The State of New Hampshire

Supreme Court

No 2018-0649

City of Portsmouth,
Condemnor

v.

150 Greenleaf Avenue Realty Trust, Minato Auto LLC, Toyota Motor Credit Corporation, Eversource, and Fairpoint Communications, Inc.
Condemnees

MANDATORY APPEAL
FROM RULINGS OF THE ROCKINGHAM COUNTY SUPERIOR COURT

REPLY OF CONDEMNEE, JAMES G. BOYLE, TRUSTEE

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INTRODUCTION

This atypical eminent domain case begs affirmance of the Trial Court's well-reasoned, 29-page findings and order. For five independent reasons, the Court sustained Mr. Boyle's preliminary objection. There is, however, a far darker side than the usual case.

Three lawyers manipulated the proceedings to gain an advantage in litigation, manipulation so severe that the Trial Court called it a "ploy." City Addend. 83. Portsmouth failed to follow the Eminent Domain Procedure Act and constantly shifted the grounds for the taking. Yet even with this shifting, it could not present enough evidence to justify its action. For example, Portsmouth took the property in fee simple but offered no evidence to justify this overreach. To the contrary, Portsmouth's engineer testified an easement would suffice. The real effect of this overreach is to devastate a business and prevent development.

Now, in this appeal, Portsmouth argues a ground for the taking that was never identified in the Declaration of Taking. It does not address the facts found by the Trial Court, including that its motive was not to take under either statute identified in the Declaration, but rather tries to twist its complaints about the factual findings into errors of law. The Court should avoid this misdirection. Simple justice, consistent with black letter law, should result in affirming the Trial Court. Mr. Boyle should get his land back so he may develop following sound environmental practices without delay.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

I. Background Of The Sewer Line Litigation.

Except for two matters, the City's procedural history is correct. Portsmouth, attempting to strengthen its case, constantly refers to the Trial Court's suggestion of eminent domain. The Trial Court's suggestion had nothing to do with the actual taking

here.[1] On summary judgment in 2013, the Trial Court held the sewer line was trespassing.[2] It made no findings about the wetlands[3] as it held their characterization posed issues of fact. Thus, the suggestion was to take a narrow easement for the sewer line only. TR. Vol. III, 26:4-6. It clearly was not a suggestion to take 4.6 acres, a third of Mr. Boyle's property, for wetlands the City denied it was using for stormwater detention and which had not yet been adjudicated as a nuisance.

The Trial Court's endorsement of taking only a limited easement is confirmed in its factual findings. "Second, much of the 4.6 acre taking is not needed to maintain the existing sewer line and, … there is otherwise no independent public necessity to take the wetlands." City Addend. 74. "In this case, the City has taken far more land than it can legally justify." City Addend. 76-77. The Court acknowledged its suggestion of eminent domain, but distinguished the taking of the wetlands. City Addend. 82. The Court noted it does not have the power to limit the taking to support the public need to maintain only the sewer line. City Addend. 85. The City's attempt to make it appear as if the Court endorsed the taking is misleading.

Secondly, the City omitted the many steps Mr. Boyle took to either stop the taking, combine the preliminary objection with the sewer line trial, or delay the trial. He was trying to avoid possible confusion as the two matters interacted. Portsmouth always contended the matters were separate, but has reversed course for this appeal.

II. Background Of This Eminent Domain Proceeding.

The City's statement of the eminent domain proceedings is accurate although it oversimplifies Mr. Boyle's preliminary objection. He objected on, *inter alia*, public use, necessity and net public benefit, as well as statutory authority, issues with the appraisal

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[1] The City waited three years before acting, clearly evidencing there is no present need.

[2] The City is currently appealing that point in Docket No. 2018-0327.

[3] Mr. Boyle disagrees the wetlands are naturally occurring and uses the term "wetlands" for convenience.

process, the view, the vote, and other matters. A significant objection based on bad faith was subsumed by the Trial Court under necessity.

The Board of Tax and Land Appeals did not consider any of Mr. Boyle's objections prior to its referral to the Superior Court. Thus, in the unlikely event this Court does not affirm, there would still be further proceedings before the BTLA concerning the remaining substance of the preliminary objection.

FACTS

The City does not appear to contest any facts as found by the Trial Court. The Trial Court has a good summary of background facts in its opinion. City Addend. 60-61. Only facts directly relevant to this argument will be cited below.

I. Facts Found By The Court And Supported By The Record.

The City does not challenge the Court's factual findings and each finding was supported by overwhelming evidence. Since they are not appealed, they must be accepted. *See Berthiaume v. McCormack,* 153 N.H. 239 (2006); *Cadreact v. Citation Mobile Home Sales*, 147 N.H. 620, 622 (2002). However, even if these findings were challenged, there was ample evidence in the record so each finding was neither an abuse of discretion nor unsupported by the evidence.

1. Much of the condemned property is not needed for the operation and maintenance of the existing sewer line. City Addend. 66, 74; support: TR. Vol. I, 85:20-25.
2. The City has no plans for construction of any "drains or common sewers, stormwater treatment, conveyance and discharge systems, sewage and/or waste treatment works" on the condemned property. City Addend. 67; support: TR. Vol. I, 62:2-63:3.
3. The City has not done any planning or study of the wetlands preceding the condemnation, and has no specific plans for them. City Addend 68, 83; support: TR. Vol. I, 66:19-21, 72:24-73:1.

4. The City justified the taking on a speculative concern that Mr. Boyle will develop the land in a way that would undermine sound stormwater run-off practices and harm stormwater quality. City Addend. 69; support: TR. Vol. I, 72:20-23.
5. The City's purpose in seizing the wetlands was not to construct or maintain a sewer or stormwater management system. City Addend. 71, 79; support: TR. Vol. I, 110:20-111:2.
6. The City's goal was to prevent development. City Addend. 71-71; support: Ex. S, Boyle App. 236.
7. The City's concerns were speculative. City Addend. 72; support: TR. Vol. I, 105:11-106:2.
8. City Ordinance prevents development within a 100' zone around freshwater wetlands. City Addend 72; support: TR. Vol. II, 101:20-25.
9. Taking the land in fee simple eliminates an opportunity for Mr. Boyle to develop. City Addend 74, 77; support: Ex. S, Boyle App. 236; TR. Vol. III 33:25-34:22.
10. The City offered little to no testimony or evidence to support a fee simple taking. The City Engineer testified the City exercises control of most sewer lines by easement, and the Department of Public Works would have been satisfied with an easement. City Addend. 75; support: TR. Vol. I, 103:7-104:6.
11. There is no evidence the City considered taking Boyle's property until the eve of the sewer line trial. City Addend. 81; support: TR. Vol. II, 83:1-12; City App. Vol. I, 149.
12. The environmental planner did not recommend the taking to the City Council and he never had an interest in acquiring the property. City Addend. 83; support: TR. Vol. II, 82:9-12, 83:1-12.
13. Taking the wetlands was an eleventh hour ploy to gain an advantage in the sewer line litigation. City Addend. 83; support: Three year delay in taking just prior to trial, absence of evidence throughout the record; Ex. I marked for ID.

