

## DOLLARS AND (NON)SENSE: AN ANALYSIS OF TEAM RELOCATION IN SPORTS AND HOW CITIES CAN PROTECT THEMSELVES

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### I. INTRODUCTION

In March 2018, the State of Ohio filed suit against Precourt Sports Ventures (hereinafter “Precourt”) to enjoin Precourt from relocating their soccer franchise, the Columbus Crew, to Austin, Texas.<sup>1</sup> Ohio alleged that Precourt and Major League Soccer (MLS) were legally prevented from relocating the team because of a unique Ohio statute which called for certain conditions to be satisfied before *any* professional sports team in the state could relocate.<sup>2</sup> The case was dismissed on appeal because the court lacked jurisdiction, immediately shutting the door on exploring the team-city relationship of professional sports teams.<sup>3</sup> Nevertheless, the suit shed light on a question that has yet to be answered: do municipalities have any protections in place to prevent a professional sports team’s relocation when the team’s stadium is built using the municipality’s own tax funds?

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<sup>1</sup> See *generally* State ex rel. DeWine v. Precourt Sports Ventures LLC, 2018-Ohio-2414, 1 (Ohio Ct. App. 2018).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 4.

Professional sports teams, like all other for-profit businesses, prioritize profit maximization.<sup>4</sup> Thus, when an out-of-state move seems fiscally advantageous for a team, it is unlikely that any loyalty to the present domain will prevail.<sup>5</sup> Municipalities may find themselves strong-armed by a team's threat of relocation, resulting in the municipality making concessions that it would otherwise not make.<sup>6</sup> In such situations, state and local governments are seemingly stuck between the proverbial rock and a hard place; they must weigh upgrading or building a new stadium for the team against investing those same funds into other more essential services, such as education.<sup>7</sup> As stadiums become more expensive to build, maintain and operate, cities and teams alike are recognizing that it is essential to protect such large investments.<sup>8</sup> Today, those protections remain nonexistent in most jurisdictions.<sup>9</sup> This comment aims to advance a legislative reform agenda that provides municipalities adequate protections for their tax investment against the relocation of the professional sports teams.

Part II of this comment will provide a brief history of team relocations and highlight some historical misfortunes which have come at the hands of relocation efforts, showing the urgency in creating adequate protections. Part III will analyze the effectiveness of eminent domain and contract terms (both express and implied), legal theories previously used in attempts to prevent a team's relocation, as adequate protectionary measures. Part III will also look at the current legislative efforts taken to protect against team relocations, and the viability of such protections moving forward. Part IV will conclude by proposing new legislation which, if enacted, will allow New Jersey municipalities to protect themselves against losing their professional sports franchises via relocation.

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<sup>4</sup> See *Sports Law - Come Back, Shane: The Movement of Professional Sports Teams*, LAW LIBRARY – AMERICAN LAW AND LEGAL INFORMATION, <http://law.jrank.org/pages/10434/Sports-Law-COME-BACK-SHANE-MOVEMENT-PROFESSIONAL-SPORTS-TEAMS.html> (last visited Feb. 2, 2020) (“Owning a professional sports team is a risky, speculative endeavor, and owners must act to protect their interests and maximize the values of their franchises.”).

<sup>5</sup> *Id.* (“The owners of professional sports teams have been able to obtain generous deals from city and state officials by threatening to move their franchises. If the owners do not receive the support they seek, they move their team to a more accommodating city.”).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *generally Non-Relocation Agreement between the City of Erie and Buffalo Bills, Inc.*, BUFFALO BILLS STADIUM LEASE (Dec. 21, 2012), <http://www2.erie.gov/exec/sites/www2.erie.gov/exec/files/uploads/Buffalo%20Bills%20Non-Relocation%20Agreement.pdf> (“[T]he Bills’ obligations under the Non-Relocation Covenants are unique, are the essence of the bargain and are essential consideration for this Agreement . . .”).

<sup>9</sup> Ohio is the only state to enact such protections; see *generally* Ohio Rev. Code Ann. § 9.67 (1996).

This comment will look at the viability of creating protections against the relocation of professional sports teams. Specifically, it posits that first, eminent domain is not helpful in its present context because of violations to the United States Constitution and complexity with the “just compensation” and “public use” requirements. Second, the inclusion of express terms in the municipality-team contract, while certainly a possible solution, can become impractical in light of imbalances in bargaining power among teams and cities. Third, imputing implied terms to the municipality-team contract, while also possible, lacks the precision desired in view of the magnitude of the contractual undertaking. Fourth, municipal use of tax funds to build or improve a stadium by its nature provide the basis for requiring municipalities to receive a value equivalent to the amount of tax funds given, before allowing a team within their jurisdiction to relocate. Since this protection is too important to succumb to a court’s discretion in application, New Jersey must take the initiative to protect its municipalities by proposing full legislation in the form of a statute covering this arena.

## II. BACKGROUND/OVERVIEW

The idea of sport subsidies began in 1951, when then Major League of Baseball (hereinafter “MLB”) commissioner, Ford Frick, decided the MLB’s professional baseball teams were generating excess value for other businesses in town, all of which the teams were unable to profit from through gate or stadium advertising.<sup>10</sup> As a solution, Frick demanded that the home cities now support the league’s teams by building and maintaining new stadiums, funded with the municipality’s own taxpayer money.<sup>11</sup> Fast-forward nearly seven decades later and Frick’s demands continue to resonate just as loudly, if not louder, than they ever have.

During the twentieth century, more than \$20 billion was spent on professional ballparks, stadiums, and arenas.<sup>12</sup> At least \$14.7 billion of the \$20 billion spent (nearly seventy-four percent) has come in the form of government subsidies.<sup>13</sup> The problem has not improved with time either: \$5.2 billion of these government subsidies were given between 1989 and 1999 alone.<sup>14</sup> From 2000 through the end of 2020, the National Football League (hereinafter “NFL”) alone will have successfully opened sixteen stadiums, fourteen of which together swallowed \$5 billion in public

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<sup>10</sup> RODNEY D. FORT, *SPORTS ECONOMICS* 338 (2ND ED. 2006).

<sup>11</sup> *Id.*

<sup>12</sup> Raymond J. Keating, *Sports Pork: The Costly Relationship between Major League Sports and Government*, CATO INSTITUTE (Apr. 5, 1999), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa339.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

funding.<sup>15</sup> This figure does not include taxpayer subsidized stadium renovations by three other teams,<sup>16</sup> amounting to \$820 million.<sup>17</sup> In 2017, Nevada shook this landscape even further when it promised to give a record-breaking amount of nearly \$1 billion to lure the Oakland Raiders to Las Vegas.<sup>18</sup> The message has become loud and clear: when relocating, sport teams seek money—especially “free” money in the form of taxpayer funding—and try to secure as much as possible. Yet, as you will see, promising these very coveted, large public contributions does not always guarantee the municipality will have its beloved team in the long term.

In 1987, Bud Adams, owner of the then Houston Oilers, threatened to relocate his NFL team unless the city improved their existing stadium.<sup>19</sup> Fearful of losing the Oilers, Harris County<sup>20</sup> met Adams’ demands and committed \$67 million in taxpayer funding for the requested improvements.<sup>21</sup> However, six short years later in 1993, even after securing funding for their stadium improvements and while the improvements were being made, Adams began petitioning Harris County for a *completely new* stadium.<sup>22</sup> When Adams’ request was rejected by then-mayor Bob Lanier, Adams threatened to relocate the Oilers to Nashville, Tennessee.<sup>23</sup> In August of 1995, Adams opened negotiations with Nashville, without informing Houston.<sup>24</sup> Despite Mayor Lanier ultimately offering a new stadium, it was too little, too late for Adams.<sup>25</sup> Adams announced an agreement relocating the Oilers to Nashville in November of 1995.<sup>26</sup> Importantly, Nashville did not require Adams to pay a single dime to erect the new facility.<sup>27</sup>

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<sup>15</sup> Kevin Seifert, *With \$6.7 billion in public money, NFL closes stadium era*, ESPN (Mar. 28, 2017), [http://www.espn.com/blog/nflnation/post/\\_/id/234573/with-6700000000-in-public-money-nfl-stadium-era-closes](http://www.espn.com/blog/nflnation/post/_/id/234573/with-6700000000-in-public-money-nfl-stadium-era-closes).

