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THE USE OF EMINENT DOMAIN AND CONTRACTUALLY IMPLIED PROPERTY RIGHTS TO AFFECT BUSINESS AND PLANT CLOSINGS

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INTRODUCTION

In recent years numerous writers have charted the evolution of the American economy as businesses have divested assets and completely closed facilities.1 The results of these decisions have been discussed at length elsewhere and are known to include such symptoms as chronic unemployment, reduced incomes, loss of savings and other property, and physical and mental health problems such as alcoholism, physical abuse, divorce and even suicide.2

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2. See, e.g., B. HARRISON & B. BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 63–64 (1988); see also Comment, supra note 1, at 97–98 n.16 (citing B. BLUESTONE & B. HARRISON, supra note 1, at 51–65 (corporate shutdowns causing blue-collar workers to lose their middle-class lifestyles); Kasl, Gore & Cobb, The Experience of Losing a Job: Reported Changes in Health,
A business decision to close a facility has a tremendous impact on both individuals and communities. Sometimes this impact will not remain localized but be felt across a large geographic area if the employer is big enough and the area is sparsely populated. A case in point is the gradual demise of the taconite mining industry now occurring across the "Iron Range" of north-central Minnesota. Northern Minnesota is a sparsely populated area that, until recent years, enjoyed some measure of economic security. This security was provided, in large part, by the large mining companies operating in the area. These companies mined taconite, an element used in the production of steel. For many years the taconite mines of northern Minnesota were primary suppliers to the steel mills located in Chicago, Illinois and Gary, Indiana. These mills in turn supplied steel to Detroit for the domestic auto industry. This web of economic interdependence and prosperity has nearly come to an end in northern Minnesota with the substitution of cheaper, imported taconite from Brazil. The employers have almost all departed now and the area has been left in a state of environmental and economic chaos. This chaos has been well documented and includes widespread social problems such as chronic unemployment, an increase in the demand for public services occurring while tax bases are shrinking, an out-migration of population, a decrease in real estate values, a loss of secondary businesses, and a general blow to community pride.  

Symptoms and Illness Behavior, 37 PSYCHOSOMATIC MED. 106, 118–21 (1975) (report on job loss causing stress, depression and various physical symptoms)).

3. Taconite is "a flint like rock containing granules of iron oxide; specif: this rock when high enough in iron content to become commercially valuable as an ore." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2326 (1976).

4. The "Range" is actually a line of low-lying hills beginning around Grand Rapids, Minnesota and extending in a north-easterly direction to approximately Babbitt, Minnesota.

When faced with the prospect of an employer leaving, a community may feel entirely unable to affect that business decision. Recently, several options have been suggested that can be used to challenge business decisions that cause plants to be closed. One option typically chosen by unions is to attempt to reach a negotiated settlement with the employer on the closing. The usefulness of this option is limited, however, because it is generally available only in unionized settings. Even in those settings, negotiations producing an actual agreement are few and far between.

Another method to affect a plant closing decision is to adopt legislation regulating the closing process. Typically this legislation requires advance notification for either a major layoff or a complete closing. The goal of this legislation is to cushion

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6. While it is not the purpose of this article to pursue this option in detail, the option is most often exercised pursuant to the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) & (d) (1982). Section 158(d) requires "the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . ." 29 U.S.C. § 158(d). This language has been interpreted to require employers to bargain with employees about the "effects" of a shutdown, such as severance pay, pensions and benefits. It does not, however, give employees a specific remedy to prevent the shutdown. Memorandum of the Institute for Public Representation, Power of New Bedford, Massachusetts, to Acquire the Morse Cutting Tools Plant Through Eminent Domain 2 (May 18, 1984) (prepared by A. Buchbaum, A. Haft & D. Parker). See also First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981) (bargaining over management decision affecting continued availability of employment is required only if benefit for labor relations outweigh burden placed on the conduct of the business); Textile Workers of Am. v. Darlington Mfg. Co., 380 U.S. 263, 273-74 (1965) (employer closing business due to vindictiveness toward the union is not unfair labor practice).

7. See Comment, Eminent Domain: The Ability of a Community to Retain an Industry in the Face of an Attempted Shut Down or Relocation, 12 OHIO N.U.L. REV. 231, 232 n.5 (1985), which states that "less than a quarter of the American workforce is unionized, and of those, only 13 percent of 400 sampled contracts placed any limitation on closings or relocations." (citing Rhine, Business Closings and Their Effects on Employees—the Need for New Remedies, 35 LAB. L.J. 268, 269 (1984)). In the same footnote, the author also cites the 1 NATIONAL LAWYERS GUILD, EMPLOYEE AND UNION MEMBER GUIDE TO LABOR LAW 4.01 n.2 (1984) as a source of cases where contract provisions barring runaway shops can be found.

8. See, e.g., 29 U.S.C.A. §§ 2101-2109 (West Supp. 1990) (the recently passed federal plant closing notification law); MASS. GEN. LAWS ANN. ch. 149, § 182 (West Supp. 1989) (company closing plant must give the "longest practicable advance notice" to employees); MASS. GEN. LAWS ANN. ch. 151A, § 71B (West Supp. 1989) (notice given by company closing plant to director of employment security who, in turn, notifies the union of the closing); WIS. STAT. ANN. § 109.07 (West 1988) (advance notice required for mergers, liquidations, dispositions, relocations or cessation of operations affecting employees); see also PLANT CLOSING LEGISLATION (Key Issues No. 385).
the disruption individuals and communities experience when jobs are lost. Unfortunately, these statutes usually require only a few months notice and the payment of limited economic benefits, if any, to affected workers. Furthermore, they do not directly address the impact of the closing on the health of the whole community.

While these options may cushion the impact felt by employees, they cannot actually prevent a plant closing or compensate a community for the socio-economic losses that flow from these types of business decisions. However, two additional options are available to accomplish these goals. First, the community can oppose a plant closing by claiming the infringement of a contractually implied property right. The second option involves using eminent domain power to accomplish the same goal. Both options would be exercised by the community itself, as a government, or by some other governmental entity.

This article offers communities two innovative options for affecting what otherwise is a unilateral business decision to remove assets from a community. Four case studies are


9. While the more popular or frequently suggested name for this right is a "community property right," we have adopted our language to avoid confusion with other legal terms. Also, our language is a more accurate description of the legal cause of action that a party can bring on this issue.

10. At this juncture it is important to note a fundamental tension between the government sponsored remedies that we recommend a community may utilize to affect business decisions and what many view to be a business' fundamental right regarding disposition of its assets. Many view a business' right to deploy its assets where and when it wants to, to maximize shareholder profit and without government supervision, as a fundamental tenet of American business law. Others argue that, among other things, due to the monolithic size of many American businesses and the concomitant power they wield, businesses should and must be subject to social values in addition to maximizing shareholder value, especially when business decisions are particularly disruptive to an economy or community.

It is not the purpose of this article to explore this related but distinct issue. Rather, we proceed upon the basis that in some circumstances governments may affect otherwise unilateral business decisions.

For authorities advocating the "unfettered" perspective, see generally M. Friedman, Capitalism and Freedom 133–34 (1982); Fischel, The Corporate Governance Movement, 35 Vand. L. Rev. 1259, 1291 (1982) (arguing that no evidence exists to support the claims of corporate regulation advocates); Werner, Corporation Law in Search of Its Future, 81 Colum. L. Rev. 1611, 1614 (1981) (discussing history of internal governance structure of big corporations). For authorities advocating the broader "social responsibility" perspective, see generally Weiss, Social Regulation of Business Activity: Re-
presented that explore and assess the legal and policy feasibility of using either option as a tool to influence business decisions. Finally, Minnesota law will be examined to determine the feasibility of the options under current state law.

THE EXPANSIVE MODERN USE OF EMINENT DOMAIN

Eminent domain is the authority of the government to take private property for a public use as long as just compensation is paid to the owner for the taking. This authority is available to the federal as well as each state government by virtue of their respective constitutions. Historically the "public use" predicate has been construed narrowly by the judiciary. Typically, only roads, sewer systems, and other public utility projects and public institutions such as schools, prisons, and state hospitals have met the requirement. In recent years, however, the definition of a public use has expanded so that practically any acquisition meets the test if it serves a public...


12. U.S. Const. amend. V. This amendment is made applicable to the states as well through "the fourteenth amendment to the United States Constitution [which] throws the protection of the federal courts over an individual whose property is sought to be taken by a state without compensation." 3 NICHOLS' THE LAW OF EMINENT DOMAIN § 8.1[2] (J. Sackman & P. Rohan 3rd ed. 1989).

13. See, e.g., ALA. CONST. art. I, § 23; MASS. CONST. Pt. 1, art. 10; MINN. CONST. art. 1., § 13; WASH. CONST. art. 1., § 16. A state's "eminent domain power may be exercised by the legislature directly or delegated in the public interest to corporate bodies, including individual enterprises and municipalities." Comment, supra note 7, at 235 & n.20 (citing 1A NICHOLS' THE LAW OF EMINENT DOMAIN § 3.12 (J. Sackman & P. Rohan 1979)).

14. See generally Burnquist v. Cook, 220 Minn. 48, 73, 19 N.W.2d 394, 406 (1945) (eminent domain applied to easement taken for highway); State v. Severson, 194 Minn. 644, 648, 261 N.W. 469, 471 (1935) (taking of private property allowed for many uses including streets, parks, highways, and drainage); Knapp v. State, 125 Minn. 194, 199, 145 N.W. 967, 969 (1914) (taking of right of way for railway).
purpose, confers a benefit on the public, or furthers the state's police powers.

In 1954, the United States Supreme Court, in *Berman v. Parker*, unanimously held constitutional Washington, D.C.'s use of eminent domain, pursuant to statutory authority, for the public use of acquiring commercial property for an urban renewal project. While hardly newsworthy today, the *Berman* decision was quite remarkable when announced. The expan-

15. For an in-depth discussion of these modern definitions, see infra the cases cited at footnotes 17, 21-23, and accompanying text. See also Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978), which states, in part, that:

The precise meaning of the "public use" requirement has varied over time and according to the type of taking involved. The conventional statement of the historical case development holds that there are two basic opposing views of the meaning of "public use": (1) that the term means advantage or benefit to the public (the so-called broad view); and (2) that it means actual use or right to use of the condemned property by the public (the so-called narrow view). The conventional wisdom goes on to say that right after the Revolution the broad view dominated the courts; that later the narrow view came into fashion; and that later still and to date, the broad—and according to many—the enlightened view has returned to favor. Actually, the history is somewhat more complicated. *Id.* at 205.

