

Baltimore v. Valsamaki:

The Maryland Court of Appeals' Response to *Kelo*

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Forward

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Abstract

In the years following the Supreme Court's controversial decision in *Kelo v. New London*, state judges and legislators across the country responded with a tidal wave of reform to state eminent domain law. While legislative reform efforts largely floundered in the Maryland General Assembly, the Maryland Court of Appeals, in the case of *Baltimore v. Valsamaki*, curbed the City of Baltimore's use of quick-take condemnation procedures, imposed additional planning requirements on condemning authorities, and emphasizing the fact that property rights are fundamental constitutional rights. This article will begin with an examination of quick-take procedures and the reasons why its extensive use by Baltimore caused great hardships for property owners wishing to fight the city's condemnation efforts. This article will then discuss the history of the Charles North Revitalization Area, and the city's efforts to condemn George Valsamaki's bar, *The Magnet*, as part of an urban renewal plan. The article will then discuss the impact that the Court of Appeals' decision has had on eminent domain within Maryland, and will conclude with an overview of the issues *Valsamaki* left unresolved.

Disciplines

Legal History, Maryland History, Property Rights

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Introduction

On March 9, 2006, the City of Baltimore filed a petition to condemn George Valsamaki's bar, *The Magnet*.¹ In the eyes of the city, the petition was a rather routine and uncontroversial use of its power of eminent domain. Over the decades Baltimore had filed countless such petitions in its ongoing quest to stanch the city's decline and build the city's tax base. Prior to George Valsamaki, nobody had challenged the procedures that the city used to take private property, and no court had ever questioned the city's use of those procedures. The President of the Baltimore Development Corporation, M.J. "Jay" Brodie, stated that, "This is not unique in any way. This is the way the city's done things for the last 40 years. It's called urban renewal."² Brodie, however, was unaware that a fundamental shift had occurred in the debate over the rights of property owners.

In 2005 the U.S. Supreme Court upheld the City of New London, Connecticut's condemnation of several homes in the Fort Trumbull neighborhood.³ The City condemned the property in order to turn the area over to a private developer. New London hoped that the development would bring jobs to the area and increase the city's tax base. The Court ruled that the Public Use requirement of the 5th Amendment Takings Clause was broad enough to authorize the taking of property for any public purpose, including transferring property to a private developer for the purpose of economic development.

While most legal scholars believed that the Court's opinion was a rather straightforward application of precedent, the publicity of the case and the scathing opinions of the dissenting Justices created an immediate public backlash that cut across partisan, racial, and economic lines. State legislatures across the country repudiated the Supreme

¹ *Mayor and City Council of Baltimore v. Valsamaki*, 397 Md. 222 (2007).

² Jill Rosen, *City bid to seize bar is blocked*, *BALTIMORE SUN*, May 24, 2006, http://articles.baltimoresun.com/2006-05-24/news/0605240171_1_eminant-domain-charles-north-economic-development.

³ *Kelo v. City of New London*, 545 U.S. 469 (2005).

Court's decision by enacting reforms to reduce or eliminate the type of economic development taking the Court authorized in *Kelo*. Additionally, numerous state high courts interpreted their state constitutions as providing greater protection to property rights than the Federal Constitution.

One such high court opinion was the 2007 decision of the Maryland Court of Appeals in *Mayor and City Council of Baltimore v. Valsamaki*.⁴ The unanimous Court struck down Baltimore's attempt to take a property for economic development in an urban renewal scheme. The Court chastised the city for failing to meet the requirements of either the statute granting the city the power of eminent domain or the minimal requirements set down in *Kelo* that condemning authorities must have a comprehensive plan in order to take private property. The Court also expressed deep concern about whether the city's use of "quick-take" procedures violated the Due Process rights of property owners.

The strongly worded opinion in *Valsamaki* broke with the Court's previous eminent domain jurisprudence. Rather than adopting the deferential posture previously taken in eminent domain cases, the Court placed the burden squarely on the government to prove its case. While the Court of Appeals has provided some additional guidance in the wake of *Valsamaki*, there are numerous unanswered questions about exactly what limits the Court placed on the government's ability to take and regulate private property.⁵

Kelo v. City of New London

The case of *Kelo v. City of New London* arose from an economic development plan created by the city and the New London Development Corporation (NLDC) with the aim of creating jobs and increasing tax revenue.⁶ The plan called for the city to acquire approximately 115 privately owned properties in the Fort Trumbull neighborhood which the

⁴ *Valsamaki*, 397 Md. 222.

⁵ See *Saper v. Mayor and City Council of Baltimore*, 398 Md. 317 (2007); *Makowski v. Mayor and City Council of Baltimore*, 439 Md. 169 (20134).

⁶ *Kelo*, 545 U.S. 472.

NLDC (a non-profit corporation established by the city) would offer to private developers.⁷ The city hoped that the development, consisting of a mix of residential and commercial properties, would entice the pharmaceutical company Pfizer, Inc. to invest nearly \$300 million to expand its nearby headquarters facility.⁸ While Pfizer would not own any of the land taken by New London, it is clear that the city created its plan in order to make the neighborhood more amenable to Pfizer's needs.⁹

Susette Kelo and eight other property owners in Fort Trumbull¹⁰ challenged the takings as a violation of the Public Use clause of the Fifth Amendment.¹¹ The owners, represented by the Institute for Justice, a libertarian leaning public interest law firm, argued that taking private property and transferring it to a private developer with the hope that it will attract jobs, investment, and tax revenue to the city was not a public use. Relying on its precedent¹², the majority held that "public use" is properly understood to mean any legitimate public purpose, and that promoting economic development fell within this broad category.¹³

Although Justice Steven's majority opinion emphasized the "broad latitude" given to legislature in determining what constituted a public use, this latitude is not unlimited.¹⁴ The reiterated the rule, dating back to *Calder v. Bull*¹⁵, that a purely private taking, where the state takes property from A and gives it to B is forbidden.¹⁶ The Court also cautioned against takings where the public purpose behind the taking is a mere pretext for a private benefit.¹⁷ The majority opinion also emphasized that economic development plan developed

⁷ *Id.* at 473-5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 475.

