REPORT OF THE

STATE OF MARYLAND

TASK FORCE ON BUSINESS

OWNER COMPENSATION IN

CONDEMNATION PROCEEDINGS

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I. INTRODUCTION

A. The Issues That The Task Force Is Required To Study Under Chapter 446 Of The Laws Of Maryland Of 2004

The Task Force on Business Owner Compensation in Condemnation Proceedings (the "Task Force") was created by Chapter 446 of the Laws of Maryland of 2004 and was directed to study the following matters:[1]

(1) the concept of business goodwill, with a particular focus on small business goodwill, and the appropriateness of developing a method for determining the value of business goodwill for purposes of calculating compensation in condemnation proceedings;

(2) the feasibility of requiring a displacing public agency to conduct a study of the impact of condemnation on businesses, including small businesses, in the proposed area where condemnation proceedings will take place;

(3) the appropriateness of establishing a fund, similar to the fund administered by the Baltimore Development Corporation, to provide financial assistance for businesses, including small businesses, impacted by a condemnation proceeding;

(4) the feasibility of shortening the condemnation process to lessen the uncertainty that the process creates for businesses;

(5) the appropriateness of making a legislative proposal on business owner compensation in condemnation proceedings applicable statewide or only in Baltimore City; and

(6) the circumstances in which condemnation can be used in the State.

[1] The Task Force wishes to express its appreciation to Melissa L. Mackiewicz, Esquire of DLA Piper Rudnick Gray Cary US LLP who spent considerable hours researching the legal issues that the Task Force was directed to study and address in this report.

B. The Composition Of The Task Force

Chapter 446 provides that the Task Force must consist of the following members:

(1) One member of the Senate of Maryland, appointed by the President of the Senate;

(2) Two members of the House of Delegates, appointed by the Speaker of the House;

(3) One representative of the Department of Business and Economic Development, designated by the Secretary of Business and Economic Development;

(4) One representative of the Department of Housing and Community Development, designated by the Secretary of Housing and Community Development;

(5) One representative of the Department of Transportation, designated by the Secretary of Transportation;

(6) One representative of the Department of Planning, designated by the Secretary of Planning;

(7) One representative of the Department of General Services, designated by the Secretary of General Services;

(8) One representative of the Maryland Retailers Association, designated by the Maryland Retailers Association; and

(9) The following members, appointed by the Governor:

  (i) Three representatives of local government, including one representative of the Maryland Municipal League and one representative of the Maryland Association of Counties;

  (ii) Two merchants or owners of businesses who have experience in condemnation;

  (iii) One attorney who has experience with condemnation in the private sector, recommended by the Maryland State Bar Association;

  (iv) One attorney who has experience with condemnation in the public sector;

  (v) One developer who has developed a project that involved condemnation; and

  (vi) One commercial real estate broker or agent.

Pursuant to Chapter 446 the following members were appointed:

(1) Kurt J. Fischer, Chairman (Attorney experienced with condemnation in the private sector);

(2) Delegate Patrick N. Hogan (Member of the House of Delegates);

(3) Delegate Marvin E. Holmes, Jr. (Member of the House of Delegates);

(4) Gregory Kosmas (Representative of the Department of Business and Economic Development ("DBED"));

(5) John Papagni (Representative of the Department of Housing and Community Development ("DHCD"));

(6) Glenn M. Torgerson (Representative of the Department of Transportation ("DOT"));

(7) William P. Gibson (Representative of the Department of Planning ("DOP"));

(8) Nelson Reichart (Representative of the Department of General Services ("DGS"));

(9) Tom Saquella (Representative of Maryland Retailers Association ("MRA"));

(10) Heidi Dudderar (Representative of Maryland Association of Counties ("MACO"));

(11) Howard Klein (Merchant or owner of business with experience in condemnation);

(12) Ray Mertz (Merchant or owner of business with experience in condemnation);

(13) Young Kim Robinson (Merchant or owner of business with experience in condemnation);

(14) Melville E. Peters (Real Estate Appraiser and Broker);

(15) Henry Marraffa (Representative of Maryland Municipal League ("MML"));

(16) Janet Bush Handy (Assistant Attorney General experienced with condemnation in the public sector, the State Highway Administration ("SHA")); and

(17) Jay Creech (Representative of local government).[2]

No member of the Senate of Maryland was appointed to the Task Force.

II. THE TASK FORCE'S MEETINGS AND INVESTIGATIONS

The following is a description of the meetings held by the Task Force and the scope of its investigation. This description has been taken largely from the minutes of the Task Force which are attached as Exhibit 1.

A. Session 1: Friday, January 14, 2005 1:00 pm

The Task Force members and staff were introduced. The staff members assigned to support the Task Force were Christian Larson, Director of Real Estate for the Maryland State Highway Administration ("SHA") of the Department of Transportation ("DOT"), and George M. Faber, a DOT official assigned to the Office of the Secretary of Transportation. The Chairman reviewed the requirements of Chapter 446 with the Task Force members and staff. Mr. Larson made a detailed presentation regarding a property owner's entitlement to (1) just compensation under existing Maryland law for real estate interests acquired by condemnation, and (2) relocation assistance under Title 12 of the Real Property Article of the Annotated Code of Maryland, 42 USC §§ 4601 et seq., and 49 CFR §§ 24.301 et seq. The provisions of Title 12 of the Real Property Article, Title 42 of the United Stated Code, and Title 49 of the Code of Federal Regulations governing relocation assistance are attached as Exhibits 2, 3, and 4, respectively.

[2] The Honorable Crystal Mittlestadt served on the Task Force until her appointment by Governor Robert L. Ehrlich, Jr. to the District Court of Maryland for Prince George's County. She was replaced by Mr. Creech.

B. Session 2: Monday, February 14, 2005 9:00 am

Delegate Samuel I. Rosenberg addressed the Task Force and explained his understanding of the purpose of Chapter 446 and his expectations for the scope of the investigation and report of the Task Force. Delegate Rosenberg stated that the Task Force should focus on the adequacy of compensation, i.e., whether the governing authority is exercising all appropriate measures to ensure complete compensation. He stated that examination by the Task Force of the impact of the eminent domain process on business owners is important.

Mr. Dick McJilton appeared on behalf of Senator Norman Stone and requested the Task Force members to "make a serious study for Owners as well as Tenants" of condemned real estate that is used in the operation of a business.

John C. Murphy, Esquire, an attorney with extensive experience in condemnation cases who has represented property owners in Baltimore City whose properties have been condemned for urban renewal projects, addressed the Task Force and emphasized that the business owner is not at fault in condemnation cases and must be made whole. He stated that a "turn-key" relocation of the business is an effective means of protecting the business owner. The business owner should be entitled to cease operations one day at the existing location and begin operations at the new location the next day.

Mr. Larsen presented information to the Task Force regarding the laws of some jurisdictions which afford compensation for damages to business goodwill resulting from condemnation.

C. Session 3: Monday, March 21, 2005 9:00 am

Andrew Bailey, Esquire, an Assistant City Solicitor for Baltimore City, explained the nature and scope of Baltimore City's urban renewal program and the way it

administers relocation assistance under Federal and State law. Mr. Bailey recommended that the Task Force propose raising maximum reestablishment payment for business above the $10,000 maximum currently provided. Further, Mr. Bailey suggested that the maximum reestablishment pay be subject to an annual increase to reflect inflation. Pat Dablock, Diversified Property Services, explained her company's role as a relocation coordinator for the City and stated that California, unlike Maryland, provides compensation for damages to business goodwill. Thomas Hart of the Baltimore Development Corporation ("BDC") explained in detail a fund that the BDC has established to provide low interest loans to business owners who are forced to relocate and suffer business interruption or disruption as a result of condemnation proceedings. A detailed description of the BDC Loan Program is set forth in § VI of this Report.

D. Session 4: Friday, April 22, 2005 9:00 am

At this session, the Task Force invited business owners who have been affected by condemnation to explain their experiences. Noel Levy, an Owings Mills resident, explained that Senate Bill 509 which was the subject of great public debate in 1999 and 2000 would have given Baltimore County authority to condemn sites in eastern and northwestern Baltimore County, Dundalk, Essex, and Randallstown for urban renewal projects. Senate Bill 509 was enacted by the General Assembly in April, 2000. On June 30, 2000, residents, however, succeeded in taking the proposal to referendum with approximately 45,000 signatures. The measure was defeated by the voters in 2000. Mr. Levy stated that certain properties were to be condemned while others in a similar location were excluded. Local residents believed that Senate Bill 509 was a misuse of power, and the cost to them of campaigning to defeat the measure was high, both in expense and personal stress.

Ann Klohr explained that her family owned a welding shop in Randallstown that was targeted for acquisition. Ms. Klohr stated that the Klohr family business was one of the oldest in Randallstown, and the business had supported many generations of her family. The business was targeted for acquisition under Senate Bill 509, and the site was to be used for a park. The family went through a period of incredible stress until Baltimore County decided not to pursue the acquisition.

Brad Wallace explained to the Task Force that he is the owner of an engine repair business in the Middle River area of Baltimore County. Mr. Wallace stated that his business, which had been family-owned for two generations, was slated for acquisition for an urban renewal project under Senate Bill 509. He was not presented with a relocation plan or negotiations of any kind. The business was such that it could not be successfully relocated. Additionally, many business owners affected by this project were tenants who would have lost their livelihoods without meaningful compensation for the business.

Janice Hundt, a Dundalk business owner whose property was slated for acquisition under Senate Bill 509, stated that it is very difficult for a small business owner to protect herself in condemnation proceedings and attorney's fees should be paid to the business owner if she is successful in the condemnation case.

Lou Boulmetis, the owner of Hippodrome Hatters, was featured in a 2001 video presented by John Murphy covering condemnations for westside redevelopment in Baltimore City. The haberdashery has been located on Eutaw Street for 70 years. Baltimore City took the property in 2000 and moved the business one block in 2001. Mr. Boulmetis stated that, while the process was traumatic for him, he credited the Baltimore City government and a "turn-key" relocation. Mayor Martin O'Malley, in particular,

worked to prevent hardship to business owners and ensured that he and others were made whole. Mr. Boulmetis described the "Westside Grant Program" of the BDC which made interest free loans for five years provided the business did not leave the City during this time period. Further, Baltimore City purchased his inventory and repeatedly extended his moving deadline. He was pleased with the way in which his case was handled. The City relocated his business to a temporary location and then, ultimately, to his new location. He also received payment for (1) a mailing list, and (2) an aggressive advertising program to inform customers of his new location.

Arthur Lambert, an insurance business owner, stated that he has owned a two-story building on three acres at 4605 Edmondson Avenue in the Edmondson-Old Frederick-Uplands area for 40 years. The building houses his insurance business on the first floor and a chiropractor tenant on the second floor. A City Ordinance (No. 04-1523) introduced in December 2004 targeted all properties in this area for acquisition for urban renewal. The City incorrectly alleged, Mr. Lambert stated, that his property was blighted. Further, Mr. Lambert stated that he had accumulated significant goodwill at this location. His clients were largely elderly and would not be able to visit him if he relocated. He explained that the government imposes a great hardship on businesses when it requires them to vacate in 90 days. Ironically, Mr. Lambert stated, the party that stood to benefit from the condemnation of his property, a church, has subsequently acquired property elsewhere.

E. Session 5: Wednesday, May 18, 2005 9:00 am

Janet Bush Handy, Esquire and Kurt J. Fischer, Esquire made presentations to the Task Force on the circumstances in which the government can exercise eminent domain in Maryland, including detailed descriptions of the public use and necessity. The public use and necessity doctrines will be described in detail in § IV of this Report.

F. Session 6: Monday, September 12, 2005 9:00 am

John J. Boland, PhD, PE, and David C. Lennhoff, MAI, CRE, addressed the Task Force regarding the valuation of businesses and the component property interests including business goodwill. They explained in detail how appraisers and economists determine whether the market value of the total assets of an operating business exceed the market value of the real and personal property utilized in the operation of the business. Dr. Boland and Mr. Lennhoff explained that one problem with this area is that numerous, overlapping terms are frequently used (misused) without a clear understanding of the applicable economic principles. They defined various terms such as total assets of the business, business intangibles, goodwill, going concern value, and business enterprise value.

Dr. Boland and Mr. Lennhoff submitted written materials to the Task Force which are attached as Exhibits 5 and 6 respectively. In addition, attached as Exhibit 7 is an excerpt from The Appraisal of Real Estate (Appraisal Institute, 12th ed. 2001) which describes appropriate techniques for the valuation of the total assets of a business and the component property interests: real property, tangible personal property, separable intangibles and non-separable intangibles. Non-separable business intangibles are sometimes referred to as business "goodwill" or "going concern" value. These concepts will be discussed more fully in § III.D.1 of this Report.

G. Session 7: Thursday, October 20, 2005 9:00 am

Janet Bush Handy, Esquire and Kurt J. Fischer, Esquire explained two recent Court decisions that directly impacted the Task Force's work: the United States Supreme Court's decision in Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655 (2005), and the Maryland Court of Appeals' decision in Reichs Ford Road Joint Venture v. State Roads Commn., 388 Md. 500 (2005). Further, the Task Force heard presentations from

Andrew Bailey, Assistant City Solicitor for Baltimore City, and John C. Murphy, Esquire as to whether Maryland should ban the use of eminent domain for economic redevelopment. Mr. Bailey opposed such a ban, and Mr. Murphy supported one.

III. THE AUTHORITY TO EXERCISE THE POWER OF EMINENT DOMAIN AND PROCEDURE IN EMINENT DOMAIN CASES

A. General Principles

The power to condemn private property (exercise eminent domain) is an inherent attribute of the sovereignty of the State of Maryland. Berman v. Parker, 348 U.S. 26, 33 (1954); Lore v. Board of Public Works, 277 Md. 356 (1976). The General Assembly may delegate the power of eminent domain to state agencies, political subdivisions, and municipal and private corporations. A number of state agencies have been delegated the power of eminent domain, most notably the State Roads Commission of the State Highway Administration ("SHA"). (The procedures governing the SHA's power of eminent domain will be discussed in § III.C below.) Further, in § 11A of Article 25 of the Annotated Code of Maryland, the General Assembly delegated a broad power of eminent domain to county commissioner counties to acquire property in furtherance of their public duties and responsibilities. Likewise, in § 5(B) of Article 25A, the General Assembly delegated a broad power of eminent domain to charter counties, that is counties established pursuant to Article XI-A, § 4 of the Maryland Constitution, including Baltimore City. The general procedures governing condemnation by Baltimore City are contained in Article II, § (2) of the City Charter. Other provisions relating to Baltimore City's power of eminent domain are found in Article XI-B of the Maryland Constitution relating to redevelopment, Article XI-C relating to off-street parking, and Article XI-D relating to port development.

The General Assembly granted municipal corporations authority to exercise eminent domain in § 2(b)(24) of Article 23A of the Annotated Code of Maryland. Additionally, certain private corporations providing public utilities have been delegated the power of eminent domain in the Public Utility Companies Article of the Annotated Code of Maryland including water companies (§ 5-411), telegraph and telephone companies (§ 5-410), gas companies (§ 5-403), oil pipeline companies (§ 5-404), and railroads (§ 5-405).

A normal condemnation case, that is, one not involving the exercise of "quick take" power, is initiated by filing a petition to acquire property in circuit court pursuant to §§ 12-101 – 12-112 of the Real Property Article of the Annotated Code of Maryland and Maryland Rules 12-201, et seq. The petition must identify all persons with an interest in the property and contain a legal description of the property to be acquired. The property owner is required to file an answer or responsive motion 30 days after receipt of the petition and the case proceeds as a civil case with discovery and motions.

Under Maryland Rule 12-207, condemnation cases must be tried to a jury unless all parties consent in writing to a trial by the presiding judge. This rule is mandated by Article III, § 40 of the Maryland Constitution which provides that "[t]he General Assembly shall enact no law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation." Another effect of Article III, § 40 is that the authority to exercise "quick take" must be specifically granted in the State Constitution and cannot be delegated by an Act of the General Assembly in the absence of specific Constitutional authority.

At the conclusion of a condemnation trial, the trier of fact (the jury unless the right to a jury trial has been waived by all parties) determines the amount of just compensation to which the property owner is entitled. The trier of fact enters a special verdict called an inquisition which states the amount of just compensation. The inquisition in a condemnation case effectively functions as a deed conveying the property to the condemning authority. When the trier of fact is a jury, every member of the jury is required to sign the inquisition. The amount of the award of just compensation must be stated in the inquisition. Like a deed, the inquisition is recorded among the Land Records of the county where the property is located.

