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EMINENT DOMAIN

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The Condemnation Landscape Across the Country Post-*Kelo* -- A Maryland Perspective

After the Supreme Court of the United States decided the *Kelo* case[1] permitting private property to be condemned for economic development, the public reaction was surprisingly swift and overwhelmingly against the decision. Within several months, four states, Alabama, Delaware, Ohio and Texas enacted eminent domain legislation in the

[1] *Kelo v. City of New London*, 545 US 469, 125 S. Ct. 2655 (2005). Many people read the *Kelo* case as eliminating the "public use" requirement of the Fifth Amendment which states, "Nor shall private property be taken for public use, without just compensation…". In fact, many people accepted the notion expressed by Justice Sandra Day O'Connor in her dissent when she wrote:

> "Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting form the subsequent ordinary use of private property render economic development takings "for the public use" is to wash out any distinction between private and public use of property—and thereby effectively delete the words "for public use" from the *Takings Clause of the Fifth Amendment.* Accordingly I respectfully dissent."

She went on to observe that today nearly all real property is susceptible to condemnation on the Court's theory. Specifically, she said:

> "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."

2005 legislative session and Michigan passed a Constitutional amendment to counteract *Kelo*. This eminent domain reform generally fell into five categories:

- Prohibiting eminent domain for economic development, including for generation of increased tax revenues or for transferring property to another private party;
- Limiting eminent domain to a "stated public purpose";
- Restricting eminent domain to blighted properties or where an area as a whole is considered blighted;
- Imposing a moratorium on eminent domain use for economic development for a stated period while legislative task forces evaluated the issue; and
- Increasing the compensation amount for condemned property where it is a person's principal residence.

In 2006, twenty-one states passed eminent domain reform to limit *Kelo*, some with Constitutional amendments and most by statutory provisions. These states include Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, Nebraska, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin; and five states Florida, Georgia, Louisiana, New Hampshire and South Carolina passed Constitutional amendments. Two additional states, Arizona and New Mexico, passed eminent domain legislation but it was vetoed by the governors. The 2006 eminent domain reform legislation fell into the same categories as it did for 2005, with two additional areas of coverage:

- It imposed greater procedural requirements on eminent domain use, e.g., greater public notice, more public hearings, good-faith negotiations and elected governing body approval; and
- Redefining "public use" as possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.

Eminent Domain Reform Efforts in Maryland

You will note that none of the lists of states mentioned above include the State of Maryland. Numerous anti economic development bills were introduced in the General Assembly and a constitutional amendment was proposed. In addition, collateral efforts were made to expand the effort and provide for eminent domain reform in other areas of the law. However for a variety of reasons, eminent domain reforms failed in the General Assembly. An article in the Maryland Bar Journal in September, 2006, entitled "Eminent Domain Reform's Failure in Maryland" provides some important insights into this process. Mr. Fischer, a co-author, points out some of the deficiencies in the existing Maryland eminent domain law in the article and the reforms suggested by the legislature's "Task Force on Business Owner Compensation in Condemnation Proceedings" which he chaired. Although the Task Force was not formed to address the *Kelo* situation (having been created in 2004), it gave consideration to the problem as a postscript to its report. As to the *Kelo* situation, it did not recommend a ban on economic takings or economic development as many other states had done; it made a series of recommendations for procedural safeguards requiring condemning authorities to enter specific findings in economic development takings such as:

> (1) That the private market is unable to accomplish the project and, hence, the exercise of eminent domain is necessary to perform the project, and
>
> (2) That the condemnation is based upon an integrated development plan with the government maintaining specific control over the project.

Other important legislature protections in these cases were introduced into several bills in the Senate. For example, in an economic taking case, the condemning authority would be required to prove public purpose and necessity by clear and convincing

evidence. Further, at the option of the owner, the property's fair market value would be determined without regard to the scope of the project rule. Also, a bill was introduced to permit the property owner to recover his attorney's fees if the jury award or the final settlement exceeded the condemning authority's final written offer by 20 percent or more. Finally legislation was introduced to provide business owners with compensation for the loss of business good will if the business could not be relocated, as well as for the loss of income during the period the business was interrupted, not to exceed three years, and relocation assistance provisions of the real property article were revised and updated removing the outdated limits on those benefits.

Unfortunately, these legislative efforts were unsuccessful. The primary bill which was introduced, Senate Bill 3 and House Bill 1137, were opposed by local government organizations and others and a strong counter-coalition developed. Although Senate Bill 3 received a favorable report from the Senate Judicial Proceedings Committee, it was returned to Committee without a floor vote when the Republican Caucus in the Senate sought to attach a Constitutional ban amendment on the legislation and the President of the Senate sought to avoid that vote by aborting our bill. However, the problems in eminent domain still exist and it's clear that efforts will be made to reform this matter in the 2007 legislature.

Cases around the country have arisen since the *Kelo* case in various state courts which challenge economic development and challenge the definition of "public purpose"

in this type of condemnation. To provide balance, we've selected several leading cases in different states on both sides of the issue:[2]

1. *Norwood v. Horney*, 2006 Ohio 3799, 2006 Ohio Lexis 2170 (2006). In this case the City of Norwood tried to condemn the defendants' residential properties as a part of the "Norwood Exchange Project," a redevelopment project that would construct chain stores, condominiums and office space in the area. The condemning authority asserted that this project satisfied the public use requirement in the Ohio Constitution because it would alleviate a "deteriorating area" under the City Code. The defendant challenged the proposed taking as unconstitutional, arguing that the City did not have the right to take private property and transfer it to a private entity for economic redevelopment. The Ohio Supreme Court unanimously agreed with the property owner defendants. The Court pointed out that it was not bound by the United States Supreme Court interpretation of the Federal Constitution's public use requirement and expressly rejected the *Kelo* case, choosing instead to adopt the dissenting Opinions of Justices O'Connor and Thomas. It also clarified the Court's role in reviewing a local government's "public use determination." It explained that although it was limited in reviewing legislative determinations and should give them "deference" it is independent of them. It further went on to determine that if an area might in the future become a slum or blighted area, that was not sufficient and that that term was unconstitutional under the void for vagueness doctrine. It determined that the only remaining "public use" for the City's proposed taking was for economic benefit which, standing alone, was not a "public use" under the Ohio Constitution.

2. *Board of County Commissioners of Muskogee County v. Lowery*, 136 Pacific 3rd 639 (Okla. 2006). In this case, the county brought condemnation proceedings against the defendant property owners to acquire right-of-way easements for placing three water pipelines, two of which would solely service a private plant proposed for construction and operation in the county. The defendants challenged the taking as unconstitutional under Oklahoma's eminent domain law, which allows taking property for a "public purpose." In deciding this case, the Oklahoma Supreme Court cited Justice O'Connor's dissenting Opinion in *Kelo* to support a narrow interpretation of the phrase "public purpose" and excluded economic development from that definition. It further restricted the use of the *Kelo* case in Oklahoma by limiting that decision to the

[2] The summary of these cases came from an extensive review of the post-*Kelo* cases and law in all states entitled "Continuing Issues Notice" prepared for Congress by Mary Massaron Ross and Kristen M. Tolan with the firm of Plunkett & Cooney, P.C.

