

SJC10714

DAR-18700

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. _____

MASSACHUSETTS WATER RESOURCES AUTHORITY,
Defendant-Appellee

v.

EXELON EDGAR, LLC, FORE RIVER DEVELOPMENT, LLC
and BOSTON EDISON COMPANY,
Plaintiffs-Appellants

A.C. No. 2010-P-0321

Defendant-Appellee's Application for
Direct Appellate Review

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I. REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure, the Massachusetts Water Resources Authority ("MWRA"), appellee and defendant below,¹ requests direct appellate review in this court because the issues raised in this appeal present novel questions of law and involve matters of considerable public interest.

II. PRIOR PROCEEDINGS

This case arises out of four eminent domain takings of land located in North Weymouth by the MWRA for purposes of constructing the Braintree-Weymouth Sewer Relief Facilities Project. The takings occurred between August 1999 and June 2003 and involved both a permanent taking in fee and takings for permanent and temporary surface and subsurface easements. At the time of the first taking the property was owned by plaintiff Sithe Energies, Inc. ("Sithe"), predecessor in interest to plaintiff Exelon Edgar, LLC ("Exelon"), subject to a reserved easement in favor of plaintiff Boston Edison Company ("BECO").

¹ Because plaintiffs filed a cross appeal, the MWRA is considered the appellee pursuant to Mass. R. App. P. 16(i).

The original complaint in the case was filed on August 6, 2002; the complaint was amended on March 21, 2003 and again on January 3, 2005 to incorporate claims for damages for the takings made after the original complaint was filed in 2002.² The case was specially assigned to the Honorable John Connor, Jr. on December 23, 2005 and tried in October and November 2007. After twenty-two days of trial, the case was submitted to the jury on five special questions pursuant to Mass. R. Civ. P. 49(b). After ten days of deliberation, on November 30, 2007, the jury returned a verdict responding to the special questions and awarding damages in the amount of \$8,100,000 for diminution in value to the north side of the property and \$2,900,000 for diminution in value to the south side of the property. A copy of the jury's verdict slip is appended at Tab 2 of the Appendix to the Massachusetts Water Resources Authority's Request for Direct Appellate Review (hereafter "Appendix"). Pursuant to Mass. R. App. P. 11(b), a certified copy

² The MWRA answered the complaint and amended complaint and asserted counterclaims which were dismissed by the court on October 11, 2007, just prior to trial. This ruling is not challenged on appeal.

of the docket sheet is appended at Tab 1 of the Appendix and is also appended to this Request.

On December 13, 2007, pursuant to Mass. R. Civ. P. 59(e), plaintiffs filed a Motion to Establish Pre and Post Judgment Interest Rate and for Costs. The MWRA opposed these motions, a hearing was held and the court issued rulings on the motions in April and June of 2008. Judgments on the jury verdict were issued on August 8, 2008.³ The MWRA filed timely motions for Judgment Notwithstanding the Verdict and for a New Trial and/or Remittitur which were denied on September 4, 2008. The MWRA's Assented to Motion to Correct Clerical Mistakes in Judgment was filed on August 26, 2008 and amended judgments pursuant to that motion were entered by the court on September 4, 2008. Timely notices of appeal were filed by all parties. Notice of the Assembly of the Record was docketed on

³ The delay in entering judgment resulted in part from the fact that although the Second Amended Complaint stated claims for damages resulting from each of four takings, the case was presented to the jury on two distinct valuation theories pertaining to the north and south sides of the land in question and the special questions to the jury reflected this. Because G.L. c. 79 requires that interest run from the date of each taking, it was necessary for counsel and the court to "apportion" the jury's verdict among the four takings in a manner consistent with the evidence and verdict.

February 18, 2010. The MWRA entered the case in the Appeals Court on February 22, 2010 and the plaintiffs Exelon Edgar, LLC, Fore River Development, LLC and Boston Edison Company entered a cross appeal on March 1, 2010.

III. FACTS RELEVANT TO THE APPEAL

Beginning in August 1999, after years of discussion with BECO, the then owner of the property, concerning the location and scheduling of the takings, the MWRA took permanent and temporary easements and a fee interest in certain property located in Weymouth (a small portion is located in Quincy) known as the Fore River Station. The property is located on the north and south sides of Route 3A (also known as Bridge Street), adjacent to the Fore River Bridge in Weymouth. The entire site consists of approximately 56 acres; approximately 18 acres are located north of Bridge Street or Route 3A ("the north side") and the remaining 38 acres are located south of Route 3A ("the south side"). A sketch showing the entire site is included at Tab 3 of the Appendix.

A little over a year before the first taking, on May 15, 1998, BECO conveyed the site to Sithe for \$4,330,000, retaining certain easement rights on the

south side of the Fore River Station. As a result of the conveyance, BECO had no fee interest or surface easement rights on the north side of the property at the time of the first taking by the MWRA on August 13, 1999 which involved fee and easement interests on the north side of the property. On February 20, 2001, the MWRA recorded a second taking of certain permanent and temporary easements on the south side of the property. The MWRA recorded two additional orders of taking on April 10, 2003 and June 24, 2003. A chart summarizing the dates of the takings and interests taken, marked at the trial as Exhibit 92, is located at Tab 4 of the Appendix.

The pro tanto award for interests taken on the north side of the property in August 1999 totaled \$1,638,000. The total pro tanto award for all four takings totaled \$3,176,000. Plaintiffs claimed damages amounting to \$11,400,000 for diminution of value to the north side of the property; the jury awarded \$8,100,000. For the south side, plaintiffs' claimed damages were \$11,820,000; the jury awarded \$2,900,000.

Plaintiffs argued different valuation theories for the north and the south sides of the site as a

basis for their claims for damages as a result of the MWRA takings. These valuation theories were consistently pursued throughout the trial and were the basis for the special questions posed to the jury and the damages awarded. Plaintiffs called numerous witnesses to support each of these theories; Mr. Martin Coleman was plaintiffs' valuation expert on the north side and Mr. Robert Coleman testified as to damages on the south side.

The North Side Case

The valuation theory for the north side assumed a mixed use development that included 390 condominium units as the highest and best use of that portion of the property prior to the taking. The MWRA consistently and unsuccessfully sought to exclude evidence of this development on the grounds that plaintiffs had shown no likelihood of overcoming the regulatory and practical obstacles to development of the site at the time of the taking. Among other issues, the north side of the site consisted almost entirely of filled tidelands in a Designated Port Area ("DPA"). As a matter of law, residential uses are prohibited on filled tidelands in DPAs.

BECO's ownership of the Fore River Station dated back to the early 1900's and until approximately 1975, BECO operated an electrical generating facility on the south side of the property. At all relevant times, both the north and the south side of Fore River Station were zoned in Quincy and Weymouth for industrial use, which permitted BECO's historical use of the property for fuel storage and electrical generating, transmission and distribution services but did not permit residential use.⁴

In 1996, as a result of state deregulation of the energy industry and mandated divestiture of its energy generating facilities, BECO was faced with the need to divest itself of several of its properties, including the North Weymouth site. BECO retained the services of a development consultant, Meredith & Grew, in order to explore potential development alternatives for the property. Meredith & Grew recommended that BECO undertake a series of actions (e.g., remediate environmental problems, initiate permitting

⁴ Weymouth's zoning bylaw does not permit residential uses in an industrial zoning district and therefore any use for residential purposes would require a use variance. Pursuant to G.L. c. 40A, §10, use variances are permitted only where specifically authorized by local law. The Weymouth zoning bylaw does not permit use variances.

applications to change zoning, etc.) in order to pursue a mixed use property development that would include a substantial residential component. BECO never followed any of Meredith & Grew's recommendations and had rejected the development concept set forth in the plan well before its conveyance to Sithe in 1998 and the MWRA's first taking in August of 1999.

Sithe had no plans to utilize the site in question for residential or mixed use prior to the taking and intended to construct and did construct an electrical generating facility at the site. Because the site is located on filled tidelands in a DPA, pursuant to G.L. c. 91 and 360 CMR 9.32(1)(b), use of the land is restricted to water dependant industrial uses. Under current law, property can be removed from a Designated Port Area only by an act of the Legislature.

The issue of whether plaintiffs' proposed development scheme would have been permitted under existing G.L. c. 91 regulations dominated the trial and the jury deliberations in this case and is the major focus of the appeal. Witnesses who addressed this issue included Robert Daylor, a planning expert,

Charles Natale, a former DEP employee and expert in G.L. c. 91 regulations, Gregor I. McGregor, an attorney and expert in environmental law and regulation and Martin Coleman, an appraisal expert, all of whom testified for the plaintiffs and Dennis Duscik, the Tidelands Policy Coordinator for Coastal Zone Management, and Pamela McKinney, an appraisal expert, who were called by the MWRA.

At the time of the taking, neither BECO nor Sithe nor Exelon had taken any actions whatsoever to explore, initiate or otherwise set in motion the process for rezoning the north side of the site from industrial to residential use nor had plaintiffs sought legislative action to remove the site from the DPA in order to permit residential development. The proposed mixed use/residential development was concocted purely to augment plaintiffs' damages at trial and was entirely speculative.

The MWRA filed a Motion in Limine to Exclude Testimony Relating to Plaintiffs' Valuation Theory Based on a Hypothetical Residential Development on March 28, 2006, seeking to exclude all evidence related to plaintiffs' proposed development on the basis that plaintiffs had made no showing that either

the zoning or regulatory obstacles posed by G.L. c. 91 could be overcome. The court held a two day evidentiary hearing on the motion on October 23, 2006 and October 26, 2006 at which two witnesses (Martin Coleman and Charles Natale) testified. The court denied the MWRA's motion on December 28, 2006 but addressed only the question of likelihood that the property would be rezoned in that ruling. Appendix Tab 5. In part because the court's December 28, 2006 ruling had failed to address the second and equally critical issue of whether there was any reasonable likelihood of permitting a residential development in a DPA under existing Chapter 91 and Coastal Zone Management regulations and in part because Moot v. Department of Environmental Protection, 448 Mass. 340 (2007) and U.S. Gypsum Co. v. Executive Office of Environmental Affairs, 69 Mass. App. Ct. 243 (2007) were decided after the court's December 26, 2006 ruling and provided further support for the MWRA's position, a renewed motion in limine was filed just prior to trial on October 4, 2007 and argument on this motion was heard on October 9, 2007. The day prior to opening arguments and empanelment of the jury, the court denied the motion in limine, ruling that there

was "a reasonable probability that either DEP or legislature will take action which allow residential use made of the property north of Route 3A and further find that such action is not precluded by the CZM designation of the property as a DPA." Appendix Tab 6. The MWRA objected to the admission of the development plan at the time it was offered. Id.

The South Side Case

With respect to the portion of the site south of Bridge Street, the MWRA made no takings in fee but took permanent subsurface easements and temporary and permanent surface easements. During the time that the MWRA was constructing the relief sewer on the site, plaintiffs were constructing a new power station, which exists on the site today, and both the MWRA and Sithe made efforts to coordinate these simultaneous construction activities. The plaintiffs' appraiser for damages to the south side of the property, Mr. Robert Coleman, testified at trial that based on comparable sales the land on the south side of the parcel was valued pre-taking at \$12.50 per square foot and post-taking at \$5 per square foot for a total loss in value of \$11,820,000. According to Coleman, direct damages caused by the takings amounted to 15.23% of

the total damages while severance damages comprised 84.77%.

Central to plaintiffs' theory of damages resulting from the south side eminent domain takings was that the MWRA's takings had "caused" the relocation of the BECO switch house on the south side. The plaintiffs claimed that the total cost of relocating the switch house amounted to \$8,100,000 and attempted to recover these costs as an element of indirect or "severance damages." A special question posed by the court to the jury elicited the response that the MWRA takings on the south side did not cause BECO to relocate the switch house. Nevertheless, the jury awarded damages \$1,100,000 in excess of plaintiffs' direct damages of \$1,800,000 for a total damages award of \$2,900,000 on the south side. This figure is inconsistent with the jury's response to special question no. 4 and there is no factual basis in the record to establish an additional \$1,100,000 in damages as a result of takings to the south side.

IV. ISSUES OF LAW RAISED BY THE APPEAL⁵

1. Whether the lower court erred in admitting evidence of a proposed development plan and eminent domain damages based on that plan where uses presented in the plan were prohibited under the current zoning and applicable G.L. c. 91 regulations and where plaintiffs had offered no evidence that any steps had been taken to overcome those obstacles to development at the time of the taking and further erred in submitting the case to the jury.