B. Quick Take Procedure

Under the "quick take" procedure, the condemning authority acquires immediate possession of the property by filing a condemnation petition in circuit court and paying an estimate of just compensation into the registry of court. When the condemning authority exercises the quick take power, the case continues in circuit court to determine the amount of just compensation to which the property owner is entitled. Further, if the amount of just compensation awarded by the trier of fact exceeds the estimate paid into court, the property owner is entitled to receive prejudgment interest on the excess award in an amount equal to the greater of six percent or the market rate of interest. King v. State Roads Commn., 298 Md. 80 (1983). In King, the Court of Appeals was presented with the question whether a property owner in a quick take case may recover a higher rate of return on the deficiency than the six percent interest rate specified in § 12-106(c) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. In answering this question in the affirmative, the Court began by explaining (298 Md. at 86, citations omitted):

> The prejudgment interest authorized by § 12-106(c) in quick-take cases is not a matter of legislative grace, as with the post-judgment interest

> authorized in conventional condemnation cases. Rather, it is a part of the just compensation required by the Constitution to be paid for the taking; it is designed to pay the condemnee for the "time value" of the money which he should have received for his property on the day it was taken. In other words, interest in quick-take cases, unlike interest in conventional condemnation cases, is a constitutionally required element of just compensation and no specific statutory authority is required for its payment. Our cases, citing extensive Supreme Court authority, have repeatedly recognized the principle that the constitutional requirement of just compensation in quick-take cases entitles the property owner as a matter of constitutional right, to recover interest from the date of the taking to the date of payment.

The Court explained that the required interest payment "is not an award of interest in the traditional sense but rather … is a good yardstick by which to determine the rate of return on the property owner's money had there been no delay in payment of the full amount of the deficiency." 298 Md. at 89.

Further, because prejudgment interest in quick-take cases is not a matter of legislative grace but is required as an element of just compensation, the Court explained that (298 Md. at 90):

> it necessarily follows that a rate higher than the six percent statutory rate may at times be constitutionally required to compensate the property owner for the loss of use of his money between the time of the taking and payment of the full amount constitutionally due.

Accordingly, the Court held (298 Md. at 91):

> The six percent rate specified in § 12-106(c) is the minimum rate of interest to which a property owner is entitled in a quick-take case. If the property owner produces evidence that the six percent rate is constitutionally insufficient, he should be entitled to a higher rate of return as part of just compensation.

The Court then considered the standard for fixing a rate of return on the amount of the deficiency, explaining (298 Md. at 91, citations omitted):

> If the property owner had been paid on the day of the taking when he was entitled to receive the full value of the property taken, he presumably would have invested the funds in a prudent manner. Thus, when payment is delayed, the jury must fix interest on any deficiency award at the rate a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal would receive.

The Court described the methods which courts have recognized to ascertain the reasonable rate of interest (298 Md. at 92-93, citations omitted):

> To arrive at a reasonable rate of interest, three methods of ascertaining the proper rate have been used. The first method of computation utilizes stable long term corporate bond rates to determine the rate of return that would have been available to a prudent investor. Interest at the average annual rate on Moody's Composite Index of Yields on Long Term Corporate Bonds has been computed for each year of the deficiency period. Under the second approach, rates of return on various United States government securities are used. The third method combines several investment market rates. … Any of the foregoing methods and perhaps others as well would appear to be reasonable in the ascertainment of the rate of interest that would be earned by a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal.

Finally, the Court held that "where the property owner claims that the six percent statutory rate is inadequate to satisfy the constitutional just compensation standard, the question of the proper rate to be paid is manifestly a matter for factual determination by the trier of fact, and requires evidence of the prevailing market rates." 298 Md. at 93.

As previously indicated, the right to exercise quick take authority must be specifically granted to a condemning authority in the State Constitution. Article III, § 40A of the Maryland Constitution provides for "quick take" of property, subject to actual provisions granting authority by the General Assembly, in Baltimore City, and Baltimore, Cecil, and Montgomery Counties. In Baltimore City, property may be taken immediately upon payment to the owner or owners by the State or the Mayor and City Council of Baltimore, while allowing courts to tack on additional sums awarded by juries

above and beyond the estimates provided by the State or the Mayor and City Council. In Baltimore County, property may be taken after the County Council provides for the appointment of an appraiser or appraisers by a Court of Record to value property, followed by actual payment of that amount, and subject to additional sums tacked on by a jury. In Montgomery County, quick take is limited to the immediate need for a right of way for County roads or streets. When that circumstance exists, property may be taken immediately, upon payment of an amount determined by a real estate appraiser appointed by the County Council, based on the fair market value of the property, subject to additional amounts awarded by a jury. In Cecil County, quick take is allowed after its governing body determines an immediate need for a right of way for roads, streets and extension of municipal water and sewage facilities, and subject to the fair market value appraised by a real estate broker and any additional amount awarded by a jury.

In addition, Article III, § 40B of the Maryland Constitution allows quick take when the State Roads Commission determines that the land is needed for State highway purposes, subject its determination of fair market value and the award of any additional amount by a jury. Similarly, in § 40C, providing authority for the Washington Suburban Sanitary Commission ("WSSC"), land in Prince George's County may immediately be taken when deemed necessary in the judgment of the WSSC for water supply, sewage, and drainage systems to be constructed by the WSSC. This particular provision limits the eminent domain power by denying the ability to take buildings through quick take, and that the land's value must be assessed by a qualified appraiser, who qualifications have been accepted by a Court of Record of the State, subject to any additional amounts awarded by a jury. Another limitation in § 40C is that only one-half of the land needed for the work may be condemned through the quick take method.

C. State Highway Administration Procedure

Title 8, Subtitle 3, Part III of the Transportation Article of the Annotated Code of Maryland sets forth a procedure under which the SHA may exercise quick take authority. Under § 8-320, before the SHA may condemn property under Part III, it must complete all engineering studies and construction plans for the project for which the property is to be acquired and must prepare plats, showing, among other things, the centerline and length of construction. The plats must be approved by the State Roads Commission and recorded among the Land Records of the County where the property to be acquired is located.

After the plats are recorded, the SHA must file an informal condemnation petition in Circuit Court and pay an estimate of just compensation into the Registry of Court which may be withdrawn by the property owner within 10 days of making a written request. Further, after the informal petition is filed and the payment is made into the Registry of Court, the SHA may take possession of the property. If the SHA is unable to acquire the property by negotiation, the case is referred to a Property Review Board for a hearing. The Property Review Board subsequently makes an award of just compensation, and either the SHA or the property owner may file a notice of dissatisfaction and have the case proceed in Circuit Court as if the matter had not been heard by the Property Review Board. If the case proceeds in Circuit Court, the SHA must file a formal condemnation petition.

Under Title 8, Subtitle 3, Part IV of the Transportation Article, the SHA may exercise quick take by filing a formal petition of condemnation in Circuit Court and paying an estimate of just compensation into the registry of the court. The SHA is then

entitled to take immediate possession of the property, and the action proceeds in Circuit Court as a civil case to determine the final amount of just compensation.

IV. THE CIRCUMSTANCES UNDER WHICH CONDEMNATION CAN BE USED IN MARYLAND: PUBLIC USE AND NECESSITY

A. The Public Use Doctrine

The Fifth Amendment to the United States Constitution states in pertinent part: "nor shall private property be taken for public use without just compensation." The Supreme Court has interpreted the Fifth Amendment to mandate that property can only be taken by eminent domain for a "public use." 2A J. Sackman Nichols' The Law of Eminent Domain, §§ 7.01[1], 7.02[2] & [3]. The public use requirement, however, does not limit the power of eminent domain to the taking of property for actual use by the government or public. Id. Rather, in the latter half of the 20th Century, the Supreme Court adopted a broad view of the public use requirement. The Supreme Court ruled that property may be acquired by the government through eminent domain even if it is not to be used by the government or the public, "so long as its acquisition furthers the public good or general welfare, or secures some public benefit." Id. at § 7.01[1]. In short, the Court ruled that the scope of the power of eminent domain is "'coterminous with the scope of a sovereign's police powers.'" Id. quoting Haw. Hous. Auth. v. Miclkiff, 467 U.S. 229 (1984). The Supreme Court has emphasized that the determination as to whether there is a valid "public use" for the property must be made in the first instance by the governmental agency exercising eminent domain. In reviewing this determination, the courts will inquire only as to whether there is a reasonable and rational basis to support the agency's determination. The Supreme Court has articulated its broad interpretation of the public use doctrine in three leading cases: Kelo v. City of New

London, ___ U.S. ___, 125 S. Ct. 2655 (2005); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); and Berman v. Parker, 348 U.S. 26 (1954).

In Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655 (2005), the Supreme Court upheld the condemnation of a group of properties by the City of New London through a non-profit development corporation to further an economic development plan for an area in the City adjacent to a research facility operated by Pfizer, Inc. The City of New London had undergone decades of economic decline and the United States Naval Underwater Warfare Center, which had been located in the City, had shut down its operations. These events resulted in widespread unemployment and a decreasing tax base in the City, particularly on a peninsula known as the Fort Trumbull area of the City. The non-profit corporation developed, and the State approved, a comprehensive redevelopment plan in which the following uses would be established: a hotel, an urban village with restaurants and retail shops, 80 residences, research and development space, office space and parking and other amenities to support a nearby State park and marina.

The Supreme Court reaffirmed its broad view of the public use doctrine, ruling that the power to exercise eminent domain is coterminous with the police power. The Court held that the City could exercise eminent domain to acquire property from one private person to give it to another private person even if neither the property acquired nor the area in which it is located is blighted. The Court held that a government's exercise of eminent domain in this circumstance will pass muster under the public use doctrine as long as it were rationally related to a public purpose (125 S. Ct. at 2664-65):

> Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic

> development plan that it believes will provide appreciable benefits to the community, including – but by no means limited to – new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

In Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), the Hawaii legislature enacted the Land Reform Act of 1967 which created a land condemnation scheme under which the Authority acquired real property from lessors and transferred it to lessees. Under the Act, lessees living on single family residential lots within tracts of at least five acres were entitled to ask the Authority to condemn the property on which they lived and to transfer it to them. The purpose of the Act was to reduce the perceived social and economic evils of the concentration of land in a small number of families traceable to the Hawaiian Monarchy. The Hawaii legislature found, for example, that 22 landholders owned more than 73% of fee simple titles on the island of Oahu, the most urbanized of the Hawaiian Islands. The landholders generally leased their property to a large number of tenants. The Supreme Court ruled that condemnations from the lessors to convey the property to the tenants was supported by a rational public purpose (467 U.S. at 241-42, citations omitted):

> Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.
>
> On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers

> of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.

Likewise, Berman v. Parker, 348 U.S. 26 (1954), Congress authorized the District of Columbia Redevelopment Land Agency (the "Agency") to acquire and assemble by eminent domain real property for the redevelopment of blighted areas within the District. In the exercise of this authority, the Agency sought to condemn a parcel owned by certain property owners on which they operated a department store. The Agency intended to demolish the department store and sell the land to a private developer who would build residential units, including low rent units. The Supreme Court ruled that, because Congress had authority to take actions to eliminate blight and protect the public health, safety, and welfare by providing safe and adequate housing, Congress could authorize the exercise of eminent domain for this purpose, even if the property of one private person was being condemned for the purpose of conveying it to another (348 U.S. at 33-34, citations omitted):

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. … Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. … The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the

> fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the overall plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose.

Accordingly, the Supreme Court has held that, in order to pass muster under the public use doctrine of the Fifth Amendment the exercise of eminent domain must be rationally related to a legitimate public purpose. If so, the government can condemn property to transfer it from one private property owner to another even though the property will be put to private, not public, uses.

B. The Maryland Rule: A Mirror Of Supreme Court Analysis

The Court of Appeals has consistently followed Supreme Court precedents in interpreting the "Takings Clause" of the Maryland Constitution (Article III, § 40) ruling that Supreme Court cases on the Fifth Amendment are practically direct authority for the interpretation of the Maryland provision. King v. State Roads Commn., 298 Md. 80, 83-84 (1983). In Prince George's County v. Collington Crossroads, 275 Md. 171, 191 (1975), the Court of Appeals upheld the condemnation of property for an economic development, concluding that "projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions, are public uses at least where the exercise of condemnation provides the impetus which private enterprise cannot provide." In City of Baltimore v. Chertkof, 293 Md. 32, 42 (1982), the Court explained that:

> [i]t is elementary, of course, that government cannot use its power of eminent domain to condemn property for the private use of another. Equally elementary is the principle that when legislation authorizes the acquisition of land by condemnation, the extent and type of taking rests largely in the judgment of the condemnor, and will not be declared unlawful unless it is so oppressive, arbitrary or unreasonable as to suggest bad faith.

C. The Narrow View Of A Minority Of State Courts

In recent years, some state courts have adopted a narrower view of the circumstances in which the government can take private property for a use that will ultimately be made by a private entity. These courts have drawn a distinction between a "public purpose" and "public use." They have concluded that, while public money can be spent for a large range of purposes which directly benefit private interests, there are limitations on the circumstances that eminent domain can be used to convey property from one private interest to another.

In Manufactured Housing Communities of Washington v. Washington, 13 P.3d 183 (Wash. 2000), for example, a mobile home industry association challenged the constitutionality of a chapter of the Revised Code of Washington that gave qualified tenants a right of first refusal – i.e., the right, if they met certain conditions, to purchase the mobile home park in which they lived in the event the park owner decided to sell. The association argued that this chapter constituted a taking of one critical stick of their bundle of rights in property and, thus violated the Washington State Constitution's ban on taking private property for a private use.

The Supreme Court of Washington held that the chapter violated the Washington State Constitution because it effected a taking for a private use by taking from the park owner "the right to freely dispose of his or her property and giv[ing] to tenants a right of first refusal to acquire the property by blocking the owner's sale to the third party and substituting themselves as buyers." 13 P.3d at 190. To reach this conclusion, the Court began by refusing to apply the U.S. Supreme Court's broad and flexible method of meeting the public use requirement. The Court wrote that Washington courts have traditionally "provided a more restrictive interpretation of public use. In fact, this court has consistently held that a 'beneficial use is not necessarily a public use.'" Id. at 189.

The Court then observed that the challenged statute did not permit the general public to use the land that has been taken because the tenants become private landowners. The Court then rejected the State's contention that the statute constitutes a public use of eminent domain because the statute preserves the supply of housing — here, in the form of mobile homes – for low-income people as well as the elderly. The Court stated that the critical issue was whether the condemned land was being put to a public or quasi-public use, "'and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.'" Id. at 196. The Court concluded that any land acquired by tenants under the statute would not meet this standard because only the tenants of the park could freely use the land. Therefore, the alleged public interest that the statute furthered did not constitute a public use.

In 99 Cents Only Stores v. Lancaster Redevelopment Agency, 2001 WL 811056 (C.D. Cal. 2001), the City of Lancaster adopted a redevelopment plan in 1983 under which it developed blighted land into the highest quality commercial retail property in the City. In 1998, a 99 Cents Only Store moved into the area and was located next to a Costco store. Immediately after 99 Cents moved in, Costco informed the City that it needed to expand its store and would relocate outside of the City if its needs were not met. Costco demanded to move into the space in which 99 Cents was doing business. To retain its anchor tenant, the City passed a resolution to condemn the real property in which 99 Cents held leasehold estate. The resolution did not contain any findings of blight. 99 Cents filed a suit to contest the resolution, arguing that the City's attempt to condemn its property interest "violate[d] the 'Public Use' clause of the Fifth Amendment because such condemnation … serve[d] no purpose other than to appease a purely private entity, Costco." Id. at 3.

The Court held that the City did not have a valid reason for condemning 99 Cents' property interest because: (1) the City's clear goal was to benefit a private party, i.e., Costco, by taking 99 Cents' land; and (2) Costco had alternative areas in which to expand, so the City was essentially catering to a private interest because the City was willing to do anything, by its own admission, to retain Costco. The Court reached this conclusion even while working within the framework of Hawaii Authority v. Midkiff. The Court held that the previous findings of blight could not justify a blight-based taking now because the area in the initial redevelopment plan was no longer blighted. Thus, the City was left to argue that the taking served a public use by preventing future blight – blight that would occur if Costco left because the City failed to appease it. The Court rejected this justification of future blight, finding it unsubstantiated. The Court stated that a resolution must address presently-existing blight, for "the notion of avoiding 'future blight' as a legitimate public use is entirely speculative and wholly without support in California redevelopment law." Id. at 6.

In Tolksdorf v. Griffith, 626 N.W.2d 163 (Mich. 2001), the Michigan Supreme Court reviewed that State's Opening of Private Roads and Temporary Highways Act which allowed a landlocked, private landowner to petition the township to open a private road across another landowner's property. Under the Act, if a jury of landowners authorized a private road, then the petitioner must pay compensation awarded by the jury. Tolksdorf sued Griffith to open a private road on Griffith's land. Griffith responded by challenging the constitutionality of the Act, arguing that it effected a private taking.

The Court held that the Act is unconstitutional because any benefit to the public from the Act is "'purely incidental and far too attenuated to support a constitutional taking of private property.'" 626 N.W.2d at 169. To reach this conclusion, the Court initially found that a taking had occurred because opening a private road on another

landowner's property necessarily entails a "permanent physical occupation," and this eliminates "the landowner's right to exclude others from his property…." Id. The Court then found that the taking was essentially private because private individuals benefited predominantly from the Act. As evidence, the Court noted that under the Act the private person petitioning for the right of way paid the compensation – not the government. The Court then put forth its essential problem with the Act: it granted a property right to a private party, not to "the community as a whole." Id. at 166. Because the benefit did not accrue to the whole, the taking was for private interests and, therefore, unconstitutional.

The Michigan Supreme Court's recent decision in Wayne County v. Hathcock, 684 N.W.2d 765 (Mich. 2004), is the most marked example of a narrower interpretation of the public use doctrine by a state court. The Court expressly overruled its prior decision in Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981). In Poletown the Michigan Supreme Court, applying the Berman and Midkiff rules, approved the acquisition of over 1000 homes and 600 businesses in order to facilitate economic development: the construction of a General Motors Cadillac plant. A dissenting justice in Poletown, Justice Ryan, argued that a lenient public purpose standard could be applied to the expenditure of state funds, but that a stricter public use standard should govern the taking of private property through eminent domain, stating "[t]he degree of compelled deprivation of property is manifestly less intrusive in the former case; it is one thing to disagree with the purposes for which one's tax money is spent; it is quite another to be compelled to give up one's land and be required, as in this case, to leave what may well be a lifelong home and community." Poletown, 304 N.W.2d at 474 (Ryan, J. dissenting).

In Hathcock, over 20 years later, when Detroit's Wayne County sought to condemn land for the development of a new technology park near Metropolitan Airport,

the Michigan Supreme Court adopted the distinction between "public purpose" and "public use" espoused by Justice Ryan – and expressly overruled Poletown. In Hathcock, Wayne County initiated condemnation actions to acquire 19 properties as part of a project to assemble 1300 acres for the Pinnacle Aeropark, a proposed business and technology park. The aeropark was projected to create 30,000 new jobs and $350 million in tax revenue. The Court acknowledged there was a proper public purpose for the project stating "[a] transition from a declining rustbelt economy to a growing, technology-driven economy would, no doubt, promote prosperity and general welfare." 684 N.W.2d at 776. The Court held, however, that eminent domain could not be constitutionally used because, with a few exceptions, conveying the condemned land to a private landowner after the taking was not a proper public use. The exceptions identified by the Court were as follows (684 N.W.2d at 781-83):

(1) where "public necessity of the extreme sort" requires collective action;

(2) where the property remains subject to public oversight after transfer to a private entity; or

(3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.

The following are examples of permissible exceptions: (1) taking for a linear strip, like a railroad right-of-way or a fiber-optic telecommunications line; (2) taking for a privately-owned public utility; and (3) taking to eliminate slums or prevent blight.

The Hathcock Court stated that its decision was necessary to "vindicate" the Michigan Constitution, and that the Supreme Court's rule in Berman v. Parker was neither controlling nor persuasive. 684 N.W.2d at 786-87.

D. The Public Necessity Doctrine

In addition to the requirement that land be condemned only for a public use, the Maryland courts have also held that there must be a public necessity for the taking. In determining whether there is a public necessity, however, the courts have also deferred to the authority of the condemning authority to make this determination. Judicial review is limited to whether the decision to condemn was arbitrary, capricious, or unreasonable.

The deferential judicial standard of review applied to decisions to condemn is based on separation of powers principles. In Bowie Inn v. City of Bowie, 274 Md. 230, 236 (1975), the Court of Appeals explained:

> The exercise by the Legislature of the police power will not be interfered with unless it is shown to be exercised arbitrarily, oppressively or unreasonably. The wisdom or expediency of a law adopted in the exercise of the police power of a state is not subject to judicial review, and the law will not be held void if there are any considerations relating to the public welfare by which it can be supported.

Accord, Maryland Aggregates Assoc., Inc. v. Maryland, 337 Md. 658, 672-73 (1995) (quoting FCC v. Beach Commns., Inc., 508 U.S. 307, 313 (1993). The courts have not required the condemning authority to articulate the reasons for the condemnation in the authorizing resolution or ordinance. Herzinger v. City of Baltimore, 203 Md. 49, 63 (1953).

It is settled under Maryland law that the question whether there is a public necessity for the acquisition of private property by eminent domain is a question for the court to decide, not for the jury. Lustine v. State Roads Commn., 217 Md. 274, 278 (1958) ("The appellants contend that there was error in refusing to allow them, during the course of the trial, and as part of their case before the jury, to attempt to show that the determination of necessity … by the State Roads Commission was arbitrary, capricious

or unreasonable …. We find no merit in this contention. Such questions, at most, were for the court, and not for the jury, to pass upon."); Johnson v. Consol. Gas, Electric, Light & Power Co., 187 Md. 454, 461 (1947) (question of right to take is for the court, not the jury).

Under the deferential standard of review, courts refuse to substitute their judgment for that of a condemning authority as to whether there is a public necessity for acquiring a property. In Murphy v. State Roads Commn., 159 Md. 7, 15 (1930), for example, the Court of Appeals ruled that the courts could not become involved in determining which of several possible routes for a State highway was the most appropriate route and that "the decision of such an agency [the State Roads Commission] as to the public necessity for taking particular property is not subject to judicial review unless its decision is so oppressive, arbitrary or unreasonable as to suggest bad faith." Accord, Free State Realty Co., Inc. v. City of Baltimore, 279 Md. 550, 558-59 (1977); Director v. Oliver Beach Imp. Assn., 259 Md. 183, 189 (1970). Accordingly, in determining whether there is a public necessity for a taking, the Court is required to make a legal determination as to whether there is some evidence upon which a reasoning mind could reasonably have concluded that there is a public necessity for the taking.

V. JUST COMPENSATION UNDER CURRENT LAW

A. Compensation For Real Property Interests: Fair Market Value And Severance Damages

An analysis of the compensation recoverable in Maryland condemnation proceedings must begin with the settled proposition that "[t]he power of eminent domain is derived from the sovereignty of the state," and any limitation on that power, that is, any requirement of compensation must emanate directly from the Federal and State Constitutions or statutes. Ridings v. State Roads Commn., 249 Md. 395, 399 (1967).

The Fifth Amendment to the United States Constitution (applicable to the States through the Fourteenth Amendment, Chicago, B. & O. R.R. v. Chicago, 166 U.S. 226 (1897)) and Article III, § 40 of the Constitution of Maryland prohibit the taking of private property for public use without payment of "just compensation." "Decisions of the Supreme Court interpreting the Fifth Amendment's just compensation clause are . . . practically direct authority for [the Court of Appeals'] interpretation of the identical provision in Art. III, § 40 of the Constitution of Maryland." King v. State Roads Commn., 298 Md. 80, 83-84 (1983). Further, Title 12 of the Real Property Article of the Annotated Code of Maryland grants property owners the right to certain elements of damages for takings by subdivision and agencies of the State.

The Supreme Court and the Maryland Court of Appeals have defined "'just compensation' to be the 'full and perfect equivalent in money of the property taken' from the landowner." Dodson v. Anne Arundel County, 294 Md. 490, 494 (1982), quoting United States v. Miller, 317 U.S. 369, 373, reh'g denied, 318 U.S. 798 (1943). The Supreme Court and Maryland Court of Appeals have ruled that "just compensation" is an amount equal to the "fair market value of the land at the time of the taking." Dodson, 294 Md. at 494 quoting State Roads Commn. v. Warring, 211 Md. 480, 485 (1957). As a general proposition, the Court has accepted, for constitutional purposes, the General Assembly's definition of "fair market value" in § 12-105(b) of the Real Property Article (294 Md. at 494-95):

> The price of the valuation date for the highest and best use of the property which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy would pay, excluding any increment in value proximately caused by the public project for which the property condemned is needed. In addition, fair market value includes any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of actual taking if the trier of facts

> finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning the public project, and was beyond the reasonable control of the property owner.

In the Real Property Article of the Annotated Code of Maryland, the General Assembly has codified the constitutional rules governing just compensation. Section 12-104(a) of the Real Property Article requires that in a taking of an entire tract of land, the property owner must be compensated in an amount equal to the fair market value of the property at the time of the taking. Further, § 12-104(b) provides that, where part of a tract of land is taken, the compensation to be awarded is the fair market value of the part taken (and not less than the actual value of the part taken) plus any "severance" or "resulting" damages to the remaining land by reason of the taking or the future use by the condemning authority of the part taken. Additionally, this provision states that the severance or resulting damages must be reduced by the amount of special benefit to the remaining property resulting from the condemning authority's use of the part taken. The Court of Appeals has defined "severance damages" under § 12-104(b) as the reduction in value of the remaining portion of the land. Washington Suburban Sanitary Commn. v. CAE-Link Corp., 330 Md. 115, cert. denied, 510 U.S. 907 (1993). Further, the Court has ruled that in a partial taking, just compensation may be awarded in an amount equal to the fair market value of the property before the taking less the fair market value of the taking. State Roads Commn. v. Adams, 238 Md. 371 (1965).

As previously indicated, § 12-105(b) defines fair market value to include any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of taking if the trier of fact finds that the diminution was proximately caused by the project or by announcements or acts of the condemning authority. The Court of Appeals applied this

provision in Reichs Ford Rd. Joint Venture v. State Roads Commn., 388 Md. 500 (2005). The Court held that, where, after the date a project is announced, precondemnation activity on the part of the condemning authority interferes with the property owner's use and enjoyment of the property, the property owner is entitled to receive as compensation any diminution in value or loss caused by the acts of the government or its officials. There, the property owner, Reichs Ford, owned a 33,000 square foot parcel zoned for commercial uses which was leased to a tenant for the operation of a service station. In 1988, the SHA informed Reichs Ford that it intended to construct an interchange at Routes 85/355 that would detrimentally affect the property. In 1996 and 1997, the SHA approached Reichs Ford's tenant, informed him that it intended to acquire the property, offered to provide assistance to relocate him and drafted a lease termination agreement through which the tenant could terminate his lease with Reichs Ford. Thereafter, the tenant exercised its right not to renew its lease with Reichs Ford, and Reichs Ford was unable to relet the property. The tenant filed an action against SHA, alleging that SHA's taking constituted a taking without just compensation. The Court of Appeals held that, in the context of a condemnation case, the General Assembly in §12-105(b) of the Real Property Article provided that the property owner is entitled to compensation for such precondemnation activity by the government that interferes with the property owner's use and enjoyment of the property and results in a diminution in value. The Court explained that Reichs Ford was seeking the following damages (388 Md. at 522):

> In the instant case, Reichs Ford claims to have suffered nearly the same types of damages the General Assembly foresaw. After the public project was announced and remained pending, the tenant vacated the property, creating a situation in which Reichs Ford claims it suffered a loss in rental income, the payment of continuing real property taxes, mortgage interest, insurance, and other costs associated with maintaining the property.

The Court of Appeals then held that the General Assembly intended to compensate the property owners for these damages claimed by Reichs Ford (id. at 521-22, footnotes omitted):

> In keeping with the stated goal of just compensation, to place the property owner in as good a financial position as if eminent domain had never happened, it follows that fair market value, as contemplated by the definition provided by the Legislature, includes related lost rental income. We conclude, therefore, that the Legislature intended to compensate property owners for a wide range of detrimental effects that the exercise (or threatened exercise) of eminent domain might have, including those categories of damages apparently sought by Reichs Ford in this case, from the time that the governmental body or agency vested with the taking power decides to take the specific property until the date of the actual taking.

The constitutional and legal requirements for just compensation apply to leasehold interests. A leasehold interest constitutes an interest in real property for which just compensation must be paid if the whole or part o the leased property is taken by eminent domain. 4 J. Sackman, Nichols' The Law of Eminent Domain, § 12D.04[1], at 12D-25 (Cum. Supp. 2005); A.W. Duckett and Co. v. United States, 266 U.S. 149, 151 (1924). The lessee is entitled to be compensated for the taking of all or part of the leasehold interest, as is any sublessee or assignee of the lessee under the lease from the fee owner of the leased property. 2 J. Sackman, Nichols' The Law of Eminent Domain, § 5.06, at 5-101-102.

> Just compensation for the taking of a leasehold interest is generally measured by the fair market value of the leasehold interest for the unexpired term of the lease. Mayor and City Council of Baltimore v. Gamse and Bros., 132 Md. 290, 294 (1918); 4 J Sackman, Nichols' The Law of Eminent Domain, 12D.04[4], at 12D-49-50.

The fair market value of a leasehold interest is the amount of any positive difference between (1) the present market value of the use and occupancy of the property under the terms of the lease for the remainder of the lease term, plus the value of any

right to renew, and (2) the agreed rent which the tenant would pay for such use and occupancy. United States v. Petty Motor Co., 327 U.S. 372, 381 (1946); Viers v. State Roads Commn., 217 Md. 545, 551 (1958). The leasehold interest has a compensable value only if "the capitalized then fair rental value for the remaining term of the lease, plus the value of any renewal right, exceeds the capitalized value of the rental the lease specifies." Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 304 (1976). The excess of the fair rental value over the rental specified in the lease is referred to as the "lease advantage."

"If there is no lease advantage, the expropriator owes the lessee nothing." Central La. Electric Co. v. Gamburg, 200 So.2d 733, 740 (La. App. 1967). Accord, In re Urban Redevelopment Auth. of Pittsburgh, 272 A.2d 163, 165 (Pa. 1970) ("[Because] the leases had no 'bonus value' ... the lessee was not damaged by their condemnation."). As the court explained in NJ Highway Auth. v. J. & F Holding Co., 123 A.2d 25, 29 (N.J. Sup. 1956) (citations omitted):

> The tenant's recoverable damage, if any, is ascertained and determined fundamentally by a comparison of the fair value of his leasehold interest and the rent reserved. The burden descends upon the tenant to disclose by a fair preponderance of the evidence that the fair market value of his lease was greater than the rent reserved. The mere proof that one holds a tenancy in the condemned premises is not sufficient ipso facto to prove that the tenant has suffered a compensable loss in consequence of his deprivation of possession.

Accord, John Hancock Mutual Life Ins. Co. v. United States, 155 F.2d 977, 978 (1st Cir. 1946) (Upholding instruction to jury that it could award damages to the lessee only if the fair market rental of the premises exceeded the rent specified in the lease); Commercial Delivery Service v. Medema, 129 N.E.2d 579, 581 (Ill. App. 1955) (Holding that the tenant was entitled to no compensation because the market rental value of the property

was equal to or less than the rent stated in the lease); State v. Platte Valley Public Power & Irrigation Dist., 23 N.W.2d 300, 308 (Neb. 1946) ("Where the rent reserved equals or exceeds the rental value, the lessee had suffered no loss and cannot recover.").

The fair market value of a leasehold interest must reflect the terms and conditions of the lease under which the interest is held. Smith v. Potomac Electric Power Co., 236 Md. 51 (1964); Veirs v. State Roads Commn., supra, 217 Md. at 551-52 (The fair market value of a tenant's leasehold interest may be affected by any of the terms of the lease ...); 29A C.J.S. Eminent Domain § 132, at 343 (1992) (Any restrictive clause in the lease must be considered in determining the ... value of the lessee's unexpired term.). Thus, it is settled that when the lease limits the character of the business that can be carried on upon the premises, the value of the term for any other purpose is not material. 4 J. Sackman, Nichols' The Law of Eminent Domain, § 12D.01[3][j], at 12D-46 (Cum. Supp. 2005).

As the Supreme Court of Missouri explained in Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780, 784 (1965):

> the value of the leasehold should be determined from the testimony of qualified expert witnesses as that value which a buyer under no compulsion to purchase the tenancy would pay to a seller under no compulsion to sell, taking into consideration the period of the lease yet to run, including the unexercised right of renewal, the favorable and unfavorable factors of the leasehold estate, the location, type and construction of the building, the business of the tenant, comparable properties in similar neighborhoods, present market conditions and future market trends, and all other material factors that would enter into the determination of the reasonable market value of the property.

Accord, State v. Samborski, 463 S.W.2d 896, 902 (Mo. 1971); Minneapolis-St. Paul A.C. v. Hedberg-Freidmein Co., 32 N.W.2d 569, 572 (Minn. 1948) (The fair market value of a leasehold interest is "the price a buyer would be willing to pay for the leasehold with the

[improvement], subject to the terms and conditions of the lease."); Application of Bronx River Expressway, 104 N.Y.S.2d 554, 556 (N.Y. App. Div. 1951) ("All the provisions of the lease, including those governing the right of cancellation, must be given consideration in determining the rental value of the leasehold.").

If the tenant has installed or erected structures or other permanent improvements on the leased property, and the lease provides that the tenant is entitled to remove them during or at the end of the lease term, the tenant is entitled to be compensated for the taking of the improvements. 4 J. Sackman, Nichols' The Law of Eminent Domain, § 13.07[2] (Cum. Supp. 2005). The tenant, however, is not entitled to recover the value of the improvements as a separate item in addition to the value of the leasehold interest, nor is the tenant entitled to the diminution in value of the improvements or the cost of their removal. Id. Rather, the measure of damages is the increased market value of the leasehold interest by reason of the buildings and fixtures. Id.; accord, Minneapolis – St. Paul A.C. v. Hedberg Friedmein Co., supra, 32 N.W.2d at 572; State v. Samborski, supra, 463 S.W.2d at 902; Bd. of Regents v. Fischer, 498 S.W.2d 230, 233 (Tex. Civ. App. 1973).

