

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

December 31, 2008

Timothy G. Willard, Esquire  
Fuqua and Yori, P.A.  
P.O. Box 250  
Georgetown, DE 19947

James D. Griffin, Esquire  
Griffin & Hackett, P.A.  
116 West Market Street  
P.O. Box 612  
Georgetown, DE 19947

**RE: City of Milford v. Key Properties Group, LLC**  
**C.A. No. S07C-07-023-ESB**  
**Letter Opinion**

Date Submitted: June 16, 2008

Dear Counsel:

This is my decision on Key Properties Group, LLC's motion to dismiss the condemnation action filed against it by the City of Milford. This is the second condemnation action that Milford has filed against Key<sup>1</sup> in order to obtain temporary construction and permanent utility easements through Key's Hearthstone Manor development so that the Milford can run a sewer line through Hearthstone Manor to DLM, LLC's West Shores development. I dismissed Milford's first condemnation action because Milford did not follow its charter when it voted to file the condemnation action against Key. Key filed an answer to the complaint, counterclaim and motion to dismiss. Milford and Key have filed briefs addressing the issues raised in the pleadings. I held

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<sup>1</sup> The condemnation action was actually filed against MG Development Company, LLC, Key's predecessor-in-interest. For ease of understanding, I have used the names of the current property owners of Hearthstone Manor and West Shores when referring to all other litigation, utility agreements and other matters even though the current owners' predecessors-in-interest were actually the parties involved.

a hearing on the first condemnation action. I declined to hold a hearing on the second condemnation action because the factual issues have not changed. Superior Court Civil Rule 71.1 provides that in a condemnation proceeding filed by a municipality that 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. Key argues that Milford's condemnation action should be dismissed because (1) Milford violated its charter, the Freedom of Information Act and the Real Property Acquisition Act when it approved and filed the condemnation action, (2) Milford is not using its condemnation power for a public purpose, (3) Milford should be estopped from violating a utility agreement that it has with Key, and (4) Milford did not name the actual property owner, mortgage holder and agricultural tenant as defendants. I have concluded that Key's arguments are without merit. Therefore, I have granted Milford's request for an order of possession.

### **Background**

Hearthstone Manor and West Shores are adjacent residential real estate development projects in Milford. Milford annexed Hearthstone Manor before it annexed West Shores. Milford and Key entered into a Utility Agreement on April 24, 2000. The Key Utility Agreement provides that Milford will install sewer and water systems up to Hearthstone Manor and that Key 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 once Key turns them over to Milford. 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. Key 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. Key has installed sewer lines within Hearthstone Manor, but not up to West Shores. The easements obtained by Milford when it approved the Hearthstone Manor development plan are not wide enough for the actual construction of a sewer line. When Milford refused to allow DLM to use Milford's easements through Hearthstone Manor to connect to the sewer lines that had been installed by Key in Hearthstone Manor, DLM filed suit against Milford, Key and others in the Superior Court on June 15, 2005. Milford and DLM entered into a Utility Agreement on September 15, 2005. The DLM Utility Agreement provides that DLM shall be responsible for the cost of extending the sewer line through Hearthstone Manor to West Shores. It also provides that Milford has all of the easements necessary for the sewer line construction.

Milford and DLM 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 in Hearthstone Manor and that Milford will also allow DLM to use the easements in Hearthstone Manor. Although Key was a defendant in the litigation, it was not a party to the settlement agreement. Milford then told DLM that it could use its easements in Hearthstone Manor. DLM and a contractor went to Hearthstone Manor on May 3, 2006. Key called the police and DLM and the contractor were ordered to leave Hearthstone Manor. Milford then filed a condemnation action against Key to obtain temporary construction and permanent easements in Hearthstone Manor wide enough to allow for

the construction of a sewer line. I dismissed the first condemnation action because Milford did not follow its charter when the city council voted to file the condemnation action. Milford then filed a second condemnation action for the same purpose.

### **The Milford Charter**

Key argues that Milford violated its charter when the city council (1) voted in public to authorize filing the condemnation action against Key without first publishing the matter on the agenda for the next city council meeting, (2) voted to reauthorize filing the condemnation action after it had already been filed, (3) did not pass an ordinance or resolution authorizing the filing of the condemnation action, and (4) decided to assign the condemned easements for the construction of a sewer line to DLM.

