Public Use in Eminent Domain: Are there Limits After Oakland Raiders and Poletown?

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NOTES

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INTRODUCTION

Eminent domain is a governmental power used to acquire private property without the owner's consent. The use of eminent domain is restrained by the requirements of public use and just compensation. Some have viewed the public use limitation as a dying concept. The debate over the boundaries of public use is again at issue as a result of the decisions in Poletown Neighborhood Council v. City of Detroit and City of Oakland v. Oakland Raiders.

In Oakland Raiders, the California Supreme Court concluded that the owning and operating of a sports franchise may be a valid public use. The eminent domain proceeding, initiated by the city, was sent back to the trial court for a decision on the merits. Prior decisions in this area of recreational public use have held that construction and operation of a sports stadium for both pro-

1. J. Sackman, Nichols’ The Law of Eminent Domain § 1.11 (rev. 3d ed. 1981) [hereinafter cited as Nichols]; Humbach, A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use, 34 Rutgers L. Rev. 243, 249 & n. 33 (1982) [hereinafter cited as Humbach]. Eminent domain is distinct from inverse condemnation. In an inverse condemnation, the government places restrictions on the use and enjoyment of the property through its police power. In contrast, eminent domain involves the compulsory transfer of the property to the government.


3. Comment, The Public Use Limitation of Eminent Domain: An Advance Requiem, 58 Yale L.J. 599 (1949) [hereinafter cited as Comment, Public Use]. See also Berger, The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203, 223-26 (1978) [hereinafter cited as Berger]. Berger takes the position that the public use requirement has not been removed, since courts still provide a check on a taking that goes too far. He goes on to state, “It is impossible to distinguish rationally a large plant employing half the town and a railroad right of way, saying there may be condemnation in the latter case but not in the former.” Id. at 226. In essence this was the dilemma in Poletown, and the basis of the decision.


5. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

6. Id. at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681. The case was remanded to the trial court to determine if there was a valid public use in this situation. On July 22, 1983 the court ruled against the city of Oakland citing the city's failure to show that the team was necessary either for the economic health or well-being of Oakland. The case is now pending before the appellate courts.

7. Id. at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.
fessional and amateur events was a proper public use. 8

In Poletown, the Michigan Supreme Court held that eminent domain could be utilized for the sole purpose of alleviating unemployment and retaining local industries. 9 The Poletown decision is a sharp departure from economic and residential redevelopment cases wherein only slum clearance satisfied the public use element necessary for condemnation. 10

The dissents in both Oakland Raiders and Poletown asserted that the application of public use had become unlimited, and therefore public use no longer served as an effective restraint on the indiscriminate use of eminent domain. 11 The potential for abuse of this governmental power clearly troubled the dissenting justices. 12

This Note examines the public use issue in the aftermath of Oakland Raiders and Poletown. First, it briefly discusses the historical background of eminent domain and the concept of property rights. The second section will examine the fluid nature of public use. The third section will analyze recreational public use, and contrast these limits with the decision as set forth in Oakland Raiders. Next, it will focus on the Poletown decision in light of prior redevelopment cases. Finally, the Note will explore the ramifications of an unrestrained public use standard and examine the manner in which public use can be harnessed.

8. See, e.g., Conrad v. City of Pittsburgh, 421 Pa. 492, 218 A.2d 906 (1966). The city authorized a municipal debt in order to construct Pittsburgh stadium. The authorization of the debt by the government, like eminent domain, must comply with the public use requirement. Often an eminent domain proceeding will also rely on debt authorization decisions. For instance, in Oakland Raiders the court based its ruling on Martin v. City of Philadelphia, 420 Pa. 14, 215 A.2d 894 (1966) (upheld city ordinance authorizing loan to build a sports stadium). See also City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 333 P.2d 745 (1959) (struck down a taxpayers’ suit to stop construction of a stadium); Meyer v. City of Cleveland, 35 Ohio App. 20, 171 N.E. 606 (Ct. App. 1930) (permitted issuance of bonds to build stadium). See generally Martin v. City of Philadelphia, 420 Pa. 14, 215 A.2d 894 (1966). The Pennsylvania Supreme Court stated that while operation of the stadium was permissible, the private business of owning and managing a professional team would be a private not a public use. Id.


11. Oakland Raiders, 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683 (Bird, C.J. dissenting); Poletown, 410 Mich. at 644, 680-81, 304 N.W.2d at 464, 480.

12. Id.
I. HISTORICAL BACKGROUND OF EMINENT DOMAIN

Today the use of eminent domain is, without question, a legitimate tool of government. Eminent domain is the process whereby the sovereign is permitted to take private property for public use without the owner's permission.\(^\text{13}\) It has been described as "an inherent attribute of sovereignty."\(^\text{14}\) This exercise of power for the public good has been viewed as "necessary to the very existence of the government."\(^\text{15}\) It has enabled government to provide services and projects that benefit the entire society which would not be possible without the use of eminent domain.

The first significant limitation upon this inherent power can be found in the Magna Carta. This historic document limited the power of the king to take private property by declaring that "no freeman shall be . . . deprived of his freehold . . . unless by lawful judgment of his peers and by the law of the land."\(^\text{16}\) However, there were no provisions in the Magna Carta for compensation to the land owner.\(^\text{17}\) By the time of the American Revolution eminent domain was a well-recognized governmental tool, and limitations were placed on the exercise of eminent domain in the fifth amendment of the United States Constitution. The amendment asserted that no person could be deprived of "property, without due process of law; nor shall private property be taken for public use, without just compensation."\(^\text{18}\) With the addition of the fourteenth amendment to the Constitution, the states were compelled to apply the due process clause of the fifth amendment to their exercise of eminent domain.\(^\text{19}\)

\(^\text{13.} \) See Nichols, supra note 1, at § 1.11.


\(^\text{15.} \) Nichols, supra note 1, at § 1.14(2).

\(^\text{16.} \) Magna Carta art. 39 (1215).

\(^\text{17.} \) Id.

\(^\text{18.} \) U.S. Const. amend. V; People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); City of Anaheim v. Michel, 259 Cal. App. 2d 835, 837, 66 Cal. Rptr. 543, 545 (Dist. Ct. App. 1968). Eminent domain proceedings as we know them are an outgrowth of "inquest of office." Jurors in this proceeding examined any act by the king where the king felt he was entitled to possess private property. Nichols, supra note 1, at § 1.2I(1). Since eminent domain is an inherent attribute of the sovereign, the fifth amendment is regarded as placing a limitation upon the government's use of eminent domain. Comment, Public Use, supra note 3, at 599-600.

\(^\text{19.} \) See U.S. Const. amend. XIV. The use of eminent domain became more prevalent as states used their power in favor of the developing railroads that linked the country together. Because the population was sparse in many regions of the country, few landowners were affected to any substantial degree. Comment, Public Use, supra note 3, at 602-03. But cf. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (where the use of eminent domain affected 3,438 people who lost their homes, required the destruction of 1,176 structures and involved a cost of $200,000,000 to the public).
Because the power of eminent domain is so extraordinary, there has been a recognition that it must be exercised with caution. It has been observed that next to the power of military conscription, eminent domain is "the most awesome grant of power under the law of the land." Furthermore, since the right to acquire and possess property is a fundamental right under the Constitution, it has been held that property rights should be jealously guarded.

The tradition of protecting property rights was reaffirmed in 1972 by the United States Supreme Court in *Lynch v. Household Finance Corp.* Justice Stewart said:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

This reaffirmation of property rights is in line with the perception that governmental actions impact upon our lives. The taking of private property affects not only the property itself but the rights and life of the property owner. Therefore, property should not be viewed apart from ownership. Ownership rights are not a separate and distinct component; the disposition of property naturally affects the owners of the property.

