IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2006
No. 55

MAYOR AND CITY COUNCIL OF BALTIMORE,
Petitioner,

v.

GEORGE VALSAMAKI, et al.,
Respondents.

Appeal from the Circuit Court for Baltimore City
(John Phillip Miller, Judge)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

THOMAS A. BOWDEN, *Counsel of Record*
Kollman & Saucier, P.A.
The Business Law Building
1823 York Road
Timonium, MD 21093
Telephone: (410) 727-4300
Facsimile: (410) 727-4391

TIMOTHY SANDEFUR, *Of Counsel*
Cal. Bar. No. 224436
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae Pacific Legal Foundation

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INTRODUCTION AND SUMMARY OF ARGUMENT

Baltimore Public Law title 4, section 21-16, is a typical "quick take" provision that allows the government to take immediate possession of private property that is subjected to an eminent domain proceeding, by providing the court with an affidavit "stating that it is necessary for the City to have immediate possession" and giving "the reasons" for such necessity. Similar "quick take" provisions appear in the laws of many states. These provisions are intended to allow government to act in emergencies when the normal legal proceedings attending a condemnation are too slow or too cumbersome. Unfortunately, government agencies often exploit these provisions to take property in the fastest way possible, even where no genuine urgency appears. This imposes serious harms on property owners, and employs what ought to be a rarely used emergency power for cases where it is not justified. In this case, the trial court found that the City's recitation of an economic hardship caused by following the normal legal procedures was not enough to justify the emergency "quick take" procedure. That holding was correct and ought to be affirmed.

ARGUMENT

I

QUICK-TAKE PROCEDURES SHOULD BE RESERVED FOR CASES WHERE THERE IS GENUINE URGENCY TO TAKE IMMEDIATE POSSESSION OF PROPERTY

The "quick take" provision of section 21-16 is a typical example of the quick take provisions found in the laws of many states. These provisions were adopted after "urgent public transportation, communication and urban renewal projects . . . illustrated the many

inadequacies in the traditional [eminent domain] procedures." 6 Julius L. Sackman, *Nichols on Eminent Domain* § 24.10[2] (3d ed. 2002). But while in urgent cases, such proceedings may be warranted, their overuse presents a serious threat both to the security of property rights and to the security of the due process rights of affected owners. *See generally* Nicole Stelle Garnett, *The Public-Use Question As a Takings Problem*, 71 Geo. Wash. L. Rev. 934, 970-74 (2003).

As Prof. Garnett points out, the law generally requires that the government accord a property owner a pre-deprivation opportunity to challenge the taking of property. *Id.* at 973. Only where such a process is not feasible is a post-deprivation procedure allowed. *See*, *e.g.*, *Parratt v. Taylor*, 451 U.S. 527, 541 (1981). Some sort of genuine urgency is necessary before the government can justify dispensing with a pre-deprivation remedy, and offering a post-deprivation procedure instead. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But where no exigent circumstances exist, normal legal procedures ought to be followed.

Although this Court has not specifically addressed the question, it did reject an attempt by government to use a similar emergency procedure in *J.L. Matthews, Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71 (2002). There, the government sought an injunction to preserve property in a certain condition before taking it through eminent domain. The Court, in denying this attempt, noted that an earlier case had recognized the legitimacy of such a procedure under certain rare circumstances. *See id.* at 100 (quoting *Wash. Suburban Sanitary Comm'n v. Nash*, 284 Md. 376, 383 n.5 (1979)). But in *J.L. Matthews*, the Court found that the government could not use this procedure in

the absence of "extraordinary or exceptional circumstances." 368 Md. at 102. Such circumstances, moreover, would have to be demonstrated with "specificity." *Id.* at 104—not through general allegations that the lack of an injunction might impede the government's plans. The Court concluded that "[a] condemning authority *is not entitled to utilize injunctive relief as a means of preserving its financial valuation of private property.* To permit otherwise in a typical condemnation case, such as the present one, would wholly circumvent the Legislature's 'precise scheme for the acquisition of land.'" *Id.* (quoting *Nash*, 284 Md. at 382) (emphasis added). Yet that is precisely what the City is attempting here: it has offered only general statements to the effect that the Charles North Project might be halted pending a regular hearing on the condemnation—and therefore that a quick-take is necessary to preserve the financial value of the project. These are not acceptable grounds for the extraordinary procedure of a quick-take.