While the narrow view of public use held considerable sway, especially in the latter half of the nineteenth century, it never completely took over the field. The two doctrines competed, leaving the commentators in hopeless confusion as to what the "true rule" (for in those days they believed in such things) was. And no wonder the difficulty, for each view as applied to particular cases obviously led to at least what were then regarded as unacceptable results. Thus the narrow use by the public rule would have allowed condemnation for the purpose of erecting a privately owned theater or hotel, something which no one then (or perhaps even now) would seriously advocate. And the broad public advantage test would have allowed a toy manufacturer who provided substantial employment in the vicinity to condemn land for the construction of a plant, likewise then unthinkable. *Id.* at 209.

It has been said that the law has finally eliminated the public use requirement as an effective barrier to takings. This is most certainly a vast overstatement of what the law is. Courts still have a strong desire to act as a check on takings that they regard as "going too far." On the surface of things what they regard as "going too far" is answered by reference to one of the two tests for public use: use by the public or advantage to the public. But it is submitted that two other issues (sometimes perhaps subconsciously) govern their decisions upon the propriety of a nongovernmental taking to a much greater degree than is generally realized.

First, does the condemner's need for the taking outweigh the harm to be visited upon the condemnee? ... Second, is it necessary that eminent domain be used to carry out the project or could a purchase in the open market practicably be made? *Id.* at 223–24.

16. For a somewhat dated (but interesting nonetheless) discussion exploring the relationship between the state's eminent domain and police powers, see E. FREUND, POLICE POWER § 511 (1904).

17. 348 U.S. 26, 36 (1954). The specific statute under review was the District of Columbia Redevelopment Act of 1945. In reviewing the constitutionality of the eminent domain provisions of this Act, the Court observed that:
sion of the public use definition came as the Court noted that "[t]he concept of public welfare is broad and inclusive . . . . [T]he power of eminent domain is merely the means to the end."\textsuperscript{18} Notably, the Court also found that the means used to exercise eminent domain could include utilizing an entity of private enterprise or the authorization to take private property for its resale or lease to the same or other parties.\textsuperscript{19} In this regard, and especially important here, the Court said that:

[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.\textsuperscript{20}

By § 2 of the Act, Congress made a "legislative determination" that "owing to technological and sociological changes, obsolete lay-out and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose."

Section 2 goes on to declare that acquisition of property is necessary to eliminate these housing conditions.

Congress further finds in § 2 that these ends cannot be attained "by the ordinary operations of private enterprise alone without public participation"; that "the sound replanning and redevelopment of an obsolescent or obsolescing portion" of the District "cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs"; and that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use."

Section 4 creates the District of Columbia Redevelopment Land Agency (hereinafter called the Agency), composed of five members, which is granted power by § 5 (a) to acquire and assemble, by eminent domain and otherwise, real property for "the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighted factors or causes of blight."

\textit{Id.} at 28–29.
\textsuperscript{18} \textit{Id.} at 33 (citation omitted).
\textsuperscript{19} \textit{Id.} at 34.
\textsuperscript{20} \textit{Id.} at 33–34 (citations omitted). \textit{Berman} is a case of importance because "redevelopment statutes," such as the one at issue there, have been a source of the eminent domain power that can logically be used to keep a plant in town. For discussions on the application of redevelopment statutes, see \textit{infra} notes 25–36, 110–14, 170–71, and 174–80 and accompanying text. However, at least one judge has recently argued that these widely-found redevelopment statutes cannot properly form
While *Berman* illustrates the use of eminent domain to benefit society as a whole, other recent decisions approve its use to benefit narrower interests in the hope that they will eventually serve the broader, public interest. This concept is important because it supports using eminent domain to prevent a business closing even though it would appear to only benefit employees. In fact, given the ripple effect of unemployment in the economy, preventing closings often benefits the entire public.

With *Berman* as a base, numerous court decisions have expanded upon the public use concept. Cases illustrating this include the decisions in *Poletown Neighborhood Council v. City of Detroit*, 21 *City of Oakland v. Oakland Raiders*, 22 and *Hawaii Housing Authority v. Midkiff*. 23 In *Poletown* the court held constitutional the City of Detroit’s proposed use of its eminent domain authority to condemn and remove a city neighborhood and to relocate its residents in order to accommodate the desire of General Motors Corporation to build a new assembly plant. 24 The eminent domain authority was exercised pursuant to the Michigan Economic Development Corporations Act, 25 a stat-


22. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
24. The specifics of this project were enormous. “City officials had to acquire nearly seventeen hundred pieces of property, relocate more than thirty-five hundred residents, demolish fifteen hundred residential and commercial structures, and complete the site preparation in less than eighteen months.” B. Jones & L. Bachelor, *The Sustaining Hand* 84 (1986). To accomplish this the city would invest over $250 million of public monies. General Motors investment in the project amounted to $600 million. The project was the “largest urban land-assemblage and clearance program in United States history.” *Id.* at 74.
25. Mich. Comp. Laws Ann. §§ 125.1601–36 (West 1986 & Supp. 1989). Also employed in the Poletown eminent domain action was an act passed by the Michigan Legislature in April, 1980. This act, also commonly known as the “quick take law,” was used in conjunction with the Economic Development Corporations Act in the case to ensure the speedy condemnation of property and removal of the property owners. The quick take law:

- allowed municipalities to acquire title to property before reaching agreement with individual owners on a purchase price. The Act responded to experiences in urban-renewal and other redevelopment projects in which negotiations over the price of a few parcels of land had delayed and often sabotaged the implementation of a project. Previously, owners could block governmental action by obtaining an injunction in circuit court; if the parties could not agree on a purchase price, the court would impose one.
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ute similar to that at issue in *Berman*. The Act declares that:

There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local industrial and commercial enterprises, including employee-owned corporations, to strengthen and revitalize the economy of this state and its municipalities . . . . Therefore, the powers granted in this act constitute the performance of essential public purposes and functions for this state and its municipalities.26

With the City of Detroit's stated objective and this statute before it, the issue for the court was whether the proposed use of eminent domain was an unconstitutional taking of private property for private use. The court held it was not.

The court began its analysis of the issue by signaling that this case was not going to be decided by a rigid application of the public use or purpose requirement. Rather, an expansive definition was to be followed, for this was a case of great social and economic importance for both the City of Detroit and the State of Michigan.27 Stating that "[t]his case raises a question of paramount importance to the future welfare of this state and its residents,"28 the court rephrased the purely legal issue by asking:

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26. MICH. COMP. LAWS ANN. § 125.1602.
27. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 620-21, 304 N.W.2d 455, 457 (1981). The City argued its case from beginning to end emphasizing the great social and economic issues at stake. Specifically, [t]o justify the need for the project, the city provided information on the declining job base of the cities of Detroit and Hamtramck and the unemployment rates in those cities, layoffs of city employees, cutbacks in city services, lowering of ratings of city bonds, reductions in the tax base of both cities, and increases in the number of residents receiving welfare. Construction of the GM plant . . . was essential "to address the city's emergency financial condition and the economic state of emergency that has been declared by the Governor of Michigan."

28. 410 Mich. at 629, 304 N.W.2d at 457.
Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act, to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?\textsuperscript{29}

The court found that what constitutes a public use varies with changing societal conditions and the touchstone of public use analysis is whether there is a public right to the benefits of the use.\textsuperscript{30} Having concluded that in Michigan the approach to satisfying the public use requirement is flexible and changes with society’s changing needs, the court then addressed the plaintiffs’ claims.

The plaintiffs claimed that using the power of eminent domain to condemn one person’s private property to convey it to another private person in order to bolster the economy was unconstitutional. The Neighborhood Council argued that General Motors was a private person and was primary beneficiary of the condemnation. Thus, the use of eminent domain in this instance represented a conveyance of one’s private property to another and that any public benefit was incidental.\textsuperscript{31}

On the other hand, the City argued that the controlling public purpose in taking the land was to create a manufacturing facility which would ultimately alleviate and prevent conditions of unemployment and fiscal distress in the area. Thus, the property being conveyed to and ultimately used by a private manufacturer did not defeat this predominant public purpose. The court stated that there was no dispute regarding condemnation law. If the condemnation is for a public purpose, it is permitted and, if for a private use, it is forbidden.\textsuperscript{32} The difficulty in \textit{Poletown} was not that the condemnation was for the general good of the community, but rather that the direct and immediate beneficiary was a private corporation.

Over vigorous and thoughtful dissents, the majority of the court was persuaded by the City’s arguments. After noting that “[t]he legislature has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose,” the court stated that its

\textsuperscript{29}. \textit{Id.} (citation omitted).
\textsuperscript{30}. \textit{Id.}
\textsuperscript{31}. \textit{Id.} at 631, 304 N.W.2d at 458.
\textsuperscript{32}. \textit{Id.}
role after such a determination was limited. Specifically, a court's determination of what constitutes a public purpose is subject to adherence to legislative intent. If the legislature precisely states what a public purpose is, then the courts may only make a determination when the legislative power is abused. Furthermore, courts are to use heightened scrutiny in cases where the condemnation power is exercised in a way that benefits specific and identifiable private interests. In particular, the "public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature."  

Certainly the condemnation in *Poletown* benefits private interests. But, the court also found several "clear and significant" public benefits, including the alleviation of severe economic conditions in both the city and state, the revitalization of local industries through new industrial development, and the general economic boost that the project would provide. These benefits were sufficient to satisfy the court that: such a project was an intended and a legitimate object of

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33. *Id.* at 632, 304 N.W.2d at 458. These public needs and purposes were specified in the Act and are reprinted at *supra* note 25 and accompanying text.
34. *Id.* at 634, 304 N.W.2d at 459.
35. *Id.* at 635, 304 N.W.2d at 459-60.
36. *Id.* at 634, 304 N.W.2d at 459. These "public benefit" issues were thoroughly developed at the trial court level in large part through the testimony of Detroit Mayor Coleman Young.

Young's testimony emphasized the serious fiscal problems being faced by the city, with repeated references to the deterioration of its economic base, the loss of jobs, the increasing unemployment, budget deficits, the layoffs of city employees, and cutbacks in city services. The city's attorney, Jason Honigman, explored these topics at length with the mayor, securing abundant testimony on the relationship between the topics and the public interest and public purpose that provide the legal basis for land acquisition under [the Economic Development Corporation Act].