¹¹ U.S. CONST. amend. V.

¹² See *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

¹³ *Kelo*, 545 U.S. at 484.

¹⁴ *Id.* at 483.

¹⁵ 3 Dall 386, 388 (1798).

¹⁶ *Kelo*, 545 U.S. at 477.

¹⁷ *Id.*

by New London was “carefully considered¹⁸,” had a “comprehensive character¹⁹,” and was the product of “thorough deliberation.²⁰” The majority opinion implies, and Justice Kennedy’s concurring opinion explicitly states, that a taking that is not supported by such a plan would not receive judicial deference.²¹

In closing, the Court stated that “[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the taking power.”²² Much to the surprise of the legal community (and likely Justice Stevens himself), almost every state has accepted this invitation to repudiate the Supreme Court’s holding in *Kelo*.

The Response to *Kelo* at the Maryland General Assembly

The reaction to *Kelo* was enormous, overwhelmingly negative, and produced more legislative reform than any other Supreme Court decision in history.²³ Public opinion polls showed that over 80% of Americans disagreed with the *Kelo* decision.²⁴ While the lineup of the Justices in *Kelo* (with four progressive justices voting for the opinion, four conservative justices dissenting, and Justice Kennedy providing the swing vote) would seem to indicate a sharp partisan divide, the vast majority of both Democrats and Republicans opposed *Kelo*.²⁵

The day after the Supreme Court issued its opinion in *Kelo*, the president of the Institute for Justice, Chip Mellor, announced that IJ would launch a \$3 million “Hands Off Our Home” campaign to “[f]ight the battle at the state level, whether through litigation, legislation, initiative, and try to get greater property rights against eminent domain.”²⁶ The efforts of IJ and other property rights advocates to capitalize on the public hostility towards

¹⁸ *Id.* at 478.

¹⁹ *Id.* at 484.

²⁰ *Id.*

²¹ *Id.* at 493 (Kennedy, J., concurring).

²² *Id.* at 489.

²³ See generally ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN*, chapter 5 (Kindle ebook ed. 2015).

²⁴ *Id.*

²⁵ *Id.*

²⁶ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 242 (2008).

eminent domain ultimately resulted in forty-five states enacting some form of legislative reform restricting the power of eminent domain.²⁷ The legislative reforms ranged from the outright prohibition of both economic development and blight removal takings, to largely symbolic laws which change little.²⁸

In the years prior to *Kelo*, Maryland was particularly aggressive in the use, and threatened use, of eminent domain for economic development and blight clearance projects.²⁹ Given the state's relatively small size and population, Maryland was among the most aggressive states in the union. Thus, it is not surprising that the legislative reform enacted by the Maryland General Assembly did relatively little to limit the use of eminent domain.

In the 2006 legislative session, legislators proposed over 40 different bills to reform eminent domain in Maryland.³⁰ None passed. The next year (after the Court of Appeals decided *Valsamaki*) the General Assembly enacted a statute requiring that a condemning authority must commence condemnation proceedings within four years of the legislative authorization for the condemnation.³¹ Given the Maryland Constitution's grants the state extensive eminent domain powers, this statute will do little to prevent takings similar to *Kelo*.³² Due to the General Assembly's failure to enact any meaningful eminent domain reform following *Kelo*, the response of the Maryland judiciary is all the more important.

²⁷ See SOMIN, *supra* at location 3126.

²⁸ *Id.* at location 3392-3597; INSTITUTE FOR JUSTICE, 50 STATE REPORT CARD: EMINENT DOMAIN REFORM LEGISLATION SINCE KELO, http://ij.org/wp-content/uploads/2015/03/50_State_Report.pdf (last visited Nov. 29, 2015).

²⁹ DANA BERLINER, INSTITUTE FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 92 (2003), http://ij.org/wp-content/uploads/2015/03/ED_report.pdf (last visited Nov. 29, 2015).

³⁰ See INSTITUTE FOR JUSTICE, 50 STATE REPORT CARD, *supra* at 24.

³¹ MD. CODE ANN., REAL PROP. § 12-105.1 (West).

³² See MD. CONST. art. III, § 61 (granting the authority to clear slums and blighted areas); MD. CONST. art. XI-B (granting Baltimore the authority to take land for development and redevelopment).

Quick-Take Condemnations in Maryland

Maryland is one of numerous states that allows “quick-take” condemnations. Under a regular condemnation statute, the case proceeds much like any other civil case, with the condemning authority gaining possession of the property only after discovery, trial, judgment, and appeal. While each quick-take statute is different, the general effect of these statutes is to empower the condemning authority to gain possession of private property without having to wait for a full condemnation trial. The source of Baltimore’s quick-take power is Article III, § 40A of the Maryland Constitution. Section 40A provides that:

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 that such property may be taken immediately upon payment therefor to the owner or owners thereof by the State or by the Mayor and City Council of Baltimore, or into court, such amount as the State or the Mayor and City Council of Baltimore, as the case may be, shall estimate to be the fair value of said property, provided such legislation also requires the payment of any further sum that may subsequently be added by a jury.³³

Section 40A also grants the counties of Baltimore, Montgomery, and Cecil, but Montgomery and Cecil counties cannot use quick-take against properties with buildings.³⁴ While Baltimore County (Baltimore City is legally independent of surrounding Baltimore County) has quick-take powers, the County has rarely used them, and a bill considered by the County Council in 2000 to authorize quick-take in an economic development plan was overwhelmingly defeated by 70% to 30% in a ballot referendum.³⁵ Additionally, the Maryland Constitution allows the State Roads Commission³⁶ and the Washington Suburban Sanitation Commission (WSSC) to use quick-take (but WSSC may not take any buildings).³⁷ Since the quick-take powers of Cecil and Montgomery counties and WSSC are limited to

³³ MD. CONST. art. III, § 40A.

³⁴ *Id.*

³⁵ David Nitkin & Joe Nawrozki, *Condemnation Bill Defeated*, BALTIMORE SUN, Nov. 8, 2000, at 1A, http://articles.baltimoresun.com/2000-11-08/news/0011080345_1_dutch-ruppersberger-baltimore-county-county-executive.

