

THE STEEL VALLEY AUTHORITY

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INTRODUCTION

The shutdown of steel production in Youngstown and Pittsburgh that began in the mid-1970s has resulted in the loss of tens of thousands of jobs, both in steel and in other industries.¹ In 1979, union, church, and grass-roots activists in the region organized the Tri-State Conference² on the Impact of Steel ("Tri-State") to try to save the steel mills of these "rust bowl" communities. In 1984, U.S. Steel announced that it planned to demolish a large blast furnace, popularly known as "Dorothy Six," at its Duquesne works.³ During a campaign mounted in response to this announcement, Tri-State persuaded nine municipalities in Allegheny County, Pennsylvania⁴ to incorporate the Steel Valley Authority ("SVA").⁵ Tri-State proposed to create a regional development authority empowered to acquire abandoned industrial facilities by eminent domain; after acquiring the facilities, it planned to operate them itself or to broker them to other operators.⁶

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1. Successive steel mill shutdowns between 1977 and 1980 destroyed all steel production in Youngstown, Ohio at the cost of 10,000 jobs in basic steel. S. LYND, *THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS* (1982). In the decade 1975-85, manufacturing production jobs in the Youngstown-Warren metropolitan area fell from 63,300 to 39,600. OHIO BUREAU OF EMPLOYMENT SERVICES, *LABOR MARKET REVIEW* (July 1986). In Pittsburgh, 15,000 jobs were lost between 1980 and 1983 at U.S. Steel's Allegheny County mills alone. DEP'T OF ENGINEERING AND PUBLIC POLICY, SCHOOL OF URBAN AND PUBLIC AFFAIRS & DEP'T OF SOCIAL SCIENCE, CARNEGIE-MELLON UNIVERSITY, *MILLTOWNS IN THE PITTSBURGH REGION: CONDITIONS AND PROSPECTS* 203 (1983).

2. Conference members represent Pennsylvania, Ohio, and West Virginia.

3. The ensuing battle to save "Dorothy" generated considerable publicity. See *Clerics Split in Battle over Steel Jobs*, New York Times, Jan. 18, 1985, at A10, col. 1; *Reprieve for "Dorothy,"* Pittsburgh Post-Gazette, Jan. 29, 1985; *Pittsburgh Area Rallies to Save Blast Furnace*, New York Times, Jan. 30, 1985, at A10, col. 2; Hoerr and Symonds, *A Brash Bid to Keep Steel in the Mon Valley*, BUS. WK., Feb. 11, 1985, at 30; 2 *Views of Steel's Future*, New York Times, Feb. 13, 1985, at A19, col. 1; *In Withering Steel City, Dream Turns Desolate*, New York Times, Feb. 5, 1986, at A16, col. 1.

4. Pittsburgh, McKeesport, East Pittsburgh, Glassport, Homestead, Munhall, Rankin, Swissvale, and Turtle Creek.

5. Plotkin & Scheuerman, *Get Them Before They Get You*, 20 THE NATION 309 (1986). Articles of incorporation for the SVA were filed with the Secretary of the Commonwealth of Pennsylvania on November 15, 1985; a certificate of incorporation was issued on January 31, 1986.

6. The SVA is not the first regional development authority empowered to exercise eminent

Although the SVA was unable to stop the demolition of U.S. Steel's Duquesne works, it has continued to explore eminent domain as a means of preventing disinvestment in heavy industry. The SVA is currently attempting to avoid two plant closures in Allegheny County.⁷ While the ultimate success of the SVA experiment remains to be seen, Tri-State and the SVA have transformed the debate about reindustrialization in the Pittsburgh area. The steelworkers union has adopted Tri-State's assertion that American steelmaking could be revitalized if government financed the rebuilding of the nation's decaying infrastructure.⁸ The idea of using eminent domain to acquire facilities that private industry no longer finds profitable to operate has become a com-

domain. The Tennessee Valley Authority ("TVA") is its most famous precursor. Unlike TVA, however, the SVA's decision-making structure is designed to be democratic. Each participating municipality sends three representatives to the SVA's Board of Directors. Intermunicipal Agreement para. 11, effective November 13, 1985, reprinted *infra* as an appendix to this article. The present Board includes local residents and union members.

By contrast, TVA's governance structure does not provide the people of the states it serves with any formal means of participation in its decisions.

Since it is a federal agency, none of [the states served by the TVA] has any effective regulatory control over TVA; no public service commissions regulate its actions as they do in areas served by private utilities. Furthermore, since it supplies power through distributors rather than directly to ratepayers, the consumer does not deal with TVA directly. What little oversight of the agency does exist is parceled out among various congressional committees, many headed by politicians who have reaped the rewards of TVA pork-barrel projects. In essence, the operations of this \$4 billion-a-year agency rest in the hands of a three-member board of directors appointed by the president and approved by the Senate.

Overton, *Taking on TVA: Tennessee Valley Ratepayers Protest Soaring Electric Utility Charges*, SOUTHERN EXPOSURE, Jan.-Feb. 1983, at 23. One author has found that, while TVA has technically complied with the "Government in the Sunshine Act," 5 U.S.C. §§ 551-59 (1982), its procedures do not adequately satisfy the Act's intent. See N. McBride, TVA's Compliance with the "Government in the Sunshine Act" (Oct. 3, 1977) (unpublished paper).

7. In August, 1985, American Standard announced its intention to close its Westinghouse Air Brake plant in Wilmerding and its Union Switch and Signal plant in Swissvale. Later that year, the company agreed to sell the land, buildings and fixtures at the Swissvale site to a real estate developer. *Union Switch Plant Sold to Developer*, Pittsburgh Post-Gazette, Oct. 15, 1985 at 1, col. 1. In March, 1986, the SVA sued American Standard and the Swissvale developer in state court to enjoin both closings until the SVA could determine the feasibility of eminent domain proceedings. *Injunction Sought on WABCO, Switch*, Pittsburgh Post-Gazette, March 19, 1986. After American Standard removed the case to federal court, the Third Circuit remanded to state court on the ground that lack of diversity precluded removal jurisdiction. *Steel Valley Authority v. Union Switch and Signal Division*, 809 F.2d 1006 (3d Cir. 1987), *petition for cert. filed*, 55 U.S.L.W. 3714 (U.S. Apr. 10, 1987) (No. 86-1621). At this writing, American Standard continues to remove machinery and equipment from both plants under the protection of a stay of mandate. Fed. R. App. P. 41(b).

8. The United Steelworkers of America ran a full-page advertisement in the New York Times which stated in part:

Federal and State Governments, which for too long have watched the roads, bridges, water systems and other arteries of commerce within this country go to pieces, must commit to a major effort to rebuild our nation's infrastructure—a commitment comparable to a domestic "Marshall Plan." This can be done even in today's economy, and must be done to ensure America's ability to compete.

New York Times, Jan. 30, 1986, at D7, col. 1.

monplace of public discourse.⁹ As the SVA's experience shows, however, both legal and political considerations will affect the ability of a public authority to revitalize its surrounding communities. This article discusses how those factors influenced the creation of the SVA and sketches some of the broader implications of using the public authority as a tool for economic development.

