

PRINCE GEORGE'S COUNTY V. COLLINGTON CROSSROADS, INC.: THE LEGITIMACY AND (UN) FAIRNESS OF PUBLIC LAND BANKING, THE UNARTICULATED ISSUES OF EMINENT DOMAIN

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I. INTRODUCTION

In the early 1970's, all three branches of Maryland's government underwent significant reform and unprecedented expansion. For the first time, African Americans and women were voted into the House of Delegates and the Senate. The rookie lawmakers of the General Assembly acknowledged their inexperience and, thus, demanded a robust research and advisory staff. Under the leadership of Governor Martin Mandel, the executive branch organized its chaotic mish-mash of 248 regulatory agencies into twelve newly created departments headed by Secretaries that reported directly to the Governor. The judiciary likewise reorganized and expanded; a four-tiered judiciary consisting of the Court of Appeals, Court of Special Appeals, Circuit Courts, and newly created District Courts emerged from an antiquated system that lacked adequate oversight over local judges. For the first time, Maryland's judges were provided with full-time law clerks to take on Maryland's growing judicial dockets. All three branches of Maryland's government expanded at an unprecedented rate, and so did its influence on the lives of Marylanders.

Government growth sets the stage for a story of its time, *Prince George's County v. Collington Crossroads* ("Collington"). In 1975, thirty years ahead of the Supreme Court's controversial *Kelo* decision, the Court of Appeals of Maryland, in *Prince George's County v. Collington Crossroads, Inc*, upheld the constitutionality of economic development takings in Maryland. Specifically, the Court of Appeals held that condemning private property for the development of an industrial park meets "public use" and is thus constitutional. This paper explores the landmark *Collington* case from a legal, but also a historical perspective.

The paper begins by mapping Maryland's eminent domain law as it has evolved by way of constitutional amendment and judicial interpretation. As you will learn, Maryland's courts

historically have interpreted “public use” broadly and have almost always deferred to the legislature’s eminent domain efforts. The paper next explores the fundamental disagreement over the correct interpretation of “public use” between a career trial court judge and a young Appeals judge then recently appointed to the Court of Appeals of Maryland. In these sections, the political landscape in Maryland, characterized by unprecedented growth in all three branches of Maryland’s government, is also discussed. By describing the parties, the different judges that presided over the *Collington* controversy, and the political landscape of 1970s Maryland, I hope to give the reader a glimpse of the different forces at play that shaped the landmark *Collington* decision.

Against this backdrop, the paper then evaluates whether Prince George’s County (“PG County”) economic takings land condemnation was successful. Although the industrial park failed to attract desirable businesses and the media, business leaders, and even Maryland’s governor unanimously declared the industrial park a failure, this paper argues that PG County nonetheless benefited from the land condemnation to the extent that it appropriated land that had since appreciated substantially in value. While only compensating Collington Crossroads, Inc. \$2.5 million for its 323-acre tract of land in 1976, that same tract of land appreciated to approximately \$38 million in 1987. As such, PG County effectively banked on Collington Crossroads’ real-estate investment.

In conclusion, the paper argues that the Court of Appeals of Maryland, despite the unfairness of the situation, decided *Collington* correctly. This is because the takings clause is comprised of two elements, “public use” and “just compensation.” The former speaks to legitimacy; the latter speaks to fairness. As the Court of Appeals was only asked to decide whether economic development constituted “public use,” but not asked to decide “just

compensation,” the paper concludes that the Court of Appeals correctly decided the *Collington* case.

II. HISTORY OF EMINENT DOMAIN IN MARYLAND

A. DUAL NATURE OF MARYLAND’S TAKINGS CLAUSE

Article III Section 40 of Maryland’s Constitution provides:

The 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.¹

Taking property, therefore, is not unconstitutional so long as the burdened private property owner is compensated justly for his or her losses. When enacting Maryland’s takings clause, the framers of Maryland’s Constitution envisioned that the right to private property, although important, must at times yield to the demands of the public.

B. MARYLAND’S COURTS HAS READ ARTICLE III § 40 “PUBLIC USE” EXPANSIVELY

Curiously, Maryland’s constitutional takings clause, like those of many states and the federal government, does not expressly prohibit government condemnations of private property for private use. It only provides that Maryland has the right to condemn land for a public use when “just compensation” or fair-market value is tendered to the private landowner.² Article III Section 40, is silent as to the legitimacy of condemning private property purely to benefit another private party. That Maryland’s takings clause does not speak to the legitimacy of taking property for another private individual probably does not stem from oversight of the drafters, but from the firm conviction that condemning private property purely for the benefit of another private party is so fundamentally wrong that its prohibition need not be expounded upon in Maryland’s

¹ MD. CONST. art III, § 40 (amended 1864).

² See generally *Chi., Burlington and Quincy R.R. Co. v. Chi.*, 166 U.S. 226 (1896) (Delivering the opinion of the court, Justice Harlan states that the owner of private property taken under the right of eminent domain obtains just compensation if he is awarded the fair and full equivalent for the thing taken from him by the public.)

constitution. This intuition has been confirmed by Maryland's courts, which have no doubt, interpreted Article III Section 40 to imply the prohibition of private use takings. In *Arnsperger v. Crawford*, Judge Pearce expressed that the "implied prohibition contained in section 40 of Art. III is too clear to be questioned," thereby disposing of the notion that private property might be constitutionally taken for private uses.³ Maryland, therefore, may only condemn private property for a public use, and then, only when the condemned party is provided with just compensation.

Maryland courts, however, have had difficulty drawing the line that separates public from private. The line drawn always seems to be a fine one, and to add to the difficulty, it has changed positions over time. Some courts defend the lack of a bright line rule separating public from private by arguing that a fixed rule in an ever-changing world would be unwise, if not futile.⁴ As such, States have had varying interpretations as to how far "public use" extends within their jurisdictions. Where to draw the line between private and public is the most hotly contested issue underlying eminent domain law.

Despite the inherent difficulty in distinguishing public from private, Maryland's courts no doubt have taken an expansive view of what constitutes "public use." The Court, for one, has made clear that "public use" is not read literally to imply that the government condemnation must allow for the general public to use or occupy the condemned land. Maryland's courts, for example, have upheld government condemnations to benefit private railroad companies on grounds that railroads facilitate transportation and commerce, and thus, benefit the public at large. The Court has also made clear that a "use" does not become "private" if the "public use"

³ *Arnsperger v. Crawford*, 101 Md. 246, 61 A. 413 (1905).

⁴ *Collington*, at 181; *see also* *Riden v. Phila.*, 182 Md. 336, 340-341; *see also* *N.Y. City Housing Auth. v. Muller*, 270 N.Y. 333 ("Over many years and in a multitude of cases the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here as elsewhere that to formulate anything ultimate, even though it were possible, would, in an inevitably changing world, be unwise if not futile.")

incidentally benefits private owners to the detriment of others. On this theory, the Court has upheld the condemnation of a coal mining property for the construction of a railroad.⁵

Moreover, the Court has also deemed constitutional the condemnation of private harbor-front properties for the comprehensive redevelopment of Baltimore's blighted harbor.⁶ As case law makes clear, Maryland courts have always interpreted "public use" expansively.

C. MARYLAND DECLARES SLUM CLEARANCE A "PUBLIC USE"

The domain of Maryland's "public use" expanded even farther under the current of the 20th century slum clearance movement, America's easy answer to poverty. In the 1800's, as American port cities became centers of industry and commerce, people flocked to urban cities in search for jobs. However, the supply of labor exceeded the demand for help. As a result, many of the migrant workers lived in poverty for lack of work or dearth of pay. Shanty communities sprung up along the outskirts of affluent city centers.⁷ Neighboring the poor for the first time, the urban elite grew concerned that their communities might also become impoverished. Urged by the governing elite, state and local government began clearing poor neighborhoods to make way for public works such as roads, highways, and railroads. Thus began the discourse of urban "blight," a movement that expanded the domain of "public use" considerably.

In the twentieth century, the urban elite's conviction that slums were public nuisances that ought to be cleared for beneficial uses grew only stronger. In a nation-wide effort to eliminate slums, urban renewal advocates created a discourse of blight that armed government

⁵ See *New Cent. Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537, 560 (1873) (Upheld government condemnation of mining company's property to make possible for a private railroad company to build tracks to facilitate the transport of coal.); see also *Pitznogle v. W. Md. R. R. Co.*, 119 Md. 673, 678 (1913) (Upheld condemnation of private road for both the construction of a railroad line and to develop another private road on which people could travel to and from the railroad.).

