

Baltimore Tries to Use Eminent Domain to Condemn the Preakness Stakes Horse Race

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A horse is a horse, of course.... unless it's running in a race the City of Baltimore is trying to condemn!

Baltimore has filed a lawsuit seeking to use eminent domain to take Preakness Stakes horse race and the Pimlico racetrack, where the race is held. As one leading eminent domain expert puts it, "Baltimore is trying to condemn a horse race. A freaking horse race."

The Preakness is one of the Triple Crown horse races (along with Belmont and the Kentucky Derby) and therefore one of the most significant events in American horse racing. The condemnation is legally questionable. But even if the city wins the lawsuit and succeeds in taking over the Preakness, it is likely to end up a loser.

Walter Olson of the Cato Institute has a Wall Street Journal op ed discussing the case. As he explains, the city's goal is to keep the owners of the Preakness from moving it out of the city:

In 2009, then-[Maryland] Gov. Martin O'Malley threatened condemnation to keep the venerable Preakness Stakes horse race, including its trademarks and other intangible assets, from leaving Baltimore. It stayed. In the ensuing 10 years, the economic rationale for keeping the Preakness in Baltimore have dwindled to nothing. The race is held at Pimlico, a decrepit facility in a severely depressed section of the city that is hard for visitors to get to and sits idle the rest of the year.

The owners of the race and track, Canada's Stronach Group, have focused renovation energies on the Laurel Park racetrack midway between Baltimore and Washington, where the race would continue to benefit the greater Baltimore economy and would likely have a more secure future. But Baltimore Mayor Catherine Pugh has filed suit, asking a court to use condemnation powers to award ownership of the racetrack and the race to the city.

Pause to think how a city nationally famed for its failures at running such basic services as police and schools is going to turn around a struggling facility and event in a sector of the sporting world, horse racing, itself long in decline. Most likely state taxpayers would end up subsidizing the event and facilities even more heavily than they now do.

The Inverse Condemnation blog has some additional details about the case, including the complaint Baltimore has filed in state court. It is important to emphasize that the city is trying to condemn not just the race track, but also all the "intellectual property" associated with the Preakness Stakes, including its trademarks and the legal right to hold the race. Some of the legal issues at stake in this battle for ownership of the Stakes are likely to prove difficult.

Maryland state law authorizes Baltimore to condemn both the race track and the associated intellectual property. Both the Fifth Amendment and the Maryland state constitutions mandate that the government may only use eminent domain to take property for a "public use." However, a publicly owned entity - even a race track and horse race - probably qualifies as a public use even under the narrow interpretation of that concept that I have defended in my work on the subject. Another possible basis for a "public use" is a 1982 California Supreme Court decision holding r that promoting sports and recreation qualifies as a public use, thereby validating the City of Oakland's plan to condemn the Oakland Raiders in order to keep them from moving to Los Angeles - though that ruling strikes me as extremely dubious (the Oakland Raiders taking was eventually invalidated on other grounds). Regardless, Baltimore will probably prevail on the public use issue.

But that's just the beginning of the fun. The condemnation of the Raiders was eventually invalidated in state court because it violated the Dormant Commerce Clause of the federal Constitution, which prevents state and local governments from unduly intruding on Congress' power to regulate interstate commerce. The court ruled that the Dormant Commerce Clause had been violated because of "the interdependent character of the NFL [in which] each member team is substantially dependent for its income on every other team..."

For this reason, and also because there is a "nationwide league structure" in professional football, Oakland's effort to condemn a franchise to keep it from moving undermined federal power over interstate commerce. Horse racing is not as integrated a business as the NFL. Nonetheless, the Triple Crown races are marketed as a unified entity by Triple Crown Productions, and many of the same horses compete in all three races. It is plausible to argue that "each member [race] is substantially dependent for its income on every other [race]." Thus the owners of the Preakness have at least some substantial chance of getting the taking invalidated on the same basis as the Raiders prevailed over Oakland.

Another difficult issue is the question of the location of the trademarks and intellectual property associated with the Preakness. Baltimore only has authority to condemn property within its jurisdiction. In the case of land and other tangible property, location is usually easy to determine. Things are much tougher when it comes to intellectual property.