<sup>16</sup> *Id.* (These teams include the Green Bay Packers, Chicago Bears, and Kansas City Chiefs.).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Raymond J. Keating, *The NFL Oilers: A Case Study in Corporate Welfare*, FOUNDATION FOR ECONOMIC EDUCATION (Apr. 1, 1998), <https://fee.org/articles/the-nfl-oilers-a-case-study-in-corporate-welfare/>.

<sup>20</sup> *Id.* (Although named the “Houston Oilers,” the Oiler’s stadium was actually located in Harris County, Texas.).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Raymond J. Keating, *The NFL Oilers: A Case Study in Corporate Welfare*, FOUNDATION FOR ECONOMIC EDUCATION (Apr. 1, 1998), <https://fee.org/articles/the-nfl-oilers-a-case-study-in-corporate-welfare/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Adams initially promised to play out the rest of the contract in the Harris County stadium.<sup>28</sup> However, after having low attendance numbers during the 1996 season, Adams negotiated a buyout to play in Nashville two seasons sooner.<sup>29</sup> So Harris County, even after succumbing to the Oilers demands and committing \$67 million for stadium improvements, was nevertheless stood up by a franchise owner looking to leverage the “legalized larceny” landscape to garner tax breaks from local politicians.<sup>30</sup> Thankfully, the NFL awarded Harris County an expansion franchise in the Houston Texans, which helped to shoulder the debt remaining from the Oiler’s agreed-upon stadium improvements years before.<sup>31</sup>

At the same time, the Oakland Raiders were involved in a similar situation. In 1995, the City of Oakland, California successfully courted the Los Angeles Raiders by committing \$200 million of taxpayer funds to improve to the Oakland Coliseum.<sup>32</sup> The Raiders would continue to play in the Coliseum for more than twenty-three years until 2018, when the team announced they would relocate.<sup>33</sup> While more than two decades objectively may appear as an adequate tenure, the improvements to the Oakland Coliseum demanded by the Raiders in 1995 took twenty-five years to complete.<sup>34</sup> The improvements requested in 1995 are on track to be completed by the end of 2020.<sup>35</sup> On top of this, interest nearly doubled the initial project cost to \$350 million.<sup>36</sup> In 2017, the total cost remaining for the project was estimated to be \$95 million, an amount which would be taken from Oakland taxpayers while the Raiders enjoy greener pastures in Las Vegas.<sup>37</sup> With no team scheduled to play in the Coliseum at the time, the tax obligation of \$13 million per year is placed upon the taxpayers to satisfy the property taxes through 2025.<sup>38</sup> However, on December 23, 2019, the Oakland Athletics came to the rescue by purchasing the city’s stake in the Coliseum for \$85 million.<sup>39</sup> Although only acting as a temporary home as

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Sports Law, supra* note 4.

<sup>32</sup> Patrick Redford, *Oakland Taxpayers Will Still Be on The Hook For \$163 Million After The Raiders And Warriors Leave*, DEADSPIN (Mar. 29, 2017), <https://deadspin.com/oakland-taxpayers-will-still-be-on-the-hook-for-163-mi-1793801493>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Matier & Ross, *Taxpayers’ tab for Coliseum redo: It’s even worse than you knew*, S.F. CHRONICLE (Mar. 29, 2017), <https://www.sfchronicle.com/bayarea/article/Taxpayers-tab-for-Coliseum-redo-It-s-even-11034482.php>.

<sup>37</sup> Redford, *supra* note 32.

<sup>38</sup> Redford, *supra* note 32.

<sup>39</sup> CBS San Francisco, *Alameda County Officials Approve Coliseum Ownership Sale To*

they build their own, new ballpark, the Athletics' purchase allowed the county to flip the payment and pay off the remaining debt obligations from the 1995 renovations.<sup>40</sup>

These are among the most popular instances of team relocations, but they just begin to scratch the surface.<sup>41</sup> Recently, in December 2018, Phoenix Suns owner Robert Sarver threatened to relocate his National Basketball Association (hereinafter "NBA") team.<sup>42</sup> However, a vote on the matter was tabled for a later time when the city found that "only [twenty] percent of area voters were in favor of the deal . . . with [sixty-six] percent opposed."<sup>43</sup> One month later, on January 23, 2019, the Suns agreed to a twenty-three year deal with the Phoenix City Council to renovate their arena instead of relocating.<sup>44</sup> This situation only further proves that even today, the threat of relocation remains an important issue for cities across the country to address.

Relocation on its face appears to be quite positive, forging a new bond between a municipality and the newly relocated team. Yet, in practice, it has faced heavy opposition as far as the threat of relocation and actual practice of relocation has been weaponized by team owners to extract concessions from municipalities of the sort unlikely to redound to taxpayers' best interests. Municipalities have recently taken initiatives to mitigate, if not preempt, such abuses by using various legal theories such as eminent domain and contractual terms as measures to prevent certain relocation efforts. The following section will look at the application of those theories and their viability to prevent relocation measures.

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*Oakland A's*, CBS NEWS (Dec. 23, 2019), <https://sanfrancisco.cbslocal.com/2019/12/23/alameda-county-officials-approve-coliseum-complex-sale-to-oakland-as/>.

<sup>40</sup> *Id.*

<sup>41</sup> Robin Respaut, *With NFL Rams gone, St. Louis still stuck with stadium debt*, REUTERS (Feb. 3, 2016), <https://www.reuters.com/article/us-sports-nfl-stadiums-insight-idUSKCN0VC0EP> ("Seattle's Kingdome bonds were retired only last year, 15 years after the facility was imploded in 2000. Philadelphia has \$160,000 left to pay on Veterans Stadium, more than a decade after the facility was torn down. Debt from Indianapolis' Hoosier Dome - demolished in 2008 - still hadn't been paid off in 2013, according to state filings.").

<sup>42</sup> Des Bieler, *Phoenix Suns owner reportedly threatens to move team to Seattle or Las Vegas*, THE WASHINGTON POST (Dec. 12, 2018), [https://www.washingtonpost.com/sports/2018/12/13/phoenix-suns-owner-reportedly-threatens-move-team-seattle-or-las-vegas/?utm\\_term=.50c9cc267920](https://www.washingtonpost.com/sports/2018/12/13/phoenix-suns-owner-reportedly-threatens-move-team-seattle-or-las-vegas/?utm_term=.50c9cc267920).

<sup>43</sup> *Id.*

<sup>44</sup> Bill Bradley, *Phoenix vote ends speculation of Suns' move to Las Vegas*, LAS VEGAS REVIEW-JOURNAL (Jan. 23, 2019), <https://www.reviewjournal.com/sports/basketball/phoenix-vote-ends-speculation-of-suns-move-to-las-vegas-1580459/>.

## III. ANALYSIS

Previous attempts to prevent a sports team's relocation have largely rested in eminent domain, contract terms, and in one case, state law. Under these theories, individuals have sought to gain ownership of teams, land, and stadiums themselves. However, how these legal theories ultimately stack up to the adequate protectionary measures required today by municipalities, in practice, remains unseen. Thus, the following analysis will highlight these theories in practice, their benefits and shortcomings, and room, if any, for improvement.

*A. Eminent Domain*

Eminent domain is a right bestowed upon both citizens and the government to legally take private property for some public use.<sup>45</sup> Vested by the Fifth Amendment of the United States Constitution, eminent domain has historically been used to take an individual's private land and convert it to a public use.<sup>46</sup> The State of New Jersey allows vast use of eminent domain by both the government and private individuals.<sup>47</sup> In fact, the sole limitations New Jersey places on eminent domain are for "just compensation" and "public use."<sup>48</sup> However, does a sports stadium count as public use?

In 1971, New Jersey enacted the New Jersey Sports & Exposition Authority Law,<sup>49</sup> which founded the New Jersey Sports & Exposition Authority (hereinafter "Authority" or "NJSEA"). The Authority serves as "an instrumentality of the State exercising public and essential governmental functions."<sup>50</sup> The Authority was created in anticipation that professional sports teams would relocate to New Jersey at the Meadowlands Sports Complex.<sup>51</sup> Since New Jersey allows for the use of eminent domain by political subdivisions,<sup>52</sup> the Authority would have the power to invoke eminent domain and seize land at the site of the future Meadowlands complex.<sup>53</sup> Upon doubts from one official appointed within the group, the Authority sought a declaratory judgment on the constitutional validity of the law.<sup>54</sup> The Superior Court held that the law was constitutional because "the

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<sup>45</sup> *Eminent Domain*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/eminent\\_domain](https://www.law.cornell.edu/wex/eminent_domain) (last visited Feb. 2, 2020).

