

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 8 (Delegate Smigiel)
Environmental Matters

Eminent Domain - Condemnation Proceedings and Limitation on Condemnation Authority

This proposed constitutional amendment prohibits the taking of private property through the power of eminent domain if: (1) the private property is to be used for economic development purposes; and (2) ownership or control of the property is intended to be transferred to a private person. The proposed amendment applies this general requirement to specific authorizations in the constitution to condemn land for certain purposes, notably prohibiting property acquired for urban renewal projects from being transferred to a private person. The proposed amendment further requires that, in a condemnation proceeding, the condemnor's right to condemn be tried by a jury unless the parties file a written election submitting the issue to the court for determination.

Fiscal Summary

State Effect: State costs may increase due to the State's inability under the proposed amendment to transfer property condemned for economic development. The requirement that the issue of a condemnor's right to condemn be tried by a jury may cause more defendants to go to trial, increasing litigation costs for the State.

Local Effect: Local governments may experience increased costs to engage in economic development or revitalization. Those local governments may also experience increased litigation costs in the event that the proposed requirement that the issue of a condemnor's right to condemn be tried by a jury causes more defendants to go to trial. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Minimal.

Analysis

Current Law: The power to take, or condemn, private property for public use is one of the inherent powers of state government. Courts have long held that this power, known as “eminent domain,” is derived from the sovereignty of the state. Both the federal and State constitutions limit the condemnation authority. Both constitutions establish two requirements for taking property through the power of eminent domain. First, the property taken must be for a “public use.” Secondly, the party whose property is taken must receive “just compensation.” In either event, the party whose property is being taken is generally entitled to a judicial proceeding prior to the taking of the property. However, the Maryland Constitution does authorize “quick-take” condemnations in limited circumstances prior to a court proceeding.

Public Use

There is no clear cut rule to determine whether a particular use of property taken through eminent domain is a “public use,” and Maryland courts have broadly interpreted the term. The Court of Appeals has recognized takings that encompass a “public benefit” or a “public purpose.” Maryland’s courts have given great deference to a legislative determination as to whether property should be taken for a particular public purpose.

The courts have stated that government may not simply transfer property from one private party to another. For example, in *Van Witsen v. Gutman*, 79 Md. 405 (1894), the Court of Appeals invalidated a condemnation by Baltimore City in which the court found the transfer would have benefited one private citizen at the cost of others. However, transferring property from one private party to another is not necessarily forbidden. In *Prince George’s County v. Collington*, 275 Md. 171 (1975), the Court of Appeals authorized the county to use its eminent domain authority to take private property to be used for economic development purposes, even though the property was not blighted. The *Collington* court enunciated the following rule: “projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions, are public uses, at least where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide.” *Id.* at 191.

Just Compensation

The damages to be awarded for the taking of land are determined by the land’s “fair market value.” By statute, fair market value of the condemned property (property taken through eminent domain) is the price as of the valuation date for the highest and best use of the property that a willing seller would accept from a willing buyer, excluding any change in value proximately caused by the public project for which the property is needed.

Local Urban Renewal Projects

Under the Maryland Constitution, the General Assembly may authorize and empower any county or municipal corporation to acquire land, by condemnation or other means, to carry out urban renewal projects in slum or blighted areas, and may authorize the Mayor and City Council of Baltimore to acquire, by condemnation or other means, land:

- for development or redevelopment, including, but not limited to, the comprehensive renovation or rehabilitation thereof;
- for storing, parking, and servicing self-propelled vehicles; and
- for or in connection with extending, developing, or improving the harbor or Port of Baltimore and its facilities and the highways and approaches thereto.

The acquisition of land pursuant to these provisions is declared to be needed or taken for a public use.

Right to Condemn Determined by the Court

At common law there was no right to a jury trial in a condemnation proceeding, which was considered a special proceeding “lacking the characteristics of [an] ordinary trial.” *Bouton v. Potomac Edison Co.*, 28 Md. 305, 309 (1980). Therefore, while Article III, § 40 of the Maryland Constitution requires the issue of compensation to be tried by a jury, “the issue of the right to condemn is for the court’s determination.” *Id.* at 310.

Background: The U.S. Supreme Court ruled in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) that New London, Connecticut’s use of its condemnation authority under a state law to require several homeowners in an economically depressed area to vacate their properties to make way for mixed use development did not violate the U.S. Constitution. In essence, the *Kelo* decision left the determination to state law as to whether eminent domain may be used for economic development purposes. An earlier decision, *Berman v. Parker*, 75 S. Ct. 98 (1954), had already found that taking a nonblighted property in a blighted area as part of an overall economic development scheme does not violate the U.S. Constitution.