The Stronach Group, current owner of the Preakness and Pimlico, is located in Canada, but the officially listed owner of the trademarks is the Maryland Jockey Club (MJC), located in Baltimore, but owned by Stronach. Stronach could potentially try to amend the trademark ownership to have it listed as Stronach's directly owned property, rather than that of the MJC (which, to repeat, is itself owned by Stronach). The question of jurisdiction is going to be a crucial one, and it is hard to say which way the court will rule on it. This issue is vitally important because the intellectual property associated with the Preakness is far more valuable than the decaying Pimlico racetrack. It's the real prize in the case.

Finally, should Baltimore prevail on the public use, dormant commerce, and jurisdictional questions, there will be a further legal battle over the amount of compensation owed to Stronach. Supreme Court precedent requires the government to pay "fair market value" compensation to owners of condemned property. Estimating the fair market value of a major horse race may not be an easy task. It certainly is not the sort of property that is usually appraised in eminent domain litigation. In fact, I cannot think of another similar case. Expect prolonged litigation over that question if the two sides cannot agree on a price.

But let's assume that Baltimore prevails on all counts and becomes the proud owner of both Pimlico and the Preakness Stakes horse race. That might be an impressive legal victory. But what will the city actually gain?

As Olson points out, owning a decrepit and unprofitable race track is unlikely to be a boon to the city. Indeed, it will probably be a money-loser.

The Preakness Stakes is, of course, far more valuable. Perhaps the city could turn a profit on that. But, as Olson also notes, Baltimore's record of economic management is far from wonderful. And the history of publicly managed commercial enterprises is not an encouraging one. There's a reason why such activities are usually best left to the private sector.

Moreover, the "fair market value" the city will have to pay Stronach in compensation for the trademark will surely incorporate estimates of the race's future profitability (probably on the assumption that the race will be owned by a normal private owner). In order to come out ahead on the transaction, Baltimore will need to make a bigger profit than a conventional private owner would be expected to achieve. That's a very dicy proposition at best.

Studies show that owners of condemned property often don't manage to secure the fair market value compensation the law requires. Perhaps Baltimore hopes to make the taking pay by low-balling Stronach. But that's unlikely to work in a case where the owner is a sophisticated commercial entity, with sufficient resources to hire topnotch lawyers and engage in prolonged litigation. Low-balling is far more effective in cases where the owners are poor, lacking in legal sophistication, or both.

Moreover, Olson notes that the use of eminent domain here would send a terrible signal to other businesses considering investing in the city:

[T]hink what message this sends other large enterprises eyeing the city. The nation's seventh-biggest city and a jobs powerhouse as recently as 50 years ago, Baltimore now has little attraction for national employers (it hosts no Fortune 500 companies) and has yielded ground in what was once a modestly successful finance and insurance sector, for which payrolls within the city have declined from 19,700 at the start of 2004 to 11,800 at the start of 2019....

The message to others that might think of coming to Baltimore? If you do, we'll consider your property—including your intellectual property and business relations—ours to grab in the future. That won't exactly get tomorrow's enterprising ambitions off to the races.

Businesses considering moving to the city might choose to go somewhere else. Some of those already in Baltimore would be more likely to move. These sorts of considerations are a big reason why local governments rarely try to condemn mobile assets, including intellectual property. Doing so is likely to cause them to flee the jurisdiction - or never come there in the first place.

It is likely that Baltimore's ultimate goal is not really to condemn the Preakness, but to use the threat of eminent domain to force Stronach to give up its plan to leave. Indeed, eminent domain is probably a "Plan B" that will be used only if the city's other causes of action against Stronach (which contend that state law bars them from moving the Preakness) fail. But even just using the threat of eminent domain to force a business to stay could still have a chilling effect on other

potential investors. Moreover, it is far from clear that Baltimore will really benefit from forcibly retaining a business that is struggling in its current location.

This is not the first time Maryland authorities have tried to use eminent domain to keep a prominent entertainment business from moving. In 1984, the state famously tried to condemn the Baltimore Colts to keep them from moving to Indianapolis. The plan failed when the franchise literally escaped in the dead of night. As Olson notes, the state used the threat of eminent domain to keep the Preakness from moving in 2009 - only to end up with an increasingly troubled enterprise, and a decaying race track. In 2014, the state legislature considered, but ultimately rejected an ill-considered plan to condemn the popular TV show "House of Cards" in order to prevent it from filming in another state.

Baltimore would do well to learn from this history. The city should take the advice of Walter Olson and other naysayers who counsel the city to let the neighsayers go race somewhere else.

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