I

CREATION OF THE SVA

Prior to the incorporation of the SVA, the Tri-State Conference on Steel had encouraged individual municipalities to create their own municipal authorities in response to specific plant closings. In the summer of 1982, Colt Industries announced the total shutdown of its Crucible Steel facility in Midland, Beaver County.¹⁰ Tri-State unsuccessfully advocated the immediate formation of an industrial development authority.¹¹ A year later, Tri-State approached the Borough of West Homestead in Allegheny County and asked it to create a municipal authority in response to the closing of the Mesta Machine Company.¹² While pursuing these individual attempts, Tri-State's goal was to call on a number of municipalities at the same time to create a joint authority. Tri-State envisioned the SVA as an agent for long-range, regional economic renewal in basic industry rather than as a knee-jerk reactor to crisis situations.¹³

By late 1984, as part of its "Save Dorothy" campaign, Tri-State began to convince various municipalities of the possible advantages of a joint industrial development authority. The formalities for the incorporation of such an entity were clearly set out in the Pennsylvania Municipality Authorities Act.¹⁴ Nev-

9. See, e.g., *Eminent Domain Plan Urged to Save Mesta*, Pittsburgh Post-Gazette, Apr. 23, 1983; *Group Urging Unusual Tactic to Save Crucible*, Pittsburgh Post-Gazette, Aug. 19, 1982; B. Doherty, *The Struggle to Save Morse Cutting Tool* (unpublished paper).

10. *Colt Sets Charge of \$193 Million to Shed Division*, Wall St. J., Aug. 12, 1982, at 5, col. 2; *Crucible Mill Closing Could Be Midland's Doom*, Youngstown Vindicator, Aug. 18, 1982, at 1, col. 1.

11. *Midland Group Studies Crucible Takeover Plan*, Pittsburgh Press, Aug. 18, 1982; *Group Urging Unusual Tactic to Save Crucible*, Pittsburgh Post-Gazette, Aug. 19, 1982; *Midland Officials Cool to Save-Crucible Plan*, Pittsburgh Press, Aug. 20, 1982; *Midland Mulls Crucible Takeover*, Pittsburgh Post-Gazette, Aug. 21, 1982; *Midland Won't Take Over Crucible Mill*, Pittsburgh Post-Gazette, Aug. 28, 1982.

12. *West Homestead to Study Mesta Operation Takeover*, Pittsburgh Press, Apr. 14, 1983; *W. Homestead Acts, Hopes to Save Mesta*, Pittsburgh Post-Gazette, June 16, 1983.

13. TRI-STATE CONFERENCE ON STEEL, STEEL VALLEY AUTHORITY: A COMMUNITY PLAN TO SAVE PITTSBURGH'S STEEL INDUSTRY (1984).

14. Pennsylvania Municipality Authorities Act, 53 PA. CONS. STAT. ANN. §§ 301-22 (Purdon 1974). A municipality must first give notice of and hold a public hearing on the proposal. Then it must adopt a resolution stating its intention to organize an authority. *Id.* § 303(A) (Purdon Supp. 1986). The articles of incorporation are filed with the Secretary of the Commonwealth; after approving them, the Secretary issues a certificate. *Id.* § 303 (Purdon 1974 & Supp. 1986). Once this is done, a third party has no standing to challenge the validity of the incorporation in a later proceeding. See *Upper Dublin Township v. Piszczek*, 420 Pa. 536, 218 A.2d 328 (1966).

ertheless, Monongahela and Turtle Creek Valley residents and politicians raised legal and political concerns which required nine public hearings and several informal caucuses to resolve. After twelve months of such deliberations, nine municipalities¹⁵ agreed to file articles of incorporation¹⁶ for the Steel Valley Authority pursuant to an agreement executed in November of 1985.¹⁷

The participating municipalities' major concern was their potential financial liability. No local government except Pittsburgh¹⁸ made any financial contribution to the SVA's start-up costs. With respect to future liability, Tri-State assured each municipality that, under state law, the SVA would have no power to pledge the incorporators' credit or taxing power.¹⁹ Nor would the SVA's obligations be deemed obligations of any municipality;²⁰ Tri-State also addressed this issue in the intermunicipal agreement.²¹ State law does not permit a municipality to withdraw from a joint authority once the authority has incurred any obligation.²² Under federal bankruptcy law, however, the insolvency of the authority would still not pass those obligations along to the municipalities.²³ Moreover, the agreement specified that the SVA would not have the power to impose any assessment on the general public or on any municipality.²⁴

Because property acquired by the SVA might be tax-exempt under Pennsylvania law,²⁵ municipal officials were concerned about the loss of tax revenues. In recognizing that one of the SVA's goals is the stabilization of the economic situation in the Monongahela and Turtle Creek Valley communities, the intermunicipal agreement specifies that the SVA will make payments in lieu of taxes to the municipalities and school districts in which its projects are

15. For list of incorporating municipalities, see *supra* note 4.

16. Articles of incorporation for the SVA were filed with the Secretary of the Commonwealth of Pennsylvania on November 15, 1985; a certificate of incorporation was issued on January 31, 1986.

17. Intermunicipal Agreement, effective November 13, 1985, reprinted *infra* as an appendix to this article.

18. Upon request of Tri-State, the Pittsburgh City Council committed itself to providing \$50,000 to SVA for early operating costs. *A Good-Neighbor Response*, Pittsburgh Press, June 3, 1985; *Group Targets Reviving Area's Factories*, Pittsburgh Business Times-Journal, Nov. 18, 1985.

19. See 53 PA. CONS. STAT. ANN. § 306C (Purdon 1974).

20. *Id.*

21. Intermunicipal Agreement para. 4, effective November 13, 1985, reprinted *infra* as an appendix to this article.

22. 53 PA. CONS. STAT. ANN. § 304A (Purdon 1974).

23. The SVA is a "municipality" as that term is defined under federal bankruptcy law and is therefore authorized to become a debtor under the Bankruptcy Code. 11 U.S.C. §§ 101(12), 109(a) and (c) (1982); *Matter of North and South Shenango Joint Municipal Authority*, 14 Bankr. 414 (W.D. Pa. 1981).

24. Intermunicipal Agreement para. 5, effective November 13, 1985, reprinted *infra* as an appendix to this article.

25. 53 PA. CONS. STAT. ANN. § 318 (Purdon 1974).

located.²⁶ The payments are to be in amounts equal to the annual taxes that would normally be due on the property.²⁷ The agreement further provides that, when the SVA improves its property, the local government may have the property reassessed to reflect any increase in value.²⁸

One major question was left open: if the municipalities were not themselves to be liable for the SVA's costs, where would the authority obtain the financing necessary for paying "just compensation" to plant owners? Although the agreement does not directly address this subject, Tri-State attempted to answer it in public and informal meetings.²⁹ In the long run, Tri-State planned that the SVA's project track record would enable it to obtain grants and loans from governmental sources and to raise revenue on its own through industrial development bonds.³⁰ In the short run, however, Tri-State presented the SVA as a redevelopment coordinator for private operators who arrange their own financing for the SVA to use in eminent domain proceedings.³¹

Each municipality, while desirous of as much legal and financial independence from the SVA as possible, also wanted to retain maximum control over the SVA's activity. In addition to their statutory grant of power to appoint SVA board members,³² the municipalities preserved the right to specify SVA projects before acquisition.³³ In preserving this right, the municipalities expressed their desire to review the SVA's feasibility studies independently before permitting the authority to initiate eminent domain proceedings.