<sup>46</sup> *Id.*

<sup>47</sup> *See generally* N.J. Const., Art. I, par. 20.

<sup>48</sup> *Id.* ("Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.")

<sup>49</sup> N.J.S.A. § 5:10-1.

<sup>50</sup> N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 580, 583 (N.J. Super. Ct. 1971).

<sup>51</sup> *Id.* at 583.

<sup>52</sup> N.J. Const., Art. IV, § 6, par. 3.

<sup>53</sup> N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 580, 584 (N.J. Super. Ct. 1971).

<sup>54</sup> *Id.*

act is a reasonable exercise of the police power in that it is general law with a public purpose and will greatly enhance the general welfare of the citizens of New Jersey.”<sup>55</sup> The court acknowledged “the view that the construction and maintenance of stadiums and related facilities constitutes a public purpose has received virtually universal approval in most jurisdictions.”<sup>56</sup> The court further noted that “health, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state”<sup>57</sup> and that “[o]ne of the tests of public use must surely be not so much how the use is furnished but rather the right of people to receive and enjoy its benefit.”<sup>58</sup> Under this court’s broad interpretation of justified eminent domain uses, a municipality may condemn private land in order to build a sports complex for a professional sports team. This use of eminent domain would presumably constitute a public purpose under this broad definition. However, the court refrained from ruling whether a municipality could condemn the actual sports team itself.

In 1982, Oakland, California attempted to invoke eminent domain as a method to prevent the Oakland Raiders from relocating to Los Angeles.<sup>59</sup> This time, unlike NJSEA, the city was attempting to condemn the team itself instead of the facility’s land.<sup>60</sup> The Supreme Court of California held that “the 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.”<sup>61</sup> Thus, public use is key. Essential to the court’s holding was the idea that intangible property may be condemned, drawing from a determination that “[a] franchise is property, and nothing more.”<sup>62</sup> Indeed, the court there reasoned that it was “aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property.”<sup>63</sup>

The court discussed the difference between condemning a team and condemning the facility they play in.<sup>64</sup> In its analysis, the court determined there is no legal basis for concluding that the difference is legally substantial,

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<sup>55</sup> *Id.* at 640.

<sup>56</sup> *Id.* at 598.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 63 (1982). This is the same Raiders team that would return to Oakland in 1995, only to leave again in 2018.

<sup>60</sup> *Id.* In *N.J. Sports & Exposition*, the authority was attempting to condemn *the land* which the Meadowlands complex would be built, not a team.

<sup>61</sup> *Id.* at 72 (emphasis added).

<sup>62</sup> *Id.* at 66 (citing *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848)).

<sup>63</sup> *Id.*

<sup>64</sup> *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 72 (1982).



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but also did not foreclose the trial court from determining the opposite:

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? To date, respondents have not presented a valid legal basis for concluding that it is, but we do not foreclose the trial court's reaching a different conclusion on a fuller record.<sup>65</sup>

It is important to acknowledge that the Supreme Court of California is not saying that a sports team undoubtedly will satisfy the public use requirement; rather, the court is saying that so long as a public use is proven, the acquisition and operation may rise to the level of a municipal function for which eminent domain may be possible.<sup>66</sup> Due to the court's lack of a concrete determination on whether a sports team itself can be condemned, municipalities still find themselves lost on how eminent domain will provide protections in relocating situations.

In 1984, the Baltimore Colts publicly considered relocating to Indianapolis.<sup>67</sup> In response, the Maryland General Assembly passed emergency legislation which authorized Baltimore to condemn a sports franchise under eminent domain.<sup>68</sup> The legislature opined that if it could pass this legislation prior to the Colts relocation, then the State could successfully invoke eminent domain to seize the Colts and prevent the relocation altogether.<sup>69</sup> Before Maryland had the opportunity to pass this emergency legislation though, Colts owner Jim Irsay heard of such rumblings and proceeded to immediately move his team to Indianapolis.<sup>70</sup> The team—and all its property—abandoned Baltimore one day before the legislation was passed.<sup>71</sup>

Nevertheless, Baltimore still brought suit against the Colts, seeking to enforce a condemnation of the team.<sup>72</sup> The court ultimately held that Baltimore lacked sufficient power to condemn the Colts because “just compensation” is a crucial aspect of eminent domain and, at the time, Baltimore had not made any payment to the Colts which constituted such just compensation for the team.<sup>73</sup> Furthermore, the court found that even

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<sup>65</sup> *Id.* at 72.

<sup>66</sup> *Id.*

<sup>67</sup> *Baltimore v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 279 (D. Md. 1985).

<sup>68</sup> *Id.* at 280.

<sup>69</sup> *Id.* at 279.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Baltimore v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 284 (D. Md. 1985).

despite this shortcoming, “the Colts franchise had left Maryland by the time the City instituted the condemnation proceedings,” and thus “the inescapable conclusion is that the franchise is beyond the jurisdictional reach of Baltimore City.”<sup>74</sup> It is crucial to note that the court never explicitly stated that it was impossible to invoke eminent domain to legally condemn a team. However, Baltimore lacked the power to condemn the Colts because of a lack of just compensation and the lack of the court’s jurisdiction over the team, as the organization was no longer located in Maryland.<sup>75</sup>

One year later, in *City of Oakland v. Oakland Raiders*,<sup>76</sup> the California Court of Appeals struck Oakland’s exercise of eminent domain over the city’s NFL franchise. The court held that condemning the Raiders through eminent domain violated the Commerce Clause of the United States Constitution.<sup>77</sup> The court concluded that “the burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise.”<sup>78</sup> The court also recognized that if they were to permit condemnation of the Raiders through eminent domain, it would necessarily implicate an indefinite bar on the Raiders franchise from ever leaving Oakland, thus violating the commerce clause and rendering it unconstitutional.<sup>79</sup> The majority of the court found that the local interests pursued by Oakland were not sufficiently compelling to justify eminent domain:

Plaintiff here does not seek to promote the health or safety of its citizens, or even, as in *Partee*, promote fair economic competition. Instead it seeks to act for what may be presumed, for purposes of analysis, to be legitimate, but less compelling reasons: to promote public recreation, social welfare, and to secure related economic benefits, as well as to best utilize the stadium in which the Raiders played.<sup>80</sup>

Under existing legal precedent at the time of this case, condemning a team would be prohibited because its purposes in promoting public recreation, social welfare, and economic benefits are insufficient to satisfy the public use requirement.<sup>81</sup> Thus, eminent domain failed to provide cities with an appropriate protection against teams relocating because of uncertainty in defining a “public use” and violations of the commerce clause.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 289.

<sup>76</sup> *See City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153 (1985).

<sup>77</sup> *Id.* at 154.

<sup>78</sup> *Id.* at 158.

<sup>79</sup> *Id.* at 157.

<sup>80</sup> *Id.* at 158.

<sup>81</sup> *Id.*

To analyze whether these relocations efforts would fare differently today, we must look at how eminent domain has evolved. In *Kelo v. City of New London*,<sup>82</sup> a case decided nearly twenty years after *City of Oakland*, the Supreme Court of the United States expanded the public use requirement tremendously:

[T]he Court today significantly expands the meaning of public use. . . it holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.<sup>83</sup>

Based on this expansion, seemingly any mere benefit to the public will be sufficient to constitute public use, including aesthetics.<sup>84</sup> Using this as a backdrop, a municipality may argue that condemning a team through eminent domain generates many secondary benefits, including revenue from games and enjoyment on behalf of fans. Since increased city revenues and enjoyment of games benefit the public at large, these benefits may arguably constitute public use today, even if they would not have in the past. Such an argument is likely to succeed as the Court in *Kelo* recognized that eminent domain can be used to take property specifically designated for stadiums: “the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium.”<sup>85</sup>

Bruce Ratner exposed this idea when he decided to move his team, the New Jersey Nets, to Atlantic Yards in Brooklyn.<sup>86</sup> In *Goldstein v. Pataki*, the United States District Court for the Eastern District of New York considered whether the government can utilize eminent domain to obtain land for construction of an arena.<sup>87</sup> The plan proposed by Ratner’s company was to construct a twenty-two-acre development that would consist of housing, office space, and parks surrounding a new arena.<sup>88</sup> The local government declared the area blighted and qualified Atlantic Yards as a land use development project.<sup>89</sup> By declaring the area blighted, the government opened the door to utilizing eminent domain to legally take private property

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<sup>82</sup> *Kelo v. City of New London*, 545 U.S. 469, 501 (2005).

<sup>83</sup> *Id.* at 501.

<sup>84</sup> *Id.* at 481.

<sup>85</sup> *Id.* at 498.

<sup>86</sup> *See generally* *Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y. 2007).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 256.

within the designated area, including Plaintiff Daniel Goldstein's residence.<sup>90</sup> The court found that the taking in question satisfied the public use requirement.<sup>91</sup> The court clarified its view of when the public use requirement fails:

[A] taking fails the public use requirement if and only if the uses offered to justify it are 'palpably without reasonable foundation,' such as if (1) the 'sole purpose' of the taking is to transfer property to a private party, or (2) the asserted purpose of the taking is a 'mere pretext' for an actual purpose to bestow a private benefit.<sup>92</sup>

Essentially, absent proof that the development will not provide benefits to the area or evidence of a purely private driving interest, the public use requirement will be met and eminent domain would be permissible.<sup>93</sup> The court further noted that "[w]hether the Project will in fact achieve this [benefit] or any other objective is not a matter that this court may consider."<sup>94</sup> In other words, the public use requirement looks only to the intended public use; whether that use is achieved does not truly matter. The United States Court of Appeals for the Second Circuit affirmed this ruling, explaining that courts should rarely intervene on whether a taking satisfies the public use requirement: "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power,' but the Supreme Court has repeatedly 'made clear that it is "an extremely narrow" one.'"<sup>95</sup> Under such reasoning, there is nothing to prevent a legislature from offering slightly questionable public uses as reasoning to invoke eminent domain. Further, since judicial review occurs in only narrow circumstances, this questionable reasoning will likely succeed. Such a situation is exactly what transpired in *Goldstein*.<sup>96</sup> Thus, arguing that a team satisfies the expanded public use requirements because the public can now enjoy their games and benefit from the tourism influx suddenly carries legitimate weight.

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<sup>90</sup> *Id.*

<sup>91</sup> *Goldstein*, 488 F. Supp. 2d at 291.

<sup>92</sup> *Id.* at 286. (citations omitted).

<sup>93</sup> *Id.* at 288-89.

<sup>94</sup> *Id.* at 287 n.12 ("Whether the Project will in fact achieve this or any other objective is not a matter that this court may consider.") (citing *Kelo v. City of New London*, 545 U.S. 469, 488 (2005) ("rejecting the argument that courts should require a 'reasonable certainty' that expected public benefits will accrue.")).

<sup>95</sup> *Goldstein v. Pataki*, 516 F.3d 50, 57 (2d Cir. 2008) (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

<sup>96</sup> *See generally* *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008).

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At this point, the only remaining element to justify eminent domain is the payment of just compensation on behalf of the municipality.<sup>97</sup> This requirement ultimately becomes a major downfall of eminent domain as a viable legal theory to protect against team relocations. The reason for this is because the purchasing and selling market for teams is unique in that teams often sell for prices in excess of what they are truly worth.<sup>98</sup> Along with immeasurable things like goodwill and history, part of the value paid for is the perceived “trophy” value of the team.<sup>99</sup> One financial analyst even stated, “the value of professional sports franchises will continue to depend on the willingness and availability of individuals wealthy enough to pay . . . to own these “trophy” assets.”<sup>100</sup>

Nontangible property undoubtedly factors into the value of the team, but due to the nature of the property, it is hard to clearly identify. Owners of teams should, in theory, always argue for more value attributed to these nontangible factors since it will inflate the value of the franchise altogether. To the contrary, municipalities should always argue for less value because this would take away some of the leverage which teams start with. Agreeing to a satisfactory valuation is key since one does not want an outside party weighing in; allowing a third party to unilaterally determine a sufficient value of just compensation may result in the franchise being severely undervalued or overvalued and, in both situations, one party loses. This hurdle is simply too high and impractical to jump over in many cases.

Eminent domain may be a legally permissible way to prevent a team relocation once satisfying the public use and just compensation requirements. However, the nature of the just compensation requirement can be quite speculative, rendering the taking’s power impractical, if not ill advised in this setting. The following section examines real contracts used by teams, highlighting the protections (or lack thereof) in each, and analyzing the viability of employing contractual terms as a main protectionary measure to relocation.

*B. Contracts*

An analysis of twenty-three stadium agreements between NFL teams and their home cities, executed between 1984 and 2005, shows that every single contract failed to contain explicit protections for the municipality

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<sup>97</sup> See N.J. Const., Art. I, par. 20. (“Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.”).

<sup>98</sup> David Turney, *Professional Sports Franchise Valuation*, TOPTAL, <https://www.toptal.com/finance/mergers-and-acquisitions/sports-franchise-valuation>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

against a team relocation.<sup>101</sup>

Within every contract, the terms of the agreement can be either express or implied.<sup>102</sup> An express term is a term clearly spelled out in the contract, while an implied term is one which is not actually written in the contract, but implied into the contract by a court and enforceable as if it was expressly written.<sup>103</sup> Express terms are relatively straightforward; terms that are expressly included within the contract are usually enforced.<sup>104</sup> By putting protections against relocation into the contract itself as express terms, municipalities in theory should have a fully legally enforceable method to invoke when their team attempts to relocate.<sup>105</sup>

The first contract analyzed is the Cleveland Browns 1996 agreement with the City of Cleveland, precipitating the teams return.<sup>106</sup> In the contract, the parties agreed to give Cleveland the ability to terminate the contract upon specific conditions.<sup>107</sup> These conditions included default, dissolution of the franchise, and bankruptcy, meaning that if the team defaulted on their loan, dissolved, or went bankrupt, then Cleveland could rescind the contract without penalty.<sup>108</sup> This provision was unilateral, as only Cleveland had this power.<sup>109</sup> These conditions are unique, because they provide the municipality with protections if the franchise were to fail or go under. However, these parameters would not provide any protection to the municipality in the case of relocation. Aside from a thirty-year lease term, nothing within the contract protects the municipality's public investment in the Browns.<sup>110</sup> Furthermore, a long lease term arguably lacks sufficient

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<sup>101</sup> See generally *Professional Sports Facility Lease Summaries (NFL)*, (Summer 2012), <https://law.marquette.edu/national-sports-law-institute/professional-sports-facility-lease-summaries>.

<sup>102</sup> *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 188 (1992) (“[I]t is true that the terms to which the contracting parties give assent may be express or implied in their dealings . . .”).

<sup>103</sup> See Restatement (Second) of Contracts § 4 cmt. a (“[j]ust as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances.”).

<sup>104</sup> See Restatement (Second) of Contracts § 203(b) (“[E]xpress terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade.”).

<sup>105</sup> If a team were to relocate in violation of their contract, they would be liable under a breach of contract theory.

<sup>106</sup> *Lease by Way of Concession between the City of Cleveland, Ohio and Nat'l Football League*, CLEVELAND BROWNS STADIUM LEASE SUMMARY (April 26, 1996), <https://law.marquette.edu/assets/sports-law/pdf/ls-nfl-cleveland.pdf> [hereinafter “Browns Contract”].

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Even as a year term, these are not even really protections because there are other ways around it, like buyouts.

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power to even constitute a legitimate protection to relocation in itself, evidenced through the Raiders relocating immediately despite having multiple years left on their lease.<sup>111</sup> Even with Cleveland's express termination term, in reality this protection is useless against relocation.