14. The City did not follow its procedures for acquiring property. City Addend. 83; support: TR. Vol. I, 74:2-8; TR. Vol. II, 84:17-85:5; Ex. Q, Boyle App. 212.

15. The environmental planner testified this was the only wetlands seized by eminent domain in 17 ½ years. City Addend. 84; support: TR. Vol. I, 82:4-5.

16. City's experts were only consulted after the fact. City Addend 84; support: TR. Vol. I, 152:1-4; TR. Vol. II, 39:1-8.

17. The only witnesses who presented the proposed taking to the City Council were City Attorney Sullivan, Assistant City Attorney Woodland and Attorney Bauer, who led the Sewer Line Litigation for the City. City Addend. 84; support: Ex. V, Boyle App. 238.

18. The City's true motive for seizing Mr. Boyle's land was "to have the final word in the decade-long battle". City Addend 84; support: TR. Vol. I, 105:9-10, 25-106:2.

II. Fact Cited By The City Which Need Correction.

The City has provided a distorted summary of facts, most of which are to extol the benefits of wetlands in general through the testimony of Mark West.[4] Importantly, Mr. West testified the City did not take the property for preservation of wetlands as it now contends. TR. Vol. II, 39:9-12. He was never consulted on the need or advisability of the taking, but was only brought in after the fact. TR. Vol. II, 39:1-8. Alternatively James Gove, who is extensively familiar with the site, testified that large areas of these specific wetlands are very unhealthy. TR. Vol. II, 123:14-19. He thought chemicals from dumped materials were leaching up. TR. Vol. II, 119:1-7. He warned that using this area for stormwater reaching Sagamore Creek would be environmentally dangerous, and was concerned there was no evaluation of the site due its known history as a landfill. TR. Vol.

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[4] Mr. West, the City's expert, and Mr. Gove, Mr. Boyle's expert, have been involved in litigation over this property for a decade. In 2006 the City brought an enforcement action. They testified about the character of the wetlands. Judge Lewis accepted Mr. Gove's testimony. In the sewer line trial, the experts again testified concerning the wetlands. The jury accepted Mr. Gove's testimony. Due to the substance of Judge Delker's decision, he did not have to weigh their relative testimonies in this proceeding.

II, 125:15-21. He thought a system that capped the wetlands and treated stormwater through pervious pavement was environmentally sound. TR. Vol. II, 125:22–126:5.

Additionally, the City has taken contradictory positions regarding stormwater on the area taken. The installation of the sewer line interfered with a perimeter ditch and created the wetlands. In 2011, Mr. Boyle restored the perimeter ditch. The bulk of the stormwater currently flows through the perimeter ditch, and not in front of the sewer line. The City engineer admitted he had no knowledge of water flow in front of the sewer line, and he did not observe any water entering the wetlands the day he observed the property. TR. Vol. I, 87:1-13. Extensive testimony stated there were no plans to do anything to the property, yet if the property is left as is, it would not provide water quality functions such as retention and attenuation. TR. Vol. II, 27:17– 28:23. The wetlands do not serve any significant stormwater function as they are currently configured. TR. Vol. II, 37:14-20. Mr. West testified that he has discussed the benefits of removing the 2011 culverts with City attorneys. TR. Vol. II, 49:1-10. However, the City environmental planner testified that the City would follow the consent decree between Mr. Boyle and NH DES to make a permanent design for the 2011 culverts. TR. Vol. II, 97:18- 98:4. Thus, the wetlands have no stormwater functionality. It is irrational to take opposite positions about the same subject simultaneously, and a decision which does so must be reversed. *See Appeal of Lemire-Courville Associates*, 127 N.H. 21, 32 (1985); *In re: Montplaiser*, 147, N.H. 297, 303 (2001). Given the City's contradictory positions, it was impossible for the Trial Court to give any credence to the City's stormwater argument.

On the other side, Mr. Boyle has spent hundreds of thousands of dollars on engineers and consultants as part of permitting process, and found an environmentally better solution for development. TR. Vol. III, 17:6–21:11. He applied for a wetlands permit and an Alteration of Terrain (AoT) permit to develop the property, capping the wetlands consistent with Mr. Gove's suggestion. These permits are based on a 2013 consent decree between Mr. Boyle and NH DES, and approved by the same Trial Court.

The consent decree requires developing the entire parcel, including the area of the taking. Exhibit D, Boyle App. 17; TR. Vol. II, 91:8-10. NH DES indicated it would issue permits for all construction of Mr. Boyle's development.[5] Exhibit T, Boyle App 237. The City was aware Mr. Boyle ultimately revised his design plans to allow preservation of the sewer line, which negates any immediate need to take the land to preserve the sewer line in its place. TR. Vol. III, 22:5-18. Moreover, the City has no reason to oppose development as an automobile dealership makes perfect sense in that location, and his plans are consistent with the Portsmouth Master Plan. 218-2010-EQ-00100 (Witten) Trial Transcript, 517:9-518:14. Nevertheless, the City wrongfully opposed development.