³⁶ MD. CONST. art. III, § 40B.

³⁷ MD. CONST. art. III, § 40C.

unimproved land, and Baltimore County has largely refrained from using its power, almost all quick-take cases involve either Baltimore City or the State Roads Commission.³⁸

The General Assembly codified Baltimore City's quick-take power through Public Local Law § 21-16 (a public local law is a statute enacted by the state legislature that is only applicable in one jurisdiction of the state).³⁹ Under § 21-16, the city files an ex parte petition for immediate taking in the Circuit Court of Baltimore City. When the city files this petition it must deposit with the court its estimate of the fair market value of the property.⁴⁰ In this petition the city must state under oath "that it is necessary for the City to have immediate possession of, or immediate title to and possession of, said property, and the reasons therefore."⁴¹ If the court finds that "the public interest requires the City to have immediate possession" then the court may grant the City possession of the property, with title vesting in the City 10 days after the owner receives notice.⁴² The property owner has 10 days to file an answer challenging the taking, and a hearing must be held within 15 days of this answer.⁴³ The only issue litigated at this hearing is the City's right to condemn the property.⁴⁴ Either the city or the owner may appeal the outcome of this hearing directly to the Court of Appeals of Maryland.⁴⁵ If the property owner does not contest the taking, or loses at the hearing, the court will schedule a trial to determine just compensation. Since this trial on compensation is like any other civil case, it is often months or years before a final judgment on just compensation.

³⁸ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

³⁹ Code of Public Local Laws of Baltimore City, § 21-16.

⁴⁰ PLL § 21-16(a).

⁴¹ *Id.*

⁴² PLL § 21-16(d).

⁴³ PLL § 21-16(c).

⁴⁴ *Id.*

⁴⁵ *Id.*

Disadvantages of Quick-Take to Property Owners

The impact of quick-take proceedings is to significantly reduce the property owner's ability, will, and incentives to fight the condemnation or litigate the City's estimate of fair market value. Quick-take disadvantages owners because it limits their due process rights, imposes equitable hardships on the owner, and shields the condemning authority from democratic accountability. These disadvantages were not lost on the City, which exclusively use quick-take procedures. According to John Murphy, a prominent eminent domain attorney in Baltimore, "the city wouldn't have known how to file a regular condemnation petition."⁴⁶

Quick-Take Limits the Due Process Rights of Owners

The Fifth and Fourteenth Amendments to the Constitution guarantee that no person may be deprived of "life, liberty, or property, without due process of law."⁴⁷ Article 24 of the Maryland Declaration of Rights also provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."⁴⁸ The text of Article 24, which dates back to the Magna Carta, is synonymous with the due process of law.⁴⁹

One of the fundamental principles of the due process of law is that "a deprivation of life, liberty, or property 'be preceded by notice and an opportunity for a hearing appropriate to the nature of the case.'"⁵⁰ The Supreme Court has repeatedly held that seizing or

⁴⁶ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

⁴⁷ U.S. CONST. amend. V.; U.S. CONST. amend. XIV.

⁴⁸ MD. CONST. DECLARATION OF RIGHTS, art. XXIV.

⁴⁹ *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 99 (1891) (stating that "'The law of the land' and 'due process of law' as here used, it can hardly be necessary to say, mean the same thing").

⁵⁰ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); see also *Canaj, Inc. v. Baker and Division Phase III, LLC*, 391 Md. 374, 424 (2006) (same).

restraining an individual's property in the context of civil forfeiture⁵¹, replevin⁵², or attachment of property in a civil action⁵³ without proper notice and a meaningful hearing violates due process. While the prohibition on the pre-hearing deprivation of property is not absolute, it is typically only allowed when some exigency or emergency is present.⁵⁴ Baltimore's practice of using § 21-16 to gain immediate possession of property in every condemnation case, regardless of exigency, and without any notice or hearing significantly impaired the due process rights of property owners.

Another requirement of the Due Process of Law is that a defendant, in both criminal, civil, and administrative proceedings, be given a reasonable amount of time to secure and consult with counsel and prepare his defense.⁵⁵ While there are no clear rules on what is and is not a sufficient amount of time to prepare a defense in a given case, the highly compressed timeline in quick-take cases provides property owners far less time to prepare than is given in almost any other civil case. Given the magnitude of depriving an individual of his home or business, a mere 10 days to obtain and consult with counsel, and file an answer is a very short time.

A property owner's ability to prepare a defense is further limited by § 21-16 since the shortened time frame precludes any discovery. According to Md. Rule 12-206, "discovery in actions for condemnation shall be conducted pursuant to Chapter 400 of Title 2 of these Rules."⁵⁶ Under § 21-16, the hearing will be held no later than 25 days after the owner received initial notice of the proceeding (10 day time period to file an answer, with the hearing held with another 15 days). Parties in a civil case, however, have 30 days to

⁵¹ United States v. James Daniels Good Real Property, 510 U.S. 43 (1993).

⁵² Fuentes v. Shevin, 407 U.S. 67 (1972).

⁵³ Connecticut v. Doehr, 501 U.S. 1 (1991).

⁵⁴ James Daniels Good, 510 U.S. at 62.

⁵⁵ Powell v. Alabama, 287 U.S. 45 (1932) (holding that black defendants facing capital rape charges were not afforded sufficient time to consult with counsel and prepare a defense in violation of Due Process); Phillips v. Venker, 316 Md. 212, 221 (1989) (stating that "it is axiomatic that [the defendants] were entitled to adequate notice of the time, place, and nature of that hearing, so that they could adequately prepare").

⁵⁶ MD. RULE 12-206.

respond to discovery requests.⁵⁷ Thus, the City need not ever respond to a discovery request in a quick-take proceeding. While discovery is also unavailable to the City under this time frame, since the quick-take hearing is limited to the issue of the City's right to condemn the property, the City has little, if any reason, to need discovery. If the case proceeds to a trial on just compensation, however, discovery is available for the City regarding the owner's witnesses and evidence about the value of the property.

