

Department of Legislative Services  
Maryland General Assembly  
2006 Session

**FISCAL AND POLICY NOTE**

Senate Bill 9  
Judicial Proceedings

(Senator Astle)

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**Eminent Domain - Public Use**

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This bill prohibits private property from being acquired by condemnation unless it is necessary for public use. Public use is defined as: ● the possession, occupation, and enjoyment of land by the general public or a governmental entity; ● the use of land for the creation or functioning of a public service company; or ● the acquisition of land to cure a concrete harmful effect of the current use of the land, including the removal of public nuisances, structures that are beyond repair, or structures that are unfit for human habitation or use, and the acquisition of abandoned property. Public use does not include the public benefits of economic development, including an increase in tax base, tax revenue, employment, or general economic health.

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**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. Potential decrease in State revenues.

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

**Small Business Effect:** Potential meaningful.

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## 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 property at fair market value for economic development purposes because the property cannot be taken by condemnation. 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.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Baltimore City, City of Bowie, Town of Elkton, Town of Thurmont, City of Takoma Park, City of Annapolis, Wicomico County, Allegany County, Montgomery County, Prince George's County, Talbot County, Maryland Department of Planning, Judiciary (Administrative Office of the Courts), Department of Budget and Management, Department of Business and Economic Development, Office of the Attorney General, Washington Suburban Sanitary Commission, Department of General Services, Board of Public Works, Maryland Municipal League, Maryland Stadium Authority, University System of Maryland, Maryland Department of Transportation, Department of Legislative Services

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