⁶ See *Marchant v. Baltimore*, 146 Md. 513, 126 (1924)(Upheld constitutionality of condemnation by looking to the economic benefit that the public would derive from the comprehensive harbor development. The Court found nothing wrong with government taking public land and, in turn, lease it to private corporations.)

⁷ See Garrett Power, *Deconstructing the Slums of Baltimore*, Vol. *New Perspectives on Baltimore's Past*, Maryland Historical Society, 47 (2002).

with a powerful excuse to condemn private property. Blight, according to them, was a contagious disease that unless eliminated would infect a city spreading deterioration and poverty. The discourse of blight eventually reached the courts, and property rights were redefined when the courts interpreted slum clearance as a legitimate “public use.” Even the United States Supreme Court considered the clearing of slums to eliminate blight a “public use” within the meaning of the 5th Amendment’s Takings Clause. In *Berman v. Parker*, Justice Douglas defended the use of eminent domain to remove blight.

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.⁸

Blight, according to urban renewal advocates, threatened not only the communities that it touched, but also the spirit of poor communities. In *Berman v. Parker*, the Supreme Court legitimized a 19th century policy that displaces, but does not remedy, poverty. Furthermore, the Supreme Court greatly expanded government condemnation authority to the detriment of private property rights. As one commentator put it, slum clearance significantly diminished one stick in the proverbial bundle of property rights, namely, the right to undisturbed possession.⁹

Maryland was no exception to the nation-wide slum clearance movement. As blight was most prevalent in Maryland’s densely populated urban areas, such as Baltimore City, Maryland’s General Assembly amended its constitution to deal with urban blight. By amending the Maryland constitution in 1913, the General Assembly entitled Baltimore City an expedited process for condemning land within its city lines. Article III, Section 40A of Maryland’s constitution provided a quick-take exception for properties within Baltimore’s city lines.

⁸ *Berman v. Parker*, 248 U.S. 26 (1954), *see also* Power, *supra*, at 60-61.

⁹ *See* Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *Yale L. & Pol’y Rev.* 1, 3 (2003).

The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, *but where such property is situated in Baltimore City and is desired by this State or by the Mayor and City Council of Baltimore, the General Assembly may provide for the appointment of appraisers by a Court of Record to value such property, and that, upon payment of the amount of such valuation, to the party entitled to compensation, or into Court and securing the payment of any further sum that may be awarded by a jury, such property may be taken.*¹⁰

Pursuant to Article III, Section 40A, landowners could have their property taken away from them without the safeguard of a trial by jury. Under Section 40A, government may take rightful possession of private property in Baltimore by simply appraising the value of the property and depositing that sum into a court. By emasculating the traditional due process proceedings for eminent domain condemnations, Maryland's General Assembly aggrandized its and Baltimore's power to take property in Baltimore City.

In 1943, Maryland expanded "public use" yet again. By adding Article XI-B by constitutional amendment, the General Assembly further strengthened Maryland's and Baltimore City's authority to condemn property within Baltimore's city lines. Unlike Article III Section 40, Article XI-B makes no mention of "public use," but rather empowers local government to take private property for "development or redevelopment."

The General Assembly of Maryland, by public local law, may authorize and empower the Mayor and City Council of Baltimore...to acquire, within the boundary lines of Baltimore City, land and property of every kind, and any right, interest, franchise, easement or privilege therein, by purchase, lease, gift, condemnation or any other legal means, *for development or redevelopment*, including, but not limited to, the comprehensive renovation or rehabilitation thereof...¹¹

Article XI-B of Maryland's constitution effectively wrote equated economic development with "public use" within the city lines of Baltimore City. After 1943, property of every kind in Baltimore became subject to the development or redevelopment plans of government.

¹⁰ MD. CONS. Art. III, § 40A. (amended 1913); *see also* ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 192 (Hepbron & Haydon Law-Book Sellers, Baltimore, Md.)

¹¹ Md. Cons. Art. XI-B § 1 (amended 1943); *see also*, Youngstown Cartage Co. v. North Point Peninsula Community Co-ordinating Council, 24 Md. App. 624, 332 A.2d 718 (1975) (Held that a taking under Article XI-B § 1 is constitutional only if the purpose of the taking is for the "public benefit" that suggests that Article XI-B § 1 is a broader enabling constitutional provision than Article III Section 40 because "public benefit" is broader than "public use.")

This broad sweeping authority did not go to waste. In 1949, the Baltimore Redevelopment Corporation had been created pursuant to Article XI-B for the purpose of redeveloping Baltimore's slums. In 1953, the City's condemnation authority under Article XI-B was challenged as not furthering a "public use" but was ultimately upheld by the Court in *Harzinger v. City of Baltimore*.¹² In 1964, the Court revisited the constitutionality of Article XI-B in *Master Royalties v. Baltimore City*. In that case, the Court upheld the constitutionality of Article XI-B by holding that XI-B embodied a broad concept of "public use" which enabled government to acquire blighted property for redevelopment.¹³ The *Master Royalties* Court, moreover, found additional justification of its expansive view of "public use" in the Supreme Court's landmark decision, *Berman v. Parker*.

In the 20th century, blight became a new device for Maryland's government to constitutionally take private property. No longer limited to condemning property for the public uses of providing public works, or their functional equivalents (i.e., private railroads), Maryland could also use its condemning authority to clear slums and blighted areas. This extension, however, can hardly be surprising in light of the Court's traditionally deferential construction of "public use."

D. DOES PUBLIC USE EXTEND TO ECONOMIC DEVELOPMENT IN ALL OF MARYLAND?

To summarize, Article XI-B empowers the General Assembly and Baltimore to condemn property in Baltimore for redevelopment (i.e., to remove blight). The constitutionality of Article XI-B was upheld by the Court in *Marchant v. Baltimore*. Article XI-B, however, is limited to condemnations in Baltimore. Maryland's authority to condemn property outside of Baltimore is limited by Article III Section 40. Is such a distinction between Baltimore and the rest of

¹² *Harzinger v. Baltimore*, 203 Md. 49, 59 (1953).

¹³ *Master Royalties Corp. v. Baltimore*, 235 Md. 74, 84 (1964).

Maryland constitutional? Does Article III Section 40 of Maryland's Constitution provide Maryland with authority to condemn land for economic development?

As argued above, Article III has always been liberally interpreted by Maryland's courts. "Public use," for example, has not been held to literally require public access to the condemned property. Nor does "public use" forbid government from benefiting a new private party to the detriment of the former property owner. As long as the public benefit incident to the taking predominates, Article III's "public use" requirement will likely be met in Maryland's courts. Does "public use," however, extend to government condemnations of property purely for economic development? In *Prince George's County v. Collington Crossroads* ("Collington"), the Maryland Court of Appeals faced this very question.

III. WHETHER CONDEMNING LAND FOR THE DEVELOPMENT OF AN INDUSTRIAL PARK CONSTITUTES THE REQUISITE "PUBLIC USE" SO AS TO JUSTIFY THE TAKING?

Under Ch. 689 of the General Assembly's 1968 session laws, Prince George's County ("the County"), Maryland gained authority to condemn land for the construction of certain "public airport facilities and industrial parks."¹⁴ The General Assembly had found the development necessary to generate opportunities for local employment and to increase the County's taxable base.¹⁵ The General Assembly maintained, moreover, that its enabling legislation had the

¹⁴ 1968 Md. Acts, Ch. 689, § 1(b) ("The term 'industrial parks' shall mean (i) the acquisition, by any legal means, of land or property in Prince George's County generally in the southwest quadrant of the intersection of Maryland Route 214 and U.S. Route 301 in one contiguous tract as now determined by the County to be suitable as the site or sites for the establishment of one or more industrial parks to encourage and promote the creation of new industry and the growth of existing industry in Prince George's County and (ii) the grading of such site or sites, the tracks and taxiways, the construction and equipment of buildings, the construction and installation of all utility services and the doing of any and all things necessary in connection with or pertaining to the acquisition and development of such land or property as industrial sites including but not limited to the architectural and engineering services incident thereto."); Prince Georges County, 275 Md. at 172-173.