The City's deprivation of a property owner's possessory right without any notice or hearing, the short time frame allowed under § 21-16, combined with the owner's inability to obtain discovery, significantly impairs the owner's ability to mount an effective legal challenge to the City's condemnation petition.

Quick-Take Creates Economic Hardships for the Property Owner

The City's ability to take immediate possession will often create an incredible, and often irreparable, economic hardship on the property owner. The loss of possession means that a small business will have no choice but to immediately shut down operations, a landlord will have no choice but to immediately evict his tenants, and a homeowner will have no choice but to immediately secure other living arrangements. Even if the owner eventually prevails and retains title to the property, the damage is already done. This hardship will often force the owner to acquiesce in the taking or accept a much lower offer of compensation.

It is no secret that many small businesses operate on precariously small profit margins. The losses associated with even a temporary closure or relocation may be enough to ensure that the business never again reopens. Even if the business manages to reopen, either at the original location or a new one, the loss of business goodwill with customers, suppliers, and employees may prove fatal to the business. Thus, when the City takes

⁵⁷ See MD. RULE 2-421 (interrogatories); MD. RULE 2-422 (documents); MD. RULE 2-424 (admissions of fact).

immediate possession of a business it is, in many cases, signing the death warrant of the business. With the business destroyed, the owner now has little incentive to challenge the actual taking, and instead will focus on obtaining greater compensation down the road.

If one believes that the City will fairly and accurately estimate the fair market value of the property and pay that amount into the court, then the economic hardships of a quick-take may be minimal. After all, if the owner is able to quickly obtain the “true” fair market value of his property by simply accepting the City’s offer, then the owner can avoid much of the hardship of drawn out litigation. But “[t]he market value of real estate is not ordinarily the subject of ready computation.”⁵⁸ Fair market value is “a largely theoretical concept” which is “largely affected by the different needs of the seller and the buyer.”⁵⁹ The difficulties in ascertaining fair market value are “exacerbated when the abstract standards are applied in court.”⁶⁰ The City, like any other buyer, wants to obtain the property at the lowest price possible. This incentive, combined with the largely “largely theoretical” and subjective process of determining fair market value, means that the City will almost always provide a low estimate.

The result is that the City can provide an unreasonably low estimate of fair market value, take immediate possession of the property, and then negotiate with the owner from a position of strength. The owner, who is deprived of property, with only the distant hope of compensation after months of litigation and significant attorney’s fees, will often have no choice but to accept a lower negotiated settlement. This reduced compensation will often mean that a business is unable to open at a new location, and families may have no choice but to move to a less desirable neighborhood and enroll their children in less desirable schools.

⁵⁸ 4-12B Nichols on Eminent Domain § 12B.03 (2015)

⁵⁹ *Id.*

⁶⁰ *Id.*

Quick-Take Circumvents the Democratic Process

As a practical matter, the government's decision to acquire property through eminent domain is often very controversial. Many condemnations are only tenable if the public is unaware, and wither under political scrutiny. The quick-take process, however, allows the City to swoop in and take title to the property before the owner is able to raise the hue and cry.

A recent example of a condemnation which failed after sustained public criticism involved the Philadelphia Redevelopment Agency's attempt to take the studio of artist James Dupree. Philadelphia wanted to acquire Dupree's 8,600 foot art studio, as well as numerous other properties, to build a grocery store and parking lot.⁶¹ While Dupree litigated the case in court, an unusual coalition of the ACLU, the libertarian-leaning Institute for Justice, the conservative group Americans for Prosperity, and a host of local art groups organized a grassroots campaign to save Dupree's studio.⁶² After numerous protests and negative coverage in the local media, the city chose to abandon its condemnation of Dupree's studio.⁶³

James Dupree's story is hardly atypical. The Castle Coalition, an organization created by the Institute for Justice to organize and equip grassroots activists, regularly assists owners in their



Artist James Dupree at his Studio

⁶¹ Jared Shelly, *West Philly artist won't lose studio as city drops eminent domain proposal for supermarket*, PHILADELPHIA BUS. J., Dec. 11, 2014, <http://www.bizjournals.com/philadelphia/blog/real-estate/2014/12/west-philly-artist-wont-lose-studio.html>.

⁶² Nick Silba, *Philadelphia Artist Defeats Eminent Domain Land Grab, Will Keep His Studio*, FORBES, Dec. 23, 2014, <http://www.forbes.com/sites/instituteofjustice/2014/12/23/philadelphia-artist-defeats-eminent-domain-land-grab-will-keep-his-studio/>.

⁶³ See generally Seth Zweifler, *W. Phila. Artists fights city plan to buy his studio*, PHILADELPHIA INQUIRER, Jan. 28, 2014, http://articles.philly.com/2014-01-28/news/46690560_1_art-studio-susette-kelo-eminent-domain; Gene Marks, *Can Someone Help James Dupree? And Let's Fix Eminent Domain While We're at It*, PHILADELPHIA MAGAZINE, Jan. 30, 2014, <http://www.phillymag.com/news/2014/01/30/james-dupree-artist-eminent-domain-philadelphia/>.

fight against eminent domain. The Coalition's web site documents an impressive list of instances where property owners successfully challenged eminent domain through grassroots activism.⁶⁴

The public outrage and media coverage necessary for this type of grassroots activism to succeed requires time. Time to organize owners, time to prepare protests and write letters to the editor, time for the news to spread by social media and word of mouth. The shortened timeframe involved in a quick-take condemnation means that City will rarely have to face the kind of sustained challenge that will cause elected officials to rethink the condemnation.

Even those who generally believe that the judiciary should defer to the judgments of the legislature in eminent domain cases should be troubled by the way that quick-take insulates government officials from democratic accountability. If a property owner may not vindicate his rights in a court of law, he should at least be given the opportunity to present his case to the court of public opinion.

