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May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 423 and House Bill 875

Dear Governor O'Malley:

We have reviewed Senate Bill 423 and House Bill 875, identical bills entitled "Local Government - Street Lighting Equipment," for constitutionality and legal sufficiency. While the bills may be signed into law, it is our view that they must be administered in a way that will protect the right to just compensation as guaranteed by the Maryland and federal constitutions.

Senate Bill 423 and House Bill 875 authorize a local government to request, and require an electric company to sell, street lighting equipment located within the local jurisdiction to the local government. The bills further provide that the local government must pay fair market value for the street lighting equipment.

Both the Fifth Amendment to the Federal Constitution and Article III, § 40 of the Constitution of Maryland prohibit the taking of private property for public use without the payment of just compensation to the property owner. *King v. State Roads Commission*, 298 Md. 80, 83 (1983). The Maryland provision has generally been read as *in pari materia* with the federal provision. *Id.* at 83-84. Article III, § 40 provides:

The General Assembly shall enact no law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

Senate Bill 423 and House Bill 875, by requiring an electric company to sell its electric lighting equipment on request of a local government, provides for the taking of private property. This taking is for a public use, as required by Article III, § 40 and the Fifth Amendment. *Webster v. Pole Line Co.*, 112 Md 416, 429 (1910) (The planting of poles and stringing of wires for the purpose of street lighting is a public use). Moreover, the bills require the payment of fair market value, which is generally understood to constitute “just compensation.” *City of Baltimore v. Concord*, 257 Md. 132, 141 (1970). However, the bills do not expressly provide for the amount of compensation to be determined by a jury, as required by the clear language of Article III, § 40.

It is our view that the failure to expressly include the requirement of a jury trial on the matter of just compensation does not render the bills entirely invalid. Instead, it is our view that the statutes can be implemented in a constitutional manner by use of the local governments’ condemnation powers to gain possession of street lighting equipment when the electric company objects to the sale.¹ *Becker v. State*, 363 Md 77, 92 (2001); *Atlantic & P. Tel. Co. v. Chicago, R.I. & P.R. Co.*, 6 Biss. 158, 2 F.Cas. 176 (C.C.Ill. 1874) (Reading Act to require agreement or condemnation).

We note that both bills have been amended to provide that “[a]ny dispute between an electric company and a local government arising under this subsection shall be submitted to the Public Service Commission for resolution.” The subsection in question, however, is § 5-101(e), which relates to the right to use space on a pole, lamppost or other mounting surface previously used in the local jurisdiction by the lighting company for street lighting purposes. Thus, the provision does not cover disputes relating to the taking of, and fair market value of, the street lighting equipment under § 5-101(b) and (c).²

¹ All local governments have the authority to acquire property needed for a public purpose by condemnation. Article 23A, § 2(b)(24) (Municipal Corporations); Article 25 § 11A (Commissioner Counties); Article 25A § 5(B) (Charter Counties); Article 25B § 13 (Code Counties). The proceedings are governed by Maryland Rule 12-201 *et seq.*

² Because some of the discussion on the floor indicates that at least some members may have understood the Public Service Commission remedy to apply more broadly, *see* Senate Proceedings, March 13, 2007, at 32:43 and following, we further state that it is our view that extension of the remedy by appeal to the Public Service Commission to these matters would violate Article III, § 40 because no jury determination would be available at the Public Service Commission or on appeal from its decision. Public Utility Companies Article §§ 3-202 and 3-203. *See American Telephone and Telegraph v.*

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For the above reasons, it is our view that where an electric company is unwilling to sell street lighting equipment under the provisions of these bills, the local government must proceed by way of a condemnation action.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/KMR/kmr

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Richard S. Madaleno, Jr.
The Honorable Jane E. Lawton

Pearce, 71 Md 535, 547 (1889) (Statute providing remedy in action for damages after taking would be unconstitutional).