Defendant MWRA sought to exclude this evidence in a motion in limine filed over a year prior to trial in this action. After a two day evidentiary hearing, the court denied the motion. Immediately prior to trial, the MWRA renewed the motion in limine which the court denied. See ruling at Appendix Tab 6. The MWRA objected again to the admission of the development plan at the outset of the trial and at the time plaintiffs sought to admit the plan depicting the development scheme into evidence. Id. Defendant MWRA moved for a directed verdict at the close of

⁵ The issues outlined herein are the principal issues raised. There are multiple evidentiary issues that will be addressed in the MWRA's brief, most of which derive from the issues presented here.

plaintiffs' case, renewed its motion at the end of all evidence and filed a timely Motion for Judgment Notwithstanding the Verdict, all of which motions were denied by the court. Finally, the MWRA requested certain jury instructions relative to this issue that the court refused, specifically an instruction that residential development was prohibited on filled tidelands in a DPA. Appendix Tab 7 at p. 225-226 and Tab 8 at p. 29-41.

2. Whether the judge erred in permitting expert testimony offering opinions relative to existing law under G.L. c. 91 and applicable regulations contrary to statutory and decisional law of the Commonwealth and compounded this error by failing to instruct the jury as to the correct applicable law.

Defendant MWRA moved in limine to exclude this testimony and objected to its admissibility through two witnesses, Charles Natale and Gregor I. MacGregor, at the time of the trial. MWRA further moved for a directed verdict at the close of plaintiffs' case, renewed their motion for directed verdict at the close of all the evidence and filed a timely Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial, all of which motions were denied by the

court. The MWRA further requested a specific instruction to the effect that the regulations under G.L. c. 91 prohibit residential development in a Designated Port Area, which the court refused.

3. Whether the jury's verdict awarding damages from takings on the south side of approximately \$1,100,000 in excess of plaintiffs' claimed direct damages was inconsistent with its answer to special question no. 4 that the MWRA's taking did not cause the relocation of the BECO switch house.

The MWRA objected to the admission of evidence of the cost of relocating a switch house on the south side of the parcel which the judge overruled. The judge submitted the question of whether the relocation of the switch house was caused by the MWRA's takings to the jury which responded in the negative. Nevertheless, the jury returned a verdict well in excess of plaintiffs' evidence of direct damages. The MWRA moved for a new trial and/or remittitur on this issue, which motion the court denied. Appendix Tab 9.

V. ARGUMENT

A. Admission of Evidence Concerning the Hypothetical Residential Development Was Error

The trial judge's failure to either exclude evidence of the hypothetical residential development or direct a verdict where plaintiffs offered no evidence that steps had been taken to overcome either the zoning impediments or the substantial regulatory hurdles imposed by G.L. c. 91 at the time of the takings resulted in a substantial miscarriage of justice. In denying the MWRA's repeated motions and objections and refusing to direct a verdict in its favor, the judge committed reversible error, adopting plaintiffs' erroneous interpretation of existing law and G.L. c. 91 regulations, and leaving the matter of interpreting those regulations to the jury.⁶

In the context of an eminent domain trial, the trial judge must exclude proposed "[u]ses which explore an unexecuted plan of development in unreasonable detail" or are "unduly speculative or conjectural." Clifford v. Algonquin Gas Transmission Co., 413 Mass. 809, 814 (1992) (citations omitted).

⁶ As evidenced by their questions throughout deliberations, including a request that they be provided with a copy of G.L. c. 91, the jury struggled for ten days with this issue. On the ninth day of deliberations, counsel reargued the applicability of the G.L. c. 91 regulations to the hypothetical plan. See Trial Exhibits SSS, TTT, VVV, WWW, XXX, AAAA, DDDD, EEEE, FFFF and GGGG at Tab 10 of the Appendix and discussion among the court and counsel at Tab 8.

"[W]hether a particular use should be taken into account 'is a matter for demonstration, not mere guesswork." Id., citing Skyline Homes, Inc. v. Commonwealth, 362 Mass. 684, 687 (1972). Hypothetical development schemes may be considered by the jury "where an owner has taken some steps toward development," but not "where the evidence...was hastily drawn up for the mere purposes of trial tactics." Id. at 815, citing 4 Nichols, Eminent Domain §12B.14[1].