Finally, the City attempts to use its consent decree with EPA as evidence of necessity, but it is undisputed the area taken is not related to that consent decree. Exhibit 8; TR. Vol. 1, 77:14-18. The City admitted that it has not started testing water quality of source points to the Sagamore Creek, and therefore has no knowledge whether the water discharging from this property contributes to its impairment. TR. Vol. I, 50:20-51:1. Without this knowledge, the City may have even created its own permit compliance issue by taking this property. TR. Vol. I, 151:23-25. The City engineer testified he is unaware of any work towards best management practices on the property taken. TR. Vol. II, 49:1-22. He went even further in testifying he has no knowledge of water flow on the property as there was never a study or request for a study on storm water on the property. TR. Vol. I, 87:9-13. It makes sense there were no studies or evaluations of stormwater on the property as it was not part of any long-range planning. TR. Vol. II, 83:1-12. As of November 30, 2016, three weeks prior to the taking, the City Manager, John Bohenko testified on deposition that Portsmouth never used the property for stormwater management. City App. Vol. I, 149. This property was clearly not taken to comply with the EPA consent decree, and in fact the City has never taken property by eminent domain for stormwater management. TR. Vol. II, 81:24-82:5.

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[5] It did not issue the permits because the City took title just prior to issuance.

ARGUMENT

"A taking by eminent domain is a drastic exercise of the power of government. It should be invoked only after there has been a considered determination that particular land is needed for a specific public purpose." *Muir v. Leominster,* 2 Mass. App. Ct. 587, 595 (1974). This considered determination is utterly lacking here.

SUMMARY OF ARGUMENT

The correct standard of review, abuse of discretion rather than an error of law, establishes the Trial Court must be affirmed. Portsmouth alleges numerous discrete errors of law, none of which has merit, and improperly introduced a new ground for the taking for the first time on appeal in clear violation of the Eminent Domain Procedure Act. Portsmouth bases it arguments on five evidentiary points for which there is no evidence: (1) the City was trying to avoid damages; (2) the sewer line and wetlands are intertwined; (3) the City was abating a nuisance; (4) there was a present need to take the property; and (5) the wetlands were constructed as part of a system with material required by R.S.A. 149-I. Each of these five issues must be disregarded as they lack support. On the other hand, the Trial Court had ample support for its findings of fact and clearly did not abuse its discretion in sustaining the preliminary objection. The Court correctly construed the statutes on which the City relies and limited its consideration of necessity to R.S.A. 47:11 and 149-I. The Court was correct in holding the City could not take in fee simple, because the City admitted it did not need to take in fee simple. In addition, there was overwhelming evidence to infer bad faith. There are five independent grounds to set aside the taking, any of which is sufficient and the objection must be affirmed unless all five grounds are reversed. The Trial Court's well-reasoned opinion should be affirmed.

I. The City Attempts To Evade The Standard Of Review Of Substantial Deference By Mischaracterizing The Court's Action.

The applicable standard of review is for unsustainable exercise of discretion. The Eminent Domain Procedure Act makes plain that the standard of review in this appeal is for unsustainable exercise of discretion. R.S.A.498-A:9-a, V says that preliminary

objections shall be adjudicated "as justice shall require." Then R.S.A. 498-A:9-b, I, in turn, charges the Superior Court with that adjudication as to "necessity, public use, or net-public benefit." The statutory framework vests the Superior Court with the normal discretion in equity matters, which this Court reviews for unsustainable exercise of discretion. "A finding of public necessity, or a lack of such necessity, is discretionary and we are therefore hesitant to disturb such findings." *Jackson v. Ray*, 126 N.H. 759, 762 (1985); s*ee also* R.S.A. 498-A:28 (indicating that appeal to Supreme Court will be "in the manner provided for review of any other final judgment"); *see*, *e.g., LSP Ass'n v. Town of Gilford*, 142 N.H. 369, 373 (1997) (observing that statute conferring authority upon Superior Court to make such order "as justice requires" in tax abatement proceeding "confers broad discretion and equitable powers upon the superior court"); *Foley v. Wheelock*, 157 N.H. 329, 332 (2008) (reviewing for unsustainable exercise of Superior Court's discretion in partition case). As such, this Court may reverse only if it finds an unsustainable exercise of discretion. *State v. Korean Methodist Church of N.H.*, 157 N.H. 254 (2008) (reviewing appeal brought pursuant to eminent domain procedure act for unsustainable exercise of discretion); *Brodeur v. City of Claremont*, 121 N.H. 209, 211 (1981) ("A court will uphold a decision of the superior court regarding necessity if it is supported by some evidence, and if it is not based on fraud or gross mistake."). Here, the Trial Court is entitled to great deference in its findings after a three day trial.[6]

The City tries to characterize everything as an error of law in order to reach a more attainable standard for reversal. However, the majority of the Court's rulings involve findings of fact rather than interpretations of law. For example, whether or not the City has a present need for the wetlands is a determination of fact. Similarly, the issue of fee simple versus an easement is a determination of fact based on testimony. Yet in each

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[6] The Trial Court was very familiar with the property, especially in light of the view it took. Due deference is given to a trial court's factual findings particularly when they are based on a view. *Sleeper v. Hoban Family P'ship,* 157 N.H. 530 (2008); *Flanagan v. Prudhomme*, 138 N.H. 561 (1994).

instance, Portsmouth characterizes the issue as one of jurisdiction, usually reverting to arguments about R.S.A. 31:92. The correct standard must be applied, which in this instance is for unsustainable exercise of discretion.

II. Portsmouth Failed To Follow The Eminent Domain Procedure Act.

A. THE CITY'S USE OF THE WORDS "AND OTHER AUTHORITY" FAILS TO COMPLY WITH THE ACT.

The City's appellate brief, which for the first time in these proceedings appears to contend the taking was authorized by R.S.A. 31:92, is both unsupported by the record and untenable as a matter of statutory construction.[7] While paragraph 8 of the Declaration of Taking identified R.S.A 47:11 and R.S.A.149-I:2 as the authority for the taking, it did not identify R.S.A. 31:92. This is fatal to the City's position. It cannot raise for the first time in this appeal reliance on authority which it never used for the proceedings at the City Council or in the Trial Court.

R.S.A. 498-A:5, II(c) provides the Declaration of Taking must contain: "A specific reference to the Statute, Chapter and Section thereof, under which the condemnation is authorized." The purpose is clearly to put the condemnee and public on notice of the specific basis for the taking. Without notice, the condemnee could not properly challenge a taking as the grounds for it could constantly shift to thwart due process, as the City is attempting here. Undisputedly, there is no specific reference to R.S.A. 31:92 in the Declaration that would meet the terms of the Eminent Domain Procedure Act.