The structural value of the buildings and fixtures – that is, the cost of their replacement or reproduction less depreciation – "may be a fair test of what they add to the market value of the leasehold if they are well adapted to the best use of the property... [and the lease is] of such duration that it will outlast the fixtures, or ... contain[s] a covenant of perpetual renewal at the option of the tenant." 4 J. Sackman, Nichols' The Law of Eminent Domain, § 13.121[1], at 13-63 (Cum. Supp. 2005). Additionally, "[e]vidence of the cost of removing the fixtures, the damage to them by removal, and the value of fixtures lost because incapable of removal has been admitted, not as proving specific items of damage, but as a means of showing the value of the unexpired term."

4 J. Sackman, Nichols' The Law of Eminent Domain, § 13.12[1], at 13-61 (Cum. Supp. 2005).

In addition to allowing the fair market value at the time of the taking (which is constitutionally mandated), Title 12 requires "as a matter of legislative grace" that State agencies pay several specific elements of damages. King, supra, 298 Md. at 85. These damages include, among others: (1) the legal rate of interest from the date of the jury's inquisition, Maryland Rule 2-604(b); Dodson, supra, 294 Md. at 496, (2) the cost of reproducing or replacing improvements in the case of condemnation of a church, § 12-104(d) of the Real Property Article, (3) the amount of taxes already paid attributable to the remaining portion of the year after the time of the taking, § 12-110(a) of the Real Property Article, and (4) relocation assistance which will be described in detail in § V. B, below.

B. Real Estate Valuation Techniques

Economists and real estate appraisers generally recognize three approaches to determining the market value of property: the cost approach, the sales comparison approach, and the income capitalization approach ("Income Approach"). The Appraisal of Real Estate (12th ed.) at 417 describes the sales comparison approach as follows:

> In the sales comparison approach, the appraiser develops an opinion of value by analyzing similar properties and comparing these properties with the subject property. The comparative techniques of analysis applied in the sales comparison approach are fundamental to the valuation process. Estimates of market rent, expenses, land value, cost, depreciation, and other value parameters may be derived in the other approaches to value using similar comparative techniques. Similarly, conclusions derived in the other approaches are often analyzed in the sales comparison approach to estimate the adjustments to be made to the sale prices of comparable properties.
>
> In the sales comparison approach, an opinion of market value is developed by comparing properties similar to the subject property that have recently

> sold, are listed for sale, or are under contract (i.e., for which purchase offers and a deposit have been recently submitted). A major premise of the sales comparison approach is that the market value of a property is related to the prices of comparable, competitive properties.
>
> Comparative analysis of properties and transactions focuses on similarities and differences that affect value, which may include variations in the following:
>
> (1) Property rights appraised
> (2) The motivations of buyers and sellers
> (3) Financing terms
> (4) Market conditions at the time of sale
> (5) Size
> (6) Location
> (7) Physical features
> (8) Economic characteristics, if the properties produce income

In the cost approach, value is estimated as the value of the land as vacant, plus the current replacement cost new (or reproduction cost of) the improvements, less accrued depreciation to the improvements. The Appraisal of Real Estate (12th ed., The Appraisal Institute, 2001) at 50. (Ex. 7). There are three elements of accrued depreciation: physical deterioration, functional obsolescence, and external obsolescence or externalities. An externality is a loss or gain in improvement value based on factors that are external to the property itself. Id. at 352-53. "If properties of a certain type are scarce or it is difficult to construct new, competitive properties, the value of a newly constructed building may be higher than its cost." Id. at 353. On the other hand, a lack of demand for the property may "cause the value of the property to be less than its cost." Id.

Income producing properties or business properties are typically valued using the income approach. "Income-producing real estate is typically purchased as an investment, and from an investor's point of view earning power is the critical element affecting property value." Id. at 471. Further, it is settled that "[a]ny property that generates

income can be valued using the income capitalization approach," and "when more than one approach to value is used to develop an opinion of value for an income-producing property, the value indication produced by the income capitalization approach might be given greater weight…." Id. at 472. In the Income Approach, the appraiser analyzes a property's capacity to generate the benefits of cash flow and a reversion and converts those benefits to a present value. Id. at 471. In a direct capitalization, the appraiser determines the present value of a future income stream by applying an overall capitalization rate to the net operating income of the property. Id. The authors of The Appraisal of Real Estate provide the following example of the determination of net operating income for an apartment complex (id. at 525):

Southside Apartments: Reconstructed Operating Statement

Income		
Potential gross annual income		
Rents:		
11 units @ $500/mo.	$66,000	
12 units @ $525/mo.	75,600	
16 units @ $575/mo.	110,400	
16 units @ $600/mo.	115,200	
	$367,200	
Other income	1,380	
Total potential gross income @ 100% occupancy	$368,580	
Less vacancy and collection loss @ 4%	-14,743	
Effective gross income		$353,837
Operating expenses		
Fixed		
Real estate taxes	$18,700	
Insurance		
Fire and extended coverage	1,880	
Other	770	
Subtotal	$21,350	
Variable		

Management $352,512x0.05)	$17,625	
Superintendent	16,800	
Site maintenance and snow removal	5,900	
Electricity	2,200	
Other utilities	1,000	
Repair and maintenance	12,500	
Trash removal ($45x12)	540	
Pest control ($65x12)	780	
Supplies	325	
Other	325	
Subtotal	$57,995	
Replacement allowance		
Interior decorating	$3,750	
Exterior paint ($4,650/3)	1,550	
Kitchen and bath equipment ($1,300x55)/10	7,150	
Carpeting ($900x55)/6	8,250	
Roof ($18,000/20 years)	900	
Subtotal (6.1% of EGI)	$21,600	
Total operating expenses		
Operating expense ratio ($100,945/$353,837)=28.53%		-$100,945
Total expenses per unit ($100,945/55)=$1,835 per unit		
Net operating income		$252,892

The Maryland courts have recognized, to varying degrees, the validity of the three approaches to value utilized by economists and appraisers. The sales comparison or "market data" approach is favored, State Roads Commn. v. Adams, 238 Md. 371, (1965), provided that such sales are voluntary. Williams v. New York, Philadelphia & Norfolk R.R., 153 Md. 102 (1920). Evidence of comparable sales voluntarily made is admissible as primary evidence of the value of the property taken, or to support an expert's opinion, or both. State Roads Commn. v. Adams, 238 Md. 371 (1965). The Circuit Court has wide latitude and discretion with respect to the admissibility of comparable sales. State Roads Commn. v. Parker, 275 Md. 651 (1975); Taylor v. State Roads Commn., 224 Md. 92 (1961).

The income approach to valuing real estate has been embraced by the Court of Appeals on a limited basis where the real estate appraiser capitalizes market derived rental rates for the subject property. Brinsfield v. Baltimore City, 236 Md. 66 (1964). This method was not admitted where there existed considerable evidence of comparable sales, Harford Bldg. Corp. v. City of Baltimore, 58 Md. App. 85 (1984), and was disallowed as a sole method of valuation where otherwise competent evidence existed. United States v. Upper Potomac Properties, 448 F.2d 913 (4th Cir. 1971). The apparent reason for judicial reluctance to embrace the income approach is that, in a condemnation case, the property owner is entitled only to the fair market value of the real estate, and not the fair market value of the business operated on the property. An income approach that capitalizes the profits or net operating income of the business would reflect the value of the business, not the real estate.

The cost method is not favored as a result of the difficulty in estimating accrued depreciation. C & P Telephone Co. v. Public Service Commn., 201 Md. 170 (1952). In The Appraisal of Real Estate (12th ed., 2001), at 355, the Appraisal Institute indicated that the difficulty of estimating depreciation in older properties may diminish the reliability of the cost approach in that context.

C. Relocation Assistance

Maryland's relocation assistance law guarantees reimbursement to a displaced person whose home or business is displaced as a result of condemnation by a public agency of the person's costs and expenses incurred in relocating the home or business. Relocation assistance is provided in a separate administrative proceeding and is not part of the condemnation proceeding in which the condemning authority acquires real property interests for their fair market value. Specifically, under § 12-205(a) of the Real Property Article of the Annotated Code of Maryland, if the acquisition of land for a

project undertaken by a public agency will result in the displacement of any person, the agency is required to make a payment to the displaced person, upon proper application, of (1) the "actual reasonable expenses in moving himself, his family, business, farm operation or other personal property," and (2) the amount of "actual direct loss of tangible personal property as a result of moving or discontinuing a business or farm operation, but not exceeding an amount equal to the reasonable expenses that would have been required to relocate the personal property, as determined by the agency," (3) actual reasonable expenses in searching for a replacement business or farm, and (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site as determined by the displacing agency, but not to exceed $10,000.

A "business" is broadly defined to include any lawful activity conducted primarily "for the manufacture, processing, or marketing of products, commodities, or any other personal property" or "for the sale of services to the public." Real Property Article, § 12-201(c). A person is "displaced" by a public project if the person "moves from land, as a result of the whole or partial acquisition of the land" for a public project by a public agency. Real Property Article, § 12-201(f)(1).

In lieu of payment from the public agency for the costs and expenses actually incurred in relocating the home or business, a property owner may elect to receive a fixed payment in an amount to be determined according to criteria established by the public agency, except that such payment may not be less than $1,000 nor more than $20,000 or the amount produced under the federal Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601-4638 (the "Relocation Assistance Act"), whichever is greater. Real Property Article, § 12-205(c). A person whose sole business at the displacement dwelling is the

rental of such property to others, however, shall not qualify for a fixed payment of relocation expenses. Id.

State and Federal law require that any eligible person, family, business, farm or non-profit organization displaced by any public agency be offered relocation assistance advisory services. Real Property Article, § 12-206; 49 CFR § 24.205. Section 4622(a)(1) of the Relocation Assistance Act provides that a person or business displaced by a federally funded project is entitled to the payment of "actual reasonable expenses in moving" to a new location. Pursuant to § 4633(b) of the Relocation Assistance Act, the Department of Transportation ("DOT"), the lead agency for administering the Relocation Assistance Act, adopted §§ 24.301 et seq. of Title 49 of the Code of Federal Regulations ("CFR") which sets forth the specific moving and related expenses that are eligible for relocation assistance under the Relocation Assistance Act. Specifically, 49 CFR § 24.301 identifies the following eligible actual moving expenses for which the displacing agency is responsible under the Relocation Assistance Act for non-residential moves:

(1) Transportation costs for a distance of up to 50 miles;

(2) Packing, crating, unpacking and uncrating of the personal property;

(3) Disconnecting, dismantling, removing, reassembling, and reinstalling relocated household appliances, personal property, machinery, equipment, and connections to utilities and includes modifications to the personal property, machinery, and equipment necessary to adapt it to the replacement structure, site, or utilities at the replacement site;

(4) Storage of the personal property for a period of up to 12 months;

(5) Insurance for the replacement value of the property in connection with the move and necessary storage;

(6) Replacement value of property lost, stolen, or damaged in the process of moving provided that the loss is not through the fault or negligence of the displaced person, his agent or employee and where

insurance covering such loss, theft or damage is not reasonably available;

(7) Any license, permit, fees or certification required of the displaced person at the replacement location based on the remaining useful life of the existing license, permit, fees or certification;

(8) Professional services as the displacing agency determines to be actual, reasonable, and necessary for planning the move, moving, and installing the personal property at the replacement location;

(9) Relettering signs and replacing stationary on hand at the time of displacement that are made obsolete as a result of the move;

(10) Actual direct loss of tangible personal property incurred as a result of moving or discontinuing the business or farm operation including the lesser of (a) the fair market value of the item as is for continued use, less the proceeds from its sale, or (b) the estimated cost of moving the item as is but not including any allowance for storage or for reconnection if the item is in storage or not being used at the replacement location. If the business or farm operation is discontinued, the estimated cost of moving the item shall be based on a moving distance of 50 miles;

(11) If an item of personal property which is used as part of a business or farm operation is not moved but is promptly replaced with a substitute item, the displaced person is entitled to payment of the lesser of (a) the cost of the substitute item, including installation costs at the substituted site minus the proceeds from the sale or trade-in of the replaced item, or (b) the estimated cost of moving and reinstalling the replaced item but with no allowance for storage;

(12) Costs, not to exceed $2,500, incurred in searching for a replacement location, including transportation, meals and lodging, time spent searching based on reasonable salary or earnings, fees paid to a real estate broker or agent to locate a replacement site, time spent in obtaining permits and attending zoning hearings, and time spent negotiating the purchase of a replacement site based on a reasonable salary or earnings; and

(13) Other necessary and related incidental expenses.

The displacing agency, however, is not responsible for the reimbursement of the property owner for the following ineligible moving and related expenses for non-

residential moves (49 CFR § 24.305): (1) the cost of moving any structure or other real property improvement in which the displaced person reserved ownership, (2) interest on a loan to cover moving expenses, (3) loss of goodwill, (4) loss of profits, (5) loss of trained employees, (6) personal injury, (7) any legal fee or other cost for preparing a claim for a relocation payment or representing a claimant before the displacing agency, (8) expenses for searching for a replacement dwelling, (9) costs for storage of personal property on real property already owned or leased by the displaced person, or (10) refundable security and utility deposits.

D. Damages to Business Goodwill And Loss Of Business Value Are Not Compensated Under Current Law

1. Valuation Of The Total Assets of A Business And Business Intangibles

Dr. Boland and Mr. Lennhoff explained that an operating business can have a market value that exceeds the real property and tangible personal property that are utilized in the operation of the business. This proposition appears to be universally accepted by economists and real estate appraisers. The Appraisal of Real Estate (12th ed. The Appraisal Institute, 2001) at 641-44; 4 J. Sackman, Nichols' The Law of Eminent Domain, § 13.18 (Cum. Supp. 2005). The increment of value in excess of the value of real and personal property interests has been given numerous labels. The additional increment has been referred to as "business goodwill," "going concern value" or "business enterprise." The Appraisal of Real Estate (12th ed. The Appraisal Institute, 2001) at 642. In The Appraisal of Real Estate (11th ed., Appraisal Institute, 1996) at 578-79, the Appraisal Institute defined "business enterprise value" ("BEV") as:

> Business enterprise value is a value enhancement that results from items of intangible personal property such as marketing and management skill, an assembled work force, working capital, trade names, franchises, patents,

> trademarks, non-realty related contracts/leases, and some operating agreements.

One commentator, M. Kenney, Business Enterprise Value: The Debate Continues, The Appraisal Journal, Vol. 63, No. 1, 1995 WL 12072365 (1995), which is attached as Exhibit 8, quoting William N. Kinnard, Jr., "Standards for Measuring Business Enterprise Value in Regional and Super-regional Shopping Centers: Operating Entrepreneurship, Economic Rent and Profit Residuals," 57th Annual International Association of Assessing Officers (IAAO) Conference (Phoenix, Arizona, October 1991) explains (Ex. 8 at 3):

> The creation of BEV may have several sources; the "ultimate reason for its existence, however, is superior management or operating entrepreneurship. ... Operating entrepreneurship is resource management of an operating business that results in supramarket rentals and [net operating income] NOI."

In the Twelfth Edition of The Appraisal of Real Estate, the Appraisal Institute abandoned the term "business enterprise value" in favor of the term "total assets of the business" which includes the following component parts (Ex. 7 at 642):

- Real property
- Tangible personal property
- Intangible personal property

The personal property is broken down into:

- Furniture, fixtures, and equipment (FF&E)
- Inventory

The intangibles are made up of:

- Contracts
- Name
- Patents
- Copyrights
- An assembled work force
- Cash

- Other residual intangibles

The "residual intangible" category includes a component called "capitalized economic profit" or "CEP" which the Appraisal Institute defines as the present worth of an entrepreneur's economic profit expectation. In other words, the CEP is the residual value that is left after all agents of production employed in a business (e.g., land, labor, capital, tangible personal property) are identified and stripped away.

Businesses are bought and sold in the same manner as other property interests. When an entire business is sold, it is sold with all its component property interests, real, tangible and intangible, including the CEP. The total assets of a business can, therefore, have a fair market value that is distinct for the fair market value of any of its component property interests. Many Federal and State statutes and regulations require that the fair market value of a business be determined for estate taxation, excise taxation income taxation and a myriad of other purposes. The "fair market value" of intangible property, such as businesses, must be determined under: (1) 26 U.S.C. § 170, income tax charitable contributions, (2) 26 U.S.C. § 642, special rules for charitable deductions, (3) 26 U.S.C. § 664, charitable remainder trusts, (4) 26 U.S.C. § 2055, estate tax charitable contributions, (5) 26 U.S.C. § 2512, gift tax, and (6) 26 U.S.C. § 2624, generation skipping transfer tax. In Hood, Tax Management Portfolio, Estates, Gifts and Trusts: Valuation General and Real Estate (2003), the commentator listed numerous authorities (court decisions, revenue rulings, Treasury regulations) describing the determination of the "fair market value" for intangible interests in closely held corporations, partnerships, limited liability companies and joint ventures. These authorities include Treasury Reg. §§ 20.2031-3 and 25.2512-3 which govern the determination of fair market value of a sole proprietor business.