Addressing the issue specifically, Illinois courts repeatedly have held that "a quick-take motion will not be granted if the condemnor fails to demonstrate the statutory requirement of immediate need." *City of Chicago v. First Bank of Oak Park*, 533 N.E.2d 424, 427 (Ill. App. Ct. 1988) (citing *Dep't of Pub. Works & Bldgs. v. Neace*, 301 N.E.2d 509 (Ill. App. Ct. 1973). *See also Dep't of Transp. of the State of Illinois v. VIP Manor, Inc.*, 453 N.E.2d 44 (Ill. App. Ct. 1983). In *Dep't of Pub. Works & Bldgs. for and in Behalf of the People of the State of Illinois v. Vogt*, 366 N.E.2d 310 (Ill. App. Ct. 1977), *app. dismissed as moot sub nom. Dep't of Transp. v. Schien*, 381 N.E.2d 241 (Ill. 1978), the Illinois Court of Appeals held that "it is an abuse of power for a condemning authority to 'quick take'

property under the pretense of imminent necessity when there exists only some possibility of need at an indefinite future date." *Id.* at 316. In that case, the condemning authority used a quick take proceeding in 1971 to seize land for a construction project that then did not proceed. Five years later, title still had not transferred, and the project still had not gone forward, so the property owner moved that the court return the property. The court agreed. The quick take procedure, the court noted, "involves a unique process" which allows the government to take possession of land only when "the time element is . . . an extremely important factor." *Id.* at 314. It was "not intended to deprive property owners of a method of challenging questionable practices." *Id.* at 316.

Minnesota courts have found that quick-take procedures may not be used in cases where there is no urgency requiring resort to emergency proceedings. *See Coop. Power Ass'n v. Eaton*, 284 N.W.2d 395, 398 (Minn. 1979) ("[A]ppellants claim that respondents do not 'require' the requested easements prior to the time a damage award could be filed by court-appointed commissioners. Since this issue is disputed, the parties may present evidence at the hearing in support of their respective positions."). Legislative authorities have broad discretion in their decisions to use eminent domain, but "where the legislature itself chooses to limit the municipality's exercise of eminent domain by requiring some finding of necessity, a court may review that finding to determine it was justified on the facts." *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 396 (Minn. 1980). In addition, the Alaska Supreme Court has suggested that the use of quick-take proceedings in the absence of an immediate need for the property would be an abuse of process. *See 22,757 Sq. Ft.,*

More or Less v. State of Alaska, 799 P.2d 777, 778 (Alaska 1990) ("The state seized immediate possession of the property despite Walton's later admission that the state had no immediate need for the property . . . . This admission constitutes some evidence that appellate review might have been successful.").

The quick-take proceeding is a highly controversial scheme in Maryland, which the voters have resisted granting to their public officials. *See J.L. Matthews, Inc.*, 368 Md. at 97 ("[C]ondemning authorities interested in obtaining 'quick-take' authority consistently have been denied that objective by the voters."). This Court should regard the authority with similar skepticism. Government agencies should be required strictly to adhere to normal procedures in all but exceptional circumstances, and to demonstrate a genuine urgency before using quick-take procedures.

II

THE ABUSE OF QUICK-TAKE PROCEDURE CAUSES SERIOUS AND NON-COMPENSABLE INJURIES TO PROPERTY OWNERS

Quick-take procedures short-circuit the usual course of eminent domain proceedings by allowing government to take possession of land before addressing whether the taking is justified in the first place. As Prof. Garnett has explained, Garnett, *supra*, at 970, "the lack of a predeprivation opportunity to litigate the legitimacy of a condemnation may impose additional uncompensated losses on property owners." There are at least three reasons why the exploitation of quick-take procedures harms property owners and should not be permitted in the absence of genuine urgency.

First, once government takes possession of property through a quick-take procedure, it will begin to use that property, or to destroy it, thus rendering pointless any opportunity the owner might have to challenge the taking afterwards. "If the government avails itself to quick-take procedures, a postdeprivation determination that its actions were illegal may come too late." *Id.* at 971. This concern is particularly acute in a case where the condemnation is intended to serve, not a public road or an emergency need, but a controversial "public use" in the form of urban renewal and economic development. The United States Supreme Court recently held that although legislatures have "broad latitude" in choosing when to use eminent domain, *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 2664 (2005), condemnations which "benefit a particular class of identifiable individuals" are still forbidden by the Public Use Clause of the Federal Constitution. *Id.* at 2662. *See also id.* at 2661 ("[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."). Thus it is possible that the condemnation of property for an urban renewal or economic development project will be held unconstitutional. But when property is taken through a quick-take proceeding, such a finding may be of no use to a property owner whose home or business has been destroyed in the interim.

Second, "quick-take procedures may reduce the administrative costs associated with a condemnation, eroding any deterrent effect that such costs have on the government's acquisition of property." Garnett, *supra*, at 971. By streamlining the procedure for seizing land, abuse of the quick-take procedure makes the judicial process unjustly simple for

government and difficult for property owners. The owner must await an ultimate trial on the merits, while the government is free to enter the property and use it—possibly generating income to the government. This inequality increases the government to exploit the quick-take procedure and, ultimately, encourages the use of eminent domain in ways that may not be proper.