The facts presented in this case are markedly different from those of Salem Country Club, Inc. v. Peabody Redevelopment Authority, 21 Mass. App. Ct. 433 (1986), which upheld an award of eminent domain damages based upon a prospective development proposal facing a number of practical obstacles. Salem Country Club's holding that the jury may consider potential land uses with development handicaps "with discounts for the likelihood of their being realized and for their futurity," was tempered by the requirement that the trial judge determine that overcoming *each* development obstacle is not "unduly speculative or conjectural," allowing the jury to consider only "informed mercantile calculations, not hallucinations

or guesswork." Id. at 435, citing Skyline Homes, Inc., at 687. Where no facts supporting the likelihood that obstacles to permitting would be overcome, the court's failure to exclude plaintiffs' evidence or direct a verdict was error.

1. Residential Development Is Not Permitted on Filled Tidelands Within a DPA

Plaintiffs' expert witnesses consumed several days of trial attempting to obfuscate, evade and otherwise confuse the law with respect to residential development on filled tidelands in a DPA. Confusion concerning this issue permeated the trial and the jury's deliberations. Two separate sections of the Code of Massachusetts Regulations were admitted into evidence, and the questions posed by the jury reveal that at least some jurors understood the conflict between the testimony of the experts and the requirements of the regulations.⁷ The regulations at

⁷ 310 CMR 9.00 was marked as Trial Exhibit 28 and is included at Tab 11 to the Appendix. 301 CMR 25.00 was marked as Trial Exhibit 20 and is included at Tab 12 to the Appendix. See discussion and jury question TTT, Appendix Tabs 8 and Tab 10. The witnesses who testified for plaintiffs concerning the regulations and development in DPAs were highly qualified and likely had more experience interpreting the regulations in question than the trial judge. The events of this case strongly suggest that a more rigorous standard for admitting testimony as to

310 CMR 9.32, permit only those projects on filled tidelands which accommodate a supporting DPA use, as defined in 310 CMR 9.02 and clearly prohibit residential use.

Applicable regulations provide that land may be removed from a DPA by the Office of Coastal Zone Management ("CZM") where the land in question fails to meet the criteria for inclusion in a DPA set forth at 301 CMR 25.04(2). On cross-examination, plaintiffs' expert Charles Natale conceded that the north side parcel met all of applicable criteria for designation and also conceded that no steps had been taken to seek a DPA boundary review.

Given the parcel's demonstrated suitability for industrial use, there was no reasonable probability that CZM would elect to remove the property from the DPA and no reasonable developer would conclude otherwise. The court should have allowed the MWRA's motion for directed verdict on this issue.

Plaintiffs' fallback position with respect to the DPA was that the Massachusetts Legislature would vote to redraw the boundary lines of the Fore River DPA to

hypothetical development in eminent domain proceedings needs to be established.

exclude the north parcel. Appendix Tab 14 at pp. 115-116. (Testimony of Gregor I. McGregor). Given the unpredictability of legislative action, it was error to submit this issue to the jury, whose role was transformed from that of finder of fact to forecaster of outcomes.

2. The Likelihood of a Rezoning of the Property at the Time of the Taking Was Not Established

Although testimony concerning a proposed or hypothetical development requiring a zoning change has been admitted in limited cases, the specific facts supporting the likelihood of the rezoning in those cases are not present here. In Roach v. Newton Redevelopment Authority, 8 Mass. App. Ct. 618 (1979), for example, the court found a reasonable probability of a rezoning from residential to commercial office use where the property was considered "unfit for residential use," a city report expressly identified the "highest and best use" of the property as commercial office use and the property was in fact rezoned to permit commercial use after the taking. Roach at 621, n.4 and n.5, 625.

In contrast, the testimony in this case established that the locus was suitable for industrial

use and that other rezonings relied on by the plaintiffs were a considerable distance from the locus. The plaintiffs, moreover, had taken no steps to initiate a rezoning of the property for residential use either before or after the taking.

3. At the Time of Trial, the Plaintiffs Presented No Evidence That Favorable Action By Public Authorities Was Imminent

All the plaintiffs' witnesses - Robert Daylor, Charles Natale, Gregor I. McGregor, Robert Vanesse and Martin Coleman - testified that they were unaware of any application for permitting a residential use on the north side or of any concrete, "real world" steps taken to market or develop the property for that use. To the contrary, the assembled "development experts" testified that they began their considerations in 2005, six years after the taking on the north side, strictly for purposes of trial. When asked on cross-examination whether he had analyzed the cost of developing the property, plaintiffs' appraiser Martin Coleman responded that such an analysis would have been "mere guesswork."

Whether a particular use is likely and imminent enough to be considered by a jury is "a matter for demonstration and not mere guesswork." Skyline Homes

at 687, quoting Brush Hill Development, Inc. v. Commonwealth, 338 Mass. 359, 361-364 (1959). The plaintiffs utterly failed to produce evidence from which a reasonable jury could find approval for a residential use to be "imminent." See Skyline Homes at 688 ("It is by no means sufficient to show merely that land is suited to a given use which, however, is prohibited by law") and the court should have directed a verdict for the defendant based on this lack of evidence.

B. The Court's Admission of Opinion Evidence on the Likelihood That the Hypothetical Residential Development Would Receive Permits Was Error as the Opinions Were Contrary to Applicable G.L. c. 91 Regulations

Counsel for the MWRA objected to certain testimony from the expert witness Gregor I. McGregor both on the grounds that such testimony invaded the province of the court and represented an inaccurate statement of existing law. See e.g., pp. 47-49 of transcript of October 19, 2007 at Appendix Tab 14.

In general, the opinion of an expert concerning the legal issues before the court is not admissible because issues of law are the exclusive domain of the trial judge. Perry v. Medieros, 369 Mass. 836, 842 (1976) (trial court properly excluded the testimony of the

local building inspector concerning whether the plaintiff's back stairway violated the local building code); Foley v. Hotel Touraine Co., 326 Mass. 742, 745 (1951) (testimony calling for legal conclusion excluded).

In this case, much of the expert testimony admitted by the trial court purported to advise the jury on what its ultimate conclusions should be as to the permissibility of plaintiffs' proposed development plan. Such testimony confused the jury and should not have been permitted. The question of permissibility, moreover, is a question of law that should have been determined by the court and not submitted to the jury.

C. With Respect to Damages Awarded for Diminution in Value to the South Side, the Jury's Award Is Inconsistent with its Response to Special Question No. 4 and Must Be Set Aside

The plaintiffs presented evidence intended to show that the MWRA's takings caused the relocation of the BECO switch house at a cost of \$8,100,000 and attempted to recover that amount as an element of indirect or "severance damages." The jury rejected this claim, determining that the MWRA takings on the south side did not cause BECO to incur those costs.

Mr. Robert Coleman, the plaintiff's damages expert for the south side valued the south side parcel before the takings at \$19,700,000. Exhibit 78 at Appendix Tab 15. Mr. Coleman opined that the post-taking value of the south side parcel was \$7,880,000, an \$11,820,000 "loss in value and damages sustained." Trial Exhibits 78 and 79 at Appendix Tabs 15 and 16. Of that amount, Coleman testified that severance damages of \$10,019,438 resulted from the alleged need to remove and relocate the switch house and that \$1,800,562 represented the value of interests taken. Id.⁸

In its answer to special question no 4, the jury responded that the MWRA takings on the south side had not caused the relocation of the switch house. This finding comports with the evidence presented by the MWRA. The jury's award of damages in the amount of \$1,100,000 in excess of Mr. Coleman's testimony of direct damages was accordingly inconsistent with its response to special question no. 4.

⁸ Coleman testified that he added a factor of 15% based on published sources of "rate of return" to the relocation costs of \$8,100,000 thereby increasing the amount attributable to the Switch House to \$9,400,000. Coleman explained that he arrived at the total of \$10,019,438 by taking into account "additional risk."

The MWRA filed a timely Motion for a New Trial and/or Remittitur raising the inconsistency in the jury's verdict. Commerce Bank & Trust Co. v. Hayeck, 46 Mass. App. Ct. 687, review denied, 430 Mass. 1104 (1999). This motion was denied by the trial judge. The law is clear that where the evidence is insufficient to support a money verdict, remittitur is required. Automated Donut Systems, Inc. v. Consolidated Rail Corp., 12 Mass. App. Ct. 326 (1981). In addition, although the refusal of a trial judge to set aside a verdict on the grounds that it was against the weight of the evidence cannot ordinarily be reviewed on appeal, in this case the denial of the MWRA's motion for a new trial constituted an abuse of discretion and resulted in a miscarriage of justice that should be reviewed by this court. Turnpike Motors, Inc. v. Newbury Group Inc., 413 Mass. 119 (1992); Morgan v. Laboratory Corp. of America, 65 Mass. App. Ct. 816, review denied, 447 Mass. 1107 (2006).

VI. DIRECT APPELLATE REVIEW IS APPROPRIATE IN THIS CASE

The Supreme Judicial Court should accept this case for Direct Appellate Review because of the substantial public interest issues involved and the need for clarification by the Court relative to admissibility of hypothetical development proposals in eminent domain proceedings, where such developments are prohibited by existing law and the only evidence that such prohibitions will be overcome are the opinions of well paid experts. The takings were made by the MWRA, an authority of the Commonwealth, in connection with a substantial public project to alleviate sewerage overflows in areas of the South Shore. The question of admissibility of a concocted proposed development that violated both current zoning restrictions and regulations promulgated pursuant to G.L. c. 91 was intensely debated by the parties and the court for a period of a year and a half prior to trial and consistently throughout the six week trial. Plaintiffs took advantage of the complexity of the G.L. c. 91 regulatory scheme and purported to meet their burden that the regulatory obstacles would be overcome through a series of seemingly convincing

opinions by qualified experts. These experts were permitted to testify solely on the basis of their qualifications; there was no factual basis for their opinions which were contrary to existing law. Ultimately, the judge refused to direct a verdict on this issue and left it to the jury to decide whether the project could be permitted, requiring the jury to determine issues of law they were unequipped and unqualified to review. The entire trial became a debate on applicable G.L. c. 91 law, a topic of considerable debate in the appellate courts of Massachusetts.

Despite repeated attempts to correct this error throughout the course of the proceedings and even into the jury deliberations, the MWRA was unsuccessful in persuading the trial judge to exclude the evidence in the first instance or, direct a verdict and to provide proper and clear instructions to the jury on the applicable law under G.L. c. 91 and regulations promulgated thereunder at the end of trial.

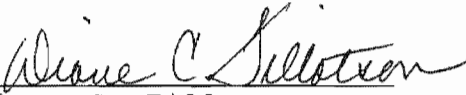
Plaintiffs' attempt to circumvent the requirements of the regulations in question by offering a veritable parade of highly qualified expert witnesses, all of whom opined that the project could

successfully surmount permitting and regulatory obstacles notwithstanding the plain language of the regulations, should be firmly rejected by this court. If recently invented hypothetical development plans such as the one posited by the plaintiffs in this case are permitted in eminent domain cases based solely on the opinion of expert witnesses, regardless of whether that opinion is contrary to existing law or supported by actual steps taken to overcome these obstacles, the exposure of public authorities to inflated damage awards due to concocted development schemes having no basis in fact will be limited only by the imagination of those expert witnesses. This court should enunciate clear and specific guidelines on the admissibility of such evidence to provide guidance to trial judges and avoid future miscarriages of justice.

Respectfully Submitted,

MASSACHUSETTS WATER RESOURCES
AUTHORITY

By their Attorneys,



Diane C. Tillotson

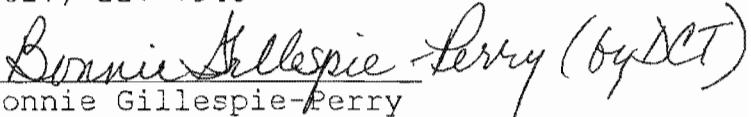
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Dated: March 12, 2010

CERTIFICATE OF SERVICE

I, Diane C. Tillotson, hereby certify that I have this 12th day of March, 2010, caused two copies of Application for Direct Appellate Review and Appendix as filed to be served by mail, postage prepaid, upon the following:

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CERTIFICATE OF COMPLIANCE
WITH MASS. R. APP. P. 16(k)

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing brief complies with all applicable appellate rules.



Diane C. Tillotson