In 2012, the Buffalo Bills brought a glimmer of hope to using express terms as a protectionary measure.<sup>112</sup> The stadium contract executed in 2012 shows that both sides explicitly recognized that non-relocation clauses are an "essential consideration" for agreements between teams and cities.<sup>113</sup> Such an acknowledgement proves the magnitude of the situation and the importance of protections. As part of their contract, Erie County specifically negotiated for a binding non-relocation agreement, secured by right of specific performance and backed by a \$400 million fee.<sup>114</sup> Essentially, this provision means that if the Bills were to relocate while still under their lease, Erie County could sue for specific performance, forcing the Bills to play out the rest of their contract.<sup>115</sup> Alternatively, Erie County could sue for damages in the amount of \$400 million—a figure worth more than ten times the capital investment of \$35 million the Bills provided.<sup>116</sup> In return, the Bills are permitted to buy themselves out of the last three years of the contract for \$28 million, but only after the first seven years of the lease have passed.<sup>117</sup> The contract specifically prevents the Bills from (1) applying to play in a different stadium; (2) moving the team to a new location; (3) selling the team to an owner who intends to relocate; (4) entertaining offers to relocate the team; and, (5) transferring or surrendering the team where they would play their games in a different stadium or not at all.<sup>118</sup>

Since the Bills explicitly wrote this non-relocation term into the contract, this term constitutes an express term.<sup>119</sup> While encouraging as a protectionary measure, this example poses itself as an outlier because of the nature of the Bills contract. First, since this agreement included only

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<sup>111</sup> Keating, *supra* note 19.

<sup>112</sup> Despite being called the Buffalo Bills, the Bill's hometown is actually Erie County.

<sup>113</sup> *Non-Relocation Agreement between the City of Erie and Buffalo Bills, Inc.*, BUFFALO BILLS STADIUM LEASE (Dec. 21, 2012), <http://www2.erie.gov/exec/sites/www2.erie.gov/exec/files/uploads/Bufalo%20Bills%20Non-Relocation%20Agreement.pdf>.

<sup>114</sup> *Lease between the County of Erie and Buffalo Bills*, Buffalo Bills Lease Terms Summary (Dec. 21, 2012), <http://www2.erie.gov/exec/index.php?q=buffalo-bills-lease-terms-summary>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> What is EXPRESS TERM?, BLACK'S LAW DICTIONARY, <https://thelawdictionary.org/express-term/> ("A rule in a contract that is clearly written or spoken.").

improvements to the stadium, the cost and length of the project pales in comparison to total relocation efforts.<sup>120</sup> The contract here runs for merely ten years, although the Bills have an option to buy themselves out of the contract after year seven.<sup>121</sup> For most cities, especially those courting a brand-new team, ten years is unusually short when committing to building a completely new stadium.<sup>122</sup> The Bills were able to negotiate such a small lease term because the agreement revolved around improvements to an already existing stadium instead of construction of a new stadium, thus less money was needed.<sup>123</sup> With less money and a shorter lease length on the table, negotiating for certain conditions—like protections on relocation—is easier to accomplish because the parties are only bound by them for a few years. On the other hand, if a team were to require a new \$800 million stadium—which is more likely when teams look to relocate<sup>124</sup>—then the municipality will often seek much longer lease terms.<sup>125</sup> Since a team is less likely to breach a short term lease because the lease ends sooner, the exorbitant \$400 million penalty for relocating becomes less powerful. Also, by giving the Bills an option to opt out of their contract after seven years, these upgrades in reality need to be sufficient for just these first seven years, at which point the Bills can uproot and relocate wherever they desire.<sup>126</sup>

Terms not expressly written in the agreement may be enforceable too.<sup>127</sup> Occasionally, courts will read unwritten terms into contracts, even if the terms are not present within the four corners of the document.<sup>128</sup> These

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<sup>120</sup> See generally *Professional Sports Facility Lease Summaries (NFL)*, (Summer 2012), <https://law.marquette.edu/national-sports-law-institute/professional-sports-facility-lease-summaries>.

<sup>121</sup> See *Lease between the County of Erie and Buffalo Bills*, Buffalo Bills Lease Terms Summary (Dec. 21, 2012), <http://www2.erie.gov/exec/index.php?q=buffalo-bills-lease-terms-summary>.

<sup>122</sup> See Las Vegas Review-Journal, *Stadium and rent details for all 32 NFL teams* (Mar. 5, 2017, 10:28AM), <https://www.reviewjournal.com/sports/raiders-nfl/stadium-and-rent-details-for-all-32-nfl-teams/> (showing the most recent new stadium leases including the Atlanta Falcons in 2017, Minnesota Vikings in 2016, New York Giants in 2010, and New York Jets in 2010, all negotiated lease terms of at least 30 years.).

<sup>123</sup> The agreement centered on improvements to the Bills venue at the time, Ralph Wilson Stadium. Ralph Wilson Stadium was renamed to New Era Field in 2015.

<sup>124</sup> \$800 million is a figure used solely for discussion purposes. However, new stadiums often reach far above this number, including the new Las Vegas stadium discussed earlier which will cost nearly \$1 billion.

<sup>125</sup> Las Vegas Review-Journal, *supra* note 122.

<sup>126</sup> Albeit, the Bills would be required to pay their relocation fee first.

<sup>127</sup> McCabe Rabin, P.A., *What are the implied terms in a contract?*, MCCABE RABIN, P.A., <https://www.mccaberabin.com/business-copyright-faq/what-are-the-implied-terms-in-a-contract/>.

<sup>128</sup> *Kas Oriental Rugs, Inc. v. Ellman*, 394 N.J. Super. 278 (Super. Ct. App. Div. 2007) (“[W]hen a contract is found to have emanated from an agreement on essential material terms, a court will also fill the gaps created by the parties’ silence by adding terms that accomplish



are known as implied terms. New Jersey is one state which recognizes an implied covenant of Good Faith and Fair Dealing.<sup>129</sup> This means that “a party must act in a way that is honest and faithful to the agreed purposes of the contract and consistent with the reasonable expectations of the parties.”<sup>130</sup> The Supreme Court of New Jersey described their stance on this term in *Sons of Thunder v. Borden, Inc.*:

This Court has stated that “[i]n every contract there is an implied covenant that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.’”<sup>131</sup>

The term implies in all contracts, regardless of whether the parties explicitly negotiated for the term.<sup>132</sup> Since this term is implied in all contracts, it necessarily applies in all sports team contracts as well.

Breach of this implied term requires an injury to the “fruits of the contract” to one party.<sup>133</sup> A “fruit” in this sense is “the equivalent of the parties’ reasonable expectations that may or may not be set out expressly in the contract.”<sup>134</sup> In other words, the “fruits of the contract” are the expected benefits that either side would receive if the contract was fully executed. This could be anything from profits to real property, so long as it was a reasonable expectation held by at least one party.<sup>135</sup> When a team purposefully relocates while still under their contract, it destroys the fruits of the contract because the team is thereafter performing their service—the fruits which they specifically contracted for with the original municipality—in another area. Downstream fruits—fruits enjoyed indirectly from the contract, such as goodwill—will also sour by a team’s relocation.<sup>136</sup> As a

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a result that was necessarily involved in the parties’ contractual undertaking.”).

<sup>129</sup> See generally *Sons of Thunder v. Borden, Inc.*, 148 N.J. 396, 420 (1997).

<sup>130</sup> N.J. Model Civil Jury Charges § 4.10(J) (2011).

<sup>131</sup> *Sons of Thunder*, 148 N.J. at 420 (1997); see also *Hills v. Bank of Am.*, Civil Action No. 13-4960 (ES) (MAH), 2015 U.S. Dist. LEXIS 32502 (D.N.J. Mar. 17, 2015).

<sup>132</sup> *Sons of Thunder*, 148 N.J. at 420 (1997).

<sup>133</sup> *Id.* at 418.

<sup>134</sup> Tory Weigand, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 MASS. L. REV. 174-96, 182 (2004).

<sup>135</sup> Parties can negotiate whatever expectations they desire, so what qualifies as an expectation is case sensitive.

<sup>136</sup> Branson Wright, *Cleveland Browns Move to Baltimore Left City Stunned, left city stunned, angered: PD 175th*, CLEVELAND.COM (Apr. 30, 2017), [https://www.cleveland.com/ohio-sports-blog/2017/04/cleveland\\_browns\\_move\\_to\\_balti.html](https://www.cleveland.com/ohio-sports-blog/2017/04/cleveland_browns_move_to_balti.html). (When the Browns relocated, “Modell became Public Enemy No. 1 in Cleveland. Fans wore shirts with disparaging comments about the owner.”).

result, the municipality will suffer deprivation of all the fruits they contracted for if a team were to completely relocate.

The important question remains whether such a term as defined can apply in a way to provide cities with the adequate protections they require. There are three situations in which breach of the implied covenant of Good Faith and Fair Dealing can apply:

(1) to allow the inclusion of additional terms and conditions not expressly set forth in the contract, but consistent with the parties' contractual expectations; (2) to allow redress for a contracting party's bad-faith performance of an agreement, when it is a pretext for the exercise of a contractual right to terminate, even where the defendant has not breached any express term; and (3) to rectify a party's unfair exercise of discretion regarding its contract performance.<sup>137</sup>

Under the first application, the covenant will supply additional terms to the contract so long as they are consistent with the parties' expectations.<sup>138</sup> However, if one party has different expectations regarding this term, it may not be implied since it would be contrary to the party's initial expectations when they entered into the contract.<sup>139</sup> In the case of a municipality courting a sports team to their jurisdiction, it can usually be implied that the municipality expects, or at the least hopes, that the team will remain there for at least the foreseeable future.<sup>140</sup> Teams however, by the mere fact that relocation has occurred in the past (including multiple relocations by some teams), seem to expect the possibility of future relocations. Due to differing expectations, the implied covenant of Good Faith and Fair Dealing would likely fail to imply adequate protections under the first application.

The second and third applications of the implied covenant of Good Faith and Fair Dealing provide even less support. Under the second theory, a municipality would need to show a bad-faith performance by the team, which sparks a contractual right to terminate.<sup>141</sup> In this case, it is not necessary to prove that the team actually breached any expressly written term.<sup>142</sup> An argument can be made on behalf of the municipality that uprooting a team abruptly and in violation of their contract constitutes a bad-

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<sup>137</sup> *Barrows v. Chase Manhattan Mortg. Corp.*, 465 F. Supp. 2d 347, 365 (D.N.J. 2006).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> By numerous teams requiring lease lengths in excess of thirty years, it suggests that cities, especially at the creation of the contract, expect the team to remain there for a long time.

<sup>141</sup> *Barrows*, 465 F. Supp. 2d at 365.

<sup>142</sup> This is true because the term is implied, so it is not required to exist expressly within the contract.

faith performance on which the city may have a contractual right to terminate. The third theory applies a similar line of reasoning, requiring a claim that the team unfairly exercised its discretion when relocating.<sup>143</sup>

One major, glaring flaw in the application of both theories revolves around the language used to outline these applications. The first theory explicitly allows for the “inclusion of additional terms,” while the second and third theories instead seek to “redress” and “rectify” the situation.<sup>144</sup> In carefully choosing this language, the legislature allows the latter two theories to take many forms of relief.<sup>145</sup> With such discretion in the type of relief, teams can seek redress most favorable to them—such as simply cutting a check—instead of actually inserting and drafting an additional term which they have limited power over writing.<sup>146</sup> Such an ability completely undermines the capability of municipalities to protect themselves in the first place. With that in mind, it appears that the implied covenant of Good Faith and Fair Dealing present in all contracts provides protections to parties unfairly injured, but its viability as a solution to protect against relocating sport teams in general is lacking.

Since the current existing implied terms fail to give relocation protections to municipalities, implication of a term by statute is the only remaining option. Although the implied covenant of Good Faith and Fair Dealing began as a legal doctrine created by the courts, today the covenant has gained enough support that it is codified in a statute as well.<sup>147</sup> Similarly, statutes throughout property,<sup>148</sup> torts,<sup>149</sup> and other areas of contract law<sup>150</sup> have implied terms into contracts. The hurdle preventing implication of a term by statute here is that no such statute exists.

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<sup>143</sup> *Barrows*, 465 F. Supp. 2d at 365 (“(3) to rectify a party’s unfair exercise of discretion regarding its contract performance.”).

<sup>144</sup> *Barrows*, 465 F. Supp. 2d at 365.

<sup>145</sup> Seeking redress or rectification only looks to remedy the situation in some way. These ways are not limited in the same way that the first theory is limited to solving the situation by only including additional terms. Thus, there are presumably many different ways that would satisfy a redressing or rectifying the situation here.

<sup>146</sup> Since the agreement has to be agreed to by both parties, both teams and cities are limited in their power to add favorable terms because the other side can simply disagree. At this point, teams may be more willing to cut a check and relocate than to take their chances drafting the term.

<sup>147</sup> See U.C.C. § 1-304.

<sup>148</sup> See *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (holding that an implied warranty of habitability exists in all residential leases).

<sup>149</sup> See *generally* *Ramsey v. Marutamaya Ogatsu Fireworks Co.*, 140 Cal. Rptr. 247 (1977) (implying strict liability for inherently dangerous activities).

<sup>150</sup> See U.C.C. § 2-309.

As of 2018, the home city was a contractual party in seventeen of the thirty-two (53%) NFL stadium leases.<sup>151</sup> The NFL administers a hefty fee on teams who relocate, acting as a deterrent to relocation.<sup>152</sup> In fact, the NFL even opposed the Raiders' first relocation effort by unanimously voting against the effort.<sup>153</sup> Not only does the league's animosity towards teams relocating suggest that legislation in this area is necessary, but it is proven by the fact that despite the league's efforts against it, the Raiders were still legally allowed to relocate and leave Oakland to foot the remaining bill.<sup>154</sup> In its discussion about the threat of team relocations, the court in *Raiders* went a step further to enlist the legislature in creating these protections:

The spectre of such local action throughout the state or across the country demonstrates the need for uniform, national regulation. In these circumstances (and apart from other potential bases of commerce clause violation), to the text of the note if relocation threatens disproportionate harm to a local entity, regulation—if necessary—should come from Congress.<sup>155</sup>

The peak of a team's bargaining power lies within the ability to relocate at increasingly lower costs to themselves through public funding, which incidentally creates a pseudo black market for teams where they can essentially "shop" between municipalities for the best benefits.<sup>156</sup> However, in order to propose effective legislation to solve the issue, it is important to recall what legislation already exists.

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<sup>151</sup> See generally *Professional Sports Facility Lease Summaries (NFL)*, (Summer 2012), <https://law.marquette.edu/national-sports-law-institute/professional-sports-facility-lease-summaries>.

<sup>152</sup> Luke Kerr-Dineen, *Why NFL Relocation Fees are the Biggest Boondoggle in Sports*, FOR THE WIN (Mar. 28, 2017, 7:56AM), <https://ftw.usatoday.com/2017/03/oakland-raiders-las-vegas-move-relocation-fees-350-million> ("Relocation fees for each the Chargers' and the Rams' move to Los Angeles were reportedly in the \$600 million range per team.").

<sup>153</sup> L.A. Mem'l Coliseum Com. v. Nat'l Football League, 89 F.R.D. 497 (C.D. Cal. 1981) ("The NFL meeting at which the league formally voted not to approve a transfer of the Oakland Raiders to Los Angeles was held within the Central District.").

<sup>154</sup> See *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153 (Cal. Ct. App. 1985).

<sup>155</sup> *Id.* at 157.

<sup>156</sup> See generally Barry Wilner, *The NFL tends to award Super Bowl hosting duties to cities with new, state-of-the-art stadiums*, BOSTON.COM (January 22, 2019), <https://www.boston.com/sports/nfl/2019/01/22/super-bowl-nfl-new-stadium-atlanta> (One such benefit given to new stadiums is the opportunity to host the Super Bowl. The Atlanta Falcons completed construction of their brand-new stadium in 2017, and the facility is slated to host the 2019 Super Bowl); see also *Sports Stadium Subsidies*, The Heartland Institute, <https://www.heartland.org/topics/government-spending/stadium-subsidies/index.html> ("In the last few decades professional sports teams have also gained a great deal of bargaining power with relocation becoming more easily accomplished where it was once expensive and risky. Cities are now competing for new and relocating franchises, enticing teams with tax breaks and stadium funding.").

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*C. Current Legislative Efforts*

In the wake of the Browns relocation to Baltimore, Browns fans in Cleveland were notably upset about how things unfolded.<sup>157</sup> In an effort to prevent the same heart-ripping tragedy in the future, Ohio created a statute commonly known today as the Modell Rule.<sup>158</sup> The Modell Rule, named after Browns owner Art Modell, states the following:

No owner of a professional sports team that uses a tax-supported facility for most of its home games and receives financial assistance from the state or a political subdivision thereof shall cease playing most of its home games at the facility and begin playing most of its home games elsewhere unless the owner either:

(A) Enters into an agreement with the political subdivision permitting the team to play most of its home games elsewhere; or

(B) Gives the political subdivision in which the facility is located not less than six months' advance notice of the owner's intention to cease playing most of its home games at the facility and, during the six months after such notice, gives the political subdivision or any individual or group of individuals who reside in the area the opportunity to purchase the team.<sup>159</sup>

The Modell Rule effectively prevents the relocation of a sports team in Ohio unless the team either receives explicit permission from the municipality to relocate or gives the municipality advanced notice of leave,<sup>160</sup> and additionally offers to individuals from the area a right of first refusal to purchase the team.<sup>161</sup> The key aspect of this statute is its narrow scope; it applies only to a professional sports team that “uses a tax-supported facility . . . and receives financial assistance from the state or a political subdivision.”<sup>162</sup> Thus, under this statute, a team that plays in a privately built stadium would be permitted to relocate wherever and whenever it saw fit.

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<sup>157</sup> Branson Wright, *Cleveland Browns Move to Baltimore Left City Stunned, left city stunned, angered: PD 175<sup>th</sup>*, CLEVELAND.COM (Apr. 30, 2017), [https://www.cleveland.com/ohio-sports-blog/2017/04/cleveland\\_browns\\_move\\_to\\_balti.html](https://www.cleveland.com/ohio-sports-blog/2017/04/cleveland_browns_move_to_balti.html).

<sup>158</sup> Ohio Rev. Code Ann. § 9.67 (1996).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (Owners must give advanced notice of at least six months).

<sup>161</sup> What is RIGHT OF FIRST REFUSAL?, BLACK'S LAW DICTIONARY, <https://thelawdictionary.org/right-of-first-refusal/> (“A right in a contract where the seller must give the other party the chance to match the offer that a third party has given to buy a certain asset.”).

<sup>162</sup> Ohio Rev. Code Ann. § 9.67 (1996) (emphasis added).

International sports are no stranger to public ownership.<sup>163</sup> The Bundesliga, Germany's top soccer league, instituted a rule in 1998 called the 50+1 Rule.<sup>164</sup> The rule prevents football clubs in the Bundesliga from engaging in interleague play if commercial investors own more than a 49% stake in the company.<sup>165</sup> In other words, the rule requires each team to be more than 50% owned by the public, including fans.<sup>166</sup> Before enacting the rule, any kind of private ownership was forbidden.<sup>167</sup> The Bundesliga's intent in implementing the rule was to prevent private investors from attaining personal and dominant control of the team.<sup>168</sup> Without dominant control of the team, investors could not unilaterally prioritize profit over the fans who form the backbones of the teams.<sup>169</sup> Thus, the rule would prohibit relocation without the support of fans and general public, who comprise a majority ownership stake.

Since its enactment, the 50+1 Rule has been seemingly effective in the Bundesliga, as the league now boasts the highest average attendances in football across the world.<sup>170</sup> Although successful in Germany, the adoption of the same rule in the United States would not be feasible. The first reason is that the rule controls soccer teams in Germany, who traditionally refrain from relocating as often as United States sport teams.<sup>171</sup> Second, as currently situated, every professional team in the United States is privately owned except for the NFL Green Bay Packers.<sup>172</sup> Instituting a similar rule requiring fan ownership of professional franchise ownership would require all the existing private team owners to divest themselves of their ownership stake in excess of over 50%.<sup>173</sup> It is easy to see how such a situation would be at

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<sup>163</sup> See generally BUNDESLIGA, *German soccer rules: 50+1 explained*, bundesliga.com (Dec. 21, 2017), <https://www.bundesliga.com/en/news/Bundesliga/german-soccer-rules-50-1-fifty-plus-one-explained-466583.jsp>; See also

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> BUNDESLIGA, *supra* note 163.

<sup>170</sup> BUNDESLIGA, *supra* note 163.

<sup>171</sup> Bayer 04 Leverkusen, BayArena: A Stadium With A Long History, BAYER 04 LEVERKUSEN, [https://www.bayer04.de/en-us/news/bayer04/bayarena-a-stadium-with-a-long-history?vid=20180912\\_BayArena\\_W](https://www.bayer04.de/en-us/news/bayer04/bayarena-a-stadium-with-a-long-history?vid=20180912_BayArena_W)

Andel (Bayer Leverkusen, for example, has been in the same venue since 1958).

<sup>172</sup> Kalyn Kahler, *Green Bay Packers Inc., Owners of Green Bay Packers*, SPORTS ILLUSTRATED (July 17, 2018), <https://www.si.com/nfl/green-bay-packers-shareholders-team-owners> ("The Packers pride themselves on being the only publicly-owned, not-for-profit, major league professional team in the United States.")

<sup>173</sup> This assumes that a grandfather provision would be ineffective in the United States since all teams except the Green Bay Packers would be then be grandfathered in, rendering the effort useless.

least problematic, if not nearly impossible.<sup>174</sup>

Applying the Modell Rule and the 50+1 Rule, the relocations of the Oilers, Raiders, and Browns today would have likely resulted in different outcomes. For example, loyal Browns fans with majority ownership of the team under the 50+1 Rule likely would have prevented management from relocating the team to a different city.<sup>175</sup> Even without the 50+1 rule, the Modell Rule would give the Cleveland the ability to deny the team's request to relocate assuming that a potential buyer would exercise the right of first refusal. However, neither the fans nor Cleveland, had such power.

Professional sports leagues in the United States are in a unique position. The lack of protections against relocation have only come to light since teams started to relocate, and such protections have so far originated only by fans and city residents.<sup>176</sup> While the only state with protections is Ohio,<sup>177</sup> the other forty-nine states remain completely vulnerable to a team's abrupt relocation. As such, it is appropriate for New Jersey to create and enact legislation that provides municipalities adequate protections against franchise relocation. The following section proposes new legislation which serves to protect such interests.

#### *D. Legislation Proposal*

Professional teams and leagues are not a single entity, so a solution does not require a rule for the entire league at once.<sup>178</sup> Instead, an approach focusing on individual teams will provide a comprehensive solution without setting off a missile to kill a mouse. Although not perfect, the Modell Rule provides New Jersey with a firm foundation in which to construct its own legislation giving municipalities protections. Similar to the Modell Rule, New Jersey's statute should limit its scope to sports teams that receive financial assistance from the state or municipality.<sup>179</sup> The Modell Rule also requires the team to use a tax-supported facility for most of its home

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<sup>174</sup> Raphael Honigstein, *What would happen if Bundesliga clubs scrapped '50+1' Ownership?*, ESPN (Mar. 9, 2018), <http://www.espn.com/soccer/german-bundesliga/10/blog/post/3412475/what-would-happen-if-bundesliga-clubs-scrapped-50+1-ownership-rule> (“[W]ell-situated clubs have found it incredibly hard to attract minority shareholders who are happy to forego control.”).

<sup>175</sup> *Cleveland Browns: One of the best fan bases in the world*, FOX SPORTS (Jun. 30, 2017), <https://www.foxsports.com/nfl/story/cleveland-browns-one-of-the-best-fan-bases-in-the-world-111216> (“But the love of the team has never wavered, as Browns fans take pride in sticking with the team in hopes of a better tomorrow.”).

<sup>176</sup> The Modell Rule was enacted by the citizens of Ohio through a referendum.

<sup>177</sup> See Ohio Rev. Code Ann. § 9.67 (1996).

<sup>178</sup> *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1388-89 (9th Cir. 1984).

<sup>179</sup> See Ohio Rev. Code Ann. § 9.67 (1996).

games,<sup>180</sup> but such a requirement makes this rule overly narrow. In requiring both conditions simultaneously, a municipality could presumably allow a team that plays in a private facility to receive financial assistance, but not subject itself to the limitations on relocating. By limiting the scope just to teams receiving financial assistance from the state or municipality, it would necessarily cover teams that use taxpayer money to construct stadiums.