The Charles/North Revitalization Area and George Valsamaki

1982 the Baltimore City Council created the Charles/North Revitalization Area.⁶⁵The Charles/North Urban Renewal Plan was amended numerous times over the following twenty years. The City Council approved the fifth such amendment on July 24, 2004.⁶⁶ The Plan's goal was "the revitalization of the Charles/North area in order to create a unique mixed-use neighborhood with enhanced viability, stability, attractiveness, and convenience for

⁶⁴ Castle Coalition, Success Stories, <http://castlecoalition.org/stories>.

⁶⁵ Ordinance No. 82-799.

⁶⁶ Ordinance No. 04-695.

residents of the surrounding area and of the City as a whole.”⁶⁷ The Plan established special zoning overlays for the Charles/North Revitalization Area and specifically authorized the acquisition, by purchase or condemnation of specific properties.⁶⁸

The 2004 amendment to the Urban Renewal Plan specifically authorized the city to acquire George Valsamaki’s bar, The Magnet, located at 1924 N. Charles Street, near the corner of Charles and 20th Streets. The Magnet was a tavern and packaged goods store, which meant that it could operate seven days a week and serve customers on sight or sell alcohol for consumption off site.⁶⁹ A significant portion of The Magnet’s revenue came from selling six-packs of beer and miniature liquor bottles to the impoverished residents of the area.⁷⁰ While Valsamaki’s



Exhibit 2: Property Acquisition in Charles/North

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

⁷⁰ *Id.*

attorney conceded that The Magnet was not the nicest or most attractive business imaginable⁷¹, the property was not blighted, was well maintained, and in compliance with all applicable building, zoning, and health codes.

Valsamaki acquired the property in 1981, prior to the creation of the Charles/North Revitalization Area for \$30,000.⁷² Valsamaki, a Greek immigrant, commuted to the store early every morning from Harford County, where he lived with his wife, an African-American woman from Baltimore.⁷³

At some point between June, 2004 and March, 2006, the Baltimore Development Corporation approached Valsamaki in order to purchase his property. The Baltimore Development Corporation (BDC) is a not-for-profit corporation in order to:

develop and implement long-range development strategies for commercial, industrial, office, residential, and other development in the City of Baltimore (the 'City'); to serve as a liaison between the private and public sector to coordinate development efforts and to expedite the review of public approvals and other government services in the City; and to undertake any other appropriate activity to achieve the continued strong business climate, urban renewal, and development throughout the City⁷⁴



The Magnet, and two adjacent lots would be assembled into one lot on the corner of Charles and 20th

⁷¹ Oral Argument, *Mayor and City Council of Baltimore v. Valsamaki*, 397 Md. 222 (2007) (No. 55), http://www.courts.state.md.us/coappeals/webcasts/webcastarchive_rm.html; Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

⁷² Recorded Deed from Evelyn Pistolas to George Valsamaki, Dec. 30, 1981, <https://mdlandrec.net/main/>.

⁷³ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

⁷⁴ *City of Baltimore Dev. Corp. v. Carmel Realty Associates*, 395 Md. 299, 309 (2006).

While the BDC is nominally a private, non-governmental organization, it is, for all practical purposes, an arm of the City of Baltimore.⁷⁵

The BDC wanted to acquire Valsamaki's property in order to assemble it with the two adjacent properties of 1922 and 1926 N. Charles Street. The BDC would then issue a Request for Proposals (RFP), seeking bids from private developers who were interested in building on the site. Given his age, Valsamaki was nearing retirement, and would have considered selling if offered the right price.⁷⁶ The BDC, however, was unwilling to make Valsamaki an offer sufficient to compensate him for his property and business.

As negotiations broke down, the BDC threatened to take Valsamaki's business through eminent domain. At this point Valsamaki began looking for an attorney. Valsamaki was a bit overly suspicious and believed that all attorneys in Baltimore were untrustworthy and in league with the City.⁷⁷ Valsamaki eventually retained the services of James Thompson, of the firm of Miller, Miller, & Canby in Rockville, MD. While Thompson had extensive experience in eminent domain cases in southern Maryland, he had never litigated a quick-take case in Baltimore. After realizing that the quick-take procedures in § 21-16 were unlike anything he had ever seen, Thompson enlisted the aid of leading Baltimore eminent domain attorney John C. Murphy.⁷⁸

The Case of Baltimore v. Valsamaki

Following the failure of negotiations, the city filed a petition for immediate possession of Valsamaki's bar with the Circuit Court for Baltimore City on March 9, 2006, nearly two years after the City Council first authorized the acquisition of the property.⁷⁹ The City's

⁷⁵ *Id.* at 336 (holding that the "Baltimore Development Corporation is, in essence, a public body" for the purposes of the Maryland Open Meeting Act the Public Information Act).

⁷⁶ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Valsamaki*, 397 Md. at 230.

petition stated that the “property will be used for redevelopment purposes; namely in the Charles North Project area.”⁸⁰ In the attached affidavit of William N. Burgee, Director of Property Acquisition and Relocation, Department of Housing and Community Development, Burgee stated that the property “must be in possession of the Mayor and City Council of Baltimore at the earliest possible time in order to assist in a business expansion in the area.”⁸¹ Beyond these two statements, the City did not provide the Court with any details on what it planned to do with the property, why it needed immediate possession of the property, and how the taking served a legitimate public use. The City estimated the fair market value of the property at \$140,000. On March 15, 2006 the Circuit Court granted the City immediate possession of the property affording Valsamaki any notice or pre-deprivation hearing, and the title would vest in the City 10 days after notice was served on Valsamaki.⁸²

Valsamaki filed a timely answer and the Court scheduled a hearing for April 18, 2006. Valsamaki served interrogatories and notices of depositions on William Burgee and Paul Dombrowski, the Project Manager for the Charles/North area at the BDC.⁸³ This attempt to obtain discovery proved fruitless since the City refused to respond before the 30 day deadline, and the Court denied a motion to shorten the time for discovery.⁸⁴

At the April 18 hearing the City called two witnesses to testify about the Urban Renewal Plan and why the City needed immediate possession, Paul Dombrowski and Jay Brodie, the president of BDC. On cross examination John Murphy repeatedly sought to ascertain what, if any, plan the BDC had for Valsamaki’s property. Dombrowski testified that the plan for the property was a “mixed-use development,” and that the BDC would issue a Request for Proposals to private developers once it assembled the land.⁸⁵ When Murphy pressed Dombrowski for further details on would qualify as a mixed-use

⁸⁰ *Id.*

⁸¹ *Id.* at 231.

⁸² *Id.* at 226.

⁸³ *Id.* at 231.

⁸⁴ *Id.* at 232.

⁸⁵ *Id.* at 233.

development under the plan Dombrowski referenced the Charles/North Land Use map, *supra*, and admitted that any permitted use under the zoning code referenced on the map would qualify as a mixed-use development under the plan.⁸⁶ Finally, in response to Murphy's question of, "So as I understand what you're saying then, you really didn't have any specific plan for this property or for the plan when you adopted the Urban Renewal areas," Dombrowski answered, "Not a specific plan. We would chose that when proposals came in."⁸⁷ Murphy then moved on to the issue of why the City needed immediate possession. When asked if he could predict when, or even if, the City would receive a response to the (as of yet unissued) RFP Dombrowski answered, "No, we never know that in advance."⁸⁸

The cross examination of Jay Brodie largely follows the same course, with Murphy trying to pin down a specific use for the property (or the lack thereof), and Brodie responding that the Urban Renewal Plan approved by the City Council was a specific plan for the property. Brodie explicitly disagreed with Dombrowski's statement that there was not a specific plan for Valsamaki's property.⁸⁹ His principle argument seems to be urban renewal plans are, by their very nature, never more detailed than the plan developed for Charles/North.⁹⁰ Such plans never attempt to pinpoint the exact use of a given lot, rather these plans set certain zoning and land uses and authorize the acquisition of certain properties.⁹¹ Brodie drew a distinction between the specific *plan* authorized by the City Council in the Charles/North Urban Renewal Plan, and the final specific *design* for the property which would come from a proposal from a private developer, subject to BDC approval.⁹²

⁸⁶ *Id.* at 234-35.

⁸⁷ *Id.* at 235.

⁸⁸ *Id.*

⁸⁹ *Id.* at 236.

⁹⁰ *Id.* at 236-37.

⁹¹ *Id.*

⁹² *Id.* at 238.

On May 19, 2006, Judge John P. Miller issued a memorandum opinion holding that the City had failed to prove that it had the right to condemn Valsamaki's property. Judge Miller held that the City failed to meet its burden of demonstrating a public interest of sufficient necessity to justify immediate possession as required by the text of § 21-16.⁹³ Judge Miller noted that while the New London had created a "carefully considered development plan" that was "comprehensive in nature" and the product of "thorough deliberation," BDC's plan, or lack thereof, did not measure up to this standard.⁹⁴ The City, which had never before been required to meet this burden, filed a motion for reconsideration, which Judge Miller rejected, and a direct appeal to the Court of Appeals of Maryland.⁹⁵

While Murphy and Thomson prepared to brief the Court of Appeals, property rights advocates began to take notice of the case. The Pacific Legal Foundation, a conservative public interest law firm which litigates property rights issues, filed an amicus curiae brief in support of Valsamaki. Tim Sandefur, the attorney at PLF who authored the brief, had studied the abusive use of quick-take condemnations in California when he learned of *Valsamaki*, and decided to file a brief.⁹⁶ The brief argued that quick-take condemnations should only be authorized in exigent circumstances, that the abuse of quick-take creates serious and non-compensable injuries to property owners, and that the plain text of § 21-16 requires more than a mere declaration that the City needs immediate possession.⁹⁷ In addition to the amicus brief from the Pacific Legal Foundation, Murphy and Thompson received assistance from the Institute for Justice. While IJ did not formally participate in the case, Dana Berliner, who represented the property owners in *Kelo* and argued the case

⁹³ *Id.*

⁹⁴ *Id.* at 239.

⁹⁵ *Id.*

⁹⁶ Email Correspondence with Timothy Sandefur, Principal Attorney, Pacific Legal Foundation (Nov. 16, 2015).

⁹⁷ *MAYOR AND CITY COUNCIL OF BALTIMORE, Petitioner, v. George VALSAMAKI, et al., Respondents.*, 2006 WL 3905932 (Md.)

before the Connecticut Supreme Court provided significant assistance throughout the course of the case.⁹⁸

Oral Argument took place on January 8, 2007. Throughout oral argument the Judges hounded the City's attorney to provide greater detail about what the city intended to do with Valsamaki's property, what qualified as a mixed-use development, and why the city needed immediate possession of the property instead of waiting for a regular condemnation proceeding.⁹⁹ The City's argument largely consisted of imploring the Court to defer to the judgment of the Baltimore City Council when it enacted the Charles/North Urban Renewal Plan. The City also argued that it should not bear the burden of proving an immediate necessity for the taking. This argument is based on the Court of Appeals prior holdings that, in regular condemnation cases, the owner could only challenge the necessity of a taking by proving that it was "so oppressive, arbitrary, or unreasonable as to suggest bad faith."¹⁰⁰

Judge Cathell, writing for a unanimous court, rejected the City's argument and affirmed the Circuit Court. While the Court notes that prior opinions in regular condemnation cases place the burden on the owner to show that a taking is not necessary, § 21-16 clearly places the burden on the City to show that the taking is immediately necessary.¹⁰¹ "Section 21-16 expressly requires the City to state reasons relating to immediacy, thus the City has the burden not only to present a prima facie case of public use, but, additionally, in a quick-take action, the burden to establish the necessity for an immediate taking."¹⁰²

⁹⁸ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

⁹⁹ Oral Argument, *Mayor and City Council of Baltimore v. Valsamaki*, 397 Md. 222 (2007) (No. 55), http://www.courts.state.md.us/coappeals/webcasts/webcastarchive_rm.html.

¹⁰⁰ *Green v. High Ridge Ass'n, Inc.*, 346 Md. 65, 80 (1997).

¹⁰¹ *Valsamaki*, 397 Md. at 254.

¹⁰² *Id.*

The Court also affirmed the Circuit Court's ruling that the City's Urban Renewal Plan was not sufficiently comprehensive to satisfy the requirements of *Kelo*. The Court reasoned that purely private or pretextual takings are forbidden by the Public Use clause of the Fifth Amendment; thus the government must always present a prima facie case that the taking is indeed for a public use.¹⁰³ The government must have a comprehensive plan for a taking because, without one, "[i]t is virtually impossible to determine the extent of the public/private dichotomy when no one knows the who, what, and whether of the future use of the property." In essence, there is no way that a court can ascertain if there is a legitimate public use unless the government lacks a comprehensive plan. While it did not explicitly hold that the City's plan would not suffice even in a regular condemnation case, the Court strongly hinted that the City's lack of a comprehensive plan would be equally as fatal in a regular condemnation trial.

In both the oral argument and the written opinion, the Court mentioned the Due Process concerns created by quick-take condemnations, but the court declined to expressly rule on the issue.¹⁰⁴ Two months later, in a case nearly identical to *Valsamaki*, the Court of Appeals explicitly ruled on the Due Process concerns.¹⁰⁵ *Sapero* involved another attempt by the BDC to condemn a commercial property in the Charles/North Revitalization Area, with the City proposing an equally vague "mixed-use development" for the property. The Court held that quick-take condemnations under § 21-16 are only warranted in extreme circumstances, such as when "there is an immediate threat to the public health, safety, and welfare, or possibly in extreme cases of 'hold-outs'."¹⁰⁶ Seven years later, the Court made clear that in a hold-out situation, no additional exigency was necessary to employ a quick-take under § 21-16.¹⁰⁷

¹⁰³ *Id.* at 273.

¹⁰⁴ *Valsamaki*, 397 Md. at 232 n.8.

¹⁰⁵ *Sapero v. Mayor and City Council of Baltimore*, 398 Md. 317, 347 (2007).

¹⁰⁶ *Id.*

¹⁰⁷ *Makowski v. Mayor and City Council of Baltimore*, 439 Md. 169, 192 (2014).

The Impact of *Valsamaki*

In addition to the obvious impact that the case had on George Valsamaki, the case revolutionized the nature of eminent domain in Baltimore. Rather than quick-take condemnations being the norm in Baltimore, § 21-16 is now only used in rare hold-out situations such as in *Makowski*.¹⁰⁸ Indeed, the requirement that the City produce a comprehensive plan seems to have caused the BDC to avoid condemnation altogether if possible. Instead the BDC has chosen to rely on voluntary negotiations and mediation to the greatest extent possible.¹⁰⁹ In those instances where BDC still resorts to condemnation, it now attempts to produce a much more comprehensive plan for the property.¹¹⁰

This change in policy proved to be enormously beneficial to George Valsamaki. Following renewed negotiations over the purchase of his property, Valsamaki and the BDC agreed to a purchase price of \$365,000.¹¹¹ The BDC also agreed to pay approximately \$60,000 in relocation expense and all attorney's fees (assuming a standard 30% contingency fee of the amount received over the original offer of \$140,000, this saved Valsamaki \$85,000).¹¹²

The BDC's "plan" to bring a mixed-use development to the former site of The Magnet on the corner of Charles and 20th has yet to come to fruition. The City still owns the vacant lot and the BDC is not reviewing any proposals from developers to build on the site.¹¹³

¹⁰⁸ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

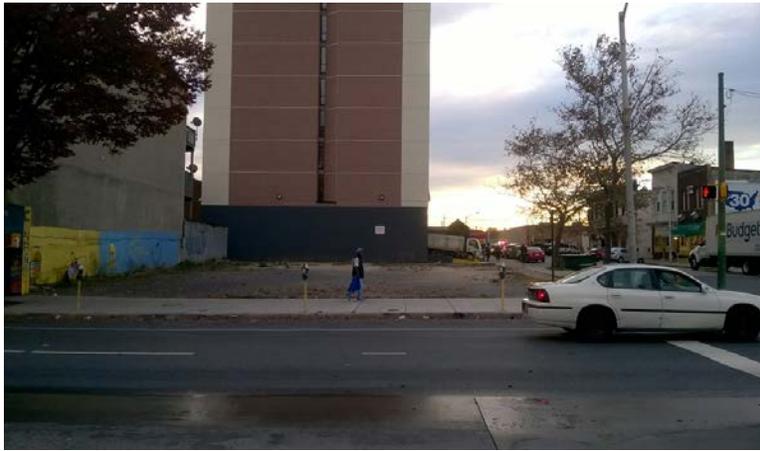
¹⁰⁹ Will Skowronski, *BDC: More mediation, less 'quick take' to be used in property disputes*, BALTIMORE BUS. J., July 11, 2007, <http://www.bizjournals.com/baltimore/stories/2007/07/09/daily21.html>.

¹¹⁰ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

¹¹¹ Recorded Deed from George Valsamaki to Mayor and City Council of Baltimore, July 31, 2007, <https://mdlandrec.net/main/>.

¹¹² Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

¹¹³ Email Correspondence with Susan Yum, Managing Director, Marketing & External Relations, Baltimore Development Corporation (Nov. 13, 2015).



The former site of the Magnet remains vacant in November 2015

Potential Areas for Litigation

While property rights advocates scored important victories against Baltimore's abusive use of eminent domain, there are a number of loose ends from *Valsamaki* and *Sapero* that need to be addressed through future litigation. First and foremost, the central Holding in *Makowski*, that quick-take may be used in hold-out situations should needs to be overturned, either by the Court of Appeals or a Federal Court. While a hold-out situation may well justify the use of eminent domain to force a recalcitrant owner to sell, a property owner does not forfeit his due process rights simply by demanding a greater sale price. The limitations that quick-take places on the due process rights of owners can only be justified under truly exigent circumstances.

Additionally, many condemning authorities in the state act as if *Valsamaki* and *Sapero* were merely statutory decisions about § 21-16, and thus is only relevant to quick-take condemnations in Baltimore. The Court's analysis of the Due Process concerns of quick-take clearly applies with equal force to the other jurisdictions in the state which possess quick-take authority. While Baltimore, Montgomery, and Cecil Counties and the Washington Suburban Sanitary Commission rarely use quick-take, the State Roads

Commission regularly uses quick-take in cases lacking exigent circumstances.¹¹⁴ These takings violate the Due Process of Law just as much as Baltimore's quick-take condemnations under § 21-16 did. Additionally, the Court's analysis of *Kelo's* requirement for a comprehensive plan applies with equal force to all condemnations across the state.

Finally, and potentially most importantly, the Court of Appeals declared property fundamental constitutional right under both the U.S. and state constitutions. This was no mere slip of the pen. Four times in *Valsamaki*¹¹⁵ and three times in *Sapero*¹¹⁶, the Court explicitly described property as a fundamental constitutional right. It is well established that laws implicating fundamental constitutional rights are subject to heightened judicial scrutiny, rather than the toothless rational-basis test applied to "non-fundamental" rights. If private property rights are truly to be treated like fundamental constitutional rights, then this will revolutionize judicial review of zoning & building codes, land use regulations, environmental law, and a whole host of other government regulations.

Conclusion

Following the Supreme Court's widely reviled decision in *Kelo v. New London*, and in the midst of an unprecedented backlash against that decision's casual dismissal of property rights, the Court of Appeals of Maryland significantly limited the ability of government to take private property in *Baltimore v. Valsamaki*. While *Valsamaki* was a significant victory,

¹¹⁴ Telephone Interview with John C. Murphy, Attorney, Law Offices of John C. Murphy (Nov. 20, 2015).

¹¹⁵ See *Valsamaki*, 397 Md. at 258 (stating that "[s]uch a use would violate the rights of property owners, fundamental rights that are protected by the Federal and State Constitutions"); *id.* at 259 ("Reverence is due the property rights clause just as is due the other great provisions of the Fifth Amendment. It is a fundamental right"); *id.* at 262 (noting that the statute "involves fundamental constitutional rights of individuals"); *id.* at 251 n.17 (noting that greater judicial review is required when "the deprivation of fundamental constitutional rights is involved").

¹¹⁶ See *Sapero*, 398 Md. at 326 (stating that "It must not be forgotten that private property rights are fundamental constitutional rights under both the Federal and State Constitutions"); *id.* at 343 ("That right to private property is a fundamental right provided by both the Federal Bill of Rights and the Maryland Declaration of Rights"); *id.* at 347 ("These quick-take condemnations deal with the fundamental right of property").

further reform is necessary in order to property is indeed protected as a fundamental constitutional right.

Appendix

M.J. "Jay" Brodie

M.J. "Jay" Brodie began his career as an urban planner in 1969 when he joined the Baltimore City Department of Housing and Community Development.¹¹⁷ While working for the Department of Housing and Community Development he worked on numerous urban renewal projects in Baltimore, including the Inner Harbor.¹¹⁸



M.J. "Jay" Brodie

After leaving the Department of Housing and Community Development he served as the Executive Director of the Pennsylvania Avenue Development Corporation, a federal entity established to revitalize the federal lands between the White House and the U.S. Capitol.¹¹⁹ In this capacity he oversaw the use of \$150 million in public funds, and helped attract \$1.5 billion in private investment.¹²⁰ Brodie returned to Baltimore in 1996 when he became the president of the Baltimore Development Corporation. Brodie retired in 2012 at the age of 75.¹²¹ While he is said to have retired for family reasons, some journalists suspect that a disagreement between Brodie and the administration of Mayor Stephanie Rawlings-Blake

¹¹⁷ Partners for Livable Communities, William H. Whyte Awards, M.J. Jay Brodie, <http://livable.org/services/awardshonors-programs/-william-h-whyte-award/808-mj-jay-brodie>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Lorraine Mirabella, *M.J. "Jay" Brodie to leave helm of Baltimore Development Corp. once a replacement is hired*, BALTIMORE SUN (Feb. 23, 2012), http://articles.baltimoresun.com/2012-02-23/business/bs-bz-brodie-retirement-20120223_1_bdc-president-brodie-baltimore-development-corp.

caused Brodie to retire.¹²² Brodie now writes a column about real estate and economic development for the Baltimore Business Journal.¹²³

James Thompson

James Thompson graduated with a B.A. from Yale University, and from the University of Virginia School of Law in 1966.¹²⁴ He has worked at the law firm of Miller, Miller, & Canby in Rockville, MD for more than 25 years. His practice



James Thompson

focuses on eminent domain and real estate valuation. He was elected president of the Montgomery County Bar Association in 1998 and the Maryland State Bar Association in 1999-2000. He has represented Maryland in the Owners' Council of America, a national network of eminent domain attorneys, has lectured on eminent domain across the country, and has published numerous articles on eminent domain.

John Murphy

John C. Murphy obtained his B.S. from College of Holy Cross and his LL.B. from New York University School of Law.¹²⁵ He operates as a sole-practitioner in Baltimore, where he specializes in eminent domain and land use cases. He has represented property owners in some of the most controversial eminent domain cases in Baltimore's recent history,

¹²² Mark Reutter, *Jay Brodie's retirement, announced by mayor's office, comes as a surprise*, BALTIMORE BREW (Feb. 24, 2012).

¹²³ Lorraine Mirabella, *City Economic Development Chief Brodie to Retire*, BALTIMORE SUN (Feb. 23, 2012), http://articles.baltimoresun.com/2012-02-23/business/bs-bz-brodie-retirement-20120223_1_bdc-president-brodie-baltimore-development-corp.

¹²⁴ Miller, Miller, & Canby, *Our Attorneys*, http://www.millermillercanby.com/attorney_detail.cfm?b=1&aname=James%20L.%20Thompson.

¹²⁵ Murphy, John C., *Attorney and Judge Profiles*, West.

including George Valsamaki, Carmel Realty Associates, and numerous business owners in Baltimore's infamous "Superblock."¹²⁶

¹²⁶ Daniel J. Sernovitz, *City extends 'superblock' contract*, BALTIMORE BUS. J. (Dec. 21, 2006), <http://www.bizjournals.com/baltimore/stories/2006/12/18/daily30.html>.