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 include the power to acquire lands, tenements, real property or interests therein by condemnation for the purpose of 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.<sup>2</sup> 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 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.<sup>3</sup>

The city council has met seven times to consider the condemnation action.<sup>4</sup> However, despite meeting this many times, the city council only voted four times on the condemnation action. The

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<sup>2</sup> See 56 Am. Jur. 2d *Municipal Corporations, Etc.* §175 (2007).

<sup>3</sup> Milford's charter does not have a Section 2.05.

<sup>4</sup> March 26, April 9, April 23, June 11, July 23, August 13, and October 22, 2007.

first two votes were on April 23, 2007, to authorize the filing of the condemnation action and to try to negotiate a settlement with Key. The third vote was on August 13, 2007, to give Key a 90-day extension to respond to the condemnation action. The fourth vote was on October 22, 2007, to reauthorize the already-filed condemnation action. The first three votes were taken in public after executive sessions. The fourth vote was taken in public without an executive session.

#### The April 23, 2007 Meeting

The agenda for this meeting stated that there would be an executive session to deal with a “Legal Matter/Personnel.” A motion was made and seconded during the public meeting to go into an executive session to deal with a litigation issue and personnel matter. After the city council returned to the public meeting, the city council voted 5 to 4 to proceed with an action to condemn certain lands in Hearthstone Manor for a sewer line to West Shores. The city council then voted 8 to 0 to try to negotiate a settlement Key. Milford filed the condemnation action against Key on July 26, 2007.

#### The August 13, 2007 Meeting

The agenda for this meeting stated that there would be an executive session to deal with “Litigation.” A motion was made and seconded during the public meeting to go into an executive session to deal with “litigation issues.” After the city council returned to the public meeting, the city council voted 8 to 0 to give Key a 90-day extension to respond to the condemnation action.

#### The October 22, 2007 Meeting

The agenda for the meeting stated that there would be a special meeting to deal with the “Milford v. MG Development Condemnation Authorization.” The agenda did not list an executive session and one was not held. During the public meeting, Milford’s attorney stated that when the

city council voted at the public meeting on April 23, 2007, to file the condemnation action that it did so before the vote on the matter was placed on the agenda. Milford's attorney noted that the vote should have taken place at the next public meeting after the issue of the condemnation action had first been placed on the agenda for the public meeting. In order to correct this procedural problem, Milford's attorney advised the city council to reauthorize its previous actions. The authorization was, as I noted before, listed on the agenda for the October 22, 2007 meeting. A motion was made and seconded to authorize the previous action taken by the city council to proceed with the condemnation action. The city council passed the motion unanimously.

#### The City Council Votes

Key argues that Milford violated its charter when the city council voted in public to file the condemnation complaint against Key without first putting the vote on the agenda at the meetings on April 23, and August 13, 2007. These were the two meetings where the city council discussed filing the condemnation action in executive sessions and then immediately after completing the executive sessions went into a public meeting and voted to file the condemnation action, attempt to negotiate a settlement with Key, and give Key a 90-day extension to respond to the condemnation action. Key is correct. The Milford Charter clearly requires that after the city council has gone into an executive session it must first put the matter that is up for a vote on the agenda for the next public meeting before voting on it. The vote must also be done in public. The city council did not do this for the three votes regarding the condemnation action that were taken at the public hearings on April 23, and August 13, 2007. Therefore, the actions taken by the city council at these two meetings are void.<sup>5</sup>

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<sup>5</sup> *The City of Milford v. MG Development, LLC*, 2007 WL 969032 (Del.Super. March 27, 2007).

Milford argues that this does not matter because the city council realized that it had not correctly followed its charter at the two earlier meetings and corrected its mistake by reauthorizing the filing of the condemnation action at the public meeting on October 22, 2007. The agenda for the city council meeting on this date listed the “Milford v. MG Development Condemnation Authorization” as an agenda item. The city council at this public meeting voted unanimously to reauthorize the condemnation action that it had previously authorized and filed against Key.