Of particular importance for this paper's purposes, it should be noted that in the trial court the City argued that one of the primary public benefits to be derived from the proposed use of eminent domain was the retention (as opposed to the creation) of employment opportunities. If the proposed use were sanctioned, and the new plant built, jobs in two other already existing nearby GM plants would be saved because these plants would supply parts to the new plant. (The new plant was to replace one being closed so the supply would remain steady.) If the proposed use were not permitted the plant would be located elsewhere and suppliers close to the new location would replace those in the Detroit area. The City argued these facts to the trial court claiming the retention of employment opportunities constituted a legally recognized public purpose. The trial court held in the City's favor on all issues presented. Poletown Neighborhood Council v. City of Detroit, No. 80-039-426 CZ (Wayne County Circuit Court, Dec. 8, 1980).
the Legislature when it allowed municipalities to exercise condemnation powers even though a private party will also, ultimately, receive a benefit as an incident thereto.

The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.\(^{37}\)

To summarize, the *Poletown* court held: 1) that the project would serve the public purposes enumerated by the Michigan Economic Development Corporations Act, and 2) that these purposes fell within the scope of the proper exercise of eminent domain under the state constitution.

What is most notable about the *Poletown* decision is its expansive definition of what could constitute a public use or purpose. In the past, the public use requirement could be met only by the construction of such "traditional" public necessities as roads, sewer systems, penal institutions and hospitals. Now, general economic prosperity supplements the traditional purposes and creates a previously unknown flexibility in the use of eminent domain. This flexibility greatly troubled the *Poletown* dissenters, who concluded that "the proposed condemnation clearly exceeds the government's authority to take private property"\(^{38}\) and expressed concern that the court's ruling could set a precedent for "the most outrageous confiscation of private property for the benefit of other private interest without redress."\(^{39}\) As the dissenters had feared, the *Poletown* case now clearly stands for the proposition that the power of eminent domain can be used to both preserve and to create jobs.

*City of Oakland v. Oakland Raiders*\(^{40}\) is another recent example

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38. Id. at 636, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).
39. Id. at 639, 304 N.W.2d at 462 (Fitzgerald, J., dissenting).
40. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982). An outline of the subsequent procedural history of the case is as follows. The Supreme Court remanded the case to the trial court for further proceedings. Subsequently, the court of appeals granted a preemptory writ of mandate directing the trial court to hold a hearing on an application for reinstatement of an earlier issued preliminary injunction against the transfer of the franchise. 136 Cal. App. 3d 565, 186 Cal. Rptr. 326 (Cal. Ct. App. 1981). Following the reinstatement and modification of the injunction against the transfer, the trial court entered a judgment against the City. The court of appeals then issued a writ of mandate ordering the trial court to vacate the instruction and to proceed to determine the remaining objections to the eminent domain
of the use of eminent domain to accomplish broadly drawn social, economic, and, in this case particularly, cultural purposes, all of which are deemed "public purposes." In *Oakland Raiders* the City of Oakland attempted to use its eminent domain power to seize all the real and personal business assets of the Raiders' football franchise. In effect, eminent domain was being used to take over a private business in order to serve the greater cultural and economic needs of the general public.

In *Oakland Raiders*, the coliseum that the team played in was leased by the team owners from a public, non-profit city-county corporation. Upon failure to reach a settlement on an option to renew the lease, the team announced its intention to remove itself to Los Angeles. To prevent this, the City of Oakland commenced an eminent domain action to acquire all the property rights associated with the team, including players' contracts, team equipment, and television and radio contracts. The franchise owner argued against the City's action on three grounds: 1) that the law of eminent domain did not permit the taking of intangible property not associated with realty (here, the team's network of intangible contractual rights), 2) that the City's contemplated taking could not, as a matter of law, be for any public use within the City's authority, and 3) that, even if it is proper for the City to own a sports franchise, it could not condemn an established team.41

In reversing the grant of a motion for summary judgment in the team's favor, the California Supreme Court rejected all of the team's arguments. Responding to the team's first argument, the court initially noted that "[n]o constitutional restriction, federal or state, purports to limit the nature of the property that may be taken by eminent domain."42 Similarly, the court noted that under the applicable California eminent domain statute, there were no apparent restrictions on the action that had not been ruled on previously. 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (Cal. Ct. App. 1983). In this remand, the court held that the City's action was invalid under the commerce clause of the federal Constitution. 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (Cal. Ct. App. 1986). See also *Note, The Commerce Clause Limitation on the Power to Condemn a Relocating Business*, *96 Yale L.J.* 1343 (1987). A petition for a writ of certiorari to the Supreme Court was filed on this decision but was subsequently denied. 478 U.S. 1007 (1986). Except for one final appeal based on attorneys fees awarded earlier, the denial of the writ for certiorari was effectively the end of the case.

41. *Oakland Raiders* at 64, 646 P.2d at 837, 183 Cal. Rptr. at 675.
42. *Id.* at 64, 646 P.2d at 838, 183 Cal. Rptr. at 676.
“type” of property that may properly be taken by eminent domain.\textsuperscript{43} The court interpreted the statute to allow a broad definition of property, which included “‘any type of right, title or interest in property that may be required for public use.’”\textsuperscript{44} Citing respected treatise writers and commentators as authoritative, the court recognized that the power of eminent domain could be used to acquire “‘[i]ntangible property, such as choses in action, patent rights, franchises, charters or any other form of contract’”\textsuperscript{45} and “‘property of every kind and character, whether real or personal, or tangible or intangible . . . .’”\textsuperscript{46} Based upon these authorities the court concluded “that our eminent domain law authorizes the taking of intangible property.”\textsuperscript{47} Thus, the team’s first argument, that eminent domain law did not permit the taking of its intangible personal property, was soundly refuted by the court.

Turning next to the team’s improper public use argument, the court began its analysis of this issue by defining the modern parameters of the public use requirement. A public use is:

“a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.” On the other hand, “[i]t is not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement in order to constitute a public use.”\textsuperscript{48}

The court then noted and discussed the wealth of authority\textsuperscript{49} holding generally that the acquisition and provision of recreational facilities and services by a municipality are indeed proper public uses or purposes. Finally, the court posed the rhetorical question: “[i]s the obvious difference between man-

\begin{footnotes}
\item[43] Id. at 65, 646 P.2d at 838, 183 Cal. Rptr. at 676.
\item[44] Id. at 65, 646 P.2d at 838–39, 183 Cal. Rptr. at 677 (citation omitted).
\item[45] Id. at 67, 646 P.2d at 839, 183 Cal. Rptr. at 677 (citing I NICHOLS ON EMI-
\item[46] NENT DOMAIN § 2.1[2], at 2–8 to 2–9 (3d ed. 1980)).
\item[47] Id. at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678.
\item[48] Id. at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679 (citations omitted).
\item[49] Id. at 70–71, 646 P.2d at 841–42, 183 Cal. Rptr. at 679–80. (citing, for exam-
\item[50] ple, City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 434, 333 P.2d 745, 751
\item[51] (1959); County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 84, 38
\item[52] Cal. Rptr. 474, 478 (1964); Egan v. City and County of San Francisco, 165 Cal. 576,
\item[53] 582, 133 P. 294, 296 (1913); New Jersey Sports & Exposition Auth. v. McCrane, 119
\item[55] 420 Pa. 14, 17, 215 A.2d 894, 896 (1966)).
\end{footnotes}
aging and owning the facility in which the game is played, and managing and owning the team which plays in the facility, legally substantial?" 50 The court answered itself by stating that, at least up to that particular moment in time, the team had not presented any valid legal basis for concluding there is a substantial difference. 51 The court closed this phase of the case by concluding that "the acquisition and, indeed, operation of a sports franchise may be an appropriate municipal function." 52

Turning finally to the team's last argument that the City could not condemn an established team, the court simply noted that "[w]hile some statutes do explicitly prohibit the acquisition of an ongoing enterprise, there is no such provision in present law which would preclude the taking contemplated by [the] City." 53 It was pointed out that the California Legislature clearly knew how to prohibit such acquisitions and would have had it so desired. The Legislature thus recognizes the power of a municipality to acquire an existing business through eminent domain unless expressly forbidden. In fact, it was pointed out that prior acquisitions of operating businesses had received court approval. 54

The court then summarized its opinion by stating that "[u]nder the present statutory scheme, the courts have no authority to choose those items of property which they deem appropriate for condemnation." 55 Since the California Legislature clearly stated that any property may be acquired by eminent domain, the courts would be making new law, and not simply interpreting law, if they decided whether this particular piece of property can be condemned.

The goal sought to be served by the use of eminent domain in the Oakland Raiders case is indistinguishable from the goal that would be served by using that power to prevent a plant shutdown. Furthermore, the taking of an on-going business enterprise, in the form of a football franchise, is indistinguishable from taking a manufacturing plant as long as the same

50. *Oakland Raiders* at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680.
51. *Id.*
52. *Id.* at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681.
53. *Id.* at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681.
54. *Id.* (citing Citizen's Utilities Co. v. Superior Court of Santa Cruz County, 59 Cal. 2d 805, 818, 382 P.2d 356, 365, 31 Cal. Rptr. 316, 323 (1963)). For similar uses of the eminent domain power, see *infra* note 173 and accompanying text.
55. *Oakland Raiders* at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.
public interests are served. Finally, it is more appropriate that maintaining a community’s economic and social fabric receive a higher priority than a recreational public purpose.

Another case that exemplifies and solidifies recent state court expansion of the public use doctrine is Hawaii Housing Authority v. Midkiff. In Midkiff the issues revolved around the constitutionality of the Land Reform Act enacted by the Hawaii Legislature in 1967. The purpose of the Act was to eliminate the perceived social and economic evils inherent in the

56. Chief Justice Bird, in her Oakland Raiders dissent, was very disturbed about the proposed use of eminent domain and would presumably also be about the use we advocate here. Bird stated:

The power of eminent domain claimed by the City in this case is not only novel but virtually without limit. This is troubling because the potential for abuse of such a great power is boundless. Although I am forced by the current state of the law to agree with the result reached by the majority, I have not signed their opinion because it endorses this unprecedented application of eminent domain law without even pausing to consider the ultimate consequences of their expansive decision. It should be noted that research both by the parties and by this court has failed to disclose a single case in which the legal propositions relied on here have been combined to reach a result such as that adopted by the majority.

There are two particularly disturbing questions in this case. First, does a city have the power to condemn a viable, ongoing business and sell it to another private party merely because the original owner has announced his intention to move his business to another city? For example, if a rock concert impresario, after some years of producing concerts in a municipal stadium, decides to move his productions to another city, may the city condemn his business, including his contracts with the rock stars, in order to keep the concerts at the stadium? If a small business that rents a storefront on land originally taken by the city for a redevelopment project decides to move to another city in order to expand, may the city take the business and force it to stay at its original location? May a city condemn any business that decides to seek greener pastures elsewhere under the unlimited interpretation of eminent domain law that the majority appear to approve?

Second, even if a city were legally able to do so, is it proper for a municipality to drastically invade personal property rights to further the policy interest asserted here?