Municipal officials were also concerned about the language in the Municipality Authorities Act that allows a public entity to exercise the eminent domain power "either within or without the municipality or municipalities."³⁴ In order to assuage their concerns, the intermunicipal agreement contains a paragraph requiring the prior approval of a project by the municipality in which the property to be condemned is located. This provision applies regardless of whether the municipality participated in organizing the SVA.³⁵

Finally, municipal officials and industry employees and retirees wanted to know that consequences a public acquisition would have on benefit plans ne-

26. Intermunicipal Agreement para. 9, effective November 13, 1985, reprinted *infra* as an appendix to this article.

27. *Id.*

28. *Id.*

29. *Steel Authority Held "Only Way to Go,"* McKeesport Daily News, Mar. 26, 1985, at 1; *Steel Authority idea gaining support,* Pittsburgh Post-Gazette, PG East, Mar. 28, 1985.

30. *Council Wooed to Join Steel Body, Study Mills,* Pittsburgh Post-Gazette, Mar. 27, 1985; STEEL VALLEY AUTHORITY, *supra* note 13, at 7.

31. Pittsburgh Business Times-Journal, Nov. 18, 1985.

32. 53 PA. CONS. STAT. ANN. § 309 (Purdon 1974).

33. Intermunicipal Agreement para. 3, effective November 13, 1985, reprinted *infra* as an appendix to this article.

34. 53 PA. CONS. STAT. ANN. § 314 (Purdon 1974); *see also* Piszek, 420 Pa. 536, 218 A.2d 378; *In re 203.76 Acres of Land in Franklin Township*, 431 Pa. 306, 245 A.2d 451 (1968).

35. Intermunicipal Agreement para. 6, effective November 13, 1985, reprinted *infra* as an appendix to this article.

gotiated with a prior private owner. As a result, the agreement requires the SVA to explain such consequences to the member municipalities before any project may proceed. Furthermore, the SVA is required to declare that those terms and benefits will be preserved for past and present employees to the fullest extent possible.³⁶

II

LEGAL CONTEXT OF THE SVA

A. *Municipal Authorities under Pennsylvania Law*

The Pennsylvania Municipality Authorities Act defines the SVA's power to engage in economic development.³⁷ The parameters of the Act are quite broad. It permits an authority to undertake various kinds of projects, including the acquisition, construction, improvement, maintenance, and operation of structures or facilities.³⁸ The purposes of these projects may include efforts to "retain or develop existing industries and the development of new industries."³⁹ Furthermore, the delegated powers may be exercised to acquire and hold any form of property.⁴⁰ An authority may sell, lease, transfer or dispose of all or part of a project to a third party,⁴¹ or it may operate the project itself.⁴² The Act also grants authorities power to "contract with any municipality, corporation, or any public authority of this *or any adjoining state*, on such terms as the said authority shall deem proper, for the construction and operation of any project which is partly in this Commonwealth and *partly in such adjoining state*."⁴³ The SVA could rely on this provision to counteract deindustrialization beyond the borders of Pennsylvania.

At present, the SVA does not contemplate operating industrial development projects in the sense of managing the facilities. Instead, the SVA intends to coordinate industrial development managed by third parties. This coordination may be carried out in two ways. First, the SVA could "retain or de-

36. *Id.* para. 10. It would appear that an SVA acquisition, whether by purchase or condemnation, would not have a unique legal effect upon employee benefits. The manner in which the acquisition would affect the terms of existing employment agreements depends on the same considerations that affect a private party purchase: whether the corporate entity will remain in existence after acquisition; the language of the employment agreements between the corporate entity and its past and present employees; whether the facility is an abandoned or a presently-operating enterprise; and whether substantially all of the present employees will be hired for the SVA project. See *NLRB v. Burns International Security Services Inc.*, 406 U.S. 272 (1972). In addition, there is a viable legal argument that SVA may condemn an employment agreement as well as land, buildings, machinery and equipment. See 53 PA. CONS. STAT. ANN. § 306B(d); *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (holding that the eminent domain power reaches intangible property).

37. 53 PA. CONS. STAT. ANN. §§ 301-322 (Purdon 1974).

38. *Id.* § 302(j).

39. *Id.* § 306A(a)(17) (Purdon Supp. 1986).

40. *Id.* § 306B(d).

41. *Id.*

42. *Id.* § 306B(e).

43. *Id.* § 306B(o) (emphasis added).

velop existing industries"⁴⁴ by acting as a broker between owners of a presently operating facility and a third party. Second, the SVA could acquire abandoned facilities for the "development of new industries"⁴⁵ and then sell or lease them to other operators. Under the first option, when a party is interested in acquiring an existing industrial facility whose present owner is not willing to sell, the SVA could condemn the property and then transfer it to the buyer. The SVA would thus "force" a sale of the structure or facility at fair market value as determined in an eminent domain proceeding.⁴⁶ While there is precedent for the second option—condemnation and development of abandoned property for new uses⁴⁷—the brokering option appears to be an innovation.

Disputes over the SVA's "broker" role could arise were the SVA to condemn property in order to retain a presently operating project for the same industrial use, since the original Municipality Authorities Act precluded the development of projects which would duplicate or compete with existing enterprises.⁴⁸ The Pennsylvania legislature attempted to create an exception to this limitation in 1961, but the language of the exception only increases the ambiguity of this section.⁴⁹ Because of this ambiguity, the current statute appears to allow the construction or operation of any project which "duplicates" but does not "compete" with existing industries. Since existing industries are already "competing" with the projects, the proviso can be explained as applying only to the establishment and development of new industries that will constitute new sources of competition.

The Supreme Court of Pennsylvania has suggested another way in which an SVA project could be excepted from the anti-competitive limitation. The court reviewed the statutory language in a 1967 case involving the conversion

44. *Id.* § 306A(a)(17).

45. *Id.*

46. See generally Pennsylvania Eminent Domain Code, 26 PA. CONS. STAT. ANN. §§ 1-101-1-903 (Purdon Supp. 1986).

47. For example, the Pittsburgh Urban Redevelopment Authority has condemned property for new uses. *Pittsburgh "Renaissance" Meets Modern Resistance*, N.Y. Times, June 13, 1980, at A12, col. 2.

48. The Purpose and intent of this Act being to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity, and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises, none of the powers granted by this act shall be exercised in the construction . . . or operation of any project or projects which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes.

The Municipality Authorities Act, 1945 Pa. Laws 382 § 4 (current version at 53 PA. CONS. STAT. ANN. § 306A(b)(2) (Purdon Supp. 1986)).

49. "This limitation shall not apply to the exercise of the powers granted hereunder . . . for industrial development projects if the Authority does not develop industrial projects which will compete with existing industries. . . ." 1961 Pa. Laws 936 § 1 (current version at 54 PA. CONS. STAT. ANN. § 306A(b)(2)(ii) (Purdon Supp. 1986)) (amending the Municipality Authorities Act, 1945 Pa. Laws 382 § 4).

of a privately-owned airport into a public facility.⁵⁰ The court distinguished the private airport from the municipal airport by ruling that they did not serve "substantially similar" purposes. An operating economic development authority could define a project to take advantage of this ruling. For example, a steelmaking project which acquired existing structures and facilities for the purpose of meeting infrastructural needs would be substantially dissimilar to any existing private steelmaking facility. Indeed, because of its specific purpose, such a specially-funded project would not "compete" with any existing industry and thus would not run afoul of the anticompetitive proviso.⁵¹

The idea of a Steel Valley Authority has sparked interest in steel communities in other states. The Chicago-Gary area, where the steel industry is stronger than anywhere else in the United States,⁵² has welcomed the Tri-State plan because of its emphasis on saving American steel-making capacity.⁵³ In Utah, where U.S. Steel's Geneva mill has been closed because of the company's decision to import slabs from Korea,⁵⁴ eminent domain is considered a possible means to save steel facilities.⁵⁵ Of course, the applicability of the SVA model in other states will depend on the law of those jurisdictions.⁵⁶