To get around this, the City offers that the phrase "and other statutes" in the Declaration is sufficient to put the condemnee on notice, and that the unambiguous words of the statute may be ignored. Statutes are interpreted according to their plain meaning. *In re Town of Belmont*, No. 2018-0217 (N.H., 2019). The Court will not add or subtract words but enforce the statute as written as long as it is not ambiguous. *Id.* "The

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[7] In its response to the preliminary objection, Portsmouth mentioned in passing that it had the power to take under R.S.A. 31:92 but it never asserted that in this case it was proceeding under that section. In any event, a passing reference does not comply with R.S.A. 498-A:5. II(c).

legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009). "[This Court] will not construe a statute in a way that would render it a virtual nullity." *Wolfgram v. N.H. Dep't of Safety*, 169 N.H. 32, 36 (2016). Nothing about the statute here is ambiguous. The statute requires specific notice detailed by chapter and section. The phrase "and other authority" hardly meets this criteria. *See General Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 608 (2010) (rejecting "substantial compliance" argument and observing that "[o]ur law is well settled that in giving statutory notice the requirements of the statute must be strictly observed." (quotation omitted)). Further, notice is supposed to be fair and meaningful when a statute requires it. *City of Claremont v. Truell*, 126 N.H. 30 (1985). Portsmouth's use of the phrase shows it did not want to be bound by the plain requirements of the statute. Having lost on the two statutes before the Trial Court, it now introduces a new statutory ground to this Court in violation of the Act.

Mr. Boyle defended on the basis of these two statues and not some undisclosed theory of the taking.[8] Due process requires notice and a fair hearing. Mr. Boyle would be denied due process if the case on appeal were fundamentally altered by this new argument. The statute should be enforced as written and all arguments in the City's brief based on R.S.A. 31:92 disregarded. Leading up to the de novo hearing[9], the Trial Court considered numerous motions and had an extensive pre-trial conference. It issued a procedural order that expressly stated the City was proceeding under 47:11 and 149-I:2.

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[8] Mr. Boyle did put on evidence that the wetlands were impaired and environmentally dangerous to show how the City's proposed use of them for stormwater management was flawed.

[9] The parties vehemently disagreed over what constitutes a de novo hearing. The Trial Court accepted the City's position. Mr. Boyle did not appeal this ruling as he otherwise prevailed.

Boyle App. 6. The City did not object. While the City put on a "wetlands are good"[10] case, it did so to amplify the overall net public benefit, not as proof of necessity. TR. Vol. II, 40:18-43:4. The Trial Court held the City was not limited to the context of the Declaration of Taking to demonstrate the net public benefit. *Id.*

The applicability of R.S.A. 31:92 was not argued before the Trial Court. Nor was there a motion for reconsideration of the Court's final order. As such, it should not be considered by this Court. *Vention Med. Advanced Components, Inc. v. Pappas*, 171 N.H. 13, 27 (2018); *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 786-90 (2006); *Provencher v. Buzzell-Plourde Associates*, 142 N.H. 848 (1998). Even in those places the City claims to have preserved the issue, Brief at 8, the City still did not argue its applicability. It is improperly raised for the first time on appeal. The Trial Court certainly committed no unsustainable exercise of discretion in light of the fact that the City neither raised nor briefed the issue they now assert on appeal. Finally, as will be discussed in the section on bad faith, this chameleon-like use of disclosure skirting the statute is yet another example of the lawyers manipulating the process.

B. THE TRIAL COURT NEITHER REVERSED ITSELF OR MADE RULINGS ON STATUTORY AUTHORITY.

The City somehow contends that the Court made rulings on authority and reversed itself from its pretrial rulings. That position completely misconstrues the proceedings. The Declaration of Taking only identified R.S.A. 47:11 and R.S.A. 149-I. These were the only statutes argued by Portsmouth. Thus, the Trial Court correctly found as a fact that: "the City does not rely on any authority beyond RSA 47:11 and RSA 149-I to justify the necessity of taking in this case". City Addend. 64. It then ruled the City must establish necessity in light of the statutes on which it relied. City Addend. 63-64. This is an

[10] Substantively, a taking would not have succeeded under R.S.A. 31:92. The City did not distinguish these wetlands from hundreds of other wetlands so there was no showing of a particular need. The City's only argument why these wetlands were needed was the benefits to stormwater - the very ground the Trial Court rejects under the other sources of authority.

entirely sustainable and rational ruling on the standards to apply to the case that the City brought. Necessity for a sewer is different than necessity for an airport. Context is crucial in a necessity analysis.

As an evidentiary matter, the Court indicated it would hear evidence not limited by a narrow reading of the authorizing statutes on which the City relied. TR. Vol. II, 40:18-43:4. Thus, much testimony came in concerning wetlands generally. The Trial Court ruled much of it was irrelevant in light of the statutes on which the City relied. City Addend. 67. Great deference must be give to a trial court's determination of relevancy and admissibility. *State v. Lisasuain*, 167 N.H. 719 (2015). The Court correctly considered the evidence and appropriately characterized it. The Trial Court did not consider it in light of R.S.A. 31:92 simply because until it lost and filed its appellate brief, there was no indication the City was relying on that general taking power.

Indeed, the matter came up in Mr. Boyle's Motion in Limine Concerning Statutory Authority. City App. Vol. II, 5. The Court and the parties recognized the broad grant of authority under R.S.A. 31:92, but the City never contended it was relying on that statute. Indeed, it acknowledged its lack of reliance by contending it could seek to amend the Declaration of Taking if it needed to rely on it. City App. Vol. II, 43. It never did amend, thereby confirming that it was not relying on R.S.A. 31:92.

The Trial Court recognized various statutes granting authority for a taking. This does not conflict with its earlier ruling limiting the balancing test to the actual statutes relied on. The Court did not "inexplicably reverse course" as contended by the City, Brief at 30, but rather limited its review to the statutes advanced by the City. When it said that the balancing test is independent of the statute, the Court was addressing the process - the balancing test does not change with different authority. That does not negate that the evidence considered must be relevant to the specific statute being used for authority.