Federal takings clause and interpreting Oklahoma's takings law more strictly than that.

3. *City of Long Branch v. Brower*, No. Mon-L-4987-05 (N.J. Super. Ct. Law Division, June 26, 2006). In this case the City of Long Branch sought to condemn the plaintiff's residential properties as a part of a redevelopment plan. The property owners challenged the City's condemnations under the New Jersey eminent domain law and the U. S. Constitution's Takings Clause. The Court upheld the takings finding that taking private property for economic rejuvenation is permissible and asserting that the judiciary should give great deference to the municipality's public use determination. Here the Court cited Justice Kennedy's concurring Opinion for support.

4. *Talley v. Housing Authority of Columbus, Georgia,* 279 Ga. App. 94, 630 S.E. 2d., 550 (2006). In this case the City Housing Authority condemned the plaintiff's property as a slum under Georgia's urban renewal law. The property owner argued that the City illegally condemned his property in 1994 and had since abandoned any alleged "public use" of the property by selling it to a private citizen. The Court rejected the property owner's challenge to the condemnation's legality under principals of *res judicata*. It also rejected the property owner's claim of abandonment of public use because under Georgia's urban renewal law it allows housing authorities to take slum area property for redevelopment and sell it to private persons. Although the Court noted that *Kelo* has "ignited a national debate on the subject of government use," it pointed out that the decision left it to the states to enact more restrictive condemnation laws if they chose to do so. Because Georgia's urban renewal law and its underlying constitutional authorization remain in place, the Court held that the housing authority had acted properly.

In Maryland, we have a case that has just been heard by the Court of Appeals on January 8, 2007—*Mayor and City Council v. George Valsamaki*, Sept. Term 2006, Case No. 00055. John Murphy and James Thompson represented George Valsamaki in his successful challenge to the quick-take condemnation of the Magnet Bar at 1924 North Charles Street in Baltimore City for urban renewal / economic development. Although the property is located in the Charles North Urban Renewal area, Mr. Valsamaki challenged the quick-take condemnation asserting that the City did not carry its burden to

demonstrate a necessity for the immediate possession and title to the property. In addition, he argued that the taking was not for a "public use" and that the quick-take procedures followed in this case denied him due process of law by preventing him from having discovery or permitting him adequate time to prepare for the trial. Public Local Law 21-16 requires trial within fifteen days after filing an answer, and the Court denied a motion to shorten the time for discovery in this two-week window. However, Judge Miller, sitting as the trial judge, denied the City's quick-take condemnation and stated:

> "The plaintiff [City] impassively asserts that the Charles North Project will likely come to a temporary halt unless plaintiff is awarded the property in interest immediately. The Court, based upon all the evidence, is not satisfied that the plaintiff has met its burden. The plaintiff has failed to submit to the Court either a contract, a focused development plan as it pertains to the property in interest, or even a request for proposal (hereinafter "RFP"), supporting its contentions and establishing necessity under Section 21-16."

Later in the trial Court's opinion, the Court ruled that there was no development plan for the property. We have categorized this type of condemnation as "RFP Condemnation" where the condemning authority condemns property in Baltimore City for redevelopment and assemblage without having any plan for its public use or ultimate development. In fact, the City acquires the property then submits and RFP to the real estate development community and, based on their response, determines how the property will be used and to which private developer the property will be conveyed. This does not meet the constitutional requirements of *Kelo* or the constitutional or statutory requirements in Maryland. A copy of Mr. Valsamaki's draft Brief is attached to these materials for ready reference.

With this background and the several lessons which are currently being taught in the state legislatures and courts around the country, we would offer the following observations about how the *Kelo* case and post-*Kelo* developments might impact your case.

A. In economic taking cases. As we have seen, some states have adopted the view that public use or public purpose does not include economic takings where private property is taken from A and conveyed to B for a greater economic purpose, and "enhancement." In those cases, one should examine carefully whether or not the condemning authority has a well articulated economic development plan similar to the economic plan in the *Kelo* case. A red flag should be raised if there's no plan. Compare what has happened in Baltimore City in the *Valsamaki* case to the *Kelo* case. Clearly, the Maryland courts are not bound by the Supreme Court's interpretation of "public use" as articulated in *Kelo* since that represents a federal constitutional minimum. Our courts will interpret the Maryland Constitution in reference to economic taking and have done so in *Prince George's County v. Collington Crossroads*, 275 Md. 171, 339 A 2d. 278 (1975). Our Court permitted condemnation for economic development in a circumstance where the Court found that the County had adopted a comprehensive plan for the industrial development park which it considered necessary for the economic well being of the County; that the project was too costly for private developers to carry out; and that the County would maintain significant control of the industrial park and commercial land sold to private owners. These are items which a Maryland practitioner should note in examining any economic taking case. Further, some of our sister states have taught us to look for a challenge to the legislative determination to take the property and to insist that

the court not pay blind deference to legislative pronouncements since the Court is and should be independent of them.

B. In evaluating urban renewal plans. There are several factors to consider. Check out the age of the urban renewal plan. In the *Valsamaki* case, the Charles North Urban Renewal Plan was first established in Baltimore City by Ordinance No. 799 which was adopted October 25, 1982. Although the plan was amended in 2004 authorizing the acquisition of the Valsamaki property, the underlying premise of the plan and its proposed uses of the property were not updated. The plan identifies general land-use categories, such as office-residential, community business, community residential and central commercial, plus industrial. These use districts permit the uses allowed in the zoning districts having the same name. The Valsamaki property is in central commercial, which allows all of the uses by the City's B-5 Zoning District, the most extensive zoning district in the City. In this case, no witness could state what would even be the generalized use of the property or the area beyond the description of saying a "mixed-use" development. Upon more detailed examination, the City did not have a plan and indicated that this was an RFP condemnation, where the use of the property would be for economic development—nothing more specific. The lesson here is to carefully consider the urban renewal plan and test its logic and validity as applies to your property.

C. In negotiating with the condemning authority. The condemnor must consider the issues we've discussed above and the general public outcry concerning economic development takings. Many of the condemning authorities have bond issues or other financing obligations in which lenders want assurance that the condemning authority has

the right to take—an assurance that is difficult to give when the condemnation project appears to take property from A and give it to B. Do these lenders have deadlines? Are there deadlines for the condemnation to be concluded? What happens if the condemnation is not concluded on time? Are there bond consequences? Are there economic penalties imposed, such as those involved in the condemnation for the new DC Nationals' Stadium in Washington? How strong or compelling is the condemnor's public use or public purpose argument in connection with the condemnation? In negotiating with any condemning authority, the attorney for the property owner needs to understand the legal underpinnings of the case, the strength of the condemnor's right to take, the timeline, as well as the valuation questions which are involved in the case.

IN THE

COURT OF APPEALS OF MARYLAND

_____

SEPTEMBER TERM, 2006

_____

No. 00055

_____

MAYOR AND CITY COUNCIL OF BALTIMORE CITY

Appellant

v.

