

RISK MANAGEMENT BULLETIN

No. 105

January 5, 2007

Eminent Domain

Public Scrutiny of Private Not for Profit Economic Development Entities Utilized by Local Governments to Exercise Eminent Domain Power

Introduction

In a case recently decided by the Court of Appeals of Maryland (*City of Baltimore Development Corp. v. Carmel Realty Associates*, decided November 3, 2006), the issue of governmental use of private development corporations to exercise eminent domain power intersected with the requirements of the Open Meeting Act and Maryland's Public Information Act ("MPIA"). Although the crucial eminent domain issues were not directly before the Court of Appeals in this case, the issue of *public scrutiny* of eminent domain power was. Accordingly, the issues resolved in the case are important to any local government which utilizes, or contemplates utilizing, a private development corporation to exercise, or assist it in exercising, the governmental power of eminent domain.

In essence, the Court of Appeals established in this case that the City of Baltimore Development Corporation (the "BDC"), a not-for-profit corporation, was formed to develop and implement long-range development strategies for commercial, industrial, office, residential, and other development in the City of Baltimore. When certain property owners attempted to gain access to meetings of the BDC, and to obtain records from it under the MPIA, their requests were denied. In response, they filed a lawsuit.

The Court of Appeals determined that, due to its "intertwined" relationship with the City of Baltimore, the BDC met the definition of "public body" in the Open Meetings Act, as it was a multimember board, appointed by the Mayor, that included in its membership at least 2 individuals not employed by the State or City. Based upon the functions it was empowered to perform, it was clear to the court that the BDC had "been able to cloak the business of the Citizens of the City of Baltimore behind the veil of a supposedly private corporation." Similarly, the Court deemed the BDC an "instrumentality" of the City, and, as such, ruled that it was subject to the requirements of the MPIA. Some of the aspects of the BDC's relationship with the City that make it an instrumentality of the City include: (1) the BDC's Board of Directors are nominated or appointed by the Mayor of Baltimore; (2) the Mayor has the power to remove members of the Board before their terms of office expire; (3) the Mayor has the power to fill vacancies on the Board; (4) the City's Commissioner of the Department of Housing and Community Development and the City's Director of Finance are permanent

Founding Organizations



members of the Board; (5) the BDC receives a substantial portion of its budget from the City; and (6) the BDC is authorized to prepare and adopt Urban Renewal Plans, Unit Development, Industrial Retention Zones, and Free Enterprise Zones which are traditionally governmental functions. Thus, even though the BDC was not created by a legislative act, the factors listed above demonstrated to the court that the BDC is subject to substantial control by the City.

The Impact of *City of Baltimore Development Corp. v. Carmel Realty Associates* on Maryland Local Governments

In light of this case, Maryland local governments must be mindful of their relationships with privately created economic development corporations, or, for that matter, any multimember board or entity that may fall within the definition of “public body” in the Open Meetings Act or “instrumentality” or “unit” in the MPIA. If the statutory criteria are met, these entities will be required to operate pursuant to the requirements of the Open Meetings Act and the MPIA.

Beyond the issue of public scrutiny of privately created economic development corporations, Maryland local governments must consider other important issues when such entities are utilized. These issues include:

(1) whether the entity can be deemed a “local government” under the Local Government Tort Claims Act (“LGTCa”)¹ and, consequently, be entitled to share in that statute’s protections, including its limitation of liability and preclusion of awards of punitive damages; and

(2) whether the entity can be protected by governmental immunity. With regards to the second issue, the question is whether a reviewing court will deem the functions performed by the entity to be “governmental” or “proprietary” (corporate). Governmental immunity only protects local governments from non-constitutional State tort claims when they are engaged in governmental as opposed to corporate functions;

(3) whether the entity has adequate insurance coverage; and

(4) whether the entity is eligible to participate in LGIT’s insurance program.

Concerning the last issue, LGIT’s insurance program is designed for its local government members. LGIT also extends membership to “[a]ny Public Entity that is sponsored for coverage in the Excess Liability Pool pursuant to the Trust Agreement.” The definition of “public entity” is limited to (i) the State or any political subdivision or unit, agency or instrumentality of the State; (ii) any Local Government, or any unit, agency or instrumentality

¹ To date, only one economic development entity, the Howard County Development Authority, is expressly included in the LGTCA.

of a Local government; or (iii) any nonprofit or nonstock corporation that is exempt from taxation under Section 501(c)(3) or (4) of the [IRS] Code and receives 50 percent or more of its annual operating budget from the State or local government. LGIT's insurance coverage also extends to "[a]ll boards, councils, commissions and units and members thereof that are operated exclusively by, under the exclusive jurisdiction of and directly controlled by a Member, while acting within the scope of their authority."

When a local government utilizes a private entity such as the BDC, it is imperative that public officials and their legal counsel address the following questions:

- (1) For what specific purposes is the entity being used?**
- (2) Are these purposes ones ordinarily exercised by government and not by private corporations?**
- (3) Should the entity be included in the LGTCA?**
- (4) Does the entity fall within the definition of "public body" in the Open Meetings Act?**
- (5) Does the entity qualify as a unit or instrumentality of local government under the MPIA?**
- (6) Does the entity qualify for LGIT's insurance program as either a member or a sponsored entity?**

Conclusion

From this case, it is important to remember that eminent domain is a quintessential governmental power, the exercise of which will be carefully scrutinized by the courts. When local governments utilize private development corporations to assist them in exercising eminent domain, the courts may view such corporations to be nothing more than extensions of the government. If the corporation is so viewed, it will be required to operate "in the open" under the dictates of the Open Meetings Act and the MPIA. Because of the invasive impact of eminent domain on the private ownership of real property, the courts seemingly will advance rationales that allow thorough and exacting public scrutiny of the process.

The specific issues and questions included in this Bulletin should be addressed to your county or municipal attorney or solicitor. If you wish to discuss these issues with Underwriting Services, please contact Hank Schomburg, Director, Loss Control & Underwriting Services, at 1-800-673-8231.

This bulletin is intended to be merely informational and is not intended to be used as the basis for any compliance with Federal, State or local laws, regulations or rules, nor is it intended to substitute for the advice of legal counsel.