The cases of *Molloy v Town of Exeter,* 107 N.H. 123 (1966), *Leary v. Manchester,* 90 H.H 256 (1939), and *Leary v. Manchester,* 91 N.H. 442 (1941)[11] do not provide justification for the City's arguments that R.S.A. 31:92 can automatically save a defective taking. They are not "identical" situations as the City contends. Brief at 33. Both predate the Eminent Domain Procedure Act and its requirements that chapter and section be identified. Further, there was no issue of notice discussed in those opinions as exists here. Thus, no conclusion about these cases can be drawn as presumably the condemning authorities made proper disclosure. The cases are further inapposite because the specific statute involved in each did not expressly cover the subject matter of the taking so that the taking had to be done under a general power. Here, very specific applicable statutes are involved.

Normally, a specific statute controls over a more general statute and a party must meet the requirements of the specific statute. *In re Pennichuck Water Works, Inc.*, 160 N.H. 18 (2010). *See Also State v. Cheney*, 165 N.H. 677 (2013); *Ford v. NH Department of Transportation*, 163 N.H. 284, 294 (2012); *Energynorth Natural Gas, Inc. v. City of Concord*, 48 A.3d 960 (N.H., 2012). In cases cited by the City, there was some question as to whether the specific grants of authority actually applied, and the general taking authority was invoked instead of a statute with questionable applicability. That is not the situation here. Drainage and stormwater statutes unquestionably apply to drainage and stormwater. The clarity of their application precludes resort to the general taking authority. *See, e.g., Ford v. N.H. Dept. of Transp,* 163 N.H. 284, 294 (2012) ("to the extent two statutes conflict, the more specific statute... controls over the general statute").

"It is fundamental that a legislative grant of power to condemn for a public use, being derogatory of common right, may be exercised only within the clear definition of the grant". *Maine-New Hampshire Interstate Bridge, etc. v. Ham,* 91 N.H. 179, 181

[11] *Leary* will be discussed again below. In *Leary*, damages were fixed. Here, at the time of the taking, liability for the wetlands was uncertain and no amount of rent had been set for the sewer line.

(1940). “The eminent domain proceeding is considered ‘one of the most harsh proceedings known to law.’ For this reason, when a state or other authority seeks to condemn private property, the condemning authority will be held to strict compliance with the authorizing statute.” 7 Nichols on Eminent Domain G2.05. The Trial Court was correct in its treatment of the case. It employed the specific statutes Portsmouth cited to analyze necessity. It found facts that supported each of its conclusions. It did not usurp jurisdiction or engage in contradictory analysis. Rather, it reasoned through numerous issues in this complex matter, allowed the parties their say, and reached tenable conclusions based on the facts found.

III. The City Improperly Argues Matters Not In Evidence.

Throughout its brief, Portsmouth makes arguments based on facts that are not in the record, each of which must be given no weight. Moreover, the arguments are so different than those at the hearing that it appears the City is using this appeal as another trial *de novo* as this appeal bears little relation to what was tried.

A. THERE IS NO EVIDENCE IN THE RECORD THAT THE CITY WAS TRYING TO AVOID DAMAGES.

Portsmouth never argued the taking was to avoid damages. At the time of the taking, the sewer line trial had not occurred. There were no damages and the City was emphatically denying that Mr. Boyle would recover. By the time of the de novo hearing, the jury had awarded damages to Mr. Boyle, but no witness testified that the taking was to avoid these damages. In fact, the City is appealing that award and still contends there are no damages. Thus, it is seeking to avoid damages it contends either don’t exist or cost far less than acquiring the property[12]. This is in sharp contrast to *Leary v. Manchester,* which held that relieving an economic burden could justify a taking. 91 N.H. 442 (1941). In *Leary,* the potential burden had been determined by a final judgment. Thus, Manchester could rationally determine whether taking the property was in the public

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[12] The City contended it only owed $7,366 for rent of the sewer line for the three years since summary judgment.

interest. The City cannot do that here. Until such time as future damages are determined, it is not ripe and cannot be a justification for the taking.

Even if the city had argued this below (it did not), the argument carries no weight because it is impossible to measure the benefit to the City compared to the burden on the City when the burden is unknown. At best, the City might claim it was avoiding future rent for the use of Mr. Boyle's property. However, there was no evidence of rental value or any other information which would allow any sort of balancing test at the de novo hearing. While there was testimony concerning $605,458 to move the sewer line, Mr. Boyle contends that if the taking stands, just compensation will be over $3,500,000. Ex. 6, App. Vol II, 149; Ex. K, Boyle App. 25. The City engineer who provided the cost estimate to move the sewer line testified that he never offset that cost nor do a benefit detriment analysis. TR. Vol. I, 90:22-91:7. This taking may become Portsmouth's biggest fiscal fiasco. It is not surprising that there was no evidence put in the record by the City as it is all speculative. The City didn't even know if it would need to incur the capital cost of replacing the sewer line regardless of the taking. TR. Vol. I, 66:19-21. Eminent domain cannot be based on speculation and the entire argument about damages is meaningless at the present time.[13]

"A future hope based on speculation is not sufficient to justify the taking of private property in a condemnation proceeding." *Rueb v. Oklahoma City*, 435 P.2d 139, 141 (Okla. 1967). Nichols on Eminent Domain has addressed the issue of pre-condemnation planning considerations:

> Condemnation, in sharp contrast, arises as part of a designed activity on the part of the condemnor. The fact that the condemnor creates the key facts such as how much property to take, where to take it, and when the taking is to be done, often permits the condemnor limited discretion as to the choice

[13] The Trial Court never had to address this issue as it decided the matter on the first prong of the balancing test.

of defendant, forum, and the use of contingent plans. 7 Nichols on Eminent Domain § G1A.01(1)(a).

In the end the City did not put in the evidence needed to prove it was using eminent domain to cut off damages as it decided to try and argue a stormwater case. Only after it lost does it now focus on damages.

B. THERE IS NO EVIDENCE IN THE RECORD THAT THE SEWER LINE AND WETLANDS ARE INEXTRICABLY LINKED.

The City implicitly knows its justification for taking the wetlands is flawed. To mask this failure, it now argues that the wetlands are inextricably linked to the sewer line and that justifies taking the wetlands. The only evidence in the record was testimony from the City engineer and it goes against the City's position. TR. Vol. I, 85:16-86:12. First, Portsmouth put on no evidence that the sewer line necessitates the wetlands. Whether wetlands accumulate in front of the sewer line depends on the drainage structures, that is, the existence or lack of culverts under the sewer line. With sufficient drainage, the sewer line can exist without wetlands accumulating. Uncontradicted testimony established that the sewer line and wetlands are not linked.