The Twelfth Edition of The Appraisal of Real Estate states (at 643) that the income approach to value is generally the most effective way to determine the fair market value of the total assets of a business if the business has an operating history. The cost approach offers little or no insight into the value of the operating business, and the sales comparison approach, while reasonably straightforward and sometimes effective, involves difficult adjustments in many situations.

Accordingly, the most effective manner of determining the fair market value of the total assets of the business is the income approach. Dr. Boland explained how the income approach is utilized to value the total assets of the business. First, the future net income from the business is projected based on sales and revenue forecasts and cost models. The net income is the net cash flow from the business, after accounting for all expenses, investments, and other capital cost. In other words, the net income is the actual cash flow to the owner, plus retained earnings. Projections of revenues and expenses are based on historic experience and reasonably anticipated changes. In the income capitalization approach, the projected net income for a stabilized year is reduced to a present value using an appropriate capitalization rate to give the present value of future income. In a discounted cash flow approach the projected net income for a holding period, plus a terminable capitalization value, is reduced to present value by use of a discount rate. Dr. Boland explained that a business is viable when the present value of future cash flow is greater than the sum of the values of all real property, tangible personal property and identifiable and separable intangible assets such as patents, copyrights and contracts.

2. Current Law: No Compensation In Condemnation Proceedings For Loss Of, Or Damage To, Business Intangibles

As previously indicated, the Court of Appeals has ruled that, in determining the proper formulation of just compensation in a condemnation case, Supreme Court decisions are practically direct authority for the takings clause in Article III, § 40 of the Maryland Constitution. King v. State Roads Commn., 298 Md. 80, 83-84 (1983). In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the Supreme Court analyzed whether, in an action to condemn real estate on which a business is operated, the owner of the business is entitled to compensation for the loss of, or damages, to business intangibles or "goodwill." The Court ruled that, as a general matter, a business owner is not entitled to compensation for business intangibles, but the Court identified two limited exceptions. The United States had condemned the right to temporary use and occupancy of Kimball's laundry during World War II to provide laundry and dry cleaning services for members of the armed services. The property owner argued that it was entitled to compensation for the going concern value of the business. The Supreme Court initially explained that such a value is ordinarily not compensable in a condemnation case (338 U.S. at 11-13):

> 'In determining the value of a business as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances.' See also Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165, 35 S.Ct. 811, 814, 59 L.Ed. 1244; McCardle v. Indianapolis Water Co., 272 U.S. 400, 414, 47 S.Ct. 144, 149, 71 L.Ed. 316.
>
> What, then, are the circumstances under which the Fifth Amendment requires compensation for such an intangible? Not, indeed, those of the usual taking of fee title to business property, but the denial of compensation in such circumstances rests on a very concrete justification: the going-concern value has not been taken. Such are all the cases, most of them

> decided by State courts under constitutions with provisions comparable to the Fifth Amendment, in which only the physical property has been condemned, leaving the owner free to move his business to a new location. E.G. Bothwell v. United States, 254 U.S. 231, 41 S.Ct. 74, 65 L.Ed. 238; Banner Milling Co. v. State of New York, 240 N.Y. 533, 148 N.E. 668, 41 A.L.R. 1019. In such a situation there is no more reason for a taker to pay for the business' going-concern value than there would be for a purchaser to pay for it who had not secured from his vendor a covenant to refrain from entering into competition with him. It is true that there may be loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will, and that such loss, like the cost of moving, is denied compensation as consequential. See Joslin Mfg. Co. v. Providence, 262 U.S. 668, 676, 43 S.Ct. 684, 688, 67 L.Ed. 1167 But such value as the good will retains, the owner keeps, and the remainder dissipated by removal would not contribute to the value paid for by a transferee of the vacated premises, except perhaps to the extent that the prospect of its loss would induce the owner to hold out for a higher price for his land and building. Cf. United States v. General Motors Corp., 323 U.S. 373, 383, 65 S.Ct. 357, 361, 89 L.Ed. 311, 156 A.L.R. 390. When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. See Sawyer v. Commonwealth, 182 Mass. 245, 65 N.E. 52, 59 L.R.A. 726, per Holmes, C.J. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. Mitchell v. United States, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644.
>
> The situation is otherwise, however, when the Government has condemned business property with the intention of carrying on the business, as where public-utility property has been taken over for continued operation by a governmental authority.

The Supreme Court then explained that the property owner was entitled to compensation for the going concern value in the case before it because the government's exercise of eminent domain had the inevitable effect of depriving the owner of the going concern value of its business (338 U.S. at 14):

> The Government's temporary taking of the Laundry's premises could no more completely have appropriated the Laundry's opportunity to profit from its trade routes than if it had secured a promise from the Laundry that it would not for the duration of the Government's occupancy of the premises undertake to operate a laundry business anywhere else in the City of Omaha. The taking was from year to year; in the meantime the Laundry's investment remained bound up in the reversion of the property. Even if funds for the inauguration of a new business were obtainable otherwise than by the sale or liquidation of the old one, the Laundry would have been faced with the imminent prospect of finding itself with two laundry plants on its hands, both of which could hardly have been operated at a profit. There was nothing it could do, therefore, but wait. Besides, though trade routes may be capable of transfer independently of the physical property with which they have been associated, it is wholly beyond the realm of conjecture that they could have been sold from year to year or that the Laundry would have bound itself to give them up for a longer period when at any time its plant might be returned. It is equally farfetched, moreover, to suppose that they could have been transferred for a limited period and then recaptured.

Accordingly, under the Federal and State Constitutions, a property owner is not entitled to compensation for business "goodwill" or intangibles. The two narrow exceptions to this rule are that the property is entitled to compensation for business intangibles if: (1) the condemning authority is acquiring the business to continue operating it; or (2) the condemning authority is acquiring the property only temporarily and will return it after a period of time. It is important to note that, under the Kimball Laundry rule, the Court established an irrebuttable presumption that business intangibles can be transferred to a new location in all situations, even if this may not be true as a practical matter in a specific situation. Further, the Court's analysis indicated that just compensation does not include compensation for the disruption of a business. See, Newark v. Cook, 133 A. 875, 879 (N.J. Eq. 1926) ("Loss of business, profits, goodwill, … and cost of removal and the like suffered … are obviously not lands or real estate or rights or interest therein in the legal sense and not within the criterion fixed by the statute.").

In Maryland, because there is no statutory right to recover damages to business intangibles in addition to the fair market value of the land being acquired, such damages are not recoverable in a condemnation case. Mercantile-Safe Deposit & Trust Co. v. City of Baltimore, 308 Md. 627, 643 (1987); Rudolph Hills v. Shoreham, 266 Md. 182, 192 (1971).

Like the Supreme Court in Kimball Laundry, courts in other jurisdictions have consistently held that, in the absence of a statute that authorizes compensation for the loss of business intangibles or "goodwill," a business owner is not entitled to compensation for such damages. A leading commentator, 4 J. Sackman Nichols' The Law of Eminent Domain, § 13.18[1] (Cum. Supp. 2005) states, quoting State v. Davis Concrete of Delaware, Inc., 355 A.2d 883, 886 (1976):

> Businesses are bought and sold like any other property. A perusal of any major newspaper will disclose classified advertisements for the sale of going businesses. The numerous franchises a prospective entrepreneur can purchase are another aspect of the business market. Clearly, businesses do not need to be started from scratch; many operating businesses are available for purchase on the open market.
>
> Despite the marketplace's widespread acceptance of businesses as valuable and saleable assets, it has generally been held that a business is not property covered by the constitutional prohibition against the taking of private property for public use without payment of just compensation. One court stated:
>
> "It is settled here and elsewhere that, in determining constitutional 'just compensation,' the owner is not entitled to recover compensation for the destruction of a business conducted on the land taken. A business is not "property" in the constitutional sense; and the value of a business is not material to the issue of just compensation, except insofar as it may tend to establish the market value of the real property."
>
> This statement summarizes the past consensus of many courts addressing the condemnation of a business. Under this reasoning, an owner whose

> business was destroyed or interrupted was out of luck when it came to receiving compensation from the condemnor.

This commentator then explained the various rationales offered by the courts for the rule that the loss of business goodwill is not compensable (4 J. Sackman Nichols' The Law of Eminent Domain at § 13.18[2], footnotes omitted):

> Past judicial justification for denying compensation for goodwill has been based upon various theories:
>
> (1) Under one theory, damage to a business was not considered compensable by virtue of the fact that neither the business nor its goodwill were taken. Since title to property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense of surrendering possession are not compensable.
>
> (2) The second theory is merely a restatement of the rule in different terms. The denial of compensation is based upon the doctrine that damages to a business or goodwill are damnum absque injuria (Loss without injury in the legal sense).
>
> (3) The third theory is based upon the argument that business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution undertakes to protect.
>
> (4) Still another view embodies the concept that such losses were not within the contemplation of the eminent domain clause of the constitution.

Another commentator, 1 L. Orgel, Orgel On Valuation Under Eminent Domain, § 77, pp. 333-34 (1953) agrees, stating:

> With respect to the allowance of incidental damages, the courts appear to adhere rather strictly to the market value standard. Thus, they exclude from consideration certain types of losses which can be regarded as having little, if any, bearing on the sale value of the premises. These losses are generally expressed in terms of the financial outlays which the condemnation imposes on the owner or in terms of lost opportunity to secure an income.... [I]t seems plausible that the underlying basis of this argument is the feeling that to permit recovery for these losses would make it impossible to

estimate in advance the probable cost of the property appropriated and would thus deter or discourage public improvements. The denial of compensation and the strict adherence to the market value standard in these cases is thus seen to be a mode of compromising or adjusting the conflict between the community'[s] interest in public improvements and the principle of complete indemnity to the owner.

3. The Uniform Eminent Domain Code And Statutes And Constitutions From Other States Providing For Compensation For Loss Of Business Intangibles

The Uniform Eminent Domain ("UED") Code is a model condemnation statute first promulgated by the Real Property, Probate, and Trust Section of the American Bar Association during the late 1960s and later redrafted by the National Conference of Commissioners on Uniform State Laws in 1974. Section 1016 of the UED Code was intended to reverse the general, but widely criticized, rule under which compensation for loss of business goodwill is not allowed in eminent domain. See Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth., 517 P.2d 845 (Colo. 1974). Section 1016 of the UED Code, which is attached as Exhibit 9, provides:

> (a) In addition to fair market value determined under Section 1004, the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill only if the owner proves that the loss is (1) caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill, (3) will not be included in relocation payments under Article XIV, and (4) will not be duplicated in the compensation awarded to the owner.
>
> (b) Within the meaning of this section, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

Several jurisdictions have created statutory or constitutional entitlements to compensation for the loss of business intangibles in condemnation proceedings. (Ex. 9). For example, California and Wyoming have amended their eminent domain laws to conform § 1016 of the UED Code. Section 1263.510 of the California Civil Procedure Code and § 1-26-713 of the Wyoming Statute each adopt the definition of "goodwill" provided in § 1016(b) of the UED Code. The California and Wyoming statutes further provide that the owner of a business conducted on the property taken by the condemning authority shall be compensated for loss of goodwill if the owner proves all of the following:

> (1) the loss is caused by the taking of the property or injury to the remainder;
>
> (2) the loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill;
>
> (3) compensation for the loss will not be included in payment under the provision of the State Code which provides for relocation assistance; and
>
> (4) compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

Cal. Civ. Proc. Code § 1263.510; Wyo. Stat. Ann. § 1-26-713.

Vermont also recognizes business loss as an item of damage in a condemnation proceeding. 19 Vt. Stat. Ann. § 501(2). To be compensable, the business loss must be one "'which has not necessarily been compensated for in the allowance made for [the] land.'" In re Condemnation Award to 89-2 Realty, 566 A.2d 979, 981 (Vt. 1989), quoting Sharp v. Transp. Bd., 451 A.2d 1074, 1076 (Vt. 1982). Business loss, however,

is allowed only with respect to a "fixed and established business." Sharp, 451 A.2d at 1076.

Florida provides that in limited circumstances, a property owner may recover the lost profits or goodwill of the business located on a property taken by the condemning authority. Fla. Stat. Ann. § 73.071(3). If the following conditions are met, an award can be made for going concern value:

(1) The business must be more than five years old. This does not mean that the present owner must have been the owner for five years, but the courts draw a distinction between the sale of a business versus the sale of a place of business. Tampa-Hillsborough County v. K.E. Morris Allign., 444 So.2d 926, 929 (Fla. 1983); Division of Admin. v. Lake of the Woods, Inc., 404 So.2d 186, 187-88 (Fla. Dist. Ct. App. 1981); Hodges v. Division of Admin., 323 So.2d 275, 276-77 (Fla. Dist. Ct. App. 1975).

(2) The taking must be for right-of-way purposes by one of the condemning authorities named in the statute, i.e., the state road department, a county, a municipality, board, district or other public body. Fla. Stat. Ann. § 73.071(3)(b).

(3) The business must have been located upon the land taken and adjoining land for five years. Tampa-Hillsborough, 444 So.2d at 929.

The Florida statute is strictly construed in favor of the State and business damages will be awarded only when it is clearly consistent with the legislative intent. Tampa-Hillsborough, 444 So.2d at 929. If a business is completely destroyed, the proper total measure of damages is the market value of the business on the date of the loss. Polyglycoat Corp. v. Hirsch Distribs., Inc., 442 So.2d 958, 960 (Fla. Dist. Ct. App. 1983). If the business is not completely destroyed, then the business owner may recover lost profits. Aetna Life & Cas. Co. v. Little, 384 So.2d 213, 216 (Fla. Dist. Ct. App. 1980). A business, however, may not recover both lost profits and the market value of the

business. Sostchin v. Doll Enters., Inc., 847 So.2d 1123, 1128 n.6 (Fla. Dist. Ct. App.), review denied, 860 So.2d 977 (Fla. 2003); Trailer Ranch, Inc. v. Levine, 523 So.2d 629, 631 (Fla. Dist. Ct. App. 1988).

Finally, Louisiana took a constitutional approach to resolving the question of business losses when it redrafted its constitution in 1974. In Article I, § 4 of the Louisiana Constitution, the provision of "just and adequate compensation" was replaced with one requiring that the condemnee "be compensated to the full extent of his loss." Louisiana Courts interpret this provision to include business losses. Layne v. City of Mandeville, 633 So.2d 608, 611 (La. Ct. App. 1993).

4. Judicially Established Exceptions To The General Rule Denying Compensation For Loss Of Business Intangibles

Courts in some jurisdictions have carved out further exceptions to the general rule and allowed the recovery of damages to business intangibles where the business and the land are so intertwined that the property constitutes a "special purpose" or "unique" property, or if the business is otherwise incapable of being moved from the land.

One of these exceptions exists where (1) the property owner holds a franchise or license that enables him or her to conduct a regulated business, and the franchise or license relates specifically to the property being condemned, (2) the franchise or license can be transferred to a subsequent purchaser of the property, and (3) the franchise cannot, as a legal or practical matter, be transferred to a new location. If these elements exist, the franchise is found to be an integral and concrete component of the real estate, and the condemnor must pay for the value of the franchise as an element of just compensation. As the authorities described below establish, if these elements exist, the franchise is an integral component of the real estate, and the condemnor must pay for the value of the franchise as an element of just compensation.

"A franchise is a contract creating property rights." 4 J. Sackman, Nichols' The Law of Eminent Domain, § 13.15[2] (3d. ed. 1982, Supp. 1998). Nichols' has defined a franchise as follows (id.):

> In the typical franchise agreement, a company (the "franchisor") owns a trade mark or trade name which it licenses to another (the "franchisee") to use upon the condition that the uses conform to the franchisor's business standards insofar as the franchisee's business is associated with the trade mark or trade name. Franchise agreements, therefore, require a cooperative effort. McDonald's and other fast food restaurants are well known franchise businesses.

Further, "it is generally held that a franchise is property for which compensation must be paid when it is taken for a public use," and "[t]his is true whether a business franchise is involved between private parties or the franchise exists between a government and a private party." Id.

These courts have held just compensation must be paid for a franchise when the three requisite elements listed above exist. The leading case is Michigan State Highway Commn. v. L&L Concession Co., 187 N.W.2d 465 (Mich. App. 1971). There, the State Highway Commission condemned real property improved by an automobile racetrack and grandstands. L&L Concession Company ("L&L") held a leasehold interest in a portion of the property which included a franchise which gave it the exclusive right to concessions in the grandstand for a specified period of time. At trial, L&L was denied the opportunity to present evidence regarding the value of its leasehold interest and concessions franchise, and the Highway Commissioners returned a verdict only in favor of the fee owner of the track and grandstand for the value of the real estate. No award was made to L&L.