It strikes me as dangerous and heavy-handed for the government to take over a business, including all of its tangible assets, for the sole purpose of preventing its relocation. The decisional law appears to be silent as to this particular question. It appears that the courts have not yet been confronted with a situation such as that presented by this case. However, a review of the pertinent case law demonstrates that decisions as to the proper scope of the power of eminent domain generally have been considered legislative, rather than judicial, in nature. Therefore, in the absence of a legislative bar to the use of eminent domain in this manner, there appears to be no ground for judicial intervention.

Oakland Raiders at 76–78, 646 P.2d at 845–46, 183 Cal. Rptr. at 683–84 (Bird, C.J., dissenting).


large feudal land estates existing since the time of the early high chiefs of the Hawaiian Islands. To achieve this purpose, the Act created the Hawaii Housing Authority (Authority). By using a land condemnation scheme, the Authority could take title to the real property from the lessors, condemn it, compensate the lessors for the taking, and then sell the property to the lessees inhabiting the land at the time it was condemned. The process was instituted only after the Authority determined that the acquisition of the tract would effectuate the public purposes of the Act.

In Midkiff, the Authority determined that taking the land held by the lessors would effectuate the Act's purposes and directed the lessors to negotiate the sale of the land to its lessees. When these negotiations failed, the Authority ordered the lessors to submit to compulsory arbitration as required by the Act. Rather than comply with the order, the lessors filed suit in federal district court asking that the Act be declared unconstitutional. The district court held the compulsory arbitration and compensation formulas of the Act unconstitutional but found the remainder of the Act constitutional under the Fifth Amendment's public use requirement. The Ninth Circuit Court of Appeals reversed, holding that the Act violated the public use requirement of the Fifth Amendment.

On appeal, the Supreme Court unanimously reversed the court of appeals. The Court noted the appeals court's concern that "[s]ince Hawaiian lessees retain possession of the property for private use throughout the condemnation process, . . . the Act exacted takings for private use." In response to this concern, the Court stated that:

The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly en-

62. Id. at 243.
joy or participate in any improvement in order [for it] to constitute a public use.” “[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.”63

The Midkiff ruling, as well as the rulings in Oakland Raiders and Poletown, endorses the use of eminent domain as a tool to redistribute private resources within society to accomplish widely drawn public purposes. The cases exemplify the expansive interpretation now given the public use requirement and signal the appropriateness of using eminent domain to prevent plant closings. Such a use is clearly within the spirit, if not the letter, of these cases. These cases have led legal commentators64 and community activists65 to concluded that eminent domain could be used by municipalities as a tool, bargaining chip, or strategy to prevent a plant closing. Against this eminent domain case law backdrop, we turn then to the first two of the four promised case studies.

II. EMINENT DOMAIN AND PLANT CLOSINGS

A. The Steel Valley Authority

The Steel Valley Authority (SVA) is a quasi-public agency which represents various economic development interests of ten communities in and around Pittsburgh, Pennsylvania. The SVA was organized in response to the general erosion, during the late 1970’s and early 1980’s, of the manufacturing base in the tri-state region of eastern Ohio, western Pennsylvania and northern West Virginia.66 Threatened by the erosion of the

63. Id. at 243–44 (citation omitted).
64. See, e.g., Comment, Eminent Domain as a Tool to Set Up Employee-Owned Businesses in the Face of Shutdowns, 4 ANTOCH L.J. 271, 286 (1986) (noting that eminent domain may be used by municipalities to promote employee-owned business arrangements); Comment, supra note 1, at 129 (points out the pros and cons of exercising eminent domain to avoid plant shutdowns, including policy considerations that encourage and discourage municipalities’ exercise of eminent domain); Comment, supra note 7, at 248 (recent court decisions have apparently dissolved the public use requirement of municipalities’ exercise of eminent domain). But see, Note, The Commerce Clause Limitation on the Power to Condemn a Relocating Business, 96 YALE L.J. 1343 (1987) (arguing that these types of uses of eminent domain would violate the Commerce Clause).
65. Local community action groups that have pressed eminent domain arguments in their efforts to prevent plant closures include The Plant Closure Project (433 Jefferson St., Oakland, CA 94607) and The Seattle Work Center (an organization discussed by Lewiston & Wise, Locked Out By Lockheed, DOLLARS AND SENSE, Dec. 1987, at 17).
66. See Harrison, When Workers Become Entrepreneurs, TECHNOLOGY REV., July 1989
manufacturing base of this region, local union, church, and grass roots political activists banded together in 1979 to form the Tri-State Conference on Steel (Tri-State). Tri-State’s goal was to save the steel mills of the area and to keep jobs in local communities. In 1984, when the United States Steel Corporation announced its plans to close its Duquesne, Pennsylvania blast furnaces, Tri-State called for the formation of the SVA to combat the closure. When the ten municipalities banded together, the SVA was born.

The concept of an SVA was first proposed at a Tri-State meeting held late in 1983. Out of this meeting came a published proposal entitled Rebuild Steel.67 The proposal ambitiously called for the establishment of a “Tennessee Valley Authority for Steel” program which would seek a workable and socially responsible plan to save the domestic steel industry. This would be accomplished by the creation of the SVA which would acquire abandoned, or soon to be abandoned, steel mills in the area. The major difference between the Tennessee Valley Authority (TVA) and the SVA would be that the latter would be neither federally funded or controlled. In fact, the aim of the SVA was local community control.68

To accomplish these goals Tri-State stated that “[t]he power of ‘eminent domain’, inherent in the sovereign [sic] State of Pennsylvania, must, therefore, be delegated to the ‘Steel Valley Authority.’ ”69 Both SVA’s incorporation70 and its use of the eminent domain power rested on the Pennsylvania Municipal- ity Authorities Act.71 This Act defines the power of any authority incorporated under it, including the SVA, to engage in economic development. The parameters of the Act are very broad. It permits an authority to undertake various kinds of

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at 19. In this article Harrison states that “[b]etween 1977 and 1982, shrinking steel firms laid off about 100,000 workers in the tri-state region . . . . Local officials estimate that there are still 25,000 to 30,000 former industrial workers out of work in the Mon Valley alone.” Id.

67. Tri-State Conference on Steel, A Summary of a Plan to Reconstruct Pitts- burg’s Steel Industry (1984) (main author of summary is C. McCollester, assisted by members of various unions).

68. Id. at 8–9.

69. Id. at 9.

70. “Articles of incorporation for the SVA were filed with the Secretary of the Commonwealth of Pennsylvania on November 15, 1985; a certificate of incorporation was issued on January 31, 1986.” Hornack & Lynd, The Steel Valley Authority, 15 N.Y.U. REV. L. & SOC. CHANGE 113, 116 n.16 (1986–87).

projects, including the acquisition, construction, improvement, maintenance, and operation of certain structures and facilities.\(^{72}\) The purposes of these projects include efforts to retain or develop existing industries and the development of new industries.\(^{73}\) Furthermore, the delegated powers may be exercised to acquire and to hold almost any form of property.\(^{74}\) An authority may sell, lease, transfer, or dispose of all or part of a project to a third party,\(^{75}\) or it may operate the project itself.\(^{76}\) The Act also grants authorities power "[t]o contract with any municipality, corporation, or any public Authority of [Pennsylvania] or any adjoining state, on such terms as the said Authority shall deem proper, for the construction and operation of any project which is partly in [Pennsylvania] and partly in an adjoining state."\(^{77}\)

Based upon the clear authority and mandate of the Municipality Authorities Act, the SVA has formulated a basic operational outline.

At present, the SVA does not contemplate operating industrial development projects in the sense of managing the facilities. Instead, the SVA intends to coordinate industrial development managed by third parties. This coordination may be carried out in two ways. First, the SVA could "retain or develop existing industries" by acting as a broker between owners of a presently operating facility and a third party. Second, the SVA could acquire abandoned facilities for the "development of new industries" and then sell or lease them to other operators. Under the first option, when a party is interested in acquiring an existing industrial facility whose present owner is not willing to sell, the SVA could condemn the property and then transfer it to the buyer. The SVA would thus "force" a sale of the structure or facility at fair market value as determined in an eminent domain proceeding.\(^{78}\)

Despite the obvious attraction and utility of using a munici-

\(^{72}\) § 302(j).


\(^{74}\) § 306(B)(d) (Purdon 1974).

\(^{75}\) Id.

\(^{76}\) § 306(B)(e).

\(^{77}\) § 306(B)(o).

pal corporation's powers of eminent domain to prevent plant closings, inherent in the use of these powers is the problem of providing just compensation for the taking. The traditional measurement of just compensation is the fair market value of the property taken, with fair market value defined as what a willing buyer would pay a willing seller. As envisioned by Tri-State, the money necessary to provide the required compensation would come either through the Act's bonding authority provision, or from a variety of other sources, including federal pension fund investment in federally guaranteed bonds; federal and state loan guarantees; direct investment by local, State and Federal Government; tax exempt municipal and industrial bonds; tax credits; worker contributions; and guaranteed purchase agreements for the plate and structural steel to be used in infrastructure rebuilding.

If the acquisition of a plant appears difficult due to the inability to raise an adequate amount of money for compensation, some commentators have suggested an alternative valuation to replace the fair market value test.

Commentators on international law have suggested that just compensation is a social as well as a technical issue. According to this view, the fair value of a facility may be affected by how that facility has been operated. Some have suggested that the following factors should be considered in determining the amount of compensation: the circumstances of the original investment (for instance, whether the company secured its initial position through force or fraud); whether the company has extracted substantial profits from the community; whether a facility's operations have caused environmental damage over a period of years; and whether the taking is pursuant to a broad program of economic and social reform. These factors can dramatically affect the amount of compensation required in an eminent domain proceeding.