Arguments which lack any support should be disregarded. *In re Yaman*, 167 N.H. 82 (2014); *Appeal of Net Realty Holding Trust*, 128 N.H. 795 (1986). In 2011, Mr. Boyle installed two additional culverts. The effect of this was to significantly decrease the amount of water staying on site. The wetlands are drying out while the sewer line is still present. TR. Vol. II, 117:5-9. Thus, the City's arguments about the need to take the wetlands with the sewer line has no basis.

C. THERE IS NO EVIDENCE IN THE RECORD THAT THE CITY WAS TRYING TO ABATE THE NUISANCE.

The City's argument that it was trying to abate the nuisance caused by the wetlands is disingenuous. Portsmouth insisted that it was going to keep the wetlands as is. It was not reducing them or otherwise altering them. Ordinarily when property is taken, the taking authority has concrete plans and specific uses. *Connecticut Light and*

Power Co. v. Huschke, 409 A.2d 153 (Conn. Super. Ct. 1979); *State v. 0.62033 Acres of Land in Christiana Hundred*, 112 A.2d 857 (Del. 1955). It is hard to see how leaving a nuisance the same, abates it.

Taking title does not abate the nuisance as the continued nuisance affects the property which Mr. Boyle still owns after the taking. The City took to the edge of the wetlands. Under Portsmouth's zoning ordinance, a very restrictive 100 foot buffer must exist between the wetlands and any development. City Addend. 72. Thus, the wetlands still affect the use of 100 foot strip along a significant length of Mr. Boyle's back boundary. There is no dispute of fact concerning this, and the City's argument about abating the nuisance is lacking of any merit. Moreover, the City presented no evidence which tied the taking of 4.6 acres to the nuisance. It is a new argument devoid of evidentiary support.

D. THERE IS NO EVIDENCE IN THE RECORD OF A PRESENT NEED TO TAKE THE PROPERTY.

In order to take property, there must be a present need for it. *In the Matter of Davis Holding Co., LLC v. Village of Margaretville*, 55 A.D.3d 1101 (N.Y. App. Div., 2008); *See City of Joliet v. Mid-City Nat'l Bank of Chi.* (N.D. Ill., 2012). In *City of Joliet*, the Court held that the current condition of the property is relevant "to whether the taking will effectuate the proffered public purpose at the time the title would transfer". Necessity cannot be based on an erroneous assumptions or designs. *Rafferty v. Town of Colonie*, 300 A.D.2d 719, 752 N.Y.S.2d 725, (N.Y. App. Div. 3d Dep't 2002). A mere possibility of future use is insufficient to justify a taking. *Board of Education v. Baczewski,* 65 N.W.2d 810, 811 (Mich. 1954). Here, the City's testimony was unanimous that the City has no plans for the property and that it would just sit there unused. There had been no studies of the property, no testing or any other steps which would indicate even a remote possibility of use. TR. Vol. I, 62:7-63:3, 72:20-73:5; TR. Vol. II, 83:1-12, 83:25–85:5. Even a year after the taking the city engineer and environmental planner weren't consulted about the property (until presumably the lawyers contacted them to testify).

The Court noted the substantial evidence submitted by Mr. Boyle that the City had no plans and would do nothing. City Addend. 68.

The Court then reasoned that since the City was doing nothing with the land, its real purpose in the taking was not for a present use, but rather to prevent development. Thus, the taking was not based on a present need. City Addend. 68-69. Substantial evidence supported this conclusion including a memo by Dean Peschel, one of the City's experts, which expressly said that the purpose of the taking was to prevent development. City Addend. 71-72; Def. Ex. S, Boyle App. 236. The Court then held that preventing development based on speculation any development would not properly manage stormwater was an improper use of eminent domain. City Addend. 69.

The Court's discussion of land use regulations was not essential to this conclusion and proves a red herring in the City's brief. Essentially, the Court was reassuring the City that it could still protect the environment through its land use regulations. The City's evidence supported this holding as land use regulations prevented development for an abutting property. TR. Vol. II, 80:13-81:10. Of particular note, the New Hampshire Department of Environmental Services agreed with Mr. Boyle's development plans, further underscoring that preventing development rather than stormwater management was the City's real agenda.

Finally, since the City was doing nothing with the property, the only environmental concern would be Mr. Boyle's development plans. The Court noted that Mr. Boyle did not have all permits and approvals so that it was too speculative to factor these possibilities into the taking analysis, consistent with *Green Crow Corp. v. Town of New Ipswich,* 157 N.H. 344 (2008) and *Graves v. Town of Hampton,* No. 2017-0451 (N.H., June 28, 2018).

Not only is there not a "present" need as argued by the City, the Court found there was <u>no</u> need for taking the property. City Addend. 73. If land use regulations curtail development, there is no need to take the property, and if development is permitted the

regulations will insure environmental integrity. *Id*. Thus, under either scenario, there is no need to take the land, regardless of the authorizing statute.[14] The finding that there was no necessity for the taking is a finding of fact supported by voluminous evidence and subject to great deference.

E. THERE IS NO EVIDENCE THAT WETLANDS ARE CONSTRUCTED WITH MATERIALS ADAPTED TO THE PURPOSE AND MAINTAINED AS CONTEMPLATED BY R.S.A. 149-I:2

R.S.A. 149-I:1, which provides authority for takings involving stormwater, provides, in part: "The mayor… may construct and maintain all main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment, works which they adjudge necessary.… Such drains, sewers, and systems shall be substantially constructed of brick, stone, cement, or other material adapted to the purpose,…" The Trial Court correctly made the factual finding that the City had no plans to construct a system. Without construction of a system, the statute clearly does not apply. This is reinforced by the Court finding the wetlands don't qualify as "materials adapted to the purpose."

