

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

TOWN OF WASHINGTON GROVE	)	
	)	
Plaintiff	)	
v.	)	Civil No. 267037V
	)	
TOLL MD II, L.L.C., previously known as	)	
OXBRIDGE DEVELOPMENT AT	)	
WASHINGTON GROVE, L.C.,	)	
	)	
Defendant and	)	
Third Party Plaintiff	)	
v.	)	
THE MARYLAND-NATIONAL CAPITAL	)	
PARK AND PLANNING COMMISSION	)	
	)	
Third Party Defendant	)	

OPINION AND ORDER

This matter came before the Court for a hearing on Plaintiff’s Motion for Partial Summary Judgment (Docket Entry #74), the Defendant Maryland-National Capital Park and Planning Commission’s Motion for Summary Judgment (Docket Entry #77), and Defendant Toll MD II, L.L.C.’s (previously known as Oxbridge Development at Washington Grove and hereinafter “Toll”) Motion for Summary Judgment (Docket Entry #79). After oral argument on April 24, 2007, the parties requested leave to submit Post Hearing Memorandums, which were due and received by the Court on May 18, 2007.

I.

This case arises out of a condemnation action the Plaintiff Town of Washington Grove (hereinafter the “Town”) has filed to acquire a 12 acre property located outside of its corporate limits. The Town is a Maryland municipal corporation organized and existing pursuant to the provisions of an Act of the General Assembly of the State of Maryland of May 18, 1937, and Article XI-E of the Constitution of the State of Maryland, and is located entirely within Montgomery County, Maryland. The subject property is described as the “Legacy Open Space Natural Area”(hereinafter “Legacy Open Space”) depicted on a preliminary plan of subdivision, which was approved by the Montgomery County Planning Board of the Maryland –National

**ENTERED**

SEP 06 2007

Clerk of the Circuit Court  
Montgomery County, Md.

Capital Park and Planning Commission (hereinafter the "Commission") on July 11, 2005. This property consists of approximately 12.5 acres, which is part of a larger parcel of land owned in fee simple by the Defendant Toll MD II, L.L.C.

The Defendant Toll impleaded the Commission as a third party defendant in a Complaint for Declaratory Judgment (Docket Entry #16) for the purpose of acknowledging that if Plaintiff were to condemn the subject property, the condemnation would satisfy the Commission's preliminary plan requirement that the property be dedicated as "Legacy Open Space." Although initially brought in as a Third Party Defendant, the Commission filed a Motion to Realign Parties (Docket Entry #60), which was denied by the Court on February 28, 2007. At that point in time, the Court found that the Commission was not an owner of the subject property or a recipient of the real property through dedication. On April 19, 2007 Toll conveyed a Deed of Dedication to the Commission regarding the real property.

The Plaintiff has moved for partial summary judgment on the issues of its legal authority to condemn the subject property and as to the public purpose for the said condemnation (Docket Entry #74). Defendant Toll filed a Motion for Summary Judgment on February 13, 2007 (Docket Entry #79) as did the Third Party Defendant Commission on January 31, 2007 (Docket Entry #77) whereby they both claim that the Town of Washington Grove does not have the legal authority to condemn nor the public purpose to support a condemnation.

Black's Law Dictionary defines condemnation as the "determination and declaration that certain property is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a governmental entity." In the case at bar, the Town of Washington Grove, a municipal corporation seeks to condemn 12.5 acres of property owned by the Defendant corporation. The Town has provided several citations of statutory authority that it alleges grants it the right to condemn property. The three statutes cited are Article 23A§ 2(24), Article 23A§ 7A, and Article 25A §224(a). The Court has reviewed the memoranda and the cited cases and statutory authority therein, and finds that these three statutory provisions taken together provide the Town of Washington Grove, a municipal corporation, with the authority to condemn.