¹⁵ Id. § 10(c) ("...[T]he County Commissioners for Prince George's County by the acquisition of potential industrial lands may directly solicit industrial users of said land thereby affording the creation of employment opportunities for the residents of Prince George's County, the diversification and increase of the taxable base available to said County so as not to depend in too large a degree upon one segment of the economy...."); Prince George's County, 275 Md. at 172.

single object of preserving and improving the economic well-being of Prince George's County residents.¹⁶

On August 22, 1968, Prince Georges County commenced condemnation actions in order to make way for an airport. Given that Maryland's precedents had consistently upheld takings of private land for highway and railroad expansion, the County's initial Airport proposal was not very controversial, at least from a legal perspective. After all, an airport is a form of transportation and thus the logical extension of a highway or a railroad. Although the issue had not been litigated, the County's airport proposal would likely have passed the test of "public use" under Maryland law.

Against the current of the law, citizens of Bowie, Maryland, nonetheless, vigorously opposed the County's airport project. They feared that the excess noise and pollution incident to an airport would reduce property values in the area. From 1968-1975, Bowie vehemently opposed the County's condemnation efforts. These controversies bounced back and forth between Prince George's County Circuit Court and the Maryland Court of Appeals. The *Collington* controversy had reached the Maryland Court of Appeals five times in seven years.

A. THE CITY OF BOWIE V. COUNTY COM'RS FOR PRINCE GEORGE'S CO., 262 A.2D 172 (1970)

Pursuant to Ch. 689, the County issued and sold bonds to private investors to finance its airpark condemnations. In June of 1969, Bowie filed suit in the Circuit Court for Prince George's County to have the bonds declared invalid on grounds that they had been illegally issued.¹⁷ The City argued that the County had neither given notice of their proposal nor held a public hearing prior to adopting its resolution. In turn, the County denied its responsibility to

¹⁶ Id. § 10(d). ("...[T]he acquisition of potential industrial lands and construction of industrial facilities has the single object of preserving and improving the economic well-being of the residents of Prince George's County, and is found and determined to be in the public interest."); Prince George's County, 275 Md. at 173.

¹⁷ The City of Bowie v. Board of County Comm'rs I, 262 A.2d 172 (1970)

give notice or provide for a public hearing on grounds that its proposal constituted an “emergency measure.”¹⁸ Such a measure, according to the County, was exempt from the usual notice and hearing requirements typically required.

The circuit court found, but on different grounds, that the County had no obligation to notify the public of its action. Skirting the issue of whether building a public airport constituted an “emergency measure,” the court held that the County had acted “executively” by selling bonds to finance its airport project, and therefore had not been required to provide notice of its action.¹⁹ On June 5, 1970, the Maryland Court of Appeals affirmed.

A. CITY OF BOWIE V. BOARD OF COUNTY COM’RS, 271 A.2D 657 (1970)

Later that year, the City of Bowie again brought suit against the County on different grounds. On this occasion, the City asked the court to grant an injunction on the airpark project on a theory of anticipatory nuisance. The City feared that the airport would “emit unusual, unreasonable, and unnecessary noise, vibration, dust, stench and filth...creating danger, fear, hurt, and inconvenience” to the people of Bowie.²⁰ The City further claimed that the airport project quite simply was not a good idea and was doomed to end in “financial catastrophe.”²¹

Circuit Judge Ralph Powers upheld the County’s petition for condemnation on two grounds. Finding the City’s new claim of anticipatory nuisance unpersuasive, Circuit Judge Ralph Powers first held that the allegations of noise, vibration, and stench were not supported by evidence great enough to justify an injunction against a project backed by the County government.²² Judge Powers also rejected the City’s claim of “financial catastrophe.” According to Judge Powers, it is not the province of the judiciary to “review the wisdom of

¹⁸ Id.

¹⁹ Id.

²⁰ *The City of Bowie v. Board of County Comm’rs II*, 271 A.2d 657, 658 (1970).

²¹ Id. at 660.

²² Id.

projects which elected bodies undertake, nor can courts substitute their judgment for the judgment of the people in authority who make the decisions.”²³ On appeal, Judge McWilliams of Maryland’s Court of appeals affirmed Judge Powers’s opinion in its entirety.

B. GENERAL ASSEMBLY REPEALS CH. 689

Given the strong opposition to the County’s proposed airport, Maryland’s General Assembly had second thoughts regarding the County’s condemnation authority. In 1971, the Maryland General Assembly repealed the County’s authority to condemn the disputed property “generally in the southwest quadrant of the intersection of Maryland Route 214 and U.S. Route 301,” but authorized the County to condemn “any other site within Prince George’s County provided adequate safeguards...to limit the noise, safety and nuisance hazards imposed on the residents of the immediate area...and the impact of the project on the local environment.”²⁴

In turn, the County challenged the validity of Chapter 6. Prince George’s County Circuit Court held that the General Assembly’s 1971 Chapter 6 session law was voided because the County had already invested considerably in its proposed airpark when relying on Chapter 689 of the General Assembly’s 1968 session laws.²⁵ With the judiciary’s support, the County executive issued executive order “No. 72-1971,” reaffirming the County’s interest in the property bound to the north by Route 214 and to the East by U.S. Route 301.

After three years of administrative and legal delay, the County executive had revised its original condemnation plans. On this occasion, the County sought to build an industrial park instead of an airport. This change in position incited even more opposition, but this time from the County’s legislative branch. On May 18, 1971, the Prince George’s County Council passed 10

²³ Id.

²⁴ 1971 Md. Acts, Ch. 6.

²⁵ See Opinion of Ralph W. Powers, C. J., Prince George’s County v. Caulfield, No. 47, 357 (Md. 7th Cir. Ct. 1971) (affirmed).

votes to 1 Councilman White's bill No. 19-1971 ("White bill") which revoked the County's authority to condemn land for the purposes of the airport, declared the land already acquired surplus property, and directed the County Executive to sell the land as expeditiously as possible.²⁶ Despite almost unanimous disapproval of the industrial park proposal, the County Executive ignored the Council's bill and on September 21, 1971 issued an order to condemn land exclusively for the development of an industrial park and to amend any pleadings in any pending cases to reflect the new executive directive.²⁷

The County's new industrial park proposal raised constitutional issues not implicated in the previous litigation. By abandoning the airport project for an industrial park development, the County effectively raised the question of whether it had the constitutional authority to condemn private property for the purposes of economic development. The former airport proposal, although vigorously opposed, did not implicate Maryland's takings clause because Maryland's courts had consistently upheld government condemnations of private land to make way for public works, such as roads and highways, to further transportation and commerce. Moreover, the courts had consistently upheld condemnations for private railroads on the logic that railroads are the functional equivalent of roads and highways. While taking property for airport development was not constitutionally controversial, taking property for the sole purpose of industrial development raised significant constitutional "public use" issues.

C. WITH THE CONDEMNATION OF PRIVATE PROPERTY FOR ECONOMIC DEVELOPMENT,
COLLINGTON CROSSROADS SEEKS FOREIGN HELP

The County's new industrial park proposal raised the constitutional issue of what constitutes "public use." Toby Prince Brigham, a fiery eminent domain lawyer hailing from

²⁶ See Opinion by Judge Parker, Board of County Comm'rs v. Collington Crossroads, Inc., No. 37.944 (Md. 7th Cir. Ct 1972) (reversed); *see also* (p. 499 of PDF 1.)

²⁷ Prince Georges County v. Beard, 266 Md. 83, 86 (1972).

Miami, Florida, served as counsel for Collington Crossroads, Inc. Eminent domain ran through Mr. Brigham's blood. Brigham's father, E.F.P. Brigham was an eminent domain lawyer of prominence who had convinced the Florida Supreme Court that government is required to pay for the defendant's expert testimony in government land acquisition cases.²⁸ Toby Prince Brigham followed his father's footsteps. Since *Collington*, Mr. Brigham has earned the reputation as Florida's top eminent domain lawyer. Fighting passionately for forty years on behalf of private landowners across the country, Brigham is referred to as "a preacher of the gospel of property rights."²⁹ Brigham himself styles his livelihood as a "cause of freedom" to protect civil liberties and prevent government from becoming "totalitarian."³⁰ Collington Crossroads, Inc. was likely one of Brigham's earliest clients.



Toby Prince Brigham, Esq.
Source: Brigham Moore,
LLP, Brigham recognized in
the 2005-2006 edition of The
Best Lawyers in America®,
<http://www.eminentdomain.com>



Mr. Brigham vigorously opposed the County's motion to amend its condemnation petition on grounds that using eminent domain to build an "industrial park" is an unconstitutional

²⁸ Robert P. King, *The Lawyer*, PALM BEACH POST, February 23, 2003, at sec. A.