Even with the obvious financial problems the SVA faces in paying just compensation, the recent use of eminent domain power for this purpose is substantial. As noted above, the

81. Tri-State Conference on Steel, supra note 67, at 10.
82. Hornack & Lynd, supra note 70, at 122-23 (footnotes omitted).
83. See supra Section II of the text.
recently expanded definition of public use resulting from the Berman, Poletown, Oakland Raiders, and Midkiff cases supports the conclusion that local, quasi-governmental entities can constitutionally exercise granted eminent domain powers for the public use purpose of broadly or discretely enhancing the local economy. Furthermore, other quasi-governmental agencies established pursuant to the Pennsylvania Municipality Authorities Act have had their exercises of eminent domain power upheld under Pennsylvania law. 84

Despite its apparent legal authority to use eminent domain, the SVA has not actually used this power to acquire property. This is due in large part to the financial constraints of exercising the power. Nevertheless, even the threat of using eminent domain can be an effective tool in keeping a plant where it is currently located. 85

For example, in the fall of 1982, the Nabisco Brands Food Company announced its intention to close a plant in Pittsburgh that employed 650 people. A coalition of various community groups, including political forces, threatened the use of eminent domain should the company attempt to close the plant. Less than a month after the threat was initially voiced, the company announced that the plant would remain open. 86

B. Morse Cutting Tool

The widely publicized Morse Cutting Tool Company (Morse)87 case provides another example of the effectiveness of threatening to exercise eminent domain, although the Morse situation represents a more formalized threat than that voiced in the Nabisco case. The threat was voiced by the

84. See, e.g., In re Condemnation of 49.0768 Acres, 427 Pa. 1, 4, 233 A.2d 237, 239 (1967) (municipal corporation power of eminent domain is not limited where land being condemned for second airport would not serve same purpose as first airport); Truitt v. Borough of Ambridge Water Authority, 389 Pa. 429, 431, 133 A.2d 797, 798 (1957) (water authority’s power includes right to acquire land presently needed and land possibly needed for future use).

85. Hornack & Lynd, supra note 70, at 123. The authors noted that:

[t]hreatening to take a facility may avoid the problem of determining and paying just compensation, while securing the desired result of keeping business in the community. In order for this tactic to work in the long run, the public authority must at least appear to have the ability and the intent to take the property.

Id.

86. Id. at 123–24 & nn.71-74.

87. Several authors also refer to the Cutting Tool plant as Morse Cutting Tools.
Mayor of New Bedford on June 2, 1984, as a final attempt by a frustrated city and its citizens to keep a large employer in the community. Less than three months later the company was in the hands of a new owner who promised to keep it in New Bedford.88 While New Bedford did not actually have to exercise its eminent domain power, the Morse case illustrates how the threatened exercise of the power may work as an effective tool of industrial policy to fight plant closings.

As “[t]he first plant of its kind in the United States, Morse Cutting Tool was organized in 1864 as a family firm in New Bedford. Its founder, Stephen Morse, invented the modern-day twist drill, rendering obsolete the old straight drill . . . .”89 In 1941, while the company was still family-owned, it was unionized by the United States Electrical Workers Union.90 In its almost fifty year involvement at Morse, the union has gone on strike only twice, once in 1976, and again in 1982.91 The events that unfolded shortly after the second strike prompted the mayor’s eventual threat to take over the company through eminent domain.

The problems began at Morse in 1981, thirteen years after Gulf + Western (G + W) purchased the plant.92 At G + W’s annual meeting, Board Chairman Charles Bluhdorn proposed a “‘six-month freeze on all wages at G + W and a reduction of bonuses.’”93 The proposal came despite record earnings for G + W. The following January, corporate management requested further concessions from the New Bedford local union to prevent a plant move to Super Tool in Michigan. Several days later G + W management presented new terms to the union’s officials demanding substantial wage and benefit concessions.94

Despite a 415 to 7 union membership vote in favor of a

88. Hornack & Lynd, supra note 70, at 124.
90. Swinney, UE Local 277’s Strike at Morse Cutting Tool, 1 Labor Research Rev., Fall 1982, at 4, 5.
91. Id.
92. B. Doherty, supra note 89, at 2. The Morse family sold the plant in 1946. The plant was then owned by only two successive owners until G + W purchased the plant in 1968.
93. Id. at 3.
94. Swinney, supra note 90, at 5–6.
strike, the "[union] leaders did not want to wage a long defensive strike." Instead, they took the offensive, making G + W's disinvestment at Morse the real issue rather than wage concessions.

To substantiate the disinvestment theory, the union hired a private consultant to investigate G + W's policies. The consultant discovered that G + W was implementing a policy of "systematic corporate disinvestment." Profits from Morse were being transferred to other G + W operations. Between 1977 and 1982, capital investment in the Morse plant was less than $800,000, far below the industry standard.

Armed with data indicating that the real source of Morse's problems was its disinvestment policy, and not high wages and low productivity, the union went on strike. The strike lasted thirteen weeks and resulted in a slight union victory: wages were nominally increased. Several days into the strike the New Bedford City Council raised its first "trial balloon" on the use of eminent domain when it resolved "[t]hat we do everything possible within the jurisdiction of the City Council to insure Morse Cutting Tools will survive in New Bedford under the present or alternate ownership."

After the strike ended, everyone in the community thought that the fight to save Morse had been won. In fact, the struggle had only begun. After the strike only 200 of the 500 pre-strike Morse employees were called back to work. Then, exactly one year after the strike ended, G + W announced plans to eliminate much of its manufacturing operations. The following month, G + W announced its plans to sell Morse. By the spring of 1984 the union, with help from the State of Massa-

95. Id. at 6-7.
96. B. Doherty, supra note 89, at 7. In fact, "[b]ecause management and labor disagreed over the basic issues underlying their dispute, the strike at Morse received extensive media coverage, locally, regionally and nationally." Id. Doherty cites, for example, an article that appeared in the Providence Journal Bulletin on June 27, 1982, which stated that "'if the UE can keep the debate on this level it may have some powerful allies. The issue will not be a narrow one of labor versus management, but the much broader one of community versus conglomerate.' " Id.
97. Swinney, supra note 90, at 7. Compared with the $800,000 invested in the New Bedford operation, "[f]rom 1978 to 1982 (four years), $1.5 million was invested in Union Twist Drill in Athol, and from 1979 to 1982 (three years), more than $5 million was invested in new equipment at Greenfield Tap and Die-two of Morse's chief competitors, also located in Massachusetts." B. Doherty, supra note 89, at 6.
98. Swinney, supra note 90, at 12 (City of New Bedford resolution).
chusetts and Governor Dukakis, was actively seeking a buyer for Morse. 100

On June 4, 1984, the City of New Bedford formally became involved. In a major news conference and address to the City Council, the mayor announced the City's plan to seize Morse through its eminent domain power and sell the plant to a buyer who would commit to keeping the plant in New Bedford and to modernizing it. 101 Noting first the long relationship between the City and the company, the mayor stated that "'[i]t's a two way street. We have been interwoven with private business for quite some time. We've got a company here that plans to abandon the city. It is not our intent to run (Morse), we are looking to save it and the jobs in the community.'" 102

Two months after the June 4 news conference, G + W backed down and sold Morse to a buyer who would agree to the two conditions set by the City. 103

Even if a buyer had not been found for the company, the City was convinced of its authority to proceed with its threatened use of eminent domain. The City relied in this regard upon the conclusions drawn in a report prepared for the union local by the Institute for Public Representation (IPR) of Washington, D.C. 104 The union asked IPR to produce a memorandum examining the legal justification for the City of New Bedford to take over the Morse plant. 105 The memorandum that was prepared concluded that "'the [C]ity of New Bedford can use its eminent domain powers to condemn the Morse Cutting Tools plant.'" 106 Since the City's goals in acquiring the plant were to prevent unemployment, preserve jobs, and maintain a healthy local economy (all proper public purposes under

100. Id. at 15.
101. Id. at 17.
102. Id. at 14. For a similar "relationship" argument, see supra notes 131-32 and accompanying text.
103. Id. at 17.
104. Id. The IPR is a public interest firm and law school clinical education program which was founded by Georgetown University Law Center and the Ford Foundation in 1971. The IPR provides legal services to groups and individuals who are unable to obtain effective legal representation on matters which have a significant impact on issues of broad public importance.
105. Id.
the recent public use definitions107), the IPR reasoned that, based upon at least two authorities, such a taking would be permissible.108 Those sources of authority were the Home Rule Amendment to the Massachusetts Constitution109 and the Massachusetts Economic Development and Industrial Corporations Act (Act).110

Pursuant to the latter Act, a municipality may organize an economic development and industrial corporation111 for the general purpose of enhancing local economic development and the well being of communities.112 To accomplish these goals the Act establishes the corporation's power to acquire property through eminent domain.113 Based upon their analysis of these sections, relevant case law and other authority, the IPR concluded that the City had the authority to acquire the real property elements of the Morse plant.114

107. See generally supra Section II of the text.
109. MASS. CONST. Amend. Art. II.
111. Id. at § 3.
112. Id. at § 2.
113. Id. at § 5(l). The Act states that power to acquire property is granted for the: purpose of eliminating decadent, substandard, or blighted open conditions therein, preventing recurrence of such conditions in the area, the removal of structures and improvements of sites for manufacturing and industrial uses, the disposition of the property for redevelopment incidental to the foregoing, the exercise of powers by the corporation and any assistance which may be given by the municipality, or any other public body in connection therewith are public uses and purposes for which public money may be expended and the power of eminent domain exercised; and that the acquisition, planning, clearance, development, rehabilitation or rebuilding of such decadent and blighted open areas for industrial or manufacturing purposes, are public uses and benefits for which private property may be acquired by eminent domain or regulated by wholesome and reasonable orders, laws and directions and for which public funds may be expended for the good and welfare of the municipality and of this commonwealth.

The second source of authority for New Bedford to proceed was the Home Rule Amendment. This amendment grants cities and towns powers not denied them by express or clearly implied state legislation or by state constitutional provisions. Of particular importance in the Morse case is the Amendment’s apparent authorization of ordinances that allow condemnation of personal and intangible property.

Despite this apparent authority to do so, New Bedford was not forced to test the correctness of the IPR’s eminent domain conclusions because the Morse plant was purchased by a private investor who promised to keep it in town. However, some commentators believe that New Bedford’s threatened use of eminent domain helped push G + W into a position where it was more amenable to an offer from this investor. The Morse case shows that, although as yet not entirely tested and upheld in a court of law, this use of eminent domain has enough credibility to alter some corporations’ behavior. Until the time comes when these theories are fully tested, at least this threat is an effective tool in influencing the corporate decision-making process.

Finally, the most important limitation on this use of eminent domain is the requirement that the company be paid for what is taken. Because of this limitation, eminent domain should not be viewed as either the sole or most important economic development tool in a community’s arsenal. It is only one tool and, as with plant closing laws, it is primarily, although not exclusively, a defensive measure. This tool should not be used in every case of an attempted shut down. Eminent domain is an important policy choice that must be made on a case by case basis.

For example, there may be many cases where it is simply not financially feasible to keep a company in a community. Sometimes a plant is closed because of changes in consumer preferences or an inability to manufacture a product profitably. A

Any city or town may . . . exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court . . . and which is not denied, either expressly or by clear implication, to the city or town by its charter.

116. The New Bedford Memorandum pursues a detailed analysis of various related statutes and case law to arrive at this conclusion, an analysis that cannot be repeated in detail here. See New Bedford Memorandum, supra note 106, at 20–33.

