

SJC10714

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. DAR-18700

MASSACHUSETTS WATER RESOURCES AUTHORITY,
Defendant-Appellee

v.

BOSTON EDISON COMPANY,
Plaintiff-Appellant

A.C. No. 2010-P-0321

Plaintiff-Appellant's Opposition to Defendant-
Appellee's Application for Direct Appellate Review

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I. BOSTON EDISON COMPANY OPPOSES THE REQUEST FOR DIRECT APPELLATE REVIEW

Boston Edison Company ("BECO") the appellant and a plaintiff below, pursuant to Massachusetts Rule of Appellate Procedure 11(c), **opposes** the Massachusetts Water Resources Authority's ("MWRA") request for direct appellate review. The request must be denied as the issues presented in the instant application present no novel questions of law, no constitutional questions of law and no questions of such public interest as requiring final determination by the Supreme Judicial Court.

II. PRIOR PROCEEDINGS AND STATEMENT OF FACTS

BECO finds MWRA's statements of prior proceedings and facts inaccurate and misleading. MWRA's statements characterize in partisan fashion the procedural and factual history of the instant matter, rather than neutrally summarizing the procedural and factual history. The following statement of procedure and facts concisely and fairly sets forth points in this matter relevant to the instant application.¹

The subject property lies in Weymouth and Quincy and comprises in part filled tidelands. The locus is within

¹ In so doing, BECO in no way intends to waive its objection to MWRA's statements of prior proceedings and facts *in toto*, but chooses to save its argument for its brief in chief.

the geographical boundaries of one of seven designated port areas ("DPA") in the Commonwealth. Route 3A/Bridge Street splits the property into northern and southern portions. For convenience sake, throughout the litigation in the trial court, the parties referred to the locus as two parts - the North and South Parcels.

BECO owned the property for almost the entire Twentieth century and used the property to produce and transmit electricity, and for affiliated support activities. During its ownership and prior to the subject takings, BECO investigated developing the North Parcel for residential use. The North Parcel consists almost entirely of upland and private tidelands lawfully filled, under state permits, long ago. In the distant past the legislature's power to regulate use of the North Parcel's private tidelands was limited to preserving the public's rights to fishing, fowling and navigation in the intertidal zone, and was terminated long ago when BECO's predecessors paid fees in exchange for the permits for filling the tidelands.

Shortly prior to the takings at issue, but on notice that they were imminent, BECO ceased development steps. In addition, contemporary legislation impacting energy market deregulation prompted BECO to sell the locus. BECO sold

the property in 1998; however, the sale was complicated by the imminent MWRA takings. As part of the sale, BECO retained easements on the locus and the right to sue for eminent domain damages flowing from the MWRA's anticipated Braintree-Weymouth Relief Facilities Project.

As promised, from 1999 through 2003, both the North and South Parcels of the locus suffered extensive and serial takings by the MWRA. This action arises out of four groups of particular takings, which were made as part of the MWRA's Braintree-Weymouth Relief Facilities Project public works project. This project included a Sewer Pump Station, deep rock tunnel and Interceptor line.

At hearings on the MWRA's motion *in limine* prior to the trial, and during the trial of the instant matter, BECO provided substantial evidence, including the testimony and opinions of numerous experts, that it was reasonably likely BECO would have been successful in the marketing and lawful development of the North Parcel for residential use.

The Court after extensive pretrial hearings duly ruled that BECO was to be allowed to admit this evidence. Throughout the subsequent seven-and-one-half-week trial², in the repeated face of MWRA objections, the Court

² The trial commenced on October 9, 2007, and lasted until the jury returned a verdict on November 30, 2007.

continuously reaffirmed its carefully considered evidentiary ruling regarding the admissibility of evidence of potential residential development of the North Parcel. In the end, the jury obviously found credible the Plaintiff's experts and other evidence.³

At the conclusion of the MWRA's case in chief, in accordance with the law of the Commonwealth, the Special Verdict slip submitted to the jury did not ask for damages to be apportioned between the four separate takings. Therefore, the jury decided the four takings collectively caused \$11,000,000.00 worth of economic harm to BECO.

The jury, in accordance with the Special Verdict slip, did split damages between the North and South Parcels. The

³ In particular, the defendant argued whether or not c. 91, the regulations thereunder and related Coastal Zone Management policies would have prevented any potential residential development of the property. The MWRA consistently argued residential development was totally impossible in a DPA. Contrary to the MWRA's position, BECO presented substantial evidence of the likelihood of permitting residential development in a DPA, or excluding the land itself from a DPA. Interestingly, Mr. Ducsik, the Tidelands Policy Coordinator in the office of Coastal Zone Management, called by the MWRA as its main witness on the DPA issue, himself admitted on cross-examination that CZM had in the recent past expressly modified the boundaries of the East Boston DPA in order to carve out from the DPA a parcel proposed for residential development. That parcel subsequently was permitted for residential development. Trial Transcript, vol. 23, pg. 219. This is entirely consistent with the admitted expert opinions of BECO's expert witnesses.

Special Verdict asked the jury to assess the reasonable likelihood of residential development on the North Parcel before requesting a finding of value as to that parcel. The jury answered the question of development in the affirmative and then assigned a value of \$8,100,000.00 for the North Parcel. See Exhibit 2 of the MWRA's Appendix to DAR Application.

The Special Verdict also asked the jury to assess whether the takings forced BECO to demolish and replace its switch house on the South Parcel before requesting a finding of value as to that parcel. The jury answered the switch house question in the negative and then assigned a value of \$2,900,000.00 for the South Parcel. See Exhibit 2 of the MWRA's Appendix to DAR Application. Even though damages were split between parcels, the jury did not, and was never asked to, apportion damages amongst individual takings.

Despite the lack of division between takings in the jury's verdict, the trial judge then accepted the MWRA's reasoning and divided the jury award and applied the applicable interest among the four takings. BECO maintains the trial court erred here. It is BECO's position that under, M.G.L. c. 79, as interpreted by the courts of the Commonwealth, the applicable interest rate applied to the

subject takings runs from the date of the first taking, in August 1999, which initiated the entire public works project. Indeed, case law states:

[D]amages for land taken shall be fixed at the value thereof before the taking . . . [T]he words "before the taking" are not limited to the taking of the particular land, but mean "before such laying out, relocation, alteration, widening, grading or discontinuance"; in other words, before the beginning of the entire public work which necessitates the taking.

Connor v. Metropolitan District Water supply Commission, 314 Mass. 33, 39-40 (1943) (internal citations omitted); see also Lipinski v. Lynn Redevelopment Authority, 355 Mass. 354 (1969) ("[T]he landowner is entitled to damages equal to the value 'before the recording of the order of taking.' The quoted phrase means 'before the beginning of the entire public work which necessitates the taking.'"); Cole v. Boston Edison Co., 338 Mass. 661 (1959). Therefore, the applicable interest rate should have been set in August 1999 and run from then.

III. ARGUMENT

MWRA has not met the standard required for direct appellate review, as established in Massachusetts Rule of Appellate Procedure 11(a). As shown below, the MWRA's application presents (1) no novel questions of law; (2) no constitutional questions; and (3) no questions of public

interest requiring final determination by the Supreme Judicial Court. Massachusetts Rule of Appellate Procedure 11(a). Therefore the instant application for direct appellate review must be denied.

As grounds for its application, the MWRA states three issues, including: (1) admission of evidence of a hypothetical residential development constitutes error; (2) admission of opinion evidence regarding the likelihood of obtaining approval for a residential development constitutes error; and (3) the jury's award with respect to the South parcel is inconsistent.

A. The MWRA's Motion Fails to Present Any Novel Issues of Law.

The MWRA's motion fails to present any novel issues of law.⁴ The Appellate Court and the Supreme Judicial Court have dealt numerous times with the issue of admitting hypothetical residential developments into evidence in eminent domain cases.

⁴ The sole argument advanced by the MWRA, which purports to concern a novel issue at law, is found in Footnote 7 of its application for direct appellate review. Therein, the MWRA postulates that a more rigorous standard for admitting testimony in eminent domain cases should be established. The MWRA provides no basis for why evidentiary standards should be stricter for eminent domain cases than for other civil cases, and since this argument surfaces in a footnote it is not appellate argument. Comm v. Lydon, 413 Mass. 309, 317-18 (1992); See Mass.R.A.P. 16(a)(4). As such the Supreme Judicial Court is free to disregard this argument in its entirety.

The principal cases include Skyline Homes Inc. v. Commonwealth, 362 Mass. 684 (1972) and Roach v. Newton Redevelopment Authority, 381 Mass. 135, 136 (1980).⁵ These cases permit admission of expert testimony on the matter of hypothetical residential developments, even where the law might prohibit those developments at the time of the taking. Skyline explicitly states:

The fact that a use was prohibited by law at the time of the taking does not prevent its consideration if there was then a reasonable prospect that the bar would soon be lifted.

Skyline at 687 See also Douglas Environmental Associates, Inc. v. Dept. of Environmental Protection, 429 Mass. 71, 76 (1999); Boston & Maine Corp. v. Commonwealth⁶, 1995 Mass.Super.LEXIS 506, 509 (McHugh, J).

⁵ Other cases which have addressed this evidentiary issue include, Clifford v. Algonquin Gas, 413 Mass. 809, 815 (1992), Newton Girl Scout Council v. Mass. Turnpike Auth., 335 Mass. 189, 193 (1956), Boy Scouts v. Town of Yarmouth, 32 Mass. App. Ct. 713, 718 (1992), Salem Country Club, Inc. v. Peabody Redevelopment Authority, 21 Mass.App.Ct. 433, 435 (1986), Roach v. Newton Redevelopment Authority, 8 Mass. App. Ct. 618, 624 (1979), Colonial Acres, Inc. v. Inhabitants of North Reading, 3 Mass.App.Ct. 384 (1975). This list is by no means exhaustive. In fact, the MWRA cites in its application two more related cases - 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).

⁶ Boston & Maine was a case, similar to the instant one, in which the land's historic use had been industrial, and the taking authority brought a motion in limine seeking to bar the plaintiff's mixed-use development approach to valuation on the basis that the land was former filled tidelands,

Proving the bar to residential development would soon be lifted was a matter of proof, and "deciding whether the proof [went] far enough to warrant consideration of" the North Parcel for residential use was a matter wherein the trial court "judge ha[d] a margin of ultimate discretion." Roach at 136-37. In the event, judge and jury accepted as credible the offered proof.

B. The MWRA Fails to Present Any Issues of Constitutional Import.

The MWRA fails to present any issue of constitutional import. The sole issue of constitutional import raised on appeal is BECO's issue regarding the proper rate of interest as an element of just compensation. BECO has not applied for direct appellate review. Therefore, that issue is not before the Supreme Judicial Court on the instant application.

C. The MWRA Fails to Present any Questions of Public Interest Requiring Final Determination by the Supreme Judicial Court.

The MWRA fails to present any questions of public interest requiring final determination by the Supreme Judicial Court. In prior cases the Supreme Judicial Court

subject to the public trust and licensing restrictions under G.L. c. 91. The court denied the motion and admitted the evidence.

or the Massachusetts Appeals Court have addressed all of the issues raised by the MWRA in its application.

The MWRA makes no argument implicating the public interest other than that it is a public agency, and would have to pay money if the trial court's verdict is upheld. Public agencies or authorities, or private entities to which such public power is designated, make all eminent domain takings in the Commonwealth. If this case involving a taking by a public authority were deemed a matter of sufficient public interest for the purposes of direct appellate review, then all eminent domain cases would be allowed to bypass the Appeals Court. Such result is neither justified, nor remotely feasible. Without any greater indication of public interest than a taking by a public authority, the direct appellate review application must be denied.

IV. CONCLUSION

WHEREFORE, Boston Edison Company ("BECO") the appellant and a plaintiff below, pursuant to Massachusetts Rule of Appellate Procedure 11(c), **opposes** the Massachusetts Water Resources Authority's ("MWRA") request for direct appellate review, and requests this honorable court **DENY** the application.

Respectfully Submitted,

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Dated: March 19, 2010

CERTIFICATE OF SERVICE

I, Jeffery A. Tocchio, hereby certify that I have this 19th day of March, 2010, caused two copies of Plaintiffs-Appellants' Opposition to Defendant-Appellee's Application for Direct Appellate Review as filed to be served by mail, postage prepaid, upon the following:

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CERTIFICATE OF COMPLIANCE

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.


Jeffery A. Tocchio