NOTE

Anticipating an Instant Replay: *City of Oakland v. Oakland Raiders*

Like most marriages, partnerships between a city and its sports franchises generally begin as if they were made in heaven.

As economic promises are given and vows of loyalty and mutual admiration exchanged, expectations run high. The city, frequently smoothing the way with costly new playing facilities and favorable rental terms, sees the Hometown Heroes as a good business investment: an asset that will create jobs, pump money into the local economy and build civic pride. For the franchise holders, the prospects of sellout crowds and rising profits are irresistible.

So the honeymoon begins, with talk of pennant drives and playoff berths ahead. As in real marriages, though, the partnership sometimes ends in court with legal battles over desertion, separation or divorce.[1]

INTRODUCTION

Professional sports in the United States has increased dramatically in the past three decades. Teams have expanded not only in number but also in locale. Originally concentrated in large Eastern cities, franchises are now located across the country.[2] This expansion has provided an opportunity for millions of people to enjoy the excitement of athletic competition. In many cities, on the day of the game, the fans and their team, are almost inseparable.[3] The experience is much more than vicar-

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[1] Cady, *When Do Franchises Have the Right to Relocate?*, N.Y. Times, Apr. 20, 1977, at 23, col. 3.

[2] H. DEMMERT, THE ECONOMICS OF PROFESSIONAL SPORTS TEAMS 6 (1973). Before 1958 the 41 major professional sports franchises were located in 19 cities from the Great Lakes to the East Coast. By 1973, 105 clubs were spread throughout the United States and Canada. *Id.* For a good discussion of how this transition occurred, see J. DURSO, THE ALL-AMERICAN DOLLAR viii to x (1971); Cady, *supra* note 1.

[3] "For millions, sports results are the most important news of the day, and the success of a team can send a whole city into unrestrained rejoicing." Comment, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81

ious. Each fan is a participant in every decision and every play.[4]

The growth of professional sports has not been limited to public recreation. Sports has become big business.[5] Probably the only people who still view games played by professionals as sports, rather than business enterprises, are the starry-eyed fans rooting for the home team.[6] In this era of fiscal constraints, many localities view professional sports teams as financial panaceas — generating both additional revenues and increased employment.[7] The competition between cities seeking a franchise is as intense as the games themselves.[8] However, while the games are played according to detailed and intricate rules, the contests between localities are waged on a virtually undefined and unmarked field of play.[9]

Although strong ties bind a sports team and a city, the team is still a privately owned enterprise.[10] It does not belong to the public. Until recently, a locality's claim to the team has been primarily debated by

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HARV. L. REV. 418, 418 (1967) [hereafter Comment, *Super Bowl and Sherman Act*].

[4] "[E]veryone has been taken up in the excitement and passion of a thrilling play at home, a brilliant runback or a perfectly executed jump shot. We are on that field with the team. We laugh when their play sparkles and cry when they make fools of themselves." New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 477, 292 A.2d 580, 600 (1971), *aff'd*, 61 N.J. 1, 292 A.2d 545, *appeal dismissed*, 409 U.S. 943 (1972).

[5] "In many respects, professional sports clubs are similar to other enterprises engaged in selling a service to the public. The club sells a service consisting of a sporting event produced jointly with another team." Okner, *Taxation and Sports Enterprises*, in GOVERNMENT AND THE SPORTS BUSINESS 159, 161 (R. Noll ed. 1974). *See generally* J. DURSO, *supra* note 2 (describing the big business of professional sports).

[6] Shirley, *Sports Has Become More Than a Game; It's Serious Business*, L.A. Times, Mar. 29, 1983, pt. III (Sports), at 1, col. 5; *see* Okner, *supra* note 5, at 159 ("To most people 'sports' simply means athletic contests. But professional sports is also a business that can generate substantial income for team owners and investors.").

[7] *See generally* L. SOBEL, PROFESSIONAL SPORTS & THE LAW 368-76 (1977); Block, *When Cities Lure Big League Sports*, 14 CAL. J. 287 (1983); Burck, *It's Promoters v. Taxpayers in the Super-Stadium Game*, FORTUNE, Aug. 1983, at 105; Malcom, *The Colts' Move: For Indianapolis It's a Boon . . .*, N.Y. Times, Apr. 8, 1984, at 13, col. 2; *cf.* Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 LAW & CONTEMP. PROBS. 42, 48 (1973).

[8] "The fierce competition among cities when a franchise is up for bids is further testimony to the economic benefits accruing." New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 471, 292 A.2d 580, 594 (1971), *aff'd*, 61 N.J. 1, 292 A.2d 545, *appeal dismissed*, 409 U.S. 943 (1972); *see* Block, *supra* note 7, at 287-89.

[9] L. SOBEL, *supra* note 7, at 492-93; *see also infra* note 13.

[10] *See* H. DEMMERT, *supra* note 2, at 4.

sports writers,[11] sports enthusiasts,[12] and political figures.[13] But when the City of Oakland filed an eminent domain action to acquire the Raiders, the focus of the dialogue shifted to the courtroom.[14] Oakland's

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[11] *See, e.g.*, H. COSELL, COSELL 93 (1973) ("There is no municipal obligation to support a bad product, but neither is there a law that says a businessman must go broke."); Cady, *supra* note 1; Will, *Oakland Deserves to Win the Raiders' Return*, L.A. Times, June 13, 1983, pt. II (Metro), at 5, col. 4 (discussing the Raiders' move); Smith, *The Fox in Rozelle's Shirt*, N.Y. Times, July 6, 1980, § II, at 2, col. 1 (same).

[12] *E.g.*, *Letters to the Green*, San Francisco Chron., Feb. 4, 1984, at 38, col. 4 (contributors omitted):

> The Raiders should have deplaned in Oakland instead of L.A. They would have been mobbed. What a hollow, empty victory for Al Davis and Co., who threw a party and nobody came. . . . Come home where you belong. There is still time.
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> . . . .
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> . . . Sports teams build an emotional bond with local teams that should not be broken when the bond is strong and produces a success in the bank book for an organization. I think we now know how Brooklyn fans felt when the L.A. Dodgers went to the World Series — lousy.

[13] Proposed federal and state legislation in this area includes the following: H.R. 6467, 97th Cong., 2d Sess., 128 CONG. REC. H2598, H6973-75 (1982) (antitrust exemption for National Football League); H.R. 2557, 97th Cong., 1st Sess., 127 CONG. REC. H86, E1134, E3498 (1981) (movement of sports franchise to be treated as sale for tax purposes); H.R. 823, 97th Cong., 1st Sess., 127 CONG. REC. H86, E3277, E3498 (1981) (Sports Franchise Relocation Act prohibiting professional teams from relocating unless noncompliance with material provision of stadium lease, inadequacy of stadium, or continuous net loss shown); S.B. 564, Cal. Leg., 1983-84 Sess. (1983) (professional sports franchise may not be taken by eminent domain); S.B. 2097, Cal. Leg., 1981-82 Sess. (1982) (same); *see also* PRO SPORTS: SHOULD GOVERNMENT INTERVENE? 36-40 (1977) (round table discussion sponsored by American Enterprise Institute for Public Policy Research) (Congressman Jack Kemp, American League President Lee McPhail, NFL Players' Association Executive Director Ed Garvey, and economist Roger Noll participating).

[14] The courtroom has not been entirely out of bounds. A number of antitrust suits have been attempted. *See* Los Angeles Memorial Coliseum Comm'n v. NFL, 519 F. Supp. 581 (C.D. Cal. 1981) (NFL held not to be single entity; therefore subject to § 1 of Sherman Act), *aff'd*, 726 F.2d 1381 (9th Cir. 1984); San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974) (League refusal to allow team to move to Vancouver not violation of § 1 of Sherman Act); Wisconsin v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (rejecting claim that league sanctioned movement of team to Atlanta violated state antitrust law), *cert. denied*, 385 U.S. 990 (1966). *See generally* Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws:* Los Angeles Memorial Coliseum Commission v. National Football League, 15 CONN. L. REV. 183 (1983); Comment, *Super Bowl and Sherman Act*, *supra* note 3.

A few cities have also sought injunctive relief to prevent a relocation constituting a

action is a logical extension of eminent domain power, exemplifying the close relationship that exists between a city and its team.[15]

This Note examines Oakland's attempt to use eminent domain to carry out this purpose. Part I discusses the context of the dispute between the City of Oakland and the Raiders. Part II surveys the development of eminent domain law in California, focusing on the public use requirement. Part III compares the parameters set down by the California Supreme Court in the Raiders case with the decision rendered by the trial court on remand, in light of the recent court of appeal decision which reversed the trial court's ruling. The Note concludes that the trial court's digressions from the guidelines established by the supreme court were, for the most part, unwarranted, and that the acquisition of the Raiders constitutes a valid public use. However, the ramifications of this unprecedented application of eminent domain must not be ignored. Therefore, this Note also examines the potential dangers of such an expansive interpretation of public use, as highlighted by Chief Justice Bird's concurring and dissenting opinion in *City of Oakland v. Oakland Raiders* (*Raiders I*).[16]

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breach of the stadium lease. *See* San Diego v. National League of Professional Baseball Clubs, No. 343508 (Cal. Super. Ct., San Diego County, July 10, 1973), *aff'd*, (4th Dist. 1973) (unpublished opinion) (denying preliminary injunction in city's suit to prevent Padres from breaching lease and moving to Washington, D.C.); HMC Management Corp. v. New Orleans Basketball Club, 375 So. 2d 700 (La. Ct. App. 1979) (denying preliminary injunction preventing team from moving to Utah); City of New York v. New York Yankees, 117 Misc. 2d 332, 458 N.Y.S.2d 486 (N.Y. Sup. Ct. 1983) (issuing preliminary injunction prohibiting team from playing opening series in Denver); City of New York v. New York Jets Football Club, Inc., 90 Misc. 2d 311, 394 N.Y.S.2d 799 (N.Y. Sup. Ct. 1977) (issuing preliminary injunction prohibiting team and league from scheduling home games anywhere but Shea Stadium).

[15] Some commentators have reached an opposite conclusion. *See* Sackman, *Public Use — Updated* (City of Oakland v. Oakland Raiders), 1983 INST. ON PLAN. ZONING & EMINENT DOMAIN 203 (proposed taking constitutes private use — under economic benefit theory); Smolker, *Prisoners of Oakland: Triumph of Power Over Sportsmanship*, 16 J. BEV. HILLS B.A. 174 (1982) (abuse of government power); *The California Supreme Court Survey: A Review of Decisions, January 1982-June 1982*, 10 PEPPERDINE L. REV. 167, 236 (1982) (action of city arbitrary, capricious, and a "selective prosecution") [hereafter *Supreme Court Survey*]; *see also* Note, *Public Use In Eminent Domain: Are There Limits After* Oakland Raiders *and* Poletown?, 20 CAL. W.L. REV. 82 (1983) (indicating public use is now meaningless restraint, and suggesting possible limiting parameters) [hereafter Note, Raiders *and* Poletown]; 6 WHITTIER L. REV. (1984) (public use analysis should include consideration of owner's right to use and enjoy property); *see generally* Comment, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 EMORY L.J. 857 (1984) (economic theory).

[16] 32 Cal. 3d 60, 76, 646 P.2d 835, 845, 183 Cal. Rptr. 673, 683 (1982) [hereafter

I. HISTORY OF THE CASE

In 1966, the Raiders and the Oakland-Alameda Coliseum Commission entered into a license agreement[17] which called for the Raiders to play their home games in the Oakland Coliseum for five years.[18] The Raiders were granted options to renew the agreement for as many as five additional three-year periods.[19] At the end of the third extension, the Raiders decided against another renewal because they were no longer satisfied with the facilities.[20] Negotiations were held with the Coliseum Commission, but an alternative accord could not be arranged.[21] On December 31, 1979, the licensing agreement formally expired.[22] Subsequent proposals were made to no avail.[23] On February 4, 1980, negotiations irreparably broke down.[24]

On July 20, 1978, the Los Angeles Rams had announced that the franchise would relocate to Anaheim for the 1980 season, leaving the Los Angeles Coliseum without a professional football team.[25] The Los

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Raiders I].

[17] City of Oakland v. Oakland Raiders, Case No. 76044 at 4 (Cal. Super. Ct., Monterey County, July 22, 1983) (Notice of Intended Decision *finalized* Aug. 5, 1983) (Agliano, J.) (copy on file at U.C. Davis Law Review office) [hereafter *Raiders Trial*]. The Coliseum Commission is a nonprofit corporation organized by the City of Oakland and the County of Alameda to build and operate the Coliseum.

[18] *Id.* The Coliseum was completed in 1966. The facility includes the 54,000 seat stadium at issue here, and a 12,000 seat indoor arena. The Coliseum was financed by a $25,000,000 bond issue, which is due to be paid off in the year 2004. *Id.* at 3.

[19] *Id.* at 4.

[20] *Id.* at 6. The Raiders sought to increase the capacity of the Coliseum either through direct expansion of the stadium or by adding luxury box seats. They also sought to upgrade the locker rooms, scoreboards, sound system and stadium seats. In addition, under the terms of the license agreement, a football game could not be played within 36 hours of an Oakland Athletics game. On occasion, home games had to be played at the University of California stadium in Berkeley. The Raiders wanted to modify or eliminate this provision.

[21] *Id.* The Coliseum Commission agreed that the stadium should be expanded, and indicated that luxury box seats would be an acceptable method. However, the two sides were unable to reach an accord to finance the proposed expansion.

[22] *Id.* at 7.

[23] *Id.* at 7-9. Three proposals were made by the Coliseum Commission between the date of expiration of the lease and the Raiders' move to Los Angeles. The second proposal, made January 21, 1980, was the most promising. The plan called for a loan of $4,000,000 to be made to the Raiders to enable them to finance the construction of 64 luxury boxes. However, a dispute as to the amount of the loan put an end to this proposal.

[24] *Id.* at 9.

[25] *Id.* at 7.

Angeles Memorial Coliseum Commission contacted the Raiders and other franchises, attempting to fill the upcoming vacancy.[26] Since the stadium has a 90,000 person seating capacity, and the Commission was willing to construct luxury box seats, the Raiders considered a move to Los Angeles particularly attractive.[27] However, the National Football League (NFL) had constraints on a team's ability to move.[28]

Section 4.3 of the NFL Constitution and By-Laws required consent of three-quarters of the existing franchises to relocate a team to another city.[29] This restriction was implemented to maintain financial stability and continuity within the League.[30] On March 10, 1980, the NFL owners denied the Raiders permission to move to Los Angeles by a vote of twenty-two to zero.[31]

Anticipating that the Raiders would attempt to relocate without ob-

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[26] *Id.* The other teams contacted were the Baltimore Colts and the Minnesota Vikings because their respective stadium leases had expired. The Colts moved from Baltimore to Indianapolis on March 29, 1984. *Colts Sneak to Indianapolis*, San Francisco Chron., Mar. 30, 1984, at 75, col. 2. Baltimore, not unlike Oakland, may seek to acquire the team by eminent domain. *Id.* However, Baltimore must overcome many more obstacles than Oakland has to surpass. *See infra* notes 46, 150.

[27] *Raiders Trial* at 7. Ironically, since the Raiders have moved to Los Angeles, their paid attendance has decreased. While in Oakland, every home game from 1968 through 1979 was sold out. A waiting list was the sole consolation for a fan who was unable to acquire a ticket for one of the 54,000 seats. In 1982, the Raiders' average attendance for home games played in Los Angeles was 52,935. The attendance for the 1983 season was equally uninspired. The Raiders averaged approximately 46,000 during the regular season. L.A. Times, Sept. 5 to Dec. 19, 1983, pt. III (Sports) (actual attendance) (if no-shows included figure increases to about 50,000). The only large crowds occurred during the playoffs. An average of 89,000 people attended the two post-season games (91,500 including no-shows). L.A. Times, Jan. 2 to Jan. 9, 1984, pt. III (Sports); *see* Greenberg, *Business the Raiders Way Doesn't Play in L.A.*, L.A. Times, Oct. 28, 1983, pt. III (Sports), at 1, col. 1.