GEORGE VALSAMAKI, ET AL

Appellees

APPELLEES' BRIEF

STATEMENT OF THE CASE

This is an action for quick take condemnation against a property used for a long time operating bar and package goods business called the Magnet. The Appellees own the real property and one of the Appellees, George Valsamaki, operated the Magnet for thirty years. The City filed a petition for condemnation and petition for immediate possession and title. Upon the filing of the petition for immediate possession and title, the court entered an order, ex parte, granting immediate possession to the City. The Owner answered the petition for immediate

possession and title and the matter was heard by the Circuit Court, testimony from representatives of the City of Baltimore was taken, and the Court entered an order denying the petition for immediate possession and title and the petition for condemnation. Appellants filed this direct appeal to this Court pursuant to Section 21-16© of the Code of Public Local Laws for Baltimore City.

QUESTIONS PRESENTED

1. Did the City of Baltimore carry its burden to demonstrate a necessity for immediate possession and title of the property?

2. Did the City demonstrate that the taking was for a public use?

3. Are the procedures contained in Section 21-16, and the actual procedures followed in this case, a denial of due process because they do not allow time for adequate preparation and because they do not allow time for discovery?

4. Was the ex parte award of immediate possession in this case invalid because there was no need for immediate possession?

PERTINENT STATUTES

(in appendix)

Maryland Constitution

Article III, Section 40A , Eminent Domain

Article XI-B City of Baltimore—Land Development and Redevelopment

Maryland Rule 12-206

Charter of the City of Baltimore

Article II, Section 15. Land development and redevelopment .

Code of Public Local Laws for Baltimore City

Section 21-16 “Quick take” condemnation—in general

Baltimore City Code

Article 13 Housing and Urban Renewal, 2-3—2-6

Zoning Code, 6-301—6-615

STATEMENT OF FACTS

The subject matter of this case is a property at 1924 N. Charles Street in Baltimore City. It is improved by a three story structure which houses a bar and package goods store called the Magnet. The property is owned by the Appellees and the Magnet is owned and operated by Appellee George Valsamaki through a wholly owned corporation, Val’s Inc.

The property is located within the boundaries of the Charles North Urban Renewal Area and subject to the Charles North Urban Renewal Plan, E.101-121. The urban renewal area and the plan were originally established by Baltimore City Ordinance No. 799 adopted on October 25, 1982. E. 101. The plan was amended in 2004 by Baltimore City Ordinance 04-695 which authorized the acquisition of the subject property by purchase or condemnation for renewal purposes. E. 122 This matter began with the filing of a petition for condemnation and a petition for immediate possession and title on March 9, 2006 in the Circuit Court for Baltimore City. The petition for immediate possession and title alleged in paragraph 2:

"That it is necessary for Petitioner to acquire immediate possession and title to the said property interest as appears from the affidavit of William N. Burgee, Director of Property Acquisition and Relocation, Department of Housing and Community Development, attached hereto and prayed to be taken as a part hereof". E. 163

The Burgee affidavit attached to the petition read as follows:

"This property known as 1924 N. Charles Street, Block 3602, Lot 04, must be in possession of the Mayor and City Council of Baltimore at the earliest possible time in order to assist in a business expansion in the area". E. 166.

The Circuit Court entered an order, ex parte, on March 15th, 2006 which (1) vested possession of the property in the City as of March 15, 2006 and (2) provided that title would vest in the City 10 days after personal service on the Owner unless the owner filed a answer within 10 days "alleging that the City does not have the right or power to condemn title to the property described in these proceedings". E. 169

The Owner filed an answer which denied the City's power to condemn the property and denied that there was any necessity for the City to acquire immediate title, stating that the basis set forth in the affidavit was a "patently insufficient reason". E. 175 The matter was set for hearing for April 18, 2006. Prior to the hearing the Owner served interrogatories and notices of deposition for Burgee and another City official, Paul J.M. Dombrowski, and moved to shorten the time for discovery. Apx. 67-74. The lower court denied the motion on April 4, 2006. Apx. 80. After the motion to shorten the time for discovery was denied, the City never

complied with the discovery by producing its witnesses for deposition or answering the interrogatories.

At the hearing on April 18, the City introduced the Charles North Urban Renewal plan and the 2004 Ordinance amending the plan which authorized the acquisition of the subject property.

Prior to the calling of the City's witnesses, there was extensive discussion between the court and counsel for the City. E. 3-35. The City's position was that the exercise of quick take was necessary after negotiations for the property had failed. E. 16. The unwillingness of the owner to sell for the offered price resulted in the quick take. E. 12. If the City has been unable to acquire the property through negotiation—what the City counsel called a "glitch in the system"—then the City files a quick take. E. 17.

The City called two witnesses, Paul J. M. Dombrowski, the official at the Baltimore Development Corporation responsible for the Charles North Project, and M.J. Brodie, the president of BDC which is the quasi private arm of the City government responsible for carrying on the City's urban renewal programs. The owner objected (unsuccessfully) to this testimony because he had served a notice of deposition for Mr. Dombrowski and Mr. Burgee and interrogatories asking general questions about the basis for the condemnation and quick take and that it was unfair to allow these individual to testify when he had been unable to conduct discovery. E. 27, 55.

Mr. Dombrowski testified that the plan had been adopted in 1982. The amendment in 2004 included 19 properties in order to assemble sites for development “because the redevelopment had not been occurring”. E. 40

In regard to the affidavit submitted to support the petition, Mr. Dombrowski testified as follows:

“Q. Do you know what is meant by a business expansion in the area?

A. I think so. It means, to us, at least, the opportunity to provide for additional business expansion opportunities”. E. 44.

Mr. Dombrowski testified extensively that no specific plan existed for the subject property, E. 47-, or for the area, E. 48-49. Instead, BDC proposed to assemble the site and put out a Request for Proposals (RFP) which would invite developers to bid on the sites and propose a specific development plan. The overall purpose was not any more definite than a mixed use development.

“Q. Is there any plan for the development of this property?

A. The specific property?

B. Q. yes.

A. Not as yet because the procedure we follow is to go through a request for proposal as you well know”. E. 44

The property and the area as a whole could be residential, commercial, office, or parking, whatever was determined in by the specific development proposal selected by the City. E. 48 No plan for the property or the block in which it was located existed. E. 46. The City was seeking a mixed use development in

accordance with the urban renewal plan which permitted a wide variety of uses. E. 46.

Mr. Dombrowski gave this description of how the specific plan would be developed, through selection of proposals:

A. It's done by, again, a whole process of having an advisory panel, generally made up of various agencies as well as representatives from the community. They give us advice on which plan seems most appropriate. We do our own analysis. It goes through a series of reviews by our board of Directors and then the recommended plan is posed (sic) for approval". E. 50.

Mr. Dombrowski offered this explanation why it was necessary to have immediate possession:

"Q. Is there any reason why it is necessary to have immediate possession?

A. Well, immediate possession to us means getting something going after 20-some years of non investment in the area or 30 years. It's a matter of trying to assemble the site, given the fact that we know it takes time to go through this kind of procedure with appraisals, et cetera, and relocation assistance in Mr..Valsamaki's case. So we are looking for the most expeditious way to get development going and we deferred to the Law Department to tell us how to do that". E. 52.