**II. Development of the Public Use Concept**

Public use is an essential and necessary element in any exercise of eminent domain. In fact, eminent domain can only be used to acquire property for public, not private use. There are two dis-
distinct schools of interpretation on exactly what is public use.27 Jurisdictions which have followed the narrow interpretation hold that public use means use by the public.28 The more commonly held view and the view adopted by the United States Supreme Court29 interprets public use to mean public advantage.30

In Karesh v. City Council31 the South Carolina Supreme Court, following the narrow view of public use, stated that before eminent domain could be invoked the public must have an enforceable right to a definite and fixed use of the property.32 It is not enough that the public will receive benefit from the acquisition of the property.33 The South Carolina Supreme Court clearly stated its view of public use when it said "'public use' means just that."34 The court refused to allow the city to condemn land for a proposed parking garage and convention center, because they felt the primary benefit would be to the developer and would be of minimal advantage to the public.35 While acknowledging that other states have permitted land to be condemned for parking facilities, the court insisted the proposed long-term lessor, not the public,
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would have control over the facility.\textsuperscript{36}

In contrast, the broad view of public use is based on the notion that public use is not a static concept.\textsuperscript{37} The United States Supreme Court in 1896 noted "what is a public use frequently and largely depends on facts and circumstances surrounding" the proposed acquisition project.\textsuperscript{38} In 1923, the Supreme Court included public health, recreation, and enjoyment as valid public purposes.\textsuperscript{39} When upholding a redevelopment project in 1954, the Court asserted that the concept was both broad and inclusive, and that it represented values that were spiritual, physical, and aesthetic.\textsuperscript{40}

The movement by the courts from the strict, narrow view of public use to the broader and expanding view is due in large measure to the change in society and the broadening scope of governmental functions.\textsuperscript{41} The Pennsylvania Supreme Court in \textit{Conrad v. City of Pittsburgh}\textsuperscript{42} approved the public financing and construction of a municipal stadium by asserting that the goal of a community is not merely to survive, but also to pursue and increase the quality of life for the community and its citizens.\textsuperscript{43} If public use were confined to basic services, "Such a city would be a dreary city indeed. As man cannot live by bread alone, a city cannot endure on cement, asphalt and sewer pipes alone".\textsuperscript{44}

\textsuperscript{36} Id. at 343-44, 247 S.E.2d at 345.
\textsuperscript{38} Id.
\textsuperscript{39} Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707, (1923).
\textsuperscript{40} Berman v. Parker, 348 U.S. 26, 33 (1954).
\textsuperscript{42} 421 Pa. 492, 508, 218 A.2d 906 (1966).
\textsuperscript{43} Id. at 508, 218 A.2d at 914.
\textsuperscript{44} Id. However, as public use broadened, two issues continued to plague the courts. The first was whether public use was satisfied if only a segment of the community received the benefits. In Fallbrook Irrigation District v. Bradly, 164 U.S. 112 (1896) the United States Supreme Court held that even though the use of the water might be limited to landowners this would not defeat the public nature of the project. It was not required that every resident have a right to the use of the water. The intent of the legislation was to provide water so that millions of acres of otherwise worthless land could be cultivated. Id. at 161-62. The other issue concerned gains to private parties as a result of the taking, and subsequent resale of the land. Courts have held, benefits to private individuals are "incidental benefits." See City of Miami v. Coconut Grove Marine Properties, Inc., 358 So. 2d 1151, 1155 (Fla. Dist. Ct. App. 1978); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 634, 304 N.W.2d 455, 459 (1981). See also Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U.L. REV. 615 (1940) [hereinafter cited as Nichols, Public Use]. "The 'incidental benefit' to a private corporation when it is the donee of the power does not defeat the public character of the use". \textit{Id.} at 622. The United States Supreme Court
III. PUBLIC USE IN SPORTS CONTEXT

A. Rationale for Municipal Stadiums

One trend in the evolution of public use is well illustrated in cases dealing with the construction of sports stadiums. As early as 1893, the United States Supreme Court upheld the use of eminent domain for the establishment of a public park in the District of Columbia. Condemnation of land for a public park was held a proper public use. This rationale led to the recognition that public need for recreation might be sufficient to establish the requisite showing of public use to construct sports stadiums. In 1930, an Ohio Court of Appeals upheld the construction of a municipal stadium in *Meyer v. City of Cleveland*.

The court took notice of the wide acceptance of municipal stadiums. The court continued to note the wealth of services and facilities that municipalities now provide for residents. Libraries, parks, monuments, statutes, public concerts, and public golf courses are designed to enhance the lives of the citizens. There was a clear acknowledgment by the court that society had moved beyond survival needs, and was now concerned with enrichment of the community.

In the 1950's and 1960's there were a series of suits challenging the construction of stadiums to house professional sports teams. The suits were brought on the basis that condemnation, authorization, and funding of these stadiums were prohibited since it was not a valid public use. Yet the courts expanded the public use definition of recreation to include both participation and spectatorship, and indeed, many felt its benefit extended beyond stated as long as the public purpose is established, the goal may be better served by the private sector. *Berman v. Parker*, 348 U.S. 28, 33-34 (1954).

46. *Id.* at 297.
47. *35 Ohio App. 20, 171 N.E. 606 (Ct. App. 1930).*
48. *Id.* at 22-23, 171 N.E. at 606-07. The court noted the trend of authority is to permit cities to undertake a broader range of projects in order to promote public welfare and enjoyment. Stadiums are a typical example of the expansion of governmental services that reflect the increased expectations of community life. The court stated that municipal stadiums are not new and have been in existence throughout history. At the time of the decision, there were ninety-three municipal stadiums erected or in the construction process. The ancient Greeks and Romans constructed them, and they remain as a legacy and reminder to us of their civilization. Some of these facilities are used today. The 1896 Olympic games were held in a refurbished Greek stadium. *Id.* at 23-25, 171 N.E. at 606.

50. This change in attitude recognized the expanding role of spectator sports today which include professional football, basketball, hockey and baseball. It can be
sports to the spirit of the country.\textsuperscript{51}

In several cases, the construction of the sports stadium was undertaken specifically to entice a sports franchise to locate in their community.\textsuperscript{52} In \textit{New Jersey Sports \\& Exposition Authority v. McCrane},\textsuperscript{53} the enabling legislation was designed specifically to induce the location of sports franchises in their state.\textsuperscript{54} Not only would these stadiums provide recreation to the public, they would also provide stimulus for the economic growth and development of the area.\textsuperscript{55} Therefore, the court held that stadiums would serve the public with respect to recreational, cultural and economic benefits.\textsuperscript{56}

Since the construction and operation of stadiums clearly benefits private owners of various professional franchises, courts have felt compelled to address the private benefit issue. The Supreme Court of Pennsylvania viewed the advantage conferred on private franchise owners as incidental to providing public recreation.\textsuperscript{57} However, the court carefully drew the distinction between a city entering into a stadium lease with the privately owned football or

attributed to the expansion of major leagues, and competition between cities to induce a franchise to locate in their city. Cities, the court acknowledged, benefit from revenue produced by the operation of the franchise within the city. Additionally, the athletes themselves command substantial salaries, endorse commercial products, serve as role models, and are the subjects of many articles, and television stories. This court also noted that spectatorship "to many people in this country [is] the greatest possible recreation with respect to athletic activity." \textit{New Jersey Sports \\& Exposition Auth. v. McCrane}, 119 N.J. Super. 457, 481, 292 A.2d 580, 594 (1971) (quoting Green v. Garrett, 192 Md. 52, 61-62, 63 A.2d 326, 330 (1949)).