The City does not seriously challenge this factual finding. While there was evidence of a general description of the drainage area, there was no evidence of what constituted the drainage system; how it was constructed or maintained; or whether it was a system or naturally occurring. All of the drainage appears either natural or by random development that can hardly be considered an orderly system. Indeed, the City describes the wetlands as naturally functioning, which belies the whole notion they are constructed. City Brief at 34.

To circumvent this, the City complains that the Court misinterpreted the statute. Construct, it contends, does not have the ordinary meaning of building something, rather it can be a collection of disparate parts. This is an untenable interpretation of the word, particularly when the materials of construction are identified as brick and stone, items

[14] This same reasoning would defeat a taking under R.S.A. 31:92.

which fit well within the normal definition of construction. The City also complains the Court ignored the word maintenance. The statute requires "construct and maintain". Since the Court found as fact that there were no plans for construction, it need not reach the concept of maintenance.

The City further complains the Court treated the sewer line and wetlands inconsistently because it found the City needed to maintain the sewer line. The sewer line, as the Court noted, is constructed of asbestos pipe. It requires maintenance and the City described its maintenance. Since the sewer line is constructed of a material envisioned by the statute, the Court found the sewer line alone met the terms of R.S.A. 149-I. The City's tortured argument that the wetlands are "other material adapted to the purpose" can be easily disposed of. When a list of items is given it only allows for items similar in character and nature to the specifically described items. *Phaneuf Funeral Home v. Little Giant Pump Co*., 163 N.H. 727 (2012); *United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). Wetlands are not at all similar in character as brick, stone, or cement. Materials are things which can be combined and used. *Boyle v. City of Portsmouth*, 154 N.H. 390 (2006). "The plain meaning of the noun material[s] is 'the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made.'" *Id*. at 391. A wetland is just not the type of thing that would ordinarily be considered a material.

Finally, as noted above, the undisputed evidence established that these wetlands are not part of a stormwater system. Mr. Boyle's restoration of the perimeter ditch and addition of culverts in 2011 diverted any stormwater away from the wetlands. Once Mr. Boyle accomplished his work, even if the wetlands were once part of a system, they no longer remain a part of it. The City offered no evidence that it would reconnect the wetlands to the drainage. Further, the City put on no evidence to justify how these

particular wetlands were functioning for stormwater based on current conditions. There is simply no evidentiary basis to reverse the Trial Court's finding.

IV. In Contrast, There Is Ample Evidence To Support The Trial Court's Factual Findings Which Defeat The Taking.

A trial court's findings of fact would not be disturbed unless there was an abuse of discretion or no evidence to support them. *Jackson v. Ray*, 126 N.H. 759, 762 (1985). As set out in the Statement of Facts above, there is record support for each of the findings. The findings were detailed and reached after three days of hearing where multiple witnesses testified. The matter was extensively briefed by the parties after a trial transcript had been obtained so that the Court had the benefit of citations to the transcript in evaluating the position advocated by each. The Trial Court did not remotely abuse its discretion in making its findings.

V. The Court Correctly Held That The City Could Not Take In Fee Simple When it Admitted It Only Needed An Easement.

In a proper case, where it is needed, property may be taken in fee simple. The Trial Court never questioned the ability to take in fee - only if it was appropriate here. The question presented is not the legal authority, but rather the question of whether it was justified factually by the evidence presented. Takings by their nature are invasive of a person's property so it is widely accepted that only the property needed to accomplish the purpose of the taking may actually be taken. *In the Matter of Davis Holding Co., LLC v. Village of Margaretville*, 55 A.D.3d 1101, 2008 NY Slip Op 8057 (N.Y. App. Div., 2008). "The right to take private property for a public use is founded upon and limited by public necessity. Where the necessity stops there stops the right to take, both as to amount of land and the nature of the interest therein." *In re Winnisimmet Co.*, 95 N.E. 293, 294 (Mass. 1911). Thus, fee simple ownership will not be taken if an easement suffices. In *Hallock v. State of N. Y.,* 300 N.E.2d 430 (N.Y., 1973), the court stated:

> The general principle that there is no right to condemn land in excess of the need for public purposes, and that no more may be taken than is required

for the particular public purpose, applies not only as to the volume of land to be taken, but as well to the nature or extent of the estate in the property taken. In general there may not be the acquisition of a fee when only an easement is required. See 2 A Nichols, Eminent Domain, § 7.223, subd. (1), p. 7--63; Ann., 6 A.L.R.3d 297, esp. § 5, at p. 308.

In this case, the city engineer testified that an easement for the sewer line would suffice. TR. Vol. I, 103:7-20. He also testified, apparently with no basis, that the City has multiple drainage easements but this area needed to be taken in fee because there may be a future need and to avoid potential future disputes [with Mr. Boyle].[15] TR. Vol. I, 104:17-105:22. (emphasis added). Speculative fear of difficulties working with the subservient estate owner does not justify taking in fee. It should be noted that the City Engineer would be the person responsible for the sewer line so his opinion as to the suitability of an easement holds great weight. The Court correctly noted that: "In light of this testimony, it is difficult to discern a substantial public need for the City to acquire a fee interest in the sewer line." City Addend. 75.

Only one other witness, the City's Environmental Planner, testified the reason for taking in fee was that Mr. Boyle is difficult. Later on cross-examination he admitted the he could work with him. TR. Vol. II, 87:2-4. What came out from the testimony was that there was no legitimate reason to take in fee but rather it was motivated by a dislike of Mr. Boyle. *See Brannen v. Bulloch County*, 387 S.E.2d 395 (Ga. App., 1989); *Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington*, 506 N.E.2d 1152, (Mass., 1987). The Court even noted the City made virtually no effort to justify taking in fee. City Addend. 76.

The City misses the point by claiming an error of law that somehow the Trial Court did not understand property could be taken in fee. Here the issue was simple,

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[15] We assume that this was more manipulation by the lawyers as the witness did not testify he had any difficulties with Mr. Boyle.

based on the testimony, the Court made a finding of fact that there was no need to take the 4.6 acres in fee. There is no abuse of discretion in such a finding and it must stand. *Petition of Bianco*, 143 N.H. 83 (1998); *State v. 3M Nat. Advertising Co., Inc.*, 139 N.H. 360 (1995); *Society Hill at Merrimack Condominium Ass'n v. Town of Merrimack*, 139 N.H. 253 (1994). The cases cited by Portsmouth to argue theoretical authority are inapposite.

