

CODE ENFORCEMENT

Video Gaming: From Taverns to... Cafes?

By David Wesner, Corporation Counsel, Danville, Illinois

For many years now the State of Illinois has discussed the expansion of gambling, focusing on increasing the reach of casinos. While not seeming to actually move off the mark, the State did in fact take a step in that direction when it legalized video gaming (a recognition of Illinois' desperate need of revenue).

As may be similar with other states that have legalized gambling, the State put in many restrictions and regulations governing every aspect of the video gaming process. The regulations also limited the locations at which the machines could be located. Only the following sites are permitted to have video gaming machines: truck stops (as defined in the statute); veterans' organization establishments; fraternal organization establishments; and what is termed a "licensed establishment". These types of establishments are required to have a liquor license that authorizes consumption on-premises. A further restriction under the statute is that any establishment authorized to provide video gaming may only have five such machines within their premises—a parameter likely added in response to the casino lobby which would have argued that without some limitation their business would be negatively impacted. The statute was also designed to provide that gambling would be authorized in all municipalities, unless the municipality passed a referendum prohibiting video gaming.

Subsequent to the State's legalizing video gaming, my Mayor and City Council began discussions on whether they would seek a referendum prohibiting video gaming and, if not, whether to impose additional licensing and regulations on the companies and establishments who would be involved in video gaming in our community. The City Council was not opposed to video gaming. It recognized that some establishments were already using video machines for gaming, in order to keep their doors open. So Council members discussed the need to change certain ordinances to be consistent with the State statute – and considered whether to impose additional licensing and regulations. While the Council understood a need to impose some further licensing and regulation, it they wanted the additions to be minimal since the State statute already provided extensive licensing and regulation. When it was all said and done, the City Council adopted an ordinance that provides licensing of each machine (similar to our ordinance on amusement devices) and the establishment where the machines would be located.

Many establishments in town have gone through the process of getting the appropriate licensing to permit video gaming in their businesses. What we have seen is that some locations generate significant revenue while other establishments only generate minimal proceeds. As such, we have not seen a large proliferation of video gaming in town.

However, we recently had a discussion at a City Council committee meeting about a potential next level in video gaming that could have some negative consequences. Our Mayor has been approached by some companies about establishing what they call video gaming cafes. These companies understand the state and local licensing requirements which are necessary to allow video gaming in a location, specifically the type of liquor license necessary. These companies are asking if a certain type of liquor license could be created to meet the standard set by the State but would not necessarily be a full-blown liquor license such as a tavern needs to serve its customers. They are looking to have minimal offerings and perhaps even provide free drinks to patrons; the idea being that they would have five machines in a small establishment with only minimal alcohol, to allow low overhead and make substantial profit from gaming. And, although the State declined to expand casinos, these companies are also suggesting they would subdivide retail storefronts to have a couple of entrances and run several of these "video gaming cafes" side-by-side.

This concept begs many questions and poses concerns for businesses that already offer video gaming machines. The State statute defines a licensed establishment as "any licensed retail establishment." If a video gaming café does not sell any product or item, is it considered a "retail" establishment? The other aspect of licensing and regulation is the view that the majority of a business would be the sale of those items falling within the category of the license. The concept of a video gaming café would be that the nature of the business is gambling only and the business would not be expecting or concerned with the sale of any tangible goods such as the liquor associated with the required liquor license. The bigger problem would be the impact on local business if video gaming cafes could be established. We believe we would see a proliferation of store fronts and subdivision of buildings to try and fit as many cafes in as possible because of a belief in the pots of gold

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Makowski vs. Mayor and City Council of Baltimore (2014)

In a case decided in June of this year, the property involved was one of 150 properties in a square block that the City of Baltimore set out to acquire either through negotiated sales or regular condemnation for a redevelopment project as part of the East Baltimore Development Initiative (EBDI). To acquire the property, the City of Baltimore initially filed a regular condemnation case. The commercial property had been rented as a church. A year had passed, and all of the other properties had been acquired. The church tenant had been relocated and the city continued to pay rent to the owner. The City converted the regular condemnation case to a quick take because of the time that had elapsed since the filing of the case and the urgency to proceed with the project.

The owner challenged the quick take action. At a hearing on the challenge, the Circuit Court for Baltimore City granted the City's petition for immediate possession and title. Upon direct appeal to the Court of Appeals,[12] the Court unanimously concluded that the evidence was sufficient to support the trial court's finding that the property owner was a "hold out" and that the City's quick take action was warranted. *Edward J. Makowski v. Mayor and City Council of Baltimore*, 2014 WL 2853818 (June 24, 2014).