\textsuperscript{51} Professional sports play such an important part in our lives that the New Jersey court remarked:

\begin{quote}
Sport is truly an international language; through it we read the minds and hearts of the fellow members of our community, state and nation—yes, even the world community . . . . From the four-year old slum child to the 80 year old pensioner—no longer the sole enjoyment of the wealthy and affluent—everyone has been taken up in the excitement and passion of a thrilling play at home, a brilliant runback or a perfectly executed jump shot. We are on that field with the team. We laugh when their play sparkles and cry when they make fools of themselves. No matter what one thinks of Namath and the "New York Jets," how many of us failed to experience a twinge of his anger, and frustration when a pre-season injury sidelined him for the year?
\end{quote}

\textit{New Jersey Sports} at 491, 292 A.2d at 600. Justice Musmanno observed that the opportunity to watch and enjoy athletic competition "helps to build up a healthy community." He summarized this attitude by stating that the song, "Take Me Out to the Ball Game" symbolized our national spirit. Conrad v. City of Philadelphia, 421 Pa. 492, 507, 511, 218 A.2d 906, 914-16 (1968) (Musmanno, J., concurring).

\textsuperscript{52} \textit{See}, e.g., \textit{New Jersey Sports} at 463, 292 A.2d at 583.


\textsuperscript{54} \textit{Id.} at 463, 292 A.2d at 583.

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.} at 479, 292 A.2d at 593.

baseball clubs, and a city operating and owning a team. In the latter event, the court stated the city would be engaging “in the private business of promoting sports events.” The court asserted that if a city took part in the business aspect, it would most likely be a private use rather than a public use.

B. City of Oakland v. Oakland Raiders

It is primarily because sports play an important role in our lives, that the City of Oakland v. Oakland Raiders decision has received widespread attention. The Oakland Raiders football franchise became the subject of an eminent domain proceeding by the city of Oakland. In 1966, the Oakland Raiders and the Oakland-Alameda County Coliseum entered into a five-year lease for the use of the Oakland Coliseum with five three-year renewal options. The Raiders exercised three of the options, but chose not to exercise the option for the 1980 season. After contract negotiations between the parties ended and the Raiders announced their intention to move to Los Angeles, the city began eminent domain proceedings. The trial court granted a summary judgment for the Raiders, and dismissed the suit. The California Supreme Court overturned the decision, and sent the suit back to the trial court.

58. Id.
59. Id.
60. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
61. Id. at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.
62. Id. The plan to relocate the 1981 Super Bowl winners, the Oakland Raiders, also encountered other legal problems. The team faced a suit by the National Football League and its Commissioner. Lawyers for Al Davis, general managing partner of the Raiders, successfully defended this antitrust suit which paved the way for the move to Los Angeles. Oakland Blitzes the Raiders, Newsweek, July 26, 1982, at 68 [hereinafter cited as Newsweek]. While the L.A. Coliseum is generally considered inferior to Oakland's stadium, it had important advantages for the team's owner. The location was superior, and the facility accommodated 47,900 more people. In addition, one hundred fifty boxes that would sell for forty thousand dollars a piece were to be constructed by the 1983 season. Wiley, Less Than Colossal in the L.A. Coliseum, Sports Illustrated, September 6, 1982, at 22-29. Yet, another incentive for the relocation of the franchise was the enormous revenue which would be realized from cable television. Newsweek, supra note 62, at 68.
63. Brief for Petitioner at 3-4, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) [copy on file in the offices of California Western Law Review]. This action was prompted by the Oakland city officials' belief that the loss of the Oakland Raiders would result in both economic and social losses. This social loss of community spirit and pride was recognized by the Pennsylvania Supreme Court in Conrad v. City of Pittsburgh, 421 Pa. 492, 218 A.2d 906 (1966), as a likely result of losing a major league team. The court observed that the "electrifying sensation" of a championship game would, at least temporarily, erase the problems and troubles that overwhelmed the city's residents. This heavy weight would be "drowned out in a flood of throbbing anticipations." The court concluded by saying that for a city to suffer the loss of its team would be a tragedy for the community. Id. at 509, 218 A.2d at 914.
court to decide if indeed the acquisition of the team is an appropriate public use; thereby substantially expanding the public use definition in the sports field.\(^{64}\) Perhaps in response to the attention received by the decision, the court issued a modified decision.\(^{65}\) However, the court continued to maintain that the operation of a sports franchise may be an appropriate municipal function.\(^{66}\) This decision takes a quantum jump from providing a community with a sports stadium to the operation of a professional sports franchise by a municipality.

The California Supreme Court reasoned that the concept of public use is not only broad, but that it must expand to meet changing public needs.\(^{67}\) Additionally, the court cited the recent revisions in the California Government Code which permit a city to "acquire by eminent domain any property necessary to carry out any of its powers or functions."\(^{68}\) The intent of the revisions was to give a city considerable latitude in identifying and implementing public uses.\(^{69}\)

The court in its first ruling attempted to justify its conclusion with the short sentence, "Times change."\(^{70}\) Although this was deleted in the final decision, the court stood by the rationale that there has been consistent expansion of eminent domain to take

\(^{64}\) *Oakland Raiders*, 32 Cal. 3d at 63-64, 646 P.2d at 837, 183 Cal. Rptr. at 675. See also *Newsweek*, supra note 62, at 68; Studer, *Government in the Locker Room*, San Diego Union, July 4, 1982, at C-1 [hereinafter cited as Studer].

\(^{65}\) *Oakland Raiders*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673. See generally *Newsweek*, supra note 62, at 68 (reported the court rested its opinion on the notion that times change. This was deleted from the modified opinion.) See infra note 67 and accompanying text. Some California legislators were outraged, and State Senator William Campbell introduced legislation to exempt sports franchises from eminent domain. He remarked, "Using the court's logic the city of Anaheim could take over the Rams or even Disneyland." *Newsweek*, supra note 62, at 68. The initial decision was *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656 (1982).

\(^{66}\) *Oakland Raiders*, 32 Cal. 3d at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681.

\(^{67}\) *Id.* at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680.


\(^{69}\) *Oakland Raiders*, 32 Cal. 3d at 69-70, 646 P.2d at 841, 183 Cal. Rptr. at 679; *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656, 668 (1982) [copy on file in the offices of California Western Law Review]. Writing for the majority, Justice Richardson rejected, as have other courts, the limited narrow use. He observed that limits on the application of eminent domain were largely by tradition, and that the limits were not imposed either by statute or the constitution. Thus, the evolving nature of public use would not prohibit the taking of a sports franchise. After all, "times change." *Oakland Raiders*, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 681. The reasoning process remained intact, although the phrase "times change" was removed.

\(^{70}\) *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656, 668; see also *Newsweek*, supra note 62, at 68; Studer, supra note 64, at C-1. This particular sentence, "Times change" received widespread attention. There was amazement among the press that a precedent and landmark case would be justified by the trite statement of "Times change." Subsequently, it was omitted from the modified decision.
property for recreational purposes. The court relied on the language, "anything calculated to promote the education or recreation of the people is a proper public purpose," found in Egan v. City & County of San Francisco and New Jersey Sports & Exposition Authority v. McCrane to reinforce their conclusions. This "literal use" should be questioned since the cases the court relied upon did draw careful distinctions between public and private use. Arguably, it is more likely this language reflected the developing latitude of public use, and not the total removal of all boundaries to public use. The literal application of "anything calculated" was used to bridge the gap between owning and operating a stadium, and owning and operating a team.