The Modell Rule specifically prevents the affected team from playing “most of its home games” in a different location.<sup>181</sup> This limitation also poses too narrow of a restriction. Specifically, using the word “most” grants the relocating team considerable leeway in working around the statute. The word “most” by definition only requires a majority,<sup>182</sup> meaning a team could decide to play 49% of their games in a different location and comply with the statute. By using a different word, such as “all,” it would prohibit a relocation of any degree.

The Modell Rule’s second condition provides another glaring weakness. This condition requires the team to give the municipality or state advance notice of its intention to leave and further offers individuals in the area a right of first refusal.<sup>183</sup> Advance notice gives investors of teams an option to get out by selling the team instead of relocating.<sup>184</sup> Granting a right of first refusal to individuals of the state or municipality attempts to shift power back to the municipality by allowing the municipality to unilaterally keep the team so long as it has a viable purchaser.<sup>185</sup> However, in many municipalities, there will not be an individual who is both willing and able to buy the team. This is especially true as the value of teams have exploded into the billions of dollars.<sup>186</sup> Without anybody to step up, the team could potentially still relocate even if the municipality did not want it to, simply because the municipality did not have a buyer, a loophole which further undermines the protections sought here.

Against the current landscape of professional sports teams’ movement and fluidity, New Jersey should enact legislation giving its cities protections against the relocation of their teams. Such a statutory protective model will

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<sup>180</sup> *Id.*

<sup>181</sup> Ohio Rev. Code Ann. § 9.67 (1996).

<sup>182</sup> *Most*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/most>.

<sup>183</sup> *See* Ohio Rev. Code Ann. § 9.67 (1996).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Kurt Badenhausen, *Full List: The World’s 50 Most Valuable Sports Teams of 2018*, FORBES (Jul 18, 2018 10:36AM), <https://www.forbes.com/sites/kurtbadenhausen/2018/07/18/full-list-the-worlds-50-most-valuable-sports-teams-of-2018/#3fafbc586b0e> (explaining there are eleven sports franchises in the United States which are valued at \$3 billion or more.).



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likely fall under Title 40 (Municipalities and Counties),<sup>187</sup> and should use Ohio's Modell Rule as a rough foundation.<sup>188</sup> The statute will read:

An owner of a professional sports team who receives taxpayer backed funding on behalf of any state, city, or political subdivision herein, is prohibited from relocating their team to any location unless either:

- (1) A benefit, equal in value to the total amount of taxpayer backed funding, is repaid back the state, city, or political subdivision.
  - a. The repayment period begins on the date the funding is disbursed. The first payment is due within 60 days after the date the funding is disbursed.
    - i. For funding up to \$100 million, complete repayment is due 10 years from the date the loan is disbursed.
    - ii. For funding between \$100 and \$500 million, complete repayment is due 20 years from the date the loan is disbursed.
    - iii. For funding above \$500 million, complete repayment is due 30 years from the date the loan is disbursed.
    - iv. Extension of the repayment period is prohibited unless a subsequent agreement requests improvements, repairs, or any agreed upon event
- (2) An agreement is reached with the state, city, or political subdivision granting the team permission to relocate.

Comments to this statute should define "relocating" to mean "playing any of the team's designated 'home games' in a facility other than its home stadium." This comment should further reserve an exception to this definition for "specialty games," which include games played at a neutral location due to acts of God, charity events, or league initiatives.<sup>189</sup> Most

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<sup>187</sup> N.J. Stat. § 40.

<sup>188</sup> See generally Ohio Rev. Code Ann. § 9.67 (1996).

<sup>189</sup> League initiatives include international games played for the purpose of league

importantly, however, the comments should define “benefit” to constitute “any tangible or intangible property mutually agreed upon by the parties.” By expanding the definition of benefit, this allows for a degree of creativity for both sides in negotiating a deal because instead of repaying actual dollars, teams can offer other, more specific benefits that tailor themselves to both the owner and the municipality. These benefits can include anything like a percentage of concession profits, voting power, investment in a particular industry of the municipality, repairs to a blighted community, etc. For added measure, the comments should also state that this term implies in all sports law contracts, then allowing for implication of the term by statute in existing contracts.

In terms of the municipality, this legislation gives them the ability to leverage their geographical location advantageously in a way they have never been able to before. At the same time, owners can now leverage their expertise, connections, etc. in order to drive down their risk of repaying the loan, especially with owners having massive expertise in some area. An alternative way to think about this would be to compare it to a barter and trade agreement. Take the following example as an illustration: owner A is a wealthy man from Texas, who earned his fortune through construction. Owner A wants to move his team, located in Texas, to a remote area of New Jersey. Lacking a major city to play in, this may seem like a less attractive place to move a team.

As a solution, the municipality may creatively ask for construction of \$250 million worth of townhouses near the stadium as “repayment” for a \$250 million loan. For the municipality, this is good because it creates new housing, which significantly increases the population and attempts to stimulate the economy. The construction request is also attractive to the owner since, being in construction, they would presumably have comparative and competitive advantages in this area, which would allow him to build this housing cheaper and more efficiently than others. Even though the real, raw value of the construction is \$250 million at the end of the day, the ability of the owner to “repay” this value in their area of expertise reduces their perceived risk and allows them to build on their competitive advantages. At this point, thanks to the new legislation, a remote area of New Jersey, which usually would stand a limited chance of obtaining a professional sports team, suddenly has a very realistic chance of courting one.

Another key feature of this statute is the variable repayment period, based on the total amount of taxpayer funds the municipality contributes. This system provides advantages to both municipalities and team owners

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alike. Since the repayment periods are concretely set, the municipality does not need to bargain for this term. The elimination of bargaining poses an obvious benefit due to the fact that, as evidenced throughout this comment, municipalities are often in an inferior bargaining position.<sup>190</sup> Additionally, this is beneficial for team owners since they can now take longevity into their own hands. If an owner wants to be able to move their team readily, they can simply take less than \$100 million in tax funds and be able to freely move in fewer years with no strings attached. If the owner repays the value in a shorter amount of time, then they can relocate even sooner.

In creating these parameters, New Jersey will effectively secure protections for municipalities against the relocation of professional sports teams. The first condition of this proposed statute will require a return of a benefit to the municipality, which is equal in value to the amount of taxpayer funds given to the team. This condition purposefully uses and describes the word “benefit” to allow both parties to define exactly what tangible or intangible property constitutes the “benefit” given and received.<sup>191</sup> A second condition acts as a safety net for teams, allowing them to agree on their own terms regarding a proposed relocation. By reserving this in just the team, it ensures that a team could never relocate against the will of the municipality. Utilized together, New Jersey municipalities should enjoy full protection of their taxpayer funding without fear of relocation.

## IV. CONCLUSION

This comment analyzed the landscape of sports team relocation and how municipalities are unprotected from teams relocating, even after securing millions of dollars in taxpayer funding. This comment did not discuss whether the moral issues of cities themselves courting professional teams or whether or not a municipality should be able to use tax money to support a stadium. In fact, this comment assumed both are allowable. This comment argued that eminent domain is a less than viable option because of uncertainties surrounding the application of the “just compensation” and “public use” requirements. Additionally, express terms and implied terms are ineffective as adequate protections due to disproportionate bargaining power between the municipality and team. Instead, the legislature must enact its own statute to provide such protections when a municipality

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<sup>190</sup> Clifton B. Parker, *Sports Stadiums Do Not Generate Significant Local Economic Growth, Stanford Expert Says*, STANFORD NEWS (July 30, 2015), <https://news.stanford.edu/news/2015/july/stadium-economics-noll-073015.html> (“Cities have very little bargaining power with an NFL team. As long as there are cities without NFL teams that are willing to subsidize a stadium, cities will have to pay part of the cost of a new stadium.”).

<sup>191</sup> Such benefits can include repayment of the taxpayer money, exclusive rights to use the stadium, or whatever the parties see fair.

contributes taxpayer funding to building or repairing a stadium. The statute should state that if the team gets any such money, it must keep using the home location until the municipality receives repayment of the funding in some value. The terms for the repayment of the loan, however, are defined by whatever the parties agree, whether through cash repayments or other means. Through this route, the state would ensure that municipalities receive adequate protections against relocation, allowing the team-municipality relationship to flourish in the future.