Key does not make a procedural challenge to the city council’s action taken at the meeting on October 22, 2007. It instead argues that Milford’s charter does not allow the city council to reauthorize what it has previously done incorrectly. Milford argues that it can do this. The Milford charter is silent on this issue. It only discusses the procedure that the city council must follow when it exercises its authority. In any event, I have concluded that Key’s argument is of no consequence given the nature of the action taken by the city council and the status of the already-filed condemnation action when the city council reauthorized it. Milford clearly has the authority to condemn land for a sewer line.<sup>6</sup> Thus, the city council was acting well within its authority when it voted to reauthorize the condemnation action at the public hearing on October 22, 2007. Moreover, the condemnation action was barely underway when the city council voted to reauthorize it. Key’s attorney had only entered his appearance and Key and Milford were still trying to negotiate a resolution of the dispute. Thus, when the city council voted to reauthorize the condemnation action, it had only been filed and served on Key. As such, the condemnation action was not completed, leaving the city council with the choice of either dismissing or proceeding with it.

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<sup>6</sup> Milford, Del., C. (Charter) § 2.01(a).



Key argues that the city council should have voted to dismiss the condemnation action and then voted to file it again a third time if the city council wanted to proceed with it. Milford argues that this would have been a waste of time and accomplished nothing. I agree with Milford. There is no substantive difference between (1) dismissing the already-filed condemnation action and filing it again, or (2) reauthorizing the already-filed condemnation. Proceeding as Key suggests would not have given the citizens of Milford any more notice and opportunity to address the condemnation action than they had at the public meeting on October 22, 2007. It would only have taken more time and cost more money. The law generally requires that a municipality substantially comply with its charter when it takes action.<sup>7</sup> The city council has done that.

#### Ordinance and Resolution

Key argues that Milford violated its charter because the city council did not pass an ordinance or resolution when it authorized the filing of the condemnation action. The Milford charter lists eight acts that the city council must do by ordinance.<sup>8</sup> The filing of a condemnation action is not one of them.<sup>9</sup> The Milford charter further provides that all other acts by the city council may be done by ordinance or resolution.<sup>10</sup> The Milford charter is silent on what is a resolution. As a practical matter, a resolution encompasses all actions of a municipality other than ordinances.<sup>11</sup> Moreover, there is

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<sup>7</sup> *Brett v. City of Rehoboth*, 1986 Del. Ch. LEXIS 431 (Del. Ch. June 26, 1986).

<sup>8</sup> Milford, Del., C. (Charter) § 4.11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 5 McQuillen Mun. Corp. § 15.02, at 59 (3<sup>rd</sup> Ed.).

no substantive difference between a resolution and a motion.<sup>12</sup> Indeed, the terms are considered to be synonymous.<sup>13</sup> The city council acted by motion when it authorized and reauthorized the filing of the condemnation action. This was a proper way for the city council to exercise its authority.

#### Assignment

Key argues that Milford's charter does not allow Milford to condemn Key's land for easements for a sewer line and then assign the easements to DLM. Key's argument is not factually correct. Milford has made it clear that it will retain ownership of the easements and the sewer line. The only thing that will happen is that a construction company, with Milford's permission, will go to Hearthstone Manor and use Milford's easements to construct a sewer line to West Shores at DLM's expense. Milford's charter does not prohibit this.

#### The Freedom of Information Act

Key argues that Milford violated the Freedom of Information Act ("FOIA")<sup>14</sup> when it met to discuss and vote on the condemnation action. Although the city council met seven times to discuss the condemnation action, it only voted on it four times. Thus, what happened at the other meetings is irrelevant because it is not possible to void an action that was not taken.<sup>15</sup> Of the three meetings where the city council voted, Key only argues that the city council of Milford violated the FOIA at the meetings held on April 23, and August 13, 2007. Having concluded that Milford violated its charter at these meetings, there is no need for me to consider whether it also violated the FOIA. Key

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<sup>12</sup> 5 McQuillen Mun. Corp. § 15.08, at 85 (3<sup>rd</sup> Ed.).

<sup>13</sup> 5 McQuillen Mun. Corp. § 15.08, at 84 (3<sup>rd</sup> Ed.).

