

Department of Legislative Services  
Maryland General Assembly  
2005 Session

FISCAL AND POLICY NOTE

House Bill 80 (Delegates Boteler and Cluster)  
Environmental Matters

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**Real Property - Eminent Domain - Limitation on Condemnation Authority**

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This bill provides that the State or any of its instrumentalities or political subdivisions may not acquire private property by condemnation unless the property is necessary for a public use. "Public use" is defined as: (1) public ownership or control; or (2) physical use or access by the general public. The bill also requires that property acquired in a condemnation proceeding, if later sold, must first be offered to the defendant from whom the property was acquired or the heirs or assignees of the defendant.

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**Fiscal Summary**

**State Effect:** The State could experience increased costs to acquire property for economic development purposes. These costs cannot be accurately estimated, but could be substantial.

**Local Effect:** Local governments could experience increased costs to acquire property for economic development purposes. These costs could be substantial for some local governments. **This bill imposes a mandate on a unit of local government.**

**Small Business Effect:** Potential meaningful.

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**Analysis**

**Bill Summary:** "Public use" includes the:

- possession, use, and enjoyment of property by the public, the State, an instrumentality of the State, or a political subdivision;

- use of property for the creation or operation of a public utility or common carrier;
- use of property for a public emergency or disaster relief; and
- destruction of property to prevent a catastrophe.

The sale price of the property, when offered by the plaintiff to the defendant from whom the property was acquired, is the amount of the award of compensation originally paid to the defendant less documented taxes and other expenses paid by the defendant and not reimbursed by the plaintiff during the condemnation proceeding. The defendant or the heirs or assignees of the defendant have the right to repurchase the property within 90 days after the date of the written offer, otherwise the plaintiff may sell the property to any other person.

**Current Law:** The power to take, or condemn, private property for public use is one of the inherent powers of state government and, through the State its political subdivisions. 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.

### *Disposal of Land by the State Highway Administration (SHA)*

Notwithstanding any other statute to the contrary, if land acquired for transportation or other public purposes will not be used, SHA must dispose of it as soon as practicable after the completion or abandonment of the project for which the land was acquired. If the Secretary of Transportation determines that land from an abandoned project is no longer needed for any State transportation purpose, a county or municipality may acquire it for a transportation purpose, with the Secretary’s approval, on payment of the lesser of: (1) the land’s appraised value; or (2) the consideration originally paid for the land, plus simple interest at the fair market rate calculated from the time of acquisition to the time of disposition, and administrative costs.

If the land is not needed for a county or municipal transportation purpose, the person from whom the land was acquired or that person’s successor in interest has the right to reacquire it, on payment of an amount equal to the lesser of: (1) the land’s appraised value; or (2) the consideration originally paid for the land, plus simple interest at the fair market rate calculated from the time of acquisition to the time of disposition, and administrative costs.

If neither of those rights is exercised, the land must be disposed of in the same manner as if it were from a project that has been completed or as otherwise permitted.

For land from a completed project, SHA must notify the person from whom the property was acquired, or that person’s successor in interest, within 30 days after making a determination that the land is not needed and available for reacquisition. Within five years from the date the land was acquired, the person from whom it was acquired or that person’s successor may reacquire the land, on payment of an amount equal to the

consideration originally paid. After five years from the date the land was acquired, the person or the successor has the right to reacquire the land at the current market value.

If the right to reacquire the land from a completed project is not exercised within eight months after SHA provides the required notice, SHA must sell the land at public auction.

### *Possible Plaintiffs*

Possible plaintiffs to a condemnation action under Maryland law include the federal government, the State, a county, a municipal corporation, a corporation that transmits or supplies natural or artificial gas, an oil pipeline corporation, a telephone or telegraph company, a water company, and a railroad company.

**Background:** Recently, 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.

Several measures have been introduced in Congress that would limit the use of eminent domain. To date, only one has passed. The appropriation measure that funds the Department of Transportation, the Judiciary, and the Department of Housing and Urban Development for federal fiscal 2006, P.L. 109-115, prohibits funds provided under that Act being used for projects that seek to use eminent domain for economic development that primarily benefits private entities, under certain circumstances.

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 responses to surveys conducted this interim by 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 446 of 2004 established a Task Force on Business Owner Compensation in Condemnation Proceedings. The task force made several recommendations regarding business owner compensation; however, it did not develop comprehensive legislation containing those recommendations. None of those recommendations are reflected in this bill. The task force did not develop any estimates as to the cost of its recommendations or current payments to business owners displaced by condemnation actions.

**State Fiscal Effect:** The State will not be able to ensure the acquisition of land at fair market value for economic development purposes. The State's costs to acquire property for economic development purposes could increase, and the State could experience difficulty assembling contiguous land for economic development. These costs cannot be reliably estimated, but could be substantial.

If the State or a local government were to forego an economic development project because of the bill, future revenues from State property, income, sales, recordation, and transfer taxes could be affected. It should be noted that any tax revenue that might derive from economic development depends on the success of a particular project.

In the event the State decides to sell property taken through condemnation, it could lose the value of any improvements made on the property, as well as any increased equity in the property if the defendant or his/her heirs or assigns repurchase the property at the original price the State paid for it. For each parcel sold, revenues would decrease to the extent the property's current fair market value exceeds the fair market value of the property at the time it was obtained. The revenue loss could be significant, even with a relatively small number of affected properties. For example, SHA regularly disposes of properties (either entire parcels or remainders of parcels) that are no longer needed for transportation projects.

**Local Fiscal Effect:** To the extent local governments seek to acquire property for economic development purposes, they could experience increased costs and difficulty

assembling contiguous land if negotiations with property owners fail. These costs could be substantial for some local governments.

If the State or a local government were to forego an economic development project because of the bill, future local government tax revenues could be affected. It should be noted that any tax revenue that might derive from economic development depends on the success of a particular project.

In the event a local government decided to sell property taken through condemnation, the value of any improvements and any increased equity in the property would be lost if the defendant or his/heirs or assigns repurchased the property at the original price the local government paid for it. For each parcel sold, revenues would decrease to the extent the property's current fair market value exceeds the fair market value of the property at the time it was obtained. The revenue loss could be significant, even with a relatively small number of affected properties.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts), Department of General Services, Department of Business and Economic Development, Maryland Department of Transportation, Department of Budget and Management, Maryland Municipal League, Maryland-National Capital Park and Planning Commission, Washington Suburban Sanitary Commission, Board of Public Works, University System of Maryland, Maryland Department of Planning, Office of the Attorney General, Department of Legislative Services

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