Finally, "the 'quickness' of a quick-take procedure may preclude the effective exercise of 'voice' by affected property owners and their sympathizers." *Id.* In the past year, the use of eminent domain for urban renewal and redevelopment has become an increasingly controversial issue. *See generally* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 Mich. St. L. Rev. ____ (forthcoming).[1] In the November elections, voters in 9 states approved new restrictions on the use of eminent domain, in overwhelming numbers. *See Lexington: An American's Home Is Still Her Castle*, The Economist, Nov. 25, 2006, *available at* 2006 WLNR 20520851. Average citizens are increasingly engaging in political activity in opposition to the taking of their land through eminent domain. For example, in 2004, residents of Lakewood, Ohio, rallied in opposition to that city's use of eminent domain for an economic development project and, in a referendum, overturned the city's decision to take the property. *See* Steven Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* 12-18 (2004).

[1] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=868539 (last visited Dec. 5, 2006).

In the wake of *Kelo*, such political activism is the only route left for many property owners who wish to stop government from taking their property. But political activism takes time to organize. By streamlining the condemnation process, the abuse of quick-take procedures short-circuits the citizens' ability to rally in opposition to the government's plans. This is troubling in a democratic society in which the people's voice ought to be heard. As this Court recently declared: "[W]hen one is forced to convey his or her property to a public entity it is in contravention, albeit alleviated by compensation and thus permitted, of a constitutional right and, seemingly, such proceedings should be even more open to public scrutiny." *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*, No. 14, Sept. Term, 2006, 2006 WL 3104641, at *6 (Md. Ct. App. Nov. 3, 2006). Allowing government to abuse the quick-take procedure by seizing property immediately without a clear showing of an urgent need prevents such public scrutiny by making it more difficult for the people to organize and protest takings they oppose.

III

THE STATUTORY LANGUAGE OF SECTION 21-16 REQUIRES MORE THAN A PRO-FORMA DECLARATION OF NECESSITY

"Quick take offers less protection to property owners than possession after judgment . . . [and therefore] should be construed 'to make it effectual in the protection of the rights of the citizen.'" *Johnson v. Wells County Water Res. Bd.*, 410 N.W.2d 525, 529 (N.D. 1987) (citations omitted). The quick take mechanism was designed as an emergency measure for exceptional cases in which the taking of land through eminent domain was

immediately necessary. Extraordinary circumstances might authorize the use of such a procedure, *see*, *e.g.*, *King v. State Roads Comm'n of the State Highway Admin.*, 298 Md. 80, 87 (1983) (allowing "immediate possession of property needed for State highway purposes"). But it should not be exploited in a way that deprives property owners of a pre-deprivation opportunity to be heard—and deprives the citizenry of the opportunity to mobilize politically. Allowing an affidavit to satisfy the section 21-16(a) requirement by containing a mere *ipse dixit* recitation of urgency would render that requirement an exercise in boiler-plate, and nothing more. This would render nugatory the term "necessary" in section 21-16(a), as well as the requirement that the affidavit state "the reasons" for resorting to quick take. But "[i]t is a well settled canon of statutory construction that we should, when interpreting a statute, give effect to all of the language and avoid a construction that renders any portion superfluous." *Stanley v. State*, 390 Md. 175, 183-84 (2005). Instead, the Court should require that an affidavit make some realistic showing that there is actually a necessity for resorting to an extraordinary procedure before allowing the taking of land through a quick-take proceeding. The court below did just this, and its decision should be upheld.

CONCLUSION

The judgment of the Court of Special Appeals should be *affirmed*.

DATED: December ____, 2006.

Respectfully submitted,

THOMAS A. BOWDEN
Counsel of Record
Kollman & Saucier, P.A.

TIMOTHY SANDEFUR
Of Counsel
Pacific Legal Foundation

By _____
THOMAS A. BOWDEN

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I CERTIFY that on this ____ day of December, 2006, I caused two copies of this BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS to be sent via U.S. Mail, first class, postage prepaid, to the following:

RALPH S. TYLER
Baltimore City Department of Law
City Hall
100 North Holliday Street
Room 101
Baltimore, MD 21202
Counsel for Petitioner

JOHN C. MURPHY
516 North Charles Street
Suite 206
Baltimore, MD 21201
Counsel for Respondents

_____
THOMAS A. BOWDEN

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Maryland Rule of Court 8-504(a)(8) the attached BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS is proportionately spaced, in Times New Roman font, and has a typeface of 13 points.

_____

THOMAS A. BOWDEN