50. Thompson Appeal, 427 Pa. 1, 4, 233 A.2d 237, 239 (1967).

51. Recent Congressional action and United States Supreme Court decisions may shield entities like the SVA from federal antitrust liability. Congress has eliminated federal antitrust damage liability for official conduct of a "local government" and its official as well as of third parties who deal with a local government. The Local Government Antitrust Act of 1984, Pub. L. 98-544, 98 Stat. 2750 (codified at 15 U.S.C. §§ 34-36 (1984 Supp. II)). The United States Supreme Court has held that a public authority's anticompetitive conduct may fall within the "state action" exception to federal antitrust law if the legislature creating the authority clearly contemplated that it might engage in such conduct. *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985). Furthermore, certain anticompetitive conduct of a private transferee of a public project would also come under the "state action" exemption, so long as the conduct is subject to the municipal authority's continuing supervision. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985). For a comprehensive discussion of this subject, see A. Buchsbaum & M. Moore, *Present Status of Municipal and Private Party Exemption from the Antitrust Laws* (June 7, 1985) (unpublished manuscript); see also K. Forsythe, *The Anti-Competitive Proviso of the Municipal Authorities Act* (Aug. 5, 1982) (unpublished manuscript). (Unpublished manuscripts on file with the authors.)

52. See A. Markusen, *STEEL AND SOUTHEAST CHICAGO: REASONS AND OPPORTUNITIES FOR INDUSTRIAL RENEWAL* 187 (1985).

53. *Id.* at 49-50 (citing Tri-State, *supra* note 13, at 5). Markusen contrasts three courses open to the American steel industry: "bowing out," as recommended by the Allegheny Conference on Community Development; "bidding down," that is, cutting costs and especially wages to survive; and "betting on the basics," by revitalizing the steel industry. *Id.* at 40-52.

54. See W. WOODWORTH, *DE-STEELING: THE FALL OF U.S. STEEL AND IMPLICATIONS FOR UTAH* (1984).

55. *Id.* at 134-35. Woodworth presents four alternatives for the future of the Geneva plant; the fourth of these would require:

local government to use the right of eminent domain to condemn the Geneva Works and thus acquire the steel mill. . . . This approach would be justified on the basis that the steel plant has been severely mismanaged. . . . Admittedly this strategy is an extreme one, but the creeping crisis at Geneva demands drastic action before it is too late.

Id. at 135 (emphasis in original).

56. The law of eminent domain appears to vary considerably from state to state. In Ohio, for example, there is no broad Municipal Authorities Act comparable to the Pennsylvania statute under which the SVA is organized, but the legislature by specific enactments has authorized

B. Eminent Domain

1. Changes in the Concept of "Public Purpose"

Eminent domain is "the power of the sovereign to take property for public use without the owner's consent."⁵⁷ An eminent domain taking must satisfy two constitutional requirements: it must be for a public purpose, and it must be for fair market value.⁵⁸ The law in both of these areas is changing in such a way as to facilitate takings by an entity like the SVA.

Recent state and United States Supreme Court decisions have broadened the concept of "public purpose" to the point that the taking of almost any facility is likely to be upheld, so long as the legislature declares the action to be for such a purpose. In *Poletown Neighborhood Council v. City of Detroit*,⁵⁹ the Michigan Supreme Court considered the condemnation and destruction by the City of Detroit of a 465-acre residential neighborhood. The City planned to transfer the property to the General Motors Corporation for an automobile assembly plant. The court held that this transfer of property from a group of private parties to another private party was a taking for a "public purpose": "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental."⁶⁰

In *Hawaii Housing Authority v. Midkiff*,⁶¹ similarly, the United States Supreme Court rejected a constitutional challenge to a Hawaii statute compel-

municipalities to create housing and port authorities, with the eminent domain power for their particular purposes. OHIO REV. CODE ANN. §§ 3735.27, 3735.31(B), 3739.32, 4582.06, 4582.31(P), 4582.56 (Baldwin 1985). The Ohio Constitution provides, "Municipalities shall have authority to exercise all powers of local self-government." The Home Rule Amendment, Article XVIII, § 3. The eminent domain power is one such power. *Britt v. Columbus*, 38 Ohio St. 2d 1, 6, 309 N.E.2d 412, 415 (1974). It also seems clear that the eminent domain power under the Ohio constitution extends to "movables," including industrial equipment. *Cincinnati v. Louisville & Nash. R.R. Co.*, 223 U.S. 390, 400 (1912).

However, the power to use eminent domain to take industrial equipment can only be exercised for "purely local" purposes. *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 578, 53 N.E.2d 501, 504 (1944). The requirement of "purely local" purposes has been held to preclude a municipality from using the eminent domain power to take property outside its own boundaries. *Britt*, 38 Ohio St. 2d 7, 309 N.E.2d 415-16. It may also prohibit municipal use of the eminent domain power for industrial and economic development. *Op. Att'y Gen.* 331 (Ohio 1963). The state legislature has delegated the eminent domain power to "impacted cities" for the purpose of "creat[ing] or preserv[ing] jobs and employment opportunities." OHIO REV. CODE ANN. § 719.011 (Baldwin 1985). This power, however, is restricted to the appropriation of "real estate." *Id.*; see also M. Kane, Eminent Domain Proceedings for U.S. Steel's Ohio and McDonald Works 18-19 (1980) (unpublished manuscript); J. Piper, Taking Industrial Equipment: Limits on the Municipal Power of Eminent Domain 7-8 (1985) (unpublished manuscript). (Unpublished manuscripts on file with the authors.)

57. P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.11, at 1-7 (3d ed. 1985).

58. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

59. 410 Mich. 616, 304 N.W.2d 455 (1981).

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

61. 467 U.S. 229 (1984).

ling large landowners to break up their estates and transfer the land to tenants. The opinion expressed extreme deference to a legislative finding of public purpose. "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose," Justice O'Connor wrote for the Court, "the Court has never held a compensated taking to be proscribed by the Public Use clause."⁶² The Court went on to hold that immediate transfer to another private owner of property condemned under the eminent domain power did not vitiate the public purpose of the taking. "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public."⁶³ *Midkiff* indicates that the U.S. Constitution does not require close scrutiny of a public use designation, even when the taking authority transfers the taken property from one private party to another.

2. *The Problem of Just Compensation*

The requirement of just compensation is a more formidable obstacle to experiments like the SVA. The traditional measurement of just compensation is the fair market value of the taken property;⁶⁴ "fair market value" is defined as "what a willing buyer would pay . . . a willing seller."⁶⁵ Paying fair market value poses serious financial problems for municipalities considering eminent domain. The proposal to take abandoned industrial plants is likely to arise at a time when the taking municipality's tax base has been weakened by the very shutdowns at issue. Acquiring a capital-intensive facility like a steel mill, especially if the plant requires extensive modernization, is therefore likely to require federal funding. Not until such funds are made available for national infrastructure needs and economic development can the SVA and similar entities fulfill their purpose and potential.

Nevertheless, legal and strategic considerations suggest that the just compensation requirement is not necessarily an insuperable barrier, even for economically-distressed communities. Commentators on international law have suggested that just compensation is a social as well as a technical issue.⁶⁶ According to this view, the fair value of a facility may be affected by how that facility has been operated. Some have suggested that the following factors should be considered in determining the amount of compensation:⁶⁷ the circumstances of the original investment (for instance, whether the company se-

62. *Id.* at 241.