According to Mr. Dombrowski, an RFP had not yet been issued for the property. E. 50

Mr. M.J. Brodie generally echoed the testimony of Mr. Dombrowski. He recounted the history of the project going back to 1982, that its been "slow going ; 1982 to 2006 is not quick", E. 58, that the idea was to create disposition lots, including the subject property, and that an assemblage of individual lots, including the subject, is necessary to create a disposition lot of sufficient size to attract private investment, E. 61.

In response to a question from the City as to why it was necessary to have possession "sooner rather than later", E. 63, Mr. Brodie explained it was preferable to have title before the RFP was issued, E. 63, although he acknowledged that in many instances the City issued the RFP before acquiring title. E. 66 Mr. Brodie was asked why the City could not acquire title through the normal condemnation process before issuing the RFP and his response was as follows:

Q. Could you not follow the normal condemnation process and acquire title before you issue an RFP?
A. Could we theoretically? Yes.
Q. No, practically.
A. Well, again, we call on the colleagues in the City Law Department to basically make that determination. .
"Q. So that the necessity for the quick take here is the City Law Department to basically make that determination?
A. Yes, I mean, the Baltimore Development Corporation does not tell the Law Department to do quick take. We tell them to proceed in a way they think most appropriate". E. 67.

According to Mr. Brodie, the quick take process was instituted after the Law Department was informed that "negotiations have failed" for the acquisition of the property. E. 72. He stated that there had been no significant change in the area since the eminent domain authority was authorized in 2004. E.73.

In response to questions about the use for the property envisioned by the plan, Mr. Brodie stated that there was a plan but that it called for a "spectrum of uses" in accordance with the mixed use concept. E. 68. He acknowledged that the City could not say the specific use proposed for the property beyond the mixed use concept. E. 69.

Mr. Burgee, the author of the affidavit, did not testify. E. 74

The Court issued a written decision 15 days after the hearing in which it denied the Petition for condemnation and the petition for immediate possession and title. E. 128

ARGUMENT

Introduction

The Maryland Constitution, Article XI-B, Section 1 provides that the General Assembly may authorizes the City of Baltimore to acquire land by eminent domain for "comprehensive renovation or rehabilitation" The General Assembly has implemented this by a public local law which appears as Article II, Section 15 of the Baltimore City Charter.

Article III, Section 40A, of the Maryland Constitution authorizes the General Assembly to enact legislation allowing Baltimore City to be take land before a jury award of damages if the estimated fair market value is paid into court. The General Assembly has enacted Section 16-21 of the Code of Public Local Laws for Baltimore City which authorizes the City of Baltimore to take property immediately, commonly called quick take, and establishes detailed and rigid procedures for the exercise of such taking.

Section 16-41 authorizes the filing of a complaint for immediate possession and title if it is accompanied by the estimated fair market value of the property and contains:

‘(a) petition under oath stating that it is necessary for the City to have immediate possession of, or immediate title to and possession of, said property, and the reasons therefore”. 21-16 (a)

It provides that upon the filing of a petition for possession, the court may direct notice to the parties which the court may deem proper, and set the matter in for hearing within seven days, or the court may act upon the petition ex parte. 21-16 (b). If it appears from the petition “that the public interest requires the City to have immediate possession”, then the court may hold a hearing or act ex parte, and issue an order granting possession to the City. The order issued by the court vests possession in the City thirty days after the filing of the petition, or earlier if ordered by the court. 21-16 (d). In this case, the order provided that possession vested the same day the order was signed, and no notice was given or hearing held. E. 169

Where the City files a complaint for immediate possession and title, title shall vest in the City within ten days after service on the owner; but if the owner files an answer contesting the right or power of the City to condemn the property, then title shall vest on the date of the court decision. The hearing must be held within 15 days of the date of filing the answer, and the hearing is “only for the purpose of contesting the right or power of the City to condemn title to the property”. The court must render its decision within 15 days of the hearing. Possession vests with the title unless it has vested earlier pursuant to 21-16 (d.). This process is contained in 21-16©.

In summary, the law addresses two areas, possession and title. It authorizes an order granting possession with or without a hearing; and it provides that title will vest unless the owner files an answer, which brings about a hearing, and thereafter the title vests following the hearing. The order granting possession is subject to be revised as a result of the hearing. For title, if no hearing is held, or if the hearing results in an order granting title, then this is a final determination of title. The subsequent jury trial is concerned solely with valuation.

There is an extraordinarily short time provided by 21-16 for the vesting of title. The petition is filed and then the owner has 10 days to file an answer; and the hearing is held within 15 days after the filing of an answer, or a total of 25 days. This is insufficient time for the normal discovery by interrogatories which is 30 days, Rule 2-421. A deposition may be taken within ten days notice, Rule 2-412, but in this case the full ten days notice was not given, and the court refused to shorten the time. Apx. 80.

The arguments which the owner makes follow from the quick take law and the procedures actually followed in this case. First, the City failed to meet the standard of the law contained in 21-16(a) , that the City did not state any reason why it was necessary to have <u>immediate</u> possession and title. Second, the City failed to demonstrate that the taking was for a public use consistent with Article XI-B of the Maryland Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. Third, the procedures for the quick take contained in 21-16 deny a fair hearing and therefore due process of law, especially the

limited time which does not allow discovery. Finally, the ex parte order entered here granted immediate possession to the City without any need to grant immediate possession on an ex parte basis.

I

THE CITY DID NOT DEMONSTRATE THE NECESSITY FOR IMMEDIATE POSSESSION AND TITLE

The quick take law, 21-16, requires the City to file a petition under oath stating:

"…(I)t is necessary for the City to have immediate possession of, or immediate title to and possession of, said property, and the reasons therefore". 21-16(a)

The court grants immediate possession if:

"…(I)t appears from a Petition for Immediate Possession, with or without supporting affidavits or sworn testimony, that the public interest requires the City to have immediate possession of said property, …". 21-16 (d).

It is crystal clear from these provisions that the General Assembly has not given the City discretion to seek quick take whenever it chooses but, instead, has reserved the exercise of quick take to situations where a necessity exists for immediate possession or title. The City claims it des not have the burden of proof but this is obviously not the case since the law requires the City to file a petition under oath containing the reason why it is necessary to acquire immediate possession and title. This is a condition placed upon the City by the General

Assembly in enacting the law and the City bears the burden of proof to show the condition has been satisified. The second paragraph of the City's petition for immediate possession and title alleged that it was necessary for the City to have immediate possession and title as appears from the Burgee affidavit. E. 163 The Owner's answer denied the necessity for immediate possession and title, stating that the reason stated in the Burgee affidavit was patently insufficient. E. 175 The issue was joined and the City, as the plaintiff, had the burden of proving the allegations of its very own petition.

After hearing from the City witnesses, the lower court ruled,

"The Plaintiff impassively assets that the Charles North Project will likely come to a temporary halt unless Plaintiff is awarded the property in interest immediately. The court, based upon all the evidence, is not satisfied that the Plaintiff has met its burden. The Plaintiff has failed to submit to the Court either a contract, a focused development plan as it pertains to the Property in Interest, or even a Request for Proposal (hereinafter "RFP"), supporting its contentions and establishing necessity under 21-16". E. 130

The plain language of 21-16 requires the City to demonstrate some necessity for immediate taking. That necessity has not been demonstrated here. The City could offer no evidence of any necessity to acquire the property by quick take as opposed to a regular condemnation. It is hard to see how the court could have reached any other conclusion. The affidavit claimed that immediate possession was necessary to assist in a business expansion in the area. Neither Mr.

Dombrowski nor Mr. Brodie could explain why the quick take condemnation was required, as opposed to a regular condemnation. The only real explanation they offered was that they placed it in the hands of the Law Department, which apparently made the decision to file the quick take. The urban renewal plan had been existence for 24 years at the time of the hearing, and the specific authority to acquire the property for two years. The record demonstrates that no real necessity for immediate possession and taking exists.

According to the extensive explanations given by the City attorney, the City filed the quick take because it had been unable to agree with the owner over a price; in the words of the City counsel, a "glitch in the system" made quick take necessary. E. 17. Quick take is a club the City can use to force a sale. The practice of the City—use quick take unless the owner agrees to sell—penalizes the Owner who wishes to contest the validity of the condemnation by a trial on the merits. If taking is contested, the trial must take place in the accelerated fashion, without any discovery. In other words, if someone asserts his or her constitutional right to private property, then the only trial on the validity of the taking issue will be the accelerated quick take trial with no discovery. This is inconsistent with the plain meaning of the statute. The General Assembly must have intended some substantive reason for the quick take when it provided that the petition be accompanied by an affidavit stating the reason for the necessity for immediate possession. All the City is saying here is, we have been unable to acquire the property through negotiation, therefore we are going to use quick take.

The quick take authority has been interpreted by several cases. City of Baltimore v. Kelso, 281 Md. 514, 518 (l977) quoted the language of the statute and held:

"These sections make clear that, unless the "right or power to condemn title" is challenged, if the city has complied with the procedural requirements of section 21-16 a property owner has no basis for attacking the immediate taking of his property under the statute."

The court in Kelso said that a quick take could only be challenged for "facial non-compliance with the statutory standards or lack of power to condemn". Kelso, 281 Md. 514 n. 4. In Segall v. City of Baltimore, 273 Md. 647 (l975), the Court of Appeals dismissed a challenge to a quick take by noting that an affidavit had been filed to the effect that all the other properties in the area had been acquired and that sale of the entire parcel could not be completed until the subject parcel had been acquired. In Kelso the Court stated the holding of Segall to be that where the petition contains a statement of the reasons for the necessity for immediate possession, the Court "will make no further inquiry". Kelso, 281 Md. 514 n. 5.

Here the City has not complied with the procedural requirements of the statute. The statute says the City must file an affidavit stating the reason for the immediate possession and title. The affidavit did not even superficially meet the test of establishing a reason for the necessity for immediate possession and title—to assist in a business expansion in the area is patently not a statement of necessity for immediate possession. As explained by the witnesses, the reason for taking the property was simply to continue with the eminent domain program. Mr.

Dombrowski said the affidavit meant nothing more than the taking was necessary to provide for business expansion in the area. This is not a statement of any immediate need. Moreover the witnesses Dombrowski and Brodie were unable to give any reason for immediate possession and title and simply said that they had referred the matter to the City Law Department.

So the procedural requirements of the statute have not been met—there has not been a statement of any reason for immediate possession and title.

There is a second reason why the Owner here was entitled to a ruling that the test of the statute had not been met. Even if 21-16 could be read as stating that the hearing shall be concerned solely with the underlying right to take, as opposed to the right to do a quick take, there is a well established rule that where a unit of government makes a decision according to fact specific standards, and legal consequences ensue, a person affected is entitled to judicial review of this decision. There were at least two such decisions here. First was the decision of the City to seek quick take for the purported reason that a "necessity" existed for "immediate' possession and title. The second decision was the decision by the court which entered an order on March 15, 2006 vesting possession in the City even before the Owner had been served. The authority for this decision was 21-16 which authorizes the entry of such an order if it appears that the public interest requires the City to have immediate possession. 21-16 (d). These were not decisions made by a body exercising legislative powers since the urban renewal plan, which does qualify as legislation, does not address the means of acquisition,

whether by a regular condemnation or by quick take. Instead the decision to acquire by quick take was made by administrative officials of the City.

Under basic principles of law, there must be a way to challenge the right to a quick take. The quick take action is one of the most serious actions a government can undertake. As discussed in Part III below, it results in a vastly accelerated hearing without the normal safeguards such as the right to discovery. It normally results in the removal of the owner from the premises before the trial on damages, thus eliminating the ability of the owner to show the jury the use of the property as a functioning property. The situation is even more egregious here since the Court entered an order, ex parte, granting possession the date the action was filed, without any notice to the owner of any sort. This order granting possession was of course a taking of property in itself.

Where constitutional rights are involved, there has to be a way to challenge governmental action as a matter of fundamental due process. Bucktail v. Talbot County, 352 Md. 530 (l999); Gisriel v. Ocean City Board of Supervisors, 345 Md. 477 (l997); Criminal Injuries Compensation Board v. Gould, 273 Md. 486 (l975); Heaps v. Cobb, 185 Md. 372 (l945). Gould is most notable for establishing the right to judicial review even where the statute made it explicitly clear that no such review was intended. Gould held at 273 Md. 500:

"…(T)his Court, in a long line of cases, has consistently held that the Legislature cannot divest the courts of the inherent power they possess to review and correct actions by an administrative agency which are arbitrary, illegal, capricious or unreasonable".

Here the General Assembly clearly provided that the exercise of quick take was dependent upon a necessity for immediate action. The Owner is entitled to the benefit of this restriction, that if no immediate need exists, that quick take cannot be used to take his property since, at a minimum, it denies him discovery and adequate time to prepare. But despite the filing of an affidavit and producing the testimony of two witnesses, the City could not suggest a reason why the quick take process was necessary as opposed to a normal condemnation. To rest the necessity for immediate possession and title upon assisting a business expansion is to state no reason at all. If this was a statement of necessity for immediate possession and title, then any reason at all would suffice. The General Assembly meant something when it required the statement to be under oath and include the reasons for the immediate need. The asserted reason was truly arbitrary and capricious in so far as it purported to be a statement of necessity for immediate possession and title. The City's position is that it is under no obligation to establish the necessity for immediate taking. This is contrary to the plain language of the statute which establishes the duty by requiring the affidavit stating the reasons for the necessity for immediate possession and title.

II

THE TAKING WAS NOT FOR A PUBLIC USE AND IN COMPLIANCE WITH THE CITY CODE

The decision of the lower court denied the petition for condemnation. E. 131 The law, 21-16, directs that the hearing be on the issue whether there is a right

to take. 21-16 ©. Most of the City's Brief is devoted to establishing the right to take. Thus this issue is properly before the Court. A quick take hearing is necessarily concerned with the right to take since it results in the loss of title and possession.

The City rests on the legal principle that the enactment of an urban renewal plan establishes the legislative authority for the acquisition by condemnation of properties identified in the plan. City Brief, pp.6-7. The ordinary rule is that the City may rest on the validity of the urban renewal plan to prove the public purpose. Herzinger v. City of Baltimore, 203 Md. 49 (l953). The testimony below was that it was necessary to condemn the subject property in order to carry out the urban renewal plan by redeveloping the area. There is authority in the law to condemn properties which are so deteriorated that they present a "serious and growing menace" to the public health. Baltimore City Code, Article 13, Section 2-7 (h). The exercise of authority for this purpose was upheld in Free State Realty v. City of Baltimore, 279 Md. 550 (l977). There the testimony was that the property was vacant, there were broken windows and doors, rubbish and debris inside, and the grounds unsanitary.

Here the record contains no evidence as to the condition of the property, and the point of the condemnation is to bring about a redevelopment of the area. As stated on multiple occasions in the City's Brief, pp. 4,9,16, the purpose is economic development. In other words, the public purpose is not so much the removal of the Magnet bar as it is the redevelopment of the entire area.

If the purpose is redevelopment, the question then becomes, to what? What is the public use?

LACK OF PLAN

PUBLIC PURPOSE BY RFP

The flaw in the City's assertion that an urban renewal taking can rest on the existence of the City urban renewal plan is the fact that the lower court made an express finding that no plan existed. The record demonstrates that the taking here was not pursuant to a plan, but instead the plan will be determined by the issuance of an RFP and the selection of a developer. This is "RFP Condemnation"—a totally different breed of pragmatic redevelopment: condemnation without a plan and without constitutional underpinnings where private property is taken from the owner without articulating a public use or purpose and later conveyed for development by a private party who submits an acceptable proposal in response to the City's RFP. The stated reason is economic development, to assist in a business expansion in the area. This procedure does not meet public use standards of the Federal Constitution or the requirements of the Baltimore City Code.

The two City witnesses both confirmed that no plan existed for the development of the property or of the area in general. This was stated unequivocally by the witness Dombrowski. The witness Brodie was somewhat more guarded. He noted that there was an urban renewal plan and that the urban renewal plan is "as specific as most urban renewal plans are at that point in time". E. 68. If one examines the actual plan which is in the record, one easily sees that

it is not specific. The general land use categories are office-residential, community business, community commercial and central commercial, and industrial. E.193-194. These use districts permit the uses allowed in the zoning districts having the same name. The subject property is in central commercial, E.207, which allows all the uses permitted by the City' B-5 zoning district, the most intensive zoning district in the City. The texts of the B-2--B-5 zoning districts are contained in the appendix and they allow an incredible variety of residential, office and commercial facilities, along with public uses and uses like parking. Baltimore City Zoning Regulations 6-301—6-615, Apx. 35-66. No witness could state what will even be the generalized use of the property or of the area beyond the description of "mixed use". The property may be the site for a high rise residential or office tower, public facilities, parking, or even a tavern package -goods store exactly the same as exists now.

As both Mr. Dombrowski and Mr. Brodie noted, the actual development plan will come through the issuance of a request for proposals and the response to that request. A specific plan for the area would be selected when developers responded to the RFP. E. 49.

The lower court heard this testimony and no doubt examined the urban renewal plan which was introduced as evidence. It concluded that there was no plan:

"The Supreme Court in Kelo v. City of New London, Connecticut, 125 S. Ct. 2655, held that not only will economic development qualify as 'public use' for the purposes of eminent domain, but that given a "carefully considered

development plan", a plan that is comprehensive in nature and one that was preceded by thorough deliberation, a city's taking of private property will comport with the demands of the Fifth Amendment. In applying the holdings of Kelo, this court is not satisfied that the plaintiff has demonstrated the necessity of the taking pursuant to any specifically outlined plan or contract, or as called for by Section 21-16 of the Public Local Laws of Baltimore City." E. 130

Again it is difficult to see how the Court could have reached any other conclusion. The City witness most familiar with the planning for the project, Paul Dombrowski, insisted there was no plan for the site or the area. Jay Brodie said the plan was as specific as any other urban renewal plan. The urban renewal plan is so general that it is impossible to say what use is required—another flaw in RFP condemnation.

The Court of Appeals has upheld the acquisition of property pursuant to urban renewal plans as consistent with the public use standards of the Fifth and Fourteenth Amendments. See Master Royalties v. Baltimore City, 235 Md. 74, 88 (l964):

"We think the requirement of a public purpose for the exercise of the power of eminent domain which the Due Process Clause of the Fourteenth Amendment imposes upon the State is no more rigorous than the requirement of public use imposed by the Fifth Amendment upon the Federal Government's exercise of the power of eminent domain. Berman v. Parker, 348 U.S. 26 (decided about a year after our Herzinger case) seems to us to be controlling as showing that a taking in furtherance of a genuine urban renewal plan dealing with problems similar to those existing in the instant case, is a taking for a public purpose".

The City performs urban renewal according to detailed enabling authority contained in the City Code and is required to act according to that authority. Herzinger v. City of Baltimore, 203 Md. 49, 62 (l953), which held that the City's

urban renewal efforts are limited by the standards set out in the City Code. A basic feature of the City Code is that the urban renewal program be guided by a plan which is described as follows:

"The plan shall include a land use map showing the proposed use of all land within the area to which the plan is applicable, including the location, character, and extent of the proposed public and private ownership". Baltimore City Code, Article 13, Section 2-5 (b)(2) (2006).

Development projects are required to follow the renewal plan:

"No Renewal Project or Conservation Project shall be undertaken by the Department of Housing and Community Development except in accordance with the Renewal or Conservation Plan applicable to the area in which the project is to be undertaken". Baltimore City Code, Article 13, Section 2-5 (a)(2006).

The decision in Kelo is highly instructive on the importance of the plan. The plan in that case set out with specificity the uses for all 115 privately owned parcels. The plans included a waterfront hotel, a small village for restaurants and shopping, marinas, a riverwalk, approximately 80 new residences, 90,000 sf of research and office space, and a park and parking. Kelo, 125 S.Ct. 2659. The contrast with the total absence of any specificity in the instant case could not be more striking. Based on this record, the lower court determined that the Kelo condemnations were being conducted according to a "carefully considered development plan", Kelo, 125 S.Ct. 2661.The existence of the plan was relied on heavily by Justice Kennedy in his concurring opinion,125 S. Ct. 2670, and discussed at length by Justice O'Connor as well in her dissent, 125 S. Ct. 2676. The forerunner of Kelo was Berman v. Parker, 348 U.S. 26 (l954), which upheld a

massive redevelopment plan which promised to not only remove slums but to create a beautiful community as well.

The existence of a plan is the means by which it is assured that the exercise of eminent domain is for a genuine public use and not simply taking property from A to give it to B. It has "long been accepted" that government may not "take the property of A for the sole purpose of transferring it to another private party B". Kelo v. City of New London, 125 S. Ct. 2655, 2657 (2005). The same principle is expressed in the definitive Maryland case, Prince George's County v. Collington Crossroads, 275 Md. 171, 188 (l975) that a taking is unconstitutional where "the predominant purpose or effect of a particular condemnation action has been to benefit private interests".