The Michigan Court of Appeals reversed and ordered a trial on the issue of the value of the leasehold interest and franchise. Initially, the Court stated the general rule

that the goodwill or going concern value of a business is not compensable in a condemnation case (187 N.W.2d at 468-69, footnotes omitted):

> Ordinarily no compensation is allowed for goodwill or going-concern value of a business operated on the real estate being condemned. This view has been strongly criticized by commentators who argue that 'the owner has no assurance after the taking that he can again combine (at a new location) all the factors of production into his previously efficient and profitable operation.' However, since the State but rarely intends to operate the business, the courts have been unwilling to award compensation unless the destruction of the business was a necessary consequence of the condemnation.

The Court then held that the value of L&L's franchise to sell concessions at the racetrack was a compensable interest if L&L could prove at trial that the franchise could not practically be transferred to a new location (187 N.W.2d at 470-71):

> The going-concern value of L&L's business is not related to customers L&L cultivated but to the patronage of the race track; the concession gives L&L a monopoly on food and souvenir sales at the Speedrome. The value of the concession flows from location advantage and L&L's monopoly position at that location, not conventional customer goodwill. The value flows from an 'adaptation' of the grandstand to a use for which it is suited. Viewed from that perspective, allowing compensation for the value of the concession is consistent with the case law which recognizes that in valuing real estate for condemnation purposes it is proper to include value attributable to a use for which the real estate is adapted.
>
> The efforts to limit Kimball [Laundry Co. v. United States, 338 U.S. 1 (1949)] to temporary takings eludes the central meaning of that case. The Federal government was not required to pay for the route lists because the plant was only temporarily taken or because they represented customer goodwill but because their value was destroyed by the taking. The circumstances which caused the destruction of the value of the route lists was the temporariness of the taking which precluded construction and outfitting of a replacement plant. L&L claims that, given the opportunity to prove its case, it can provide comparable assurances that the value for which it seeks compensation has been destroyed, not saved to its advantage elsewhere.

Likewise, in City of Detroit v. Michael's Prescriptions, 373 N.W.2d 219 (Mich. App. 1985), the City condemned Michael's Prescriptions, a pharmacy, as part of an urban renewal project known. Michael's Prescriptions was located directly across the street from the entrance into St. Joseph Mercy Hospital, and the pharmacy held the exclusive right to fill prescriptions for the emergency room at the hospital. The trial court permitted Michael's Prescriptions to recover the going-concern value of its business because the monopoly franchise with St. Joseph Mercy Hospital would not be transferred elsewhere (373 N.W.2d at 225-26):

> Respondent's accountant testified that due to the unique location of the pharmacy and monopolization of the prescription business of St. Joseph Mercy Hospital's emergency room, Michael's Prescriptions generated phenomenal gross sales of pharmaceuticals. Testimony established that when Michael's Prescriptions and St. Joseph Mercy Hospital were the only businesses operating in the condemned area, Michael's Prescriptions still generated its highest sales and most profitable year.
>
> * * *
>
> We conclude that the trial court did not err in allowing the introduction of evidence as the going concern value of Michael's Prescriptions. Since the verdict was within the range of the valuation testimony offered at trial, we decline to disturb it on appeal. Moreover, we find that the method of valuation used in determining the going concern value of Michael's Prescriptions was proper under In re Park Site on Private Claim 16, 247 Mich. 1, 225 N.W. 498 (1929), and that the jury's award reflects the value of the leasehold interest. [City of Lansing v.] Wery, 68 Mich. App. 163, 242 N.W. 2d 51 [(1976)].

In State ex. rel. Mattson v. Saugen, 169 N.W. 2d 37 (Minn. 1969), for another example, the State of Minnesota condemned an improved property on which Saugen operated a liquor lounge. Saugen had a license from the City of Minneapolis to operate the liquor lounge on the property, and the license related specifically to the property designated in the license, that is, to the property being condemned. The license was

transferable to purchasers of the property. Saugen tried three times to transfer the license to a new location, but was unsuccessful. The property was subsequently demolished and the liquor license expired. The Commissioners appointed by the trial court to determine just compensation determined that the fair market value of the land, building and fixtures was $39,500. The Commissioners, however, refused to award the value of the liquor lounge business as an element of just compensation. The parties had stipulated that, if the value of the business were compensable, that value was $17,500.

Saugen appealed, contending that, under the circumstances presented, he was entitled to receive the value of the liquor lounge business as a going concern as an element of just compensation. The Supreme Court of Minnesota recognized the general rule that the loss of the going concern value of a business is not recoverable as an element of just compensation in a condemnation of real estate, but the Court held that there is an exception to this rule, and a property owner is entitled to the going concern value of a business if three elements are satisfied: (1) the business is one which cannot be pursued without a license, (2) the license is transferable to subsequent purchasers of the property, and (3) the license relates specifically to particular premises which are designated in the license itself. The Court stated (169 N.W. 2d at 42-43, citations omitted):

> In our opinion, an exception to the general rule applies in the situation where, as here, the condemnee's business is one which cannot be pursued without a license, and where that license, while transferable between persons, must relate specifically to particular premises which are designated in the license itself.

Further, the Court held that the three elements were satisfied in the case before it (id. at 46):

> The present case is one where the way is open to award appellant compensation for the going-concern value of the business. Here the condemnee was deprived of far more than the value of cold assets. The

> exercise of the right of eminent domain effectively destroyed appellant's valid and unrevoked ability to continue to engage in the liquor business. The parties stipulated that absent the taking by the state, there was no evidence that appellant could not have continued to operate its lounge at the premises in question and that the appellant has gone out of the liquor business because it was unsuccessful in transferring its license to another location. It was unable to relocate because of the restricted liquor patrol limits and other peculiarities of the Minneapolis licensing situation. There is no problem here with a speculated loss because the going-concern value has been stipulated to be $17,500. Although a liquor license is a privilege vis-à-vis the licensing authorities, it has qualities of a property right as to third parties, and in eminent domain proceedings we consider the condemnee to have a property right in his liquor license vis-à-vis the condemnor. The going-concern value of appellant's liquor lounge operating under a valid and unrevoked liquor license was a property right which was taken by the condemnor. As such, we hold that the facts of this particular case fall within an exception to the general rule of no compensation for incidental damages and that appellant is entitled to recover for the loss of the going business (stipulated as $17,500) as well as the usual award for the value of the real property taken (stipulated as $39,500).

The Minnesota Supreme Court relied on the Supreme Court's decision in Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), holding that Kimball Laundry was entitled to compensation for the value of the trade because the government's exercise of eminent domain had the inevitable effect of depriving the owner of the going concern value of its business.

The Minnesota Supreme Court also relied on Jackson v. United States, 103 F. Supp. 1019 (Ct. Cl. 1952). In that case, the property owner, Jackson, held a license from the State of Maryland to conduct commercial fishing operations in certain areas of the Chesapeake Bay. Under Maryland law, the license was effective for one year, but could be renewed. In 1943, the United States expanded restricted proving grounds for the Aberdeen Proving Ground to include Jackson's fishing ground. Jackson was, therefore, prohibited from conducting his fishing operations, and he could not establish his business

elsewhere because all other fishing grounds had been appropriated by other fishermen. The Court of Claims ruled that Jackson was entitled to a compensation for the value of his fishing business (103 F.Supp. at 1020-21):

> We think, therefore, that the plaintiff had a sort of property right in his fishing ground, and that the Government took that property from him. But the valuation of what was taken, for the purposes of just compensation, is difficult, for at least two reasons. The first is that he fished only by license from and at the sufferance of the State of Maryland, which could have changed its law at any time and refused him a further license. The second is the considerable fluctuation of the plaintiff's net income from his fishing, during the years before he was forbidden, and upon the basis of which his loss must be estimated. The best that can be done, in our opinion, is to make an estimate, in the nature of a jury verdict, of approximately what the plaintiff' rights and prospects would have sold for in 1943. We fix that sum at $10,000. In addition, the plaintiff's nets were reduced to a second-hand value, by his being forbidden to use them. The fact that they were later destroyed by fire, without the fault of anyone, did not increase the Government's liability. But the taking of his fishing ground reduced their value by $1,500, for which he should be compensated.

Similarly, in United States v. Smoot Sand & Gravel Corp., 248 F.2d 822 (4th Cir. 1957), the United States Army acquired a 250-acre farm in Virginia from the Smoot Corp. to construct a radio transmitter station. Virginia, by law, granted a revocable right to property owners to dredge sand and gravel in adjacent tidal waters owned by the state. The jury included in its award of just compensation the value of the right to dredge the gravel and sand. The Fourth Circuit upheld the award stating (248 F.2d at 827):

> Even a narrow construction of the statute cannot overlook what seems to us obvious, namely, that the riparian owner is awarded the exclusive right to dredge, and in case of its infringement by anyone, he is entitled to be reimbursed for the loss which he thus sustains. It cannot be disputed that when one is assigned the right, pending its revocation, to use or consume something to the exclusion of all others, and to receive compensation from anyone who ventures to exercise the privilege without his authority, he has a species of property, regardless of what theory of property we may adopt.

In a similar line of analysis, the courts in Georgia have ruled that a property owner is entitled to recover the value of a business located on a property that is condemned, in whole or in part, if two elements exist: (1) the property on which its business is located constitutes a unique location allowing operation of the business, and (2) the determination of the value of the business is not remote or speculative. Dept. of Transp. v. Dixie Highway Bottle Shop, 265 S.E. 2d 10, 10-11 (Ga. 1980); Dept. of Transp. v. Fitzpatrick, 361 S.E. 2d 241, 242-44 (Ga. App. 1987); Simms v. Foss, 411 S.E. 2d 59, 59-60 (Ga. App. 1991). In Dept. of Transp. v. Arnold, 530 S.E. 2d 767, 770 (Ga. App. 2000), for example, the Court of Appeals of Georgia upheld a jury verdict based on the destruction of a business that was uniquely situated on land condemned for a highway (530 S.E. 2d at 770):

> Therefore, when land qualified as peculiar because of the peculiar relationship to the owner and when any business operated on such location has a particular "good will," an intangible property interest peculiar to the land, identified only with that location in the minds of clients. Business losses reflect the value of such intangible property interest that is taken or destroyed in the condemnation and cannot be relocated, because such value is peculiar to that land and the owner's relationship to the business conducted on that location.

See also, Carlson v. Village of Union City, 601 F. Supp. 801, 813 (W.D. Mich. 1985) (a franchise granted by the Village to a cable television company granting the company the right to build, operate and maintain a cable television system within the Village is a compensable property interest).

E. Reimbursement For Attorney's Fees

1. The Current Maryland Rule

Maryland condemnation law provides that costs, including reasonable attorney's fees and expert expenses, actually incurred by the property owner shall be reimbursed by

the condemning authority when (1) judgment is entered against the condemning authority and in favor of the property owner on the right to condemn (Real Property Article, §§ 12-106 and 12-107), or (2) when the condemning authority abandons the taking (Real Property Article, § 12-109).

2. The Uniform Eminent Domain Code and Statutes From Other States Providing For Recovery Of Attorney's Fees By Condemnee In Certain Circumstances

Section 1205(b) of the UED Code provides that a condemnee shall be awarded litigation expenses including attorney's fees if the amount of just compensation awarded to the condemnee by the judgment, exclusive of interest and costs, is equal to or greater than the amount specified in the last offer of settlement made by the condemning authority at least ten days prior to the trial. The amount of litigation expenses, however, may not exceed the greater of dollars or twenty-five percent of the amount by which the compensation exceeds the amount of the condemning authority's last offer of settlement.

The majority of states do not have laws requiring the payment of the attorney's fees and costs of a condemnee. Those states not specifically listed below as requiring the payment of such compensation do not do so.

On the other hand, the UED Code of the Conference of Commissioners on Uniform State Laws and several states have determined that a property owner is entitled to recover attorney's fees and costs actually incurred in the condemnation proceeding when (1) the property owner is the prevailing party or the condemnation award exceeds the appraisal of the condemning authority, (2) the parties stipulate in a settlement agreement to the payment of fees and costs, (3) the condemning authority is a private actor, (4) the court determines that the condemning authority acted in bad faith, or (5) the court determines reimbursement appears necessary for just and adequate compensation.

Attached as Exhibit 10 are relevant provisions of the UED Code and the laws of these states. The following is a description of the laws:

Alaska – attorneys' fees and costs incurred by the condemnee must be assessed against the condemning authority if, among other reasons, (a) if the condemnee makes a successful offer of judgment, (b) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the condemnee, or (c) the court determines that the award of attorneys' fees and costs appears necessary to achieve a just and adequate compensation of the condemnee. Alaska Rules of Civil Procedure, Rule 72(k) – (l). The Supreme Court of Alaska explained the latter reasoning in Stewart & Grindle, Inc. v. Alaska, 524 P.2d 1242, 1250 (Alaska 1974) by quoting NJ Turnpike Auth. v. Bayonne Barrel and Drum Co., 266 A.2d 164, 166 (N.J. 1970):

> Under present-day conditions the traditional approach of requiring a condemnee, in all cases, to bear the expense of legal fees and expert witnesses is inequitable and an unfair burden placed on the landowner. … If the average defendant is in court, it is usually because he has committed an act of commission or omission. A condemnee becomes a litigant merely because he owns land that the sovereign wishes to acquire. The sovereign must pay just compensation for such land. Does condemnee receive just compensation or is he 'made whole' if he must expend large sums of money to insure that he gets a fair price for his land? We think not.

Arkansas – the landowner shall be entitled to recover the reasonable attorneys' fees and costs incurred in a quick-take condemnation proceeding if the amount awarded by the jury exceeds the amount deposited by the condemning authority in an amount which is more than twenty percent (20%) of the sum deposited. Ark. Code Ann. § 18-15-605(b).

California – Twenty days prior to the trial on issues related to just compensation, the parties shall file with the court and serve on each other their final offer and demand for settlement. If the court, on motion by the condemnee made within 30 days after entry of judgment, finds that the offer by the condemning authority was unreasonable and that the demand by the condemnee was reasonable viewed in light of the evidence admitted and the compensation awarded at the trial, the condemnee shall be awarded

his litigation expenses. Cal. Civ. Proc. Code § 1250.410. The California Supreme Court considers several factors including the following which serve as general guidelines for the determination of the reasonableness or unreasonableness of offers in eminent domain actions: (1) amount of difference between final offer and compensation awarded, (2) percentage of difference between offer and award, and (3) good faith, care, and accuracy in how amount of offer and amount of demand, respectively, were determined. Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp., 941 P.2d 809 (Cal. 1997). Further, the condemnee is entitled to costs, unless the court orders otherwise. Cal. Civ. Proc. Code §§ 1268.710 and 1268.720.

Colorado – the condemning authority shall reimburse the owner whose property is being acquired or condemned for all of the owner's reasonable attorneys' fees incurred by the owner where the award by the court equals or exceeds the last written offer given to the property owner prior to the filing of the condemnation action by thirty percent (30%). Colo. Rev. Stat. § 43-4-506(h)(II)(B) (applies only to public highway authorities) and Colo. Rev. Stat. § 38-1-122(1.5) (applies to most other condemning authorities).

Delaware – the court in its discretion may award the condemnee, as the prevailing party, reasonable litigation expenses, including reasonable attorney, appraisal, engineering or other expert witness fees actually incurred because of the trial on compensation issues. The condemnee is the prevailing party if the award of just compensation, exclusive of interest, is closer to the highest valuation evidence provided at trial on the condemnee's behalf than the condemning authority's final offer of judgment. Del. Code. Ann. Title 10, § 6111.

Florida – the court, in eminent domain proceedings, shall award attorney's fees to the condemnee based solely on the benefits achieved. Benefits is defined to mean the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the condemnee hires an attorney. The court may also consider nonmonetary benefits obtained for the condemnee through the efforts of the attorney, to the extent such nonmonetary benefits are specifically identified by the court and can, with a reasonable degree of certainty, be quantified. Attorney's fees based on benefits achieved shall be awarded in accordance with the following schedule:

(1) Thirty-three percent (33%) of any benefit up to $250,000; plus

(2) Twenty-five percent (25%) of any portion of the benefit between $250,000 and $1 million; plus

(3) Twenty percent (20%) of any portion of the benefit exceeding $1 million.