117. B. Doherty, supra note 89, at 17.
decision regarding which business to save depends in part on local economic needs and on the potential profitability of maintaining the business where it is located. Many profitable businesses are closed simply because their investors are not satisfied with their return on investment. The profitability of these businesses may, however, be acceptable to a community or to the employees of these businesses. Given these considerations, each community will have to embark on a fairly sophisticated financial analysis of a business before making the decision whether to pursue ownership of that business through eminent domain.

III. CONTRACTUALLY IMPLIED PROPERTY RIGHTS

Another innovative tool that could be used to prevent a plant closing is for a community to assert the existence of a property right in a business. This property right would operate to limit the business’ ability to make unilateral decisions that adversely affect the community’s economic well-being. The right would not be based exclusively upon appeals to traditional legal conceptions of property, or upon contractually expressed property rights, but would be based upon contractual metaphors that depict property rights in terms of either social or mutual reliance relationships.

These types of arguments have been pressed in several recent cases. In each, some variation of a breach of contract, promissory estoppel, or contractually implied property right argument was pursued. The final two of our four case studies illustrate these arguments in action.

A. United Steel Workers

In United Steel Workers of America, Local No. 1330 v. United States Steel Corp., the plaintiff union filed a suit seeking to keep the defendant’s plant open and operating. The basis of the plaintiff’s claim was alleged promises made by an employee of

118. For a recent example of a community’s effort, based upon express (as opposed to implied) contractual provisions, to maintain the operation of a business in a community, see In re Indenture of Trust Dated as of March 1, 1982, 437 N.W.2d 430, 434–37 (Minn. Ct. App. 1989).

119. 492 F. Supp. 1, 3 (N.D. Ohio), aff’d in part, Local 1330, United Steel Workers of Am. v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980). The appellate court affirmed the district court in all respects except for the antitrust claim which was vacated and remanded for further proceedings. 631 F.2d at 1282–83.
the defendant to keep the plant open so long as it remained profitable. At issue were statements made by the plant manager over an in-house recorded message system. This system stored recorded messages and allowed employees to later hear these messages on the system. Some of the statements made included, for example: "'With your help, this effort will continue and if and when there will be a phase-out depends on the plant's profitability . . . .'"\(^{120}\)

The plaintiffs alleged that, in response to and in reliance on such statements, they "made a sincere and forceful effort to increase productivity, or 'yield,' primarily by waiving those formal technicalities of their labor contract that contributed to easier working conditions, but detracted from productivity.'"\(^{121}\) In support of the plaintiffs' contention that it relied on the manager's profitability promise, the accounting reports indicated that the corporation was earning consistent profits.\(^{122}\)

Late in 1979 United States Steel announced its plans to close the plant. In December, 1979, the plaintiffs filed for, and were granted in February, 1980, a temporary restraining order. Trial on the merits began in March, 1980. In their complaint, the plaintiffs suggested four theories in support of injunctive relief: violation of antitrust statutes, property right, promissory estoppel and breach of contract.\(^{123}\) The three latter theories will be addressed here.

The court noted that the breach of contract and detrimental reliance claims were based on the telephone messages recorded by the plant manager.\(^{124}\) Applying Ohio contract law

\(^{120}\) 492 F. Supp. at 5.

\(^{121}\) Id. at 8.

\(^{122}\) Specifically, "the gross profit margin for 1977 was $24,899,000.00, that for 1978 was $41,770,000.00, that for 1979 was $32,571,000.00 and . . . the projected gross profit margin for 1980, . . . was $32,396,000.00." Id. at 6 (citations omitted). Although the financial projections for 1980 indicated a gross profit, the court noted that the overall projection for 1980 was a net loss of $9,387,000.

\(^{123}\) Id. at 4.

\(^{124}\) Id. at 4. In most, if not all, detrimental reliance claims the claims are based upon reliance on an oral, as opposed to a written, promise. Promises not performable within one year are required to be in writing, pursuant to the applicable Statute of Frauds. When they are not the defendant may normally defend by claiming the Statute of Frauds defense. Sometimes, however, the defendant may be equitably estopped from asserting this defense.

While the jurisdictions are divided on the issue, the majority appears to have held that in some circumstances alleged oral contracts may be recognized under the equitable or promissory estoppel theories despite the fact that they are otherwise
the court concluded that the contract at issue must have been a unilateral "promise-exchanged-for-an-act" contract, with the telephone message representing the promise and the company's profitability representing the act. In finding these facts did not give rise to a contract, the court noted that:

At the time the alleged promise was made by the company, the workers did not immediately execute the contract in full—profitability would have to be achieved over a long

within the Statute of Frauds. See generally McIntosh v. Murphy, 52 Haw. 112, 112, 469 P.2d 177, 181 (1970) (court adopted the Restatement position to give "the necessary latitude to relieve a party of the hardships of the Statute of Frauds"); Lovely v. Dierkes, 132 Mich. App. 485, 489, 347 N.W.2d 752, 753 (1984) (court held that, where the statute of frauds applies, promissory estoppel may preclude the defendant from pleading the statute of frauds defense); Berg v. Carlstrom, 347 N.W.2d 809, 812-13 (Minn. 1984) (the doctrine of promissory or equitable estoppel may take an agreement out of the statute of frauds); Olson v. Ronhovde, 446 N.W.2d 690, 692-93 (Minn. Ct. App. 1989) (the court used the doctrines of equitable estoppel and ratification to remove the claim from the statute of frauds); Nelson v. Smith, 349 N.W.2d 849, 853 (Minn. Ct. App. 1984) (jury had sufficient evidence to find equitable estoppel, but the court noted the doctrines of equitable and promissory estoppel may be used to exempt an agreement from the statute of frauds); Kline v. Famous Recipe Fried Chicken, Inc., 94 Wash. 2d 255, 258-59, 616 P.2d 644, 646-47 (1980) (court adopted the Restatement position using promissory estoppel to exempt an agreement from the statute of frauds); Monarco v. Lo Greco, 55 Cal. 2d 621, 623-27, 220 P.2d 737, 739-42 (1950) (court applied the doctrine of estoppel to exempt an agreement from the statute of frauds). See also RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981), which states:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action of forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.

See also, Note, Promissory Estoppel as a Means of Defeating the Statute of Frauds, 44 FORDHAM L. REV. 114 (1975). But see Tanenbaum v. Biscayne Osteopathic Hospital, Inc., 190 So. 2d 777, 779 (Fla. 1966) (court declined to adopt the doctrine of promissory estoppel as a defense to the statute of frauds); Wright v. Smith, 105 R.I. 1, 2, 249 A.2d 56, 57 (1969) (the statute of frauds must be strictly complied with and the doctrine of quantum meruit will not be applied to avoid the statute).

125. United Steel Workers, 492 F. Supp. at 4-5.
period of hard work. This means that the contract would not come into existence until the workers had fully performed their side of the contract by making the plant profitable. "[A unilateral] contract does not come into existence until one party to it has done all that is necessary on his part."126

The court then addressed the plaintiffs’ promissory estoppel arguments. The court began its analysis of this argument by noting the elements of a promissory estoppel claim127 and then shifted gears by correctly noting that “the formation of a proper contract requires that the employee of the corporation making a promise must have the authority to enter into the contract.”128 Thus, for the court the issue became whether the plant manager had the authority to make these types of promises on behalf of the company. Applying agency concepts in the promissory estoppel context, the court stated that “[t]he lack of a technical power of agency in any of the company’s spokesmen does not relieve the company from a binding promise if it should reasonably have expected the statements of the spokesmen to be relied upon detrimentally by the workers.”129 The court found that no such reasonable reliance existed. In support of this conclusion the court stated that:

[A] reasonable understanding of all of the statements . . . would suggest that national company management wanted to close the plant for lack of profitability and that the call for increased worker productivity was a plan [the plant manager] was presenting as a final effort for the workers to sway national management opinion. [The plant manager’s] plan was courageous and well conceived, but it did not represent a promise made by the corporation on which the workers should reasonably have relied.130

Finally, the court addressed the community right theory. This theory had actually been suggested by the court itself during a pre-trial conference. At the conference the court re-

126. Id. at 4 (citation omitted).
127. Id. at 5. The elements of a promissory estoppel claim are: 1) that a promise was made; 2) that the promisor should have reasonably expected to induce reliance on the part of the promisee; 3) that the promisee did in fact rely on the promise; and 4) that the enforcement of the promise is necessary to prevent injustice. Restatement (Second) of Contracts § 90 (1981).
129. Id.
130. Id. at 6.
quested the parties to brief "[t]he possibility of the relationships between the steel industry and surrounding community generating a property right . . . ."\textsuperscript{31} Regarding this suggestion, the court stated at the conference that:

"Everything that has happened in the Mahoning Valley has been happening for many years because of steel. Schools have been built, roads have been built. Expansion that has taken place is because of steel. And to accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: Steel. . . .

But what has happened over the years between U.S. Steel, Youngstown and the inhabitants? Hasn't something come out of that relationship, something that out of which—not reaching for a case on property law or a series of cases but looking at the law as a whole, the Constitution, the whole body of law, not only contract law, but tort, corporations, agency, negotiable instruments—taking a look at the whole body of American law and then sitting back and reflecting on what it seeks to do, and that is to adjust human relationships in keeping with the whole spirit and foundation of the American system of law, to preserve property rights."\textsuperscript{32}

Despite this initially encouraging signal to the plaintiffs, the district court ultimately found "no legal basis for the finding of a property right" because "[u]nfortunately, the mechanism . . . to recognize this new property right, is not now in existence in the code of laws of our nation."\textsuperscript{33} The court deemed itself bound to so rule even though it also felt that "United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years."\textsuperscript{34} The court then concluded its community property right discussion by noting that either the state or federal legislature was the proper forum in which the right

\textsuperscript{131.} Id. at 9.

\textsuperscript{132.} Local 1330, United Steel Workers of Am. v. United States Steel Corp., 631 F.2d 1264, 1279–80 (6th Cir. 1980). Even though the statements were originally made at the district court level, the appellate court opinion is cited because it quotes the actual statements from the pretrial conference.

\textsuperscript{133.} United Steel Workers of Am., Local No. 1330 v. United States Steel Corp., 492 F. Supp. 1, 10 (N.D. Ohio), aff'd in part, Local 1330, United Steel Workers of Am. v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).

\textsuperscript{134.} Id.
should be formally recognized. On appeal, the Sixth Circuit Court of Appeals affirmed all parts of the district court's opinion except the antitrust matter, which was remanded.

B. City of Norwood

Another recent case that raised the contractually implied property right theory was City of Norwood v. General Motors Corp. Although, as in United Steel Workers, the plaintiff in City of Norwood was ultimately unsuccessful in arguing its property right theory, the case is notable for its full factual and legal development of the theory.

Norwood is a suburb of Cincinnati, Ohio. General Motors Corp. (GM) first established an assembly plant in Norwood in 1923. This facility grew continuously over the years until, by the 1980's, it employed over 4,200 people. As such, GM was the largest employer in Norwood. In November, 1986, GM announced, "without warning," that the plant would close in 1988 and that all operations would be moved to Van Nuys, California.

The City of Norwood responded to this announcement by filing a suit against GM. In this case, however, the City did not seek to prevent the closing per se, but, instead, sought damages to compensate for public money already spent in reliance that the employer would remain in the city and for the huge decrease in tax reserves anticipated on GM's departure. In other words, the suit was filed to obtain transitional economic help from GM.

Specifically, the plaintiff's complaint focuses on the fact that the City of Norwood encouraged the growth of the Norwood

135. Id.
136. Local 1330, United Steel Workers of Am. v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980). The antitrust matter involved the refusal of U.S. Steel to sell its Ohio and McDonald steel plants to the United Steel Workers. Thus, U.S. Steel "'exercised monopoly power' for the purpose of preventing a potential competitor from entering the steel market." Id. at 1282. The circuit court was unable to decide the issue based on the facts presented and, therefore, remanded the issue to the lower court for further proceedings. Id. at 1283.
139. Complaint at 10-12.
plant by granting GM numerous concessions, including vacating streets around the plant, building bridges for the plant's exclusive use, city assistance in acquiring real property and, "in general, doing anything that General Motors requested." 140 Furthermore, the City noted that it derived nearly one-third of its tax revenues from GM and that, in anticipation of GM's departure, it had already instituted immediate, emergency cost saving measures. The measures included "[e]limination of the City's Waste Collection Department; . . . the elimination of most liability insurance coverage; . . . [and] a thirty percent (30%) increase in water rates . . . ." 141 Finally, the complaint's introductory matters are concluded by the statement that:

The overwhelming size of General Motors' Norwood plant, in relation to all other businesses in the City of Norwood, conferred upon the General Motors Corporation a virtual monopoly of power in its dealings with the City of Norwood, such dealings including General Motors' requests for concessions. Other American automakers, such as Chrysler Corporation, having comparable relationships with cities in which major plants are located, have recognized their position of power and at the time of plant closings have offered generous transitional aid to the affected communities and have paid all obligations due the communities. The Defendant, General Motors Corporation, has refused to act in a like manner. 142

Although seven causes of action were alleged in the plaintiff's complaint, only two will be addressed here. 143 The plain-
tiff alleged that a contract arose between it and GM by virtue of the operation of promissory estoppel, and that the defendant, by closing the plant, would breach the contract.\textsuperscript{144} The contract arose, according to the City, over the course of a sixty-four year long relationship between the parties, by virtue of the City granting GM numerous concessions upon the express and implied promise of GM that it would keep its plant in Norwood. The City claimed that it had relied, to its detriment, upon the defendant's actions and misrepresentations over the course of this relationship.\textsuperscript{145}

The City's other main cause of action lay in equitable estoppel. The City claimed that, through the course of its relationship with GM, GM had made numerous and repeated representations to the City and had acted in such a manner so as to lead the City to believe that GM would keep the facility in Norwood. Based upon this state of affairs the City claimed that GM "should be equitably estopped from denying any alleged
intention to retain active manufacturing facilities in the City of Norwood . . . ."\textsuperscript{146}

For the above and all other claims the plaintiff determined it had been damaged to the extent of $318,250,000.\textsuperscript{147}

General Motors responded to the plaintiff’s claim by filing a Joint Motion to Dismiss and Motion for Summary Judgment. The court responded to the defendant’s motion by essentially dismissing all of the plaintiff’s claims.\textsuperscript{148} The Norwood City Council later decided not to appeal the decision.\textsuperscript{149}

The court dismissed the promissory estoppel claim by concluding that none of GM’s alleged explicit or implicit promises to keep the plant open actually constituted a promise made by the defendant. The court reasoned that “even under the most liberal of interpretations” GM’s actions never constituted a promise to keep a manufacturing plant in Norwood.\textsuperscript{150} Since the plaintiff’s claim was that a promise existed, this claim had to fail.

Next the court dismissed the equitable estoppel claim, finding that “[e]quitable estoppel does not of itself create a new right or give a new cause of action.”\textsuperscript{151} To invoke an equitable estoppel claim, the plaintiff must assert that it relied on past or present representations by the defendant; promises to perform an act in the future do not meet the reliance element that is required.\textsuperscript{152} The plaintiff’s complaint alleged that GM’s representations had led the City to believe that GM “would retain active manufacturing facilities within the City of Norwood.”\textsuperscript{153}

\textsuperscript{146} Complaint at 13.
\textsuperscript{147} Complaint at 18 ($56 million for loss of tax revenue and commerce, $9 million for the increase in fire and police protection, $750,000 for the underpass construction, $2,500,000 for rededicating previously vacated city streets and $250 million in punitive damages).
\textsuperscript{148} City of Norwood v. General Motors Corp., No. A-8705920, slip op. at 16 (Court of Common Pleas, Hamilton County, Ohio, 1988). Six of the seven claims were dismissed under Rule 12(b)(6) of the Ohio Rules of Civil Procedure. The remaining claim having to do with GM’s handling of hazardous materials was remanded.
\textsuperscript{149} Letter from Robert G. Kelly, City Law Director, to David Schultz (Dec. 1, 1988).
\textsuperscript{150} Norwood, slip op. at 7.
\textsuperscript{151} Id. at 9. See DOBBS, HANDBOOK ON THE LAW OF REMEDIES, § 2.3, at 42 (1973) stating that “estoppel is, according to the usual statement, a shield, not a sword. It does not furnish a basis for damages claims, but a defense against the claim by the estopped party.”
\textsuperscript{152} Norwood, slip op. at 10.
\textsuperscript{153} Plaintiff’s Complaint and Jury Demand at 11, City of Norwood v. General
The court noted that since GM's declarations clearly related to future events, the equitable estoppel requirement of past or present fact was not met and the plaintiff's claim must fail.154

C. Thoughts and Conclusions on Contractually Implied Property Rights

Despite judicial reluctance to recognize the claimed contractually implied property rights asserted in the City of Norwood and United Steel Workers cases, the authors believe there are grounds to conclude that these rights may eventually be recognized by the courts. Most notable in this regard was the district court's query in United Steel Workers whether something had come out of the relationship between Youngstown, Ohio and U.S. Steel that requires U.S. Steel to fulfill its obligations to the city. This statement, and its reaffirmation in the appellate court's opinion, suggests that both courts truly felt disturbed by the resolution of the matter.155 Both courts, in a seemingly apologetic tone, stated that under the current state of the law they felt constrained to hold as they did.156 Both courts also believed that formulating public policy on plant closing issues is clearly the responsibility of state legislatures or of Congress.157 This, we feel, is an arguable conclusion.

There is no denying that, had the City of Norwood and United Steel Workers courts held in the various plaintiffs' favor, these rulings would have signaled a clear departure from traditional contract and property concepts. Nevertheless, it is elementary that in many cases when the court wishes to do what it knows to be the right thing, it reasons by analogy from existing precedent. City of Norwood and United Steel Workers presented opportunities for the courts to use this reasoning tool because:

Thus far, it is obvious that traditional contract theory and legislative plant closing proposals cannot be expected to af-

Motors Corp. (Court of Common Pleas, Hamilton County, Ohio 1988) (No. A-8705920).

154. Norwood, slip op. at 10.

155. The district court's analysis of the relationship that developed between the City and U.S. Steel was discussed by the appellate court in Local 1530, United Steel Workers of Am. v. United States Steel Corp., 631 F.2d 1264, 1279-80 (6th Cir. 1980).

156. Id. at 1279-82; United Steel Workers of Am., Local No. 1530 v. United States Steel Corp., 492 F. Supp. 1, 9-10 (1980).

ford optimum worker and community protection when a major local employer decides to relocate or shut down. It is therefore necessary for advocates to explore novel approaches to creating and saving community jobs.\textsuperscript{158}

One commentator has recently argued (while acknowledging the relative novelty of his argument) that the United Steel Workers court could have held in the various plaintiffs' favor based upon already existing law! In "The Reliance Interest in Property" author Joseph William Singer argues that, contrary to the United Steel Workers decisions, continued and sustained relationships can, in their own right, give rise to property rights.\textsuperscript{159} While acknowledging that the United Steel Workers courts would have had to interpret the existing law in a new manner to grant the union's claims, Singer asserts, nonetheless, that prior cases have found property rights based on similar assertions. Further, in tort, property, contract and family law, property interests have been shifted and shared in situations that are analogous to plant closings.\textsuperscript{160} "These currently enforceable doctrines encompass the full range of social relationships, from relations among strangers, between neighbors, among long-term contractual partners in the marketplace, among family members and others in intimate relationships, and finally, between citizens and the government."\textsuperscript{161} These relationships have given rise to "reliance interests in property" which have resulted in specific legal rules about, "for example, adverse possession, prescriptive easements, public rights of access to private property, tenants' rights, equitable division of property on divorce, [and] welfare rights."\textsuperscript{162} What is most notable about all these relationships is that:

At crucial points in the development of these relationships—often, but not always, when they break up—the legal system requires a sharing or shifting of property interests from the "owner" to the "non-owner" to protect the more vulnerable party to the relationship. The legal system requires this shift, not because of reliance on specific

\textsuperscript{158} Comment, \textit{supra} note 7, at 233–34.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at 622–23.
\textsuperscript{161} \textit{Id.} at 622–23.
\textsuperscript{162} \textit{Id.} at 622.
promises, but because the parties have relied on each other generally and on the continuation of their relationship. Moreover, the more vulnerable party may need access to resources controlled by the more powerful party, and the relationship is such that we consider it fair to place this burden on the more powerful party by redistributing entitlements.163

Singer cautions the courts that "[c]onsideration of competing interests in access to resources and past reliance on relationships granting such access should be a central component of any legal determination of how to allocate lawful power over those resources."164 Based upon all of these already legally recognized rules and principles, Singer asserts that the United Steel Workers courts "had access to enforceable legal rules based on principles that could have been seen as applicable precedent for extension of existing law by creation of this new set of entitlements."165

There are no apparent reasons why these principles would not be applicable in most, if not all, cases of plant closings. In these cases there has usually been a continuous and mutual relationship where severance most often leaves one party "vulnerable." In any particular case the strength of the property claim would be contingent upon the duration and degree of involvement in the relationship. These property rights do not need a legislative construction; they can be created by the judiciary in the same way other property and property-like interests have been.