In other words, the plan is not simply window dressing but is the means to achieve an important constitutional principle—that the eminent domain be for a genuine public use and not simply a transfer of property among various owners. It is not simply that there be a plan but that there be assurance that the project would be carried out according to the plan. In Kelo the court stated,

"Notably, as in the instant case, the private developers in Berman were required by contract to use the property to carry out the redevelopment plan. See 348 U.S., at 30". Kelo, 545 U.S. --- n. 15.

This same standard is expressed in the City Code which requires the plan to contain the nature of the restrictions and covenants which are to be incorporated

in deeds when the property is disposed of. Baltimore City Code, Article 13, Section 2-5 (b)(5).

These principles no doubt animated the City Council when it enacted the enabling legislation prescribing that urban renewal be conducted according to a plan which showed the "proposed use of all land" including the "location, character, and extent of the proposed public and private ownership". Baltimore City Code, Article 13, Section 2-5 (b)(2). In Berman, Kelo and Collington Crossroads, such plans existed. In Collington, the eminent domain was for a carefully designed industrial park of some 17 00 acres. The planning was so far advanced that it was possible to estimate the number of workers and the tax benefits. Another landmark Maryland case was Marchant v. Baltimore, 146 Md. 513 (l924). It was based on a comprehensive plan for harbor development, including wharves, piers, docks, warehouses, and the rental of those facilities to private users. In the past many of the City projects, like the Inner Harbor, have been prepared pursuant to detailed plans. See Martin L. Millspaugh, The Inner Harbor Story, Urban Land, April 2003, at 36. Mr. Millspaugh's article makes clear that the Inner Harbor did not come about through the RFP process of soliciting proposals from developers, but instead through a specific development plan for individual parcels. But as the lower court found here, no such "focused development plan" was presented by the City in the witnesses and documents it produced. E. 130. Mr. Brodie derided the concept of specific plans as being outdated and not consistent with current planning concepts. E. 69 This may be a

case where the statutory authority expressed in the City Code has not been updated. Be that as it may, it is the existing language of the City Code which governs, outdated though it may be.

THE SUBSTITUTE –RFP CONDEMNATION

The problem with the City's position is that it comes down to a plea to "trust us". Paul Dombrowski described an elaborate process including community input leading up to a selection of "which plan seems most appropriate". E.50. No doubt the City officials strive to protect the public interest in this process, but there is no assurance. At the time the eminent domain is accomplished, all this is off in the future. No one can say what the use will be, or indeed whether there will be any use at all. This is a critical failure of RFP Condemnation.

This is the answer to the basic claim of the City, that it has the right to rest on the urban renewal plan as establishing the right to take. Here the public purpose has been in doubt from the beginning. The stated purpose is to assist in a business expansion in the area, asserted in the City's affidavit and repeated in the City's Brief. It turned out through the testimony that there was no particular business expansion but instead this would come about through the RFP process. Legal rights, especially such an important right as the ownership of property, cannot be determined by labels. It is not enough to say that the urban renewal plan provides for the acquisition of the property. Despite having ample opportunity to do so, the City was unable to demonstrate that any real plan existed, and so the lower court found. Kelo and Collington Crossroads are economic development

cases, Berman and the subject case are cases based upon the urban renewal power. In Kelo the court found the existence of the plan as a necessary component to sustain a taking for economic development, a plan of similar character existed in the landmark Maryland decision, Collington Crossroads. Here the requirement for the plan is found also in the detailed prescription of the Baltimore City Code. It doesn't make any difference where the requirement emanates from, the principle and result are the same. That is, property may not be taken unless the government has adopted a specific plan which assures that the use will truly be consistent with the public use doctrine and that the exercise is not simply a means to take property form one private owner to transfer to another. This principle is exceedingly important in this case where the stated purpose of the taking is economic development. The exercise of the police power does not need the specificity needed for the exercise of eminent domain. In a particular zoning district, a wide variety of uses are allowed to be conducted by private owners. But here we have an entirely different situation. Here the government is taking the property for the stated purpose of redevelopment but without any assurance as to what that purpose is beyond "redevelopment". It follows that the taking here was not authorized because the public use was not demonstrated. It is true that normally the validity of a taking can rest on the existence of an urban renewal plan. But here it is evident from the record, and found by the lower court, that the plan does not exist. Constitutional rights cannot be determined by labels even if RFP condemnation has become a popular and pragmatic tool used by the City.

III

THE PROCEDURES CONTAINED IN SECTION 21-16, INCLUDING THE DENIAL OF DISCOVERY, DENIED THE OWNER DUE PROCESSS OF LAW

These issues were raised below and the court ruled on them finding that 21-16 comports with the due process standards. E. 129. Since the matter was heard and decided by the court, it is possible to affirm the decision of the lower court on grounds other than stated by the court.

The public local law, 21-16, mandates a trial within 25 days of being served. This is not sufficient time to allow for discovery and to prepare a case on the right of quick take and the right of condemnation. The owner moved to shorten the time for discovery, the City opposed the motion, and the motion was denied. No discovery took place. Over the Owner's objection, witnesses were allowed to testify as to matters which were sought to be discovered. The very first interrogatory, for example, asked for the reason for the immediate taking. Apx. 75. The ninth interrogatory asked what was the public use for which the property was being condemned. Apx. 76. The owner sought to depose Mr. Dombrowski, Apx. 70, but he was allowed to testify, over the owner's objection, without the Owner having had the opportunity to depose him.

Beyond the lack of discovery, the accelerated time period is simply too short to prepare for a trial. The court recently noted that where property is taken to transfer from one owner to another private party, there is a need for a heightened

attention to compliance with safeguards. City of Baltimore Development Corporation v. Carmel Realty Associates, et al (Court of Appeals, No. 14, November 3, 2006, p. 13.). The seminal Maryland case involving a taking for economic development involved extensive testimony and exhibits, Prince George's County v. Collington Crossroads, 275 Md. 171 (l975), as did the recent Supreme Court case on economic takings, Kelo v. City of New London, supra.

The Court of Appeals has held that while the quick take process is constitutionally permissible, it cannot eliminate constitutional safeguards applicable to normal condemnations. In King v. State Roads Commission, 298 Md. 80 (l983), the court held that an owner in a quick take case is entitled to a realistic rate of interest even if that rate exceeds the amount prescribed by statute. In Bern Shaw Ltd. v. City of Baltimore, 377 Md. 277 (2003) the Court held that a prejudicial view should not take place where the condition of the property had changed following the quick take. This was true even though the applicable rule mandated a view.

The constitutional principle which emerges is that the owner cannot be prejudiced by the quick take. Here the owner was most certainly prejudiced—he was forced to go to trial without the benefit of discovery, within 25 days. In an ordinary condemnation trial, discovery exists.

Rule 12-206 provides for discovery in condemnation cases:

(a) Generally. Except as otherwise provided in this rule, discovery in actions for condemnation shall be conducted pursuant to Chapter 400 of Title 2 these Rules."