<sup>14</sup> 29 *Del.C.* §§ 10001 - 10005.

<sup>15</sup> See 29 *Del.C.* §§ 10141 - 10142.

does not argue that the city council violated the FOIA at the public meeting on October 22, 2007. Thus, the FOIA is not implicated at the meeting at which the city council voted to reauthorize the filing of the condemnation action.<sup>16</sup>

### The Real Property Acquisition Act

Key argues that Milford violated the Real Property Acquisition Act (“RPAA”) by not following certain procedures before filing the condemnation action.<sup>17</sup> The RPAA sets forth certain procedures that a municipality must follow when it condemns land.<sup>18</sup> These procedures have been determined to be directory rather than mandatory.<sup>19</sup> Therefore, noncompliance with them may be excused in certain circumstances.<sup>20</sup> If there is noncompliance, then a municipality must demonstrate a valid excuse for its noncompliance. Valid excuses include a good faith effort to comply with the procedures or a showing that compliance would have been futile.<sup>21</sup> Key argues that Milford violated the RPAA by:

1. Not allowing Key’s representative to accompany the appraiser during the inspection of the property.
2. Not giving Key a written statement of the basis for determining the amount to be paid for the property to be condemned and for damages to the remaining portion of the property.

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<sup>16</sup> See 29 *Del.C.* § 10004.

<sup>17</sup> 29 *Del.C.* § 9505.

<sup>18</sup> *Id.*

<sup>19</sup> *City of Dover v. Cartanza*, 541 A.2d 580, 583 (Del. Super. March 3, 1988).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

3. Not updating its appraisal after the dismissal of the prior condemnation action and instead just re-offering the same amount as before.

Key is correct. Milford did not do these things. Milford argues that it does not matter because compliance with the RPAA would have been futile. I agree.

Milford and Key are no strangers to each other and Milford's need to use a small portion of Hearthstone Manor for a sewer line to West Shores is no surprise to Key. Key's plan to develop Hearthstone Manor went through a lengthy approval process by Milford. As part of this process, Milford required Key to grant it easements for a sewer line so that Milford could provide sewer to West Shores. The problem for Milford and Key is that West Shores needs sewer service more quickly than Milford expected. It is a problem for Milford because its existing sewer easements in Hearthstone Manor are not wide enough to allow for the construction of a sewer line. Milford's need to use the sewer easements now instead of later is a problem for Key because it may well affect the timing of its construction plans. Ideally, Key would install the sewer line when it is ready to develop those phases of Hearthstone Manor that will be served by it. Having to prepare for it now may well cause Key to spend money and commit to certain types of housing before it planned to do so. Key can not claim that Milford's actions will affect how the land being condemned is developed because the land was already burdened with an easement in favor of Milford. In any event, in that period of time after the first condemnation action was dismissed and before the second condemnation action was filed, Milford and Key have engaged in extensive negotiations to resolve this matter amicably.

Key, of course, prefers that Milford not condemn any of its property. Instead, Key argues that Milford should build a sewer line around Hearthstone Manor to get to West Shores. Milford is opposed to this because it is too expensive. Milford wants to take the more direct and cheaper route of going directly through Hearthstone Manor. When it became clear that Milford would not build

a sewer line around Hearthstone Manor, Key then proposed that Milford construct, at its expense, a sewer line, including laterals and stub outs, in accordance with the approved plans for Hearthstone Manor, as well as paying for certain legal, construction and engineering costs that Key has incurred. Key basically wants Milford to construct, at its expense, the sewer line that Key would eventually have constructed at its own expense. Milford has declined this proposal, instead proposing that Key share in the cost of a sewer line that it will benefit from. Key has refused, leaving the parties at a stalemate. Obviously, no amount of negotiation or compliance with the RPAA will resolve this stalemate. Given this, it is obvious to me that Milford's full compliance with the RPAA would have been futile and a waste of time because of the nature of the parties' concerns.

