the case. *Id.* at 958.

40. 624 F. Supp. 278 (D. Md. 1985).

41. *Id.*

42. *Id.* Commentators acknowledge that the power of eminent domain extends no further than the jurisdiction of the state. 1 NICHOLS, *supra* note 6, § 2.12. Recognizing this, however, merely begs the question of how to establish the intangible entity's location. The Maryland federal district court linked the movement of the team's tangible property with the removal of the intangible franchise interest from the state. The court stated that if the "tangibles necessary and valuable to the operation of the team" had not been removed by March 30, the result might have been different. 624 F. Supp. at 285. Additionally, the court rejected the theory that the training facility which remained in the state constituted sufficient minimum contacts to permit jurisdiction over the team. *Id.* at 284.

The court rested its decision on constitutional and statutory proscriptions requiring compensation before condemnation could occur. Maryland statutes require the payment of compensation before a governmental entity has a right to possession. 624 F. Supp. at 283. The statutes permit a quick-take procedure through which the governmental entity takes possession of the condemned property after making a payment to the court equal to the property's estimated value. The issues of public use and fair compensation are determined at a subsequent trial. MARYLAND REAL PROP. CODE ANN. § 12-101 (1982). In this case, the City of Baltimore had not paid compensation for the football franchise and had not exercised a quick-take procedure, so it had no right to possession when the Colts moved their property. 624 F. Supp. at 283.

III. POLICY ISSUES RAISED IN THE CONDEMNATION OF A SPORTS FRANCHISE

A. *Irreplaceable Property*

The act of taking a professional sports franchise through eminent domain deprives its owner of potentially irreplaceable property. Unlike the condemnation of traditional commercial enterprises, the taking of a sports franchise claims intangible property interests unique to that business. For example, a restaurant franchisee can still operate the franchise even if a city condemns the structure in which that business operates. Although the taking deprives the business of a potentially prime location, the owner retains his or her interest in the franchise and may reopen elsewhere. When a city condemns a sports franchise, however, the owner loses the essential franchise interest.

A sports franchise further represents a virtually irreplaceable commodity due to artificial entry restraints on the market. All professional sports leagues maintain tight control over the number and geographical distribution of their member-franchises.⁴³ Although such control does not wholly prevent an individual from purchasing another franchise, these restrictions distort the market in terms of both price and availability.

B. *Sufficiency of Compensation*

Compensation for condemned sports franchises also raises issues not evident when eminent domain is applied to other business enterprises. Fair market value is the traditional measure of just compensation in condemnation actions.⁴⁴ This traditional standard, however, presumes

43. The National Football League controls the establishment of new franchises, the ability of franchises to relocate, and which franchises shall have the right to employ individual athletes. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1402 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984). Historically, the NFL permitted franchises to exist only in specified territories likely to ensure financial success. *Id.* at 1394. When the NFL absorbed the teams affiliated with the American Football League, it provided hardship payments totaling \$18 million to original NFL teams located in cities also hosting a newly enfranchised American Football League team. *Id.* at 1393. The NFL's control over the number of franchises ensures the maintenance of profits derived from the gross proceeds. These profits are split among the league's membership. S. 287, 99th Cong., 1st Sess. § 302(2), (3), 131 CONG. REC. S663, S667-68 (daily ed. Jan. 24, 1985). For example, the NFL's last five-year contract with the three national television networks generated \$2.1 billion in revenue. During the contract period 1981-86, each franchise's share of revenue averaged \$13.5 million per year. *St. Louis Post-Dispatch*, Mar. 15, 1987, at 11G, col. 1.

44. Courts permit the use of methodologies other than fair market valuation when

an active market. As noted earlier, artificial restrictions on the number of existing professional sport franchises deter frequent changes of ownership and prevent the establishment of a meaningful market price. Alternatively, use of the team's book value as a basis for determining "just compensation" may not constitute sufficient proceeds for the owner to purchase another franchise, if one is even available.⁴⁵

C. *Relationships with the Parent League*

All professional sports franchises require the organization, direction, and legitimacy that a parent league affords them. Following a member franchise's condemnation, its form of ownership may represent an important issue to the league. For example, the National Football League Constitution and Bylaws restrict ownership of teams to "only a profit-making person or an entity organized for the purpose of operating a professional football club. . . ."⁴⁶ Consequently, governmental bodies lack practical alternatives if the league revokes the franchise of a team condemned through eminent domain. Without a league and other teams committed to playing, a professional sports team has no forum in which it can operate.

Although recent court decisions did find certain league rules violative of antitrust law,⁴⁷ expending public funds to challenge a private

fair market value proves difficult to calculate or results in an injustice on the property owner. *See United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

45. Professional sports franchises differ in value. Teams in major metropolitan areas such as New York, Los Angeles, Chicago, Detroit, Boston, Philadelphia, and San Francisco receive higher appraisal values than franchises located in other communities. Franigan, *Some Lessons for Business In Baseball*, St. Louis Post-Dispatch, Oct. 5, 1986, at 1G, col. 1. Additionally, some franchises' current valuations represent enormous increases in recent years. For example, the valuation of the New York Mets baseball teams increased from \$21 million in 1980 to \$80 million in 1986, *id.*, representing a 250% increase in six years. Even if an owner receives fair compensation for the condemned franchise, the ability to purchase another team may prove impossible without additional capital.

46. NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BYLAWS § 3.2 (1984).

47. Baseball is the only professional sport exempt from federal antitrust laws. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). State antitrust laws do not apply to professional sports teams because of the teams' interstate activities. *See id.* In 1984 a federal court held that the NFL's Rule 4.3 prohibiting the relocation of a franchise without league approval constituted an unreasonable restraint on trade. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984). On appeal of the decision for the second part of the bifurcated proceeding, the court of appeals held that the lower court's finding of antitrust liability applied only to the application of Rule 4.3 to the specific circumstances of that case. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1369 (9th Cir. 1986).

organization's constitution and bylaws may lack political appeal to community decisionmakers. Even if the league constitution and bylaws do not preclude governmental ownership of a member franchise, the relationship presents other problems. For example, if a league decides to assess each franchise a fee to facilitate the purchase of private property for nonpublic use, constitutional limitations may prevent local government payment of such an assessment. Similarly, a government-owned franchise may be unable to effectively disassociate itself with a league's political or philosophical views that advocate positions contrary to public policy.

D. *Contractual Relationships*

The many contractual obligations inherent in the operation of a professional sports franchise further complicate the application of eminent domain to such entities. Many state statutes provide that employment contracts requiring a particular employer's supervision prevent the delegation of that obligation to one other than the employer.⁴⁸ The taking of a franchise and the resultant delegation of supervisory responsibilities arguably discharges the player-employee from his contract.⁴⁹ An additional legal issue concerns the employment status of each player and coach after condemnation. If a player's employment status resembles that of a municipal employee and he injures another participant in the course of an athletic event, the player, coach, and municipality may be held liable.⁵⁰ Finally, a government-owned sports team is certain to encounter resistance when defending the expenditure of public funds to maintain a competitive salary structure.⁵¹

48. See 4 CORBIN ON CONTRACTS § 865, at 438-39 (1951).

49. *Id.*

50. One potential basis for suit lies in 42 U.S.C. § 1983 (1981). This provision provides a civil court remedy for the deprivation of rights protected under law.

51. The minimum salary for a first year player in major league baseball for 1987 was \$62,500. *What They Make*, SPORTS ILLUSTRATED, Apr. 20, 1987, at 55. The Los Angeles Dodgers professional baseball team's 1987 average player salary was \$580,250. *Id.* at 81. The Seattle Mariners professional baseball team reported the lowest average player salary in 1987 at \$186,146. *Id.* Pete Rose, manager of the Cincinnati Reds professional baseball team, earned \$750,000 in 1987. *Id.* In addition to base salaries, many player contracts include incentive clauses. *Id.* Reggie Jackson of the Oakland Athletics professional baseball team received 15-30 cents per person in attendance at home games when the franchise attracted between 1.6-1.8 million fans for the season. *Id.*

E. *Interstate Commerce*

In the absence of specific federal legislation, states may regulate activities affecting interstate commerce.⁵² In the seminal case of *Pike v. Bruce Church, Inc.*⁵³ the United States Supreme Court established a balancing test to determine the validity of such state actions.⁵⁴ The test requires that the state's interest in regulating a specific activity outweigh the burden imposed on interstate commerce.⁵⁵ Analyzing the condemnation of a sports franchise under the *Pike* test exposes significant intrusions on interstate commerce and marginal benefits to the governmental entity.

The condemnation of a professional sports franchise constitutes a forced sale and prevents purchase of the team through competitive interstate bidding.⁵⁶ Due to the artificial limitation on the number of franchises, potential buyers greatly exceed existing sellers. The condemnation of a franchise effectively circumvents the interstate bidding process and denies the franchise owner free market access.⁵⁷

Further undermining any validity of sports franchise condemnation under the *Pike* test is the fact that the benefits of government ownership are speculative. First, although the increase in civic pride⁵⁸ and

52. The commerce clause of the United States Constitution specifically reserves to Congress the power "[t]o regulate commerce . . . among the several States. . . ." U.S. CONST. art. I, § 8, cl. 3. "[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945).

53. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

54. *Id.* at 142.

55. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . ." *Id.*

56. Nothing precludes a governmental entity from entering the market as a participant. Therefore, if a city wanted to bid on the purchase of a professional sports franchise, the commerce clause would not restrict the activity. *White v. Massachusetts Council of Constr. Employees*, 460 U.S. 204, 208 (1983).