To reach the conclusion that the operation of a sports franchise may be an appropriate city function, the court relied on those decisions, formerly discussed, which permitted the acquisition, construction and operation of a stadium. The opinion acknowledged that "No case anywhere of which we are aware has held that a municipality can acquire and operate a professional football team." The modified decision noted the city of Visalia owns and operates a Class-A baseball franchise. The initial de-

71. Oakland Raiders, 32 Cal. 3d at 71, 646 P.2d at 841, 842, 183 Cal. Rptr. at 680.
72. Id.
73. 165 Cal. 576, 582, 138 P. 294, 296 (1913).
74. New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 482, 292 A.2d 580, 594-95 (Super. Ct. Law Div. 1971), relied on Martin v. Philadelphia, 420 Pa. 14, 215 A.2d 896 (1966), which drew a distinct line between the operation of a stadium and entering into the business of sports. Id. at 18, 215 A.2d at 896. See also supra note 56 and accompanying text. In Egan, the court acknowledged the trend was to permit municipalities to undertake a wider range of projects to promote public welfare and enjoyment. Yet, the California Supreme Court did not approve the agreement between the Musical Association of San Francisco and the city. After the opera house was to be constructed, title would revert to the city, but the association would retain management and control of the facility. Thus, the court did not use a literal interpretation of "anything calculated to promote" to sanction a beneficial project that did not conform to the public use requirement. Egan, 165 Cal. at 576, 133 P. at 294.
75. Egan, 165 Cal. at 576, 133 P. at 294.
77. Id. at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679.
78. Id. The city of Oakland does not intend to own the franchise itself, but will resell it to businessmen. There is, of course, dispute over the value of the team. City officials estimate the worth of the franchise at thirty million dollars, while Al Davis insists the team is valued at one hundred million dollars. Newsweek, supra note 62, at 68. The NFL Commissioner in an affidavit indicated that a "brief interim ownership" by the city would not be prohibited by the rules of the NFL. Oakland Raiders at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681; see also supra note 44, note 79 and accompanying text. Because the subsequent ownership by private individuals does not conflict with the public use doctrine, the cost of acquisition is likely to be within the city's abilities. Prompt resale would quickly recoup the sale price of the team without a permanent expenditure by the city. Newsweek, supra note 62, at 68.
cision stated the difference between owning and operating a stadium, and owning and managing a team was "legally insubstantial." Further, the court noted they could not discern a "valid legal reason" why owning and managing a team was not as "equally permissible" as owning and operating the stadium where the team played. In contrast, the modified decision of August 5, 1982 appeared to pull back from this assertion. Instead of asserting that the difference was legally insubstantial, the court now posed it in the form of a question. Was the difference "legally substantial?" The court stated the Oakland Raiders had produced no valid legal basis to conclude it was not legally insubstantial.

It is this apparent removal of limitation on public use that prompted the concurring and dissenting opinion of the California Chief Justice. The dissent noted that this use of eminent domain was "not only novel but virtually without limit." It stated that no case previously has held that the operation of a sports franchise was a valid public use. The Chief Justice was disturbed that the majority had not examined "the ultimate consequence of their expansive decision."

IV. PUBLIC USE IN REDEVELOPMENT

A. Rationale for Redevelopment

Condemnation by eminent domain of blighted property for redevelopment is another line of cases that shows a dramatic expansion of the public use concept. In 1954, a California District Court of Appeals decision stated that not to view redevelopment as a legitimate public use "is to view present day conditions under myopic eyes of years now gone." With this rationale the court approved a redevelopment plan that included not only substandard dwellings, but also vacant land in the area. Additionally, the court reiterated the position that benefits to private persons did not

Without this arrangement the cost of the action would be prohibitive. For instance, a hundred million dollars valuation would be equal to two-thirds of Oakland's annual budget.

80. Oakland Raiders, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680.
81. Id.; see supra notes 63-64.
82. Oakland Raiders, 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.
84. Id.
85. Id. at 800, 266 P.2d at 122.
destroy the public purpose of slum clearance.  

In the landmark case of *Berman v. Parker*, the United States Supreme Court approved the use of eminent domain to carry out the intentions of the District of Columbia Redevelopment Act of 1945. The legislation declared that slums were injurious to public health, safety, morals, and welfare and that eradication of blighted areas was a proper public use. Further, Congress intended that private enterprise be selected over public agencies in carrying out the redevelopment plan. In *Berman*, the attack on the redevelopment act was two-fold. First, the owners contended that their structures within the blighted area were not substandard. The court set forth that it was permissible to condemn an entire area including structures that were not substandard. In order to achieve the goal of eliminating all causes of slum conditions, the area must be planned as a whole. Unless all structures including those that are not substandard are removed, the problem would only be addressed on a piecemeal basis stated the Court. Justice Douglas asserted this would serve only to mask the problem and the result would be only palliative.

Redevelopment not only benefitted society, but resulted in private gains for individuals or corporations who assisted in revitalization of the area. The United States Supreme Court ended all controversy on this point when it stated that slum clearance itself satisfied the public use requirement. As a result, government actively sought the participation of the private sector. Apparently, this was a recognition that the problem necessitated resources beyond that government alone could provide, and therefore industry could assist in the financing of the plan and continue as an employer. In a 1975 New York Court of Appeals case, the Otis Elevator Company became a sponsor under a federal clearance and redevelopment program which would ultimately pay part of the cost of acquiring the land. The particular land taken

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86. *Id.* at 801, 266 P.2d at 121.
89. *Berman*, at 32-33. The court asserted public use represents values that "are spiritual as well as physical, aesthetic as well as monetary." *Id.* The court was so horrified with slum conditions that it compared residents' status to that of cattle and declared that their lives were an insufferable burden. *Id.* Clearly, the court believed that government should strive to enrich the communities.
90. *Id.* at 30.
91. *Id.* at 34.
92. *Id.*
93. *Id.*
95. *Id.* at 481, 335 N.E.2d at 330, 373 N.Y.S.2d at 116. See Nichols, *Public Use,*
by eminent domain would then be used for the expansion of Otis's existing plan facilities. The court ruled that there was nothing inherently wrong in exercising eminent domain to serve not only the redevelopment of blighted areas, but also to entice Otis Elevator Company to remain in the community. The court went on to observe that the role of private industry was not only desirable, but also was a measure of the soundness and stability of the project.

Meeting the housing needs of the ghetto's poor was only a partial solution. The decayed economic conditions persisted and became a cancer that permeated and continued to destroy the entire neighborhood. As a result, a shift in emphasis occurred in redevelopment. If conditions were to improve, it would be necessary to eradicate and rebuild the blighted commercial area. In People ex rel City of Urban v. Paley, commercial redevelopment was proposed to remove present blight and economic deterioration, and to halt its proliferation. The Illinois Supreme Court held that economic development, which was the primary emphasis of the statute, satisfied the public use requirement. The court stated:

[T]oday's decision denotes that the application of the public-purpose doctrine to sanction urban redevelopment can no longer be restricted to areas where crime, vacancy, or physical decay produce undesirable living conditions or imperil public health. Stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public weal.

