

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 850

(Senator Conway)

Judicial Proceedings

Environmental Matters

Real Property - Prohibition on Acquiring Mortgages or Deeds of Trust by
Condemnation and Related Study

This bill prohibits the State or any of its instrumentalities or political subdivisions from acquiring mortgages or deeds of trust by condemnation between June 1, 2014, and May 30, 2016. The bill also requires the Department of Housing and Community Development (DHCD) to study ways of restoring equity for underwater homeowners with private label securities and report on any recommendations to the General Assembly by November 1, 2015.

The bill takes effect June 1, 2014.

Fiscal Summary

State Effect: Based on current uses of the State's eminent domain power, State finances are unaffected. DHCD can handle the study and reporting requirements with existing resources.

Local Effect: Based on current uses of local eminent domain power, it is assumed that this bill applies in a limited number of cases. Thus, local operations and finances are not materially affected.

Small Business Effect: Minimal.

Analysis

Bill Summary: The study must identify and evaluate methods, including use of eminent domain by local governments, for restoring equity to homeowners with private label securities in their mortgages who have been unable to obtain mortgage loan modifications

that would allow the homeowners to keep their homes. In conducting the study, DHCD must monitor the development of and legal challenges to the use of eminent domain to assist underwater homeowners in other parts of the country, hold at least two public hearings, and consult with specified entities.

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.” Second, 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 and payment of just compensation.

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.” In 2005, the Supreme Court left the determination to state law as to whether eminent domain may be used for economic development purposes. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

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.

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." 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." *Bouton v. Potomac Edison Co.*, 28 Md. 305, 309 (1980).

Depending on the authority granted to a private company under federal law, State law may be preempted, and a federal court may have jurisdiction over a relevant eminent domain case. For example, condemnation actions by a gas company under the federal Natural Gas Act are heard in federal courts.

Background: According to reports by *The New York Times* in 2013 and 2014, several cities across the country have considered using their eminent domain power to assist homeowners reduce debt on mortgages, with the goal of reducing the risks of foreclosure, blight, and falling property values. The approach, first considered in Richmond, California, is for the city to identify homes that are severely underwater (*e.g.*, the owner owes significantly more than the home is worth) and offer to buy the mortgages. If the owner of the mortgage refuses to sell the mortgage, the city could use its eminent domain power to condemn and buy the mortgage. The Maryland Municipal League advises that no municipalities in Maryland have yet expressed interest in utilizing eminent domain power in this manner.

Historically, Maryland 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.

The Maryland Municipal League and the Maryland Association of Counties have historically advised that local governments 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.

Additional Information

Prior Introductions: None.

Cross File: HB 1346 (Delegates S. Robinson and McIntosh) - Environmental Matters.

Information Source(s): Montgomery County; Baltimore City; Board of Public Works; Department of General Services; Department of Housing and Community Development; Department of Labor, Licensing, and Regulation; Maryland Association of Counties; Maryland Municipal League; Department of Transportation; Library of Congress; *The New York Times*; Department of Legislative Services

Fiscal Note History: First Reader - March 3, 2014
mc/hlb Revised - Senate Third Reader - March 26, 2014
Revised - Enrolled Bill - May 6, 2014

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