

Department of Legislative Services
Maryland General Assembly
2007 Session

FISCAL AND POLICY NOTE

Senate Bill 807 (Senator Dyson)
Judicial Proceedings

Property Protection Act of 2007

This bill proposes to amend the Maryland Constitution to exclude from the definition of the term “public use” in the context of the State’s or a local government’s exercise of the power of eminent domain: • urban renewal; • community revitalization or redevelopment; • 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 these purposes. The bill also expressly prohibits private property from being acquired by condemnation to carry out an urban renewal project and repeals the authority of a county or municipal authority to condemn private property for that purpose. Finally, the bill amends provisions authorizing Baltimore City to acquire property for development or redevelopment, off-street parking, and port development by prohibiting private property from being acquired by condemnation for an economic development purpose.

Fiscal Summary

State Effect: The State could experience increased costs to acquire property for projects for which eminent domain might currently be used. These costs cannot be accurately estimated, but could be substantial.

Local Effect: Local governments could experience increased costs to acquire property for projects for which eminent domain might currently be used. 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 were introduced during the 109th Congress that would have limited the use of eminent domain; however, only one passed. Under the appropriation that funds the Department of Transportation, the Judiciary, and the Department of Housing and Urban Development for federal fiscal 2006, P.L. 109-115, funds provided under that Act may not be used for projects that seek to use eminent domain that primarily benefit private entities, under certain circumstances. The continuing resolution that funds most of the federal government through federal fiscal 2007, P.L. 110-5, continues the prohibition through September 30, 2007.

According to the National Conference of State Legislatures (NCSL), eminent domain legislation in response to the *Kelo* decision was considered in each of the 44 states that went into session in 2006. From January 2006 to date, legislatures have passed eminent domain bills in 28 of those states: in 24 states, the legislation was enacted; in 2 states, the measures passed were constitutional amendments that went on the November ballot for voter approval; and in 2 states, the legislation was vetoed by the Governor.

NCSL has identified the following seven categories of state legislation that deal with eminent domain:

- prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity;

- defining what constitutes “public use,” generally the possession, occupation, or enjoyment of the property by the public at large, public agencies, or public utilities;
- restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety;
- requiring greater public notice, more public hearings, negotiation in good faith with landowners, and approval by elected governing bodies;
- requiring compensation greater than fair market value where property condemned is the principal residence;
- placing a moratorium on eminent domain for economic development; and
- establishing legislative study committees or stakeholder task forces to study and report back to the legislature with findings.

Historically, the State has used its condemnation authority primarily for the construction of roads and highways, although 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, charged with the task of 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 in 2006 by the Maryland Municipal League and the Maryland Association of Counties, local governments 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. The project was petitioned to 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: Because the bill limits the State's authority to acquire land through condemnation, it could affect the State's decision making and planning regarding economic development or revitalization projects as well as its level of involvement in and responsibility for those projects. The State will not be able to ensure the acquisition of land at fair market value for economic development purposes. Should the State wish to participate in any of the restricted activities, the State's costs to acquire property could increase. Moreover, the State could experience difficulty assembling contiguous land for these projects 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 a 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: The effect on local governments would vary from jurisdiction to jurisdiction. To the extent local governments use their power of eminent domain to engage in activities for which condemnation would no longer be permitted, the bill's changes could affect decision making, planning, and the local governments' level of involvement in and responsibility for projects. Depending on the nature and character of projects, the bill's changes could affect the local governments' ability to acquire land for those projects. Moreover, local governments could experience difficulty assembling contiguous land for projects if negotiations with property owners fail. The overall costs attributable to the bill's changes cannot be reliably estimated, but could be significant for some local governments.

If the State or a local government were to forego a project because of the bill, future local tax revenues could be affected. As noted above, 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 elections are responsible for the costs associated with these requirements. It is anticipated that the budgets of local election boards will contain funding for notifying qualified voters about proposed constitutional amendments for the 2008 general election in newspapers or on specimen ballots.

Additional Information

Prior Introductions: An identical bill, SB 173 of 2006, received a hearing in the Senate Judicial Proceedings Committee but no further action was taken. 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 designated, although HB 257 is identical.

Information Source(s): Maryland Department of Planning, Department of Business and Economic Development, Maryland Department of Transportation, Department of General Services, Board of Public Works, University System of Maryland, Washington Suburban Sanitary Commission, Maryland-National Capital Park and Planning Commission, Maryland Municipal League, Maryland Association of Counties, Caroline County, Howard County, Montgomery County, Prince George's County, Baltimore City, City of Annapolis, City of Bowie, Town of Thurmont, Department of Legislative Services

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