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Maryland's Bad Track Record

Gideon Kanner

No sooner did the ink dry on my celebration of the 25th anniversary of the erstwhile Baltimore Colts' midnight departure to Indianapolis, when Maryland has provided us with more eminent domain related stuff for our gristmill. It seems that profitability of horse racing isn't what it used to be, and Magna Entertainment Corporation, the owner of the Preakness horse race, one of the jewels in the Triple Crown, has filed for bankruptcy. Its assets, including not only the famous, 140-acre Pimlico racetrack where the Preakness is run, but also the intellectual property rights in the Preakness name will have to be disposed of by the bankruptcy court.

But Marylanders are concerned that these iconic assets may thus fall into the hands of someone who may decide to run the Preakness in another state. Bummer. The Preakness attracts many free-spending visitors to Maryland; last year 120,000 people were in attendance. The race brings in some $60 million and is thus highly prized for the money it brings, and for the public relations benefits and emotional attachment that tend to go with high-profile sporting events. So understandably, Maryland wants to keep those well-heeled visitors coming and spending. Besides, there is a local developer who would like to buy the Pimlico racetrack from the trustee in bankruptcy, and develop the vacant land surrounding the actual track, an action that is viewed in some Maryland circles as akin to sacrilege.

And so, the locals (some of whom are evidently still smarting from the 1984 Baltimore Colts fiasco) have decided that they mustn't let the rights to the Preakness and Pimlico names

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leave the state. Maryland already claims a right of first refusal should the Preakness come on the market. But that claim may not be binding on the federal bankruptcy court. So the Maryland legislators have come up with an ingenious idea, namely, that Magna's rights be taken by eminent domain. The Maryland Legislature has quickly passed a law authorizing condemnation of the Pimlico race track as well as of any Preakness-related trademarks, copyrights and contracts, in order to prevent the loss of these culturally and economically important attributes of horse racing history. This law was passed as urgency legislation, lest Magna or its vendee emulate the Colts and leave the state in the middle of the night. But such fears are probably exaggerated; Magna would have to get the bankruptcy court's permission to do so, and Maryland cannot just prosecute an eminent domain action against Magna in state court, without similar judicial permission. So no surprises are in the offing this time.

Should this condemnation take place, would the state of Maryland go into the horse racing business? No, it would only act to gain title to these properties, thus preventing Magna from spiriting these cultural jewels in the Triple Crown out of the state, and to make sure that whoever eventually acquires them stays in Maryland. Thus, the current use of these assets would remain unchanged.

Whether this sort of taking would comply with the public use constitutional limitation is an interesting question. True enough, in 1981, the California Supreme Court held that Oakland's condemnation of the Raiders' NFL franchise could be a constitutionally sanctioned public use, and that decision is a precedent of sorts, albeit one that is not binding on the courts of Maryland. On the other hand, that Oakland Raiders ruling was greeted with widespread shock and derision, and eventually California courts backed down, though they saved face by denying Oakland the right to condemn the Raiders, not for lack of "public use," but on the theory that the taking of an NFL franchise by a city would violate the interstate commerce clause, a concern that would evidently also be true in the Preakness-Pimlico case.

Then, in 2005 came *Kelo v. New London*, which interpreted the taking clause of the U.S. Constitution broadly, so as to permit takings of private property for commercial purposes that would presumably benefit the local economy. But on the other hand, Kelo stressed that states are free to interpreted their own constitutional "public use" clauses more narrowly. In

fact, in recent years, some half-dozen state supreme courts have construed their own "public use" taking limitations more strictly than Kelo, and have expressly barred the use of eminent domain for commercial redevelopment.

So what happens now? I won't take on the role of an Etruscan haruspex and try to predict the future. If nothing else, a haruspex could foretell the future by examining the entrails of sacrificial sheep, and I lack such high-tech resources. Besides, the Maryland supreme court (which over there is called the Court of Appeals) has a good track record of impartiality in dealing with eminent domain law. So it is far from certain that it would rule for the state notwithstanding the general presumption of state authority to condemn. And so, instead of speculating on Maryland's likely interpretation of the sorely abused constitutional phrase "public use," I take note of another constitutional obstacle to this threatened taking, that has not received the judicial attention it deserves.

One of the constitutionally protected freedoms that Americans enjoy is the right to travel. As Justice Potter Stewart put it in *United States v. Guest*, 383 U.S. 745 (1966), "The constitutional right to travel from one State to another ... occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." We Californians should know. Back in the days of the Great Depression, California tried to stem the influx of poor Oakies fleeing the Dust Bowl, and to keep them from entering California. But the U.S. Supreme Court made short work of this attempt to restrict interstate travel, and held that trying to do so is unconstitutional.

The subject of freedom to travel was lurking in the Oakland Raiders case too, because Oakland's real purpose was not to acquire an NFL franchise, but to prevent the Raiders from moving to Los Angeles. But the California courts never got around to dealing with this issue because they disposed of the substantive dispute on other grounds. But the basic law on the right to interstate travel seems clear. That being the case, how can Maryland prevent local property owners from traveling to another state, except on condition that they surrender their property to the state of departure before crossing a state line? That would not only seem to violate the right to travel, but also implicate the unconstitutional conditions doctrine.

There are two morals that emerge from this tale. First, that

the awesome power of eminent domain can be applied in a reductio ad absurdum fashion, and it needs to be curbed. Second, that there is indeed an interdependence between property and liberty, as Stewart put it in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). The Supreme Court can wax eloquent all it wants about the vigor of our freedom to travel, but that freedom isn't worth the proverbial rat's patoot, if the would-be travelers can be stripped of their property as a precondition to exercising it.

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