

Department of Legislative Services  
Maryland General Assembly  
2006 Session

FISCAL AND POLICY NOTE

Senate Bill 488

(Senator Della)

Judicial Proceedings

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Real Property - Eminent Domain - Limitations on the Condemnation of Private Property

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This bill prohibits the acquisition of property through condemnation by a governmental unit (1) if the intent is to transfer ownership or control of the property to a private person for the purposes of private retail, office, commercial, industrial, or residential development; (2) primarily for enhancement of the tax base or tax revenue; or (3) to increase employment or improve the general economic health.

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Fiscal Summary

**State Effect:** Tax revenues could decrease to the extent a governmental unit foregoes or curtails an economic development project because of the bill. The amount of any such decrease cannot be accurately estimated but could be substantial.

**Local Effect:** Tax revenues could decrease to the extent a governmental unit foregoes or curtails an economic development project because of the bill. The amount of any such decrease cannot be accurately estimated but could be substantial. **This bill imposes a mandate on a unit of local government.**

**Small Business Effect:** Potential meaningful.

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Analysis

**Bill Summary:** The bill's limitations do not apply to the condemnation of private property (1) if a governmental unit retains ownership or control of the property; (2) for the creation or operation of a common carrier or public utility; (3) for the lease of

property to a private person to occupy an incidental part of public property or a public building; (4) for the acquisition of property to cure a concrete harmful effect of the current use of the land, including the removal of public nuisances or structures beyond repair; (5) for the acquisition of abandoned property or to clear defective chains of title; or (6) for the redevelopment of a brownfield site.

For the purposes of the bill, a “governmental unit” means any agency, authority, board, commission, council, office, public or quasi-public corporation, or other unit or instrumentality of the State, a county, or a municipal corporation.

**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.

### *Brownfield Site*

Title 42, § 9601 of the U.S. Code generally defines a “brownfield site” as real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

**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 and Local Fiscal Effect:** In the event that a governmental unit would have used its condemnation authority for economic development purposes in the future, restricting condemnation authority could affect State and local finances. To the extent that this economic development would have attracted businesses or more affluent residents to the targeted area, future State and county tax revenues might have increased, including property, income, sales, recordation, and transfer taxes. The precise fiscal impact, however, is unknown, as it would depend on: (1) the extent to which the governmental unit would have exercised its condemnation authority for economic development purposes in the future; (2) whether the governmental unit would have transferred the property; and (3) the extent that this area might have attracted more businesses and more affluent residents. It should be noted that any tax revenue that might derive from economic development depends on the success of a particular project.

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## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Department of General Services, Maryland Department of Planning, Maryland Stadium Authority, Maryland Department of Transportation, Kent County, Montgomery County, Prince George's County, Washington County, Worcester County, City of Annapolis, City of Bowie, Town of Elkton, City of Takoma Park, Town of Thurmont, Washington Suburban Sanitary Commission, Maryland Municipal League,

Maryland Association of Counties, University System of Maryland, Department of  
Legislative Services

**Fiscal Note History:** First Reader - February 21, 2006

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