²⁹ *Id.*

³⁰ *Id.*

taking of private party for “private use.”³¹ Moving to dismiss the County’s motion, Mr. Brigham argued that the County’s amended petition to condemn land was “unconstitutionally impermissible on its face as an attempt to acquire private property for a purely private purpose” in violation of Maryland and Federal constitution.³²

Collington’s motion to dismiss again reached the chambers of Judge Ralph W. Powers. Persuaded by Mr. Brigham, Judge Powers dismissed the County’s motion to amend its condemnation petition without, however, reaching the question of whether an industrial park constitutes a “public use.” On the facts of the case, Judge Powers did not need to. The court disposed of the case on grounds that the County Council had already unequivocally abandoned the project by passing the White bill which extinguished the County Executive’s condemnation authority.

I must conclude that the clear intent of the Council to abandon the public airport and industrial park project by the enactment of Bill No. 19-1971 cannot be circumvented by any interpretation of these sections or an Executive Order. The original legislation declared this project to be for public purposes. Subsequent legislation declared the project abandoned and the land acquired surplus property. There is no legal authority by which the acquisition of additional land by condemnation can meet the requirement that it be for public use.³³

The County again appealed, and the Court of Appeals granted *certiorari*. Four years of vigorous opposition did not seem to discourage the County Executive. In fact, the County seemed more eager than ever to push its condemnation project through. Without waiting for the Court of Appeals to decide its appeal, and thus, not knowing whether it in fact retained the authority to condemn, the County nonetheless zealously pursued its condemnation efforts. Unsure of its condemnation authority, the County again asked the court to amend its condemnation pleadings to incorporate its change in “public use” from an airpark to an industrial park development.

³¹ Prince Georges County v. Beard, 266 Md. 83, 86 (1972) (quoting Judge Powers’ opinion).

³² *Id.*

³³ *See* Opinion by Judge Ralph W. Powers, Prince George’s County v. Collington Crossroads, Inc.

On March 3, 1972, Judge Roscoe Parker, then presiding over the case, dismissed the County's motion to amend its condemnation petition with prejudice. Judge Parker held that the County Council's "White bill" effectively extinguished the County's condemnation authority, and thus, rendered moot the County's motion to amend.³⁴ The County appealed and the Court of Appeals again accepted review. The Court of Appeals was, therefore, presiding over two identical, or nearly identical, causes.

E. PRINCE GEORGE'S COUNTY V. BEARD, 291 A.2D 636 (JUNE 13, 1972).

The first appeal reached Maryland's highest court in 1972. In *Prince George's County v. Beard*, 291 A.2d 636 (June 13, 1972), the appeal from Judge Ralph W. Powers's opinion, the Court of Appeals faced two issues: (1) whether the County Council may effectively override an executive project that had been voted into the County's budget at popular referendum; (2) and whether the County has the power to condemn private property for a publicly owned and operated industrial park leased, in major part, to private industrial and commercial interests.

The Court of Appeals reversed the circuit court on the first issue taking the position that a capital project signed into the county charter could only be abandoned if (1) the County Executive recommended such an abandonment; (2) a public hearing is provided; and (3) the County Council approved the abandonment by two-thirds of its members. The Court, therefore, struck the "White bill" as an ineffective override of a capital venture already signed into the County's charter.

Again, however, the Court did not reach issue of whether the County may constitutionally condemn private property for the development of an industrial park on grounds that the record had not been sufficiently developed to the extent that the question of "public use"

³⁴ See Opinion: Judge Parker, Board of County Commissioners for Prince George's County v. collington Crossroads, Inc., Law No. 37.944 (Mar 3, 1972). (p. 499)

could be answered. The Court, without either reversing or affirming, remanded the case to provide the County with more time to amend its development plans so that the lower court might have more information on which to base its decision.³⁵ The Court further provided guidance to the County by referencing *Marchant v. Baltimore*, 146 Md. 513, 521 (1924), a case in which Baltimore City's eminent domain power was upheld by the court on grounds that the City had developed a comprehensive plan that ensured commercial growth. It seemed as if the Maryland Court of Appeals provided the County with a template on how to make their proposals constitutional.³⁶

F. "ONE MAY EXPRESS THE HOPE THAT THE LITIGATION EMANATING FROM THIS BATTLE WILL NOT CONTINUE AS LONG AS THE HUNDRED YEARS' WAR OR, PERHAPS, THE WARS OF THE ROSES..."³⁷

The second appeal that had been pending review was decided the following year. In this case, the County had appealed Judge Parker's refusal to grant the County leave to amend its condemnation petition. Presiding over the *Collington* controversy for now the fourth occasion, the Court of Appeals' discontent was manifest.

We suspect that as a result of our rulings in *Beard* and in this case yet other cases arising from this proposed project will reach us. One may express the hope that the litigation emanating from this battle will not continue as long as the Hundred Years' War or, perhaps, the Wars of the Roses which it resembles in some respects since one may draw the inference that this series of cases arise in part from a tussle for power and not simply from the never ending conflict between property owners and their government when property is to be taken for public purposes.³⁸

³⁵ Id.

³⁶ *But see*, *Beard*, 266 Md. at 95 ("Inevitably, inferences would be drawn from such comment as to whether we might or might not regard a proposed industrial park as constitutionally permissible when in fact we could make no such determination until full and complete facts were before us. The County is proposing condemnation when the record before us shows that even the County Executive is unable to say what use will be made of the property. For us to hold on such a record that a public use has been established would be to hold, in essence, that a public body may condemn private property for any purpose which suits its convenience which, to paraphrase Judge Alvey's comment in *New Central Coal Co.*, would make the rights of property solely dependent upon the will of a legislative body, without restraint. Such is not the law.")

³⁷ *Prince George's County v. Collington Crossroads, Inc.*, 268 Md. 69 (Feb. 7, 1973).

³⁸ Id. at 71.

Notwithstanding the Court's decision in *Beard*, which could have been used to control the outcome of this case, the Court of Appeals took care to emphasize its directive on remand. The Court of Appeals, moreover, seemed to scold the trial court for its quick trigger in dismissing the County's motion to amend its condemnation petition. Citing a 19th century precedent, the court reminded the lower court of *stare decisis*.

We are bound to decide according to existing laws, even though a judgment, rightful when rendered by the court below, should be reversed as a consequence.³⁹

Clearly, the Court of Appeals was unhappy with the lower court for not waiting for *Beard* to be decided before reaching another opinion on the County's motion to amend. The implications of the Court's reprimand of Judge Parker were perhaps even more serious. On remand, Judge Parker recused himself from the controversy because he owned property within the County's proposed taking lines.⁴⁰

Reversing the trial court, the Court of Appeals held that leave to amend must be granted to the County, but again did not decide whether the County's proposal fell within a "public use" on grounds that the record had not been sufficiently developed. The Court, however, did require that the County either perfect its plan expeditiously or dismiss its efforts.

The property owner is entitled to have the sword of Damocles suspended over its head in the nature of this condemnation proceeding removed by trial at an early date.⁴¹

IV. PRINCE GEORGE'S COUNTY, PROVIDED A COMPREHENSIVE PLAN AND JUST COMPENSATION, MAY CONSTITUTIONALLY CONDEMN PRIVATE PROPERTY FOR THE DEVELOPMENT OF AN INDUSTRIAL PARK

A. ON THE FACTS, JUDGE RALPH POWERS HELD THAT THE COUNTY'S INDUSTRIAL PARK PROPOSAL DID NOT CONSTITUTE A "PUBLIC USE."

³⁹ Id. at 75; *quoting* Day v. Day, 22 Md. 530 (1865).

⁴⁰ Prince George's County v. Collington Crossroads, Inc., No. 37,944, Transcript of Proceeding, at p. 18 (April 1974)(hereafter "Transcript of Proceeding")

⁴¹ Collington Crossroads, Inc., 268 Md. at 77.

Pursuant to the Court's order in *Beard*, Prince George's County prepared a comprehensive plan of its proposed industrial park development. The County hired Dr. David Wallace, an expert planner, to head the County's industrial park task force. The task force's development plan included dividing the 1,200 acre development into categories of desired uses including commercial recreation, research office buildings, manufacturing/wholesale sites, and manufacturing offices. The plan further provided for open space areas including a golf course, flood plain, and other areas that would not be developed to preserve the handsome attributes of the property.⁴² The County, moreover, claimed that it would overlook the industrial park development at every stage. The comprehensive plan was to be executed over a projected duration of 20 years.⁴³

With Judge Parker removed from the case, the *Collington* controversy again reached the chambers of Judge Ralph Powers on April 8, 1974. Judge Ralph W. Powers sat as Chief Judge of the 7th Judicial Circuit of Maryland from 1971 to 1976.⁴⁴ He was known to have been an efficient no-nonsense judge. Having served in the army in World War II, Judge Powers administered his courtroom with exacting military precision. Judge James P. Salmon, who had practiced before Judge Powers as a lawyer, shared memories of Judge Powers with the *Baltimore Sun*.

When you came into his courtroom, you had better be prepared. I remember a young lawyer who asked that a trial be postponed because his wife was expecting their first child that day. Judge Powers advised him that first babies are often late and the trial was going forward. The baby was born several days later.⁴⁵

Ralph Powers was the quintessential circuit court judge. Opposed to dilly dally, Judge Powers quickly got to the heart of issues. A lawyer who had once argued before Judge Powers esteemed

⁴² Transcript of Proceedings at p. 18

⁴³ *Id.* at p. 26.

⁴⁴ Fred Rasmussen, "Ralph Wilson Powers Sr., 89, was Judge in the 1972 Trial of Arthur Bremer," *Baltimore Sun*, 5B (January 24, 1996).

⁴⁵ *Id.*

him as “everything you wanted in a Circuit Court Judge,” adding that he could “conduct a non-jury trial faster than anyone.”⁴⁶

Accustomed to resolving controversies expeditiously from the bench, Judge Powers seemed disappointed when called to again preside over this long drawn-out tussle for power. During the trial on April 8, 1973, Judge Powers made clear to the litigants, and particularly the County, that he was indeed a no-nonsense Judge. At trial, Judge Powers made clear that he was skeptical of the legitimacy of the County’s efforts to condemn Collington’s property when he said:

The Beard case I sat on before. It was heard on the question of the constitutionality of the taking. At that time, as I recall, they had if not formally abandoned the airpark aspect of this project there were strong indications that it was to be abandoned. They had no plan as to how they were going to proceed, other than the terminology an industrial park. They didn’t have any limitations on the land involved. And, for all anybody knew, they could have, if permitted to do so, they could have condemned a couple of thousand of acres and then put it up for sale under sealed bids for the highest bidder and hopefully make themselves some money. If they didn’t get a big enough bid, they could wait a couple of years and try it again. Obviously unconstitutional and improper.⁴⁷

(Emphasis provided).

Judge Powers also seemed disappointed in the Maryland Court of Appeals. Faithful to his no-nonsense reputation, Judge Powers openly criticized the Court of Appeals for remanding the previous cases and not simply affirming the decision to reject what had been very sloppy, if not down right unconstitutional, efforts to condemn private land.

...[I]n any event, the ruling was, at that time in the Beard case, that they did not have a sufficient plan. There was some discussion among the Judges and condemnation lawyers and others when the case came down instead of affirming or reversing. They simply remanded to give the County a further opportunity for plans, instead, as some might have believed, of affirming because there was no plan, because they clearly said there wasn’t a plan and there had to be one before they had the right to condemn,....Is that a correct statement?⁴⁸

⁴⁶ Id.

⁴⁷ Transcript of Proceeding at p. 4

⁴⁸ Transcript of Proceeding at p. 54

At trial, Judge Powers found even more reasons to suspect the County's industrial park proposal. He was particularly concerned with the County's plan to sell most of the acquired land, if not all of it, to private developers, thereby losing the public oversight requisite to satisfy "public use." Mr. Brigham brought this controversial aspect of the County's plan to the court while cross-examining Dr. Wallace.

MR. BRIGHAM: So basically the plan here is to acquire the private property which is sought in (p. 83) this case and plan it for development and sell it off to private users for a profit?

THE WITNESS [DR. WALLACE]: Correct

THE COURT: Will it all ultimately be sold?

THE WITNESS: I believe it would all ultimately be sold, except for land held as public rights-of-way or as public open spaces.

THE COURT: Even golf courses?

THE WITNESS: The expectation would be the golf course would ultimately be a commercial venture.⁴⁹

Judge Powers's initial concern that the County would have take land and sell it to the highest bidder to turn a profit did not seem to change even after the County introduced its comprehensive plan.

However, the facts had changed. Pursuant to the Court of Appeal's directive, the County developed a comprehensive plan on which to proceed with its condemnation efforts. It appointed a 15-member industrial park taskforce. Unlike the County's previous half-baked condemnation proposals, its newest comprehensive plan carried the weight of experienced urban planners with doctorates. Judge Powers had hoped on deciding this case from the bench, but could not because the County had finally given him something to think about.

I was hoping that I could decide this case if not right from the bench when argument was concluded at least after a brief recess. But I am afraid I would have to go into it more comprehensively than that and I will have to take it under advisement.... / ...I don't [however]

⁴⁹ Id.

have any other cases under advisement at the present time. I can get to this without any delay and get it decided within the next few days.⁵⁰

On May 23, 1974, Judge Powers decided on the constitutionality of the industrial park proposal. On the facts, Judge Powers found that the industrial park proposal was unconstitutional. He was convinced that the “public use” limitation to eminent domain condemnations prevented the County from taking private land for its proposed industrial park, which according to Judge Powers, was a private venture. After all, virtually all of the condemned land would be turned over to private hands.

The final result would be to leave no more land for public use than the usual residue after a private developer has fully exploited such a project as this. Of interest, if not significance, is that at the final wind up of this project the estimated profit to the County is \$14,031,800.⁵¹

In dicta, Judge Powers explained his holding of unconstitutionality on Maryland’s public/private distinction. Judge Powers conceded that some states read “public use” to really mean “public benefit,” but was convinced that Maryland interpreted “public use” more strictly. Judge Powers, moreover, was convinced that a strict reading of “public use” was superior to a broad reading. According to him, a broad reading of “public use” was not judicially workable as it did not afford a definite criterion on which judges could decide cases. Under a broad reading of “public use,” Judge Powers feared that the judiciary would imprudently be “left free to indulge their own views of public utility or advantage.”⁵² Citing Henry Niles’ influential work, *Maryland Constitutional Law*, Judge Powers argued that Maryland reads “public use” strictly.

(1) It is the primary and more commonly understood meaning of the words. (2) At the time of the adoption of the second Constitution of 1851, the first of our organic instruments to contain a limitation upon the power of eminent domain, as well as the third Constitution of 1865, and our present Constitution of 1867, there was no practice in Maryland showing a contemporaneous

⁵⁰ Id. at 57

⁵¹ Prince George’s County v. Collington Crossroads, Inc., No. 37,944 (May 23, 1974)(“hereafter “Judge Powers’s Opinion).

⁵² Judge Powers’s opinion; *quoting* Arnsperger v. Crawford, 101 Md. 247, 253.

construction that the term “public use” imported public benefit. (3) Our definition furnishes a more definite guide for the courts.⁵³

On the facts and the law, Judge Powers held the County’s industrial park condemnation unconstitutional. Judge Powers did not contest that the County’s purpose might have very well furthered a public interest. Judge Powers held only that the County’s proposed condemnation could not survive the strict constitutional provision that property can only be taken for public use.⁵⁴ Despite being remanded back on several occasions by the Court of Appeals, Judge Powers stood resolute in what he believed, on the facts and the law, was an unconstitutional exercise of eminent domain. The County again sought review, now for the fifth time, in the Court of Appeals.

B. ON THE LAW, JUDGE JOHN C. ELDRIDGE REVERSES THE CIRCUIT COURT.

The following year, Maryland’s Court of Appeals accepted the County’s petition for review, its fifth review of the *Collington* controversy. Judge John C. Eldridge presided over the case. Only 40 years old when appointed to the bench by Governor Marvin Mandel in 1974, Judge Eldridge remained an associate justice on the Maryland Court of Appeals until he turned 70 years-old and was required by Maryland law to step down.⁵⁵ During his 30-year tenure on the Court of Appeals, Judge Eldridge developed an impressive track record that includes writing many of Maryland’s landmark opinions. Writing for the court, Judge Eldridge struck Maryland’s juvenile curfew laws, subjected the governor’s phone and office appointment records to public scrutiny, and declared unconstitutional the exclusion of whites from juries on grounds

⁵³ Judge Powers’s opinion; *see also Riden v. Philadelphia*, *see also Arnsperger v. Crawford*, 101 Md. 246; *see also Dobler v. Mayor and City Council of Baltimore*, 151 Md. 154; *see also Niles, Maryland Constitutional Law*, 192-201.

⁵⁴ Judge Powers’s opinion

⁵⁵ Lisa Goldberg, “Tough Questioner Prepares to Step Down: Judge Eldridge, 70, Set to Leave Appeals Bench, Plays Down the ‘Hoopla.’” *Baltimore Sun*, Sec. Local, (November 13, 2003).

of race.⁵⁶ Most recently, Judge Eldridge authored an opinion that invalidated Maryland’s two-tiered election system of qualifying for ballots, thereby, increasing minority parties’ chances of reaching the ballot boxes.⁵⁷ Former Governor Mandel speaks of Eldridge as having “one of the brightest legal minds” he has ever known and quickly points to Eldridge’s impressive career as evidence.⁵⁸



Judge John C. Eldridge
Source: Maryland State Archives,
<http://www.mdarchives.state.md.us>

Judge Eldridge’s appointment to the Court, however, was as controversial as his career was successful. Appointed to Maryland’s highest court at a youthful 40, Judge Eldridge endured much disapproval at the outset. For example, the Anne Arundel County bar publicly denounced Eldridge’s appointment as political cronyism.⁵⁹ Eldridge’s controversial appointment also stirred trouble within Maryland’s highest bench. Protesting Eldridge’s appointment, Judge Wilson K. Barnes Sr. of the Court of Appeals resigned from the bench.⁶⁰ Suspicions of cronyism cast upon Judge Eldridge’s appointment were perhaps well-founded. Judge Eldridge, after all, served as Governor Mandel’s chief legislative officer prior to serving the Court of Appeals.

⁵⁶ Id.

⁵⁷ Editorial, “A greener democracy,” Baltimore Sun, (August 5, 2003).

⁵⁸ See Goldberg, *Supra*, at id.

⁵⁹ Id.

⁶⁰ Id.

Mandel's administration was a formidable machine that, quite simply, got things done. Under Mandel's leadership, the 1968 Constitutional Convention's draft constitution, almost universally touted as exemplary but ultimately rejected at popular referendum, became law through statute and constitutional amendment. In furtherance of this massive reform, Governor Mandel created Maryland's first Office of Legislation. John C. Eldridge was appointed Chief Legislative Officer. Eldridge, with a staff of forty lawyers under him, drafted agency plans into bills for the General Assembly to sign into law.⁶¹

In his capacity as Chief Legislative Officer, John C. Eldridge, to say the least, kept busy. The 1969 and 1970 legislative sessions were high points of government activism that had been escalating throughout the 1960's.⁶² In 1970, Mandel's administration established the Nation's first complete executive cabinet system.⁶³ 248 executive agencies were consolidated into 12 major departments headed by cabinet-level secretaries who reported directly to the Governor. Reform was not, however, limited to the executive branch. The young constituency of Maryland's legislature, many of whom were first-time elects, acknowledged their inexperience and demanded a robust bureaucracy to get them on their feet.⁶⁴ Full-time staff increased from 12 in 1966 to 119 in 1969. The legislative branch's operating budget rose from \$675,000 in 1960 to \$3,900,000 in 1970.⁶⁵

Keeping pace with the growth of bureaucracy, the courts grew as well. Judges were given a staff of clerks to research the law. Maryland's new and robust judiciary consisted of 180 judges and more than 1,500 employees.⁶⁶ 1970, the General Assembly passed the Office of

⁶¹ Calcott, *Supra*, 226.

⁶² Calcott, *Supra*, 282.

⁶³ Calcott, *Supra*, 283.

⁶⁴ Calcott, *Supra*, 227.

⁶⁵ *Id.*

⁶⁶ *Id.*

Legislation's bill that reorganized Maryland's ailing judicial system into a neatly organized four-tier system, reminiscent of the system that the 1967-68 Constitutional Convention had in mind.⁶⁷ Local magistrate judges, many of whom were not even lawyers but earned their posts through political favor, were replaced by the newly established district judges.⁶⁸ Circuit courts reviewed the districts and the Court of Special Appeals and the Court of Appeals reviewed the Circuits. The Court of Appeals, moreover, gained administrative authority over its inferior courts. For the first time, the Court of Appeals could, provided a recommendation for removal from the newly created judicial disabilities commission and a hearing, remove lower court judges from the bench.⁶⁹ Under Mandel's leadership, Maryland's three governmental branches underwent revolutionary expansion. As George Calcott put it,

...more than ever before or since, people seemed to look to government to provide the kind of society they wanted, and they looked to Mandel more than people had looked to any governor in Maryland history to bring it about.⁷⁰

⁶⁷ Id. at 229.

⁶⁸ Id.

⁶⁹ 1969 Md. Laws, Chapter 789, District Court System, part VI, p. 1940 (“PROVIDING THAT THE POWERS OF THE COMMISSION ON JUDICIAL DISABILITIES SHALL INCLUDE THE POWER TO REQUIRE PERSONS TO TESTIFY AND PRODUCE EVIDENCE BY GRANTING THEM IMMUNITY FROM PROSECUTION OR FROM PENALTY OR FORFEITURE; THAT SAID COMMISSION MAY RECOMMEND TO THE COURT OF APPEALS THE REMOVAL OR RETIREMENT OF A JUDGE; THAT THE COURT OF APPEALS SHALL PRESCRIBE RULES CONCERNING THE COMMISSION; THAT THE COURT OF APPEALS, UPON RECOMMENDATION OF THE COMMISSION, AFTER A HEARING AND UPON MAKING CERTAIN FINDINGS, MAY REMOVE A JUDGE FROM OFFICE, CENSURE HIM OR RETIRE HIM FROM OFFICE; THAT A JUDGE SO REMOVED AND HIS SURVIVING SPOUSE SHALL HAVE RIGHTS AND PRIVILEGES ACCRUING FROM HIS JUDICIAL SERVICE ONLY TO THE EXTENT PRESCRIBED BY THE ORDER OF REMOVAL; THAT A JUDGE SO RETIRED SHALL HAVE THE RIGHTS AND PRIVILEGES PRESCRIBED BY LAW FOR OTHER RETIRED JUDGES; THAT NO JUDGE SHALL SIT IN ANY HEARING INVOLVING HIS OWN REMOVAL OR RETIREMENT; CREATING A SYSTEM OF DISTRICT COURTS IN THIS STATE, PROVIDING FOR THE APPOINTMENT AND CONFIRMATION BY THE SENATE OF JUDGES IN THESE COURTS, MAKING PROVISION FOR THE JURISDICTION, POWERS, DUTIES, AND OPERATIONS OF THE SEVERAL DISTRICT COURTS, CHANGING THE POWERS AND DUTIES OF CERTAIN OTHER OFFICERS AND AGENCIES WITH RESPECT TO THE DISTRICT COURTS, ABOLISHING CERTAIN OTHER COURTS AND JUDICIAL OFFICERS BEING SUPERSEDED BY THE DISTRICT COURTS AND ITS JUDGES, RELATING GENERALLY TO A SYSTEM OF DISTRICT COURTS IN THIS STATE AUTHORIZING PROCEDURES FOR THE POSTPONEMENT OF THE CREATION OF CERTAIN DISTRICT COURTS, AND SUBMITTING THESE AMENDMENTS TO THE QUALIFIED VOTERS OF THE STATE FOR ADOPTION OR REJECTION”).

⁷⁰ Calcott, *Supra*, at 285.



**Governor Martin
Mandel Signing Bill
into Law**

Source: Association
of Classified
Employees,
<http://www.ace-afscme.org/history.htm>

V. PRINCE GEORGES COUNTY V. COLLINGTON CROSSROADS, INC., 275 MD. 171 (1975)

Given Judge Eldridge's pivotal roll in the Mandel Administration that expanded government to an unprecedented scale, Judge Eldridge was destined to write the opinion that would ultimately aggrandize government authority to take private property. Presiding over *Collington*, Judge Eldridge reversed the lower court finding that the County's proposed industrial park passed Article III, Section 40's "public use" requirement.

Historians are said not to recount "history" *per se*, but to find historical support for their respective positions. Judges might very well be the same way.⁷¹ In finding that the County's proposed industrial park constituted a "public use," Judge Eldridge relied on precisely the same precedents used by Judge Powers who had found to the contrary. Relying on those same cases, Judge Eldridge held that Maryland had always liberally construed "public use" to include government projects reasonably designed to benefit the general public by significantly enhancing economic growth.

⁷¹ See Goldbert, *supra*, at 1B (Eldridge tells Baltimore Sun that tracing the legal history of a law will often decide a case).

In *Collington*, Judge Eldridge relied on *Riden v. Philadelphia*, previously relied on by Judge Powers when finding unconstitutionality, to uphold the constitutionality of the County's industrial park. Judge Eldridge, like a good historian, cited to portions of the opinion that the lower court curiously did not use. In *Riden*, the Court adjudicated the issue of whether a railroad has the right to condemn land for the purposes of constructing a branch line to a privately-owned business, the Bowie Race Track. The *Riden* Court upheld the right to condemn on grounds that the public would physically have access to the railroad. Despite this narrow holding, the *Riden* court, however, made clear that "public use" was not limited to situations where the public could physically occupy the condemned land. The court, rather, left open a broader interpretation of "public use" for a case in which such adjudication was appropriate.

But we need to deal now only with the specific question presented by the record at the present time. Here we are not faced with any difficulty, because it is universally conceded that a common carrier of passengers or freight is a public necessity.⁷²

While not drawing any distinct lines for "public use," the *Riden* court did, however, make abundantly clear that the concept of "public use" was subject to change, and that a broad expansive view may very well benefit the public.

The criticism was made...[t]hat our construction of the words "public use" would enable the State to condemn property for business enterprises such as hotels and theatres..."But why," demands one of the leading authorities on the subject in defense of the Maryland rule, "may not the Legislature provide for acquiring by condemnation a site for a hotel or theatre to which the public shall have the right to resort and which shall be subject to public regulation in its management and charges? Is not this a mere question of expediency and public policy? And is not our opinion upon this question the outgrowth of the state of society in which we live and the usages and practices to which we are accustomed? In ancient times vast sums of money were expended in the construction and maintenance of public theatres, which were regarded as among the most important of institutions. Some discretion must be left to the Legislature. It is not to be presumed that they are wholly destitute of integrity or judgment. The people have left it for them to determine for what public uses private property may be condemned. If they abuse their trust, the responsibility is not upon the courts, nor the remedy in them."⁷³

⁷² *Riden*, 182 Md. at 344. ("But we need to deal now only with the specific question presented by the record at the present time. Here we are not faced with any difficulty, because it is universally conceded that a common carrier of passengers or freight is a public necessity.")

⁷³ *Collington*, at 185; *quoting* *Riden v. Philadelphia* 182 Md. 336 (1943); Lewis, *Eminent Domain*, 3d Ed., Sec. 258.

Curiously, the Circuit Court failed to cite to the *Riden* court’s material qualifications of how it construed “public use.” The Court of Appeals, on the other hand, used the previously omitted dicta in *Riden* to support its argument that Maryland had never narrowly construed “public use.” Under *Riden*, the Court made clear that the mere fact that government involvement in new areas which were formerly the domain of private enterprise did not lead to the conclusion that a condemnation was for private and not “public use.”⁷⁴

The Court, moreover, found significant two factors in upholding the constitutionality of the County’s proposed industrial park. First, the County Executive had found that the industrial park facility was a type of project which private developers were unable or unwilling to undertake.⁷⁵ The County, therefore, was undertaking a project that the private sector could not have provided. Second, the County would maintain significant control over the industrial park even after selling it to private developers.⁷⁶ In light of the County’s findings and Maryland’s traditionally liberal construction of “public use,” Judge Eldridge, writing for the Maryland Court of Appeals, held:

Under our cases, 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 the power of condemnation provides an impetus which private enterprise cannot provide.⁷⁷

On remand, Judge Powers awarded \$2.5 million to Collington Crossroads, Inc. as just compensation for the County’s condemnation.⁷⁸

VI. WAKE OF COLLINGTON CROSSROADS

⁷⁴ Id. at 187.

⁷⁵ Id. at 179.

⁷⁶ Id.; *but see*, Opinion by Judge Ralph W. Powers.....(The Circuit Court, on the other hand, acknowledged these factors but found little significance in them given its strict construction of “public use” to mean physical occupation by the public.)

⁷⁷ Id at 190.

⁷⁸ Inquisition by Judge Ralph W. Powers, Prince George’s County v. Collington Crossroads, Inc., No. 37.944 (April 20, 1976); (p. 164 of PDF1).

A. PRINCE GEORGE'S COUNTY HAS LIMITED SUCCESS IN ATTRACTING INDUSTRY TO
COLLINGTON CENTER

In depositions, Prince George's County Councilman, John J. Garrity, revealed that part of the County's intentions for its industrial park development was to attract quality industry and avoid new warehouses which were already too prevalent in the County.⁷⁹ Warehousing, according to him, is undesirable compared to other industries such as manufacturing and research/development because it provides relatively fewer jobs and lower pay.⁸⁰ Desired industries such as manufacturing, on the other hand, provide more jobs and higher pay and increase the County's taxable base. By the 1970's, Prince George's County had developed the reputation of being the "warehouse capital" of Maryland.⁸¹ The County government's industrial park development plan sought to remedy the County's "warehousing" reputation.

In the 1970's, Developers were looking for sizeable parcels of land, surrounded by compatible uses, that were connected to major networks of transportation, such as highways, railroads and airports. Collington Center seemed a precise fit for the market demand. Tom Hutchinson, vice president and project manager for Cabot, Cabot and Forbes, a Boston-based developer of industrial parks, office and commercial complexes, was one of Collington Center's first clients. Collington, moreover, was exactly what Hutchinson was looking for in an industrial area.⁸²

Interest in Collington Center, however, was short-lived. After over a decade of hype, Collington Center's 1,200-acre plot remained virtually fallow. In 1987, the County had only successfully enticed eight clients to occupy Collington Center. Many of those businesses,

⁷⁹ Depositions, John J. Garrity p. 563.

⁸⁰ Id.

⁸¹ See Donald Hirzel, Industrial Land Boost is Sought, Washington Star News (January 24, 1975).

⁸² Hal Wilard, New Business Is More than Welcome in Prince George's County, Washington Post (April, 1 1976). ("We didn't look in Prince George's because it was Prince George's...we looked in the Washington area – including Northern Virginia – and what we wanted turned out to be Prince Georges.")

moreover, were disappointments. Given the County's difficulties in luring industry to Collington Center, the County settled on doing business with many undesirable industry types, such as warehousing. For example, Unlimited Products moved into Collington Center in 1984. With County money, Unlimited built two 40,000-square-foot buildings most of which was devoted exclusively to warehouse use. This venture flew in the face of the County's declared policy to promote desirable industries in manufacturing or research that would provide more jobs and diversify the County's taxable base. Other ventures by the County failed to provide jobs for County residents. Lanman Companies, Inc., a lithographic firm that also settled into Collington Center in 1984, is an example of that failure. Using \$4.5 million of county-backed industrial development bonds, Lanman established a printing facility. The facility, however, did not provide the residents of the County with a single local job. Already employing 150 workers, Lanman did not have any immediate plans to expand its workforce.⁸³

By 1987, Collington Center was largely considered a failure. Twelve years after the project's inception, the county's 1,200-acre development had only attracted eight interested firms. Many of the County's zoning strategies – including its 77-acre foreign trade zone – were particularly targeted as examples of the County's overall poor developmental planning.⁸⁴ Critics of the County's efforts found the 77-acre foreign trading zone too small to accommodate for foreign car dealerships, one of the few lucrative industries that would have benefited from such a duty-free haven. Collington Center's manager, Donald Spicer, attributed Collington Center's failure to the County's lack of expertise in the land development business.⁸⁵ Phillip Schwartz, a former manager of Collington Center, attributed Collington Center's failure to poor planning and

⁸³ See Ifill, *Supra*, at C3.

⁸⁴ Christopher J. Georges, Industrial Park Vacancies Disappoint Pr. George's Officials, the Washington Post, pg. MDB1, (Jul 9, 1987).

⁸⁵ *Id.*

poor location. “If we had to do it again,” he noted to the Washington Post, “we would have located it in another place.”⁸⁶ Even the local government acknowledged its failure to successfully develop Collington Center. County Executive, Parris Glendening, spoke of the industrial park as a disappointment by all assessments.⁸⁷ By the 1980’s, the enthusiasm for the County’s comprehensive plan that had carried so much weight in the *Collington* decision seemed to have vanished.



Collington Crossroads’ 325 Acres at the SW Corner of 214 and 301 Remains Barren to this Day.
Source: Google Maps (2007), <http://www.google.com>

B. HAS THE COUNTY REALLY FAILED THOUGH?

Despite the clear lack of interest in Collington Center, some officials maintain, and perhaps with good reason, that the County’s condemnation efforts were largely successful.

