

Department of Legislative Services
Maryland General Assembly
2007 Session

FISCAL AND POLICY NOTE

House Bill 87

(Delegate Shewell, *et al.*)

Environmental Matters

Real Property - Condemnation Proceedings - Valuation of Property

This bill provides for the loss of “goodwill” to be included in damages awarded for a condemnation where the land, or any part of it, is used for a business. The bill also includes specified items in the measure of the “diminution in value” that may be a part of the computation of the property’s fair market value. Specified limits on relocation expenses are also repealed.

Fiscal Summary

State Effect: State expenditures could increase significantly in condemnation actions involving the relocation of businesses, due to additional compensation of property owners and potentially protracted negotiations and litigation. Revenues would not be affected.

Local Effect: To the extent local governments engage in condemnation actions that displace businesses, expenditures would increase due to additional compensation of property owners and potentially protracted negotiations and litigation. Revenues would not be affected. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: To be awarded damages for the loss of goodwill, the owner of the business must prove the loss: (1) is caused by the condemnation or injury to the remainder; and (2) may not reasonably be prevented by relocating the business or by taking steps and adopting procedures that a reasonably prudent person would take and

adopt in preserving good will. Compensation for the loss of goodwill must not be duplicated in any other compensation awarded to the owner.

Under the bill, goodwill means benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

Diminution in value includes loss of rental income, payment of property taxes, mortgage interest, insurance, and other costs associated with maintaining the property. The diminished value is measured from the earlier of: (1) the date of the first public announcement of the project; or (2) the date of the administrative determination to acquire the property. The diminished value is measured through the date of the actual taking.

The bill repeals the current limit on payment to a displaced property owner for the actual direct loss of tangible personal property, that the payment may not exceed the amount equal to reasonable expenses of relocating the property. The bill also repeals the \$10,000 limit on reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business.

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.

Diminution in Value after Administrative Decision to Condemn

The fair market value of the property includes the amount of any diminution in value that occurs between the date of the specific administrative determination to acquire the property and the date the actual taking occurs if the diminished value was:

- proximately caused by the public project for which the property being taken is needed or by announcements or acts of the plaintiff or its officials concerning the public project; and
- beyond the reasonable control of the property owner.

Diminution in value is not specifically defined.

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.

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; and
- in every other case, if the plaintiff pays the judgment and costs to the court.

Background: 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. Some 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: State expenditures will generally increase to the extent condemnation actions necessitate relocation of businesses. The number of condemnation cases in each fiscal year, as well as the amounts attributable in each case to loss of goodwill, diminution in value (affected by the length of each condemnation action), loss of intangible personal property, and business reestablishment expenses, cannot be predicted. Expenditures related to these additional measures of compensation could be significant, even with a relatively small number of affected properties. The additional factors involved in determining compensation could also lengthen negotiation and litigation in these cases, potentially increasing expenditures.

For illustrative purposes, over the past six 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.

Local Fiscal Effect: To the extent local governments need to acquire private property on which businesses are located, costs of condemning the property would increase. Expenditures related to these additional costs could be significant, even with a relatively small number of affected properties. In addition, the time and complexity of negotiating and litigating the acquisition of these properties could increase due to the additional factors involved in determining compensation, potentially increasing expenditures.

Small Business Effect: Small businesses subject to condemnation actions would potentially receive additional compensation for loss of goodwill, the amount of which would be unique to each business. Small businesses would also benefit from compensation for loss of rental income, payment of property taxes, mortgage interest, insurance, and other costs associated with maintaining the property between the time of the administrative decision or announcement to acquire the property and the actual taking, as well as potential increases in compensation for loss of personal property and business reestablishment expenses.

Additional Information

Prior Introductions: An identical bill, HB 187 of 2006, received an unfavorable report from the House Environmental Matters Committee. Over 40 bills combined were introduced in the 2006 session that would have restricted or otherwise altered the use of eminent domain; all the bills failed.

Cross File: None.

Information Source(s): Maryland Department of Planning, Department of General Services, Department of Business and Economic Development, University System of Maryland, Maryland Department of Transportation, Maryland-National Capital Park and Planning Commission, Washington Suburban Sanitary Commission, Somerset County, Montgomery County, Prince George's County, Frederick County, Department of Legislative Services

Fiscal Note History: First Reader - March 6, 2007
ncs/hlb

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