In determining the amount of attorney's fees to be paid by the condemning authority, the court shall be guided by the fees the condemnee would ordinarily be expected to pay for these services if the condemning authority were not responsible. At least thirty (30) days prior to the hearing to assess attorneys' fees, the condemnee shall submit to the condemning authority and the court complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred. The condemnee shall also provide to the court a copy of any fee agreement that may exist between the condemnee and his attorney, and the court must reduce the amount of attorneys' fees to be paid by the condemnee by the amount of any attorneys' fees awarded by the court. Fla. Stat. Ann. § 73.092. If a settlement is reached between the condemning authority and a property or business owner prior to a lawsuit being filed, the property or business owner who settles compensation claims in lieu of condemnation shall be entitled to recover attorney's fees in the same manner as provided in Fla. Stat. Ann. § 73.092. If the parties cannot agree on the amount of attorneys' fees to be paid by the condemning authority, the business or property owner may file a complaint in the circuit court in the county in which the property is located to recover attorney's fees and costs. Fla. Stat. Ann. § 73.015.

Georgia – If either party appeals to the superior court from the assessor's award and that party does not benefit by at least 20% as compared to the assessor's award, it must pay the other party's costs, including reasonable attorney's fees incurred on appeal. If both parties appeal or if the appeal involves issues of law, neither will be awarded costs or attorneys' fees. Ga. Code Ann. § 22-2-84.1.

Idaho – in the court's discretion, a property owner may be awarded reasonable attorney's fees and costs incurred by him if he is able to establish that just compensation exceeds the last amount timely offered by the condemning authority by ten percent (10%) or more. The Supreme Court of Idaho in Ada County Highway Dist. V. Acarrequi, 673 P.2d 1067, 1070-72 (Idaho 1983), outlined factors that the court should and may consider in deciding whether to award attorneys' fees. The trial court should consider: (1) whether the condemning authority reasonably made a timely offer of settlement of at least 90 percent (90%) of the ultimate jury

verdict, (2) whether the offer of settlement was timely (i.e., an offer would not be timely if made on the courthouse steps an hour before trial), and (3) whether the offer of settlement was made within a reasonable period of time after the institution of the condemnation proceeding to relieve the condemnee not only of the expense but of the time, inconvenience and apprehension involved in such litigation, and also to eliminate the cloud which may hang over the condemnees' title to the property. 673 P.2d at 1072. The trial court may also consider: (1) any controverting of the public use and necessity allegations and the outcome of any hearing thereon, (2) any modification in the plans or design of the condemning authority's project resulting from the condemnee's challenge, and (3) whether the condemnee voluntarily granted possession of the property pending resolution of the just compensation issue. Id. The trial court must also determine who is the prevailing party in the action. Idaho Rule of Civil Procedure, Rule 54(d).

Iowa – the condemning authority shall pay the reasonable attorney's fees and costs incurred by the condemnee as determined by the commissioners if the award of the commissioners exceeds the final offer of the condemning authority by more than ten percent (10%). Iowa Code Ann. § 6B.33

Kansas – the court may in its discretion award attorney's fees to the condemnee if the jury renders a verdict for the condemnee in an amount greater than the award of the court appointed appraisers. Kan Stat. Ann. § 26-509.

Louisiana – the court may in its discretion award attorney's fees to the condemnee if the jury award exceeds the highest amount offered by the condemning authority prior to trial. La. Rev. Stat. §§ 19:8 and 19:109. Expert witness fees may be taxed against the condemning authority in the discretion of the trial court. Dept. of Transp. and Dev. v. Jacob, 491 So.2d 138 (La. 1986).

Maine – if the condemning authority appeals an award of just compensation and does not prevail on appeal, the condemning authority shall reimburse the condemnee for a reasonable attorney's fee incurred in the condemnation proceeding. If either party appeals and the award is less than the original award, the condemnee pays the costs on appeal. If either party appeals and the award is more than the original award, the condemning authority of pays the costs on appeal. Me. Rev. Stat. Ann. Title 23 § 157 (Dept. of Transp.).

Michigan – if the amount finally determined to be just compensation for the property acquired exceeds the amount of the last good faith offer made by the condemning authority prior to start of condemnation proceeding, the court shall order reimbursement in whole or in part to the condemnee of his reasonable attorney's fees. The attorneys' fees awarded, however, may not exceed 1/3 of the amount by which the ultimate award exceeds the condemning authority's last good faith offer and the condemning authority shall not be required to reimburse attorney or expert witness fees that are attributable to an unsuccessful challenge to necessity or the validity of the condemnation proceedings. If the condemning authority settles a case before entry of a verdict or judgment, it may stipulate to pay reasonable attorney and expert witness fees. Mich. Comp. Laws § 213.66.

Montana – the court shall award necessary expenses of litigation, including attorney's fees, to the condemnee when the condemnee prevails by received an award of just compensation in excess of the final offer by the condemning authority. Mont. Code. Ann. § 70-30-305; Mont. Const., Article 2, § 29.

Nebraska – If the amount of the final judgment is greater by fifteen percent (15%) than the amount of the award of the appraisers, the court may in its discretion award to the condemnee a reasonable sum for the fees of his attorney and for fees necessarily incurred for not more than two expert witnesses. Further, if the court determines that the condemning authority did not negotiate in good faith with the condemnee, the court shall award to the condemnee a reasonable sum for the fees of his attorney. Neb. Rev. Stat. § 76-720.

New York - where the final award of just compensation is substantially in excess of the amount of the condemning authority's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court may, in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. N.Y. Em. Dom. Proc. Law § 701. Courts have held that 22.8% difference between condemning authority's initial offer and amount ultimately awarded to condemnee was not "substantial." In re County of Tompkins, 749 N.Y.S.2d 332, leave to appeal denied, 790 N.E.2d 1193 (N.Y. 2002). Evidence supported finding that actual value of condemned property of $750,000 was substantially in excess (more than 26%) of condemning authority's proof of $550,000, thus justifying award of

attorney's fees and costs. Town of Islip v. Sikora, 632 N.Y.S.2d 160 (1995).

North Dakota - the court may in its discretion award reasonable attorney's fees and costs to the condemnee in all cases. If the condemnee appeals and does not prevail, the costs of appeal may be taxed against the condemnee. If the condemnee obtains a new trial and fails to obtain greater compensation than was awarded in the first trial, costs for the new trial shall be taxed against the condemnee. N.D. Cent. Code § 32-15-32.

Oklahoma – if the award of just compensation by the jury exceeds the award of the court appointed commissioners by at least ten percent (10%), the court may in its discretion award reasonable attorney, appraisal and engineering fees actually incurred because of the condemnation proceeding to the condemnee. Okla. Stat. Title 11, § 11(3).

Oregon – in quick-take actions by private condemnors, the private condemnor shall pay reasonable attorney's fees and costs incurred by the condemnee. Ore. Rev. Stat. § 35.275. Condemnee entitled to reimbursement of attorney's fees and costs incurred in condemnation proceeding if amount of just compensation assessed by the jury verdict exceeds the highest written offer in settlement submitted by the condemning authority at least 30 days before trial, or if the court finds that the first written offer made by the condemning authority in settlement prior to filing of the action did not constitute a good faith offer of an amount reasonably believed by condemner to be just compensation. Ore. Rev. Stat. § 35.346(7).

South Carolina - a landowner who prevails in a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses including attorney's fees. "Prevails" is defined to mean that compensation awarded (other than by settlement) to the landowner, exclusive of interest, is at least as close to the landowner's highest value at trial as it is to the condemning authority's highest value at trial. S.C. Code Ann. § 28-2-510.

South Dakota – if the amount of just compensation awarded to the condemnee is twenty percent (20%) greater than the condemning authority's final offer and if the total award exceeds $700, the court shall allow reasonable attorneys' fees and compensation for not more than two expert witnesses in an amount to be determined by the court. S.D. Codified Laws § 21-35-23.

Washington – the court shall award reasonable attorney's fees and reasonable expert witness fees in the event that the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty (30) days after receipt of the written request or within fifteen (15) days after the entry of an order adjudicating public use, whichever is later in the event of any of the following:

(1) if condemning authority fails to make any written offer in settlement to condemnee at least thirty (30) days prior to commencement of trial; or

(2) the judgment awarded as a result of the trial exceeds by ten percent (10%) or more the highest written offer in settlement submitted to condemnee by condemnor thirty (30) days prior to commencement of trial; or

(3) the parties stipulate in effecting a settlement of the eminent domain proceeding. Wash. Rev. Code Ann. § 8.25.070; Wash. Rev. Code Ann. § 8.25.250.

Wisconsin – if the amount of just compensation awarded to the condemnee is fifteen percent (15%) greater than the condemning authority's highest written offer and if the total award exceeds $700, the court shall allow reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in condemnation proceeding. Wis. Stat. § 32.28.

VI. THE BALTIMORE DEVELOPMENT CORPORATION LOAN PROGRAM

The Baltimore Development Corporation ("BDC") loan program is designed to assist small businesses impacted by the City's west side revitalization initiative. Permitted uses of funds include the acquisition and improvement of land, buildings, plant, and equipment including new construction or renovation of existing facilities, demolition and site preparation; leasehold improvements; and working capital. Only businesses affected by the planned west side redevelopment, which are not publicly traded or chain stores, are eligible. The business must be located in the west side redevelopment area, or if outside the area, must relocate within Baltimore City. The

maximum loan amount is $200,000, and the money is designed to be less than 50% of the sources of funding for particular projects, unless the project is for $25,000 or less. Loans will have low interest rates, and suggested maturity schedules vary. Some smaller loans may be unsecured, but if security is necessary, it is procured by a lien on the business or personal assets or real estate. Fees are limited to the cost of obtaining a Certificate of Good Standing and lien searches, with secured loan applicants also paying legal and other associated fees. It is also notable that there are additional requirements for west side revolving loans, such as: an application and appropriate business and personal financial statements to the BDC; documentation on use of loan proceeds (with invoices, leases, sales contracts, sources and use statements, or other appropriate documentation); personal guaranties for any principal with 20% or more ownership in the business; appraisals and environmental studies if applicable; and a commitment to stay in Baltimore City for the term of the loan. Attached as Exhibit 11 is a description of the BDC loan program provided by the BDC.

VII. RECOMMENDATIONS

The preceding Sections I through VI, the background portion of the Task Force Report, was approved by the Task Force. After the Task Force completed its investigation and study of the matters delineated by the General Assembly in Chapter 446 of the Laws of Maryland of 2004, various members of the Task Force made recommendations for changes in the Maryland law governing the circumstances under which condemnation may be exercised and the compensation afforded to condemnees. Many, but not all, of these recommendations were approved by the Task Force. The recommendations approved by the Task Force are set forth below in the order in which the recommendations were received by the staff of the Task Force. Further, in a separate section, the recommendations not approved by the Task Force are set forth. With respect

to each recommendation, whether approved or not approved by the Task Force, the member making the recommendation is identified and the final vote of the Task Force and how each member voted is stated.

RECOMMENDATIONS APPROVED BY THE TASK FORCE

A. Modification Of The Relocation Assistance Law

1. Compensation For Substitute Tangible Personal Property

Under § 12-205(a)(2) of the Real Property Article of the Annotated Code of Maryland, a displaced business is entitled to "[a]ctual direct loss of tangible personal property as a result of moving or discontinuing a business or farm operation, but not exceeding an amount equal to the reasonable expenses that would have been required to relocate the personal property, as determined by the agency." Section 24.301(g)(16) of Title 49 of the Code of Federal Regulations provides that, if a business moves from a location and an item of tangible personal property is replaced with a substitute item, the displaced business is entitled to the lesser of (1) the cost of the replacement item, or (2) the reasonable cost of moving it. The federal courts have ruled that, under the legislative history of the Uniform Relocation Assistance Act, the amount of this payment cannot exceed the fair market value in place for continued use of the item. Robzen's Inc. v. Dept. of Housing and Urban Dev., 515 F. Supp. 228, 238 (M.D. Pa. 1981). Accordingly, if a business moves from the condemned property but an item of tangible personal property cannot be moved (is a direct loss), the business owner is limited to recovering the fair market value in place for continued use, which may be a significantly depreciated value. This situation may prevent a business from being relocated where, for example, the business owner cannot afford to purchase substitute equipment.

Accordingly, a recommendation was made that § 12-205(a) be amended to provide that, if a business moves from its existing location as a result of condemnation, but an item of tangible personal property cannot be moved, the owner is entitled to recover the reasonable cost of a substitute item, even if the cost of that item exceeds the cost of moving or the fair market value in place for continued use. The purpose of the change is to prevent businesses from being destroyed by a condemnation where they cannot move their equipment to a new location and cannot afford substitute items because the appraised, depreciated value of the equipment is substantially less than the cost of substitute equipment. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart, DGS; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML. The following members of the Task Force were opposed: Janet Handy, SHA. The following members of the Task Force abstained or were not present for the vote: Del. Patrick Hogan; Del Marvin Holmes; Heidi Dudderar, MACO; Jay Creech, Local Government. Ms. Dudderar and Mr. Creech abstained on grounds that the recommendation was substantially revised after the Task Force's final meeting and the Task Force did not deliberate on the recommendation as revised. Rather, the Task Force voted on the recommendation by electronic messages.

2. A Requirement For A Turn-Key Relocation Where Necessary For The Business To Continue

A recommendation was made that the relocation assistance provisions of Title 12 of the Real Property Article should be amended to provide that, where it is reasonably required to continue a business as a viable business, the displacing agency is required to

conduct a "turn-key" relocation under which the business owner is entitled to close operations at an existing location one day and begin operations the next day at the new location without interruption. In the case of a required "turn-key" relocation the displaced person would be entitled to reimbursement for a substitute item within the meaning of 49 C.F.R. § 24.301(g)(16), even if the cost of the substitute item exceeds the cost of moving the original item or its fair market value in place for continued use. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Del. Marvin Holmes; Glenn Torgerson, DOT; Heidi Dudderar, MACO; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force abstained or were not present for the vote: Nelson Reichart, DGS.

B. Compensation For The Total Assets Of A Business That Cannot Be Relocated

A recommendation was made that § 12-104 of the Real Property Article be amended to provide that, if a business cannot be continued on condemned property as a result of the taking and the business cannot be reasonably relocated, the owner of the business is entitled to recover the fair market value of the total assets of the business. The compensation for the total assets of the business must include, and cannot be duplication of, any compensation that the business owner is entitled to for real estate interests also owned by the business owner. In United States v. Miller, 317 U.S. 369, 373 (1943), the Supreme Court stated that the goal of just compensation is to provide the property owner with the full and perfect equivalent in money of the property taken. This

articulation of the goal of just compensation is commonly accepted. The basis for the recommendation was that current law falls short of this goal in those situations where a condemnation results in the destruction of a business and the market value of the total assets of the business exceeds the fair market of the real estate. In the case of a business owner that leases the business premises, the hardship from the destruction of the business may be particularly severe. The market value of the total assets of the business may be substantial, but the tenant may be entitled to little or no compensation for the leasehold interest because the tenant does not enjoy a leasehold advantage. Under the recommendation, the limitations imposed on compensation for the business that are set forth in the Uniform Eminent Domain Code § 1016 should be included in the amended § 12-104. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart, DGS; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML. The following members of the Task Force were opposed: Del. Patrick Hogan; Heidi Dudderar, MACO; Janet Handy, SHA; Jay Creech, Local Government.

C. Compensation For Loss Of Net Operating Income During Business Interruption Caused By Condemnation

A recommendation was made that § 12-104 of the Real Property Article be amended to provide that, if the business cannot be continued on property as a result of a taking, and the business can be relocated, the business owner is entitled to compensation for the present value of reasonably anticipated reductions in net operating income, for a period not to exceed three years following the date of taking, that are caused by the

taking and the relocation of the business. The basis for the recommendation was that compensation for lost net operating income is necessary to put the business owner in the same position that he or she would have been had the taking not occurred. A relocation of a business that involves a period of interruption will result in financial losses to the owner of a viable business that are uncompensated under current law. In the case of small businesses, the business may well constitute the livelihood of the owner and his or her family. This interruption of the income stream is a loss that results from the public taking and is a loss that the public as a whole should bear. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Glenn Torgerson, DOT; Heidi Dudderar, MACO; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

D. A Requirement That The Condemning Authority Make Specific Findings Before Acquiring A Business For An Urban Renewal Or Economic Redevelopment Project

In connection with this recommendation, the Task Force did not consider whether the General Assembly should enact a prohibition on the use of eminent domain for urban renewal or economic development purposes. Rather, this recommendation was that, in the absence of a prohibition on the use of eminent domain for economic development purposes, Title 12 of the Real Property Article be amended to state that it is the policy of the State that (1) a viable existing business should be preserved where reasonably

practicable and should not be acquired for urban renewal or economic development purposes unless other alternatives are shown not to be reasonably practicable, and (2) when it is necessary to acquire an existing business, the condemning authority should make every reasonable effort to ensure that the business is incorporated in the project at its existing location or a nearby location. In addition, this recommendation provided that Title 12 of the Real Property Article be revised to include a requirement that, prior to exercising the power of eminent domain for urban renewal or economic development purposes, the secretary of the State department or the governing body of the County or municipal corporation seeking to exercise such authority must enter findings as to:

(1) the effect of the condemnation on each existing business that would be affected by the condemnation;

(2) whether, with respect to each business that will be acquired, the project can be restructured to avoid the acquisition of the business; and

(3) whether, with respect to each business that will be acquired for the project, the business can be incorporated into the redevelopment project and continue at its existing, or a nearby, location.