57. Some commentators perceive the condemnation of a sports franchise as obstructing the interstate movement of entertainment. See Note, *The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation*, 13 FORDHAM URB. L.J. 553, 582 (1985). The argument made by one commentator states that the condemnation of a franchise ensures "that production of the entertainment occur[s] only in its locale on those occasions when the team is designated as the home team." *Id.*

58. S. 287, 99th Cong., 1st Sess. § 101(a)(1), 131 CONG. REC. S663, S665 (daily ed.

community prestige resulting from the presence of a successful sports franchise generally raises the quality of life and attracts visitors and businesses, such gains cannot be quantitatively measured.⁵⁹ Second, even the measurable benefits of condemnation cannot survive *Pike* test scrutiny. For example, if a sports team attracts outside capital to the local economy⁶⁰ and increases entertainment tax revenue,⁶¹ the condemnation of the franchise will not necessarily ensure the continuation of those economic benefits. If the team becomes a perennial loser or develops a bad reputation and attendance declines, the government-owner risks declining tax revenue with constant or escalating costs.⁶² Similarly, if the local economy falters and attendance declines due to the shrinkage of personal discretionary funds, tax revenues will decline while costs remain constant or increase. Thus, the actual extent of the local economic benefit and generation of tax revenue from a sports franchise remains tenuous because of unique and unpredictable variables.⁶³

Jan. 24, 1985); *see also* S. 172, 99th Cong., 1st Sess. § 2(a)(1), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) (professional football teams serve to instill pride in fans).

59. Similarly, the entertainment value of a sports franchise to a city, although important, defies quantification. *See* S. 287, 99th Cong., 1st Sess. § 101(a)(9), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985); *see also* S. 172, 99th Cong., 1st Sess. § 2(a)(3), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) (professional football teams provide an important source of entertainment).

60. *Contra* Lancaster, *Stadium Projects Are Proliferating Amid Debate Over Benefit To Cities*, Wall St. J., Mar. 20, 1987, at 33, col. 4. One study indicates that the economic benefits attributed to professional sports teams actually represent a reallocation of discretionary funds from other sources of expenditures such as family entertainment. The sports franchise does not, therefore, enlarge the pie, but merely affects its division. *Id.*

61. *See* S. 287, 99th Cong., 1st Sess. § 101(a)(9), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985); *see also* S. 172, 99th Cong., 1st Sess. § 2(a)(3), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) (cities hosting professional football teams derive "substantial tax revenues and employment opportunities" from the events). *Contra* Lancaster, *supra* note 60, at 33, col. 4. Recent research suggests that employment created by the presence of a professional sports franchise has negligible impact on the local economy because the jobs consist of low-pay, service-oriented activities. *Id.*

62. Many cities construct sports stadiums with public funds and then lease the facilities to professional sports franchises at a rate that does not fully cover construction costs. S. 287, 99th Cong., 1st Sess. § 101(a)(4), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985).

63. The local economic benefits and generation of tax revenue may also be held hostage by the franchise itself. Professional sports franchises have gained leverage in lease negotiations by threatening to relocate. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1397 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

A final factor that the *Pike* Court suggested be included in the balancing process concerns a fundamental question of public function. Neither the Oakland nor the Baltimore case reached the issue of public use.⁶⁴ The modern preference for broadly defining public use permits governmental entities to assume nontraditional roles in the delivery of specific goods and services. An important public function, however, is typically present in most of these accepted nontraditional roles. The involvement of a governmental entity in the management and operation of a professional sports franchise, however, lacks the attributes of an essential public function. Additionally, a less restrictive means of retaining a franchise often exists. In both Oakland and Baltimore, the franchise's relocation followed the failure of reaching agreement on an athletic stadium's lease. If a governmental entity perceives significant benefits in retaining a professional sports franchise, some combination of monetary concessions, incentives, or direct grants provides a less costly and risky alternative.⁶⁵

CONCLUSION

The doctrine of eminent domain allows cities to efficiently grow in a controlled and deliberate fashion. The use of the doctrine to prevent the departure of a professional sports franchise is a recent phenomenon. Although such franchises make significant contributions to the host community, their ultimate societal importance does not justify condemnation under the doctrine of eminent domain. The severe impact of such a taking on affected individuals and groups together with the tenuous preservation of public benefits outweighs the perceived gains.

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64. See *City of Oakland v. Oakland Raiders, Ltd.*, No. 76044 (Cal. Super. Ct. Monterey County Aug. 10, 1984) (Judgment at 1-2); *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278 (D. Md. 1985).

65. Many of the issues raised in this Recent Development also apply to situations in which a city aids a private party in the purchase of the franchise. Although the commerce clause problem evaporates, the policy issues still exist. Similarly, if a governmental entity purchases a franchise, the policy and political issues associated with a condemnation action still apply. The author believes that every city contemplating any degree of involvement with a professional sports franchise should perform its own balancing test to assess the prudence of such an undertaking.