

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947

March 27, 2007

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RE: The City of Milford v. MG Development, LLC
C.A. 06C-05-019
Letter Opinion

Date Submitted: November 9, 2006

Dear Counsel:

_____ This is my decision on MG Development, LLC's ("MG") motion to dismiss the condemnation complaint filed against it by the City of Milford ("Milford") on May 22, 2006. Milford filed the condemnation complaint against MG to obtain temporary construction and permanent utility easements through MG's Hearthstone Manor development so that DLM, LLC ("DLM") can run sewer lines through Hearthstone Manor to its West Shores development. Hearthstone Manor and West Shores are adjacent developments in Milford. MG filed an answer to the complaint, a counterclaim and a motion to dismiss the complaint. Superior Court Civil Rule 71.1 provides that in a condemnation proceeding by a municipality, an order of possession shall be entered forthwith by the Superior Court unless the property owner can show good cause as to why the order of possession should not be granted.

I held a hearing on MG's motion to dismiss on September 21, 2006. Richard Carmean, Milford's town manager, and Elmer Fannin, a principal with MG, testified at the hearing. Milford and MG then submitted post-hearing briefs. I asked Milford to submit the agenda and minutes for the city council meetings on May 8, 2006 and May 22, 2006. Milford sent the information to me on March 16, 2007. MG argues that (1) Milford violated its charter, the Freedom of Information Act and the Real Property Acquisition Act when it acted to condemn MG's property; (2) Milford's condemnation of MG's property is not for a valid public purpose; and (3) Milford should be estopped from violating its prior agreements with MG.

Background

Milford and MG entered into a Utility Agreement on April 24, 2000 (the "MG Utility Agreement"). The MG Utility Agreement provides that Milford will install sewer and water systems up to Hearthstone Manor and that MG will install sewer and water systems within Hearthstone

Manor. It further provides that Milford will assume all operational, maintenance and repair obligations associated with the sewer and water systems. Milford annexed West Shores into the municipal boundaries of the city on March 12, 2001. Milford approved the Hearthstone Manor development plan on December 12, 2002. Notes on the plan state that Milford will provide sewer service to West Shores through easements located between lots 236 and 237 and Todd Court in Hearthstone Manor. The notes also state that Milford will not use the easements located in additional phases of Hearthstone Manor until those phases have been completed. MG reserved the right to relocate easements in the additional phases subject to Milford's approval.

Milford approved the West Shores development plan on April 25, 2005. The plan shows two sewer easements coming from West Shores to Hearthstone Manor. MG has installed sewer lines within Hearthstone Manor, but not up to West Shores. The gap is approximately 1500 feet. The easements obtained by Milford when it approved the Hearthstone Manor development plan are not wide enough for the actual construction of sewer lines. When Milford refused to allow Trolley Square Partners LLC ("TS"), DLM's predecessor in interest, to use Milford's easements through Hearthstone Manor to connect to the sewer lines that had been installed by MG in Hearthstone Manor, TS filed suit against Milford, MG and others in the Superior Court on June 15, 2005. Milford and TS entered into a Utility Agreement on September 15, 2005 (the "TS Utility Agreement"). The TS Utility Agreement provides that TS shall be responsible for the cost of extending the sewer lines through Hearthstone Manor to West Shores. It also provides that Milford has all the easements necessary for the sewer line construction.

Milford and TS settled the litigation on October 20, 2005. The settlement agreement provides that Milford will take all action necessary to allow it to use the easements through Hearthstone Manor and that Milford will also allow TS to use the easements through Hearthstone Manor. Although MG was a defendant in the litigation, it was not a party to the settlement agreement. TS conveyed West Shores to DLM after the litigation was settled. Milford then told DLM that it could use Milford's easements through Hearthstone Manor. DLM and a contractor went to Hearthstone Manor on May 3, 2006. MG called the police and DLM and the contractor were ordered to leave Hearthstone Manor.

The Milford city council held a public meeting on May 8, 2006. The agenda for the city council meeting states that there will be an executive session to deal with personnel matters and a "legal issue." A motion was made and seconded during the public session to go into an executive session. The motion did not state a general description of the reason for the executive session. The motion "carried," but the minutes of the public session do not reflect the actual vote by the city council members. During the executive session, the city council decided to file a condemnation action against MG.¹ However, the city council did not take a vote to do so in the executive session.

¹ The following is an excerpt of Richard Carmen's hearing testimony on the city council's decision:

Question: You said that the decision was reached in the executive session.

What was the decision that was reached?

Answer: To instruct our solicitor to proceed with the condemnation.

Question: Was that decision agreed to by the council members who were present?

Answer: Yes.

The city council also did not take a vote on the condemnation complaint after going back into the public session. The condemnation complaint was not placed on the agenda for the next city council meeting on May 22, 2006. Indeed, it was filed before the next city council meeting was held.²

Discussion

Article II of the Milford charter discusses the powers of the city and provides procedures for their use. Section 2.01 provides that Milford shall have all powers possible for a city to have under the constitution and the laws of the State of Delaware as fully and completely as if they were specifically enumerated in the charter. It goes on to enumerate certain specific powers, which includes the power to acquire lands, tenements, real property or interests therein by condemnation for the purpose for providing sites for sewers and sewage disposal and the construction of lines for the transmission of sewer.

Sections 3.02, 4.01 and 4.03 provide that all powers conferred by the charter, except as otherwise provided in the charter, and the exercise therefore shall be vested in the city council. Milford's charter is, in this regard, in accordance with well-settled law that a municipality's governing body cannot delegate the right to make decisions affecting the transaction of a municipality's business, but that it may by resolution or ordinance delegate to others the right to perform acts and duties necessary to the transaction of the municipality's business.³ Section 4.10 sets forth the procedure that the city council must follow in exercising its powers. It states, in part, that:

(a) Meetings: The Council shall meet regularly at least once in every month at such times and places as the Council may prescribe by rule. Special meetings may be held on the call of the Mayor or of four or more members and, whenever practicable, upon no less than twelve (12) hours' notice to each member. All meetings shall be public; however, the Council may recess for the purpose of discussing in a closed or executive session limited to its own membership any matter which would tend to defame or prejudice the character or reputation of any person, provided that a general subject matter for consideration is expressed in the motion calling for such session and that final

Question: Do you remember how many of the nine were present?

Answer: I believe all were there.

Question: And after the executive session terminated, did you come back into open session and take a vote to file the action?

Answer: No.

² The MG Utility Agreement does not state when MG will turn over the Hearthstone Manor water and sewer utility systems to Milford. The minutes of the executive session state that MG has not turned them over to Milford. Thus, it is unclear if Milford intends to condemn Hearthstone Manor's water and sewer utility systems in order to use them to provide sewer to West Shores.

³ See 56 Am. Jur. 2d *Municipal Corporations, Etc.* §175 (2007).

action thereon shall not be taken by the Council until the matter is placed on the agenda.

(b) Rules and Journal: The Council shall determine its own rules and order of business and shall provide for keeping a journal of its proceedings. This journal shall be a public record. Unless or until other rules are adopted, the Council shall follow Roberts Rules of Order and parliamentary procedure.

(c) Voting: Voting, except on procedural motions, shall be by roll call, and the ayes and nays shall be recorded in the journal. Five members of the Council shall constitute a quorum, but a smaller number may adjourn from time to time and may compel the attendance of absent members in the manner and subject to the penalties prescribed by the rules of the Council. No action of the Council, except as otherwise provided in the preceding sentence and in Section 2.05, shall be valid or binding unless adopted by the affirmative vote of four or more members of the Council.⁴

MG argues that Milford violated the procedural requirements of its charter when the city council went into an executive session and decided, without taking a public vote, to file the condemnation complaint against MG. Milford's charter provides that all city council meetings shall be public. However, the city council may recess the public meeting and go into an executive session to discuss certain limited matters provided (1) that a general subject matter for consideration is expressed in the motion calling for the executive session, and (2) that no final action shall be taken by the city council on the matter until it is placed on the agenda. Milford's charter further provides that no city council action, except on procedural matters, shall be valid unless adopted by an affirmative vote of four or more city council members.

The city council did not comply with the charter requirements when it decided to file the condemnation complaint against MG. The motion calling for the executive session did not include, as required by the charter, a general subject matter for consideration during the executive session. Moreover, after the city council went into the executive session and decided to file the condemnation complaint against MG, the city council took final action on the condemnation complaint without placing it on the agenda, as also required by the charter. The city council also never voted in any session to proceed with the condemnation complaint. Milford's charter repeatedly provides that the city council "shall" follow certain procedural requirements when exercising its powers. The use of "shall" in this context is typically deemed to be mandatory.⁵ The failure to comply, at least substantially, with such a provision means the action taken by the city council is void. Indeed, the Milford charter itself provides that no city council action shall be valid unless adopted by an

⁴ Milford's charter does not have a Section 2.05.

⁵ See *J. Ehrlich Realty Co. v. City of Dover*, 124 A.2d 732 (Del. Ch. 1956); *Kirby v. City of Milford*, 350 A.2d 760 (Del. 1975); *Eastern Shore Public Service Co. v. Town of Seaford*, 187 A. 115 (Del. Ch. 1936); *Peterman v. City of Milford*, 104 A.2d 382 (Del. Ch. 1954).

affirmative vote of four or more council members. As I noted previously, the city council members never voted in any session to proceed with the condemnation complaint against MG. Thus, Milford did not comply at all, let alone substantially, with its charter. Therefore, its action to condemn a portion of MG's land is void.

Conclusion

Given that Milford has not been able to overcome the very first procedural barrier to its condemnation complaint against MG, there is no need for me to consider MG's other arguments at this time. MG has shown good cause as to why an order of possession should not be entered. The city council's decision to file a condemnation complaint against MG is void because the city council did not follow the charter. Milford's condemnation complaint against MG is dismissed without prejudice.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley