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TO THE BREAKNESS**

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MARYLAND AND THE RIGHTS TO THE PREAKNESS

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Maryland and the Rights to the Preakness

What can Maryland do to protect the Preakness Stakes as an asset of the State of Maryland? At the 2005 Preakness, there was considerable speculation that Magna Entertainment, which is the principal owner of the Maryland Jockey Club, might, in the absence of racino legislation in Maryland, move the Preakness to one of its racetracks (possibly Gulfstream or Lone Star Park) outside the State of Maryland. Assuming that Maryland did not authorize slots, what could it do to retain the Preakness?

To a certain extent, the State of Maryland has already taken action. In 1992, the State of Maryland passed legislation to keep the Preakness in Maryland. (The text of the legislation is at the conclusion of this article.) The legislation decreases the share from wagers that would be awarded to the track owner in the event that the Preakness were to be transferred outside the State of Maryland. Thus, if you conducted the race meet at Pimlico but sold the right to conduct the Preakness to someone outside the State, your taxes would increase and your retention on a bet would decrease. Additionally, if the Preakness were to be transferred outside the State, the State of Maryland could through the racing commission terminate the license of the Maryland Jockey Club or its successor. Finally, if the rights to the Preakness were to be sold, the State of Maryland would be given the right of first refusal on any offer.

While this legislation might have been workable in 1992, it no longer seems to be viable today. The owners of the Maryland Jockey Club state that Maryland racing is unprofitable on every day of the year except for Preakness day. Gary West, "Preakness Stakes Could Leave Maryland for Greener Pastures," Fort Worth Star-Telegram, May 20, 2005 Pg 12D. Thus, the threat of revoking the license of the Maryland Jockey Club or decreasing the allocation of the wagering dollar to the Maryland Jockey Club, is no longer a significant threat. The owners of the racetrack property might be in better financial shape if they simply did not race during the remainder of the year and/or began to sell off their racetrack properties. (See comments of Joe De Francis, "Magna lost \$200 million last year. Pimlico and Laurel lose money 364 days a year and make money one day, on Preakness day. The real estate is valuable at both tracks, especially at Laurel [close to Washington], where it's extremely valuable." quoted in Bill Christine, "Racing Tradition at Stake," Los Angeles Times, May 23, 2005 Part D. Pg. 10)

Additionally, there is little likelihood that Magna Entertainment intends to sell the rights to the Preakness. It seems more likely that Magna would simply wish to run the Preakness at one of its many other out-of-state racetracks. Thus, the State of Maryland's ability to match any bid for the Preakness does not come into play. Magna Entertainment is unlikely to sell off the rights to the Preakness.

So what does Maryland do to protect the Preakness? It may be forced to fall back on the using eminent domain as its vehicle to preserve the Preakness. Eminent domain has played a brief but generally unsuccessful role in sports franchise retention history. The California Supreme Court in dealing with the Oakland Raiders authorized the application of eminent domain to a sports franchise finding that eminent domain could apply to intangibles personal property. In short, it was theoretically possible for the City of Oakland to condemn the sports franchise of the Oakland Raiders. See City of Oakland v. Oakland Raiders, 32 Cal. 3rd 60 (1982.) However, when the City of Oakland, attempted to actually take over the Raiders, it was found that the dormant Commerce Clause prevented State action against the franchise. City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414 (1985)

In 1984, similar issues played out in Maryland. On March 30, 1984, the Maryland legislature passed a law authorizing the City of Baltimore to condemn sports franchises. 1984 Md. Laws Ch. 6. The City of Baltimore promptly passed legislation authorizing the condemnation of the Baltimore Colts, and the City filed a petition to seek condemnation of the franchise. The Colts, however, had packed the franchise and moved its office and athletic equipment to Indianapolis on March 29. In Baltimore v. Baltimore Football Club, Inc., 624 F. Supp. 278, 280 (D. Md., 1985), a federal district court ruled that the City of Baltimore lacked the ability to use its powers of eminent domain over a franchise that had left the State before the condemnation action had begun.

While the eminent domain efforts have not formally succeeded, it is likely that the Commerce Clause concerns that applied to the National Football League in the Oakland Raider case would not apply to horse racing. The Commerce Clause analysis was triggered by the need for uniform national regulation under one league setup in professional football. This need for uniformity would not apply to horse racing. Thus, “not only is eminent domain a legally justifiable means to protect a city from a relocating team owner, but the least harm is inflicted upon any of the parties. The owner will receive just compensation for his team, the city will protect its residents and its investment in professional sports and the residents can continue to support their home team which brings them and their city so many tangible and intangible benefits.” Bradley J. Stein, “How the Home Team Can Keep From Getting Sacked: A City's Best Defense To Franchise Free Agency in Professional Football,” 5 Tex. Rev. Ent. & Sports L. 1, 35 (Fall 2003). See also Rafael A. Deplet, Jr., “We’ll Take The Yankees: Assessing the Feasibility Of a State Condemnation of Baseball's Greatest Franchise,” 8 Marq. Sports L.J. 53 (Fall 1997).

For eminent domain to be successful, there is a need to be able to apply eminent domain to intangible property, just compensation, and a public use. In the Baltimore Colts case, the federal court stated that “it is now beyond dispute that intangible property is properly the subject of condemnation proceedings.” 624 F Supp at 282. Just compensation is self-explanatory, and the issue of what is a proper public use is likely to be determined by the United States Supreme

Court in Kelo v. City of New London which was argued in February of this year.

Thus, if the State of Maryland can find a place to run the Preakness, and if it is willing to pay the price to compensate Magna for the Preakness, it might be possible for the legislature to authorize an action allowing the State or the City of Baltimore to obtain the rights to the Preakness pursuant to its eminent domain powers.

The Maryland Statutes and the Preakness

§ 11-516. Takeout allocation if Preakness is transferred or sold.

If the Preakness Stakes is transferred otherwise than under § 11-520(b) of this subtitle or if it is sold to a buyer other than the State, the takeout of the mutuel pools on each race held thereafter shall be allocated as follows:

- (1) to the Maryland-Bred Race Fund, 1% of each mutuel pool;
- (2) to the Commission, for State tax, 4.09% of each mutuel pool;
- (3) to purses, 5% of each regular mutuel pool, 8% of each multiple mutuel pool on 2 horses, and 14% of each multiple mutuel pool on 3 or more horses; and
- (4) to the licensee, 6.91% of each regular mutuel pool and 5.91% of each multiple mutuel pool, from which the licensee shall pay 0.25% of all pools to the Maryland Race Track Employees Pension Fund.

§ 11-520. Transfer or sale of Preakness Stakes.

- a) Reason for section.- The requirements of this section are established in recognition of the significance of the Preakness Stakes to the State.
- b) Transfer - Allowed in disaster or emergency.- The Preakness Stakes may be transferred to another track in the State only as a result of a disaster or emergency.
- c) Same - Out-of-State.- If the Preakness Stakes is transferred out of the State, the Commission may:
 - 1) revoke any racing days awarded to the Maryland Jockey Club of Baltimore City, Inc., or its successor; and
 - 2) award these racing days to another licensee, notwithstanding § 11-511(b) of this subtitle.
- d) Offer of sale of Preakness Stakes.
 - 1) If the Preakness Stakes is offered for sale, the State has the option to buy the Preakness Stakes for the amount of any offer that the licensee wishes to accept.
 - 2) Within 30 days after receiving an offer that it wishes to accept, the licensee shall give the State notice of the offer.

- 3) If the State wishes to exercise the option, it shall so notify the licensee within 60 days after it receives the notice.