The recommendation provided that the secretary's or governing body's findings be subject to review under the normal standards of review. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser. The following members of the Task Force were opposed: Glenn Torgerson, DOT; Heidi Dudderar,

MACO; Howard Klein, Merchant; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government

E. A Requirement That The Governor's Office Of Business Advocacy And Small Business Assistance Provide Direction To Available Loan Programs

A recommendation was made that the Governor's Office of Business Advocacy and Small Business Assistance appoint an individual with responsibility for (1) assisting businesses that are acquired, in whole or in part, by condemnation (2) identifying State loan programs that may be available to the condemned business, and (3) directing the condemnee to the appropriate person in State government to assist the condemnee in connection with the loan program.

There are a number of State loan programs that are available, depending on the circumstances, to assist businesses that are condemned. For example, the Maryland Capital Access Program ("MCAP"). The MCAP is a revitalization resource to support the growth and success of small businesses in Priority Funding Areas ("PFA") throughout the State of Maryland. MCAP is a credit enhancement program that enables private lenders to establish a loan loss reserve fund from fees paid by lenders, borrowers, and the State of Maryland. Communities that have small businesses receiving financing through loans enrolled in MCAP will benefit from new or expanded services provided by the small businesses. Lenders that may participate are federally insured financial institutions, institutions regulated by the Commissioner of Financial Regulation, and others who have a participation agreement with the DHCD. Eligible Borrowers include most Maryland small businesses, and nonprofit corporations are eligible as long as they are located in a PFA. The Maryland Capital Access Program, however, is currently being revised and may not be available in this form in the future.

Further, the Neighborhood Business Works Program, administered by the DHCD bears many similarities to the program the Baltimore Development Corporation offered to businesses impacted by Baltimore's West Side redevelopment. The Neighborhood BusinessWorks Program provides flexible gap financing in the form of below-market interest rate loans to small businesses and loans and grants to nonprofit organizations locating or expanding in locally designated neighborhood revitalization areas. Financing ranges from $25,000 to $500,000 for up to 50 percent of a project's total cost. Grants typically range from $25,000 to $250,000, depending on the nature of the project. Eligible projects include retail businesses, franchises, manufacturing businesses, service-related businesses, mixed-use projects – consisting of a commercial or retail use at street level and no more than 12 residential units. Eligible Use of Funds include but are not limited to property acquisition; construction or renovation of existing buildings, leasehold improvements, machinery and equipment, inventory and working capital. A description of the Maryland Capital Access Program and Neighborhood BusinessWorks Program provided by the DHCD is attached as Exhibit 12. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Heidi Dudderar, MACO; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

F. A Requirement For Speedy Condemnation Proceedings

A recommendation was made that Title 12 of the Real Property Article be amended to include a provision which requires that, upon the written request of either

party after the case is at issue in circuit court, a condemnation case be set for trial within 90 days. Additionally, it was recommended that Title 12 of the Real Property Article be amended to require that a relocation counselor of a condemning authority be assigned to every business affected by a public project and that the counselor must contact the business owner within 30 days prior to the filing of a condemnation action and negotiate with the business owner on a consistent basis to provide an effective plan for relocation for a business that will be relocated. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Heidi Dudderar, MACO; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

G. Different Rules Should Not Be Applicable To Baltimore City

A recommendation was made that the Task Force not recommend different entitlements to compensation for condemnees in Baltimore City. Recommendation by Mr. Fischer. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Heidi Dudderar, MACO; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

H. An Additional Required Finding Before A Condemning Authority May Acquire A Business For Urban Renewal Or Economic Development

A recommendation was made that, in addition to the required findings set forth in Recommendation H above, prior to exercising eminent domain for economic development or urban renewal, a condemning authority should be required to find that (1) the private market is unable to accomplish the project and, hence, the exercise of eminent domain is necessary to perform the project, and (2) the condemnation is based upon an integrated development plan with the government maintaining significant control over the project. Recommendation by Mr. Saquella, MRA. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA. The following members of the Task Force were opposed: Heidi Dudderar, MACO; Howard Klein, Merchant; Jay Creech, Local Government. A copy of the complete recommendations submitted by the MRA is attached as Exhibit 13.

I. Required Three Year Period For Condemnation To Be Filed

A recommendation was made that Title 12 of the Real Property Article be amended to require that a condemnation case be filed within three years of the date on which a property is identified for acquisition by eminent domain. If a case is not filed within the three year period, a new authorization to acquire the property must be obtained from the condemning authority. Recommendation by Mr. Saquella, MRA. This recommendation was approved by the Task Force. The following members of the Task

Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Heidi Dudderar, MACO; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

J. Recommendation For Review Of Monetary Limits – The Relocation Assistance Act

A recommendation was made that a comprehensive review be conducted by the General Assembly of all limits on the amount of relocation assistance set forth in Title 12 of the Real Property Article and that these limits be updated to present dollars. The limits in current law were established in the 1970s. Recommendation by Nelson Reichart, DGS. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart. DGS; Thomas Saquella, MRA; Heidi Dudderar, MACO; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. A copy of the complete recommendation is attached as Exhibit 14.

K. Standard For Judicial Review Of Findings Proposed In Recommendation D

A recommendation was made that a condemning authority's required findings under Recommendation D be subject to judicial review under the formulation established by the Court of Appeals. Ramsay, Scarlett & Co. v. Comptroller, 302 Md. 825, 837-39

(1985). In that Opinion, the Court of Appeals comprehensively explained the standard applicable to judicial review of administrative decisions. 302 Md. at 837-39. First, if the agency decision resolved a question of law, the reviewing court should apply the "substitution of judgment" standard under which the court is free to substitute its judgment for that of the agency. 302 Md. at 833, 837-39. Second, if the agency decision resolved a question of fact, the court must determine whether the agency's finding of fact is supported by "substantial evidence," and substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 302 Md. at 834. Third, the Court of Appeals in Ramsay, Scarlett & Co. ruled that, when a court is reviewing an application of law to fact by an agency, the court must determine whether "a reasoning mind could reasonably arrive at the conclusion" of the agency. 302 Md. at 837-38, 839. Recommendation by Ms. Dudderar, MACO. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Thomas Saquella, MRA; Heidi Dudderar, MACO; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force were opposed: Howard Klein, Merchant. The following members of the Task Force abstained or were not present for the vote: Del. Patrick Hogan; Nelson Reichart, DGS. A copy of the recommendations of MACO (and its objections to other Task Force recommendations) is attached as Exhibit 15.

L. Fiscal Impact Study

A recommendation was made that, before the General Assembly adopts changes to the eminent domain law increasing the compensation to which a condemnee is entitled, the fiscal impact of each proposal should be examined to determine:

a) the increased cost of projects currently planned by the State, counties and municipalities;

b) whether the increased cost of those projects will delay or prevent the construction of any projects; and

c) whether the increased costs will be eligible for federal participation

Recommendation by Ms. Handy and SHA. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Heidi Dudderar, MACO; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force were opposed: Kurt Fischer, Chairman; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force abstained or were not present for the vote: Del. Patrick Hogan; Nelson Reichart, DGS. A copy of the complete recommendation is attached as Exhibit 16.

M. Increase Business Reestablishment Payment And Lump Sum Payment In Lieu Of Relocation Assistance Under § 12-205(a) Of The Real Property Article

A recommendation was made to amend § 12-205(a)(4) of the Real Property Article to delete the current $10,000 cap on reimbursement for reestablishment expenses and require that the condemning authority pay all actual reasonable expenses necessary to

reestablish a displaced farm, non-profit organization or small business. Further, under this recommendation the current $20,000 payment "in lieu" of relocation assistance which is set forth in § 12-205(c) would be increased to $50,000. Recommendation by Ms. Handy and SHA. This recommendation was approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Thomas Saquella, MRA; Heidi Dudderar, MACO; Howard Klein, Merchant; Young Kim Robinson, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force abstained or were not present for the vote: Del. Patrick Hogan; Nelson Reichart, DGS. A copy of the complete recommendation is attached as Exhibit 16.

RECOMMENDATIONS CONSIDERED, BUT NOT APPROVED, BY THE TASK FORCE

N. Elimination Of The Median Rule

In Langley Shopping Ctr., Inc. v. State Roads Commn., 213 Md. 230, 236 (1957), the Court of Appeals adopted the so-called "median rule" and held that a condemnee is not entitled to compensation for any reduction in the fair market value of the property caused by the construction of a median as a part of the public project. The Court reasoned that the construction of a median divider is more akin to a diversion of traffic than to a blocking or destruction of access to the highway, the latter of which would be compensable.

The construction of a median, however, is a damage caused by the public project for which property is being acquired and may result in significant damage to a business. Under § 12-104(b) of the Real Property Article, a condemnee is ordinarily entitled to

severance or damages resulting from the public project established on the part taken. A recommendation was made that § 12-104 of the Real Property Article be amended to eliminate the median rule. Recommendation by Mr. Fischer. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Glenn Torgerson, DOT; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart, DGS; Heidi Dudderar, MACO; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

O. Compensation For Loss Of Visibility

Some jurisdictions allow compensation to a property owner when loss of visibility of the property is caused by a taking. These jurisdictions recognize that the property owner is being deprived of the right to control the view from existing highways across his own property. See e.g., 8.960 Square Feet v. Dept. of Transp., 806 P.2d 843, 846-48 (Alaska 1991); Minnesota v. Strom, 491 N.W.2d 554, 561 (Minn. 1992); New Jersey v. Weiswasser, 693 A.2d 864, 876 (N.J. 1997). A recommendation was made that § 12-104 of the Real Property Article be amended to entitle condemnees to compensation for any reduction in fair market value resulting from the loss of visibility of the subject property. Recommendation by Mr. Fischer. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Marvin Holmes; Glenn Torgerson, DOT; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Del. Patrick Hogan; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart, DGS; Heidi

Dudderar, MACO; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

P. Compensation For Attorney's Fees And Costs Where The Condemnation Award Exceeds The Condemning Authority's Final Offer By 20% Or More

A recommendation was made that Title 12 of the Real Property Article be amended to include a provision stating that, if the amount of just compensation ultimately awarded by a jury or agreed to by the condemning authority exceeds the condemning authority's final, written offer by 20% or more, the property owner is entitled to reimbursement for his or her actual reasonable attorney's fees, expert witness fees and other costs of litigation. The basis for this recommendation was that such a provision would bring Maryland in line with the Uniform Eminent Domain Code and those states that award attorney's fees and costs to the property owner when the government's final offer is substantially less than the award. Further, the basis for this recommendation was that, when a property owner is required to expend substantial attorney's fees in order to obtain a fair award of compensation, the property is necessarily not made whole by the final award because a substantial amount must be paid to his or her attorney. This result is inequitable in the context of a condemnation case because the property owner is being compelled by governmental authority to relinquish property for the good of the public and the public should bear these costs. Recommendation by Mr. Fischer. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; Glenn Torgerson, DOT; William Gibson, DOP; Nelson Reichart, DGS; Heidi Dudderar, MACO; Melville Peters,

Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

Q. Compensation For Damages Resulting From Precondemnation Activity

It was recommended that § 12-104 of the Real Property Article be amended to provide that, if precondemnation activity on the part of the condemning authority deprives the property owner of the reasonable, current use of the property, the property owner will be entitled to the fair rental value of the property between the date that the precondemnation activity began and the date of taking. In addition, the property owner shall be entitled to reimbursement for all real estate taxes, insurance and other reasonable operating costs incurred during this period. The basis for this recommendation was that it would make the statute expressly consistent with the analysis of the Reichs Ford case, but would make it clear that the precondemnation activity would not have to amount to a taking under inverse condemnation decisions of the Supreme Court. In Lucas v. SC Coastal Commn., 505 U.S. 1003 (1992), for example, the Supreme Court ruled that government conduct not amounting to a physical invasion of the property does not constitute a taking unless the property owner has been deprived of all economically beneficial or productive use of the land. Recommendation by Mr. Fischer. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Del. Patrick Hogan; Glenn Torgerson, DOT; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart, DGS; Heidi Dudderar, MACO; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government.

R. New Formulation Of Just Compensation

A recommendation was made that current law be amended to provide the following new formulation for just compensation in a condemnation case:

> Just Compensation shall be calculated in the following manner for all eligible classes of recipients for condemnation of property for a public purpose:
>
> Appraised Value of Real, Appraised Value of Business Value Loss, any and all eligible Relocation Payments, (add others as decided X 110% = Just Compensation.
>
> Just Compensation shall be calculated in the following manner for all eligible classes of recipients for condemnation of property for an economic development purpose:
>
> Appraised Value of Real, Appraised Value of Business Value Loss, any and all eligible Relocation Payments, (add others as decided (X 125% = Just Compensation.

Recommendation by Mr. Torgerson individually and not on behalf of the DOT. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Glenn Torgerson, DOT; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart. DGS; Heidi Dudderar, MACO; Howard Klein, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force abstained or were not present for the vote: Thomas Saquella, MRA. A copy of the complete recommendation is attached as Exhibit 17.

S. Compensation For Loss Of Business Income

A recommendation was made for a formulation of compensation for loss of business income which provided:

> For all business owners affected by a taking in condemnation be they property owners or tenants of property taken. All calculation to be taken against the business last full year of operations prior to the commencement of _____.
>
> For business with less than 25 employees:
>
> Payment per employee of an amount not to exceed $1000 per month for any period of business closure, or for any period of reduced operations or for loss of business income as a result of relocation as compared with the similar period of the last full year of business operations prior to the taking or relocation (referred to as the base period) said amount to be adjusted on a percentage basis as follows:
>
> [1 – (the current quarterly sales / base period quarterly sales)] X $1000.
>
> For business with 25 employees or more:
>
> Payment per employee of an amount not to exceed $500 per month for any period of business closure, or for any period of reduced operations or for loss of business income as a result of relocation as compared with the similar period of the last full year of business operations prior to the taking or relocation (referred to as the base period) said amount to be adjusted on a percentage basis as follows:
>
> [1 – (the current quarterly sales / base period quarterly sales)] X $500.
>
> The number of employees shall be determined as that number of employees on the last day of the base period increased by the addition of the business owner or the number of partners of the existing business as reported ____.

The payment to business owners would be limited to a maximum of 24 months calculated from the first time eligible. Recommendation by Mr. Torgerson individually and not on behalf of DOT. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Glenn

Torgerson, DOT; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Kurt Fischer, Chairman; Del. Patrick Hogan; Del. Marvin Holmes; Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart. DGS; Heidi Dudderar, MACO; Howard Klein, Merchant; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force abstained or were not present for the vote: Thomas Saquella, MRA. A copy of the complete recommendation is attached as Exhibit 17.

T. Compensation For Advocacy Costs And Marketing Relocations

A proposal was made to provide specific compensation for the condemnee's cost of advocacy and marketing related to relocation:

> All eligible classes under this provision shall be entitled to a payment of not less than $2,500 nor more than the lesser of 5% of the estimated amount of the "Just Compensation" or $15,000 as a fee to provide for costs of appraisals, legal expenses or marketing/advertising expense related to relocation on a reimbursement basis at any time after _____.

Recommendation by Mr. Torgerson individually and not on behalf of DOT. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Kurt Fischer, Chairman; Glenn Torgerson, DOT; Thomas Saquella, MRA; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Gregory Kosmas, DBED; John Papagni, DHCD; William Gibson, DOP; Nelson Reichart. DGS; Heidi Dudderar, MACO; Melville Peters, Real Estate Appraiser; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force abstained or were not present for the vote: Del. Patrick Hogan; Del. Marvin Holmes. A copy of the complete recommendation is attached as Exhibit 17.

U. Restrict Eminent Domain In Maryland To Actual Use By The Public And Prohibit Its Exercise For Economic Development

A recommendation was made to restrict the use of eminent domain in Maryland to takings for actual use by the public and to prohibit its use for economic development. The recommendation was closely based on H.R. 4128 which was passed by the United States House of Representatives on November 3, 2005. Recommendation by Young Kim Robinson, Merchant. This recommendation was not approved by the Task Force. The following members of the Task Force voted in favor of the recommendation: Gregory Kosmas, DBED; William Gibson, DOP; Howard Klein, Merchant; Young Kim Robinson, Merchant. The following members of the Task Force were opposed: Kurt Fischer, Chairman; John Papagni, DHCD; Glenn Torgerson, DOT; Thomas Saquella, MRA; Heidi Dudderar, MACO; Henry Maraffa, MML; Janet Handy, SHA; Jay Creech, Local Government. The following members of the Task Force abstained or were not present for the vote: Del. Patrick Hogan; Del. Marvin Holmes; Nelson Reichart, DGS; Melville Peters, Real Estate Appraiser. A copy of the complete recommendation is attached as Exhibit 18.

A chart depicting the final votes of the Task Force members on each recommendation is attached as Exhibit 19.