Thus, while both the City of Norwood and the United Steel Workers Union lost their battles, there is reason to believe that some day the contractually implied property right will be judicially recognized. This process will take time. The recognition of the right will eventually put communities in a better position to negotiate the conditions of both a company’s entrance to and exit from a community.

IV. CONTRACTUALLY IMPLIED PROPERTY RIGHTS AND EMINENT DOMAIN IN MINNESOTA

Unfortunately, the contractually implied property rights ad-
vocated here have not been recognized in Minnesota. This fact alone would counsel against a plaintiff primarily relying on this theory at this time in Minnesota.

The authors advocate, however, the advancement of these rights in Minnesota even if, in so doing, the change in law is significant. A party arguing for these rights has the option of pursuing the reasoning presented in the Singer article, the City of Norwood case, or the United Steel Workers cases.\(^\text{166}\)

Minnesota municipalities may wish to litigate a plant closing decision with the hope of an eventual recognition of a contractually implied property right. Municipalities may also assert the existence of the right in order to improve their bargaining positions with local companies. One method of helping municipalities negotiate with corporations is to recognize that a contract or property-like relationship was formed through tax abatements, provision of essential services, and direct assistance. This implied contract would define the relationship and govern changes that would be permissible between the parties. The primary goal is to prevent a business from creating large-scale economic dislocation by leaving a town. However, if this cannot be accomplished, the fallback goal is to recover adequate compensation in return for the benefits provided in reliance on a continued relationship.

Compared to contractually implied contract rights, the stronger legal argument for Minnesota municipalities is using eminent domain. Eminent domain provides municipalities with a legal tool that is much more likely under current law to accomplish the above-stated goals.

The beginning point for determining whether a particular eminent domain "taking" is legal is always a state's constitution. The Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed, or damaged for public use without just compensation therefor, first paid or secured."\(^\text{167}\) The Minnesota judiciary has historically interpreted this provision broadly, stating that "[t]he constitution should receive no such narrow and technical construction."\(^\text{168}\)

\(^{166}\) While the arguments and conclusions in this section are directed towards Minnesota, similar arguments and conclusions concerning eminent domain and contractually implied property rights may apply and be used in other states, subject to local variation in specific state law and precedent.


Minnesota Legislature has been given broad authority to acquire private property for various and novel uses, because public use has been held to be a concept that "'expands with the new needs created by the advance of civilization.' . . . 'Public use' is flexible and cannot be limited to concepts of public use or purpose held at the time of the forming of the constitution."169

This "flexible" approach to the use of eminent domain in Minnesota allows using eminent domain to condemn a business' assets to prevent removal of those assets. Minnesota law indirectly supports this proposition through the practice of condemning private property and then turning the property over to another private entity for its further development. In Housing and Redevelopment Authority v. Greenman, the Minnesota Supreme Court upheld the statutory authority of the City of St. Paul to condemn large tracts of already developed property within the city and to then turn this private property over to other private entities for their use.170 Noting that in this case the condemnation process was used to eradicate city slums and that such a purpose served a public use, the court stated that:

There are many authorities holding that various so-called redevelopment statutes which provide for the exercise of the power of eminent domain, the expenditure of public funds, and the lending of public credit are valid despite provisions for the transfer of lands thus acquired by public authority to private parties. The underlying reason for these decisions is that the acquisition and clearing of blighted areas completely serves a public purpose. The subsequent transfer of these lands to private parties is incidental to the main public purpose.171

Thus, Greenman supports the conclusion that a public use is served if a municipality condemns an on-going business, pursuant to a redevelopment statute, and then transfers the business to another private owner.

In a similar vein, the Minnesota Supreme Court has upheld

169. Housing and Redevelopment Authority v. Greenman, 255 Minn. 396, 404, 96 N.W.2d 673, 679 (1959) (quoting Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 16, 176 N.W. 159, 161 (1920)).

170. Greenman, 255 Minn. at 406–07, 96 N.W.2d at 681. The statute under consideration was MINN. STAT. § 462.415 (1947) (repealed 1987, ch. 291, § 244).

the condemnation of all the assets of a privately owned transit company in order that they be transferred to a public agency for continued operation. In Twin Cities Metropolitan Public Transit Area v. Twin City Lines, Inc., the issues before the court were primarily asset valuation and inclusion or exclusion from the condemnation award of certain assets. However, the court also implicitly upheld the legality of condemning a privately owned business for transfer to another entity for subsequent operation. This is precisely the use of eminent domain we advocate here in regard to plant closings.

While redevelopment statutes are most often used to create jobs and economic growth, the same power could arguably serve the public by preserving jobs and maintaining a stable economy. Support for this conclusion can be found in the recent case of City of Duluth v. State. In City of Duluth, the City used its eminent domain powers to condemn a large tract of land. The purpose of the condemnation was to construct a privately owned paper mill, which would result in the public benefit of long-term employment. A condemnee, upon whose land stood a large, mostly vacant building, objected to the planned use of eminent domain. In upholding the City's exercise of that power the court held that "[t]he revitalization of deteriorating urban areas and the alleviation of unemployment are certainly public goals." In arriving at this conclusion the

172. 301 Minn. 386, 390, 224 N.W.2d 121, 123-24 (1974).
173. For cases similarly affirming the acquisition of private property under eminent domain authority and its later distribution to other private parties, see City of Shakopee v. Minnesota Valley Electric Cooperative, 303 N.W.2d 58, 60 (Minn. 1981) (where the purpose is to transfer property, whether publicly or privately owned, the determining legal factor is whether the public use and benefit increase enough to justify its acquisition); Iowa Electric Light and Power Co. v. City of Fairmont, 243 Minn. 176, 180, 67 N.W.2d 41, 44-45 (1954) (MINN. STAT. § 117.01 (1954), involving eminent domain, does not differentiate between real and personal property when the property is operated as a whole).
174. 390 N.W.2d 757 (Minn. 1986).
175. Id. at 762. The eminent domain power was derived from both MINN. CONST. art. I, § 13, and Duluth's Home Rule Charter, which provides, in pertinent part, that the City may "'take and hold, by purchase, condemnation, gift or devise, and lease and convey any and all such real, personal or mixed property, . . . as its purposes may require or as may be useful or beneficial to its inhabitants.'" Id. at 767 (quoting Duluth City Charter § 1). For the exercise of eminent domain under similar authorities see the Morse Cutting Tool case and the IPR memorandum at supra notes 109-16 and accompanying text.
176. City of Duluth, 390 N.W.2d at 763.
court relied on the *City of Minneapolis v. Wurtele* case. In *Wurtele* the court upheld the condemnation of parcels for the construction of a privately owned downtown mall. In that case the court deferred to the city council's findings of how essential a downtown mall was to maintaining a viable business district in the city. A public purpose existed because evidence showed the construction of the mall created employment, generated retail sales, and increased the tax base of a city.

Should a Minnesota municipality attempt to exercise its eminent domain power to preserve, rather than create employment? In answering this question, the judiciary must attempt to distinguish between the two alternatives, labelling one a public purpose and the other not. The authors argue that there is no legally meaningful distinction between the two. The Minnesota Supreme Court may also agree if faced with the question, given the court's conclusion in *City of Duluth*, that a public purpose is served by “provid[ing] permanent and temporary employment in an economically distressed area of the state.” We maintain that, for eminent domain and public

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177. The court noted its reliance on cases from other jurisdictions. The court stated that “[a]ppellate courts in other jurisdictions have also determined that proposals to condemn and transfer property from one private owner to another are justified on the ground that the economic benefit that results is 'public' in nature.” *Id.* at 763 n.2 (citing Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 179, 339 A.2d 278, 283 (1975); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 634, 304 N.W.2d 455, 459 (1981)). Also notable is that, in arriving at its conclusion in this case the court relied on several cases discussed at length in this paper, including Berman v. Parker, 348 U.S. 26, 32 (1954) and Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984) (discussed supra notes 17–20 and 57–63 and in accompanying text).

178. 291 N.W.2d 386 (Minn. 1980).

179. It is well-settled in Minnesota eminent domain law (as well as in other jurisdictions) that the judiciary's function in this area is narrow and limited. The judiciary is to defer to the legislature's determinations regarding eminent domain.

3. It is within the province of the legislature to declare a public use or purpose, subject of course to a review by the courts, and such determination by the legislative body will not be overruled by the court except in instances where that determination is manifestly arbitrary or unreasonable.

180. City of Minneapolis v. Wurtele, 291 N.W.2d 386, 390 (Minn. 1980).

use purposes, only a distinction without a difference exists between the alleviation of unemployment and the prevention of unemployment, between generating retail sales and preserving them, and between enhancing a city's tax base and preserving the same.

CONCLUSION

In the last twenty years the United State's economy has shifted towards deindustrialization. This natural process of economic evolution has brought with it a great deal of localized hardship. In some cases, it has brought whole communities to their economic knees. In other cases, a limited number of individuals within a community have faced the same result. While in the end it is not economically healthy to artificially impede this evolution, there may be tools available to communities that slow down or alter the process without unnecessarily impeding it.

To accomplish these goals we have recommended that communities use two tools that may be at their disposal. First, we suggest using a municipality's eminent domain power to gain control of assets. Depending on the specific authority, the power can be used to purchase the assets, in particular the plant, of a business that intends to either close altogether or simply leave a particular town. In either case, the plant can then be operated by the municipality itself or by a new private entity after conveyance from the municipality.

We have also suggested that there exists between a company and the community in which it resides certain contractually implied property rights. These implied rights can be used by a municipality to control the business' ability to make unilateral decisions that harm the town. The recognition of these rights could give rise to a claim for relief based upon concepts of an implied contract through either equitable or promissory estoppel. In most cases, the equities of a given situation call out for recognition of these arguments and the provision of some remedy. Absent a remedy, municipalities are entirely at the mercy of businesses and are consequently unable to plan for or to control their destinies. Arguably, citizens have the right to expect their governments to assure greater stability and predictability in the business sector.

We recognize that certain individuals may argue these tools
are symbols of "creeping economic socialism." However, the
days of idealistic economic laissez-faire are long over. This
philosophy has been replaced by a highly regulated economy.
We believe that the economic hardship addressed here is, in
part, the direct result of the distinct advantage foreign nations
have achieved over the United States by regulating and plan-
ning their economies. While we do not advocate central plan-
ning, we do advocate some additional constraints on a
business’ ability to abandon, responsibility-free, a town and its
citizens after using up their vitality. The suggestions made
here can be used to ensure a more just evolution in the law
governing these relationships.