In light of the complete lack of need for taking in fee, the Court analyzed the impact on Mr. Boyle. It found that it prevented him from the possibility of development and concluded this was a significant burden on his rights. City Addend. 77, 79. Again, there is no serious challenge to this factual finding. Thus the Court concluded the City's need was outweighed by the burden on Mr. Boyle's rights. The Court properly balanced these factors and sustained the objection to taking in fee.

VI. The Court Correctly Held That A Taking With An Improper Motive, That Is, A Ploy To Influence Other Litigation, Cannot Stand.

New Hampshire has not expressly ruled that bad faith or an improper motive is a defense to a taking. Numerous other jurisdictions have. *Matter of Zutt v. State of New York,* 99 A.D.3rd 85, 949 N.Y.S.2d 402 (N.Y. App. Div. 2d Dep't, 2011); *HTA Ltd. Partnership v. MA Turnpike Authority*, 747 N.E.2d 707 (Mass. App., 2000); *Fowler v. City of Marietta*, 504 S.E.2d 726, 233 Ga.App. 622 (Ga. App., 1998). Nichols on Eminent Domain has stated: "…it may be safely said that the courts of the various states would feel obligated to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but felt that the body had acted with total lack of judgment or in bad faith." 1A Nichols on Eminent Domain §4:11(2); *see also Commonwealth v. Cooksey*, 948 S.W.2d 122, 123 (Ky. App. 1997). This is not a situation where a municipality exercised eminent domain after a verdict against it such as in *Leary*,

but is instead the exercise of the eminent domain power to unfairly influence that trial and verdict.

In this case, the Court ruled that improper motive goes directly to necessity, that is, a property taken with an improper motive establishes that the property was not needed or necessary. City Addend. 80-84. The Court summarized numerous indicia of bad faith, including the scope of the taking, the lack of plans for the property, the aim just to prevent development, and the timing of the taking. Id. It found the taking was an eleventh hour litigation ploy. City Addend. 83. Here, the evidence supporting the Trial Court's factual finding is legion.

Portsmouth suggests that somehow the Trial Court was influenced by the litigation history of the parties and their interactions over the years. Nothing in the opinion suggests that the Court was relying on anything but the record in this case. The Trial Court summarized ten findings based on the evidence in the preliminary objection that gave rise to the conclusion of the City's motive for the taking was to cut off future litigation over development. Reasons set out at City Addend. 82-84. Finding of ulterior motive set out at City Addend. 84.

Nor does the City's defense that the Trial Court suggested the taking have any merit. The Court was suggesting a taking of a modest sewer line easement (20 feet perhaps) rather than a taking of 4.6 acres in fee simple. City Addend. 82. Incredulously, Portsmouth argues that taking an easement only is objectively unreasonable. Brief at 50. In that case, the entire testimony of the City's principal witness, the City Engineer, should be disregarded as he testified an easement would suffice. In effect, Portsmouth views its key witness as taking "objectively unreasonable" positions. The Court never suggested taking an amount of land that would deprive Mr. Boyle of his development possibilities.

The Trial Court was in the best position to evaluate the witnesses and the case presented to it. Its findings are not lightly reversed when it has had the opportunity to observe the witnesses and evaluate their credibility. *Rancourt v. Town of Barnstead*, 5129

N.H. 45 (1986). It remarked on the lack of evidence by the City and the fact that none of the witnesses were consulted prior to the taking. Only the lawyers were involved in the proceedings before the City Council and the decision to take 4.6 acres. City Addend. 84. A taking based on a necessity hearing that is simply a "rubber stamp" to a pre-determined result cannot stand. *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 219 Cal. Rptr. 365 (1985). The factual finding that there was no necessity for taking the wetlands has ample record support and must be upheld.

VII. In Order For The City To Prevail, This Court Would Need To Reverse The Trial Court On All Five Major Rulings As Each One Is And Independent Ground Which Itself Defeats the Taking.

The Trial Court gave a detailed analysis of this case. In essence, its opinion gave five major reasons to set aside the taking: (1) there is no necessity for taking the wetlands which meets the statutory framework under which the City proceeded, (2) there was no present necessity for taking the wetlands, (3) the detriment to Mr. Boyle outweighs the City's benefit, (4) there is no justification for taking in fee simple, and (5) the taking was done with an improper motive. Each of these reasons is an independent ground to set aside the taking as if even one is present, the taking cannot stand. Therefore, to prevail, Portsmouth must show the entirety of the Trial Court's 29 page analysis is incorrect. There are ample grounds supporting the Trial Court. The City simply cannot prevail in light of the overwhelming evidence and reasoned fact findings in favor of Mr. Boyle.

VIII. In The Unlikely Event The Trial Court Is Reversed On All Five Rulings, The Matter Must Be Remanded To The Trial Court For A Balancing Test Applied To The Wetlands.

Should this Court determine that the Trial Court's analysis is incorrect and that its factual findings lacked any evidentiary basis, it still cannot simply reverse as requested by Portsmouth. In light of the reasons articulated in its decision the Trial Court never had to apply the balancing test to the wetlands under some general but unarticulated power (nor did Mr. Boyle have the opportunity to defend such claim), and it never reached the second prong of the balancing test of weighing the benefit to Portsmouth against the

burden to it. Thus, the matter cannot simply be reversed in any event as that would deny Mr. Boyle full consideration of his case.

CONCLUSION

Mr. Boyle asks the Court to affirm the Trial Court sustaining the preliminary objection to the taking and such further relief as may be just.

REQUEST FOR ORAL ARGUMENT

Mr. Boyle requests oral argument before the full court to be presented by Attorney Kuzinevich.

Respectfully submitted,

James G. Boyle, individually and as
Trustee of the 150 Greenleaf Avenue
Realty Trust

By his attorneys,

/s/ John Kuzinevich

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CERTIFICATE OF WORD COUNT

I hereby certify this reply contains 9,478 words exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service, and certification of word count.

/s/ John Kuzinevich

John Kuzinevich (#264914)

CERTIFICATE OF SERVICE

I, John Kuzinevich, hereby certify that the foregoing and Supplemental Appendix has been forwarded to all counsel on the electronic service list.

/s/ John Kuzinevich

John Kuzinevich (#264914)