63. *Id.* at 243-44.

64. *See* United States v. Miller, 317 U.S. 369, 374 (1943).

65. *Id.*

66. *E.g.*, L. Henkin, R. Pugh, O. Schachter, and H. Smith, *INTERNATIONAL LAW* 752, 754, 757 (1980).

67. *Id.* at 689; *see also* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 892 n.22 (2d Cir. 1981).

cured its initial position through force or fraud); whether the company has extracted substantial profits from the community; whether a facility's operations have caused environmental damage over a period of years; and whether the taking is pursuant to a broad program of economic and social reform. These factors can dramatically affect the amount of compensation required in an eminent domain proceeding.

A possible alternative to paying the fair market value of a corporation's asset value is to base the level of compensation on the corporation's stock price. For example, Citizens to Replace Lilco has advocated that New York State acquire the Long Island Lighting Company by paying compensation based on the market price of the corporation's stock.⁶⁸ Stock value may be less than asset value if the stock price takes into account mismanagement by the corporation's directors and officers. This approach appears to be limited to corporations which have publicly traded stock. Compensating a corporation according to stock value is most straightforward when the authority takes all of the corporation's facilities. Condemning less than the corporation's entire assets might raise difficult issues of stock valuation.

Instead of providing funds to purchase a property, an authority may broker an acquired property to an alternate entrepreneur. In this situation, the new owner provides the money to enable the taking entity to post the required bond. This approach to eminent domain relieves local government of the immediate financial burden of paying just compensation, however determined. In 1982, Tri-State planned for Cyclops Steel to provide money for Midland to acquire the Crucible mill from Colt Industries.⁶⁹ After acquiring Crucible, Midland was to turn the plant over to Cyclops to operate.⁷⁰ The proposed transfer fell through, however, when Cyclops lost interest in the acquisition.⁷¹

III

THE THREAT OF EMINENT DOMAIN

The mere threat of an eminent domain taking can persuade an existing owner to change its investment plans. Threatening to take a facility may avoid the problem of determining and paying just compensation, while securing the desired result of keeping business in the community. In order for this tactic to work in the long run, the public authority must at least appear to have the ability and the intent to take the property. In the fall of 1982,

68. N.Y. Times, Jan. 8, 1986, at B2, col. 1.

69. *Midland Group Studies Crucible Takeover Plan*, Pittsburgh Press, Aug. 18, 1982; *Group urging Unusual Tactic to Save Crucible*, Pittsburgh Post-Gazette, Aug. 19, 1982; *Midland Officials Cool to Save-Crucible Plan*, Pittsburgh Press, Aug. 20, 1982; *Midland Mulls Crucible Takeover*, Pittsburgh Post-Gazette, Aug. 21, 1982.

70. *Midland Won't Take Over Crucible Mill*, Pittsburgh Post-Gazette, Aug. 28, 1982.

71. *Givens to City: Buy Nabisco Plant*, Pittsburgh Post-Gazette, Nov. 30, 1982; *Crumbs: 1,200 Protesters Jam East Liberty Rally to Save Nabisco Plant*, Pittsburgh Post-Gazette, Dec. 17, 1982, at 6, col. 2; *Nabisco Workers Fight Shutdown*, Pittsburgh Press, Dec. 17, 1982, at A1, col. 1.

Nabisco Brands announced that it would close its plant in the East Liberty section of Pittsburgh;⁷² the plant employed 650 production workers.⁷³ A coalition of union, community, and political forces threatened to use the eminent domain power if the company went through with its plans.⁷⁴ Less than a month later the company announced that the plant would stay open.⁷⁵

The threat of resort to the eminent domain power also saved the Morse Cutting Tool factory in New Bedford, Massachusetts. Early in 1984, Gulf and Western, the plant's owner, announced that if a buyer could not be found by July 31, 1984, the plant would be closed.⁷⁶ Since 1968, G&W had been systematically disinvesting from the machine tool industry and investing the profits made at the Morse facility elsewhere.⁷⁷ Furthermore, the machinery in the plant had not been modernized for several years, and some equipment had been moved to a G&W plant in Michigan.⁷⁸ Mayor Brian Lawler of New Bedford offered to help G&W find a buyer, but G&W declined the assistance.⁷⁹ The corporation then proposed a wage cut that would make the facility more attractive to potential buyers.⁸⁰ The union, Local 277 of United Electrical Workers, refused to accept the roll-back.⁸¹ On June 2, 1984, Mayor Lawler announced that, if G&W did not find a buyer, the city might use eminent domain to keep the plant open.⁸² On August 24, 1984, G&W sold Morse Cutting Tool to an alternate entrepreneur, James Lambert.⁸³ Less than a year later, Lambert agreed to a three-year collective bargaining contract containing modest wage and benefit gains and a productivity bonus.⁸⁴

CONCLUSION

If a public development authority such as the SVA, equipped with the power to take private property by eminent domain, can also be structured to be democratically managed and accountable to those affected by its decisions, it will counteract false stereotypes about the incompatibility of public ownership and democracy. The use of government's eminent domain power is sure to be attacked as socialism. In New Bedford, for example, the executive vice president of the Chamber of Commerce said that the idea of using eminent

72. *Id.*

73. *Id.*

74. *Coalition's Muscle Keeps City Nabisco Plant Open*, Pittsburgh Press, Dec. 22, 1982.

75. *Id.*

76. B. Doherty, *supra* note 9, at 15, 17.

77. *Id.* at 2-5.

78. *Id.*

79. *Id.* at 8-9, 15-17.

80. *Id.* at 5, 7-11.

81. *Id.*

82. Massachusetts law permitted the acquisition of the Morse plant by eminent domain.

A. Buchsbaum, *Power of New Bedford, Massachusetts to Acquire the Morse Cutting Tools Plant through Eminent Domain* (May 18, 1984) (unpublished paper).

83. B. Doherty, *supra* note 9, at 17-19.

84. *Contract with New Owner of Morse Continues Gains*, UE News, June 10, 1985, at 8, col.

domain "violated the very essence of free and private enterprise which is the American way of doing business."⁸⁵ The local newspaper editorialized that "government takeover of a private industry, whether for a day or for a year, is the method of a socialist or communist country."⁸⁶ But in a case like the SVA, this kind of rhetoric loses its force because of the conditions constraining the public entity's exercise of its power.

First, the entity proposing a taking must make it clear that acquisition will be carried out only if the present owner insists on closing a plant whose continued operation is essential to the community. Second, the taking must be made at fair market value. Third, when the condemned facility is either brokered to an alternative private entrepreneur or managed by a democratically-controlled local authority, the procedure cannot justifiably be labelled centralized or bureaucratic. In serving as an unusual model for economic development, the SVA is a living rebuttal to Cold War clichés that have hindered creative responses to corporate disinvestment.

85. A. Mandel, *An Historical, Legal and Political Analysis of "Public Use": Can Eminent Domain Be Used to Prevent a Plant Shutdown?* 55 (May 1985) (unpublished paper) (quoting from her interview with James Mathes, executive vice-president of the New Bedford Chamber of Commerce).

86. *Studds, Lawler Share Blame for Alarming, Damaging Idea*, *Standard Times*, June 10, 1984. Mayor Leo Zabelsky of Duquesne commented, "What [the SVA is] doing looks a little like socialism." *Steel Authority Gaining Support*, *Pittsburgh Post-Gazette*, Oct. 17, 1985.

APPENDIX

INTERMUNICIPAL AGREEMENT .

The Municipalities of East Pittsburgh, Glassport, Homestead, McKeesport, Munhall, Pittsburgh, Rankin, Swissvale and Turtle Creek, Allegheny County, intending to be legally bound, covenant and agree as follows:

1. The above Municipalities, having adopted resolutions signifying their intention to organize the Steel Valley Authority under the Municipal Authorities Act of 1945, P.L. 382 as amended, after holding public hearings in accordance with the provisions of the Act, agree to incorporate the Steel Valley Authority as a joint authority.

2. The Articles of Incorporation for the Steel Valley Authority shall not be filed with the Secretary of the Commonwealth until each of the above Municipalities has appointed three (3) members to the Authority's Board and until said Articles are executed by each incorporating Municipality by its proper officers and under its municipal seal. Said Articles of Incorporation shall contain no provision which is in any manner inconsistent with the terms of this Agreement and shall not be amended without the approval of the above Municipalities.

3. The purpose of the Steel Valley Authority is to acquire, hold, construct, improve, maintain and operate, own, lease, whether in the capacity of lessor or lessee, industrial development projects, including but not limited to projects to retain or develop existing industries and the development of new industries, the development and administration of business improvements and administrative services related thereto: PROVIDED HOWEVER, the Authority shall have no power to acquire, hold, construct, improve, maintain and operate, own, lease, whether in the capacity of lessor or lessee, any industrial development project except as specified from time to time by a majority of the above Municipalities. For purposes of the foregoing, an industrial development project specified by the above Municipalities shall be deemed to be a project for the development and administration of business improvements unless determined otherwise by the Municipalities, and shall be therefore subject to the provisions of Section 306 B (w) and Section 306 E of the Municipal Authorities Act.

4. The Steel Valley Authority is deemed to be an "operating authority" in which none of the Municipalities can be encumbered with the financial liabilities of the Authority. All bonds that will be issued by the Authority will be revenue bonds with sufficient revenue coverages so that no bonds based on the full faith and credit of the member municipalities will be issued or required.

None of the Authority's obligations shall be obligations of the Municipalities nor shall the municipalities be liable for the payment of principal of or interest on such obligations.

5. Notwithstanding any provision to the contrary in the Municipal Authorities Act, the Authority shall not have the power to levy or impose any tax, charge, assessment or other servitude on the general public or any municipality.

6. Notwithstanding any provision to the contrary in the Municipal Authorities Act, the Authority shall not acquire and hold property located in any municipality without the approval, whether by motion, ordinance or resolution, of such municipality in addition to a majority of the above Municipalities.

7. The Authority retains, without prior specification by or approval of any municipality, the power to (1) investigate and study the economic feasibility of industrial development projects, (2) formulate plans of acquisition and development for industrial development projects, and (3) seek relief in courts of competent jurisdiction to maintain property of any form in its condition as of the time of commencement of project investigation and study or plan formulation.

8. Once a majority of the member municipalities has specified an industrial development project pursuant to Paragraph 3 of

this Agreement, and/or once a municipality has approved the acquisition and holding of property pursuant to Paragraph 6 of this Agreement, no municipality shall be permitted to rescind or revoke its specification and or its approval after any obligation on the project has been incurred by the Authority.

9. Notwithstanding any provision to the contrary in the Municipal Authorities Act, any and all property acquired and held by the Authority shall not be tax exempt. In the event that the property is found or is deemed to be tax exempt, then the Authority must agree to make payments to affected municipalities and school districts in lieu of taxes. The payments to be made shall be equal to the amount of tax and other assessment revenues received by a municipality or school district by reason of the affected property during the calendar year last preceding the calendar year in which the Authority has acquired and held said property. In the event that improvements are made on property acquired and held by the Authority, such improvements must be assessed and included in calculating the Authority's payments in lieu of taxes to affected municipalities and school districts.

10. The Authority shall not specify an industrial development project unless and until the Authority (1) explains to the satisfaction of a majority of the above municipalities the manner in which the rights, benefits, compensation and other terms of employment agreements will be affected by such project and (2) declares to the member municipalities that, to the fullest extent possible, the

rights, benefits, compensation and other terms of employment agreements will be preserved with respect to past and present employees bound by such agreements.

11. Throughout the duration of this Authority, the above municipalities shall be entitled to appoint three (3) members to the Board of the Authority. The terms of any such appointments shall be staggered in accordance with the Municipal Authorities Act. Members of the Board of the Authority shall receive no compensation for their services.

12. In order to facilitate the incorporation of the Authority, Joseph S. Hornack, Esquire is hereby appointed as interim Solicitor to the Authority and shall file Articles of Incorporation in accordance with Paragraph 2 of this Agreement. The interim Solicitor shall also submit an agenda and draft of by-laws to the Board of the Authority at its organizational meeting. Said by-laws shall not contain any provision which is in any manner inconsistent with the terms of this Agreement and shall not be amended without the approval of the above Municipalities.

13. Before any action is undertaken by the Authority, both a majority of members of the Board and a majority of the municipalities represented on the Board must be attained.

14. The provisions of the Agreement shall be specifically enforceable by a majority of the above municipalities. This Agreement is subject to amendment at any time by a majority of the above municipalities.

15. Any and all resolutions, parts of resolutions or agreements inconsistent with any part thereof, shall, and the same are hereby repealed to the extent of said inconsistency.

16. The effective date of this Agreement shall be the latest date on which the governing body of a Municipality has given its formal consent to be legally bound hereby.

This Agreement is entered into by the City of Pittsburgh pursuant to Resolution No. 569 of 1985, effective June 20, 1985.

IN WITNESS WHEREOF, the parties have set their hand and seals on the date first above written.

ATTEST:

THE CITY OF PITTSBURGH:

Anna Marie Lopez
Secretary to the Mayor

BY Richard S. Caliguiri
Mayor

EXAMINED BY: McA
Assistant City Solicitor

APPROVED AS TO FORM: R. S. Caliguiri
City Solicitor

ATTEST:

BOROUGH OF EAST PITTSBURGH

M. N. Trench
Secretary

BY: Joseph D. Byrne
President of Council

APPROVED BY ME THIS DAY OF

, 1985:

Mayor

ATTEST:

BOROUGH OF GLASSPORT:

Rance M. Jones
Secretary

BY: Anthony Pepe
President of Council

APPROVED BY ME THIS DAY OF

, 1985:

Mayor

ATTEST:

BOROUGH OF HOMESTEAD:

Irwin Zimmerman
Secretary

BY: Joseph R. Little
President of Council

APPROVED BY ME THIS

DAY OF

, 1985:

Mayor

ATTEST:

CITY OF MCKEESPORT:

Patricia Williams
Secretary

BY: Charles D. Kuhl
President of Council

APPROVED BY ME THIS 13th DAY OF November, 1985:

Sam W. Lamm
Mayor

ATTEST:

BOROUGH OF MUNHALL:

Richard D. [illegible]
Secretary

BY: *Joseph C. Kreyman*
President of Council

APPROVED BY ME THIS

DAY OF

, 1985:

Mayor

ATTEST:

BOROUGH OF RANKIN:

Nancy Koval
Secretary

BY: *Matthew [illegible]*
President of Council

APPROVED BY ME THIS

DAY OF

, 1985:

Mayor

ATTEST:

BOROUGH OF SWISSVALE:

Thomas J. Caputo
Secretary

BY: Robert G. Henderson
President of Council

APPROVED BY ME THIS 12 DAY OF Nov. , 1985:

Charles J. Martoni
Mayor

ATTEST:

BOROUGH OF TURTLE CREEK:

Thomas D. Porter
Secretary

BY: Thomas Fisher
President of Council

APPROVED BY ME THIS DAY OF , 1985:

Mayor

RESPONSE

PIERRE CLAVEL:* I think that the Steel Valley Authority model¹ is quite possibly one of the major social innovations of the last decade or so, primarily because of its grass roots emphasis. We have to ask some fundamental questions about the approaches we have been taking to the problem of economic development. The fact is that nobody really knows what to do. A colleague of mine, Bartley Jones, studies earthquakes in Yugoslavia, and he loves to talk about the story of the two disasters. He says the first disaster is the natural disaster, the earthquake. The second disaster, the more serious one, is the government's effort to deal with the consequences of the first. That story reminds me of economic development policy discussions in the United States. The first disaster for many people here is that serious structural shifts are going on in the economy. The second disaster is that nobody seems to know what to do about it and that some people think they know what to do about it. Because of our ignorance, we end up putting contradictory policies into effect.

I assume most people would agree that we are all feeling our way through our economic situation and that somehow we have got to come up with solutions. How can we integrate the plethora of interesting and sometimes exemplary cases such as the Steel Valley Authority and the work that Patricia Hanratty is doing in Massachusetts?² By what criteria do we compare and contrast these different things? How do we know what to do in what situation?

By way of an answer, I would like to suggest a few things that have occurred to me as I listened to some of the papers. When I approach a complex problem, such as economic development, I ask myself why I am interested in this subject. In other words, I try to switch from the cognitive problem to the motivational problem. If you can get a slightly deeper look into your motivations, you might be able to reorganize the structure of what you are doing in a slightly different, more productive way. We should inquire into the motivations of the actors in the economic development game. We should ask what it is that sustains the officials and the private sector owners in this. To the private entrepreneur, I think we have to ask, what percent of your energy goes in to trying to run the business right, and what percent of your energy goes to trying to maintain ownership and control? If it is primarily the first, we have one situation; if it is primarily the second, we have another situation.

There are also motivational problems on the part of the public sector. I went to Elmira, Texas not long ago, to talk with a development official. To

* Professor of City and Regional Planning, Cornell University.

1. See Hornack & Lynd, *The Steel Valley Authority*, 15 N.Y.U. REV. L. & SOC. CHANGE 113 (1987).

2. See *Crisis and Opportunity: Economic Development for the '90s*, 15 N.Y.U. REV. L. & SOC. CHANGE 141 (1987) (Remarks of Patricia Hanratty).

start the conversation, I asked him what he did. He answered, "I recruit." I asked, "What do you recruit?" "Factories," he replied, "I'm going to Boston tomorrow and try to find some factories." Although smokestack-chasing really is not the answer to local economic weaknesses,³ there was no way to talk to this official about the deficiencies of smokestack-chasing. He might even agree that it is a bad idea. But it was his job; it was the only thing he knew how to do. It seems to me that that kind of limitation is a part of the larger problem.

A second point is that, while it is chaotic out there and we do not have one uniform model for what to do, it is also true that there is a lot of experimentation and innovation occurring in different places. It becomes very important to get a handle on what those different developments are because then we can get a sense of what works under what conditions. Just to restate some examples that have been mentioned here, Pittsburgh under David Lawrence attempted a growth strategy of a shift from blue collar manufacturing into the service sector. People continue to pursue this strategy even when the growth may not be occurring or when the strategy itself results in an upward redistribution of incomes.

Another tactic, tried in places like Hartford, Santa Monica, and Burlington, is to allow the shift from manufacturing into services to continue, but to attempt to redistribute income downward by taking political control over the situation and experimenting with different kinds of mechanisms like neighborhood linkage policies and municipal co-ownership. The third strategy, which appears to be what people tried unsuccessfully to do in Youngstown, and what the Steel Valley Authority may be up to, is to maintain blue collar manufacturing employment, but to restructure control within the firm, or even restructure ownership. So there are some real alternatives. I do believe that it is too early to suggest that there is one solution that ought to be tried everywhere.

My final thought, which Dr. McGahey suggested in his paper, is that we are dealing with two quite different kinds of cases: economic development with a social movement, and economic development without an accompanying social movement.⁴ In the former situation, certain common problems seem to arise. In Chicago, Santa Monica, Burlington, Berkeley, and maybe in Boston, where strong grass roots and neighborhood coalitions have gained control of a municipal government, we have seen the problem of how to make the transition from consumerist opposition to control. A second and even more difficult problem, when you have been swept into power on the basis of a grass-roots movement, is avoiding killing the roots once you get there. This may happen in Chicago, and it did happen to some extent in Santa Monica; it happens from time to time in Berkeley.

Finally, what do you do when there is no supporting social movement?

3. See McGahey, *State Economic Development Policy: Strategic Approaches for the Future*, 15 N.Y.U. REV. L. & SOC. CHANGE 43 (1987).

4. *Id.*

One thing you can do is organize. It occurs to me that nothing could be less constructive than the academic who stays in the tower and does not get out there and make contact with whatever may be going on. I think the same is probably true of professionals. This is what strikes me when people ask me, what can I do? You may not do much, but maybe you can do a little bit about your own perspective on the situation.

RESPONSE

PATRICIA HANRATTY:* I will address the issue of eminent domain from my perspective as a policy-maker. Pierre Clavel said one thing that I thought was very good in terms of focusing our attention on what types of questions we should be asking about eminent domain. He posed the question of what you do when you get stuck on a problem.¹ He is, of course, suggesting that we collectively, as states and a policy-makers and as a nation, are stuck on a very severe economic problem; one that I would argue is not simply a problem of economic development but of economic stabilization. What he suggested is that when you get stuck on a problem, you should focus on the motives. I would agree with his analysis, with a slight change. I would say that you should focus on goals. What is it you want to accomplish? I think that we often get tied up in mechanisms and pursue the mechanism instead of the goal. In some ways, that engages us in symbolic politics, and while I think symbols are very important, they have limitations. When they become more important than the goals, then we are off the track.

What I would like to do is focus for a minute on what eminent domain can and cannot do. Certainly it is not a panacea; I do not think anything is the solution to everything. Eminent domain is not the answer to everything in terms of how to stop plant closings, or how to deal with structural economic change issues. Threatening to take every plant that proposes to close down will not solve this critical problem.²

First of all, if you look at eminent domain, what it was intended to do, and therefore what it is probably best at doing, you can see that it may not be appropriate in the case of a plant closing. The traditional purpose of eminent domain, as I see it, is the acquisition of land and, coincidentally, what happens to be on it. Traditionally, the state or the public instrumentality acquires the land for a very specific public purpose, such as building roads, parks, or reservoirs. Eminent domain has not been used as a tool for saving jobs. I question whether it is appropriate for that purpose.

The issue raises other questions. For example, while eminent domain allows you to take land, it is very unclear what else, if anything, it allows you to take. I think there are probably some strong legal arguments to the effect that the eminent domain power does not allow you to take a company's good faith, reputation, and name. That creates a problem for anyone trying to use eminent domain to preserve jobs. The company has the jobs in the first place partly because it sells a particular and well-known product. The product sells

* Executive Director, Industrial Services Program, Boston, Massachusetts

1. *Crisis and Opportunity: Economic Development for the '90s*, 15 N.Y.U. REV. L. & SOC. CHANGE 137 (1987) (Remarks of Pierre Clavel).

2. Cf. Hornack & Lynd, *The Steel Valley Authority*, 15 N.Y.U. REV. L. & SOC. CHANGE 123-24 (1987).

in part because it has a successful trade name. So, if you cannot get the trade name, and you cannot get the customer list, the sales network, or the patents, then what is the use of having the plant and equipment? Another problem arises when you are dealing with a single plant in a multi-plant company. Typically, the parent corporation wants to close one plant because of a drop in the market. When the company finds it has excess capacity, it chooses to close one facility, while its other operations continue. Thus, a taking entity steps into an already difficult market situation.

There may be a good argument for eminent domain for certain types of essential industrial resources. That was one of the arguments made in the *Youngstown Sheet & Tube* case:³ Steel is so crucial to national security and the national defense effort that the federal government has the right to step in and intercede.⁴ The courts rejected the rationale,⁵ but it did provide a stopgap which permitted the federal government to accomplish its goal of continuing steel production.⁶ In such a case, and perhaps in the experience of the Steel Valley Authority,⁷ use of the eminent domain power may be appropriate because of the nature of the capital resources. Nevertheless, I think that we really must ask whether we are trying to maintain the capital, or trying to save the jobs. If we are trying to save the jobs, having the capital will not necessarily do that.

Eminent domain is a powerful negative instrument, a sort of "veto power." The threatened use of the eminent domain power froze the Morse Cutting Tool situation;⁸ it also confused everyone, including the state. It made the stakes for Gulf and Western considerably high because it framed the issue as Gulf and Western versus the city of New Bedford, the workers, and the public good. For a large corporation, that is a rather difficult position to be in, and being in it can encourage a company to develop alternatives. Carrying this thinking a little further, I think that by and large we as policy-makers want to use positive and constructive solutions, rather than veto powers. They do not get you where you want to go; they just stop whatever it is that is happening.

Even if eminent domain has the potential to be a constructive solution, the chances are that there will be very significant legal battles, and the jobs will be lost in the interim. It is very hard to say to a worker, "Well, maybe in two years, when we get out of the courts, we will have the plant and the jobs and you can go back to work." God only knows what will happen to the worker in those two years. If there is going to be a major interruption of the work force, then the use of eminent domain probably should be questioned.

Just as eminent domain is not a panacea, employee buy-outs are not a

3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1987).

4. *Id.* at 582.

5. *Id.* at 587-89.

6. *See id.* at 583-84.

7. *See Hornack & Lynd, supra* note 2.

8. *See id.* at 124.

cure-all, either. They do not work everywhere. Knowing this, I still believe that one of the more constructive things that we can do is to put together an employee buy-out or an employee stock option plan. This will do more than simply freeze the situation. It will offer a substantive alternative to closing the plant.

Another strategy is to seek a new buyer. Joseph Hornack and Staughton Lynd discussed the Steel Valley Authority's role as a broker.⁹ I would argue that you do not need the eminent domain threat in order to play such a role. The Industrial Services Program, my agency, performs that function all the time. Out of the Industrial Services Program's seventy-five clients, we are working with 15 companies either to sell them, or to bring in new investors.

In summary, while I would not discard the eminent domain strategy, I would caution people who consider using it to keep their goals in mind. Eminent domain is a very powerful tool and is effective in some situations. But it should be viewed in a context of positive actions to keep the plant open, such as developing other types of ownership and finding other specific owners.

9. *Id.* at 118.

DISCUSSION

ANGEL ROMÁN,* MODERATOR

AUDIENCE COMMENT: My name is Mike Lugar.¹ As an economist, I can think of almost no situation in which an eminent domain take-over would be more desirable than just making an offer to buy the company privately. Pierre Clavel said in his remarks that he saw this as one of the greatest recent social developments,² but I see it as at best a last ditch-effort when a company, for some reason, does not want to sell at the fair market value anyway.

JOSEPH HORNACK: I agree as far as it being the last-ditch measure; that has been the position of Tri-State and the Steel Valley Authority from the beginning. Our hope was that having an authority in existence with that power would encourage the type of dialogue that really should be taking place in an economic democracy. It would act only as a last resort when a profitable facility may be withdrawn from a community because it is not making as much profit as the holding company would like it to make. That is the ideal situation for the government to step in and force the transfer of ownership for what in the end will be determined by the court to be a fair market value.

AUDIENCE COMMENT: The reason I think that the SVA is innovative is not the technique of eminent domain, which I find intriguing, but my impression of widespread grass-roots support for the idea. If nine towns adopted the thing and went so far as to put this threat into potential action, was it not a popular movement?

JOSEPH HORNACK: That is not an easy question to answer. Tri-State is not what would be called a grass-roots organization. It has a number of dedicated people working for it. It also prefers to work in context of coalitions with other organizations which are more grass roots, as well as with elected officials. When Tri-State convinced the nine municipalities to join us, I think that the politicians voted for it because they thought their constituents supported such an idea. We never try to ram this down any municipality's throat. We advertised the public hearings, and they were very well attended. So to that extent it was a popular movement.

AUDIENCE COMMENT: My name is Bruce Rosen.³ To what extent is any-

* Project Coordinator, Division of Physical Planning and Development, Office of Manhattan Borough President, New York, New York.

1. Professor of Public Policy and Economics, Duke University.

2. *Crisis and Opportunity: Economic Development for the '90s*, 15 N.Y.U. REV. L. & SOC. CHANGE 137 (1987) (Remarks of Pierre Clavel).

3. Executive Director, National Center for Employee Ownership, Arlington, Virginia.

thing being done to create a cease-fire between municipalities and states who compete for existing plants, research facilities, offices, and the like?

PATRICIA HANRATTY: To answer your first question, an agreement is being developed whereby the governors of various states would agree not to go company-hunting over state borders. I think quite honestly that the reason for the raiding problems is that there is no strong federal economic policy. Another explanation may be that the states actually do not have the power to effect companies' location decisions. But it is certainly not the impression of many people in state government that they do not have such power. I think that there is a fine science of decision-making for locations within companies and that probably the only thing that states can do is fine-tuning. If a state is not where the company wants it to be in terms of access to the market, offering a million pounds of gold is not going to make a difference. It may have some effect if the company is choosing between site A and site B. I personally get offended when companies try to do that. I tell them to take a hike, because if they think their margin is going to be so tight that another ten thousand dollars from us is going to make a difference, then they are not going to survive anyway. Generally speaking, I do not think that what the state offers has that much effect.

BRUCE ROSEN: Does Massachusetts have a situation similar to that of New York City, where a single sector—here, real estate development—controls economic development directly in terms of effect on market prices and indirectly through its ability to manipulate zoning, tax exemptions, and financial assistance?

PATRICIA HANRATTY: Does the real estate industry have a monopoly on use decisions in Massachusetts? No, I do not see that one industry has all of the control. I see the issue as a problem of fluctuating markets. For example, in Boston right now, land prices are rising so much that it is not efficient for manufacturing facilities to locate there. Whether I like that or not, I honestly do not know whether it is manipulated by a small group. No large city is controlled by one industry.

PIERRE CLAVEL: Most of my experience is in little cities and in upstate New York. One of the biggest problems up there is that the word "development" gets defined in a particular way and it comes to mean something rather narrow. Sometimes it means going after Boston factories; other times it means real estate development of the downtown area. No town that I have seen has ever been able to walk and chew gum at the same time. These towns can do one thing but they cannot run a multidimensional policy. It means that jobs are threatened. But the thought that one industry dominates the development strategy of New York City is mind-boggling.