

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

House Bill 1410

(The Minority Leader, *et al.*)

Environmental Matters

Property Protection Act of 2006

This bill proposes to amend the Maryland Constitution to define the term “public use” in the context of the State’s or a local government’s exercise of the power of eminent domain. “Public use” is defined as: (1) public ownership or control; (2) physical use or access by the general public; or (3) the use of land for the creation or functioning of a public utility or common carrier. “Public use” does not include use for economic development purposes, including community revitalization, attracting new business or encouraging the expansion or retention of existing business, job creation, or generating tax revenue. The bill thereby eliminates the State’s or a local government’s ability to condemn private property for an economic development purpose.

Fiscal Summary

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

Local Effect: Local governments could experience increased costs to acquire private property for economic development. 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.

Analysis

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.

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.

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 if negotiations with property owners fail. 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.

Local Fiscal Effect: To the extent local governments seek to acquire private property for economic development, 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.

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 election are responsible for the costs associated with these requirements. It is anticipated that the fiscal 2007 budgets of local election boards will contain funding for notifying qualified voters about proposed constitutional amendments for the 2006 general election in newspapers or on specimen ballots.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Town of Berlin, City of Salisbury, Charles County, Frederick County, Garrett County, Montgomery County, Prince George's County, Baltimore City, Maryland Department of Planning, Washington Suburban Sanitary Commission, Department of General Services, Board of Public Works, Maryland Municipal League, Department of Business and Economic Development, Maryland Stadium Authority, Maryland-National Capital Park and Planning Commission, Maryland Association of Counties, University System of Maryland, Maryland Department of Transportation, Department of Legislative Services

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