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RECENT DEVELOPMENT

J.P. DELPHEY LTD. P'SHIP V. MAYOR & CITY OF FREDERICK: DUE TO AN EXCEPTION IN THE OPEN MEETINGS ACT, MUNICIPAL GOVERNMENTS WITH LEGISLATIVE POWERS CAN VOTE TO CONDEMN PROPERTY IN A CLOSED EXECUTIVE SESSION WITHOUT ENACTING A PROPERTY-SPECIFIC ORDINANCE.

By: Kristy Haller

Under an exception found in section 10-508(a)(3) of the Open Meetings Act, legislative bodies may vote to condemn property in closed sessions without violating section 8 of Article 23A of the Maryland Code, which normally prohibits the adoption of resolutions in closed sessions. *J.P. Delphey Ltd. P'ship v. Mayor & City of Frederick*, 369 Md. 180, 913 A.2d 28 (2006). The Court of Appeals of Maryland found that there is no need for a legislative act or ordinance specific to the condemned property, provided that the vote for condemnation is conducted by a legislative body and not an executive body. *Id.*

In 2000, the City of Frederick, Maryland ("the City") began the process of acquiring land to be used for a fourth parking garage located within city limits. Since 1997, the City had allocated funds in its budget for the garage construction. After studies were undertaken in 1989 and 1999, the City concluded that the property owned by J.P. Delphey Limited Partnership ("Delphey") presented the best location in terms of impact on the downtown area. An offer of \$1,200,000, the appraised value of the property, was extended to Delphey, who in turn made a counter-offer for \$3,000,000.

In subsequent public meetings, Task Force recommendations on the Delphey property were adopted and a finance agreement for the construction of the garage was approved. Following a reappraisal of the property, the City offered Delphey \$1,675,000, plus additional incentives. Delphey rejected this offer as well.

On November 5, 2002, the Mayor released a media advisory stating that following the public meeting to be held the next day, a closed meeting between the Mayor and the Board of Aldermen ("the Board")

would be held to discuss the acquisition of the Delphey property. Minutes from the session revealed discussions regarding how the condemnation process would work and if alternative payment methods to Delphey could be arranged. In the end, the Board unanimously voted to begin condemnation proceedings against Delphey's property.

The City began condemnation proceedings in the Circuit Court for Frederick County, which held that the City was entitled to condemn the property. In an unpublished opinion, the Court of Special Appeals of Maryland upheld the trial court's decision, finding no legislative requirement that a property-specific ordinance be enacted before condemnation would be possible. The Court of Special Appeals of Maryland also found that the condemnation was an executive action and therefore required no specific ordinance. On appeal to the Court of Appeals of Maryland, the Court considered (1) whether the City of Frederick was required to enact a specific ordinance in order to condemn the property, (2) as a matter of first impression, whether the City violated section 8 of Article 23A of the Maryland Code when they voted for condemnation in a closed session, and (3) whether the City violated section 10-508(a)(3) of the Open Meetings Act ("Open Meetings Act") when they voted for condemnation in a closed session.

On the issue of whether an ordinance specific to the property was required for condemnation, the Court found in favor of the City. *Delphey*, 396 Md. at 195, 913 A.2d at 37. Both section 8 of Article 23A of the Maryland Code and section 173 of Article 14 of the City's charter allow the Board to condemn properties. *Delphey*, 396 Md. at 192-93, 913 A.2d at 35. Although the vote to condemn Delphey's property was conducted in a closed executive session, the Board was acting in a legislative capacity, thus falling under the provision of section 8 of Article 23A of the Maryland Code, which lists condemnation as an express ordinance-making power of municipal legislative bodies. *Delphey*, 396 Md. at 191-93, 913 A.2d at 35-36.

Referring to past decisions, the Court noted that property-specific ordinances are not always required. *Id.* at 195, 913 A.2d at 37. In past cases, prior annual budget approvals concerning the property being condemned were enough to show "proper legislative authorization." *Id.* (quoting *Boswell v. Prince George's County*, 273 Md. at 522, 533, 330 A.2d 663, 670 (1975)). In Delphey's case, the City had taken several authorized actions, including allotting funds for the garage since 1997 and conducting appraisals concerning the property. *Delphey*, 396 Md. at 195-96, 913 A.2d at 37. Sufficient legislative

authority was already in place and precludes the need for an ordinance specific to Delphey's property. *Id.*

In discussing whether the vote to condemn Delphey's property during a closed executive session violated the Open Meetings Act and section 8 of Article 23A of the Maryland Code, the Court also decided in favor of the City. *Delphey*, 396 Md. at 202, 913 A.2d at 41. The Court recognized that an exception in the Open Meetings Act and section 8 of Article 23A of the Maryland Code are in direct conflict because section 8 of Article 23A of the Maryland Code is very broad and prohibits the adoption of "any rule, regulation, resolution or ordinance during a closed executive session," while the Open Meetings Act calls for "public business to be performed in an open and public manner," but allows for closed sessions to "consider the acquisition of real property for a public purpose and matters directly related thereto." *Id.* at 197-98, 913 A.2d at 38-39 (quoting MD. CODE ANN., STATE GOV'T. § 10-501 (1984 repl. vol. 1995)). Accordingly, the Court concluded that the narrow Open Meetings Act exception overrides section 8 of Article 23A of the Maryland Code, thus legitimizing the City's actions. *Delphey*, 396 Md. at 197-200, 913 A.2d at 38-40.

In its analysis, the Court underscored the importance of public policy when interpreting the Open Meetings Act and referred to two previous decisions where the activities of the legislative bodies in question violated the Open Meetings Act. *Id.* at 200-01, 913 A.2d at 40. In *CLUB v. Baltimore Board of Elections*, the Court found that the Baltimore City Council's failure to give proper public notice concerning meetings, where the drafting of a bill was under discussion, violated the Open Meetings Act. *Delphey*, 396 Md. at 200-01, 913 A.2d at 40 (citing *CLUB*, 377 Md. 183, 832 A.2d 804 (2003)). While in *Baltimore Development Corporation v. Carmel Realty Associates*, the Court held that the corporation performed many of the functions reserved for the Mayor and City Council and therefore operated as a "public body," requiring compliance with the Open Meetings Act, which the corporation had failed to do. *Delphey*, 396 Md. at 200-01, 913 A.2d at 40 (citing *Baltimore Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 910 A.2d 406 (2006)).

In contrast to the activities taking place in *CLUB* and *Carmel Realty*, the Court highlighted the public campaign by the City of Frederick to acquire Delphey's property, including mention of the possibility of acquiring or condemning the property in two previous

public meetings, and adds that “no such evasive devices” as seen in *CLUB* and *Carmel Realty* are evident in *Delphey*. *Delphey*, 396 Md. 201, 913 A.2d at 40. Thus, even under a policy argument, the Court found that the City took the appropriate steps in condemning the Delphey property. *Id.*

In an era of rapid development and urbanization, extra care must be taken to safeguard both the fundamental right of property ownership and the public’s right to have a voice in how its government functions. The Court’s decision opens the door a little wider for municipal governments, making the process to condemn property even easier by no longer requiring public oversight at key stages of the process.