OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

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MEMORANDUM

October 25, 2004

TO: Edgar Gonzalez, Deputy Director for Transportation Policy
Department of Public Works and Transportation

VIA: Marc Hansen, Chief MPH
General Counsel Division

FROM: Clifford L. Royalty
Associate County Attorney CLR

RE: Right-of-Way Encroachments

Question

In a memorandum dated August 23, 2004, you asked what form of County approval is required when a developer proposes to encroach upon the County right-of-way ("ROW").

Answer

The requisite form of County approval is a function of a developer's property rights. When a fee simple owner of land, including a developer, dedicates the land comprising the ROW to the County subject to an express condition, or reservation, that allows for the owner to occupy the ROW, County acceptance of the dedication is sufficient to allow the occupation. Any other encroachment upon the ROW requires County approval under Chapter 49 of the County Code, except as to dedicated ROW in "rural" areas.

Background

In your memorandum, you note that "[f]or over 20 years," the Department of Public Works and Transportation ("DPWT") has entered into "a few agreements with different developers granting them rights to build under or over" the ROW.[1] You describe three representative factual scenarios that have given rise to these agreements. I have paraphrased the three scenarios as follows:

1. Underground or overhead rights (for parking or bridges) are requested at the time of subdivision approval and contemporaneous with the dedication of the ROW.

[1] This opinion does not address the legality of those agreements.

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2. The property owner, post-dedication with no prior express reservation of any right to encroach upon the ROW, seeks to place facilities in the ROW.

3. Underground or aerial rights are requested on land that was dedicated by a different owner or acquired in fee simple by the County.

You have asked this office to advise you as to how to contend with each of these scenarios.

Analysis

The County's authority over the ROW is derived from both its traditional police powers and from the Express Powers Act, including Article 25A(B), which authorizes the County to grant "any right or franchise in relation to any highway, street, road, lanes, alley or bridge." Echoing that language, § 49-11 of the County Code provides that "[n]o franchise or right in relation to any highway, avenue, street, lane or alley, either on, above or below the surface of the same, shall by granted by the council" until certain procedures have been complied with, including a written recommendation by the County Executive. Section 49-12 then provides that the County Council, after considering the Executive's recommendation, may grant a franchise for "a period not longer than twenty-five (25) years" with a right to renew the franchise "not exceeding in the aggregate twenty-five (25) years."

The County's franchise law, as codified in §§ 49-11 through 49-15 of the County Code, is not of recent vintage; its progenitor is contained in a public local law that was enacted by the General Assembly in 1910. *See 1910 Md. Laws, Ch. 484, §§ 177v-177z.* The operative language of the County's franchise law has changed little since then. At the time that the General Assembly promulgated the franchise law and well into the present, the primary purpose of such laws has been to allow traditional public utilities, the so-called "natural monopolies," including gas, electric, and the like, to occupy the ROW. *Delmarva Power & Light Co. v. Public Service Commission*, 370 Md. 1, 803 A.2d 460 (2002); *See also Easton v. Public Service Commission*, 379 Md. 21, 31, 838 A.2d 1225, 1231 (2003) (citing *Baltimore Steam Co. v. Baltimore Gas and Electric Co.*, 123 Md. App. 1, 716 A.2d 1042 (1998), *vacated as moot*, 353 Md. 142, 725 A.2d 549 (1999)). That historical purpose is reflected, for example, in § 49-12 of the County Code, which requires a franchise "to secure efficiency of public service at reasonable rates." But the franchise law does not limit the grant of a "franchise or right in relation to any highway . . ." to utilities. Nor, as we understand it, has the County's past practice assumed such a limitation. County franchises have been granted for occupations of the ROW by non-utilities. In order to respond to your inquiry, we must place that past practice and the County law in context, beginning with a definition of the term "franchise."

What is a franchise? The Maryland courts have indistinctly defined it as "'a special privilege conferred by the State on certain persons, and which does not belong to them of common right.'" *Baltimore Steam Co.*, 123 Md. App. at 21, 716 A.2d at 1052 (quoting *State v. The Philadelphia, Wilmington, and Baltimore Railroad Company*, 45 Md. 361, 379 (1876)); *See*

also 36 *Am. Jur. 2d, Franchises from Public Entities*, §1 (2004). Such a privilege can be granted by the General Assembly or "by a local government pursuant to power specifically delegated by the General Assembly." *Baltimore Steam Co.*, 123 Md App. at 21, 716 A.2d at 1052. A franchise is a "valuable property right," but "it is neither real estate nor an interest in real estate, even though the exercise of a franchise by installing conduits and occupying space in the public streets will usually result in the acquisition of an easement." *Id.; See also Kelly v. Consolidated Gas Electric Light and Power Company*, 153 Md. 523, 138 A. 487 (1927). A franchise is an "'incorporeal hereditament.'" *Baltimore Steam Co.*, 123 Md App. at 21, 716 A.2d at 1052. Its "closest functional relative" is a license "although a license is 'less extensive in its duration and incidents than a franchise.'" *Id.* (quoting, *Huebschmann v. Grand Company*, 166 Md. 615, 622, 172 A. 227, 230 (1934)). A franchise is "commonly associated with a utility company's right to dig up public streets in the course of providing its particular service." *Id.* "Minor encroachments" into the ROW can be authorized "by license, permit, or perhaps even acquiescence," but more permanent encroachments "require the type of ongoing and widespread authorization that only a franchise can provide." *Id.* (citing, *Huebschmann v. Grand Company*, 166 Md. 624-625, 172 A. at 231).

The privilege to occupy the ROW through a franchise, is not the sole source of ROW occupancy rights. A right to occupy the ROW may derive from one's interest in the property that comprises the ROW which, in turn, may arise from the manner in which the ROW was created. Generally, a ROW is "nothing more than a special and limited right of use . . . ." *Gregg Neck Yacht Club v. Kent County*, 137 Md. App. 732, 754, 769 A.2d 982, 994 (2001) (quoting *Desch v. Knox*, 253 Md. 307, 311, 252 A.2d 815, 818 (1969)). The ROW is, at minimum, "merely a right of passage." *Bishields v. Campbell*, 200 Md. 622, 624, 91 A.2d 922, 923 (1952). And it is "synonymous" with an easement. *Gregg Neck Yacht Club*, 137 Md. at 754, 769 A.2d 995 (quoting *Chevy Chase Land Co. v. United States*, 355 Md. 110, 126, 733 A.2d 1055, 1064 (1999) (internal citations omitted)).

The ROW is usually created by dedication. Dedications are "'voluntary offers to dedicate land to public use, and the subsequent acceptance, in an appropriate fashion, by a public entity.'" *Gregg Neck Yacht Club*, 137 Md. App. at 755, 769 A.2d at 995 (quoting *City of Annapolis v. Waterman*, 357 Md. 484, 503, 745 A.2d 1000, 1010 (2000)). The fee owner who dedicates the land "retains a fee simple interest in the dedicated parcel," including the bed of a roadway for example, "'subject to an easement for the public.'" *Gregg Neck Yacht Club*, 137 Md. App. at 755, 769 A.2d at 995 (quoting *Maryland-National Capital Park and Planning Commission v. McCaw*, 246 Md. 662, 229 A.2d 584 (1967)). *See also North Beach v. North Chesapeake Beach Land & Improvement Company*, 172 Md. 101, 191 A. 71 (1937); *Montgomery County Code,* § 49-14. Under County law, "dedication to the public is complete and the interest of the public has vested when the subdivision plat is filed." *Maryland-National Capital Park and Planning Commission*, 246 Md. at 673, 229 A.2d at 590-591; *See Montgomery County Code,* § 50-15.

The scope of the "easement" that the public acquires from a dedication is, in part, dependant upon the location of the ROW. To wit,

> [t]here is a logical and important distinction between the incidents accompanying or pertaining to an easement of way in a city street and highways in the open country, because the uses to which the surface and the sub-surface are usually put are different in the one case from the other. *Public Service Commission v. Maryland Gas Transmission Corporation*, 162 Md. 298, 312, 159 A. 758, 764 (1932).

"[I]n the case of an ordinary road or highway in the country . . . all the public acquires is the easement of passage and its incidents . . . .'" *Peck v. Baltimore County, Md.*, 286 Md. 368, 380-381, 410 A.2d 7, 13 (1979) (quoting *Chesapeake and Potomac Telephone Company v. MacKenzie,* 74 Md. 36, 47, 21 A 690, 693 (1891)). But "[w]hen an easement of way is obtained in a largely built-up community . . . there goes with the way, as appurtenant thereto, the right to use the sub-surface for such purposes as the laying of conduits for sewer, gas, water, and the like." *Public Service Commission*, 162 Md. at 312, 159 A. at 764. In "a developing suburban area the right-of-way for a public highway extends not only horizontally over the surface of the land for the purpose of travel but also vertically below the surface of the roadbed for the purpose of laying sewer and water lines." *Green v. Washington Suburban Sanitary Commission*, 259 Md. 206, 219, 269 A.2d 815, 824 (1970) This is so because

> with respect to streets in populous places the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam and other things capable of that mode of distribution. *Public Service Commission,* 162 Md. at 313-314, 159 A. at 765.

Thus, generally, in a rural area the dedicator of property abutting the ROW, and the dedicator's successor in interest, may place objects under the road or otherwise encroach upon the ROW without a franchise or other government approval so long as the dedicator does not obstruct the ROW. In a "built-up area," the dedicator's rights are circumscribed by the broader scope of the ROW easement. A dedicator in a urban or suburban area will, generally, need governmental approval before occupying the ROW.

Of course, when land for a ROW is acquired in fee simple by a government through purchase or condemnation, the government may exercise all rights incident to that fee simple interest. *See Chesapeake and Potomac Telephone Company v. Mackenzie*, 74 Md. 36, 21 A.2 690 (1891). An encroachment upon such government land would require some form of governmental approval. Moreover, any abutting property owner, not being a dedicator, would have no interest in the ROW and could limit use of the ROW only insofar as that use impinged upon the owner's property rights. *Id.* For example, the government might be precluded from using the ROW in a manner that deprived the abutting property owner of access to his or her

property.

Conclusion

It is apparent from the foregoing discussion that County approval, under the County franchise law, is required for most occupations of the ROW. One notable exception arises when an owner of land dedicates that land to the County with an express condition that the owner will retain some use of the property. In so doing, the owner merely exercises an ownership right. 4 *Tiffany Real Property,* § 1111 (3rd ed. 1975). Upon accepting the condition, the County accedes to that right and narrows the scope of the dedication accordingly.

Also, though it is not an exception to the franchise rule, the Department of Permitting Services ("DPS"), under § 49-18, may grant a permit for an "obstruction" of the ROW. Legislative history reveals that this section was probably intended to allow incidental or transient occupations of the ROW, like the parking of vehicles. *See Chapter 31, Laws of Montgomery County, 1950.* The County's past practice is consistent with that intent. DPS' permitting process supplements the franchise process. As a consequence, franchisees must obtain a permit from DPS under Chapter 49 before installing facilities in the ROW.

That leaves one remaining issue: what form of approval does the franchise law contemplate? The only form of approval addressed in detail in §§ 49-11 through 49-15 is "franchise." But § 49-11 also allows for the grant of a "right" in relation to the ROW. "Right" is a capacious term and could encompass sundry forms of approval. A license, permit, or contract might all suffice. More importantly, a "right" that may be granted in relation to the ROW, unlike a "franchise," is not expressly subject to a twenty-five year limitation. Whether that result was intended is incapable of divination, given the aged statutory language. In light of the County's past practice and the case law's acknowledgment that "minor" encroachments upon the ROW do not require formal franchise approval, the preferred practice would be to franchise more permanent occupations of the ROW. Utility facilities and parking garages would fall within this category. "Lesser" forms of approval, like a license, would suffice for temporary intrusions into the ROW.

However, we acknowledge that the franchise law does allow the County to grant not just a franchise, but any "right" in relation to the ROW. Thus, parking garages may be approved other than by a franchise so long as the provisions of the franchise law, including Council approval, are adhered to. The form of approval could be a license, contract or other such legal mechanism; circumstances will dictate what form is appropriate for any given proposed occupation of the ROW.

In sum, as to each of your representative scenarios, we advise you as follows:

1. No franchise or like approval is needed for occupations of the ROW that are preserved through dedication or subdivision.

2. Except in rural areas (of which there are few in the County), approval under the franchise law is a prerequisite to an occupation of the ROW, even by an abutting property owner.[2]

3. County approval under the franchise law is required for an occupation of the ROW if the County owns the land underlying the ROW or if the party seeking to occupy the ROW did not dedicate the land to the County.

We trust that this memorandum is responsive to your inquiry.

cc: Charles W. Thompson, Jr., County Attorney
Robert Hubbard, Director, Department of Permitting Services
Marilyn Praisner, Chair, Management & Fiscal Policy Committee
Glenn Orlin, Deputy Staff Director

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[2] The County may want to consider amending the County code so as to address, prospectively, incursions into the ROW in "rural" areas.