Conclusions:

What the Future Holds-Practice Pointers and Policy Considerations

Focusing on Maryland law with reference to trends in other states, this paper merely scratches the surface regarding the issues involved in an eminent domain practice representing governmental clients/agencies. Basic constitutional standards require that no property be taken without just compensation for a "public purpose," through a fair process which requires notice and opportunity to be heard. Even the most supportive court system requires a legislative process providing authority, a well thought-out plan and a clear process when subdivisions seek to acquire property through eminent domain. While we have raised several issues, our advice to overcome the charges of eminent domain abuse, and to facilitate government's redevelopment of blighted and/or undeveloped areas, is to make certain that:

1. Legislative authorization, which by its very nature includes notice and opportunity to be heard, should be current.
2. Property should be acquired pursuant to a well-reasoned plan that is supported by a legitimate legislative process.
3. Public purpose should be grounded in public benefit, if not public use.
4. Relocation should assist in making the property owner whole.
5. Valuation of the property is best achieved through a mediated process. It is always better to have the parties decide the valuation instead of a disinterested person.

1. *See generally* "50 State Report Card Tracking Eminent Domain Reform Legislation since Kelo," Castle Coalition, August 2007; "The Condemnation Landscape Across the Country Post Kelo—A Maryland Perspective," Maryland State Bar Association, Real Property Section, Ground Rules, Winter 2007, James L. Thompson and Joseph P. Suntum, Miller, Miller & Canby, Chtd.; "Eminent Domain," John C. Murphy, Maryland Bar Journal, November/December 2008.
2. *See* "Public Power, Private Gain—A Five-Year, State by State Report Examining the Abuse of Eminent Domain," by Dana Berliner, Castle Coalition—Citizens Fighting Eminent Domain Abuse, April 2003.
3. *See* "The Legitimacy and (Un)Fairness of Public Land Banking, The Unarticulated Issues of Eminent Domain, "Jonathan Cheng, Maryland Legal History Publications, August 2007.
4. See on line document at msa.maryland.gov/msa/mdmanual.
5. *See* on line document at msa.maryland.gov/msa/mdmanual.
6. *Id.*
7. Thompson and Castle Coalition publications, *supra*.
8. *Id.*
9. *See* Maryland State Bar and Castle Coalition publications, *supra.*
10. *See* "Eminent Domain Bill Passed in Maryland Senate," *Sunpapers*, Baltimore, Maryland, April 3, 2007.
11. *See* Chapter 305 (Senate Bill 3), "Real Property—Condemnation—Procedures and Compensation," Approved by the Governor, May 8, 2007 (by adding to Article—Real Property Section 12-105.1 and 12-205.1, Annotated Code of Maryland (2003 Replacement Volume and 2006 Supplement); By repealing and reenacting with amendments, Article—Real Property, Section 12-202, 12-204 and 12-205 Annotated Code of Maryland (2003 Replacement Volume and 2006 Supplement).
12. The *Code of Public Local Laws of Baltimore City*, §21-16 provides for an immediate right of appeal to the Court of Appeal of Maryland from the decision of the trial court in a quick take condemnation case. **ML**

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at the end of rainbows by having as many establishments and machines as possible. Could you imagine your downtown storefronts all taken up by video gaming cafes? Unfortunately for my community, our downtown has many vacant storefronts where this could be a reality if these types of businesses are allowed to open. Additionally, if a significant number of these types of businesses were to open, fraternal and veterans' organizations could see the result they were trying to avoid with the gaming revenue, namely closing their doors. And, we could also realistically see a decline in locally-owned taverns due to loss of customers and revenue.

One aspect of the State statute – a provision entitled "undue economic concentration" – could impact these possibilities. The State would look at whether this type of requested operation (video gaming cafes) would impede or suppress competition, adversely impact the economic stability of the video gaming industry, and/or would negatively impact the purposes of the State video gaming act. The potential problem with this posture is that it relies on the State to follow through on this examination prior to issuing licenses for these sorts of gaming businesses. Given the State's hesitancy to expand casinos, I would hope they would involve themselves in discussions about these types of businesses. At a minimum, municipalities should discuss the potential impact video gaming cafes would have and determine the need for additional licensing, regulations or other ordinances that could impede

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their proliferation or minimize their potential negative effects. I think this could be one of those circumstances where unrestrained competition, if allowed to be the driving force, may have a negative impact on existing local businesses.

