

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

Senate Bill 419 (Senators Frosh and Forehand)
Judicial Proceedings

Eminent Domain Reform Act

This bill restricts the use of eminent domain for economic development and alters provisions governing compensation to persons displaced by a condemning authority.

The bill does not apply to a determination by a condemning authority to acquire property by condemnation before October 1, 2006.

Fiscal Summary

State Effect: Expenditures related to the exercise of condemnation through eminent domain could increase under the bill. The increase cannot be reliably estimated but could be significant depending on the number, types, and locations of persons displaced by a condemnation action. Revenues would not be affected.

Local Effect: Expenditures related to the exercise of condemnation through eminent domain could increase under the bill. The increase cannot be reliably estimated but could be significant depending on the number, types, and locations of persons displaced by a condemnation action. Revenues would not be affected. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: A condemning authority may not condemn private property if the property will be sold, leased, transferred, or otherwise conveyed to or for the benefit of a private person for private retail, office, commercial, industrial, or residential

development, or for commercial enterprise carried on for profit, for purposes of economic development unless: (1) acquisition of the property is necessary to carry out an economic development plan that has a public purpose and was adopted by the condemning authority after public notice and hearings; (2) the purpose cannot be achieved practicably through private means or by a public/private partnership without the use of condemnation; and (3) the condemning authority will retain control or oversight over the project to ensure the economic development plan is carried out. Before making a determination to acquire property by condemnation, the condemning authority must make specific findings that each of these conditions is met and make a written record of the findings.

In a condemnation proceeding under the bill, the condemning authority must prove the public purpose and necessity of the taking by clear and convincing evidence. The condemning authority's determination is subject to close scrutiny by the court.

The damages in a condemnation action in which the land taken, or any part thereof, is used for a business or farm must include the loss of goodwill, as defined under the bill, if the business or farm owner proves that the loss: (1) is caused by the taking or the injury to the remainder of the property; and (2) may not reasonably be prevented by relocating or by taking steps and adopting procedures that a reasonably prudent person would take and adopt to preserve goodwill. The owner must also prove that compensation for the loss will not be included in relocation payments or duplicated in any other compensation awarded to the owner.

If the business cannot be continued on the property but can be relocated, the damages also include compensation for the present value of reasonably anticipated reductions in net operating income that are caused by the taking and relocation of the business, for up to three years.

Fair market value of condemned property includes any amount by which the price reflects a diminution in value or other damages, including lost rent and carrying costs, occurring between the earlier of the first public announcement of the project or the effective date of legislative authority for acquisition of the property and the date of actual taking, if the trier of facts finds that the diminution in value or other damages were proximately caused by the project, or by announcements or acts of the plaintiff or its officials concerning the project, and were beyond the property owner's control.

A condemning authority must file an action within three years after the date of the administrative determination to acquire the property. If the action is not filed within three years, the condemning authority may not proceed until it first obtains a new authorization.

If judgment is for the plaintiff on the right to condemn and the amount of damages is 20% more than the highest amount offered by the plaintiff, or paid into court under “quick-take” provisions, the plaintiff must pay, as costs of the proceeding, the defendant’s reasonable legal, appraisal, and engineering fees actually incurred, as fixed by the court.

The bill also repeals the limits on payments to persons displaced by a condemnation action.

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. Goodwill is not generally compensable. Fair market value also includes any amount by which the price reflects a diminution in value occurring between the earlier of the first public announcement of the project or the effective date of legislative authority for acquisition of the property and the date of actual taking, if the trier of facts finds that the diminution in value was proximately caused by the project, or by announcements or acts of the plaintiff or its officials concerning the project, and was beyond the property owner's control.

Date of Actual Taking

Property is deemed to be taken in the case of a "quick-take" action – where certain governmental entities are authorized to take property immediately upon payment of fair value to the property owner or to a court – if the plaintiff is lawfully authorized to take the property, has made payment, and has taken possession of the property and actually and lawfully appropriated the property to the public purposes of the defendant. In every other case, property is deemed to be taken if the plaintiff pays the judgment and costs to the court.

Relocation Assistance

When land is acquired by condemnation, the condemning agency must pay a displaced person for: (1) actual reasonable moving expenses for moving the person, the person's family, business, farm operation, or other personal property; (2) actual direct loss of tangible personal property as a result of moving or discontinuing a business or farm operation, up to the agency's determination of the reasonable expenses that would have been required to relocate the personal property; (3) actual reasonable expenses in searching for a replacement business or farm; and (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, up to \$10,000.

In lieu of those allowable expenses, a person who is displaced from a place of business or farm operation and meets criteria established by the agency may elect to accept a fixed payment from the agency. Such payments range from \$1,000 to \$20,000, or the amount provided under the federal Uniform Relocation Assistance Act, whichever is greater. The limits are the same under the federal Act.

A person at whose expense any personal property, dead body, grave marker, or monument must be removed as a reasonably necessary consequence of condemnation is generally entitled to an allowance for the cost of removing and placing the item or body in another location. The allowance does not include any compensation for loss of profit, goodwill, or for the acquisition of another location.

Standard of Review for Administrative Decisions

The Court of Appeals voiced a comprehensive standard of review for administrative decisions in *Ramsay, Scarlett, & Co. v. Comptroller*, 302 Md. 825 (1985). If the agency decision resolved a question of law, the reviewing court must apply a “substitution of judgment standard” under which the court may substitute its judgment. *Id.* at 833, 837-39. In reviewing an agency decision about a fact, the court must determine whether the finding is supported by “substantial evidence,” which means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 834. When a court is reviewing an application of law to a fact, the court must determine whether “a reasoning mind could reasonably arrive at the [agency’s] conclusion.” *Id.* at 837-39.

Legal Costs

The plaintiff in a condemnation proceeding is required to pay all costs in the trial court, including: (1) per diem for the jurors; (2) the cost of transporting the trier of fact to view the property; (3) the cost of meals for the jury if the court so orders; (4) the cost of recording the inquisition among the land records and all documentary stamps necessary in the transfer of the property; and (5) an allowance for the defendant, fixed by the court, for reasonable legal, appraisal, and engineering fees actually incurred by the defendant because of the condemnation proceeding, if the judgment is for the defendant on the right to condemn.

On appeal, if the decision is for the defendant, the plaintiff must pay a reasonable attorney’s fee fixed by the trial court. Costs on appeal are paid as directed by the appellate court.

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.

In *Reichs Ford Road Joint Venture v. State Highway Administration*, 388 Md. 500 (2005), the Court of Appeals stated that lost rental value and other related damages are recoverable in an “inverse condemnation” action. Inverse condemnation involves a “temporary taking” or “regulatory taking” of property, or the diminished value of property, by an entity with eminent domain authority.

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. This bill reflects some of those recommendations.

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 Expenditures: The number of condemnation actions that the State may bring varies from year to year. The number and types of businesses granted relocation assistance as part of a condemnation action will also vary but is a frequent part of the condemnation process.

For illustrative purposes, over the past five fiscal years, the amount spent by the State Highway Administration on business relocation ranged from a low of approximately \$130,000 in fiscal 2003 to a high of approximately \$601,000 in fiscal 2001. The precise amount attributable to business reestablishment costs is unknown. It is expected that these amounts could increase greatly under the bill. However, the Federal Highway Administration, by regulation, may pay a proportional share of these costs in the same proportion as its share of the project costs. Any increase in the State's payments for relocation and reestablishment costs would be lessened by the amount paid by the federal government. The federal share for an eligible highway project may vary but is generally 80% of the project's costs.

Because goodwill is not generally compensable under current law, this would represent a new expense to a condemning authority. The monetary value of goodwill can vary widely depending on the nature and location of the business. The expense could be substantial, even with a limited number of businesses involved.

To avoid a trial, which can be more costly than a settlement, the State may increase its offer for a particular parcel, thereby increasing the cost of acquisition. To the extent the bill encourages defendants in a condemnation action to go to trial, costs related to the trial would also increase. In turn, if a trial results in an award of 20% higher than the State's offer, attorney's fees could be awarded. The cumulative effect of these increased costs could be substantial.

Expenditures could also increase if a court finds that the value of the property is more than 20% higher than the State's offer (or the amount paid into court in a quick-take case). If this becomes frequent, the total expenses related to the fees for these cases could be significant. Depending on the complexity of the case, the number of parcels involved in a particular acquisition, and whether a trial is required, the fees for appraisals, experts, and opposing counsel could be in the range of \$6,000 to \$20,000, with some going even higher.

Any additional expenses related to making findings and reviewing those findings are assumed to be minimal and absorbable within existing budgeted resources.

Local Expenditures: The number of condemnation actions that local jurisdictions may bring varies by jurisdiction and from year to year. The number and types of businesses granted relocation assistance as part of a condemnation action will also vary but is a frequent part of the condemnation process. The cost to a local government could be significant, depending on the timing, location, and scope of a particular project.

Small Business Effect: Small business owners whose relocation expenses exceed the statutory limits would benefit to the extent that their expenses exceed the statutory limits, especially if the owner rents the current business locations. Small business owners could also receive the cost of their legal, appraisal, and engineering fees if offers fall below a court's determination of fair market value.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Town of Leonardtown, City of Westminster, Town of Bel Air, City of Salisbury, Frederick County, Somerset County, Montgomery County, Washington Suburban Sanitary Commission, Maryland Association of Counties, Maryland-National Capital Park and Planning Commission, Maryland Municipal League, Department of General Services, Board of Public Works, Department of Business and Economic Development, University System of Maryland, Maryland Department of Planning, Maryland Department of Transportation, Department of Legislative Services

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