This court has held that rules have the force of law and they replace inconsistent legislative provisions. Hauver v. Dorsey, 228 Md. 449 (l962). Since the Owner had a right to discovery, it follows that the court committed legal error in allowing the City to put on its case and call witnesses when it had not complied with discovery.

Beyond the discovery issue, there is the issue of going to trial within 25 days of being served, having only 10 days to file an answer, etc. As the comprehensive decisions in Kelo and Collington Crossroads demonstrate, eminent domain cases raise very serious, fact based issues based upon the constitutional right of private property. In the absence of some compelling reason, it is hard to see how such extremely short time limits are justified. The holdings of King and Bern Shaw, supra, are grounded on the constitutional rights of the owner. While these cases were directed to the compensation portion of the eminent domain trial, just as compelling constitutional rights exist in the right to take portion of the eminent domain trial. Reflect for a moment on the burden placed on the owner who must answer within 10 days and then try the case within 15 days thereafter. Compare this to the normal case where an owner has 30 days to answer and at least several months to prepare for trial. There is a stark difference in the treatment given these two situations. Yet the trial is over the very same issue, the right to

condemn, and the necessity for time to prepare exists in both cases. The difficulty with 21-16 is that is cast in mandatory language and allows no time for the case which requires more time. In this particular case, it was awkward in the extreme for the owner to face witnesses whom it sought unsuccessfully to depose, to counter testimony which it sought unsuccessfully to discover before trial. The procedure contained in 21-16 would not survive scrutiny in a case dealing with an insignificant matter; for a case dealing with the seizure of private property under the coercive power of eminent domain, it is just fundamentally inadequate and a denial of due process.

IV

THERE WAS NO NEED TO ENTER THE EX PARTE ORDER GRANTING POSSESSION

The Court entered an ex parte order, without any notice to the Owner and an opportunity to be heard, on March 15, 2006, granting the City possession as of that date. This is allowed by the quick take statute, 21-16 (b), 21-16 (d). Thus when the trial took place on April 18, 2006, the City already had the right of possession.

Normally property cannot be seized without notice and an opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67 (l972). Portions of Maryland's mechanics lien law were held unconstitutional for this reason, Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15 (l976). The City quick take law does provide for a hearing after the order granting possession but this does obviate the fact that the

order granting possession may be entered without any notice to the owner at all, and this is what happened in this case. The pleadings show on their face that they were served upon the undersigned counsel who had obviously previously agreed to accept service on behalf of the owners. This attorney could have been easily notified to attend a hearing as happens routinely when temporary restraining orders (TRO's) are sought under Rule 15-504 (b) of the Maryland Rules.

The controlling case is a decision of a three judge district court, affirmed by the Supreme Court, Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Texas, l974), aff'd, 419 U.S. 1042 (l974). There exactly the same claim was made, that the order granting possession could be entered without any adjudication of the right to take the property. The court held it constitutional because in Texas there was a procedure where a condemnation matter is initiated by filing a petition and the appointment of commissioners to assess damages. The owner has the right to notice and participate. After the assessment of damages by the commissioners, then an award of possession may be given, before an adjudication of the right to take. 380 F. Supp. 766-767. While the order granting possession did come before the adjudication of the right to take, still the owner had notice of the condemnation proceeding and the right to institute an independent suit to adjudicate the right to take before possession was awarded. The court found at 380 F. Supp. 772:

"By this procedure, therefore, property owners receive the relief they request—judicial review of the propriety of condemnation before a loss of the right of possession under Article 3268".

No such procedure exists in Maryland. In Texas, obviously, the owner had ample time to institute the separate suit to assess the right to take because it had notice of the pendency of the proceeding to determine damages.. Here no such proceeding exists. The statute requires the order to be entered within seven days of the filing of the petition, obviously insufficient time to institute a separate suit and obtain a determination on that suit. Joiner is described as the leading case according to Nichols on Eminent Domain, Section 2A.01 (2) (2005). The most recent Supreme Court case on notice is Jones v. Flowers, 547 U.S. --- (2006) which invalidated a tax sale of property after two certified letters came back unclaimed and the State made no further efforts to achieve actual notice.

The statute gives discretion to the court as to when the possession order takes effect. The court must act on the order within seven days of filing the petition, but it may or may not hold a hearing, and it may provide that the city may take possession 30 days after the filing of the petition or earlier in the court's discretion. Here the court granted the right of possession immediately and no effort was made to contact the Owner or his attorney.

Here there was no need to enter an ex parte order granting possession. The only reason stated on the face of the documents was to assist in a business expansion in the area. This is an inadequate reason for dispensing with the rights of notice and hearing. In Barry Properties, supra at 277 Md. 32-33, the Court of Appeals held:

"Although the Supreme Court has permitted prejudgment seizures of property without notice or a prior hearing or other safeguards, the court has only permitted it in extraordinary circumstances in which:

"First, ….the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action…. ". Fuentes v. Shevin, supra, 407 U.S. at 91".

Applying these principles to the facts of this case, there was absolutely no need, on the face of the documents, to issue an order granting immediate possession. The need to assist in a business expansion in the area is hardly sufficient necessity—a "special need for very prompt action", to use the language quoted above.

In short, the procedures followed here violated due process—the public interest did not require immediate possession for a business expansion. That is the test of the statute—whether the public interest requires immediate possession. The order should have provided that the matter would be decided at the hearing. There was no need for an order without notice or a hearing granting immediate possession. The lower court was without any direction in the statute of standards to follow. It may be that immediate possession is required by emergency situations but this was not an emergency situation. This accelerated process when taken in conjunction with an RFP Condemnation does the owner a double injustice – it prevents him from taking discovery to challenge the City's right to take his property without a plan or a public purpose.

The Owner submits that the lower court acted improperly when it found that the "public interest" requires immediate possession. If the statute does not contain adequate standards to guide the issuance of orders granting immediate possession, then the statute is invalid.

The harm to owners is severe. It is apparently common practice that the City obtains an order granting immediate possession upon the filing of the petition. The city has acquired immediate possession even before the owner has an opportunity to answer. It is an ominous treatment of constitutional rights.

CONCLUSION

There is a common threat which runs through all four arguments. Quick take is an extraordinary exercise of governmental power. The General Assembly confined it to situations where the City could make an affidavit that a necessity for immediate need existed. Here we do not have a building threatening to collapse on the street or presenting some other type of emergency. Instead the purpose is redevelopment. But that purpose is in doubt because of the nature of the procedures which the City follows. There is an inherent conflict between the noble purpose expressed in the Constitutional restrictions on the taking of private property except for public use and the idea that this use will be determined by the issuance of an RFP for developers to respond—the RFP condemnation. If the City cannot even identify the public use, then there has to be a doubt why it is necessary to acquire the property at all. Plainly there is no real guarantee that a public use will be achieved. In both cases, the quick take and the taking itself,

there is a lack of compelling necessity, as expressed by the lower court. The draconian quick take procedures might be necessary for certain situations, but their necessity in this case is not apparent.

The Owner asks that the decision of the Circuit Court for Baltimore City be affirmed.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this _____day of _____, I mailed a copy of the foregoing brief to Elva E. Tillman, Principal Counsel, City Law Department, City Hall, Baltimore, Md. 21202.

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