⁸⁶ Id.

⁸⁷ Id.

These supporters quickly point to the sharp increase in property value in Collington Center. In May of 1987, for example, the County sold 24-acres in the area for \$2.5 million dollars, the same price that the county had paid when it had condemned Collington Crossroads, Inc.'s 323-acre parcel in 1976.⁸⁸ Viewed in the most favorable light, the County's industrial park is a success because it had already recouped its 1975 expenditure of \$2.5 million for Collington's property. Viewed in the most unfavorable light, however, the County's sale of property in 1987 compared to its 1975 purchase of Collington's property epitomizes the unfairness that underlies eminent domain. In condemning Collington's land, the County had forever prevented Collington, the rightful owner of the disputed property, from sowing the benefits of its land.

Collington Center is divided into three sections: a 600-acre central section, 200-acre south section, and 400-acre north section, which includes Collington Crossroads, Inc.'s formerly owned 323-acre parcel of property. Perhaps encouraged by its previous sale of 24-acres of Collington Center, the County sought, in July of 1987, to sell its 400-acre northern parcel to private developers. Extrapolating from the county's 24-acre sale for \$2.5 million, the sale of the 400-acre northern parcel would be worth approximately \$41.7 million in 1987 dollars. The 2007 value of the 400-acre parcel of land zoned industrial no doubt is worth even more.

In the final analysis, the County has banked on the exponentially increased value that has accrued to its condemned property. This, however, is hardly a surprise. Owning land, after all, is rarely ever a losing venture. Taking land for economic development, therefore, presents a win-win situation for government. If the County succeeds in executing its proposed plan, the County clearly wins. If the plan fails, the County still wins because the plan's failure does not change the fact that the County remains the rightful owner of very valuable land that when sold

⁸⁸ Id.; Inquisition by Judge Ralph W. Powers, Prince George's County v. Collington Crossroads, No. 37,944 (April 20, 1976).

will add sizably to public money. Does this win-win situation behind government takings for economic development raise questions of fundamental unfairness? Is public land banking a legitimate public use? Would not such a broad sweeping eminent domain authority discourage private parties from buying and developing property when government may constitutionally condemn it for fractions of its real-life market value? During the *Collington* trial, Toby Prince Brigham, counsel for defendant, raised these very issues, arguing against both the fairness and the legitimacy of the County's condemnation efforts.

C. TOBY PRINCE BRIGHAM HAD ARGUED AGAINST PUBLIC LAND BANKING BEFORE THE COURT OF APPEALS IN 1975, BUT TO NO AVAIL.

Collington Crossroads, Inc. had purchased the 323-acre parcel south of Route 214 and west of U.S. Route 301 on September 17, 1965.⁸⁹ Three years later, and before Collington Crossroads had the opportunity to develop its property, the County sought to condemn Collington's land. In the appellate brief submitted to the Court of Appeals on behalf of Collington Crossroads, Mr. Brigham reduced the facts to their simplest form.

Prince George's County, Maryland, with good intention seeks to acquire Appellee's property, develop it and resell it for a profit to other private owners. The owner wants to own and develop its own property. So now the County wants to forcibly take the property under its sovereign power of eminent domain claiming justification on ground of public benefit or public advantage.⁹⁰

In his brief, Mr. Brigham also suggested that the real controversy underlying the County's taking was not whether an economic development backed by a comprehensive plan constituted a "public use," but rather the philosophical question of whether government may invade the domain of private free-enterprise business.

The real issue seems to be the philosophical question of whether a private owner should profit from industrial real estate development brought on by public improvement in the course of progress or whether the public authority should receive such profits."⁹¹

⁸⁹ *Supra*, Inquisition by Judge Ralph W. Powers, at (R. 167 PDF1).

⁹⁰ Appellee's brief, p. 106.

⁹¹ *Id.* 105.

In the *Collington* litigation, Mr. Brigham had built a strong case that the County could have realized its industrial park without condemning Collington's property but through the traditional joint-venture between public works and private development. During cross-examination, Mr. Brigham had asked Dr. Wallace whether the County by zoning and building infrastructure – roads, sewers, etc. – would be able to accomplish its proposed industrial park, to which, Dr. Wallace responded:

I will answer the question yes, with a considerable amount of qualification, though, because that particular situation, which is not analogous to the present one, is one in which the public infrastructure development is kind of incredible and massive, one which includes the airport itself, includes all kinds of expressways and highways that have been paid for by public monies. *And the consequence has been, if a true benefit cost analysis were done, I would suspect that it has been solely to the private benefit and the private benefit has been to only the owners of the industrial park, whereas the costs have been spread very widely on the whole population through taxation.*⁹²

The County, therefore, could very well have promoted development of an industrial park through its police power. Such an approach, however, was undesirable according to Dr. Wallace. He argued that using the police power instead of eminent domain for industrial development would solely benefit private developers while unfairly spreading the costs of public works to the public at large. Isn't this unfairness merely the other side of the proverbial coin to Collington Crossroads, Inc.'s cry of unfairness – namely, the unfairness that falls disproportionately upon the private land owner when government profits immensely by taking his land?

At the heart of eminent domain are these very issues of fundamental fairness. Is it fair for private property owners to reap the benefits of government improvements, and in this case, a comprehensive industrial park facility that might only be possible through government agency? And, on the flip side, is it fair for government to disproportionately burden select private property owners in order to pass benefits to the public at large? There is no good answer as both scenarios seem fundamentally unfair. Faced with no good answers, however, Courts must decide

⁹² Appellee's Brief on behalf of Collington Crossroads, Inc. P. 103;

cases nonetheless. In 1975, the Maryland Court of Appeals was asked choose between two imperfect outcomes. In making its difficult choice, the Court upheld the constitutionality of the County's condemnation.

VII. CONCLUSION

In deciding *Prince George's County v. Collington Crossroads, Inc.*, the Maryland Court of Appeals left unanswered questions of fundamental fairness that underlay eminent domain law. This, however, is not surprising because "public use" does not speak to fairness. Before the Court of Appeals was the sole issue of whether the County's industrial park project constituted a "public use." After holding that the County's development was a "public use," Judge Eldridge could not have answered any more. Once "public use" was established, the court deferred to the County's political branches. Legislatures, after all, are not to be presumed to be "wholly destitute of integrity or judgment."⁹³

That fairness is not found in "public use" is evidenced vividly in Maryland's "public use" case law. To illustrate, Maryland has long held "public use" to constitute the condemnation of land to make ways for railroads. These "public uses," however, are no more fair than the taking that had occurred in *Collington*. Whether condemning for railroads or for industrial development, government nonetheless discriminates against individuals in order to benefit the whole. In other words, eminent domain takings, regardless of type, force private individuals to pack their bags and leave their homes. "Public use," therefore, draws the line between permissible and impermissible takings; it does not speak to fairness, but to legitimacy.

Although not found within the constitutional limitations of "public use," fairness is not a question beyond the province of the judiciary. Fairness lies, rather, in the "just compensation" clause. Maryland's Constitution provides:

⁹³ See *Id.* at 186; see also *Riden*, 182, Md. at 343; see also *Lewis*, *Eminent Domain*, 3d Ed., s 258.

The 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.⁹⁴

Fairness, therefore, might be met when “just compensation” is tendered to the party entitled to such compensation. In *Collington*, fairness probably was not met. In 1987, the County sold 24-acres of its condemned land to a private developer for \$2.5 million, the same amount it awarded Collington when taking its 323-acre parcel. In 1987 dollars, Collington Crossroad’s 323-acre parcel would have been worth \$38.5 million. As such, Collington lost out substantially on its real estate investment. The stark difference between Collington’s actual and potential earning highlights the unfairness underlying the *Collington* controversy and eminent domain takings generally.

That *Collington* was decided unfairly, however, does not mean that *Collington* was decided incorrectly. Legitimacy and fairness, after all, are separate constitutional inquiries. Consistent with Maryland’s history of broadly interpreting “public use,” Judge Eldridge clarified “public use” by holding that economic development takings, when backed by comprehensive legislative deliberation, were constitutional. However, Judge Eldridge but did not, and indeed could not decide the issue of “just compensation,” which was not an issue before the court. In the wake of *Collington*, “just compensation” remains an issue open for judicial interpretation. Fairness to private property owners, therefore, might still be achieved in Maryland’s next landmark eminent domain decision.

⁹⁴ MD. CONST. art III, § 40 (amended 1864).