[28] *See infra* notes 29-34 and accompanying text.

[29] "No member club shall have the right to transfer its franchise or playing site to a different city . . . without prior approval by the affirmative vote of three-fourths of existing member clubs of the League." NFL CONST. AND BY-LAWS, art. IV, § 4.3 (1976 & Supp. 1982) (copy on file at U.C. Davis Law Review office). This provision was found to violate § 1 of the Sherman Antitrust Act. Los Angeles Memorial Coliseum Comm'n v. NFL, No. 78-3523 (C.D. Cal. May 7, 1982) (jury verdict), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

[30] By controlling the locations of all of the League teams, the members sought to ensure that a particular city could support a team or an additional team, develop and maintain fan loyalty, and place competitive teams in major markets, so that television revenues remained at a high level. *See* Kurlantzick, *supra* note 14, at 189-91, 196-201.

[31] *Id.* at 185 (citing Wallace, *N.F.L., in 22 to 0 Vote, Refuses to Allow Raiders to Move*, N.Y. Times, Mar. 11, 1980, at B17, col. 4).

taining consent, the League warned the Raiders that section 4.3 would be enforced.[32] In 1980, the Raiders joined the Los Angeles Coliseum Commission in its suit contending that section 4.3 violated antitrust laws.[33] On February 21, 1980, the federal district court issued a preliminary injunction prohibiting the NFL from interfering with the move.[34] The Raiders were now free to move to Los Angeles, but this new-found freedom was short-lived.

On February 22, 1980, Oakland filed suit in Alameda County Superior Court seeking to acquire the Raiders by eminent domain.[35] The court issued a temporary restraining order preventing the proposed move.[36] After overcoming the Raiders' demurrer,[37] the suit was transferred to Monterey County Superior Court on April 21.[38] Approxi-

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[32] *Raiders Trial* at 9.

[33] *Id.* at 10.

[34] Los Angeles Memorial Coliseum Comm'n v. NFL, 484 F. Supp. 1274 (C.D. Cal.), *rev'd*, 634 F.2d 1197 (9th Cir. 1980) (no showing of irreparable injury, and trial court did not consider possible harm to League); *see supra* note 29.

[35] *Raiders Trial* at 1.

[36] Brief for Appellant at 6, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (petition for hearing) (copy on file at U.C. Davis Law Review office) [hereafter City's Brief, *Raiders I*]. On April, 17, 1980, the trial court issued a preliminary injunction forbidding the relocation of the franchise, and preventing the Raiders from entering into an agreement with the Los Angeles Memorial Coliseum Commission. City of Oakland v. Superior Court, 136 Cal. App. 3d 565, 568, 186 Cal. Rptr. 326, 327 (1st Dist. 1982) (preliminary injunction preventing move to Los Angeles reinstated but modified, requiring Raiders to return to Oakland only if no trial court decision in their favor before start of 1983 season) [hereafter *Raiders II*]. On June 6, the trial court granted the Raiders' motion for summary judgment, *see infra* note 39 and accompanying text, and ordered that the preliminary injunction be dissolved on June 9. The team moved to Los Angeles for the 1982 season.

When the California Supreme Court reversed the summary judgment and remanded the case for trial on the merits, *see infra* note 41 and accompanying text, Oakland sought to have the preliminary injunction reinstated. The trial court summarily refused. The city then obtained a peremptory writ of mandate ordering the trial court to hold an evidentiary hearing to determine the matter. Following the hearing, the injunction was reinstated.

Since the circumstances had changed dramatically — the Raiders had moved to Los Angeles — the terms of the injunction were modified. The new order required the Raiders to play all of their home games in Oakland, unless judgment was entered in favor of the Raiders prior to the start of the 1983 season. The trial court held the proposed taking invalid on August 5, 1983. *See infra* note 43 and accompanying text. As a result, the Raiders have continued to play their home games in Los Angeles.

[37] The Raiders asserted the taking lacked a public purpose and that a football franchise is not property subject to eminent domain. City's Brief, *Raiders I*, *supra* note 36, at 6-7.

[38] The Raiders requested and were granted this change of venue pursuant to Civil

mately one month later, the Raiders moved for summary judgment, which was granted on June 16.[39]

The city appealed the judgment of the trial court. On September 2, the appellate court affirmed, holding that intangible property is not subject to eminent domain.[40] Oakland then obtained a hearing before the California Supreme Court, which reversed the summary judgment. The court, in an opinion by Justice Richardson, concluded that intangibles may be condemned, and remanded the case for a full hearing on the propriety of the taking.[41]

On May 16, 1983, the trial began in Monterey County Superior Court to determine whether Oakland was empowered to acquire the Raiders.[42] After a six-week trial, the matter was taken under submission by the court. On July 22, the court announced its conclusion that "Plaintiff City of Oakland does not have the right to acquire by eminent domain any property described in the complaint . . . ."[43]

Subsequent to the trial court decision, the city sought injunctive relief from the California Supreme Court, contending that the decision was clearly contrary to the rules of law established in *Raiders I*. On August 18, the supreme court transferred the petition to the court of appeal and ordered that an alternative writ be issued.[44] On December 29, the

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Procedure Code § 394. CAL. CIV. PROC. CODE § 394 (West 1973) (authorization for change of venue to jurisdiction outside plaintiff municipality).

[39] Although triable issues of fact were presented, the court decided the controversy as a matter of law, based upon public use. City's Brief, *Raiders I*, *supra* note 36, at 7.

[40] The appellate court affirmed, but it relied on a different rationale. It held the taking invalid, because intangible property — namely the team franchise — is not subject to eminent domain. City of Oakland v. Oakland Raiders, 123 Cal. App. 3d 422, 176 Cal. Rptr. 646 (1st Dist. 1981), *ordered depublished by the California Supreme Court* (June 21, 1982). The supreme court reversed, holding that all types of property are subject to eminent domain. *See infra* note 77 and accompanying text.

[41] *Raiders I*, 32 Cal. 3d 60, 63, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982) (as modified Aug. 5, 1982). The decision was first issued June 21, 1982. Subsequent to a petition for rehearing by the Raiders, the original text was amended. For a comparison of the two versions see Sackman, *supra* note 15, at 227-32 (indicating how the modification "watered down" the initial opinion).

[42] San Francisco Chron., May 17, 1983, at 2, col. 1.

[43] *Raiders Trial* at 43.

[44] City of Oakland v. Superior Court, 150 Cal. App. 3d 267, 272, 197 Cal. Rptr. 729, 731 (1st Dist. 1983) [hereafter *Raiders III*]. The procedural history is somewhat more complex than indicated. During the period between the issuance of the Notice of Intended Decision (July 22) and the entry of judgment (August 5), the city applied to the California Supreme Court for a writ of mandate and a stay of judgment. On August 2, the supreme court transferred the petition to the court of appeal which summarily rejected both requests on August 5. Since a summary denial is rarely precedent, res

appellate court issued a peremptory writ compelling the trial court to vacate its judgment.[45] The order also instructed the trial court to determine the validity of the other defenses raised by the Raiders.[46] If the

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judicata, or law of the case, *see, e.g.*, People v. Medina, 6 Cal. 3d 484, 492 P.2d 686, 99 Cal. Rptr. 630 (1972) (summary denial of writ of mandate petition only has preclusive effects when sole possible ground for denial was merits), Oakland, on August 10, petitioned the supreme court to contest the denial of injunctive relief. On August 18, the supreme court granted the city a hearing and transferred the case to the court of appeal, directing it to issue an alternative writ. *Raiders III*, 150 Cal. App. 3d at 271-72, 197 Cal. Rptr. at 730-31.

An alternative writ is employed when notice is not given to an adverse party. CAL. CIV. PROC. CODE § 1088 (West 1980). The writ is alternative because the person named therein has a choice: to comply with its terms, or to show cause why the prescribed action or inaction should not be required. CAL. CIV. PROC. CODE § 1087 (West 1980); *cf.* McPheeters v. Board of Medical Examiners, 82 Cal. App. 3d 709, 187 P.2d 116 (1st Dist. 1947) (alternative writ not conclusive determination that relief warranted).

[45] *Raiders III*, 150 Cal. App. 3d at 280, 197 Cal. Rptr. at 736. A peremptory writ is issued subsequent to notice and a hearing. Unlike an alternative writ, *see supra* note 44, a peremptory writ is a final determination of the petition. Issuance or denial of a peremptory writ is an appealable judgment. *See, e.g.*, People v. Municipal Court, 97 Cal. App. 3d 444, 158 Cal. Rptr. 739 (2d Dist. 1979) (petition for writ is civil action, appealable pursuant to CAL. CIV. PROC. CODE § 904.1 (West 1980)); Goddard v. South Bay Union High School Dist., 79 Cal. App. 3d 98, 144 Cal. Rptr. 701 (2d Dist. 1978) (denial of writ is an appealable judgment); Gilbert v. Municipal Court, 73 Cal. App. 3d 723, 734, 140 Cal. Rptr. 897, 904 (4th Dist. 1977) (appeal will lie from either grant or denial of writ or petition). Accordingly, the Raiders, on February 6, 1984, petitioned the California Supreme Court for a hearing. The court denied the petition on March 22, 1984. The case has now returned to the trial court, which must decide whether the Raiders' remaining objections, *see supra* note 46, preclude the taking. The trial court held oral arguments concerning these defenses on May 25. San Francisco Chron., May 26, 1984, at 2, col. 4. A decision is expected by the end of June.

[46] *Raiders III*, 150 Cal. App. 3d at 280, 197 Cal. Rptr. at 736. The more notable defenses raised by the Raiders include alleged violations of the right to travel, *see, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982) (distribution of excess mineral tax revenues to residents based upon length of residency held unconstitutional imposition on interstate migration), the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1. The Raiders also claimed that an indispensable party — the NFL — was absent. CAL. CIV. PROC CODE] 389] (West 1973). Since the Raiders move was intrastate, the right to travel and Commerce Clause defenses are probably inapposite. These defenses may prove to be much more effective against Baltimore if it attempts to reclaim the Colts by eminent domain, see *supra* note 26, because the Colts relocated to a different state. *See Baltimore Starts Legal Bids to Retake Colts Franchise*, N.Y. Times, Apr. 2, 1984, at 10, col. 1 (discussing potential Commerce Clause difficulties).

Another issue left unresolved by the trial court is whether the proposed taking constitutes a gross abuse of discretion. Although the trial judge deferred inquiry, he did indicate that the procedural irregularities and the lack of evidence supporting the necessity

remaining objections, including lack of public use, are found meritless, the trial court must proceed to the compensation phase of the trial.[47]

Since the primary issue on remand will be the existence of a public use, the following section discusses the present interpretation of the public use limitation by the California courts.

II. California Eminent Domain Law

Eminent domain is the power of the sovereign to take property for a public use without the owner's consent.[48] Although eminent domain is

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of the taking tend to support such a finding. *Raiders Trial* at 42. The court of appeal indicated that neither ground is sufficient to find a gross abuse of discretion. However, it did not preclude a reexamination of this matter by the trial court. *Raiders III*, 150 Cal. App. 3d at 279 n.11, 197 Cal. Rptr. at 736 n.11.

Since a finding of gross abuse of discretion allows the trial court to examine the necessity of the taking, Cal. Civ. Proc. Code § 1245.255 (West 1982), *see infra* notes 187, 196 and accompanying text, the trial court's review of necessity, overturned by the court of appeal, might be resurrected. *See infra* notes 186-205 and accompanying text.

[47] *Raiders III*, 150 Cal. App. 3d at 279, 197 Cal. Rptr. at 736. At the hearing to show cause, the Raiders asserted that mandamus was improper, because the city was entitled to appeal the trial court judgment. A writ of mandate will not issue if an adequate remedy exists at law. Cal. Civ. Proc. Code § 1086 (West 1980). Usually, the availability of an appeal is sufficient recourse. *See, e.g.*, Phelan v. Superior Court, 35 Cal. 2d 363, 217 P.2d 951 (1950) (reduction of award should have been appealed — writ denied); Lincoln v. Superior Court, 22 Cal. 2d 304, 139 P.2d 13 (1943) (mandate not substitute for appeal). However, if a special reason exists that makes an appeal inadequate, then mandamus is appropriate. *See, e.g.*, *Lincoln* (trial court's refusal to entertain motions for temporary alimony, costs, and attorney's fees insufficient); Michael B. v. Superior Court, 86 Cal. App. 3d 1006, 150 Cal. Rptr. 586 (5th Dist. 1978) (mandate proper on matter of first impression and great importance to bench and bar); Hogya v. Superior Court, 75 Cal. App. 3d 122, 142 Cal. Rptr. 325 (4th Dist. 1977) (consumer class action constitutes issue of great public importance, which must be resolved quickly, warrants mandamus).

The court of appeal did not need a special reason to issue the writ of mandate. When the supreme court grants a hearing for a writ of mandate and then transfers the case to a court of appeal with directions to issue an alternative writ, the supreme court has conclusively determined that no adequate remedy at law exists. *Raiders III*, 150 Cal. App. 3d at 272, 197 Cal. Rptr. at 731; *see, e.g.*, Brown v. Superior Court, 5 Cal. 3d 509, 487 P.2d 1224, 96 Cal. Rptr. 584 (1971) (alternative writ issued vacating trial court's sustaining of demurrer); Mooney v. Pickett, 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971) (alternative writ issued prohibiting trial court from denying petitioner welfare payments).

[48] P. Nichols, Power of Eminent Domain § 7, at 7-9 (1909); J. Sackman, 1 Nichols on Eminent Domain § 1.11, at 1-7 to 1-13 (3d ed. 1980) [hereafter 1 Nichols]. Recent commentaries on the scope of condemnation power include Bennett, *Eminent Domain and Redevelopment: The Return of Engine Charlie*, 31 De Paul L. Rev. 115 (1981) (supporting Michigan Supreme Court decision in Poletown Neigh-

an inherent attribute of government power,[49] the federal and state constitutions place limitations upon its exercise.[50] Property must be taken

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borhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (upholding use of eminent domain to acquire property for private industrial development)); Bixby, *Condemnation of Private Property in Order to Construct General Motors Plant is for a Public Use:* Poletown Neighborhood Council v. City of Detroit, 13 URB. LAW. 694 (1981) (same); Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) (use of property theory to support *Poletown* decision). Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980) (analyzing when a regulation becomes a taking).

[49] 1 NICHOLS, *supra* note 48, § 1.12, at 1-13. For a good discussion of the evolution of eminent domain in the United States, see Bennett, *supra* note 48, at 116-22; Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1937); *see also* 1 NICHOLS, *supra* note 48, § 1.14, at 1-21 to 1-34 (discussing the theory underlying this foundation).

[50] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 1 (made applicable to states in Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897)). "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." CAL. CONST. art. I, § 19.

Although the federal and state provisions are independent limitations, there is no discernible difference between the two. Both the California Supreme Court and the United States Supreme Court have defined public use broadly. J. SACKMAN, 2A NICHOLS ON EMINENT DOMAIN § 7.02[2], at 7-33 (3d ed. 1980) (federal) [hereafter 2A NICHOLS]; *see infra* note 56 and accompanying text (California). The California Supreme Court often uses language from United States Supreme Court decisions concerning eminent domain as precedent for its holdings regarding public use. *See, e.g., Raiders I*, 32 Cal. 3d at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) and Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923)); City & County of San Francisco v. Ross, 44 Cal. 2d 52, 56-57, 279 P.2d 529, 531 (1955) (citing Berman v. Parker, 348 U.S. 26 (1954)); Housing Auth. v. Dockweiler, 14 Cal. 2d 437, 450, 94 P.2d 794, 801 (1939) (citing *Rindge*); Consolidated Channel Co. v. Central Pac. R.R., 51 Cal. 269, 272 (1876) (citing Loan Ass'n v. City of Topeka, 87 U.S. (20 Wall.) 655 (1874)). California public use decisions usually recognize that both constitutions apply, but do not distinguish them. *See, e.g., Raiders I*, 32 Cal. 3d at 64, 646 P.2d at 838, 183 Cal. Rptr. at 676; People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); City of Anaheim v. Michel, 259 Cal. App. 2d 835, 837, 66 Cal. Rptr. 543, 545 (4th Dist. 1968).

The United States Supreme Court has not helped to solve this mystery. The Court has held that public use is largely a local question. *See, e.g., Rindge*, 262 U.S. at 705 (determination of public use is influenced by local conditions); Jones v. City of Portland, 245 U.S. 217, 221 (1917) ("While the ultimate authority . . . is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority . . . has peculiar facilities for securing accurate information."). If the highest state court has sanctioned the taking, the Court will almost always agree. *See, e.g., Jones*, 245 U.S. at 221 (determination of highest state court entitled to "highest respect"); Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916)

for a public use, and just compensation must be paid for it.[51] These constitutional restrictions have also been codified in California,[52] but the provisions apparently impose no additional constraints.[53]

(state court judgment entitled to great weight); Union Lime Co. v. Chicago & Nw. Ry., 233 U.S. 211 (1914) (judgment of highest state court that use is public to be accepted unless clearly without grounds). One commentator concluded that the Court has never disallowed a use which the state court held to be public. 2A NICHOLS, *supra*, § 7.05[1], at 7-48 n.4. *But see* Comment, Rex Non Protest Peccare*??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266, 267 (1971) (limiting assertion to cases decided this century; asserting that Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), is an exception to the proposition). In the Supreme Court's most recent decision concerning public use, Hawaii Hous. Auth. v. Midkiff, 52 U.S.L.W. 4673 (U.S. May 30, 1984), the Court upheld the Hawaii Land Reform Act. *See infra* note 179. Justice O'Connor, writing for a unanimous Court, held that review of legislative judgments regarding public use is "extremely narrow."

> [T]he Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."
>
> . . . [W]here the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

Id. at 4676 (citations omitted).

The "conceivable public purpose" test promulgated in *Midkiff* essentially eliminates any federal public use limitations by deferring to local legislative decisions. The City of Oakland can establish much more than a conceivable public purpose for taking the Raiders. *See infra* notes 104-13 and accompanying text. The city's proposed acquisition is also consistent with California's case law concerning public use. *See infra* notes 54-61, 112-20, 179. Therefore, provided the team owners are paid just compensation, acquiring the Raiders is a valid exercise of eminent domain power.

[51] *Raiders I*, 32 Cal. 3d at 64, 646 P.2d at 837-38, 183 Cal. Rptr. at 676; *see, e.g.*, People v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959); Rose v. State, 19 Cal. 2d 713, 719, 123 P.2d 505, 510 (1942); County of San Mateo v. Coburn, 130 Cal. 631, 634, 63 P. 78, 79 (1900); Gilmer v. Lime Point, 18 Cal. 229, 250-51 (1861); City of Anaheim v. Michel, 259 Cal. App. 2d 835, 837, 66 Cal. Rptr. 543, 545 (4th Dist. 1968); Anaheim Union High School Dist. v. Vierra, 241 Cal. App. 2d 169, 171, 51 Cal. Rptr. 94, 95 (4th Dist. 1966).

[52] "The power of eminent domain may be exercised to acquire property only for a public use." CAL. CIV. PROC. CODE § 1240.010 (West 1982).

[53] "The new law appears to impose no greater restrictions on the exercise of condemnation power than those which are inherent in the federal and state Constitutions." *Raiders I*, 32 Cal. 3d at 65, 646 P.2d at 838, 183 Cal. Rptr. at 676.

A. The Public Use Limitation

A comprehensive definition of public use does not exist,[54] because the requirement can be construed broadly or narrowly.[55] California, along with a majority of jurisdictions, has given public use an expansive definition.[56] In *Bauer v. County of Ventura*,[57] the California Supreme Court defined a public use as one "which concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[58] The court has also held that to fulfill this criterion, neither the entire community nor even a considerable portion of it must benefit from the acquisition.[59] Even if private gain incidentally results from the accomplishment of the public purpose, the taking is still valid.[60] However, condemnations that benefit only private parties

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[54] 2A NICHOLS, *supra* note 50, § 7.02, at 7-23.

[55] *Id.* § 7.2[1]-[2], at 7-23 to 7-26. The narrow view restricts public use to "use by the public," whereby the taking must result in widespread actual public access to, and enjoyment of, the property. The broad view expands this concept to include takings for public advantage, including anything that enhances the general welfare and prosperity. For an indication of the various parameters ascribed to public use, see generally Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978) (when government or private parties have right to take property of another); Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953) (how public use and public purpose restrictions apply to local agencies empowered to acquire blighted areas by eminent domain); Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980) (judicial politicization of public use); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940) (evolution of public use limitation); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) (public use and compensable takings); Comment, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409 (1983) (proposed rational relationship test for public use including rights of property owner in analysis); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949) (decrying that public use no longer meaningful restriction).

[56] 2A NICHOLS, *supra* note 50, § 7.02[2], at 7-33; *see also* Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 803, 266 P.2d 105, 122 (1st Dist.) (redevelopment project valid public use), *cert. denied*, 348 U.S. 897 (1954).

[57] 45 Cal. 2d 276, 289 P.2d 1 (1955).

[58] *Id.* at 284, 289 P.2d at 6.

[59] *Raiders I*, 32 Cal. 3d at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679; *see also* University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 527-28, 37 P.2d 163, 165 (2d Dist.) (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161 (1896)), *cert. denied*, 295 U.S. 738 (1934).

[60] "Once it is determined that the taking is for a public purpose the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose." Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 804, 266 P.2d 105, 122 (1st Dist.), *cert. denied*, 348 U.S. 897 (1954); *see also*

or carry out only private purposes have been consistently disallowed by the court.[61]

B. Municipal Eminent Domain Power

A city may exercise eminent domain only if express statutory authorization exists, because cities, unlike states, lack inherent condemnation power.[62] Section 37350.5 of the California Government Code empowers municipalities to condemn "any property necessary to carry out any of its powers or functions."[63] This section was intended to give cities adequate authority to carry out municipal functions.[64]

Prior to filing suit to acquire property by eminent domain, a city

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County of Los Angeles v. Anthony, 224 Cal. App. 2d 103, 106, 36 Cal. Rptr. 308, 310 (2d Dist.) (leasing of property condemned by county to private company for construction and operation of Hollywood Motion Picture and Television Museum does not invalidate taking), *cert. denied*, 376 U.S. 963 (1964); *cf.* United States v. 416.81 Acres of Land, 514 F.2d 627 (7th Cir. 1975) (collateral benefits flowing to private parties do not invalidate taking).

[61] Consolidated Channel Co. v. Central Pac. R.R., 51 Cal. 269, 271-72 (1876) (taking of property solely to benefit private mine company):

> It is clear from the averment of the complaint, that the object sought is the appropriation of the private property of the defendants to the private use of the plaintiff. . . . No public use can possibly be subserved by it. It is a private enterprise, to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the Constitution which permits the taking of private property for a public use after just compensation made.

See also Linggi v. Garvotti, 45 Cal. 2d 20, 286 P.2d 15 (1955) (use of eminent domain to obtain easement across another's private property to connect apartment building to sewer system held valid); City & County of San Francisco v. Ross, 44 Cal. 2d 52, 58, 279 P.2d 529, 533 (1955); People v. Nahabedian, 171 Cal. App. 2d 302, 308, 340 P.2d 1053, 1056 (2d Dist. 1959) (if purpose of taking were to lease condemned property for private benefit rather than freeway purposes, taking would be invalid).

[62] *Raiders I*, 32 Cal. 3d at 64-65, 646 P.2d at 838, 183 Cal. Rptr. at 676; Harden v. Superior Court, 44 Cal. 2d 630, 640, 284 P.2d 9, 15 (1955); City & County of San Francisco v. Ross, 44 Cal. 2d 52, 55, 279 P.2d 529, 531 (1955); City of Anaheim v. Michel, 259 Cal. App. 2d 835, 837, 66 Cal. Rptr. 543, 545 (4th Dist. 1968); City of Menlo Park v. Artino, 151 Cal. App. 2d 261, 266, 311 P.2d 135, 139 (1st Dist. 1957); Alexander v. Mitchell, 119 Cal. App. 2d 816, 821, 260 P.2d 261, 263 (1st Dist. 1953); MacKay v. City of Los Angeles, 136 Cal. App. 180, 183, 28 P.2d 706, 708 (1st Dist. 1934); City of Los Angeles v. Koyer, 48 Cal. App. 720, 725, 192 P. 301, 303 (2d Dist. 1920).

[63] CAL. GOV'T CODE § 37350.5 (West Supp. 1984).

[64] CAL. GOV'T CODE § 37350.5 law revision comment (West Supp. 1984).

council must adopt a resolution of necessity.[65] A properly enacted resolution conclusively[66] establishes that: (1) public interest and necessity require the proposed project;[67] (2) the plans are as compatible as possible with the greatest public good;[68] and (3) the property is necessary for the proposed project.[69] The property owners must be given reasonable notice and an opportunity to be heard prior to passage of the resolution.[70]

A city may only acquire property within its territorial limits, unless extraterritorial power is expressly granted by statute[71] or necessarily implied as an incident of other statutory powers.[72] Even if a municipal-

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[65] CAL. CIV. PROC. CODE § 1245.220 (West 1982). The statute applies to public entities, which include cities. CAL. CIV. PROC. CODE § 1235.190 (West 1982).

[66] CAL. CIV. PROC. CODE § 1245.250(a) (West 1982). Giving conclusive effect to a resolution of necessity is constitutionally permissible. *See* Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923), *aff'g* 53 Cal. App. 166, 200 P. 27 (2d Dist. 1921); City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1st Dist. 1924).

A valid resolution only precludes judicial review of the matters specified in § 1240.030. *See infra* notes 88-91 and accompanying text. It does not foreclose a challenge on the basis of public use, or that the condemner does not intend to use the property for the declared purpose. CAL. CIV. PROC. CODE § 1240.250 official comment (West 1982).

[67] CAL. CIV. PROC. CODE §§ 1240.030(a), 1245.250(a) (West 1982).

[68] CAL. CIV. PROC. CODE § 1240.030(b) (West 1982).

[69] CAL. CIV. PROC. CODE §§ 1240.030(c) (list of issues covered by § 1245.250(a)), 1245.250(a) (resolution conclusively establishes listed issues) (West 1982); *see, e.g.*, City of Los Angeles v. Keck, 14 Cal. App. 3d 920, 82 Cal. Rptr. 599 (5th Dist. 1971) (condemnation of fee unnecessary because city already held easement).

[70] CAL. CIV. PROC. CODE § 1245.235 (West 1982). Notice, by first class mail, must be given to each person whose property is to be acquired. Such persons must be given a reasonable opportunity to appear and be heard prior to the adoption of the resolution.

[71] A number of statutes expressly authorize extraterritorial condemnation. *See, e.g.*, CAL. CIV. PROC. CODE § 1240.125 (West 1982) (to provide water, gas, or electrical supply, airport facilities, or sewers or drainage); CAL. GOV'T CODE § 61610 (West 1983) (community service districts); CAL. HARB. & NAV. CODE § 7147 (West 1978) (small craft harbor districts provided applicable county and city governments approve); CAL. HEALTH & SAFETY CODE § 6514 (West 1970) (sanitary districts, with approval of local board of supervisors); CAL. PUB. RES. CODE § 5540 (West 1972) (regional park district powers).

[72] CAL. CIV. PROC. CODE § 1240.050 (West 1982); *see* Harden v. Superior Court, 44 Cal. 2d 630, 284 P.2d 9 (1955) (no express or implied authority to condemn land adjacent to city for parking lot); City of Carlsbad v. Wight, 221 Cal. App. 2d 756, 34 Cal. Rptr. 820 (4th Dist. 1963) (no express or implied authority to condemn land located outside of city for storm drain); City of No. Sacramento v. Citizens Utils. Co., 192 Cal. App. 2d 482, 13 Cal. Rptr. 538 (3d Dist. 1961) (power of city to operate water systems for benefit of residents and nonresidents necessarily implies power to condemn portion of water system located outside of city); City of Hawthorne v. Peebles,

ity has such authorization, its resolution of necessity is not conclusive as to extraterritorial property.[73] Instead, the resolution creates a presumption that the criteria listed above have been satisfied.[74]

A municipality need not retain ownership in the condemned property to comply with the statutory requirements.[75] A city may exercise eminent domain intending to sell, lease, or exchange the acquired property. However, the subsequent transfer must include reservations or restrictions which preserve the attractiveness or usefulness of the property.[76]

III. The Supreme Court Decision, the Trial Court Judgment, and the Writ of Mandate

In reversing the summary judgment for the Raiders, the California Supreme Court held that intangible property, even if unconnected to realty, may be acquired by eminent domain.[77] The court also framed

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166 Cal. App. 2d 758, 333 P.2d 442 (2d Dist. 1959) (express statutory authority to condemn land located partially outside of jurisdiction for park purposes); Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co., 72 Cal. App. 2d 638, 165 P.2d 741 (3d Dist. 1946) (utility distribution system, even if part of it is outside district boundaries).

[73] Cal. Civ. Proc. Code § 1245.250(b) (West 1982); *see* Harden v. Superior Court, 44 Cal. 2d 630, 284 P.2d 9 (1955); City of Los Angeles v. Keck, 14 Cal. App. 3d 920, 82 Cal. Rptr. 579 (5th Dist. 1971); City of Carlsbad v. Wight, 221 Cal. App. 2d 756, 34 Cal. Rptr. 820 (4th Dist. 1963); City of Hawthorne v. Peebles, 166 Cal. App. 2d 758, 333 P.2d 442 (2d Dist. 1959).

[74] "[T]he resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence." Cal. Civ. Proc. Code § 1245.250(b) (West 1982); *see* Cal. Evid. Code § 604 (West 1966) (trier of fact to assume existence of presumed fact unless evidence supports finding of its nonexistence).

[75] Cal. Gov't Code § 37350 (West 1968) ("A city may purchase, lease, receive, hold and enjoy real and personal property, and control and dispose of it for the common benefit.").

[76] Cal. Civ. Proc. Code § 1240.120 (West 1982); *see infra* notes 178-79 and accompanying text.

[77] *Raiders I*, 32 Cal. 3d at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678. This holding specifically reversed the court of appeal's affirmation of the summary judgment. *See supra* note 40. The court of appeal had held that "diverse contract rights" that comprise the football franchise may not be condemned because intangible property is not subject to eminent domain. City of Oakland v. Oakland Raiders, 123 Cal. App. 3d 422, 176 Cal. Rptr. 646, 650 (1st Dist. 1981), *ordered depublished by the California Supreme Court* (June 21, 1982).

The court of appeal characterized eminent domain as a power to be watched and guarded with jealous scrutiny. The court held that potential abuse of eminent domain requires strict construction of statutes that confer such power. Since California eminent domain law does not expressly provide for the taking of intangibles, *see* Cal. Civ. Proc. Code § 1240.010 (West 1982) and Cal. Gov't Code § 37350.5 (West Supp.

the primary issues to be determined on remand: whether the proposed

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1984), the appellate court held that the condemnation statutes do not authorize government acquisition of a business or other intangibles. City of Oakland v. Oakland Raiders, 123 Cal. App. 3d 422, 176 Cal. Rptr. 646, 650 (1st Dist. 1981), *ordered depublished by the California Supreme Court* (June 21, 1982).

In reaching a contrary conclusion, the California Supreme Court began its inquiry at the constitutional rather than the statutory level. The court determined neither the federal nor the state constitution expressly limits the types of property subject to condemnation. Therefore, the taking of all forms of property — real or personal, tangible or intangible — is constitutional. *Raiders I*, 32 Cal. 3d at 64, 646 P.2d at 838, 183 Cal. Rptr. at 676.

After finding sufficient constitutional authority, the court then determined whether the existing statute empowers the state (and municipalities) to acquire both personal and intangible property by eminent domain. Unlike the court of appeal, the supreme court held that the present law authorizes the condemnation of such property. *Id.* at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678.

In 1975, the state legislature extensively revised and recodified the eminent domain law. *See* CAL. CIV. PROC. CODE §§ 1230.010-1273.050 (West 1982 & Supp. 1984); CAL. LAW REVISION COMM'N, THE EMINENT DOMAIN LAW (1975). The scope of property subject to condemnation was specifically intended to be "the broadest possible." It covers "any type of right, title, or interest in property that may be required for public use." CAL. CIV. PROC. CODE § 1235.170 law revision comment (West 1982). Since no statute expressly prohibits condemning intangibles, the supreme court held that Oakland has authority to acquire a professional football franchise. *Raiders I*, 32 Cal. 3d at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678.

Justice Richardson admitted that little case law exists upholding the condemnation of intangibles unconnected to real property, but wrote that "the lack of precedent does not establish that the legal right to take intangibles is lacking." *Id.* at 66, 646 P.2d at 839, 183 Cal. Rptr. at 677. The court then referred to a number of federal and state eminent domain decisions to demonstrate that condemnation of intangibles was not unprecedented.

The Court primarily relied on West River Bridge Co. v. Dix, 47 U.S. 507 (1848) (state franchise to operate a bridge subject to eminent domain), to show that government acquisition of intangibles has been judicially sanctioned. The court also cited Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (compensation required for taking trade routes of laundry), to demonstrate that the United States Supreme Court has reaffirmed the principle that intangible property is subject to eminent domain.

Justice Richardson also relied on a number of *inverse* condemnation decisions as precedent for direct acquisition of intangible assets. *Raiders I*, 32 Cal. 3d at 67-68, 646 P.2d at 837-40, 183 Cal. Rptr. at 677-78. He found these cases to be pertinent, because "condemnation and inverse condemnation . . . are merely different manifestations of the same governmental power." *Id.* at 67, 646 P.2d at 840, 183 Cal. Rptr. at 678. Since these decisions uphold compensation for intangible property unconnected with real property, Justice Richardson inferred that the use of eminent domain to acquire such property had already received tacit judicial approval. *Id.* Chief Justice Bird strongly dissented from this facet of the court's opinion. *Id.* at 77, 646 P.2d at 845, 183 Cal. Rptr. at 684; *see Supreme Court Survey*, *supra* note 15, at 236.

taking is for a valid public use;[78] whether the property to be acquired was actually located in Oakland;[79] and, if required, whether the city was authorized to take property outside of its jurisdiction.[80] The supreme court ordered a full hearing on the merits to decide these matters.

The trial court decision in favor of the Raiders rested upon a number of apparently independent grounds. The court held that the proposed taking was invalid because:

(l) The probability of a public benefit was not discernible. Hence, the acquisition was not for a valid public use.[81]

(2) The team franchise was not located entirely in Oakland, and the city lacks extraterritorial condemnation power for this purpose.[82]

(3) The target property is not subject to eminent domain for the stated purpose — to retransfer the team to a private owner.[83]

(4) Public interest and necessity do not require the taking.[84]

(5) The city did not properly follow the procedures required for municipal condemnation.[85]

(6) Oakland did not demonstrate that the property would be devoted to a public use within seven years.[86]

The court of appeal held that the grounds relied on by the trial court were not valid objections to the proposed taking. The court also held that the trial judge never ruled on the public use issue. Without additional evidence, the trial court must now decide the merit of the Raiders' remaining defenses.[87] The following discussion compares and contrasts the decisions of the supreme court, the trial court, and the court of appeal regarding these objections.

The general provisions for challenging municipal acquisitions by eminent domain are contained in Civil Procedure Code sections 1250.360[88]

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[78] "Moreover, we do not decide whether City has a meritorious condemnation claim in this case. . . . We hold only that City should be given the opportunity to prove its case in accordance with the established legal principles outlined in our opinion." *Raiders I*, 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.

[79] *Id.* at 75, 646 P.2d at 844, 183 Cal. Rptr. at 682; *see infra* notes 124-50 and accompanying text.

[80] *Id.* at 75, 646 P.2d at 844, 183 Cal. Rptr. at 682.

[81] *Raiders Trial* at 27, 43; *see infra* notes 92-123 and accompanying text.

[82] *Raiders Trial* at 16, 43; *see infra* notes 124-50 and accompanying text.

[83] *Raiders Trial* at 22, 43; *see infra* notes 174-79 and accompanying text.

[84] *Raiders Trial* at 42-43; *see infra* notes 186-205 and accompanying text.

[85] *Raiders Trial* at 33, 43; *see infra* notes 151-73 and accompanying text.

[86] *Raiders Trial* at 27, 43; *see infra* notes 180-85 and accompanying text.

[87] *Raiders III*, 150 Cal. App. 3d at 279, 197 Cal. Rptr. at 736.

[88] CAL. CIV. PROC. CODE § 1250.360 (West 1982).

and 1250.370.[89] If the resolution of necessity were properly enacted, the former provides the only objections available to a recalcitrant property owner.[90] If procedural difficulties exist, the latter statute provides a number of additional grounds on which to contest the proposed acquisition.[91] Four grounds for the trial court decision are based upon section 1250.360.; two are contained in section 1250.370.

A. Public Use

Although the municipal eminent domain statute allows a city to condemn any property necessary to carry out its powers or functions, both the supreme court and the trial court assessed the validity of the taking in terms of public use.[92] Therefore, municipalities are apparently empowered to condemn property for the same reasons that the state government may do so.[93]

In *Raiders I*, the supreme court emphasized the expanding nature of public use.[94] The court indicated that the existence of a valid public

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[89] CAL. CIV. PROC. CODE § 1250.370 (West 1982).

[90] The statute includes the following defenses:

1. Plaintiff is not authorized by statute to exercise eminent domain for the purpose stated in the complaint.
2. The stated purpose is not a public use.
3. Plaintiff does not intend to devote the property to the stated purpose.
4. There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within seven years or a reasonably longer period.
5. The property is not subject to eminent domain for the stated purpose.
6. Any other ground provided by law.

CAL. CIV. PROC. CODE § 1250.360(a)-(e) (West 1982).

[91] The provision lists the following objections:

1. A proper resolution of necessity has not been adopted.
2. Public interest and necessity do not require the proposed project.
3. The project is not formulated to provide the greatest public good and the least private injury.
4. The property is not necessary for the proposed project.

CAL. CIV. PROC. CODE § 1250.370 (West 1982).

[92] "[T]he acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function. If such *valid public use* can be demonstrated, the statutes discussed herein afford City the power to acquire by eminent domain any property necessary to accomplish that use." *Raiders I*, 32 Cal. 3d at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681 (emphasis added). "However, the Court is unable to discern the probability of a public benefit from this proposed taking and accordingly finds that it is not for a valid *public use*." *Raiders Trial* at 25 (emphasis added).

[93] The supreme court blended the two standards: "[T]he general statutory scheme would appear to afford cities considerable discretion in identifying and implementing public uses." *Raiders I*, 32 Cal. 3d at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679.

[94] "Apparently acknowledging the evolving nature of public use, as we have noted,

purpose depends upon the particular acquisition.[95] The court also reaffirmed its earlier decision in *Egan v. City & County of San Francisco*,[96] that "anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes."[97] At one time, eminent domain was used to serve only traditional and limited public purposes,[98] because of a narrower view of appropriate governmental functions.[99] Since the scope of government activity has expanded considerably, the court concluded that the acquisition of the Raiders might fulfill the public use requirement.[100]

The trial court referred to but did not follow the supreme court's guidelines. It indicated that, "Great abuses may occur if the definition of public use depends upon 'changing conceptions of the scope and functions of government.' "[101] As a result, the trial judge carefully scrutinized the city's rationales for the taking, and determined that a valid public purpose did not exist.[102] Since the court of appeal held that the trial court failed to decide the public use issue, it did not directly assess the standard of review employed by the trial court.[103]

Oakland's resolution of necessity identified two public uses: economic and recreational.[104] According to the trial court, the evidence failed to support the city's economic theories. Oakland claimed that the Raiders were necessary to maintain the financial viability of the Coliseum, but the court held that the facility was not dependent upon the Raiders.[105] Even without the team, the Coliseum would continue to operate effec-

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the Law Revision Commission specifically recommended against the retention of the list of possible public uses in the new law . . . ." *Id.* at 72, 646 P.2d at 842, 183 Cal. Rptr. at 681.

[95] *Id.* at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159-60 (1896); University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 527-28, 37 P.2d 163, 164 (2d Dist.), *cert. denied*, 295 U.S. 738 (1934)).

[96] 165 Cal. 576, 133 P. 294 (1913).

[97] *Id.* at 582, 133 P. at 296.

[98] *Raiders I*, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 681 (purposes such as streets and parks).

[99] "[T]hese limitations seem merely to have corresponded to an accepted, but narrower, view of appropriate governmental functions then prevailing." *Id.*

[100] *Id.* at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681; *see also supra* note 92.

[101] *Raiders Trial* at 24 (quoting *Raiders I*, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680).

[102] *Raiders Trial* at 25.

[103] *Raiders III*, 150 Cal. App. 3d at 279, 197 Cal. Rptr. at 736.

[104] *Raiders Trial* at 11.

[105] *Id.* at 36.

tively and prosperously.[106] The court also refused to sanction Oakland's theory that the Raiders' departure would have an adverse effect on economic development in the city.[107] It found no substantive evidence that the presence or absence of the Raiders would significantly affect the local business environment.[108]

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[106] The figures used by the court indicate that the Raiders accounted for approximately one-fourth of the Coliseum's attendance and revenues. The court also relied on a press release by the Coliseum Commission stating that it was "not overly dependent" upon any one sport or activity. *Id.* at 35.

[107] *Id.* at 36-37.

[108] This issue was framed in terms of economic necessity rather than public benefit. The court found that the Coliseum was not dependent upon the Raiders to discharge the bond obligation or effectively operate the Coliseum. The trial judge also held that no substantial evidence was presented that the presence or absence of the Raiders in Oakland would significantly affect economic development in the community. *Id.* at 36.

The court determined that tax revenues generated by the Raiders' activities amounted to only $136,000 in 1980. Total money spent that year, in the Alameda-Contra Costa-Santa Clara-San Francisco-San Mateo County region, because of the Raiders' presence, was estimated to be $10,000,000. *Id.* at 37. Employment resulting from the Raiders, including team players, was 302. Applying the "multiplier effect," the court determined that the total financial impact of the Raiders was $30,000,000 and 860 jobs per year. *Id.* at 38. For a good discussion of how a professional team enhances the local economy, see Hoenig, *Sports Very Big League Economically*, N.Y. Times, Aug. 28, 1977, § IV, at 4, col. 1.

The trial judge was unwilling to find this impact significant because in his opinion, other entertainment and sports activities would fill the void left by the Raiders. The court also stressed the tenancy of the Oakland Invaders of the United States Football League (USFL). Since the Invaders averaged over 32,000 fans during their first year in the Coliseum, the court concluded that a significant portion of the gap had already been closed. *Raiders Trial* at 38-39.

Although the Invaders have drawn fairly well, their success has probably not significantly improved the local economy. Unlike the NFL, most USFL games are played during the major league baseball season. Many fans at Invaders' games likely elected to spend their sports dollars on football, rather than Giants or A's baseball. Since much of the spending generated by the Invaders would have occurred anyway, the economic gap left by the Raiders has probably not been reduced by the Invaders' tenancy. *See* Olderman, *USFL on TV: Tail Wagging Dog?*, Sacramento Bee, Mar. 11, 1984, § C, at 11, col. 1 ("I remain exceedingly skeptical about the attraction of pro football in the spring. It's bucking the climax of the basketball seasons, both pro and college, head on. Then it runs smack against the opening of baseball season, competing forces that were apparent last year in the tailing off of USFL attendance and TV ratings.").

George F. Will, syndicated columnist, has proposed another economic theory to support the taking. He argues that the League's use of athletes trained in college, primarily at public expense, and the use of stadiums subsidized or built by the public should preclude team owners from claiming unconditional rights of private property. Mr. Will, not unlike the City of Oakland, also asserts that the civic pride derived from having the Raiders in Oakland adds additional support to the city's action. Conse-

The trial court analyzed the city's recreational rationale by inquiring whether the Raiders were *necessary* for public recreation.[109] The court conceded that attendance at home games is recreational.[110] However, it held that neither the presence of the Raiders in particular, nor of an NFL franchise in general, was required because other means to the same end are still available in Oakland.[111] Consequently, the court answered its own inquiry in the negative.[112] The court of appeal rejected

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quently, "Oakland deserves to win because sports franchises are more subsidized than most businesses, and peculiarly woven into the fabric of civic identity." Will, *Oakland Deserves to Win the Raiders' Return*, L.A. Times, June 13, 1983, pt. II (Metro), at 5, col. 4.

For a good discussion of subsidies received by teams that use a publicly owned local stadium, see Okner, *Subsidies of Stadiums and Arenas*, in GOVERNMENT AND THE SPORTS BUSINESS 325 (R. Noll ed. 1974) ("Local governments that own sports facilities subsidize professional sports teams both directly, by pricing stadium and arena rents below the economic value of such facilities, and indirectly, by forgoing taxes on such property."). *See also* Durslag, *Colts Got a Deal in Indianapolis*, Sacramento Bee, Apr. 18, 1984, § F, at 3, col. 1 (comparing the subsidies received by the Colts and the Raiders, and determining that the Colts got a much better deal).

The city also argued that civic and social benefits will be regained by returning the Raiders to Oakland. "A National Football League franchise is an enterprise with unique economic, civic, cultural, recreational, and psychological effects . . . unparalleled by other business activities. This influence is felt especially deeply in Oakland, a city which has developed an intense identity with its Raiders." City's Brief, *Raiders I*, *supra* note 36, at 38. Civic pride will also be restored. The "unique and inseparable identification between the word 'Oakland' and the word 'Raiders' " will be renewed. *Raiders Trial* at 34 (quoting argument presented at trial).

The trial court acknowledged that "the style and success of the Raiders have improved the City's image and sense of pride." *Id.* at 40. The court also recognized that the eminent domain suit "was not commenced to acquire just any nondescript team with an NFL franchise. It was the dramatic success of the Raiders with its 'Pride and Poise' slogan that the City wants . . . to keep." *Id.* at 41. However, it concluded that the strong attachment between the city and team does not constitute an ingredient of legal necessity. *Id.* at 42.

[109] *Id.* at 39.

[110] There is no doubt that the presence of the Raiders was occasion for public recreation. Fans attending games have the opportunity to socialize at "tailgate parties" and in the stadium with other fans. A sports fan, who may have a mundane and otherwise unsatisfying job or life, receives an alternate form of compensation by vicarious participation in the game action. The fan is provided an emotional catharsis by being stimulated to shout, cheer, and otherwise let off steam.

Id. at 39.

[111] *Id.* at 40.

[112] In doing so, the trial court failed to acknowledge or distinguish cases cited by the supreme court that sanction municipal promotion of recreation. In City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 333 P.2d 745 (1959), the supreme court determined

that a contract between the city and the (then) Brooklyn Dodgers to supply land for Dodger Stadium was valid. The court held that the agreement effectuated a proper public purpose. *Id.* at 435, 333 P.2d at 752. The court of appeal, in City of Anaheim v. Michel, 259 Cal. App. 2d 835, 66 Cal. Rptr. 543 (4th Dist. 1968), upheld the use of eminent domain to acquire land to provide additional parking for Anaheim Stadium. In County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 38 Cal. Rptr. 474 (1st Dist. 1964), the court sanctioned the county's condemnation of land for the operation of a county fair.

Construction and operation of stadiums, at public expense, have been challenged in several jurisdictions. In each instance, the proposed expenditure was found to be for a valid public purpose. In New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 292 A.2d 545, *appeal dismissed*, 409 U.S. 943 (1972), the New Jersey Supreme Court upheld the creation of a special public entity to carry out the project. The Pennsylvania Supreme Court has twice approved of such endeavors. In Martin v. City of Philadelphia, 420 Pa. 14, 215 A.2d 894 (1966), the court upheld an ordinance providing a $25,000,000 loan to construct a sports stadium. Then, in Conrad v. City of Pittsburgh, 421 Pa. 492, 218 A.2d 906 (1966), the court sustained an agreement in which the city's general revenues were pledged to pay off obligations resulting from the construction of a stadium, in the event that stadium revenues were insufficient. In *Conrad*, Justice Musmanno, concurring, characterized the importance of professional sports to the community as follows:

> There is a need today to provide the public with facilities for recreation, sports and enjoyment of outdoor athletic competition. Even passive participation as an onlooker in competitive sports stimulates a desire for physical exercise. In any event it takes the spectator into the open air and provides him with exuberant escape from the cares of the day and arms him with recharged energy to meet responsibilities as a citizen. All this helps to build up a healthy community.

Id. at 507, 218 A.2d at 914 (Musmanno, J., concurring). The Colorado Supreme Court sanctioned the purchase of a stadium by a local government in Ginsberg v. City & County of Denver, 164 Colo. 572, 436 P.2d 685 (1968). The Ohio Supreme Court upheld further expenditure to complete construction of a stadium in Bazell v. City of Cincinnati, 13 Ohio St. 2d 63, 67, 233 N.E.2d 864, 869 ("[B]aseball and football are national pastimes and a great source of public relaxation and entertainment. No one will question the extent of public interest in the activities . . . ."), *appeal dismissed*, 391 U.S. 601 (1968). For a good discussion tracing the development of this facet of public use, see Note, Raiders *and* Poletown, *supra* note 15, at 88-90.

In California, both Candlestick Park (San Francisco) and Anaheim Stadium are owned and operated by the respective city governments. The supreme court, in *Raiders I*, found this to be further evidence that providing access to professional sports is an appropriate municipal function. 32 Cal. 3d at 71, 646 P.2d at 841, 183 Cal. Rptr. at 680.

Presumably, the reason for constructing and maintaining a stadium is to provide the community with a form of recreation that would otherwise be unavailable. The distance between providing a stadium and furnishing a team to play in it seems far from insurmountable. Had the trial court analyzed the proposed acquisition of the Raiders by using the *Egan* standard, *see supra* text accompanying notes 96-97, rather than inquiring into the necessity of the taking, a different result would have occurred. *See infra*

the trial judge's review of necessity.[113] Therefore, on remand, his analysis of this issue is likely to change dramatically.

The trial court also emphasized that persons other than Oakland residents would benefit from the taking.[114] Since most fans who attended Raiders games resided in communities outside of Oakland, the court found that a sufficient recreational benefit to Oakland residents was questionable.[115] The court of appeal held the nonresidence of some Raiders fans irrelevant.[116] This result is proper, as the benefits derived from a taking need not be restricted to residents of the condemning jurisdiction. Neither the entire community nor even a considerable portion thereof need benefit from the acquisition.[117] Since a significant number of Raiders fans reside in Oakland, the constitutional requirement is satisfied.[118] To illustrate its holding, the court of appeal noted that the trial court's analysis would improperly prevent Oakland from condemning land to build a park near the Berkeley border, because Berkeley residents might use the park more than Oakland inhabitants.[119]

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notes 197-205 and accompanying text.

[113] *Raiders III*, 150 Cal. App. 3d at 279, 197 Cal. Rptr. at 736. Since the court of appeal did not entirely eliminate a review of necessity, *see supra* note 46 and accompanying text, the trial court opinion might not change at all.

[114] *Raiders Trial* at 24.

[115] *Id.* at 25.

[116] *Raiders III*, 150 Cal. App. 3d at 274, 197 Cal. Rptr. at 733.

[117] *See supra* note 59 and accompanying text.

[118] The recreational benefits from having the Raiders in Oakland were grossly understated by the trial court. The court only looked at actual attendance at home games. Overlooked were the many residents who followed the games on television or radio. The trial court recognized that persons who attend professional sporting events enjoy vicarious participation and an emotional catharsis, but failed to acknowledge that the same pleasures can be derived from a broadcast of the contests. Had this been accounted for, perhaps the trial judge would have reached a different conclusion.

[119] *Raiders III*, 150 Cal. App. 3d at 274, 197 Cal. Rptr. at 733. The residence of persons who attend, or will attend, attractions has not been considered in other public recreation cases. Although many fans of the Angels (and Rams) live outside Anaheim, the court of appeal held that condemning land for additional stadium parking was a valid public use. City of Anaheim v. Michel, 259 Cal. App. 2d 835, 66 Cal. Rptr. 543 (4th Dist. 1968). Nor was this factor examined in City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 333 P.2d 745 (1959) (providing land for Dodger Stadium). Eminent domain was used by Alameda County for a county fair, an event deliberately designed to attract nonresidents. Nevertheless, the appellate court found the taking to be a valid public use. County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 38 Cal. Rptr. 474 (1st Dist. 1964). Therefore, the court of appeal was apparently correct in determining that the trial court's reliance on the residency of Raiders fans was misplaced. The California Supreme Court, in Gilmer v. Lime Point, 18 Cal.

The trial judge's scrutiny of the public benefits resulting from the proposed acquisition was improper. His personal disapproval of the expansive nature of public use is not a sufficient substitute for express statutory limitations on municipal eminent domain power. The supreme court held in *Raiders I* that cities have considerable discretion in identifying and implementing public uses.[120]

In *Raiders I*, Chief Justice Bird, concurring and dissenting, raised a particularly disturbing question concerning the ramifications of the taking: "[D]oes 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?"[121] The Chief Justice queried whether a rock concert impresario would be subject to eminent domain if he decided to relocate his productions after using a municipal stadium for a number of years.[122] She warned that the interpretation of eminent domain law in *Raiders I* may allow a city to condemn any business that seeks to move elsewhere.[123]

Presumably, the trial judge in the Raiders case was implicitly addressing this issue in his forty-four page memorandum decision. By structuring his opinion on the complex provisions of the Eminent Domain Law, he has given the supreme court a chance to reexamine, and perhaps further elaborate on, this disturbing facet of the *Raiders I* opinion.

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229 (1861), also held that benefits derived by persons outside of the condemning jurisdiction do not invalidate a taking. *Gilmer* concerned the taking of land by the state to construct a fort in northern California. The court held:

> It has also been seen that it is not essential to meet the [public use] requirement, that the use or benefit should be exlusively for the people of the State, or even a portion of those people. . . . [W]e can see no answer to the proposition that the people of California have no right to complain that the people of Oregon are also benefited by a public improvement, or that such improvement would be any the less a public use in California because it was also useful elsewhere.

Id. at 252-53.

[120] 32 Cal. 3d at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679.

[121] *Id.* at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683 (Bird, C.J., concurring in part and dissenting in part). Justice Richardson, writing for the court, indicated that taking an ongoing enterprise is permissible because no express prohibition exists. *Id.* at 73, 646 P.2d at 843, 183 Cal. Rptr. at 687; *cf.* CAL. GOV'T CODE § 37353(c) (West 1982) (municipality may condemn land for use as golf course, but existing golf course may not be acquired by eminent domain).

[122] 32 Cal. 3d at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683-84.

[123] *Id.*

B. Extraterritorial Condemnation

A professional sports team primarily consists of three assets: the franchise itself, issued by the league to the owner, the athletic and office equipment owned by the team, and the employment contracts for players and other personnel.[124] The Oakland Raiders is organized as a limited partnership,[125] a network of contractual rights and obligations apportioned among the various partners. It is not a legal entity separate from its owners.[126] Since none of the partners resided in Oakland during the Raiders' tenancy in the Oakland Coliseum, the Raiders claimed that the team franchise (and other intangible property) was never located in Oakland.[127] Consequently, the Raiders asserted that the city needs extraterritorial condemnation power to acquire the team.[128]

A municipality is clearly authorized to condemn property within its boundaries. However, Civil Procedure Code section 1240.050[129] requires that a city have express or necessarily implied statutory authority to take property outside of its territory.[130] The Raiders asserted that Oakland has no extraterritorial authority,[131] and hence is not empowered to acquire the team. The supreme court had "several possible answers" to this contention. First, section 1240.050 might not be applicable to intangibles.[132] Second, the team might actually have been located

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[124] L. SOBEL, *supra* note 7, at 539. The property sought by the City of Oakland includes:

> All of those rights associated with, incidental to, deriving from, or related to the Franchise Certificate of Membership issued by the National Football League and signifying the rights associated with permission to operate a National Football League professional football club franchise in Oakland, California; . . . and privileges of Oakland Raiders, Ltd., relating to football player contracts, agreements, options, or other contractual or quasi-contractual matters associated with the operation of said football club franchise.

Brief for Plaintiff at 3, City of Oakland v. Oakland Raiders, Case No. 76044 (Cal. Super. Ct., Monterey County) (copy on file at U.C. Davis Law Review office) [hereafter *City's Trial Brief*].

[125] *Raiders I*, 32 Cal. 3d at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.

[126] First Nat'l Trust & Sav. Bank v. Industrial Accident Comm'n, 213 Cal. 322, 2 P.2d 347 (1931); John Bollen Co. v. S. Bachnar & Co., 16 Cal. App. 589, 117 P. 690 (1st Dist. 1911); *see also* Stilgenbaur v. United States, 115 F.2d 283 (9th Cir. 1940).

[127] *Raiders I*, 32 Cal. 3d at 74, 646 P.2d at 844, 183 Cal. Rptr. at 682.

[128] *Id.*

[129] CAL. CIV. PROC. CODE § 1240.050 (West 1982).

[130] *Id.*; *see supra* notes 71-74 and accompanying text.

[131] *Raiders I*, 32 Cal. 3d at 74, 646 P.2d at 844, 183 Cal. Rptr. at 682.

[132] "It is at least arguable that this section was intended to apply only to property

in Oakland.[133] Third, existing California case law might support the taking, even if condemnation outside the city's jurisdiction were required.[134] The supreme court found prima facie evidence that the territorial restrictions were satisfied, but did not preclude the trial court from determining otherwise on remand.[135]

The trial court found that the Raiders were not located entirely in Oakland, and that the city lacks extraterritorial condemnation power.[136] Thus, it ruled that the city is unable to acquire the franchise.[137] The court of appeal, however, reversed this ruling.[138] The first issue addressed by the trial court was the applicability of section 1240.050. The judge ruled that the provision must apply; otherwise, intangible property everywhere would be a potential target of municipal condemnation.[139] To establish the situs of the Raiders, the trial court did not look to the tangible aspects of the team enterprise.[140] Instead, it examined the totality of contacts between Oakland and the intangible property — the franchise and personnel contracts — to determine the location.[141]

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which can and does have some situs, such as land and the rights related thereto." *Id.*

[133] The court indicated that any restriction based upon § 1240.050 appeared to be met, because Oakland was the designated site for all home games, the partnership's principal place of business, and the location for most of the team's tangible property. *Id.*

[134] Justice Richardson indicated that even if the intangible assets were found to be located outside of Oakland, the city might be able to use extraterritorial condemnation power if it were "necessarily implied as an incident of one of its other powers." *Id.* at 75, 646 P.2d at 844, 183 Cal. Rptr. at 682.

[135] *Id.*

[136] *Raiders Trial* at 14.

[137] *Id.* at 16-18.

[138] *Raiders III*, 150 Cal. App. 3d at 247, 197 Cal. Rptr. at 733; *see infra* notes 146-47 and accompanying text.

[139] *Raiders Trial* at 14.

[140] The court noted that "the Raiders partnership had a business office in the City and some of its tangible property was there." *Id.* at 15. It also indicated that the general partners, Allen Davis and Ed McGah, did not reside in Oakland, nor did all of the players, coaches, or other employees. However, the court concluded that these tangible aspects of the target property were not the most important in establishing its location. *Id.*

[141] *See* Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972). The facet of the *Waite* opinion relied on by the trial court concerned the jurisdiction of the Nevada trial court over the husband's pension benefits during a dissolution proceeding. The benefits arose from his service as a California judge. After establishing residence in Nevada, he brought a dissolution action there. The Nevada court held that he was entitled to all of the retirement pay. Wife then brought a divorce action in California in which the court held that the benefits should be divided equally.

In affirming the California court's decision, the California Supreme Court held that

The court found that the Raiders' activities extended to most of northern and central California and throughout the United States, because the team receives forty percent of the revenues from away games and a share of the proceeds from the NFL's nationwide television contract.[142] Consequently, the court held that fair play and substantial justice precluded a finding that the Raiders' intangible assets were located entirely in Oakland.[143]

Since the trial court determined that an unspecified portion of the Raiders lay outside of the jurisdiction, it held that the city needs extraterritorial condemnation power to complete the proposed acquisition.[144] The court further held that Oakland has neither express nor implied

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the Nevada court did not have jurisdiction over the benefits. The supreme court determined the situs of the pension based upon "what action is to be taken with reference to it." *Id.* at 467, 492 P.2d at 17, 99 Cal. Rptr. at 329 (citations and emphasis omitted). Since the purpose of assigning a situs was to establish jurisdiction over the benefits, the supreme court looked to the totality of contacts with each state and the bearing the contacts had on overall fair play and substantial justice. Noting that the retirement fund was based in California, and that the former wife still resided in California, the court held that the situs of the pension rights was California. *Id.* at 468-69, 492 P.2d at 18, 99 Cal. Rptr. at 330.

The *Raiders I* court delineated a similar standard: "We have noted that an intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. *The location assigned to it depends on what action is to be taken with reference to it.*" *Raiders I*, 32 Cal. 3d at 74, 646 P.2d at 844, 183 Cal. Rptr. at 682 (emphasis added) (citations and additional quotation marks omitted). However, the supreme court did not expressly mention the "totality of contacts" test. Rather than citing *Waite*, the court relied on Estate of Waits, 23 Cal. 2d 676, 146 P.2d 5 (1944) (situs of cause of action for wrongful death) and Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957) (situs of employer's obligation to make payments into trust fund based upon collective bargaining agreements), *appeal dismissed*, 357 U.S. 569 (1958). Neither of these cases mentioned a "totality of the contacts" analysis.

Although a "totality of contacts" test may have been appropriate in *Waite*, its application in the instant case is much more problematic. In *Waite*, the court had but two locations to choose from: California or Nevada. In *Raiders I*, a potentially infinite number of locations existed. *See infra* note 143 and accompanying text. Perhaps the supreme court deliberately limited the test to "what action is to be taken with reference to it" to avoid this dilemma.

[142] *Raiders Trial* at 16.

[143] Even if a "totality of contacts" approach were applicable, *see supra* note 141, a different result should have occurred. Although in the aggregate the Raiders may have had more contacts with locations outside of Oakland, the team indisputably had more contact with Oakland in particular than any other place. *See infra* text accompanying notes 148-49. Therefore a proper application of the test would have resulted in a finding that the Raiders franchise was located in Oakland.

[144] *Raiders Trial* at 5.

authority to do so.[145]

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[145] *Id.* at 17-18. An express grant of power cannot be found in GOV'T CODE § 37350.5 (West Supp. 1984). *See supra* text accompanying note 63. Although the provision allows for condemnation to carry out municipal powers or functions, it lacks the requisite specificity. Explicit grants of extraterritorial power can be found throughout the California codes. *See supra* note 71. However, the trial court determined that none of these statutes is applicable to the present case. *Raiders Trial* at 17-18.

Extraterritorial condemnation power exists if it is necessarily implied as incident to another of a city's statutory powers. CAL. CIV. PROC. CODE § 1240.050 (West 1982). "Statute," for purposes of eminent domain, is defined as a constitutional provision or statute. The definition specifically excludes charter provisions and ordinances. CAL. CIV. PROC. CODE § 1235.210 (West 1982).

One potential source of implied power is the municipal condemnation statute itself. The law was intended to give a city adequate authority to carry out its municipal functions. CAL. GOV'T CODE § 37350.5 official comment (West Supp. 1984). Since the operation of a stadium is presumably a municipal function, § 37350.5 can be interpreted as supplying the necessary statutory basis. However, the trial court was unwilling to sanction this construction. *Raiders Trial* at 18.

Although the trial court recognized that the municipal charter is a source for identifying municipal powers and functions, it held that the charter provisions only pertain to public use, rather than the actual power to condemn. *Id.* at 18. "The powers and functions of a city may be determined by reference to a city charter as well as to a statute." CAL. GOV'T CODE § 37350.5 official comment (West Supp. 1984). Therefore, the court found that § 37350.5 does not implicitly authorize extraterritorial condemnation. *Raiders Trial* at 18.

The trial judge held that the statutory power to condemn — what is at issue here — is different from the validity of a public use, to be determined under § 37350.5. Since this provision includes "municipal powers or functions" as permissible uses of eminent domain, he was probably correct. As a result, the requisite authority cannot be derived from the statute itself. Moreover, finding that extraterritorial condemnation power is necessarily implied from § 37350.5 would make the statutory limitation meaningless. Every general grant of eminent domain could be construed as necessarily implying extraterritorial power.

Cities have express authority to purchase, lease, exchange, or receive property located inside or outside of the city limits, as is necessary or proper for municipal purposes. CAL. GOV'T CODE § 37351 (West 1968). The trial court found this statute to be inadequate because of Harden v. Superior Court, 44 Cal. 2d 630, 284 P.2d 9 (1955). In *Harden*, the City of Hayward sought to condemn real property adjacent to, but outside of, its boundaries for additional parking facilities. The city asserted that § 37351 supplied implicit authority for the extraterritorial taking. The supreme court disagreed. Adhering to a strict rule of construction, it held that the ability to purchase property outside of municipal borders does not necessarily imply that eminent domain may be used to acquire such property. *Id.* at 642, 284 P.2d at 17. Since the language of § 37351 remains unchanged, and *Harden* continues to be viable precendent, the trial court held that the statute does not provide the requisite authority. *Raiders Trial* at 18.

Although § 37351 has remained intact, the provision authorizing cities to use eminent domain has changed. Statutes that permit the acquisition of property by means other than eminent domain do not preclude the use of condemnation. CAL. GOV'T

The court of appeal, along with the supreme court, questioned the applicability of section 1240.050 to intangible property. However, the appellate court did not determine this issue. Instead it held, as a matter of law, that Oakland is the only possible situs for the target property. The court also found that all of the factors relied upon by the trial judge to reach a contrary result were irrelevant.[146] The Raiders failed to rebut the prima facie showing that the territorial limitations were satisfied.[147]

In its discussion of the Raiders' situs, the supreme court indicated that the location of intangible property depends upon what action is to be taken with reference to it.[148] The court found the following important: Oakland was the principal place of business of the partnership, the designated site for the team's home games, and the primary location for the team's tangible personal property.[149] The trial court did not rely on these factors. Instead it looked to the totality of contacts between the city and the intangibles to discover whether fair play and substantial

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CODE § 37350.5 official comment (West Supp. 1984). Consequently, an argument can be made that the present law was designed to change the result in *Harden*. But the Official Comment does not expressly mention such an alteration. Furthermore, the Official Comment to § 1240.050 states that prior case law has been codified, and cites *Harden* as an example. CAL. CIV. PROC. CODE § 1240.050 official comment (West 1982). Since both provisions were enacted concurrently, legislative intent is anything but clear.

Although the law is uncertain, the facts in *Harden* may distinguish it from the Raiders case. A reason for the proposed taking in *Harden* was to prevent the property owners from completing construction of a department store on the site. *Harden*, 44 Cal. 2d at 633, 284 P.2d at 11-12. The ulterior motive was not raised in the form of a bad faith defense, but the outcome was at least implicitly dependent upon this factor. Presumably, the decision does not preclude extraterritorial condemnation for less pernicious purposes. Therefore, § 37351 might provide the requisite authority.

Apparently the trial court correctly held that Oakland was not expressly or implicitly granted a general power to condemn property located outside of its borders. But the judge's decision concerning the applicability of § 1240.050 rests on much weaker grounds. In *Raiders I*, the supreme court specifically held that intangible property is subject to eminent domain. *See supra* note 77 and accompanying text. Since Government Code § 37350.5 permits cities to acquire any property necessary for municipal powers or functions, the court ruled that cities may take intangibles. If Civil Procedure Code § 1240.050 is applied literally to all municipal condemnations, then cities will be effectively precluded from acquiring intangible assets by eminent domain, because most intangible property will involve a person or entity located outside of the jurisdiction. This result is incompatible with the supreme court decision.

[146] *Raiders III*, 150 Cal. App. 3d at 274, 197 Cal. Rptr. at 732.

[147] *Id.* at 274, 197 Cal. Rptr. at 733.

[148] *See supra* note 141.

[149] *See supra* note 133.

justice were served by locating the Raiders in Oakland.

It is difficult to find a situs other than Oakland. Since the partnership's principal place of business was Oakland, initiating a cause of action against the Raiders in Alameda County Superior Court would not have been unreasonable. The team owners must have anticipated being haled into court there.[150] The Raiders' contractual obligations elsewhere should not alter this conclusion. The court of appeal correctly determined that Oakland was the only legal situs of the franchise.

C. The Procedural Problems

To acquire property by eminent domain, municipalities must fulfill the procedural requirements of chapter 4, article 2 of the Eminent Domain Law.[151] After proper notice, a hearing must be held in which the property owner has an opportunity to be heard.[152] Upon completion of this hearing, the city may adopt a resolution of necessity. Once the resolution is passed, the city may begin legal proceedings to acquire the

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[150] This jurisdictional analysis is warranted only if the totality of contacts test is proper. For an argument suggesting otherwise, *see supra* note 141. Should Baltimore attempt to condemn the Colts, the city will face jurisdictional problems different from the Raiders case. The Colts moved their tangible property out of Baltimore early in the morning on March 29. Later that same day, the Maryland Legislature approved, and the Governor signed legislation allowing the city to take the team. *Baltimore Starts Legal Bids to Retake Colts Franchise*, N.Y. Times, Apr. 2, 1984, at 10, col. 1. The new law is similar to existing California statutes, *see supra* notes 62-70 and accompanying text, in that it requires the city to pass an ordinance condemning the team prior to initiating legal action. *Colts Sneak to Indianapolis*, San Francisco Chron., March 30, 1984, at 81, col. 1. Although Oakland obtained a restraining order before the Raiders were able to move their tangible assets, *see supra* note 36 and accompanying text, Baltimore failed to do so. *Colts Sneak to Indianapolis*, *supra*. Baltimore did obtain an injunction, on March 30, purporting to prevent the move. *Baltimore Starts Legal Bids to Retake Colts Franchise*, *supra*.

The effectiveness of this injunction is debatable. The Colts claim that they moved prior to the issuance of the injunction. The city says otherwise. Since the Colts' lease with the Memorial Stadium does not expire until June 30, and other legal ties to the city still exist, the Deputy Solicitor asserted that the team is still in Baltimore. *Id.* The city also claims that the deal between the Colts and Indianapolis was not finalized until March 31 — one day after the injunction was issued. Unlike the *Raiders* case, jurisdiction to condemn the team is likely to be a formidable obstacle, should Baltimore continue its efforts to acquire the Colts.

[151] CAL. CIV. PROC. CODE § 1240.040 (West 1982); *see supra* notes 62-70 and accompanying text.

[152] CAL. CIV. PROC. CODE § 1245.235 (West 1982).

property.[153] If the acquiring entity fails to adopt a resolution, it may not condemn the property.[154]

The events leading up to Oakland's attempt to condemn the Raiders do not coincide with the time frame mandated by the statutes. The city filed suit prior to adopting a resolution of necessity.[155] After adoption, the city was allowed to amend its complaint to include the resolution.[156] Subsequently, a representative of the Raiders did appear before the Oakland City Council. At the end of this meeting, the City Council reaffirmed its approval of the proposed taking.[157]

The California Supreme Court, in *Raiders I*, made no mention of these procedural lapses. The trial court, however, found that the failure to follow the guidelines precisely constituted an additional ground for invalidating the taking.[158] The judge held that the preliminary process could not be disregarded as a mere formality,[159] and that the procedural improprieties barred the acquisition.[160] The court of appeal disagreed. The court held that the supreme court, in reversing and remanding the case for trial, necessarily determined that the Raiders' procedural objections were unavailing, and that the law of the case in *Raiders I* precluded any further inquiry.[161]

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[153] CAL. CIV. PROC. CODE § 1240.040 (West 1982).

[154] CAL. CIV. PROC. CODE § 1240.040 official comment (West 1982).

[155] The initial inclination to acquire the team by eminent domain arose about January 17, 1980. On February 11, the City Council debated the proposed taking during an executive session. *Raiders Trial* at 10. On February 21, the federal district court granted a preliminary injunction preventing the League from enforcing § 4.3. *See supra* note 34. The city filed suit the next day. *Raiders Trial* at 10. However, the resolution of necessity was not adopted until February 26. *Id.* at 11.

[156] The complaint was amended February 27, 1980.

[157] On March 11, 1980, an attorney for the Raiders appeared before the City Council to protest the proposed acquisition. At the conclusion of this session, the Council ratified its earlier decision. *Raiders Trial* at 11.

[158] *Id.* at 33, 43.

[159] *Id.* at 32.

[160] *Id.* at 31. The court found that the city did not comply with the procedural requirements for the following reasons: first, a resolution of necessity was not enacted prior to filing suit; and second, the Raiders were not given proper notice to attend the meeting at which the resolution was adopted. *Id.*; *see supra* notes 155-57 and accompanying text.

[161] *Raiders III*, 150 Cal. App. 3d at 278, 197 Cal. Rptr. at 735. When an appellate court has rendered a decision, including a rule of law necessary to the decision, this law of the case is to be followed in all subsequent proceedings, trial or appellate, in the same action. People v. Scott, 16 Cal. 3d 242, 246, 546 P.2d 327, 330, 128 Cal. Rptr. 39, 42 (1976) (citing People v. Shuey, 13 Cal. 3d 885, 533 P.2d 211, 120 Cal. Rptr. 83 (1975)); *see, e.g.*, Bigbee v. Pacific Tel. & Tel., 34 Cal. 3d 49, 56, 665 P.2d 944, 951,

The Raiders initially raised the procedural objections during the first

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192 Cal. Rptr. 857, 861 (1983) (appellate judgment on extraordinary writ constitutes law of case); People v. Medina, 6 Cal. 3d 484, 493, 492 P.2d 686, 690, 99 Cal. Rptr. 630, 635 (1972) (appellate court denial of pre-trial writ to suppress evidence not law of case, because defendant entitled to written decision as per CAL. CONST. art. VI, § 14); People v. Durbin, 64 Cal. 2d 474, 477, 413 P.2d 433, 434-35, 50 Cal. Rptr. 657, 658-59 (1966) (adherence to prior appellate decision granting relief from bail forfeiture); Pigeon Point Ranch, Inc. v. Perot, 59 Cal. 2d 227, 232, 379 P.2d 321, 322, 28 Cal. Rptr. 865, 866 (1963) (court of appeal's dismissal of appeal from demurrer held law of case); Agnew v. City of Culver City, 51 Cal. 2d 474, 477, 334 P.2d 571, 573 (1959) (prior appellate decision that ordinance may not be enforced by criminal process law of case); Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 643-44, 160 P.2d 804, 808 (1945) (lack of mutuality of obligation not a defense to contract because prior appeal necessarily decided issue).

For a general discussion of the doctrine, see Vestal, *Law of the Case: Single Suit Preclusion*, 1967 UTAH L. REV. 1; Note, *Successive Appeals and the Law of the Case*, 62 HARV. L. REV. 286 (1948); Note, *Law of the Case*, 42 HARV. L. REV. 938 (1929); Note, *Law of the Case*, 5 STAN. L. REV. 751 (1953).

Normally, the law of the case must be followed regardless of whether the prior appellate decision was correct or incorrect. *Shuey*, 13 Cal. 3d at 841, 533 P.2d at 216, 120 Cal. Rptr. at 88; *see, e.g.*, Estate of Baird, 193 Cal. 225, 239, 223 P. 974, 978 (1924) (prior appellate decision that adoption had not occurred binding although incorrect); Tally v. Ganahl, 151 Cal. 418, 421, 90 P. 1049, 1050 (1907) (collection on architect's surety bond affirmed); Eldridge v. Burns, 136 Cal. App. 3d 907, 921, 186 Cal. Rptr. 784, 791-92 (1st Dist. 1982) (statement of rule, citing Lindsey v. Meyer, 125 Cal. App. 3d 536, 178 Cal. Rptr. 1 (2d Dist. 1981)); *Lindsey*, 125 Cal. App. 3d at 541-42, 178 Cal. Rptr. at 3 (statement of rule, although held that prior appellate decision was correct); Hard v. Hollywood Turf Club, 134 Cal. App. 2d 174, 179, 285 P.2d 321, 324 (2d Dist. 1955) (evidentiary matters resolved by trial court consistent with prior appeal are law of case on subsequent appeal). However, the doctrine will be disregarded for compelling reasons, because law of the case is merely a rule of procedure rather than a facet of the courts' inherent power. *Medina*, 6 Cal. 3d at 492, 492 P.2d at 691, 99 Cal. Rptr. at 634-35; *see, e.g.*, *Shuey*, 13 Cal. 3d at 846-47, 533 P.2d at 218, 120 Cal. Rptr. at 91 (People's disavowal of theory supporting validity of search on prior appeal binding waiver at subsequent trial and appeal — not sufficient to depart from rule); Vangle v. Vangle, 45 Cal. 2d 804, 809-10, 291 P.2d 25, 28 (1955) (prior appellate apportionment of profits unjustly harsh, so doctrine disregarded) Gore v. Bingaman, 20 Cal. 2d 118, 122-23, 124 P.2d 17, 20 (1942) (that initial appeal should have been decided by supreme court rather than court of appeal not sufficient); England v. Hospital of the Good Samaritan, 14 Cal. 2d 791, 795, 97 P.2d 813, 815 (1939) (determination in prior appeal that defendant exempt from tort liability not followed during subsequent appeal, because subsequent case law held no exemption, and decision most unjust to plaintiff); Ryan v. Mike-Ron Corp., 259 Cal. App. 2d 91, 96-97, 66 Cal. Rptr. 224, 228 (4th Dist. 1968) (rule not followed because subsequent case law overruled precedent used in prior appellate decision); Wicktor v. County of Los Angeles, 177 Cal. App. 2d 390, 396-97, 2 Cal. Rptr. 352, 356 (2d Dist. 1960) (prior appellate decision concerning recipient of death benefits not followed because of "grave injustice" to respondent, and interim change in applicable case law); *see also infra* note 169 and accompanying text.

trial court proceedings in 1980.[162] The trial court overruled a demurrer based upon the procedural flaws.[163] This objection was also alleged in the Raiders' answer to the complaint, in a motion for judgment on the pleadings, and as a ground for summary judgment.[164] Although the court eventually granted the summary judgment, it specifically pointed out that the procedural problems were not a basis for the decision.[165] The Raiders pursued this defense on appeal.[166] After the supreme court reversed the summary judgment, the Raiders sought a rehearing based upon this same issue.[167] The court denied the petition and remanded to the trial court.[168] The supreme court could not have remanded the case without resolving the procedural problems in favor of the city.[169]

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[162] *City's Trial Brief*, *supra* note 124, at 17.

[163] The trial court held that the original complaint, as amended, was not defective. *Id.*

[164] *Id.*

[165] "It does not appear that a Resolution of Necessity prior to filing an action is mandatory and jurisdictional. However, the court does have power to order a conditional dismissal and allow corrective and remedial action . . . . To dismiss and require a new Resolution of Necessity would be meaningless." *Id.* at 17-18 (citing City of Oakland v. Oakland Raiders, Case No. 530350-0 (Cal. Super. Ct., Alameda County, June 6, 1980) (Notice of Intended Decision *finalized* June 16, 1980)).

Civil Procedure Code § 1245.255 permits rescission and subsequent adoption of a new resolution. The provision equates this process to a conditional dismissal. Conditional dismissals are provided for in § 1260.120(c) of the Civil Procedure Code. The Official Comment to § 1260.120 indicates that improper adoption of the resolution is grounds for a conditional dismissal. It also states that a conditional dismissal is equivalent to a leave to amend.

The trial judge found that allowing a conditional dismissal to cure the procedural problems was not an appropriate remedy. A conditional dismissal is "not easy to reconcile" with the Official Comment to § 1240.040, which states that failure to pass a resolution or use of a defective resolution precludes the taking. *Raiders Trial* at 31-32; *see also supra* note 154 and accompanying text. He held that § 1240.040 is the controlling provision. Hence, the court ruled that even if the initial resolution had been rescinded and a new one adopted, his decision would have been the same. *Raiders Trial* at 44.

[166] *City's Trial Brief*, *supra* note 124, at 18.

[167] *Id.* at 18-19.

[168] Rehearing was denied August 5, 1982. *Raiders I*, 32 Cal. 3d at 79 (no citation in either unofficial reporter).

[169] *Raiders III*, 150 Cal. App. 3d at 278, 197 Cal. Rptr. at 735. The law of the case concerns implied and express rules of law. If a particular point is essential to an appellate decision, but it was not actually mentioned in the opinion, it still constitutes the law of the case, if the ruling could not have been made without the implicit determination. Lindsey v. Meyer, 125 Cal. App. 3d 536, 541, 178 Cal. Rptr. 1, 3 (2d Dist. 1981); *see* Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P.2d 804 (1945); Coats v. General Motors, 11 Cal. 2d 601, 81 P.2d 906 (1938); Davis v. Edmonds, 218

Even if the law of the case were inapplicable, the ruling by the court

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Cal. 355, 23 P.2d 289 (1933); Eversdon v. Mayhew, 85 Cal. 1, 24 P. 302 (1890); Javor v. State Bd. of Equalization, 73 Cal. App. 3d 939, 141 Cal. Rptr. 226 (2d Dist. 1977); Nevcal Enters. v. Cal-Neva Lodge, Inc., 217 Cal. App. 2d 799, 32 Cal. Rptr. 106 (2d Dist. 1963).

In *Steelduct*, plaintiffs sought damages for breach of an exclusive sales contract entered into with defendant to market plaintiff's products. At the first trial, the defendants prevailed because of a 10-day cancellation clause in the agreement. However, the court of appeal reversed, holding that a later amendment — specifying a five year term — implicitly eliminated the provision. On remand, the defendants sought to assert that the contract terms were not mutually agreed upon. However, the trial court precluded the defense, since the issue was raised at the first trial and on the initial appeal, the court of appeal affirmed the lower court's decision.

Javor concerned a class action to recover excess sales tax paid by purchasers of certain motor vehicles. At the first trial a demurrer was granted. The California Supreme Court subsequently reversed and remanded the case for trial. Prior to the second adjudication, the defendants claimed that the plaintiffs did not have standing to sue because none of them had filed a claim, as per statute, with the Board of Equalization before filing suit. The court of appeal held that the supreme court had implicitly determined this issue when it remanded the case for trial. As a result, the plaintiffs were allowed to pursue their case.

In *Nevcal*, the parties had entered into an agreement whereby the defendant sold a casino to the plaintiff. The contract required the defendant to continue to operate the casino until plaintiff qualified for a gaming license, but all of the profits and losses during this period belonged to plaintiff. During this interval, the federal government, pursuant to a tax lien, seized a considerable sum of money. Plaintiffs consequently sought an accounting as well as other relief.

At the first trial, the court ruled that the contract was unenforceable because gambling is illegal in California. The court of appeal reversed and remanded, holding that Nevada law rather than California law was to be applied to determine whether the subject matter of the contract was illegal. The trial court subsequently held for plaintiffs. On appeal, the defendants asserted that the contract was illegal under Nevada law. But the court of appeal held that this issue was already decided in plaintiff's favor because " 'the [prior] Appellate opinion could not have been written if the [court] had not found the contract to be valid in the place of performance. . . .' " *Nevcal*, 217 Cal. App. 2d at 804, 32 Cal. Rptr. at 109 (quoting plaintiff's counsel).

If, however, the rule of law claimed to be implicitly decided in an earlier appeal was not raised at the first trial, the appellate decision does not establish law of the case on that issue. *See, e.g.*, Wood v. Elling Corp., 20 Cal. 3d 353, 572 P.2d 755, 142 Cal. Rptr. 696 (1977) (tolling of statute of limitations against corporate defendant not implicitly determined); Estate of Horman, 5 Cal. 3d 62, 485 P.2d 785, 95 Cal. Rptr. 433 (compliance with probate statute not raised at first trial nor on original appeal held not to be law of the case on retrial), *cert. denied*, 404 U.S. 1015 (1971). DiGenova v. State Bd. of Equalization, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962) (prior appeal did not determine retroactivity of statute); Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P.2d 804 (1945) (defense of mutual abandonment available at second trial, because not raised earlier).

Since the procedural problems were repeatedly raised by the Raiders at both the trial

of appeal should remain intact. The time constraints imposed upon Oakland and the type of property involved in the instant case warrant an exception to the rigid procedural rules. Until February 21, 1980, the city was able to rely on the NFL's relocation requirements to ensure that the team remained in Oakland.[170] Since the Raiders were suddenly free to leave, the city had to act quickly or be relegated to an extraterritorial condemnation.[171] As a result, Oakland filed suit immediately to preserve its jurisdictional ability to condemn.

Applying the procedural rules literally to the instant case results in a victory of form over substance. After filing the action, Oakland satisfied all of the procedural requirements. No discernible prejudice was suffered by the Raiders because of the city's failure to follow the statutory order.[172] Had Oakland abided by this scheme, the Raiders might have relocated before a hearing could have been held.[173] If the property to be condemned is readily transferable, strict compliance with the procedural rules should not be required.

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and appellate level, the supreme court in *Raiders I* necessarily barred any further argument on that point by implicitly resolving the issue in favor of the city. The court of appeal also held that *Raiders I* precluded examination of whether the taking was for the stated purpose. *See infra* note 179 and accompanying text.

[170] *See supra* notes 32-34 and accompanying text.

[171] For a discussion of the difficulties inherent in extraterritorial condemnation, see *supra* notes 124-50 and accompanying text.

[172] A hearing prior to the adoption of the resolution is not required to fulfill fourteenth amendment due process. *See, e.g.*, Rindge Co. v. County of Los Angeles, 262 U.S. 700, 709 (1923) (upholding resolutions enacted without prior hearing); Joiner v. City of Dallas, 380 F. Supp. 754, 771 & n.18 (N.D. Tex.) ("*decision* to seek condemnation of private property does not per se encroach upon any interest, constitutional or otherwise, of the property owners" because full hearing occurs when condemner files suit), *aff'd mem.*, 419 U.S. 1042 (1974). Since the property owner can assert all available defenses during the condemnation trial, an appearance before the condemning authority prior to passage of the resolution is not imperative, particularly considering that the resolution is now subject to collateral attack. *See infra* note 196. In the Raiders case, the need for prompt action should outweigh protections afforded by the procedural requirements. *Cf.* National City Business Ass'n v. City of National City, 146 Cal. App. 3d 1060, 1065, 194 Cal. Rptr. 707, 710 (4th Dist. 1983) (only fundamental right in condemnation proceeding is right to just compensation).

[173] By fulfilling the statutory requirements prior to commencing its condemnation action, the City of Baltimore most likely lost its opportunity to condemn the Colts. *See supra* notes 26, 150.

D. No Authorization to Acquire the Property for the Stated Purpose

The NFL prohibits nonprofit entities from owning a franchise.[174] Presumably, this rule precludes municipal operation of a team. To comply with this bylaw, Oakland proposed transferring the team to a profit-making enterprise after the acquisition.[175] The Raiders claimed that a post-acquisition transfer by the city would be both unconstitutional and ultra vires.

Use of eminent domain with the intent to retransfer the property can be analyzed either in terms of public use or in terms of whether the taking is permitted by statute. The supreme court did not distinguish the two methods. Justice Richardson held that the Eminent Domain Law specifically authorizes retransfer of acquired property, provided adequate controls are imposed upon the transferee to ensure the public benefit.[176] Since the Commissioner of the NFL indicated that a brief interim ownership by Oakland would be allowed,[177] the court did not object to the city's plan.

The trial judge followed a different course, determining that the city lacks statutory authority to retransfer the Raiders.[178] However, the

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[174] NFL CONST. AND BY-LAWS art. III, § 3.2 (1976) ("Any person, association, partnership, corporation or other entity of good repute organized for the purpose of operating a professional football club shall be eligible for membership except: . . .[a] corporation, association, partnership or other entity not operated for profit [or] any charitable organization or entity . . . .") (copy on file at U.C. Davis Law Review office).

[175] One plan, suggested at trial, was for the team to be operated by a profit-making corporation owned solely by Oakland. L.A. Times, June 9, 1983, pt. II (Metro), at 3, col. 1. An alternative method would be for the city to acquire the team, and then sell it to new owners, who agree to keep the team in Oakland. For a discussion of the latter, see *infra* notes 176-79 and accompanying text.

[176] *Raiders I*, 32 Cal. 3d at 74, 646 P.2d at 843-44, 183 Cal. Rptr. at 682.

[177] *Id.* at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681.

[178] Although the trial court recognized that a taking predicated upon a retransfer may fulfill a valid public use, it found that the city lacked statutory authority. "Any power to condemn with the intent to transfer must be conferred by the Eminent Domain Law. . . . There is none here." *Raiders Trial* at 22 (citation omitted).

Section 1240.120(b) of the Civil Procedure Code sanctions the use of eminent domain with the intent to transfer the acquired property, provided reservations and restrictions are imposed to preserve the usefulness of the project. However, the trial judge ruled that the section only applies when property is taken to preserve the usefulness of other public assets. *Id.* at 21. Since he found that the Raiders were not necessary for an effective use of the Coliseum, *see supra* note 105 and accompanying text, he held that the provision does not authorize a retransfer in the instant case. *Raiders Trial* at 22. The judge also discovered no other statutes that authorize such a transfer.

The Official Comment to § 1240.120 indicates that it was intended to be a protective

court of appeal found that the supreme court foreclosed this defense by holding that if Oakland can establish a valid public use, the Eminent Domain Law affords it the power to effectuate that use. Consequently, the court of appeal held that the trial court exceeded its jurisdiction when it examined the statutory validity of the proposed retransfer.[179]

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condemnation statute. The only discussion of the retransfer provision concerns the acquisition of adjoining property to eliminate a detrimental effect on an existing public project. The statute does not contain a general authority to retransfer condemned property. Therefore, the trial court's analysis seems correct.

In reaching its conclusion, the trial court relied on Civil Procedure Code § 1230.020. This provision mandates that eminent domain may only be exercised as specified in the Eminent Domain Law. A similar statute existed in the prior law, at former § 1237. CAL. CIV. PROC. CODE § 1230.020 official comment (West 1982). Nevertheless a number of retransfers unassociated with protective condemnations have been upheld by the California courts. *See infra* note 179. Also, the statutory scheme does authorize takings which fulfill a public use. *See supra* note 52. The supreme court has held that a public use can be achieved even if the property is subsequently retransferred. *See infra* note 179. Hence, independent statutory authority appears to be unnecessary.

Moreover, § 1240.120 was enacted to ensure that protective condemnations would be permissible. The existence of a general retransfer power is inherent in § 1240.120. Therefore, the trial court erred in extending its inquiry beyond public use. The trial court held that no general retransfer power exists under the (new) Eminent Domain Law. It distinguished City & County of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955), *see infra* note 179, from the instant case, because *Ross* was based upon the older eminent domain law. *Raiders Trial* at 21. Since no explicit general retransfer power has been codified, the trial court held that none exists. However, no additional provisions regarding retransfer existed when *Ross* was decided. Yet the supreme court was still willing to sanction a retransfer with "stringent controls." Also, § 1230.020 is the same as former § 1237, which was the law when the court decided *Ross*. Consequently, a general power to transfer property acquired by eminent domain exists regardless of express statutory authorization.

Had the legislature intended to overrule *Ross*, this motive would have appeared in the Official Comments to the Eminent Domain Law. The Official Comment to § 1240.120 does not indicate such intent, whereas *Ross* is cited in the Official Comment to the public use provision. CAL. CIV. PROC. CODE § 1240.010 (West 1982). Section 1240.120 was enacted to ensure that protective condemnations would constitute a valid public use. Subsection (b) was added to ensure that the general power to retransfer condemned property applied to protective takings, not to provide an additional option otherwise unavailable in the Eminent Domain Law. Therefore, neither § 1230.020 nor § 1240.120 limits the retransfer of condemned property only to protective takings.

[179] *Raiders III*, 150 Cal. App. 3d at 277, 197 Cal. Rptr. at 734. A subsequent transfer to private control constitutes a public use so long as "stringent controls" are imposed upon the transferee to ensure the public benefit. City & County of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955) (plan to lease land acquired by eminent domain to private party to build and operate parking structure invalid because stringent controls not provided); *see also* City of Oakland v. Williams, 206 Cal. 315, 274 P. 328 (1929) (lease to private company of warehouse built on tidelands valid public purpose);

E. No Probable Devotion to a Public Use Within Seven Years

Regardless of whether a resolution of necessity has been enacted, a municipal taking may be challenged on the ground that no reasonable probability exists that the property will be devoted to the stated pur-

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Sherman v. Buick, 32 Cal. 241 (1867) (state statute allowing landowner to condemn easement on adjacent land for construction of "private road" constitutional); County of Los Angeles v. Anthony, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308 (2d Dist.) (leasing of property condemned by county to private companies to construct and operate Hollywood Motion Picture and Television Museum does not invalidate taking), *cert. denied*, 376 U.S. 963 (1964); Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 266 P.2d 105 (1st Dist.) (retransfer of condemned property to private owners to complete urban renewal project upheld), *cert. denied*, 348 U.S. 897 (1954). The underlying evil that these cases have sought to prevent is the use of eminent domain to arbitrarily transfer private property from one owner to another. No California cases have specifically concerned the transfer of ownership from one private person or entity to another without a significant alteration of the property. However, the United Supreme Court recently faced this issue directly in Hawaii Hous. Auth. v. Midkiff, 52 U.S.L.W. 4673 (U.S. May 30, 1984).

In *Midkiff*, property owners have challenged the Hawaii Land Reform Act, which permits certain lessees in possession of land to acquire a fee simple in that land by using eminent domain. The law was enacted to eradicate the shortage of fee simple estates and the artificial inflation of residential land values in Hawaii. The Ninth Circuit held the legislation invalid, because the benefit obtained was solely private. The court distinguished the law from redevelopment projects, holding that the Hawaii program "will result in no change in the use of the property." *Midkiff*, 702 F.2d 788, 796 (9th Cir. 1983). The court refused to recognize the change in status from investment property to residential ownership.

The Supreme Court unanimously rejected this reasoning. "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn the taking as having only a private purpose." *Midkiff*, 52 U.S.L.W. at 4677. The Court also held that the condemner does not have to use the property itself to implement a legitimate taking. "[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Id.* Since the statutory purpose will be achieved without public ownership, the Court held the Hawaii Land Reform Act constitutional.

The Act contains provisions to ensure the public benefit. Only tenants who own a house on a leased lot are eligible for the program. The Housing Authority may also restrict the new owner's fee interest by imposing a right of first refusal, in favor of the state, for the ten years following the coveyance. Since the primary purpose of the law is to eliminate Hawaii's oligopolistic land ownership, additional limitations are unnecessary.

The public benefit to be derived from taking the Raiders relates directly to retaining the team in Oakland. The public purpose can be achieved either by municipal or private ownership. If the city sells the team to a private owner, but imposes "adequate controls" restricting subsequent relocation of the franchise, then retransfer of the Raiders to private control will not invalidate the taking.

pose within seven years.[180] The trial court found that the litigation that would inevitably arise after Oakland acquired the Raiders precluded the city from fulfilling the time requirements.[181]

The provision that contains the time limit is based upon Civil Procedure Code section 1240.220,[182] which concerns taking for future use.[183] Oakland sought to acquire the Raiders for a present and existing public benefit, not for a future use. Therefore, the defense seems to be inapplicable to the instant case. Moreover, the court of appeal found this defense improper because, in adopting the statute, the legislature specifically indicated that delay caused by extraordinary litigation should not be included in the time calculation.[184] The appellate court was also unwilling to hold that the potential loss of the coaching staff and the absence of a completed retransfer agreement amounted to an insurmountable delay.[185]

F. Judicial Review of Necessity: Public Interest and Necessity Do Not Require the Proposed Project

California courts have traditionally refused to examine whether the taking of particular property is necessary to achieve a public purpose. If the objective of the project falls within the condemner's authority, then the means to fulfill that end are generally left to the legislative branch of government.[186] However, if a taking reflects a gross abuse of

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[180] CAL. CIV. PROC. CODE § 1250.360(d) (West 1982).

[181] The court was concerned with the time frame required to fully implement a retransfer. The potential for legal challenges to such an arrangement led the court to conclude: "[I]t is distinctly probable that permitting this condemnation would lead to a quagmire of disputes and legal entanglements with little expectation that the franchise would ever be devoted to a public use." *Raiders Trial* at 27.

[182] CAL. CIV. PROC. CODE § 1250.360 official comment (West 1982).

[183] CAL. CIV. PROC. CODE § 1240.220 (West 1982) (use must occur within seven years).

[184] *Raiders III*, 150 Cal. App. 3d at 275, 197 Cal. Rptr. at 733-34; CAL. CIV. PROC. CODE § 1240.220 official comment (West 1982).

Also, the seven year requirement refers to the time that the public use begins. Even if protracted litigation occurs concerning the financial structure of the team, this will not affect the public purpose. The reason behind the acquisition of the Raiders is to maintain the recreational and economic benefits derived from having the team in Oakland. The public use will be effectuated when the team returns to the city, not when a corporate structure is agreed to by all concerned. Therefore, the seven year requirement, if applicable, would be satisfied.

[185] *Raiders III*, 150 Cal. App. 3d at 275, 197 Cal. Rptr. at 734.

[186] *E.g.*, People v. Chevalier, 52 Cal. 2d 299, 306-07, 340 P.2d 598, 602-03 (1959). In her concurring and dissenting opinion in *Raiders I*, Chief Justice Bird noted:

discretion,[187] results from bribery,[188] or violates statutory procedures,[189] judicial review of necessity is appropriate. The judiciary may also inquire into necessity when a local public entity seeks to condemn extraterritorial property.[190]

The trial court relied on the latter two grounds to justify its examination of necessity.[191] The judge found that the Raiders were not necessary for either economic or recreational purposes.[192] The court of ap-

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> If the object of the legislative program is properly within the parameters of that body's authority, questions concerning the proper means used to reach that particular end . . . are generally left to the legislative branch of the government. . . . The court may not second-guess the City's determination that condemnation of the Raiders is "necessary."

Raiders I, 32 Cal. 3d at 78, 646 P.2d at 846, 183 Cal. Rptr. at 684-85 (Bird, C.J., concurring in part and dissenting in part) (citations omitted).

Accordingly, a properly enacted resolution of necessity also limits judicial review of necessity. CAL. CIV. PROC. CODE § 1245.250(a) (West 1982); *see supra* notes 66-69 and accompanying text; *see also* Miro v. Superior Court, 5 Cal. App. 3d 87, 84 Cal. Rptr. 874 (4th Dist. 1970) (city council's determination of necessity is conclusive and nonjusticiable); County of Los Angeles v. Bartlett, 203 Cal. App. 2d 523, 21 Cal. Rptr. 776 (2d Dist. 1962) (necessity of taking land for waterfront facility nonjusticiable); Barry v. Department of Pub. Works, 199 Cal. App. 2d 359, 18 Cal. Rptr. 637 (3d Dist. 1962) (necessity of taking land for highway nonjusticiable); People v. City of Los Angeles, 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (2d Dist.) (same), *appeal dismissed*, 364 U.S. 476 (1960); People v. Nahabedian, 171 Cal. App. 2d 302, 340 P.2d 1053 (2d Dist. 1959) (necessity is not justiciable, but public use is).

[187] CAL. CIV. PROC. CODE § 1245.255 (West 1982); *cf.* United States v. Carmack, 329 U.S. 230, 243-44 & n.14 (1946) (federal requirement that taking cannot be so arbitrary and capricious that it is unreasonable, or in bad faith).

[188] CAL. CIV. PROC. CODE § 1245.270 (West 1982).

[189] CAL. CIV. PROC. CODE § 1245.255 official comment (West 1982). Civil Procedure Code § 1250.370 provides that the lack of necessity is an objection to a taking if the resolution is not properly enacted. *See supra* notes 89, 91.

[190] *See supra* notes 71-74 and accompanying text.

[191] *Raiders Trial* at 28-29.

[192] *See supra* notes 104-12 and accompanying text. The trial judge ruled that when a resolution lacks conclusive effect, the burden of proof is on the condemner to show necessity. He relied on Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 P. 681 (1891), and City of Carlsbad v. Wight, 221 Cal. App. 2d 756, 34 Cal. Rptr. 820 (4th Dist. 1963), to support his conclusion. *Spring Valley* concerned a private water company's use of eminent domain to acquire land needed to construct a reservoir. The supreme court decided that, in this situation, the burden of proof was on the condemner to show public use, which (then) included necessity. In *Wight*, the court of appeal relied exclusively on *Spring Valley* for its holding. Since under present law, necessity need only be shown in an unusual case, the precedential value of *Spring Valley* and *Wight* is somewhat suspect. *See also* City of Hawthorne v. Peebles, 166 Cal. App. 2d 758, 333 P.2d 442 (2d Dist. 1959) (during condemnation trial to acquire extraterritorial property, city assumed the burden of proof, because resolution of necessity not

peal, however, determined that the taking is not extraterritorial,[193] and that the procedural problems are inconsequential.[194] Therefore, the trial court's review of necessity was unwarranted.[195] However, since the court of appeal, for other reasons, did not preclude a review of necessity, the standards applied by the trial court require examination.[196]

The trial court purportedly applied the definition of necessity employed in *City of Hawthorne v. Peebles*[197] to the instant case.[198] In *Pee-*

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conclusive).

[193] *Raiders III*, 150 Cal. App. 3d at 274, 197 Cal. Rptr. at 732.

[194] *Id.* at 277-78, 197 Cal. Rptr. at 734-35.

[195] *Id.* at 279, 197 Cal. Rptr. at 736.

[196] In *Raiders Trial*, the judge deferred inquiry regarding the existence of a gross abuse of discretion. However, he did indicate that the city's failure to abide by the procedural requirements, and the lack of evidence of necessity presented tended to support a finding of gross abuse. *Raiders Trial* at 42. The court of appeal indicated that the trial court did not rely on abuse of discretion, and determined that neither ground mentioned by the trial court is sufficient to find a gross abuse. *Raiders III*, 150 Cal. App. 3d at 279 & n.11, 197 Cal. Rptr. at 736 & n.11. As a result, the trial court may apparently revive its necessity analysis by finding that a gross abuse of discretion occurred.

Prior to 1975, a resolution of necessity could not be collaterally attacked. However, Civil Procedure Code § 1245.255 overruled People v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959), insofar as the decision precluded collateral attack on the conclusive effect of the resolution. CAL. CIV. PROC. CODE § 1245.255 legislative committee comment (West 1982). Now, a resolution can be collaterally attacked in two ways — by mandamus before the eminent proceedings begin asserting abuse of discretion, or as a defense at trial, by alleging a gross abuse of discretion. *Id.* The Raiders asserted the defense at trial, and to prevail, must establish a gross abuse.

Judicial review of abuse of discretion is restricted. The proceedings may be examined only to determine whether the enactment of the resolution was arbitrary, capricious, or entirely lacking in evidentiary support. CAL. CIV. PROC. CODE § 1245.255 official comment to 1978 amend. (West 1982). Since the Raiders must prove a gross abuse, they must demonstrate conduct even more egregious than that necessary to show abuse of discretion. If the resolution is supported by substantial evidence, than it must be upheld. *Id.* The burden of proof is on the challenger to establish a lack of substantial evidence. Huntington Park Redev. Agency v. Duncan, 142 Cal. App. 3d 17, 24-25, 190 Cal. Rptr. 744, 748 (2d Dist.), *cert. denied*, 104 S. Ct. 243 (1983); *see also* National City Business Ass'n v. City of National City, 146 Cal. App. 3d 1060, 1065, 194 Cal. Rptr. 707, 710 (4th Dist. 1983) (once resolution is passed, burden of proof on property owner). Since the city will derive great public benefits from the taking, a gross abuse of discretion will be very difficult to establish, especially considering that the Raiders have the burden of proof. Even if the trial court decides otherwise, a proper review of necessity will result in approval of the acquisition. *See infra* notes 197-205 and accompanying text.

[197] 166 Cal. App. 2d 758, 333 P.2d 442 (2d Dist. 1959).

[198] "The court will review necessity under the standard announced in *Peebles*. . . . It must be kept in mind that 'necessity' is a predicate for condemnation, and mere

bles, the city sought to acquire land located both inside and outside of its boundaries for a park. The court of appeal rejected definitions such as "indispensably necessary" and "absolute necessity," holding instead that only a reasonable or practical necessity be shown.[199] The appellate court concluded that necessity does not signify the impossibility of completing the improvement without taking the property in question. It merely requires that the property be reasonably suitable for the improvement.[200]

Had the trial court actually used the *Peebles* standard, it would have reached a different result. The Raiders were not *essential* to the viability of the Coliseum, but the team was both suitable and useful for the facility. After all, the Raiders consistently generated a substantial portion of the Coliseum's revenues.[201] Therefore, the taking seems to comport with the holding in *Peebles*.

The trial judge also applied the alternative means test of *City of Carlsbad v. Wight*.[202] In *Wight*, the court of appeal held that locating a water drainage system outside of Carlsbad was unnecessary, because alternative systems could be constructed entirely within the city.[203] Under this test, the trial court again found the taking unnecessary, because a fair and reasonable amount of sporting events are available to the residents of Oakland.[204]

This reasoning is fallacious, because Oakland's proposed acquisition of the Raiders does not concern a policy decision for which fungible alternatives are available. The Raiders provided a unique form of entertainment.[205] The subjective nature of the benefit sought requires that the taking not be analyzed in terms of available alternatives. If a review of necessity is warranted, the standards used and the result obtained should differ from the trial court's analysis and conclusion.

IV. Conclusion

Once the procedural problems are brushed aside and the statutory difficulties are eliminated, the trial court and, most likely, the supreme

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convenience, whim, wish, or desire is not enough." *Raiders Trial* at 30.

[199] *Peebles*, 166 Cal. App. at 761-62, 333 P.2d at 444 (citing *Corpus Juris Secundum*).

[200] *Id.* at 763, 333 P.2d at 445 (citing *Nichols On Eminent Domain*).

[201] *See supra* note 108 and accompanying text.

[202] 221 Cal. App. 2d 756, 34 Cal. Rptr. 820 (4th Dist. 1963).

[203] *Id.*

[204] *Raiders Trial* at 40.

[205] *See supra* note 108.

court will be required to answer the primary question: Is the proposed taking for a valid public use? Or, as the supreme court framed the issue in *Raiders I*: "Is the obvious difference between managing and owning the facility in which the game is played, and managing and owning the team which plays in the facility, legally substantial?"[206]

Public recreation is a legitimate basis for using eminent domain. A professional sports team provides the surrounding community with a form of recreation that would otherwise be unavailable. Use of public funds to construct sports stadiums has been consistently sanctioned as a valid public expenditure. Providing a stadium and furnishing a team to play in it both accomplish the same result — public recreation. For eminent domain purposes they should be indistinguishable. If the Raiders case reaches the California Supreme Court for a second time, an instant replay should occur, resulting in a determination that Oakland's proposed taking is for a valid public use.

If the supreme court is reluctant to hold that the recreational benefits alone comprise a public use, any hesitancy should be overcome by the economic and social advantages to be obtained from returning the Raiders to Oakland. A professional sports team generates tax revenues and increases tourism. The trial court found that the Raiders presence accounted for $30,000,000 of spending and 860 jobs in the surrounding area.[207] Since the local economy greatly benefited from the Raiders, the team's departure must have adversely affected the fiscal well-being of the community.

The trial judge suggested that the remaining sports and entertainment activities in the Oakland area would fill the economic gap left by the Raiders.[208] However, the unique nature of Raiders' football makes a substantial contribution unlikely. The trial court found that the great majority of loyal Raiders fans resided in cities other than Oakland,[209] and that those who attended home games came from all parts of northern and central California.[210] Although other attractions within the city may be popular, none commands the attention and devotion enjoyed by the Raiders. Local fans may still spend their entertainment dollars in Oakland, but those who reside a considerable distance away have probably reverted to closer attractions, or followed the Raiders to Los Angeles.

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[206] *Raiders I*, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680.

[207] *Raiders Trial* at 37-38.

[208] *Id.* at 38.

[209] *Id.* at 24.

[210] *Id.* at 5.

The style and success of the Raiders also improved Oakland's image and sense of pride. The "pride and poise" of the Raiders instilled dignity and respect for the city as a whole. Oakland became renowned for its Raiders; the team's winning tradition and style of play became synonymous with the city itself. Hence, removing the Raiders from Oakland was civically devastating, comparable to taking the Yankees away from New York City.[211]

By bringing the Raiders back to Oakland, the city will receive great recreational, economic, and social benefits. However, the ramifications of sanctioning the taking must not be ignored. The treble advantages to be derived from the return of the Raiders clearly outweigh the difficulties inherent in condemning an ongoing business. But a similar result is not necessarily warranted whenever the government seeks to condemn an existing business. If the case is decided by the supreme court for a second time, the court should delineate the parameters for using eminent domain in analogous situations. Should it fail to do so, the legislature will undoubtedly seize the opportunity.[212]

Eric Alan Mitnick

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[211] In 1983, the Yankees sought to play its opening series in Denver because stadium renovations had not been completed. The city obtained a preliminary injunction, prohibiting the temporary transfer because:

> The Yankee pin stripes belong to New York like Central Park, like the Statue of Liberty, like the Metropolitan Museum of Art, like the Metropolitan Opera, like the Stock Exchange, like the lights of Broadway, etc. Collectively they are "The Big Apple." Any loss represents a diminution of the quality of life here . . . .
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> . . . .
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> . . . Dare one whisper the dreaded words: "The Denver Yankees."

City of New York v. New York Yankees, 117 Misc. 2d 332, 335, 458 N.Y.S.2d 486, 490 (N.Y. Sup. Ct. 1983). The dreaded words "The Los Angeles Raiders" have been seen throughout the nation, including on the Lombardi Trophy, awarded to the Raiders for winning the 1984 Super Bowl.

[212] Recently, the potential for using eminent domain to acquire an existing business, solely for economic reasons, became a reality. In New Bedford, Massachusetts, the owner of a manufacturing plant cut back operations, and plans to sell the facility. If the plant remains unsold, the owner will close it. The unemployment rate in New Bedford is almost double the state's average. To preserve 450 local jobs, the city is seriously considering acquiring the factory by eminent domain. The city has proposed running the plant as a municipal corporation until it finds a suitable owner. N.Y. Times, June 5, 1984, at 1, col. 6.

The first legislative response, in California, occurred this year. S.B. 1585, Cal. Leg., 1983-84 Sess. (1984) would prohibit local governments from condemning certain ongoing businesses. Although the bill failed to pass out of the Senate Local Government Committee, a joint Local Government-Judiciary Committee will hold interim hearings on the measure this fall.