According to Article 23A§ 2(24), Annotated Code of Maryland, municipal corporations have the power to "acquire by...condemnation real...property needed for any public purpose." The authority granted in this section to a municipal corporation is clear. One of the issues raised by the Defendant and the Third Party Defendant, however, is that the subject property lies adjacent

**ENTERED**

SEP 06 2007

Clerk of the Circuit Court  
Montgomery County, Md

2

*Town of Washington Grove v. Toll MD II, LLC, et al.*  
Civil No. 267037

to, and outside of, the corporate limits of the municipal corporation. As a result, they suggest that the Town is not able to condemn property outside of its corporate limits. However, Section 19 of Article 23A clearly provides the Town with the ability to annex land which "is contiguous and adjoining to the existing corporate area."

To further address this question, Article 23A§ 7A and Article 25§ 224(a) should be reviewed together. Pursuant to Article 23A§ 7A, Annotated Code of Maryland, municipal corporations in Maryland have the power to "exercise any power or authority conferred by the provisions of Article 25 of this Code." Article 25§ 224(a), Annotated Code of Maryland, entitled "Public Parks and Recreation," provides that the governing body of any municipal corporation may acquire land within or beyond the corporate limits of the municipal corporation in the manner authorized by law "for the acquisition of property for public purposes, for use as park and recreation areas and facilities." In addition, municipal corporations possess the implied power to purchase property outside their corporate limits whenever that power is necessary for the exercise of an express grant of power. *Birge v. Town of Easton*, 274 Md. 635, 337 A.2d 435 (1975). Article 25§ 224(a), Annotated Code of Maryland is such an express grant of power. Therefore, statutory authority and case law both support a municipal corporation's ability to condemn property beyond the municipal corporation's corporate limits.

The Commission argues that it has preemptive jurisdiction pursuant to several cited sections of Article 23A. One section it relies upon is Section 2(a) which states that ". . . nothing in this article shall be construed to authorize the legislative body of any incorporated municipality to pass any **ordinance** which is inconsistent or in conflict with any ordinance, rule or regulation passed, ordained or adopted by the Maryland – National Capital Park and Planning Commission." (Emphasis added). However, neither the Town or the Commission have passed, ordained or adopted any ordinance rule or regulation that are in conflict with each other. As such, this cited section is not relevant.

The Commission also argues that pursuant to Section 9(a) of Article 23A municipal corporations, in this case the Town, may not "exercise or perform, divest or duplicate, within its corporate limits any of the special powers or duties" given to non-municipalities except as may be provided by "consent or approval." Upon review, the Court expressly finds that there is no attempt by the Town to exercise any "special powers or duties" pertaining to the Commission,

**ENTERED**

SEP 06 2007  
Clerk of the Circuit Court  
Montgomery County, Md.

3

*Town of Washington Grove v. Toll MD II, LLC, et al.*  
Civil No. 267037

and that nothing in Subsection 9(a) prohibits condemnation of the Legacy Open Space by the Town.

The Commission further states that Section 9 (c)(1) of Article 23A operates to prohibit the Town from exercising its right to condemn land such as the Legacy Open Space. However, a full reading of the language contained in this Section clearly indicates that there is no constraint on the ability of the Town to condemn land such as the Legacy Open Space.

Upon consideration of all these sections, the Court expressly finds that none of the cited sections in Article 23A would create or confer any type of “preemptive jurisdiction” for the Commission which would stop the Town from exercising its powers of condemnation.

Further, the Court has reviewed the statutory provisions contained in Article 28 of the Annotated Code of Maryland, as amended, which have also been cited by the Commission in support of its contention that the Town has no legal authority to take the Legacy Open Space. The Court finds nothing in the statutory provisions of Article 28 that would prohibit, conflict with, or impliedly proscribe the Town of Washington Grove from condemning the subject property. The usual test of determining the validity of municipal action is reasonableness. *Cohen v. Baltimore County*, 229 Md. 519, 185 A.2d 185 (1962). The Court finds that based on all of the evidence presented, the action of the Town in seeking to condemn the Legacy Open Space is reasonable.

## II. Public Purpose for Taking

Article 23A § 2(24) provides that municipal corporations have the power to acquire by . . . condemnation real . . . property needed **for any public purpose**. (Emphasis added). The Town of Washington Grove’s Resolution No. 2005-06 articulates Plaintiff’s alleged public purpose for the acquisition of the property. Primarily, the purpose that is stated in the resolution is that the property will add to the public parks and recreation facilities, will protect the historic rural character and setting of the town and will serve as a natural buffer to protect the town from further development. This is a legitimate public purpose, particularly since the Town is designated as a National Historic District – and the statutory authority states “for any public purpose” without qualification. Further, it is established law that property may be taken for uses which may be reasonably anticipated in the future. *State Roads Com’n v. Franklin*, 201 Md. 549,

**ENTERED**

SEP 06 2007

Clerk of the Circuit Court  
Montgomery County, Md.

4

*Town of Washington Grove v. Toll MD II, LLC, et al.*  
Civil No. 267037

95 A.2d 99 (1953). As Counsel for the Plaintiff pointed out during argument, the Town's purpose in this proceeding is to protect the Legacy Open Space from possible development in the future.

In a matter of eminent domain, property is taken from its **owners** by public authority for some public purpose. *State v. One 1984 Toyota Truck*, 311 Md. 171, 188, 533 A.2d 659, 667 (1987) (emphasis added). The Commission contends that pursuant to an agreement entered into on April 19, 2007, Toll MD II, L.L.C. "dedicated" the subject property to the Commission to be used and maintained, in perpetuity, as a Legacy Open Space natural area. Blacks Law Dictionary defines "dedication" as "the donation of land or creation of an easement for public use." BLACKS LAW DICTIONARY 442 (8<sup>th</sup> ed. 2004). The Commission asserts that as a result of the Deed of Dedication that it now owns the subject property. However, the Court finds that the Commission cannot claim that it is the owner of the Legacy Open Space pursuant to the agreement. Under Maryland law, it is clear that "when a parcel of land is dedicated as a street or for other public use, the owner of the land retains his fee simple interest, subject to an easement for the public." *Maryland Nat'l Park and Planning Comm'n v. McCaw*, 246 Md. 662, 675, 229 A.2d 584 (1967). As such, Toll remains the owner of the Legacy Open Space. Upon questioning by the Court during the April 24, 2007 hearing counsel for the Commission, Ms. Rubin admitted that the use of the Legacy Open Space could conceivably change in the future, but that there would "be severe consequences" and a "significant number of barriers that they would have to follow through." As Ms. Rubin stated, if the Commission decided that they wanted to change the use of the Legacy Open Space, they would need Toll's permission. (Transcript of April 24, 2007 hearing at 41). Although Toll dedicated the land to the Commission, it is clear that it still retains ownership, and as such the Commission is not an owner of the property. Further, under the common law, an owner of the fee in land could manifest, by an **unequivocal** act, an intent to dedicate the land for a present or future public purpose. *Cox v. Board of County Com'ers of Anne Arundel county*, 181 Md. 428, 431-32, 31 A.2d 179, 18 (1943). There has been no such unequivocal act on the part of Toll since the agreement clearly sets out that the dedication is contingent upon approval of the final site plan and the final plat of subdivision. The Court agrees with the Plaintiff's contention that the Commission is not the owner of the Legacy Open Space and as such has no role in the condemnation of the property by the Town.

ENTERED

SEP 06 2007

Clerk of the Circuit Court  
Montgomery County, Md.

5

*Town of Washington Grove v. Toll MD II, LLC, et al.*  
Civil No. 267037

Further, the Commission's authority to acquire land pursuant to Section 5-19(a) Article 28 provides for the acquisition of land by "means of donations, purchases, or condemnation." Dedication is not included in this statutory provision. Even assuming *arguendo* that if the Commission was indeed the owner of the Legacy Open Space, since it is a "public body" (*Solyom v. The Maryland Nat'l Capital Park and Planning Comm'n*, 53 Md. App. 280, 452 A.2d 1283), any land owned and designated by a public body as parkland, open space or recreation area may be condemned. Section 12-104 (e)(1) of the Maryland Code, *Real Property Article*. It is clear that the interest in this property can be condemned pursuant to Section 2(24) of Article 23A.

If the Commission is not an owner of the property, the "real property" taken through condemnation would be that of Defendant Toll, not the Commission's. Therefore, there would be no hierarchical relationship, contrary to the assertions of the Commission. The Town of Washington Grove is the only governmental entity asserting its power of eminent domain. The Town is asserting its power against a non-governmental entity, Toll, the owner of the subject property. As such, the Court finds the hierarchy argument raised by Toll and the Commission to be inapplicable in the instant case.

The Commission also argues that the doctrine of prior public use is applicable in the instant situation. This doctrine outlines that once land has been lawfully appropriated to a public use, it cannot be taken by condemnation for another public use, unless the legislature in express terms or by necessary implication has authorized it to be so taken. *Northern Cent. Ry. Co. v. Mayor and City Council of Baltimore*, 134 Md. 658, 106 A. 159 (1919); *Florida Water Services Corporation v. Utilities Commission, Etc.* 790 So.2d 501, 26 Fla. L. Weekly D1560 (2001). However, the Court distinguishes the instant case since Toll's dedication is contingent, and as such the Legacy Open Space is not permanently committed to its current use. As such the Court finds that the doctrine of prior public use is not applicable. However, it notes that other jurisdictions have held that where a condemner plans to use a property in a manner identical to its current use, it is not necessary to have specific statutory authorization, but rather a general condemnation authority will suffice. *Florida*, 790 So.2d at 505. Other courts have recognized an exception to the prior public use rule if a general condemner demonstrates that it has a paramount public use, *Berger County Sewer Auth. v. Borough of Little Ferry*, 7 N.J.Super. 213, 218-19, 72 A.2d 886, 889 (N.J.Super.Ct.App.Div. 1950); Joris Naiman, Comment, Jud.

**ENTERED**

SEP 06 2007 6

Clerk of the Circuit Court  
Montgomery County, Md.

*Town of Washington Grove v. Toll MD II, LLC, et al.*  
Civil No. 267037

Balancing of Uses for Public Property: The Paramount Public Use Doctrine, 17 B.C.Env'tl.Aff.L.Rev. 893 (1990), or a "reasonable public necessity." *Minnesota Power and Light Co. v. State*, 177 Minn. 343, 225 N.W. 164, 167 (1929). Applying the "consistent use" rule would support the Town, in that the Town's general statutory authority to condemn property would be sufficient authority for the taking. Under the paramount public use doctrine, there would clearly be no uncertainty as to the future use of the land once the Town owns it since it would be dedicated permanently as "Legacy Open Space," and as such the greater public use and increased public benefit would justify the acquisition. The Town's September 6, 2005 Resolution clearly states that the Town is attempting to acquire the Legacy Open Space in order to protect the historic rural character and setting of the Town. In view of the admission by the attorney for the Commission that the future use of the land could change, the Court finds that the condemnation of the land by the Town would constitute a "higher" or "superior" use of the land, since this would be the only way that the Town could ensure that its historical rural nature is forever protected.

In light of the foregoing, and upon review and consideration of the Motion for Partial Summary Judgment filed by the Plaintiff, Town of Washington Grove, the Motion for Summary Judgment filed by the Defendant/Third Party Plaintiff Toll MD II, LLC, and the First Motion for Summary Judgment filed by the Third Party Defendant Maryland National Capital Park and Planning Commission, the supplemental memoranda filed, exhibits submitted and the entire record of this proceeding, it is this 3/8<sup>th</sup> day of August, 2007, by the Circuit Court of Montgomery County, Maryland,

ORDERED, that the Motion for Partial Summary Judgment of the Town of Washington Grove be, and it is hereby GRANTED, and it is further,

ORDERED, that the Motion for Summary Judgment filed by the Defendant/Third Party Plaintiff Toll MD, II, LLC be, and it is hereby DENIED, and it is further,

ORDERED, that the First Motion for Summary Judgment filed by the Third-Party Defendant, Maryland National Capital Park and Planning Commission, be and it is hereby DENIED.

**ENTERED**

SEP 06 2007

Clerk of the Circuit Court  
Montgomery County, Md.

  
MARIELSA A. BERNARD, Judge

*Town of Washington Grove v. Toll MD II, LLC, et al.*  
Civil No. 267037