Historically, the State has used its condemnation authority primarily for the construction of roads and highways. However, this has not always been the case. More recent examples include the construction by the Maryland Stadium Authority of Oriole Park at Camden Yards, M&T Bank Stadium, and the Hippodrome Theater in Baltimore City. The Maryland Economic Development Corporation, even though charged with the task of encouraging increased business activity and commerce and promoting economic development in the State and authorized by law to condemn property, reports that it has not exercised the eminent domain power.

According to the Maryland Municipal League and the Maryland Association of Counties, local governments also have seldom exercised the power of eminent domain. When used, the purposes have been primarily for small, targeted public projects – for example, to construct an airport, a fire station, or a parking lot. On a larger scale, Baltimore City has exercised its condemnation powers for the redevelopment of the Inner Harbor and the Charles Center. Montgomery County used its condemnation authority as part of the downtown Silver Spring redevelopment.

In 2000, Baltimore County attempted to exercise eminent domain powers for revitalization in three aging residential areas; however, this project was petitioned to a local referendum and was rejected by the county voters at the general election that year by a margin of more than two to one and did not move forward.

Chapter 3 of 2009 authorized the State to exercise eminent domain powers over property relating to the Pimlico and Laurel Racetracks. The State has yet to exercise this power.

State Fiscal Effect: Because the proposed constitutional amendment prevents ownership or control of property acquired by condemnation for economic development from being transferred to a private person, it could affect the State’s decisionmaking and planning regarding economic development or revitalization projects. Public ownership and control would be required of a project if condemnation was to be used to acquire property for it. Land acquired by condemnation for urban renewal projects would also need to remain under public ownership or control. State costs could increase to develop and maintain property that would have otherwise been transferred to a private person. The overall costs of these changes to the State cannot be reliably estimated, but could be significant depending on the number and scale of economic development projects the State undertakes that require the use of condemnation.

The requirement that the plaintiff’s right to condemn in a condemnation proceeding be tried by a jury could increase litigation costs for the State, due to the possibility that more defendants would go to trial on the belief that a jury would be more likely to find in their favor. The extent of these costs cannot be estimated.

Local Fiscal Effect: The effect on local governments would vary from jurisdiction to jurisdiction. To the extent local governments engage in economic development or revitalization, the proposed changes would require the local government to retain ownership and control of any property condemned for those purposes, including property acquired for urban renewal projects. Costs associated with these changes cannot be reliably estimated, but could have a substantial fiscal effect on some local governments.

Baltimore City notes that 12 redevelopment projects within the city Housing and Community Development office leverage the power of eminent domain along with nine projects under the auspices of the Baltimore Development Corporation. Assuming

these 21 redevelopment projects could not move forward, Baltimore City indicates that the loss of property and income tax revenues would be substantial.

In addition, the requirement that the plaintiff's right to condemn in a condemnation proceeding be tried by a jury could increase litigation costs for local governments that use condemnation, due to the possibility that more defendants would go to trial on the belief that a jury would be more likely to find in their favor. The extent of these costs cannot be accurately estimated.

The Maryland Constitution requires that proposed amendments to the constitution be publicized either: (1) in at least two newspapers in each county, if available, and in at least three newspapers in Baltimore City once a week for four weeks immediately preceding the general election; or (2) by order of the Governor in a manner provided by law. State law requires local boards of elections to publicize proposed amendments to the constitution either in newspapers or on specimen ballots; local boards of elections are responsible for the costs associated with these requirements. Legislative Services anticipates that the budgets of local boards of elections contain funding for notifying qualified voters about proposed constitutional amendments for the 2012 general election in newspapers or on specimen ballots.

Additional Information

Prior Introductions: HB 63 of 2010 received an unfavorable report from the House Environmental Matters Committee. Previously, HB 44 of 2006 received an unfavorable report from the House Environmental Matters Committee.

Cross File: None.

Information Source(s): Maryland Association of Counties; Maryland Municipal League; Maryland-National Capital Park and Planning Commission; Caroline, Calvert, Howard, Prince George's, and Montgomery counties; City of Baltimore; Office of the Attorney General; Department of Business and Economic Development; Board of Public Works; Maryland Department of Planning; Department of General Services; Judiciary (Administrative Office of the Courts); Maryland Stadium Authority; Maryland Department of Transportation; University System of Maryland; Washington Suburban Sanitary Commission; Department of Legislative Services

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