#### Public Purpose

Key argues that Milford's condemnation of its land for the installation of a sewer line to West Shores is not for a public purpose because the real purpose of the condemnation, according to Key, is to comply with an agreement settling the litigation between Milford and DLM. Milford argues that all of its actions in settling the litigation and filing the condemnation action are for the public purpose of providing sewer service to Milford residents. The litigation between Milford and DLM was over the provision of sewer service by Milford to West Shores. Milford had always planned on providing sewer service to West Shores by going through Hearthstone Manor. This is why Milford required Key to give it sewer easements across Hearthstone Manor during the development approval process for Hearthstone Manor. However, when West Shores was ready for sewer service, the sewer lines in Hearthstone Manor, while started, were not yet up to the property line with West Shores. This led to litigation between DLM, Milford and Key. Milford settled the litigation by agreeing to take whatever steps are necessary to provide sewer service to West Shores. Milford then filed the

condemnation action against Key to obtain temporary construction and permanent easements so that it could build a sewer line through Hearthstone Manor to West Shores. Thus, the whole point of the settlement and the condemnation action is merely to do what Milford always planned to do. Milford has the power, pursuant to its charter, to condemn land for the construction of a sewer system.<sup>22</sup> The power to condemn land for this purpose has almost universally been considered to be for a public purpose.<sup>23</sup> There is no doubt that Milford's efforts to provide sewer service to the residents of West Shores is for a public purpose.

### Estoppel

Key argues that Milford should be estopped from violating the Utility Agreement and notes on the Hearthstone Manor development plan. The Utility Agreement provides that Key will install all of the sewer and water systems within Hearthstones Manor and that Milford will assume responsibility for the sewer and water systems once they are done. Key has not yet turned the systems over to Milford. The "notes" on the Hearthstone Manor development plan provide that Milford will not use the easements in Hearthstone Manor until all of the phases in Hearthstone Manor have been completed. Key also reserved the right to relocate these easements subject to Milford's approval.

Milford argues that in these agreements it never promised not to use its condemnation power against Key and, therefore, can not be estopped from using it now. I agree with Milford. To succeed on a claim of promissory estoppel, Key must prove that (1) Milford made a promise to Key with the intent to induce action or forbearance, (2) Key actually relied on the promise, and (3) Key suffered

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<sup>22</sup> Milford, Del., C. (Charter) § 2.01(a).

<sup>23</sup> 11 McQuillin Mun.Corp., § 32.60, at 483 (3<sup>rd</sup> Ed.).

injury as a result.<sup>24</sup> Equitable estoppel is based on similar principles. To succeed on a claim of equitable estoppel, Key must show that it was induced to rely detrimentally on Milford's conduct.<sup>25</sup> Key can not meet these requirements. The condemnation of a portion of Hearthstone Manor for a sewer line was, quite simply, a matter that Milford never considered when it signed the utility agreement and approved the Hearthstone Manor development plan. Milford believed at the time that the easements that it retained would be adequate to serve West Shores. When that did not work out as contemplated, Milford used its condemnation power to obtain easements large enough to construct a sewer line. Throughout the entire process, Milford never promised or indicated to Key that it would not use its condemnation powers against it. Thus, Key could not have been misled by a promise or action that Milford never made or took.

#### Parties

Key argues that Milford filed the condemnation action against the wrong party and failed to name the mortgage holder and agricultural tenant as defendants. The property is owned by Key. David Wilkins, a farmer, has an agreement with Key to farm a part of the property. Delaware National Bank has a mortgage on the property. Milford originally filed the condemnation action against MG Development, LLC. Milford did not name Wilkins and Delaware National Bank as defendants. Milford filed a motion to amend the complaint to correct this. I granted Milford's motion and it did file an amended complaint naming Key as the owner of the property. I consider this issue to be moot now. Wilkins and Delaware National Bank are still not named as defendants. However, they do not have to be parties to this litigation. Only one of the owners of the property to

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<sup>24</sup> *VonFeldt v. Stifel Financial Corp.*, 714 A.2d 79, 87 (Del. August 7, 1998).

<sup>25</sup> *Id.*

be condemned has to be named as a defendant in a condemnation action.<sup>26</sup> There is no requirement that a tenant or mortgage holder has to be named as a defendant.

Conclusion

Key's motion to dismiss the condemnation is denied, and Milford's request for an order of possession is granted.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary

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<sup>26</sup> 10 *Del.C.* § 6105(a).