Thus, the scope of eminent domain reached to include poverty-stricken business districts as the perception of slum conditions expanded.

supra note 44, at 622. The article maintained that when the public use element was satisfied, it was immaterial that the private party paid the compensation or enjoyed "the lion's share of the use." Id. 96. Yonkers Community Development, 37 N.Y. 2d at 483, 335 N.E.2d at 331, 373 N.Y.S. 2d at 118. 97. Id. 98. Id. at 482, 335 N.E.2d at 331, 373 N.Y.S. 2d at 117-18. 99. 68 Ill. 2d 62, 368 N.E.2d 915 (1977). 100. Id. at 74, 368 N.E.2d at 920. 101. Id. This case was also cited as authority in a subsequent case, City of Chicago v. Gorham, 80 Ill. App. 3d 496, 499, 400 N.E.2d 42, 45 (App. Ct. 1980) for the proposition that slum clearance in a blighted commercial area, as well as a residential, satisfies the public use element and that commercial growth and removal of economic deterioration are valid public uses. The cases illustrate the trend toward the economic revitalization of communities since intent of the statute could be directed at the economic redevelopment of the commercial blighted area. The scope of permissible action was enlarged when it was acknowledged that economic decay and unemployment are as detrimental as slum housing. 102. Paley, 68 Ill. 2d at 74-75, 368 N.E.2d at 920-21.
B. Poletown Neighborhood Council v. City of Detroit

In *Poletown Neighborhood Council v. City of Detroit*¹⁰³ the Michigan Supreme Court significantly expanded the application of public use economic redevelopment. In the spring of 1980, General Motors Corporation (G.M.) informed the city of Detroit that they planned to close their inner city Cadillac and Fischer plants.¹⁰⁴ However, G.M. stated that if a suitable site could be found, a new assembly plant would be built in the city.¹⁰⁵ G.M. set out criteria for a new site and set a May, 1981 deadline for a transfer of land to G.M.¹⁰⁶ Both G.M. and the city knew that there was no existing location available which would meet the company’s demands unless the city acquired the land.¹⁰⁷ After the city government located an acceptable parcel, the Detroit Economic Development Corporation approved the project plan on September 30, 1980. By October 31, 1980, the city council had passed a resolution approving the project, which was signed by the mayor on November 3, 1980.¹⁰⁸ Within this selected site was the small and tightly knit community of Poletown. Eminent domain proceedings were undertaken.¹⁰⁹ The case went directly from the

¹⁰⁴. *Id.* at 636, 304 N.W.2d at 460 (Fitzgerald J., dissenting).
¹⁰⁵. *Id.*
¹⁰⁶. *Id.* at 652, 304 N.W.2d at 467 (Ryan J., dissenting).
¹⁰⁷. *Id.* at 651, 304 N.W.2d at 457; *See* Bixby, *Condemnation of Private Property in Order to Construct General Motors Plant is for “Public Use”: Poletown Neighborhood Council v. City of Detroit*, 13 URB. LAW. 694 (1981) [hereinafter cited as Bixby]; Bixby characterized the actions of city officials in their search for a site as full of “missionary zeal.” *Id.* Justice Ryan’s dissent described all the governmental actions as being “caught up in the frenzy of perceived economic crisis.” *Poletown*, 410 Mich. at 646, 304 N.W.2d at 465; *see also infra* note 134 and accompanying text.
¹⁰⁸. *Poletown*, 410 Mich. at 653, 304 N.W.2d at 468; *see* The Last Day of Poletown, *TIME*, March 30, 1981, at 29 [hereinafter cited as TIME]. The city and other officials attempted to justify the action by noting the city gave “generous benefits” to offset the resettlement costs. The benefits included allowances of up to $15,000 for homeowners and $4,000 for renters. The city purchased federally owned housing for resale to Poletown residents with a “bargain 9.5 percent interest.” The action was welcomed by some residents as an opportunity to leave an aging community, and at the same time, receive a satisfactory price for their homes. There was a distinct failure in all of this rationalization to recognize that the essential issue was not compensation, but whether the condemnation was for the private use of General Motors; *see infra* note 134, and accompanying text. *See also supra* note 107.
¹⁰⁹. *Poletown*, at 655, 304 N.W.2d at 469. The construction of the new General Motors plant would employ 6,150 people and was expected to generate additional jobs, business activity and taxes. However, 3,438 people would lose their homes and 1,176 structures would be destroyed. *Id.* at 645 & n. 15, 304 N.W.2d at 464 & n. 15; public cost of the project:

<table>
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<tr>
<th>Item</th>
<th>Cost</th>
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<tr>
<td>Acquisition</td>
<td>$62,000.00</td>
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<tr>
<td>Relocation</td>
<td>25,000.00</td>
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<tr>
<td>Demolition</td>
<td>35,000.00</td>
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<tr>
<td>Roads</td>
<td>23,500.00</td>
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<tr>
<td>Rail</td>
<td>12,000.00</td>
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lower court to the Michigan Supreme Court, bypassing the court of appeals. The Michigan Supreme Court issued its opinion on March 13, 1981 meeting the May 1st deadline imposed by G.M. It is important to note that the city of Detroit did not proceed under the urban renewal statutes. It did not attempt to justify the eminent domain proceedings on the basis that the area was either a commercial or residential slum as prior decisions mandated. Instead, the action took place under the Economic Development Corporations Act whose goal was to alleviate and prevent conditions of unemployment and to assist and retain local industries.

The per curiam opinion by the Michigan Supreme Court found the transfer of the private property to G.M. satisfied the public use element, because this action would add jobs and taxes to the economic base of the community. The court held the use of eminent domain was proper to alleviate unemployment and revitalize the community's economic base. The benefit G.M. acquired was viewed as incidental. Incidental is defined as a minor concomitant. With this definition in mind, it is difficult to concep-

Other Site
Preparation $38,700.00
Professional Services $3,500.00
TOTAL $199,700.00

General Motors would pay little more than $8,000,000. *Id.* at 656 & n. 7, 304 N.W.2d at 469 & n. 7; See, *Pushing the Boundaries of Eminent Domain*, BUSINESS WEEK, May 4, 1981, at 174 [hereinafter cited as BUSINESS WEEK]. Emmett S. Moten, director of the Community and Economic Development Department was quoted as saying "It comes down to 20 people holding up the city". *Id.* Moten reported that 1,154 property owners—ninety percent of those involved—had cooperated in the sale of their homes to the city. *Time*, supra note 108, at 29.

110. Bixby, *supra* note 107, at 695; *Poletown*, 410 Mich. at 628-38, 304 N.W.2d at 457-601. The trial court ruled in favor of the city of Detroit. The Poletown Neighborhood Council had challenged the action on two grounds. The first and central issue was whether the condemnation was for public use. The plaintiffs also asserted that the proposed project would violate the Michigan Environmental Protection Act because General Motors's new plant would have an adverse impact on the social and cultural environment of Poletown. Both the majority opinion and the Fitzgerald dissent rejected this argument. *Id.*


112. *Id.* at 640, 304 N.W.2d at 462, n.9.

113. *Id.* See BUSINESS WEEK, *supra* note 109, at 174. Professor Lance Liebman of Harvard Law School stated that the significance of the decision was that public use doctrine can be used in new areas: "But it extends the rationale of public use to jobs and economic development and means that municipal governments may gain more flexibility in dealing with purely economic problems." *Id.*


116. *Id.* at 629, 304 N.W.2d at 457.

117. *Id.* at 634, 304 N.W.2d at 459.

118. *Id.*

tualize how benefit to a company, whose primary motive is profit, can be termed merely incidental to the public gain. The court went on to state "If the public benefit was not so clear and significant we would hesitate to sanction approval of such a project." Yet, nowhere does the court articulate guidelines or criteria to assist cities or courts confronted by a similar situation. For instance, could a smaller company faced with a higher unemployment rate anticipate equally favorable treatment or, is it limited to the Fortune 500 companies? The court is completely silent as to the manner by which it arrived at its conclusion.

There were two separate dissents in *Poletown*. The dissent of Justice Fitzgerald noted that no precedent existed in Michigan for this decision. Redevelopment cases that involved resale to private parties were based on the public use requirement of slum clearance. In contrast to redevelopment public use, the dissent pointed out "it is only through the acquisition and use of the property by General Motors that the 'public purpose' of promoting employment can be achieved." Thus, there is nothing to distinguish this public benefit from that realized by any other private corporation. The potential abuse of eminent domain was clear, since the decision removed all limits upon the government's use of such enormous power.

Further, the lengthy and vigorous dissent by Justice Ryan announced that the law of eminent domain had been significantly altered and that it seriously endangered "the security of all private property ownership." Justice Ryan viewed property as a total concept in which ownership cannot be separated from the "property" itself. His dissent also stated that eminent domain was now "on a spectrum that admits of no principles and therefore no limits."

V. RAMIFICATIONS OF OAKLAND RAIDERS AND POLETOWN

These decisions dramatically affect the concept of public use, and as a result troubling questions are posed. Is public use so inclusive that any benefit to the public can satisfy this requirement? Can we permit economic problems to be solved by severely impacting the property rights of both individuals and businesses? Eminent domain has been a valuable tool in addressing

120. *Poletown*, 410 Mich. at 634, 304 N.W.2d at 459.
121. *Id.* at 641, 304 N.W.2d at 462 (Fitzgerald, J., dissenting).
122. *Id.* at 641, 304 N.W.2d at 463.
123. *Id.* at 644, 304 N.W.2d at 464.
124. *Id.* at 645, 304 N.W.2d at 464-65 (Ryan J., dissenting).
125. *Id.* at 680-81, 304 N.W.2d at 480.
126. When the Raiders left Oakland, the city was expected to lose at least thirty
social problems, but can it continue to be utilized without creating enormous problems of its own, or will we discover that the solution is far worse than the problem? Property does not exist in a vacuum, and it only has meaning when it is attached to people. Eminent domain affects ownership rights as well as the lives of the owners. It is this aspect that makes the potential for abuse so alarming.

Both cases have a great deal in common. The decisions were without precedent, and the result was the removal of limitations on the concept of public use. Likewise, the ramifications of the decisions are in some aspects quite similar. In *Oakland Raiders*, the court concluded it may be an appropriate governmental function to acquire and operate an ongoing and viable business if that business encompasses a public use value such as recreation. The eminent domain proceedings were triggered by the intention of the sports franchise to relocate. In this respect, *Oakland Raiders* is similar to *Poletown*. In *Poletown* the action likewise was prompted when a major industry announced it would relocate unless another site in the community could be found. The court sanctioned the use of eminent domain to transfer property that was not blighted to a private corporation in hopes of lessening unemployment.

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128. *Oakland Raiders*, 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683; *Poletown*, 410 Mich. at 644, 304 N.W.2d at 646.
129. *Oakland Raiders*, 32 Cal. 3d at 71, 646 P.2d at 837, 183 Cal. Rptr. at 675.
131. *Id.* at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.
132. *Id.* at 634, 304 N.W.2d at 459.
The dissents shared a common fear that the removal of limits from public use would open the floodgates to abuse. While a city’s motives may be noble and altruistic, it can be argued that these motives do not always result in the just exercise of municipal power. Justice Ryan felt compelled to write a dissent in Poletown as a warning to other jurisdictions who, under substantial economic pressures, could find themselves in a similar situation. He wrote:

Finally, it seems important to describe in detail for the bench and bar who may address a comparable issue on a similarly stormy day, how easily government, in all of its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means.

The G.M. plant had the full approval of labor, business, industry, government, finance, and to some extent the news media. The only opposition came from a small minority of Poletown residents whose lives were profoundly affected.

The concern over the apparent limitless public use was manifested in the dissents of both cases. The Oakland Raiders dissent brought out several questions raised in the case in an attempt to determine how far the public use concept had been expanded. The major question was whether the city had the power to condemn a viable, ongoing business, and resell it to another private party, in order to prevent that business from relocating? The potential for abuse of eminent domain to prevent a business from relocating was discussed by California Chief Justice Bird. She stated: “It strikes me as dangerous and heavyhanded for the government to take over a business, including all of its intangible assets, for the sole purpose of preventing its relocation.”

The Poletown dissent by Justice Fitzgerald foresaw a different set of problems with the elimination of the public use requirement of slum clearance. Since Poletown was not a blighted area, the dissent asserted that under the majority opinion no matter how

133. Id. at 646, 304 N.W.2d at 465.
134. Poletown, 410 Mich. at 646, 304 N.W.2d at 465.
135. Id. at 684, 304 N.W.2d at 482. Time magazine reported the support for Detroit’s action was widespread, and the new General Motors plant was considered essential for the health of Detroit. The Poletown situation was viewed as more than the condemnation of Poletown. The proposed General Motors factory would offer “new hope to a decaying city that has hemorrhaged hundreds of thousands of jobs over the past decade . . . .” The article also took notice of the large $135 million budget deficit that Detroit faced. The Detroit Free Press termed the project essential to rebuild the city’s economy. Time, supra note 108, at 29.
137. Id. at 78, 646 P.2d at 846, 183 Cal. Rptr. at 684.
productive or valuable a homeowner’s or businessman’s land is, it is not immune from eminent domain. It could be condemned if another private interest would put the land to a higher economic use. Fitzgerald went even further to state that there is no limit to the use of condemnation to aid a private business after the Poletown decision. In light of the problems illuminated by Justice Fitzgerald, it is imperative that there be a meaningful restraint on the exercise of eminent domain.

The all inclusive public use problem was considered by the California Supreme Court. In City and County of San Francisco v. Ross, the court prohibited the use of eminent domain to condemn land for the purpose of building a parking facility which would provide the public with reasonable parking rates. The court noted that if public use were to be given such a broad meaning, all off-street parking facilities would satisfy public use, regardless of ownership or primary purpose of operation. Therefore, the present question is whether public use has become so boundless that the distinction between public need and public use no longer exists. The answer may lie in one of the dissents in Poletown. Michigan Supreme Court Justice Ryan felt the majority equated public use to the existence of a public benefit. He stated “although public benefit is a necessary condition, it is itself an insufficient condition for the existence of a public use.” Further, he felt the impact of the majority’s holding was to replace public use with public benefit as the test in eminent domain proceedings, and therefore take away all limits from the use of eminent domain.

The concept that property is more than just the land itself, but also includes ownership, was reflected in the dissent of both cases. The majority opinions are silent as to the effect on the individuals whose property is being taken. The Oakland Raiders dissent noted that this action affected the rights of both the owners and the players of the team. The employment contracts of the Raiders players would be condemned under the eminent domain action, and the court inquired as to whether the employees’ rights would be violated by the nonconsensual taking of their employ-

139. Id.
140. 44 Cal. 2d 52, 279 P.2d 529 (1955).
141. Id. at 59, 279 P.2d at 533.
142. Poletown, 410 Mich. at 680, 304 N.W.2d at 480 (Ryan, J., dissenting).
143. Id. at 680-81, 304 N.W.2d at 480.
ment contracts. The Poletown dissenters concerned themselves with the decision's effect upon the lives and rights of those whose homes were condemned. Justice Fitzgerald noted that, “Condemnation places the burden of aiding industry on the few, who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm for the promotion of industry.”

Undoubtedly, the vast resources which the government has at its disposal can be intimidating to the individuals whose land is being taken. Furthermore, for those who do contest the action, the judicial system is very expensive.

Justice Ryan examined the extent of the burden placed on Poletown’s citizens. These people were first and second generation Americans whose home was their most valuable asset, and whose community was a “symbol of the security and quality of their lives.” Payment for their homes could never adequately compensate them for their intangible losses. Truly, Poletown’s residents have paid an inordinate price for jobs in the community.

The situation in Poletown presented an additional and unique set of concerns. Once the transfer of the land occurred, public control ceased. The public had no right to use the property or direct its management. It was the contention of Ryan’s dissent that the majority sanctioned the use of eminent domain without public accountability. G.M. is accountable to its stockholders, not the public. The city of Detroit maintained neither control over the operation, nor an interest in the land. Instead, the city must rely on the best efforts of G.M. One should seriously question the judgment of Detroit’s public officials who sold a two-hundred million dollar plot of land to G.M. for eight-million dollars, and failed to retain either interest or control. With the absence of any public control on G.M.’s use of the land, it could be argued that the utilization of the land is for the private use of G.M.

145. Id.
146. Poletown, 410 Mich. at 641, 304 N.W.2d at 463 (Fitzgerald, J., dissenting).
147. Id. at 658, 304 N.W.2d at 470 (Ryan, J., dissenting).
148. See supra note 109.
149. Id. at 679, 304 N.W.2d at 480.
150. Id. at 678-80, 304 N.W.2d at 479-80; see also Egan v. City & County of San Francisco, 165 Cal. 576, 133 P. 294 (1913). The city was to have title, but no control in the management of the opera house. In rejecting the project, the court said, “But the beneficial attributes of ownership, over and above the naked legal title, are taken from the city and county, and are placed in the hands of private persons.” Id. at 581, 133 P. at 295.
151. In direct contrast, the California Supreme Court has held that resale of the land taken will not defeat the public purpose so long as the property is “subject to restrictions protecting the public use.” City and County of San Francisco v. Ross, 44 Cal. 2d 52, 58, 279 P.2d 529, 532 (1955).
Perhaps one of the most disturbing ramifications is in whose hands the power of eminent domain rests. Where a corporation is as large and influential as G.M. "the power of eminent domain, for all practical purposes, is in the hands of the private corporation." The role of a government is reduced to that of errand boy when decisions are dictated by a private industry, and yet the use of eminent domain is reserved exclusively for the sovereign. Justice Ryan reflected this dilemma when he stated: "When individual citizens are forced to suffer great social dislocation to permit private corporations to construct plants where they deem it most profitable, one is left to wonder who the sovereign is."

In the aftermath of Oakland Raiders and Poletown, we can only conjecture about the ultimate effect. While the full ramifications may not be known for years, two problems are readily apparent. Equating mere public benefit with public use has effectively destroyed public use as a restraint on eminent domain. Nevertheless, there remains one check on governmental excesses, and that is accountability. Yet, accountability is not present in all situations. G.M. dictated terms, and an entire state struggled frantically to meet G.M.'s deadline. If the exercise of eminent domain is to be insulated from abuse, the real decisions and power must be in hands of elected officials and the courts.

VI. ALTERNATIVE PROPOSALS

It is the contention of this Note that public use has expanded to such a degree that it has become a meaningless restraint upon the application of eminent domain. The public use standard is composed more of form than substance, because public use is so broad it has become illusory. The procedural safeguards of due process become, in effect, an empty process since the standard of public use admits no principles or limits by which to judge the action.

Thus, without limitations on public use, abuse of eminent domain is likely to occur, and is a serious cause for concern. Certainly,
it is not desirable to return to the era of narrow public use. Therefore, the dilemma which now exists is how to continue enjoying the benefits, while at the same time guarding against abuse.

The legislative definition of public use is "well-nigh conclusive" since the legislature is the "main guardian of the public needs to be served by social legislation . . . ." Thus, the role of the judiciary is restricted to the review of constitutional limitations placed upon eminent domain, "public use", and "just compensation." As a result, courts have been reluctant to overturn a legislative determination of public use. Both the Poletown and Oakland Raiders courts deferred to the judgment of the governing bodies.

Seemingly, these broad statutes authorizing the use of eminent domain vest in the city a blank check to deal with real or perceived problems, and the only restraint is the city's conception of what best serves the public needs. The hesitation by the courts to overturn the determination of these cities reflects an unwillingness to make the hard decisions that are necessary to set meaningful limits on the use of eminent domain. The courts deferred to the judgment of the city's legislative body, while at the same time the legislature relies on the courts to curb or stop abuses. The responsibility is passed back and forth with neither body taking responsibility for the actions taken.

In view of the hesitation of the courts to invalidate the new ap-

157. Berman v. Parker, 348 U.S. 26, 32 (1954); see also NICHOLS, Public Use, supra note 44. It is acknowledged that the definition of public use is the prerogative of the legislature to decide, but in the final analysis the courts must decide if the intended use will result in a taking for private or public use. Berman, 348 U.S. at 32. In Poletown the court adopted the reasoning of Berman that the decision of the legislature is well-nigh conclusive, and the role of the judiciary is to decide if the exercise of governmental power is for public use. The legislature determines if the governmental action meets a public need and serves the public use. The judiciary may act only if action is "manifestly arbitrary and incorrect." Poletown, 410 Mich. at 632-33, 304 N.W.2d at 458-59. See also Oakland Raiders, 32 Cal. 3d at 79, 646 P.2d at 846, 183 Cal. Rptr. at 685 (A taking decision is reversible by the court only if the legislature acted in "an arbitrary or capricious manner, or the taking reflects a gross abuse of discretion").

158. The limitations placed upon a taking are justiciable issues. All other questions about the taking are for legislative determination. People ex rel. Department of Public Works v. Laggiss, 223 Cal. App. 2d. 23, 33-34, 35 Cal. Rptr. 554, 560-61 (Dist. Ct. App. 1963). In Rindge v. Los Angeles, 262 U.S. 700 (1923) the Court held that necessity, the reason for the condemnation resolutions, is a legislative, not judicial question. Id. at 709. See also People v. Chevalier, 52 Cal. 2d 299, 304-05, 340 P.2d 598, 601 (1959). The question of public use and necessity have often been confused when the property owner asserted that the condemning body has taken in excess of what is needed for public use; an example of this confusion is illustrated in Laggiss. The court upheld the taking of land to be used for a highway. However, the necessity to condemn land for a highway is a legislative determination which can not be overturned by the courts. Laggiss, 223 Cal. App. 2d at 33-38, 35 Cal. Rptr. at 562-63.

159. See supra note 134 and accompanying text.
lications of public use, the remedy must come from the legislatures. There are several possible answers. The legislature could once again list the approved uses of eminent domain. But governmental problems today are complex and defy simple solutions, therefore, the needs and demands of modern government require standards of legislative power that do not have precise guidelines. The revision of California’s eminent domain laws reflects the need for cities to have broad discretion in identifying and implementing public uses. If rigid guidelines were enacted, the ability of the legislature to deal with changing social problems would be hampered.

Another solution would be to shift the burden of proof. Presently, there is a presumption which places the burden of proof on the party whose land is being taken to show the proposed public use is invalid. Presumptions affecting the burden of proof are created to implement public policy. The policy underlying the

160. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 79, 646 P.2d 835, 846, 183 Cal. Rptr. 673, 685 (1982) (Bird, C.J., concurring and dissenting). The Chief Justice stated relief can only be granted by the courts when the action was “completely irrational.” Therefore, restriction of the use of eminent domain must come from limitations which the legislature imposes. Justice Richardson’s majority opinion relied upon the absence of constitutional or statutory restraints on “ takings.” The court reasoned that since there was a statutory prohibition on the condemnation of an existing golf course (CAL. GOVT. CODE § 37353(c)), by implication an existing business could be acquired by eminent domain in the absence of an express ban. Oakland Raiders at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681.

161. See supra notes 37-44; see also supra note 69 and accompanying text. In Barry and Barry, Inc. v. Department of Motor Vehicles, 81 Wash. 2d 155, 500 P.2d 540 (1972) the court upheld a broad delegation of power to an administrative agency citing the need for flexibility in modern government. Strictly construed standards, the court maintained, would be logically unsound and legally meaningless because the needs and demands of government today must be able to respond to new problems.

162. CAL. CIV. PROC. CODE § 1240.030 (Deering 1981). The broad discretion is reflected in the statute. The Legislative Committee Comment of the statute defined public use as all aspects of the public good including but not limited to “social, economic, environmental and aesthetic considerations”. In Oakland Raiders the court also took notice of the broad discretion of the statutory delegation of power. The court cited CAL. GOVT. CODE § 37350.0 which states that the city may “acquire by eminent domain any property to carry out any of its powers or functions.” Oakland Raiders, 32 Cal. 3d at 72, 646, P.2d at 842, 183 Cal. Rptr. at 681.

163. Oakland Raiders, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680; see supra note 81 and accompanying text.

164. People ex rel. Department of Public Works v. Laggiss, 223 Cal. App. 2d 23, 36-37, 35 Cal. Rptr. 554, 562-63 (Dist. Ct. App. 1963). The property owner must on his own, raise the issue of whether the taking is for public use. If the condemnee fails to challenge the public use determination of the legislature, the condemnation resolution becomes conclusive that the property is appropriated for public use. If, however, the party does contest the action, the legislative determination becomes prima facie evidence that the taking is for public use, and the condemnee has the burden of proof. Therefore, the property owner must show that there has been an abuse of discretion by a preponderance of the evidence; see generally CAL. EVID. CODE § 602 (Deering 1966) (If a fact is prima facie evidence of another fact, for example, valid public use, a rebuttable presumption is created); CAL. EVID. CODE § 500 (Deering 1966). (The
presumption, in this instance valid public use, is determined to be so beneficial that it requires a finding of the presumed fact unless there is evidence to the contrary. It is conceded that when the public use concept was in the "narrow" or early "broad" stage, the presumption of validity aided in the effective implementation of social policy that otherwise would have been impossible.

A comparable situation existed in California with zoning ordinances that limited and impacted the supply of housing. Zoning policies which once served to build healthy and safe communities were now being used to restrict development and many felt this action created new housing, social, and economic problems. The California legislature in 1980 shifted the burden of proof on building restrictions to the city to establish that the ordinance was necessary for the health, safety, and welfare of its citizens. Prior to the enactment, case law had a presumption in favor of validity. The legislature felt the presumption in favor of the ordinance was no longer warranted. Restrictive building ordinances severely limited the supply of housing, exacerbated housing market conditions, and limited access to affordable housing.

Comment by the Law Revision Commission states that the party having the burden of proof in a rebuttable presumption situation must present sufficient evidence to convince the trier of fact by a preponderance of the evidence. In situations where it is desirable to require a substantially greater degree of certainty, the proponent may be required to meet a standard of clear and convincing evidence. One factor to be considered in determining if the burden of proof should be altered is public policy.

165. See generally CAL. EVID. CODE § 605 (Deering 1966) (The comment of the Law Revision Commission states that presumptions affecting the burden of proof are established in order to influence or carry out public policy. These policy considerations are distinct or in addition to the policy surrounding the actual litigation of the dispute).

166. See supra notes 47, 84 and 88 and accompanying text.

167. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Zoning ordinances were upheld that would minimize dangers of fire or collapse, restrict overcrowding, and exclude offensive industries from residential areas.

168. See, e.g., Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (the court approved the "Petaluma Plan" which would, if similar measures were adopted by other cities in the area, result in twenty-five percent (105,000 units) of the needed housing in the region for 1970-80); Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (zoning ordinance which required a minimum lot size of one acre was upheld. The practical effect of this restriction was to prevent poor people from living in Los Altos Hills, as well as limiting the population).


170. 1980 Cal. Stat. Ch. 1143, Art. 10.6, Section 65580; 1980 Summary Digest at 365. Assembly Bill 3252 switched the burden of proof to the city or county. Prior to Assembly Bill 3252, the party who challenged the ordinance was required to show that the action lacked a real and substantial relationship to the public welfare.

171. CAL. EVID. CODE § 699.5 (Deering 1966 & Supp. 1982). The legislative comment indicated that an adequate housing supply was essential for the health, safety and welfare of all Californians.
The unrestrained public use found in the *Poletown* and *Oakland Raiders* decisions necessitates a reexamination of the policy considerations behind the presumption. It can be argued that the presumption in favor of validity is no longer warranted in light of these decisions. The use of eminent domain as a tool to implement policy is well-established, and its application is no longer dependent on the presumption of validity. Some would contend that expansive public use now creates, not solves, social and economic problems. 172 Finally, it imposes an impossible burden of proof upon the property owner since there are no limits on public use. The focus must now change. 173 Certainly, a basic civil right such as property, deserves the protection of both the courts and the legislature. 174

The shift in the burden of proof in its condemnation resolution would require the legislative body to show that the proposed usage is valid and not an abuse of discretion. 175 The public policy considerations underlying the shift would be to protect against the indiscriminate use of eminent domain, to retain public accountability, and to protect property rights. Most important, the shift would protect the rights and lives of the property owners. 176 Frustration and despair resulting from a sense of powerlessness against government action cannot help but create social and economic problems of its own. Yet, the shift in the burden of proof would maintain a degree of flexibility, and at the same time guard against the automatic approval of new and novel public uses. The shift in the burden of proof would provide an equitable balance between public needs and private rights.

VII. CONCLUSION

The majority opinions in *Poletown* and *Oakland Raiders* have

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172. See supra notes 82, 123 and 125 and accompanying text.

173. Id.

174. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). The court held that property rights were basic civil rights, and have been regarded so for a long time. The court cited Locke, Adams, Blackstone, and Congress to show the longstanding tradition of property rights as basic civil rights.

175. CAL. EVID. CODE § 606 (Deering 1966). The comment by the Assembly committee would indicate that the state or municipal legislative body must be able to demonstrate that the project was for public, not private use, and valid. In the case of widely accepted public use, redevelopment of blighted areas, and construction and operation of a stadium, the proponent would have substantial support against a presumption of invalid public use. The real effect would occur in those cases that are without precedent as in *Poletown* and *Oakland Raiders*. The advantage of the shift in the burden would be to prevent the automatic approval by the courts of new public uses; see supra note 65. If the approach of California State Senator Campbell, which would except condemnation of sports franchise, is adopted, the problem could only be addressed on a piecemeal basis and would be reactive to perceived abuses.

176. See supra notes 126-54 and accompanying text.
been criticized for the apparent removal of all limitations on public use. The dissents in those cases maintain these new and novel applications of public use are without precedent, and are likely to result in the abuse of eminent domain. The failure by either the California Supreme Court or the Michigan Supreme Court to articulate meaningful guidelines concerning public use justifies this fear. The constitutional limitation of public use has been defined so broadly that it is no longer a restraint. Consequently, property rights are endangered. Yet, property does not have rights, people do. The real danger, therefore, lies in the threat to individual liberties. Unless legislative action is forthcoming, there will be new Poletown residents and new Oakland Raiders businesses.

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