So, for us the question is: once the door to video gaming is open, how far should it get pushed? ML

Ordinances *Cont'd from page 26*

The Michigan Supreme Court acknowledged that the Bonners had "a significant property interest within the protection of the Due Process Clause." However, the court's substantive due process analysis turned on the proposition that *property owners do not have a fundamental right to repair a structure that has been declared unsafe by a municipality*. Accordingly, governmental intrusion into that (non-fundamental) right only needs to be reasonably related to a legitimate governmental interest. Under this standard, the Brighton ordinance was not facially deficient; the "unreasonable-to-repair" presumption was reasonably related to the City's legitimate governmental interest in preserving the health and welfare of Brighton residents, reducing crime and maintaining property values. Demolition of an unsafe nuisance was not an arbitrary act; it was a legitimate exercise of the City's police power.

The Michigan Supreme Court also found adequate procedural due process in the Brighton ordinance scheme. While the Bonners had argued that BCO § 18-59 failed to give property owners the procedural protection of a repair option before demolition, the court stated that due process merely requires impartial "adjudication . . . preceded by notice and an opportunity to be heard . . . granted at a meaningful time and in a meaningful manner" before the deprivation of a property interest. The court held that procedural due process "was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court."

Bonner v. City of Brighton, no. 146520 (Mich. Apr. 24, 2014). ML

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Implications-

Together, *Wainfleet Wind Energy Inc. v Wainfleet (Township)*, 2013 ONSC 2194, *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 and *East Durham Wind Inc.*, are strong judicial authority for the proposition that provincially approved renewable energy projects may be constructed despite municipal opposition.

City of Burnaby- Kinder Morgan At Odds Over Pipeline.

The Supreme Court of British Columbia has rejected the City of Burnaby's bid for a temporary injunction to stop survey work for an oil pipeline expansion project proposed by Kinder Morgan.

Kinder Morgan is proposing a $5.4 billion project to triple the capacity of its Trans Mountain pipeline, which currently carries oil products to a terminal in Burnaby from Alberta. The City of Burnaby has expressed its opposition with such expansion, and has attempted to block Kinder Morgan's survey work on Burnaby Mountain. The City of Burnaby alleges that Kinder Morgan violated municipal bylaws that protect trees and parkland, when Kinder Morgan workers toppled 13 trees, although Kinder Morgan indicated it was only seven trees. The City of Burnaby filed with the British Columbia Supreme Court to issue an injunction on the survey.

The City of Burnaby's action follows a previously upheld decision by the National Energy Board of Canada last month, allowing Kinder Morgan to access the Burnaby Mountain land under federal law. The National Energy Board Act stipulates that a company may enter into the land of any person that lies on the intended route to survey or otherwise ascertain whether the land is suitable. There is no requirement for companies to reach agreement with landowners, the Crown, or otherwise, before exercising the right to access land. Therefore, the National Energy Board held that Kinder Morgan does not need the City of Burnaby's permission to access Burnaby Mountain and can proceed with necessary studies of its preferred pipeline route through the mountain without the City's consent. In response to this holding, Kinder Morgan has filed a motion asking the National Energy Board to forbid the City of Burnaby from obstructing its crew. This decision is imminent.

On September 17, the British Columbia Supreme Court judge dismissed the application for an injunction against the Kinder Morgan survey crews on Burnaby Mountain. At the time of this publication, Judge Brenda Brown had not yet given her reasons for dismissing the injunction. ML

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employees was not required under the PDA even though it was offered to employees injured on the job.[15] The court reasoned that it was not Congress' intent to provide pregnant employees with greater rights than non-pregnant employees, which would be the result if the court adopted the employee's rationale.[16]

The employee in *Young* appealed to the Supreme Court and certiorari was granted on July 1, 2014. Oral arguments will be heard in December.

The EEOC's Guidance Conflicts with Fourth Circuit's Holding and Creates Controversy

As noted above, the timing of the Guidance is controversial given the impending Supreme Court decision on the subject, and in addition to that, some of the substance of the Guidance has garnered criticism. In fact, two EEOC Commissioners provided separate written dissents to the Guidance.[17] One point of contention is that according to the Guidance, Title VII requires that employers treat pregnant workers the same for all employment related purposes as other non-pregnant individuals who are similar in their ability or inability to work.[18] The Guidance therefore reasons that if an employer provides an accommodation to an employee with a disability, a pregnant employee who has similar limitations would be entitled to the same accommodation, regardless of whether the pregnant employee is actually disabled for ADA purposes.[19] This conclusion was one of the central points of criticism by Commissioner Victoria Lipnic in her dissent:

> The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to "reasonable accommodation" as that term is defined by the Americans with Disabilities Act ("ADA"). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance