STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2018-0649

City of Portsmouth,
Plaintiff,
v.
150 Greenleaf Avenue Trust, Minato Auto LLC, Toyota Motor Credit Corporation, Eversource, and Fairpoint Communications Inc.,
Defendants.

BRIEF OF APPELLANT CITY OF PORTSMOUTH

RULE 7 APPEAL FROM FINAL ORDER OF ROCKINGHAM COUNTY SUPERIOR COURT

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Oral Argument Requested. Mr. Felmly will argue.

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QUESTIONS PRESENTED FOR REVIEW

1. In its February 27, 2014 pretrial order in Boyle's damages case alleging trespass, nuisance, and inverse condemnation, the court ruled against the City and ordered it must remove the sewer line on Boyle's land or exercise its eminent domain power. The court scheduled a jury trial in January 2017 on damages for the trespass, as well as the nuisance and inverse taking claims. As a result, the City initiated eminent domain proceedings on September 6, 2016, taking the sewer line and adjacent wetlands that Boyle claimed were inversely condemned by flooding. In setting aside the taking, the court rejected the City's reliance on RSA 47:11 and RSA 149-I, which set out a public purpose of stormwater management, and conveyance and discharge of water, and held the City had no statutory authorization. Did the court err in reversing its own pretrial and trial orders holding that statutory authorization issues were reserved to the Board of Tax & Land Appeals and outside the jurisdiction of the Superior Court, and also in disregarding its prior ruling that RSA 31:92 provided a general grant of authority to the City to condemn land for public use?

Preserved in the City's Declaration of Taking (Add.86); the City's Response to Boyle's Preliminary Objection at 5-8 (A-I.192); the Procedural Order at 12-13 (Add.104); the May 24, 2018 Order on Boyle's Motion in Limine Concerning Statutory Authority at 2 (Add.108); and the City's Reply Memorandum at 2-3 (A-III.132).

2. Where the Declaration of Taking expressly references Boyle's claims that the sewer line had flooded his land, created the wetlands and effectively taken his property for public use and New Hampshire law expressly recognizes the significant public interest in preserving wetlands for stormwater purposes, did the Trial Court commit legal error in finding irrelevant and dismissing the City's present and ongoing purposes in maintaining and preserving natural

stormwater functions in the wetland portion and seeking to avoid the burden on taxpayers from future litigation and damage claims?

Preserved in the City's Declaration of Taking (Add.86); the City's Response to Boyle's Preliminary Objection at 1-7, 11-13, and 17-18 (A-I.188-194, 198-200, 204-205; the City's Closing Memorandum at 8-18 (A-III.98-108).

3. The court found that the City established an "extremely high" public necessity to control and maintain the sewer line. Nevertheless, the court objected to the taking in fee, concluding the City could have achieved its purposes by taking only an easement to operate the sewer line. In balancing the interests of Boyle and the City, did the court err in holding the taking of a fee interest was unwarranted to accomplish the City's stated purposes to operate and maintain the sewer line, preserve and maintain the adjacent wetlands and their natural stormwater regulation functions, and avoid damage claims and inverse condemnation, while finding the corresponding burden on Boyle to be "amorphous and "speculative"?

Preserved in the City's Declaration of Taking (Add.86); The City's Response to Boyle's Preliminary Objection at 14 (A-I.201); the City's Closing Memorandum at 8-18 (A-III.98-108); and the City's Reply Memorandum at 5-6 (A-III.135-136).

4. The court concluded in the *de novo* trial that the City evidenced an improper or "ulterior motive" for including the wetlands in the taking, finding that a "further reason" for setting it aside. The court considered the taking of the sewer line and the wetlands separately, finding the City's stated purposes for the wetland taking were "irrelevant" and not the City's true reason. Did the trial court err in disregarding the City's purposes for the taking, including wetlands preservation and maintenance of stormwater regulation, and resolving ongoing claims of trespass, nuisance and inverse

condemnation, and in disregarding that the City publically set out these purposes in the Declaration and the City Council authorization?

Preserved in the City Council's Resolution (A-I.125); City's Declaration of Taking (Add.86); the City's Response to Boyle's Preliminary Objection at 2-5, 11-13, 17-18 (A-I.189-192, 198-200, 204-205); the City's Closing Memorandum at 8-18 (A-III.98-108) and the City's Reply Memorandum at 5-6, 10-12 (A-III.135-136, 140-142).

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS

The applicable statutes and ordinances are set out in the addendum to this brief. Add.113-121.

STATEMENT OF THE CASE

This appeal is one of two pending before this court relating to a parcel of real estate in Portsmouth, New Hampshire owned by 150 Greenleaf Avenue Realty Trust. James Boyle ("Boyle") holds the property in trust for himself and during the legal proceedings Boyle has been referred to as the owner. This appeal is from a decision of the Rockingham County Superior Court setting aside the City of Portsmouth's ("City") condemnation of 4.6 acres of Boyle's land for purposes of acquiring title to an existing municipal sewer line as well as adjacent wetlands on the property. The taking by eminent domain and the issues of public necessity and net public benefit arise out of a longstanding legal dispute between Boyle and the City as to Boyle's claims of

trespass, nuisance, and inverse condemnation on the land against the City (the "Boyle Damages Case"). Following a jury trial in the Boyle Damages Case and an award of damages from the jury, Boyle appealed to this Court, and the City cross-appealed the verdict. (*Boyle v. City of Portsmouth* et al., No. 2018-0327).

This Court established a parallel track for briefing on the two appeals and the factual and procedural history of the cases are heavily intertwined. Specifically, the Superior Court ruled on summary judgment in the Boyle Damages Case that the presence of the City's 50-year-old sewer line crossing the property was a trespass and that the City must either remove it or acquire property rights in the land by eminent domain. A-I.102. The eminent domain taking was initiated by the City to pursue the option presented by the court after various other defenses were denied and the matter scheduled for jury trial. Following the City's appraisal of the land to be taken and the filing of the Declaration of Taking and Deposit of Damages ("Declaration"), Boyle filed a Preliminary Objection with the Board of Tax and Land Appeals ("BTLA") raising many issues. A-I.131. Pursuant to RSA 498-A:9-b, I, the BTLA transferred only issues of public use, public necessity and net public benefit to the Superior Court and retained the remaining objections.

A. The Boyle Damages Case

Boyle commenced his damage claims against the City in 2010. A-I.8. He claimed that the City's sewer line constructed in an earthen berm on his property in 1967 (the "Line") was without any legal right or title by the City. A-I.10-11. Importantly, Boyle claimed that the Line caused flooding onto his property from accumulating stormwater on an approximately 5-acre portion of the 13-acre site. A-I.11-13, 17. This is the area, adjacent to the Line, that was acquired through eminent domain. He claimed the Line and resultant flooding constituted trespass, nuisance, and inverse condemnation (physical appropriation) by the City. A-I.14-17.

After extensive legal motions and rulings, best detailed in the companion case, on February 27, 2014, the Superior Court (hereinafter "court") ruled on Motions to Reconsider Summary Judgment reversing several of its previous rulings (the "2/27/14 Order"). A-I.82. The court reexamined its analysis and reversed its previous grant of summary judgment for the City as to the claim of trespass. A-I.102. It determined that the City's license to operate the Line was revocable and that Boyle gave notice of revocation on November 12, 2013, after the court issued its initial summary judgment order. The court also ruled that the City must either remove the Line or exercise eminent domain to acquire a property interest in the land. A-I.102. The court ordered

that the calculation of Boyle's damages for the period of trespass would be determined by jury trial, together with the resolution of issues of nuisance and taking, which involved disputed issues of fact. *Id.*

Following the 2/27/14 Order, this Court dismissed an interlocutory appeal by the parties on December 24, 2014. In addition, further proceedings related to Boyle's title were resolved by the court on March 14, 2016. A-I.116. On April 26, 2016, the court ruled on various motions, including denial of the City's renewed Motion for Interlocutory Appeal, and on April 29, 2016, the court issued a Notice of Jury Trial for January 23, 2017. A-I.123-124.

B. The City Initiates Eminent Domain Proceedings

At this point, with a trial on calculation of damages for trespass scheduled in early 2017 and the jury to consider further issues of nuisance and inverse condemnation, the City chose to initiate the eminent domain option proffered in the court's 2/27/14 Order. The City advised Boyle of its intention and obtained the required appraisal for a 4.6-acre taking of the Line and the wetland areas that Boyle claimed were flooded (the "Wetlands") by the Line. *See*, RSA 498-A:4, II.

After a public hearing on September 6, 2016, the City Council found public necessity for the taking and authorized

acquiring the land by eminent domain. A-I.125. On December 19, 2016, the City filed its Declaration with the BTLA. Add.86. Boyle filed a Preliminary Objection to the Declaration and a Request for Referral to the Superior Court on December 22, 2016. A-I.131. In part, Boyle claimed the City did not meet statutory requirements for the taking, specifically that the City's citation to RSA 47:11 and RSA 149-I:2, "and other statutes" did not provide requisite statutory authorization. A-I.135. He also claimed that there was no public use, necessity or net public benefit. A-I.146.

C. Jury Verdict in the Boyle Damages Case

The jury trial in the Boyle Damages Case occurred from January 24 through February 6, 2017. At the close of his case, Boyle dropped his inverse condemnation claim and elected to seek lost profits for trespass. A-I.177. The court also ruled that the City's taking terminated its trespass with respect to the Line. Accordingly, the court ruled the period the jury could award trespass damages ended with the 2016 Declaration. A-I.174. The jury found that City had permission to flow or store water on Boyle's land until Boyle revoked it in November 2013, awarding damages for trespass for the years 2014, 2015, and 2016. A-I.178. It additionally awarded Boyle damages for nuisance. A-I.187.

D. The Eminent Domain Court Proceedings

Following the jury trial in the Boyle Damages Case, the eminent domain case proceeded. The court issued a Procedural Order dated June 6, 2017 ruling that it did not have jurisdictional authority to resolve the issues of statutory authorization Boyle raised and reserved claims as to the adequacy of the RSA 47:11 and RSA 149-I:2 for the BTLA. Add.93, 104-105. The court also held that New Hampshire eminent domain law recognized the general authority for public taking in RSA 31:92. Add.95. Additionally, the court ruled that the taking was clearly for a valid public purpose. Add.102-103. These rulings of law were reaffirmed immediately prior to trial when the court denied Boyle's Motion *In Limine* Regarding Statutory Authorization. Add.107-108. Remaining before the court for trial was determination of public necessity in accordance with the two-step balancing test set forth in *Rodgers Development Co. v. Tilton*, 147 N.H. 57, 59 (2001).

In its October 17, 2018 decision, the court set aside the taking and granted Boyle's Preliminary Objection, finding no statutory authorization and ruling that the City's purpose to maintain and preserve natural functioning wetlands was therefore irrelevant, that the City's purpose for the wetlands was speculative and it had no present purpose, that the City was unjustified in taking a fee interest, and that the court

disbelieved the City's stated purposes, viewing the taking as part of a somehow improper plan to minimize damages in the Boyle litigation. Add.57. This appeal followed.

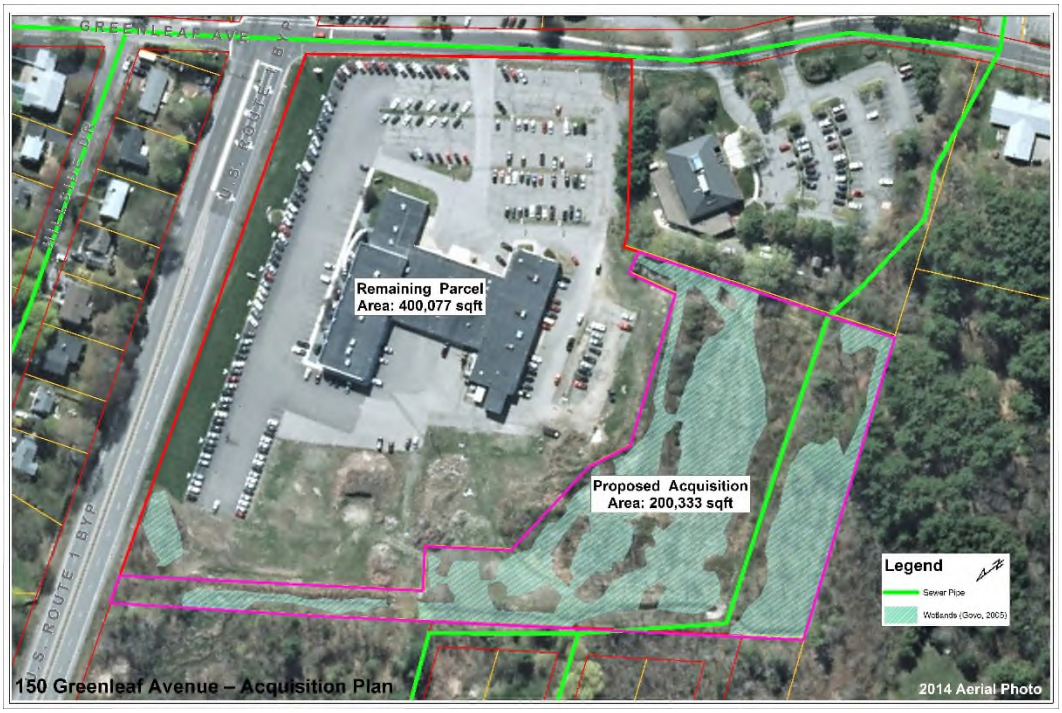
STATEMENT OF THE FACTS

A. The Property, the Line, the Wetlands, and Boyle's Current and Proposed Developments.

The eminent domain taking by the City in this appeal involves land previously owned by the State of New Hampshire then containing a vocational school. In November 1967, the Board of Education approved the City's request to construct the Line across the property. A-I.125. The City thereafter built the Line and has operated it for over 50 years. A-I.125. The Line was buried in an earthen berm and ran parallel to the western boundary of the property for approximately 450 to 500 feet. A-II.86-87. The Line serves an adjoining neighborhood of approximately 110 residences, as well as a facility for at-risk youths, the Chase Home for Children. A-II.88-89. Since its construction, the Line has operated continuously and remains in good serviceable condition with an expected service life of 40 more years. A-II.87-88.

Subsequent to his purchase of the property in 2003, Boyle renovated and expanded the existing school structure and parking on the site for a Toyota dealership. Several acres of undeveloped land lay on the northern and western sides of

the property, with the western portion dominated by the Wetlands and separated by the Line. Add.113. A perennial stream flowed westerly along the northern boundary from the Route 1 Bypass through the Wetlands. A-II.72-73, 99. The photograph marked as Exhibit 2 at trial depicts the Line (green), the 4.6-acre taking, and the remaining upland area of the site, including Boyle's dealership/parking (north is down).



In 2009, Boyle submitted a proposed development to the City for local land use approval seeking to construct a new building on undeveloped uplands and a paved parking area covering nearly all of the Wetlands to the northern and western boundaries. A-III.31.

In 2011, Boyle undertook, without permits, excavation activities in the Wetlands. He constructed an elevated berm/road along a portion of the eastern Wetlands, which prevented water from flowing out of that area into a culvert. A-II.73-75. The U.S. Army Corps of Engineers investigated and required him to breach that new berm and restore flow. A-II.141-143. Boyle also re-ditched the perennial stream along the northern boundary to newly constructed culverts that he installed. A-II.97-98. He also removed much of the tree cover from the eastern wetland. A-II.78.

B. The City Initiates the Taking After the Court Determines the City Had No Legal Rights to the Line or to Flow Water on the Wetlands.

After the court's 2/27/14 Order in the Boyle Damages Case finding that the City had no title to the Line and was committing an ongoing trespass, the City chose to obtain proper title to the land necessary for and purportedly flooded by the Line, preserve the existing stormwater functions of the Wetlands, and bring an end to the financial burden of damages by paying just compensation and acquiring the land through the court-suggested eminent domain option. The City proposed purchasing the 4.6 acres of the property impacted by the Line by paying Boyle just compensation. The City Council approved the taking on September 6, 2016. A-I.125.

C. Wetlands Protection is Prioritized by the State and City.

The City had extensive information about the nature and importance of the Wetlands at the time it initiated the taking in 2016. While its decision to use eminent domain was influenced by the litigation events and the court's rulings, the City's commitment to wetland protection—and knowledge of the importance of the Wetlands in particular—was well developed and a critical factor in its decision. In authorizing the taking, the City Council expressly referred to the Wetlands as a natural buffer and stormwater storage area following rainfall and stormwater events. A-I.126. The City Council referenced RSA 47:11, relating to sewers and stormwater, and RSA 149-I:2, which specifically addresses stormwater management, conveyance, and discharge of water, as well as referring to "other statutes." A-I.126. Although the court stated the legislature has not established a public need to take and maintain natural wetlands for stormwater management, the State's public purpose and priority for wetlands protection directly related to managing the flow of stormwater is well established. RSA 482-A:1 provides for wetlands protection related to managing the flow of water to prevent despoliation or unregulated alteration which "… will adversely affect stream channels and the ability to handle the runoff of waters, will disturb and reduce the

natural ability of wetlands to absorb floodwaters and silt, thus increasing general flood damage."

Portsmouth has long prioritized wetlands protection. Its wetlands protection ordinance as of 2009 began: "[T]he City Council finds that the wetland areas within the City of Portsmouth are in need of protection from certain activities, the impact of which results in alteration or destruction of the wetlands." These public purposes in the ordinance include "preserving the ability of wetlands to filter pollution, trap sediment, retain and absorb chemicals and nutrients, and produce oxygen"; "prevent[ing] … significant changes to, natural wetlands … which provide flood protection"; and "prevent[ing] the expenditure of municipal funds…which might be required as a result of misuse or abuse of wetlands." A-III.36.[1]

D. The Wetlands Taken by the City Provide Critical Stormwater Management and Environmental Functions.

The Wetlands were carefully assessed for the City by environmental professionals ten years prior to the 2016 taking. At trial, the City presented testimony from wetlands expert Mark West, who first examined and assessed the

[1] Excerpts from the 2009 ordinance were entered at trial. The current wetlands protection ordinance contains substantially similar purposes as the 2009 version. Add.116.

Wetlands in 2006. West testified he found the Wetlands to be a healthy forested wetland with a perennial stream flowing through. A-II.73. He described the federal guidelines which delineate the functional assessment of wetlands and characterized the property in specific relation to seven criteria. A-II.67-72. These criteria include flood alteration and the slow release of stormwater, as well as toxin, pathogen, and nutrient removal, shoreline stabilization by slowing floodwater velocity, and others. A-II.67-72. West opined that in 2006, the Wetlands performed well all but one of the criteria, only the criteria addressing recharging groundwater was limited due to clay soils on the property. A-II.72.

West made additional assessments of the property in 2011-2012 and then again in 2017. In 2011, he encountered Boyle's newly constructed road area which was impeding the flow of water across the Wetlands, causing the trees in the area to die or be damaged. A-II.73-75. In addition, Boyle had undertaken ditching causing the main flow of water to be redirected from flowage across the Wetlands into his newly constructed ditch. Consequently, the stormwater was not slowed or detained, which diminished the function of eliminating sediments and caused deterioration of water quality. A-II.76-77. West opined that if the City prevented further disturbance and protected the Wetlands that they

would return to the healthy natural character he saw in 2006. A-II.78-79.

West also explained the relationship of the Wetlands to the Sagamore Creek watershed, where the stream system across the property becomes a critical upstream component of the 139-acre catchment area for Sagamore Creek. He testified that the Wetlands provide one of the last opportunities for water to go through nutrient attenuation and sediment toxicant retention before discharging into the Sagamore Creek saltmarsh. A-II.79.

In mid-2017, West further examined the Wetlands as part of the City's comprehensive Public Undeveloped Lands Assessment ("PULA"). He noted that the health of the Wetlands had been further impacted by cutting of vegetation and ditching of water away from the main flow of the Wetlands. A-II.80. West found that despite the continued detrimental impact of Boyle's actions and operations on the Wetlands, if they were preserved without further adverse impacts, they could be expected to be reclaimed, improving the water quality flowing into Sagamore Creek. A-II.78-79.

In 2015, Boyle generated a new development proposal to build two additional buildings on the upland area of the site and submitted a plan to New Hampshire Department of Environmental Services ("DES"). This new plan proposed

filling and paving the eastern Wetlands for a parking lot up to the Line. A-II.137-138.

The City presented further evidence demonstrating the critical importance of the Wetlands and Line. City Engineer Terry Desmarais identified the relationship to Sagamore Creek of the delineated wetlands, the boundaries of the 139-acre Creek catchment area and the sub-catchment areas. A-II.81-90. Desmarais described the features, condition and viability of the Line and its advantages in comparison to relocation alternatives. A-II.86-92. He outlined the expense of additional cost of constructing a pumping system, rather than continuing to operate the gravity-fed system of the existing line. A-II.92-94. The cost to the City for such a replacement approximates $605,000 and ongoing operational costs would be much higher. A-II.93.

Desmarais described the public advantages of the taking for stormwater management by preserving the Wetlands, enabling the natural attenuation of contaminated stormwater, and the retention of water to prevent flooding. A-II.95-96. He further described the City's obligations under the federal municipal separate storm sewer system (MS4) permit. A-II.102-103. These more restrictive obligations became effective in 2018. *Id.* Boyle's current and proposed extensive paving for automotive storage allows the runoff of hydrocarbons into the natural drainage system and

ultimately into Sagamore Creek, which is already classified as "impaired" for hydrocarbons. A-II.104. Desmarais also contextualized the taking in relation to the environmental expenditure the City is making directly in efforts to improve the Sagamore Creek water quality. A-II.106-108. Finally, Desmarais described the need for the City to acquire a fee interest in the land rather than an easement. Access to the Line for maintenance and to control the flowage of stormwater on the site is best handled by the City through full ownership. A-II.119.

Peter Britz, the City's environmental planner and sustainability coordinator, was qualified as an expert in environmental planning with wetlands expertise. A-II.120. He first assessed the site in 2006 and estimated that he had made 20-plus visits over the years. *Id.* He described in detail the stormwater functions of the Wetlands and their "huge" water quality benefits. A-II.121-123. He explained that current national focus is on *natural* preservation and maintenance of wetlands. A-II.121-123. Indeed, natural wetlands are the current "gold standard" of stormwater management. A-II.122-123. He confirmed his specific observations of the nature of the vegetation, water flow, and fish in the Wetlands and reviewed Boyle's 2015 planned development, noting it as the largest wetland encroachment in the City he had ever professionally observed. A-II.124.

Finally, environmental consultant Dean Peschel testified regarding his study and observations of the Wetlands and their importance. Putting wetland preservation in context, Peschel cited the fact that the EPA regards stormwater as the largest pollution threat to water quality. A-II.126-127. He discussed the catchment area for the watershed focusing on the fact that virtually all the drainage from the watershed naturally flows to and over the taken land. A-II.128-129. He described the vegetation, the root systems of plants that stabilized the water flow and how nutrients are pulled into that vegetation. A-II.130-132. Flood management on the site was adversely affected in his view by Boyle's 2011-2012 excavations that diverted the flow from the Wetlands into less suitable areas. A-II.133-134.

E. The Taking Served the Public Purpose of Addressing Ongoing Damages Claims from Boyle.

The City's decision to take the 4.6 acres of Wetlands not only responded to the court's finding that it was trespassing in operating the Line, and Boyle's claims of inverse condemnation, but also in recognition that there was no reasonable alternative to a fee acquisition of Boyle's property. The City had experienced Boyle's 2011/2012 water diversion and ditching activities, which necessitated Army Corps of Engineers action to undo Boyle's violations. Moreover,

Boyle's entire goal is to remove the Wetlands—claiming they did not exist naturally and proposing to fill and pave them. Boyle had presented no part of his new development plan to the City's land use boards for approval, claiming distrust or the futility of such action. The City reasonably anticipates that disputes with Boyle as to his development plans will result in further litigation, renewed claims of nuisance and trespass, and claims of "bad faith," which he levels against the City.

SUMMARY OF THE ARGUMENT

In reaching its unsustainable conclusion setting aside the City's taking of the Line and adjacent Wetlands alleged by Boyle to have been subject to inverse condemnation, the court made five critical errors. First, it found a lack of statutory authority for the City to take the Wetlands, yet it had correctly ruled on multiple occasions prior to and during trial that issues of statutory authority were outside its jurisdiction and reserved to the BTLA *and* that the City had a general grant of authority to take land for any public use under RSA 31:92. Its final decision ignored both its lack of jurisdiction to decide statutory authority and the general grant of statutory authority. This error caused the court to disregard the City's evidence presented at trial of its purposes for taking the Wetlands.

Second, the court failed to recognize well-established New Hampshire precedent holding that an acceptable public purpose for a municipality to take property, as the City did here in part, is to avoid the public expense of paying damages for a private nuisance or trespass caused by the municipality.

Third, the court impermissibly severed the Line from the adjacent Wetlands and analyzed the necessity for taking each separately, as opposed to evaluating the taking as a whole, as is required under New Hampshire law.

Fourth, in finding that the City should have taken an easement over the Line as opposed to title in fee, the court ignored both well-established New Hampshire law providing that a city may take property in fee simple and the reasons supporting the City's decision.

Fifth, the court improperly found the City's evidence "irrelevant" and improperly impugned the City's motives. The court impermissibly found an alternative basis to set aside the taking by assigning "ulterior" motives to the City, when the proceeding was a trial *de novo* and the City was in any event perfectly transparent about the valid public purposes of the taking.

There were no grounds for setting aside the City's taking, and the court's order granting Boyle's preliminary objection should be reversed for legal error and gross mistake

and the matter remanded to the BTLA for further proceedings.

STANDARD OF REVIEW

This Court will uphold the Superior Court's ruling with respect to the necessity of a taking if it is supported by some evidence and if it is not based on fraud or gross mistake. *Wolfeboro Neck Prop. Owners Ass'n v. Town of Wolfeboro*, 146 N.H. 449, 452 (2001). The standard clearly "encompasses errors of law." *Id.* This Court recognizes "that a finding of public necessity, or a lack of such necessity, is discretionary" and it is "therefore hesitant to disturb such findings." *Petition of Bianco*, 143 N.H. 83, 87 (1998). "A finding based on an improper balancing, however, cannot be upheld." *Id.*

ARGUMENT

I. The Court Erred in Setting Aside the Taking Based on a Finding that the City Did Not Set Forth Statutory Authority for Taking the Wetlands.

The foundation of the court's rationale granting Boyle's Preliminary Objection and setting aside the City's taking is its determination that the statutes cited for the taking did not apply. This incorrect finding caused the court to disregard the City's overwhelming evidence of the Wetlands' public importance. The court's final rulings dramatically conflict both with its own pretrial orders which on multiple occasions clearly stated that the Superior Court had no jurisdiction to

determine the statutory authorization claims raised by Boyle, reserving them to the BTLA, and the substantive case law. The court's determination that RSA 47:11 and RSA 149-I:2 are the only statutory authority for the taking, and then its construing of these statutes inconsistently with its pretrial orders finding that the general grant of eminent domain powers in RSA 31:92 provides the City with statutory authority to condemn property, are clear error and gross mistake.

A. The Court Erred in Reversing Itself After Trial in Determining that the City Lacked Statutory Authority for the Taking While Ignoring RSA 31:92.

The court erred by determining there was no statutory authority for the taking, which is a determination reserved for the BTLA. RSA 498-A:9-b (only preliminary objections challenging the "necessity, public use, and net-public benefit of the taking" transferred to Superior Court); RSA 498-A:9-a, I(b) & V (preliminary objection regarding "[a]ny other procedure followed by the condemnor" determined by BTLA). The court recognized this jurisdictional barrier in two pretrial orders and a colloquy during trial. In its Procedural Order, the court correctly found that it was "limited to reviewing the preliminary objection concerning 'necessity, public use, or net public benefit'" and refused to address Boyle's unrelated, jurisdictional statutory authority argument. Add.104-105.

Shortly before trial, the court denied Boyle's Motion *In Limine* Concerning Statutory Authority on the ground that the *Rodgers* balancing test did not depend on the enabling statutes cited by the City and did not limit the evidence the City could introduce to meet its burden. Add.107-108.

In issuing those orders, the court recognized (and noted Boyle's concession) that the City has ample authority to take land for any "public purpose" under RSA 31:92. Add.95, 108. At trial Boyle again raised the issue of statutory authority, and the court concluded the issue had already been decided. Add.109-111. These rulings were correct and the parties conducted the trial having been explicitly instructed that the court would not address the issue.

In making its final decision, the court inexplicably reversed course and determined that the City did not have statutory authority for the taking. Add.66. It made no attempt to explain this 180-degree turn or discuss how it had acquired jurisdiction, other than stating in a footnote that it had denied Boyle's Motion *in Limine* but then—without citing any statute, case law, or other legal authority—agreeing with him that evidence had to "be relevant to support the statutory need." Add.64. No doubt evidence has to be relevant, but this statement is immaterial to the basis for the court's multiple prior findings that these issues were reserved to the BTLA. The court did not simply make evidentiary

determinations but actually found the City had no statutory authority for the taking, contrary to the procedure established under RSA 498-A. This constitutes an error of law and gross mistake.

The court's footnote further confounds the issue in recognizing the inconsistency or "confusion" this turnabout presents:

> Any confusion regarding the Court's ruling, however, is harmless, because the City does not rely on any authority beyond RSA 47:11 and RSA 149-I to justify the necessity of the taking in this case.

The notion that the ruling is "harmless" because the court went on to interpret RSA 47:11 and 149-I:2 as "irrelevant" to the taking is circular reasoning and misses the key point. The court cannot acquire jurisdiction to decide the statutory authorization issues by construing the statutes and concluding they do not convincingly support the City's analysis.

The court compounded its error by disregarding established case law, its earlier rulings, and Boyle's concession that the City had general authority to take land for any public purpose under RSA 31:92. Add.66, n.3. This Court has long held that a grant of special authority under one statute does not negate the general authority of a city to

exercise eminent domain for a public purpose under RSA 31:92.

In *Leary v. City of Manchester*, 91 N.H. 442 (1941), Manchester exercised eminent domain over property including a drainage ditch that the city had built across plaintiff's property. *Id.* at 443. Manchester already had an easement for the ditch but sought fee title to avoid the expense of paying the landowner for damage claims relating to the ditch. *Id.* This Court found that Manchester did not have authority to acquire the property under the specific statute it cited allowing a city board to take property "for the preservation of the water" of Lake Massabesic, because the easement accomplished that purpose. *Id.* at 443-44. However, nothing prohibited Manchester from acquiring fee title under the "general statute" (now RSA 31:92) that authorized cities to condemn "any land required for public use," because a "special grant of power…manifests no limitation of the public use for which the general power may be employed." *Id.* at 444. This Court went on to hold that Manchester could acquire fee title for the sole public purpose of obtaining relief from the public burden of paying for damages from any nuisance it created in constructing the ditch. *Id.* at 446-47.

This Court reaffirmed that a municipality could rely on its general statutory authority where a more specific grant

arguably did not apply in *Molloy v. Town of Exeter*, 107 N.H. 123 (1966). In *Molloy*, Exeter condemned the plaintiffs' land for a sewer system and waste treatment plant. Similar to Boyle, the plaintiffs claimed that Exeter lacked authority to condemn their land under the predecessor statute to RSA 149-I:2, because the statutory language did not specifically include waste treatment plants. *Id.* at 123. Relying on *Leary*, this Court rejected plaintiffs' argument: "The town had adequate authority under RSA 31:92 to condemn the land required for the treatment plant." *Id.* at 124.

This case sets out a virtually identical situation as resolved by this Court in *Leary* and *Molloy*. The court erred as a matter of law by disregarding its prior rulings, ignoring RSA 31:92, and focusing solely on the specific grants of authority in RSA 47:11 and RSA 149-I:2 and failing to apply its earlier rulings and clear precedent that the City had authority for the taking under the general grant in RSA 31:92.

B. The Court Erred as a Matter of Law in Finding that RSA 149-I:2 Does Not Encompass the City's Proposed Maintenance of the Wetlands for Stormwater Management.

Eminent domain statutes, like all legislative enactments, are to be reasonably construed to effectuate the legislative purpose underlying them and a condemning entity's authority may be express in or implied from the statute. *PSNH v. Shannon*, 105 N.H. 67, 69 (1963). Although

the court construed RSA 47:11 and RSA 149-I:2, finding that they authorized the City to condemn the Line, it then unreasonably interpreted the same statutes in determining that they did not authorize the City to condemn the Wetlands, which formed a part of the same taking and Boyle claimed were flooded due to the City's maintenance of the Line.

The evidence at trial showed that the Wetlands have long been part of a naturally functioning stormwater treatment, conveyance, and discharge system that the City needed and intended to maintain. RSA 149-I:1 explicitly provides that a city "may construct and maintain all … stormwater treatment, conveyance, and discharge systems…." In finding that the City had authority to condemn the Line, the court correctly centered on the statutory language that the City can "maintain" the Line. Yet when evaluating the City's authority to take the pre-existing stormwater system in the Wetlands—which Boyle claimed were created by the Line—the court ignored the word "maintain." It found that the City had no plans for the "construction" of a stormwater system on the Wetlands, which disregards the existing system. Add.67. That system is composed of manmade structures, such as multiple culverts, as well as established drainage areas, streams, and storage areas where the runoff in this critical watershed is naturally functioning to prevent

flooding and enhance water quality. A-II.82-83, 98-101, 146; A-III.180.

The court also took an unreasonably restrictive view of the word "construct" in interpreting it to mean only the physical construction of a man-made structure. Add.66-67. The common meaning of "construct" is "to make or form by combining or arranging parts or elements."[2] The property taken by the City is one part of a stormwater system for the subcatchment area that has been constructed by combining or arranging parts or elements, including wetlands, water courses, culverts, pipes, catchment basins, etc. Moreover, the stormwater system on the taken property is unquestionably made of "materials adapted to [its] purpose." RSA 149-I:1. The Wetlands and associated vegetation and other physical matter that comprise them are uniquely adapted[3] to the purpose of stormwater management, because they allow for settlement or attenuation of physical matter in the water (toxicants, sediment, nutrients), and the retention and detention of water which delays discharge further downstream. A-II.79, 95-96. The maintenance of the pre-

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[2] Merriam-Webster online dictionary, *available at* https://www.merriam-webster.com/dictionary/construct.

[3] "Adapted" is defined as "suited by nature … to a particular use, purpose or situation[.]" Merriam-Webster online dictionary, *available at* https://www.merriam-webster.com/dictionary/adapted.

existing stormwater system is plainly authorized under a reasonable construction of RSA 149-I:1 & 2 and the court erred in finding otherwise.

C. Environmentally Sound Stormwater Management is a Valid Public Purpose for Eminent Domain.

The court found that "*[i]n the context of the statutes cited by the City in this case*, the Legislature has simply not established a public need to seize and maintain natural wetlands for sewer or stormwater management." Add.67, n.5. (emphasis added). As noted above, the court erred in exercising jurisdiction it did not have and then construing the statutes inconsistently and unreasonably. But if the court had considered the general grant of authority under RSA 31:92, as it should have, it would have found taking wetlands for environmentally sound stormwater management is undeniably a public purpose. *Rodgers Dev. Co. v. Town of Tilton*, 147 N.H. 57, 62 (2001) ("Whether a particular use is a public use is a question of law to be resolved by the courts.").

The enactments of both the State of New Hampshire and the City show that protection of wetlands for the purpose of stormwater management is an important public purpose. At the state level, RSA 482-A addresses and regulates excavating and dredging wetlands. The legislative "Finding of Public Purpose" specifically refers to "protect[ing] and

preserv[ing]" wetlands "from despoliation" and maintaining "their ability to handle the runoff of waters" and "natural ability … to absorb flood waters and silt[.]" RSA 482-A:1.

The City has adopted its own wetland protection ordinance, the first enumerated purpose of which is:

> To maintain…the quality of surface waters and ground water by controlling the rate and volume of stormwater runoff and preserving the ability of wetlands to filter pollution, trap sediment, retain and absorb chemicals and nutrients, and produce oxygen.

Add.116; *see also*, A-III.36 (2009 ordinance). As detailed in the Statement of Facts, the City's witnesses at trial confirmed the public importance of wetlands as it pertains to stormwater management, including natural attenuation, the uptake of nutrients, and the delayed discharge of water further downstream. The City's expert in stormwater management and compliance testified as to the importance of wetlands in providing water quality protection and other stormwater management benefits, such as nutrient uptake, removal of sediment, and slowing water down to reduce flooding potential. A-II.125-131. The reality is that the management of wetlands to naturally control flooding and use of natural attenuation process to improve water quality is not merely a feature of current environmental management, it is the cornerstone and "gold standard"—and the court ignored

that evidence or characterized it as of no import. The court clearly erred—there is no doubt that taking property in order to engage in environmentally sound stormwater management is a valid public purpose.

D. Preservation of Wetlands and the Sagamore Creek Watershed is a Valid Public Purpose for Eminent Domain.

While the Wetlands here are an active, natural ecosystem providing stormwater management, it is also a valid public purpose to take property in order to preserve wetlands as an important environmental resource. This Court has held that a municipality may and should use the power of eminent domain for the purpose of conserving open spaces and wilderness for the benefit of the public. *Burrows v. City of Keene*, 121 N.H. 590, 600-01 (1981). There, plaintiffs sought to subdivide their property for purposes of a residential development and this led to the city amending its ordinance to include the property in a conservation district. *Id.* at 594-95. This Court affirmed a trial court ruling that the conservation district constituted an inverse taking with respect to all of plaintiffs' land within it. *Id.* at 601. However, affirming the public purpose of such preservation, this Court found that the regulation was "to give the public the benefit of preserving the plaintiffs' land as open space." *Id.* For this,

just compensation must be paid through eminent domain. *Id.*

Preserving wetlands is a clearly valid public purpose. Both New Hampshire law and the City's ordinances prioritize wetlands preservation. RSA 482-A:1; City Zoning Ord. § 10.1011(2). The City's witnesses testified extensively as to the importance of preserving wetlands, especially in the Sagamore Creek watershed. A-II.125-131; A-II.103-114 (Desmarais testified regarding importance of water quality of Sagamore Creek in light of federal MS4 permit and consent decree with DES).

Courts across the country have likewise recognized the ability of a governmental entity to take wetlands. *See*, *e.g.*, *Hamilton v. Conservation Comm'n of Orleans*, 425 N.E.2d 358, 365-66 (Mass. App. 1981); *State ex rel. Mo. Highway & Transp. Comm'n v. Keeven*, 895 S.W.2d 587 (Mo. 1995); *State v. Trap Rock Indus., Inc.*, 768 A.2d 227 (N.J. Super. Ct. App. Div. 2001); *Dare Cnty. Bd. of Educ. v. Sakaria*, 456 S.E.2d 842 (N.C. Ct. App. 1995).

The court's rationale that "nothing suggests that a municipality can take raw land and keep it in that state for stormwater management" and that "…much of the evidence that the City presented during the trial regarding environmental benefits of the wetlands as a natural stormwater management, conveyance, and discharge system

is irrelevant," misconstrues the law and priority given to natural wetland functions in current water quality management. Add.67.

E. Acquisition of the Wetlands to Address Boyle's Claims that the Line Caused Flooding on the Wetlands and Constituted Inverse Condemnation Was a Valid Public Purpose.

In addition to the valid public purposes of stormwater management and preservation of wetlands, the City also expressly condemned the property in order to address Boyle's claims in his litigation that the City's actions were causing flooding and flowage on the Wetlands—actions that Boyle alleged amounted to trespass, nuisance, and inverse condemnation. Under New Hampshire law, relieving a municipality's ongoing liability for damages claimed by a landowner and alleged to be caused by the municipality's actions is a valid public purpose by itself for exercising eminent domain.

In *Leary*, Manchester condemned the plaintiff's property in fee simple. Manchester already had an easement in the property for purposes of building a drainage ditch across the plaintiff's land. 91 N.H. at 443; *see also*, *Leary v. City of Manchester*, 90 N.H. 256, 256-57 (1939) ("*Leary I*"). However, due to defective construction, the ditch caused additional water to flow onto the plaintiff's property, the plaintiff sued and obtained damages from Manchester for nuisance. *Leary*

I, 90 N.H. at 256-57. In order to "do away with the expense of avoiding a private nuisance," Manchester took in fee simple the property alleged to have been injured by its defective ditch. *Leary*, 91 N.H. at 443, 446-47. In addressing the question of "[w]hether the city may take in order to obtain relief from a public burden," this Court said:

> The public use refers to the public welfare, and not to an active use of the property in some particular manner. While in most cases there is such active use, yet if the general welfare is served, the use may be negative and merely an acquisition of the owner's title….Exclusion of private occupancy may be a public need….
>
> That public economy, including any proper measures lessening the burden of taxation, is a matter of general welfare, needs no discussion. Const. Pt. I, art. 36. Riddance of private ownership causing undue public expense may be as great a public need as one requiring expenditure. A public use is served.

Id. at 159; *see also*, *City of Willmar v. Kvam*, 769 N.W.2d 775, 780 (Minn. Ct. App. 2009).

Here, likewise, the City's express desire to end its legal dispute with Boyle and free the taxpaying citizens of Portsmouth from ongoing claims of trespass and nuisance is consistent with well-established New Hampshire law. It plainly is a valid public purpose for exercising eminent domain over both the Line and Wetlands and is neither ulterior nor improper.

II. The Court Committed Reversible Error in Determining that the City Failed to Demonstrate a Reasonable Present Public Need for Taking the Wetlands.

The City demonstrated both a present need for the Wetlands and numerous ways in which its use of the wetlands are "fairly anticipated in the future." *Exeter & Hampton Elec. Co. v. Harding*, 105 N.H. 317, 319 (1964) (taking appropriate for a future need); *White Mountain Power Co. v. Whitaker*, 106 N.H. 436, 442 (1965). The court itself acknowledged that the City "presented a considerable volume of evidence to support its claim that the wetlands in their current condition is essential for environmentally sound stormwater management." Add.68. This considerable volume of evidence, summarized in the Statement of Facts, establishes that the City has a clear present need for the taken property.

The City further demonstrated at trial that it fairly anticipated that the Wetlands will be used to address its obligations under the federal MS4 permit in the future. A-II.102-103. The MS4 permit was in planning for years and became final in July 2018. The evidence showed that the Wetlands are a vital component of the City's obligation under that permit to control discharge of pollutants into Sagamore Creek due to their size and location upstream from the Creek.

The court nevertheless then mischaracterized the City's purposes to find that its "actual goal" was preventing Boyle from developing the Wetlands and it could not take the property because the City was limited to evaluating the potential development via its land use regulations. Add.72. This was clearly erroneous. *Rockhouse Mountain Prop. Owners Ass'n v. Town of Conway*, 133 N.H. 130, 134 (1990).

The court's finding ignores the extensive evidence supporting the City's present and fairly anticipated future needs for the Wetlands for stormwater purposes, as well as the fact that Boyle was seeking a jury verdict for ongoing damages against the City for trespass and nuisance *on the Wetlands* allegedly caused by the Line that the City was attempting to abate. The court's statements regarding the City's eminent domain options in the Boyle litigation were undisputedly a substantial impetus for the taking in the first place. One purpose of the taking, identified in both the City Council Resolution and Declaration and in the City's briefing, was to acquire legal rights to the property to abate the flooding claims on the Wetlands. Add.87; A-I.125-126; A-III.106-108, 135-136. It was gross mistake for the court to fail to consider that an important purpose of the taking was the City's effort to abate damages from a nuisance and unburden the taxpayers from the potential for ongoing damage claims. *See*, Section I.E and cases cited therein.

The determination by the court that the City could not exercise eminent domain over the Wetlands because it had to address Boyle's potential development through the City's land use process was also error. While it is true that the City took the position that Boyle's proposed development was incompatible with the Wetlands, it also took the view that *any* development on the Wetlands was incompatible. A-II.135-136. The City condemned the property so that it could be used for purposes of stormwater management and to unburden the City from ongoing damages claims relating to a claimed private nuisance, trespass, and inverse condemnation. No development that paved, filled or destroyed the Wetlands would be compatible with the City's purpose. This Court has expressly encouraged municipalities to exercise eminent domain and pay just compensation when they are seeking to maintain open space for the benefit of the public, as opposed to attempting to prohibit development through regulation. *Burrows*, 121 N.H. at 600-01.

In finding that the City was required to go through the land planning process in lieu of exercising its taking powers, the court centered its reasoning on two cases addressing the layout of highways. Add.69-71. The court cited *Green Crow Corp. v. Town of New Ipswich*, 157 N.H. 344 (2008) and *Graves v. Town of Hampton*, No. 2017-0451, 2018 WL 3237957 (N.H. June 21, 2018) for the proposition that a

municipality may not consider the benefits or the burdens of the impact of a development associated with a highway in determining whether there is "occasion" to layout a highway. Instead such impact determinations were reserved for the zoning and planning board processes.

Green Crow and *Graves* are inapposite for several reasons. First, as acknowledged by the court, they involve petitions by private residents for the laying out of a highway, not, as here, the condemnation of property by a municipality. Add.71. The entire body of eminent domain law rests on the general and special power uniquely granted to governmental bodies and is essential to the analysis. Second, the impacts at issue in those cases were secondary indirect impacts to the community at large from the potential developments—potential negative impacts of a housing development on city services in *Green Crow*, the presumably positive economic impacts from the proposed development in *Graves*. These cases do not involve direct impacts to the actual land being used for the highway and provide no authority here.

III. The Court Erred as a Matter of Law in Finding that the City Taking the Line in Fee Simple, Rather than an Easement, Was Improper and in Finding the Burden on Boyle Outweighed the Public Necessity.

The court attempted to apply the two-step balancing test set forth in *Rodgers,* 147 N.H. at 59, but unreasonably did so. While it found the public interest in maintaining the Line was "extremely high," it nevertheless determined that the burden on Boyle was even higher. Add.74, 76-77. It erroneously based that reasoning on the nature of the property interest taken, finding the City could not take a fee interest and instead only an easement.

The court found that replacing the Line would require the construction of a new pumping station, which "would impose a significant cost to the tax payers and a substantial disruption to the residents and businesses relying on that line." Add.73. It was established that cost would exceed $605,000. A-II.92-93. Thus, the court found that the public necessity associated with taking the Line to be "extremely high." Add.74.

Nevertheless, the court went on to criticize that the City took the Line in fee but failed to consider the valid purposes for which the City was taking the Line together with the Wetlands in fee. It is settled law in New Hampshire that a taking authority may condemn property in fee. *Leary II*, 91 N.H. at 447 ("Eminent domain extends to the full exhaustion

of private ownership."). In *Leary*, this Court affirmed Manchester's fee taking of land over which the city already had an easement, finding that "taking of the plaintiff's remaining ownership will be no less to serve a public need" where the city sought to "do away with the expense of avoiding a private nuisance" arising from a drainage ditch the city built. *Id.* at 443, 446-47; *see also*, *D. Latchis, Inc. v. Borofsky Bros., Inc.*, 115 N.H. 401, 403-04 (1975); *Turgeon v. Somersworth*, 116 N.H. 338, 339 (1976).

In finding that the City improperly took the Line in fee, the court cited no New Hampshire cases setting aside a taking because the municipality opted to exercise eminent domain in fee. This is not surprising—the proposition is so clear that the City may take in fee that it would not be raised. The practical reality also dictates that a condemning authority taking property in fee, as opposed to an easement, will be required to pay just compensation for the greater property interest it seeks.

The court based its determination on testimony from the City Engineer that the City typically acquires easements for sewer lines, thus finding that taking the Line in fee was a "mere convenience." Add.75. This overstates Desmarais' testimony, A-II.115-116, but also misses the point. The court failed to consider that this was not a typical sewer line acquisition and the City was taking *both* the Line *and* the

adjacent Wetlands purportedly flooded by it. It is precisely because Boyle claimed that the City's Line flooded the Wetlands that the City elected to condemn both for the purpose of "doing away with the expense of avoiding a private nuisance." *Leary*, 91 N.H. at 443, 446-47. This is especially critical since Boyle was claiming the City had already taken his land by inverse condemnation. It is beyond irony to then object to the City's exercise of formal eminent domain for land already claimed to have been taken.

Of course, if one severs the Line from the Wetlands it floods and analyzes it in isolation, as the court unfairly did, the City's need for taking *only* the Line in fee appears less urgent. Even then, it ignores testimony regarding why a fee taking would be preferable for access, maintenance, and management of a stormwater system. But, irrespective, New Hampshire courts do not parse each part for analysis, ignoring the purposes or need to acquire other land in combination. *Appeal of Cheney*, 130 N.H. 589, 597 (1988). The court erred in analyzing the acquisition piecemeal rather than as a whole under New Hampshire.

Further, the court's assessment of the impact on Boyle hardly tips the balance. It found the impact on Boyle of taking the Line in fee was "amorphous" and "minimal." Add.75. This was due to the speculative nature of Boyle's potential developments given the "significant zoning and

planning hurdles" associated with developing wetlands and the fact that one of Boyle's proposals allowed the Line to remain intact. Add.75. In misapplying the *Rodgers* test, the court's finding that an "extremely high" public interest in taking the Line was "essentially in equipoise" with an "amorphous" and "minimal" impact on Boyle's interest was unsupported by the evidence and gross mistake. Having misapplied the statutory authority issue, the court deemed the environmental and water quality purposes "irrelevant," eliminating any fair assessment or the balancing of interests at the outset.

IV. The Court Erred as a Matter of Law in Finding that the City's Purported Improper Motivation to End Litigation with Boyle Was a Basis to Set Aside the Taking.

The court detoured from the accepted balancing test used to evaluate the propriety of a taking and addressed what it deemed the City's "true purpose" for condemning Boyle's property. It found that the City did not actually acquire the property in fee for purposes of stormwater management, but instead to end the litigation with Boyle. Add.79. It cast the City's purposes for the taking as pretext which nullified the City's evidence. While the City recognizes and understands the years of experience the court had with this case, it cannot be ignored that the eminent domain option was a direct product of the court's earlier ruling and the possibility of

limiting that taking to the Line alone or obtaining only an easement was objectively unreasonable in this case. The City would still be committing trespass or nuisance, incur more litigation, and face ongoing damages with no end.

The very nature of the transfer to the Superior Court under RSA 498-A for a determination of public need and necessity is a *de novo* proceeding – it is the evidence in this case that should measure and control the City's taking, not determinations of the trial judge reacting to Boyle's claims of past alleged mistreatment, personal animosity, and private agendas. A-II.137-138. The City had a right to present the purpose of the City Council's taking, the history going back to at least 2006 of environmental experts studying the Wetlands, and the extent to which the City was committed to preservation of wetlands expressed in its ordinances. Whatever the proper role or boundaries are of the trial judge considering the context, background of the parties, and earlier litigation, the court's determination that the City's evidence was irrelevant and stated purposes were untrue was unreasonable and legally unsustainable.

The fact that the City exercised the power of eminent domain set out by the court as a response to developments in the Boyle Damages Case, including his claim of inverse condemnation, was not pretext. It was explicitly stated in the City Council's Resolution and the Declaration. Add.86-87; A-

I.125-126. Far from an "eleventh-hour ploy" to gain an advantage in Boyle's litigation, it was a legitimate exercise of the taking power for the well-established purpose of relieving a public body and its taxpayers from the expense of avoiding a private nuisance. *Leary*, 91 N.H. at 446-47.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court reverse the decision of the trial court and rule that Boyle's Preliminary Objection to the taking be denied and the case remanded to the BTLA for determining the amount of compensation to be paid.

The City certifies that the decision it appeals is in writing and appended to this brief. S. Ct. R. 16(3)(i).

Respectfully submitted,

Dated April 8, 2019

CITY OF PORTSMOUTH

By its attorneys,

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REQUEST FOR ORAL ARGUMENT

Oral argument requested. Mr. Felmly will argue.

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I served the foregoing BRIEF FOR APPELLANT CITY OF PORTSMOUTH, together the Addendum and all volumes of the Appendix by email to the parties on the electronic service list, and by first-class mail to parties without email addresses.

/s/ Bruce W. Felmly
Bruce W. Felmly

CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 9,463 words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service, certification of word count, and addendum.

/s/ Bruce W. Felmly
Bruce W. Felmly

STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2018-0649

City of Portsmouth,
Plaintiff,
v.
150 Greenleaf Avenue Trust, Minato Auto LLC, Toyota Motor Credit Corporation, Eversource, and Fairpoint Communications Inc.,
Defendants.

ADDENDUM TO BRIEF OF APPELLANT CITY OF PORTSMOUTH

RULE 7 APPEAL FROM FINAL ORDER OF
ROCKINGHAM COUNTY SUPERIOR COURT

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TO ADDENDUM

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NOTICE OF DECISION

File Copy

Case Name: **City of Portsmouth v 150 Greenleaf Avenue Realty Trust, et al**
Case Number: **218-2017-CV-00071**

Enclosed please find a copy of the court's order of October 17, 2018 relative to:

Bench Trial on Preliminary Objection to Eminent Domain Taking.

October 23, 2018

Maureen F. O'Neil
Clerk of Court

(218340)

C: Suzanne M. Woodland, ESQ; John J. Kuzinevich, ESQ; Mark P. Hodgdon, ESQ; Joshua M. Wyatt, ESQ

The State of New Hampshire
Superior Court

Rockingham

CITY OF PORTSMOUTH

V.

150 GREENLEAF AVENUE REALTY TRUST, ET AL.

No. 218-2017-CV-00071

ORDER FOLLOWING BENCH TRIAL ON PRELIMINARY OBJECTION TO EMINENT DOMAIN TAKING

On December 19, 2016, the City of Portsmouth ("the City") exercised its power of eminent domain to take 4.6 acres of land located at 150 Greenleaf Avenue in fee simple absolute when it filed its Declaration of Taking with the Bureau of Land and Tax Appeals. Doc. #3.[1] For ease of reference, the Court will refer to the land as belonging to James Boyle, even though he holds it in trust for himself through the 150 Greenleaf Avenue Realty Trust. The factual and procedural history of this case has been fully outlined in prior orders, which are incorporated by reference herein. The Court conducted a *de novo* bench trial beginning on May 29, 2018, to address Boyle's Preliminary Objection challenging the "necessity, public purpose or net-public benefit." Following the bench trial on Boyle's Preliminary Objection to the taking, both parties submitted trial memoranda summarizing their arguments.

I. OVERVIEW

Before diving into the facts of this case, it is helpful to note that the Court has presided over related litigation between the parties for approximately seven years. See

[1] References to orders and pleadings in the case at bar are to the document numbers in the docket index.

Boyle v. City of Portsmouth, No. 218-2010-EQ-0100 (hereinafter the "Sewer Line Litigation").[2] The Sewer Line Litigation centered around two issues: first, whether the City had a property interest in Boyle's land as a result of a sewer line that ran across his property; and second, whether the City was liable for the creation of wetlands or water that backed up on Boyle's property to the east of the sewer line.

The City's taking in this case consists of both the portion of Boyle's property over which the City's sewer line runs and wetlands to the east and west of that sewer line. Pl. Ex. 2. The City has cited several justifications for the taking, claiming that it was essential to maintain the integrity of its municipal sewer system and for environmentally sound stormwater and ecosystem management.

Much of Boyle's challenge to the condemnation focuses on his claim that the taking was motivated by the City's intent to gain an advantage in the Sewer Line Litigation and to put an end to the legal wrangling with Boyle. He accuses the City of acting in bad faith and alleges that the City's environmental justification for the taking is merely a front to mask the City's real motive. He contends that the City has been involved in a decade-long campaign to thwart his development of the land. Overall, his position is that when the City failed to win this battle in court, city officials used the trump card of eminent domain to cut off his further efforts to build a second car dealership on the property. Boyle further argues that it is unnecessary to seize his land in fee simple absolute to maintain the existing sewer line. He contends that an easement to run the line over his property would satisfy the City's needs. He concludes that the City's decision to take the entire 4.6 acres in fee

[2] In the Sewer Line Litigation, the Court made a number of legal rulings and a jury found the City liable to Boyle for trespass and nuisance. The Court's rulings and the jury's verdict are currently on appeal to the New Hampshire Supreme Court.

was motivated by its desire to end all future disagreements with Boyle over the use of the land.

In contrast, the City argues that the taking was justified to maintain its sewer line in order to preserve municipal services to the surrounding residences. It also contends that this land is part of a natural swamp that has long provided a basin for run-off rain and melting snow that flows naturally from neighboring properties. The City alleges that the water collects on Boyle's property and then ultimately drains from there into the Sagamore Creek. As such, the City argues that the taking is essential to preserve this land in its natural state for the purposes of both stormwater management and the preservation of the fragile environment of the Sagamore Creek. The City concludes that these public needs outweigh Boyle's property interest and any social costs.

As the outline above indicates, the Sewer Line Litigation dispute casts a long shadow over the pending eminent domain litigation. Accordingly, although this Court has previously ruled that the doctrine of collateral estoppel would not bind the Court in the case at bar with respect to rulings it made in the Sewer Line Litigation, see Doc. #26, the Court cannot completely ignore that dispute here and, as such, will take judicial notice of certain indisputable procedural benchmarks in that case to the extent those events are relevant to the pending condemnation dispute. See N.H. R. Ev. 201.

II. FINDINGS OF FACT

As a preliminary matter, the Court is extremely familiar with the property at issue having presided over the Sewer Line Litigation. Thus, by agreement between the parties, in making its factual findings, the Court has used its knowledge of the property from the view it took with the jury in connection with the trial in the Sewer Line Litigation.

On December 30, 2003, James Boyle purchased 13.78 acres of land on the corner of the Route 1 Bypass and Greenleaf Avenue. Previously, in 1968, the City constructed a sewer line encased in an earthen berm across the western portion of that land. Pl. Ex. 11. At that time, the land was owned by the State of New Hampshire and used by the State Board of Education. Id. The Board of Education granted the City permission to construct the sewer line but the City never obtained a written easement from the State of New Hampshire. Id. The State sold the land in 1983. Id. When Boyle purchased the property in 2003 there was no record in the Registry of Deeds that the City had an easement. Id. In 2010, Boyle filed a complaint in the Sewer Line Litigation, alleging that the sewer line was trespassing because the City had no easement of record. Sewer Line Litigation Doc. #1 at ¶¶28-34. In addition to alleging that the City was trespassing, Boyle alleged that the City allowed water to back up on his land because the City did not properly maintain culverts under the sewer line which would have allowed water to drain from his land. Id. at ¶¶35-44.

On February 27, 2014, in the context of the Sewer Line Litigation, this Court granted summary judgment in favor of Boyle, finding as a matter of law that the City only had a revocable license for the sewer line and that Boyle had authority to withdraw permission to keep the sewer line on his land. Sewer Line Litigation Doc. #167. The Court further ruled that the City would either have to pay rent to Boyle until it removed the sewer line or it could exercise its power of eminent domain to acquire a property interest in the land. Id. at 20. The Court granted the City's request for an interlocutory appeal, id. Doc. #180, which was dismissed when the City argued for the first time before the Supreme Court that Boyle did not have clear title to any of the 13.78 acres he purchased in 2003. Id. Doc. #189.

The Supreme Court dismissed the appeal and the case was remanded to this Court. Id. Doc. #188.

On remand, Boyle filed an Amended Complaint and joined the State of New Hampshire to resolve the title issue raised by the City. Id. Doc. #194. In response, the City asserted that title had never passed from the State of New Hampshire into private hands because the proper procedure was not followed through the Governor and the Executive Council. Id. Doc. #194 at 36-37. After additional motion practice, the State did not assert any interest in Boyle's property, so the Court granted summary judgment quieting title in Boyle's favor. Id. Doc. #217.

On May 23, 2016, the Court scheduled the remaining issues in the case for a jury trial, which was to begin on January 23, 2017. Id. Doc. #230. On September 6, 2016, the Portsmouth City Council voted to take 4.6 acres of Boyle's land in fee simple absolute. Pl. Ex. 11. As noted, Boyle filed a preliminary objection to the taking challenging the public purpose, necessity, and net public benefit. This Court conducted a bench trial on Boyle's preliminary objection beginning on May 29, 2018. In order to avoid unnecessary repetition, the Court will make additional factual findings in combination with its analysis of the issues in this case.

III. ANALYSIS

A. Overview of the Net Public Benefit Test

In its Procedural Order dated June 6, 2017 (Doc. #17), the Court set forth the law with respect to the procedural and substantive standards that govern this case. The Court will repeat that analysis in the present order only to the extent necessary to analyze the

matters before the Court. As noted in that order, id. at 10-11, the Court has already found that the taking was for a public, and not private, purpose.

At this stage, the Court must determine whether there is a necessity for the taking. With respect to this issue, the Court observed in its Procedural Order that it is appropriate to look to New Hampshire case law decided in the context of municipal taking of private land for the purpose of constructing a public road. Id. at 4, 10. The Legislature has declared that the same statutory framework that is applicable in those kinds of cases also governs this case. Id. In the context of laying out a public road, New Hampshire statutes require courts to analyze whether there is an "occasion" to establish the road. Jackson v. Ray, 126 N.H. 759, 762 (1985). The Supreme Court explained that this means the finder of fact must determine if there is a public "need" or "necessity" for establishing the highway. Id. In other words, the Court has observed: "we have used different terms to describe our consideration of the same basic question—referring variously to the 'need,' 'necessity,' 'exigency,' 'convenience,' and 'interest' of the public . . . ." Rodgers Dev. Co. v. Town of Tilton, 147 N.H. 57, 59 (2001). Determining whether there is a net public benefit for a taking involves a two-step analysis. Id. at 59–60.

The first step involves "balanc[ing] the public interest in the layout against the rights of the affected landowner." Id. at 59. As such, the greater the public need for the taking the more the infringement on the landowner's rights will be tolerated. Id. at 60. In contrast, "a layout proposed for mere convenience may justify only a slight imposition on those rights." Id. Overall, "if the rights of the affected landowner outweigh the public interest in the layout, the layout is not justified and there is no occasion for it." Id. at 59–60. On the other hand, if the public interest outweighs the landowner's interest, then the Court proceeds with the second step of the balancing test. Id. at 60.

In step two, the Court must "balance the public interest in the layout against the burden it imposes upon the town." Id. Only if the public benefit outweighs the public burden will the taking be upheld. Id.; see Petition of Bianco, 143 N.H. 83, 86 (1998) ("Public benefit is measured by considering the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form." (internal quotations and citation omitted)).

Ultimately then, the essence of the net public benefit analysis requires this Court first to determine how pressing the public's need for the private land is. Then the Court must balance that need against (a) the harm to the property owner and (b) the social costs to the municipality. In order to justify the taking, the City bears the burden of proof by a preponderance of the evidence. See Merrill v. City of Manchester, 124 N.H. 8, 16 (1983).

B. The City Has Established a Public Necessity for Taking Boyle's Land

As noted, the first inquiry in the analysis is to identify whether there is a necessity for the taking and to attempt to quantify how strong that need is. To begin that analysis, the Court will look to the statutory basis identified by the City for the taking. While this Court has previously ruled that it is not tethered to the factual justifications presented to the Portsmouth City Council for the taking, the Court is nonetheless bound to evaluate the necessity of the taking within the statutory framework put forth by the City. In other words, even though this Court previously decided that it would not rule on the jurisdictional arguments made by Boyle in objecting to the taking, see Doc. #17 at 12-13, that does not mean that the statutory justification for the taking is wholly irrelevant. The City must

establish necessity for the condemnation in light of the particular statutory basis for the taking.[3]

RSA 498-A:5, II(c) (2010) requires the City to identify the "specific reference to the statute, chapter and section thereof, under which the condemnation is authorized." The City has cited two different statutes for its authority to exercise eminent domain over Boyle's land: RSA 47:11 and RSA 149-I:2. See Pl. Ex. 11 at 2 ("WHEREAS pursuant to NH RSA 47:11 the City Council has the lawful power to undertake the 'layout' of sewers and drains (for stormwater) and to acquire by eminent domain property necessary for that effort following certain procedures set out in RSA 230 et seq. and RSA 498-A et seq.; further authority exists under NH RSA 149-I:2 and other statutes."). RSA 47:11 (2012) authorizes the City to exercise its eminent domain authority "to construct drains and common sewers." RSA 149-I:1 (Supp. 2017) gives the City authority to "construct and maintain main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment works which they adjudge necessary for the public convenience, health or welfare." RSA 149-I:2 (Supp. 2017) authorizes the City to take private land "[w]henever it is necessary to construct such main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment facilities."

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[3] The Court recognizes that it denied Boyle's Motion in Limine Concerning Statutory Authority. See Docs. #41, #61. The Court's intent was to reaffirm its earlier Procedural Order (Doc. #17) that the City would not be limited to factual justifications presented to the City Council. See Doc. #61 ("The enabling statutes do not limit the evidence the City may introduce to meet its burden of proof regarding questions of necessity, public use, and net public benefit." (emphasis added)). In fact, the Court did not prevent the City from presenting evidence generated after the City Council vote to support its case. See, e.g., Pl. Exs. 20-21. However, as Boyle correctly recognizes in his motion in limine, evidence must still be relevant to support the statutory need. Doc. #41 at 3. Any confusion regarding the Court's ruling, however, is harmless, because the City does not rely on any authority beyond RSA 47:11 and RSA 149-I to justify the necessity of the taking in this case.

1. The City has established a necessity associated with taking the sewer line.

As a threshold matter, Boyle argues that the City cannot establish a "necessity" for the taking pursuant to RSA 47:11 because that statute only authorizes the City to exercise its eminent domain authority "to construct drains and common sewers." Boyle Trial Brief at 19 (Doc. #68). He contends that the condemnation here was not for the purpose of constructing a sewer line, but rather to maintain the existing line. This presentation of the facts is far too crabbed to withstand scrutiny. If the City did not exercise eminent domain to take Boyle's land now, it would be forced to construct a sewer line elsewhere. Moreover, as noted, RSA 149-I:1 gives the City authority to "construct and maintain main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment works which they adjudge necessary for the public convenience, health or welfare." (Emphasis added). The statute requires that "[s]uch drains, sewers, and systems shall be substantially constructed of brick, stone, cement, or other material adapted to the purpose . . . ." Id. Maintaining the existing sewer line fits cleanly within this statutory authority.

The sewer line across Boyle's property is part of a gravity collection system that services the surrounding neighborhoods. Pl. Ex. 1. It consists of an eight inch asbestos cement pipe encased in an earthen berm.[4] It has existed in its present location for 50 years and has up to 40 years of additional life before it will need to be substantially repaired or replaced. Even then, the City's engineer testified its useful service could be extended for another 40-50 years beyond that.

[4] For purposes of this order, the Court will not distinguish between the actual sewer line installed by the City and the earthen berm in which the sewer line is encased. Unless otherwise relevant to the analysis, the Court will refer to the sewer line and the earthen berm collectively as the "sewer line."

The exercise of eminent domain over this portion of Boyle's property is essential for the preservation of this portion of the City's sewer system. This necessity arose when Boyle discovered that the City did not have an easement or any other deeded property right to the sewer line. This Court ruled in the Sewer Line Litigation that the City had only held a revocable license in the sewer line. Sewer Line Litigation Doc. #167 at 20. It then concluded that the City could exercise its eminent domain authority to acquire a property right in the sewer line. Id. Otherwise, this Court held that the City would be required to pay Boyle rent until it relocated the sewer line. Id. Thus, the Court finds that exercising eminent domain over the sewer line is a public necessity within the meaning of RSA 47:11, RSA 149-I:1, and RSA 149-I:2.

2. The City has not established a necessity associated with taking the wetlands.

The city engineer, Terry Desmarais, testified on cross-examination that much of the condemned property is not needed for the operation and maintenance of the existing sewer line. The City instead argues that it is necessary to take the wetlands surrounding the sewer line in their natural state for the purpose of stormwater treatment, conveyance, and discharge. It is hard to see the necessity of the taking under the statutory authority cited by the City.

a. The statutory authority cited by the City does not justify taking the wetlands.

The City relies on the same statutory authority to justify seizure of the wetlands as it does for seizure of the sewer line itself. As noted, RSA 47:11 allows a municipality to take private land "to construct drains and common sewers." RSA 149-I:1 gives the City authority to "construct and maintain main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment works which [it]

adjudge[s] necessary for the public convenience, health or welfare." The explicit terms of RSA 149-I:1 require that "such systems" be "constructed" of appropriate materials.

Nothing suggests that a municipality can take raw land and keep it in that state for natural stormwater management. Certainly, the legislature could have written the statute to grant this type of eminent domain authority. But, to read the statute in the manner the City has would require this Court to read words into the law that the legislature has not included. This runs afoul of basic tenets of statutory construction. See State v. Brawley, No. 2017-0403, 2018 WL 4440963, at *2 (N.H. Sept. 18, 2018) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." (quotation omitted)).[5]

The undisputed evidence in this case is that 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 wetland portion of the condemned property. Thus, much of the evidence that the City presented during the trial regarding the environmental benefits of wetlands as a natural stormwater management, conveyance, and discharge system is irrelevant. Accordingly, the City has not established necessity for the taking of the wetlands under the statutory authority upon which it relies. See Thompson & Nesmith v. Manchester Traction, Light & Power Co., 78 N.H. 433, 434 (1917) ("The rights that they can obtain by eminent domain are specifically stated, and flowage rights are not included. This statute, which gives to public utilities the special and

[5] This Court does not need to decide whether the government could ever seize property for purposes of keeping the land in an undeveloped state. See generally Lynda J. Oswald, Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law, 35 B.C. Envt'l Aff. L. Rev. 45, 74-76 (2008) (discussing the parameters of eminent domain authority to keep land from being developed). In the context of the statutes cited by the City in this case, the Legislature has simply not established a public need to seize and maintain natural wetlands for sewer or stormwater management.

extraordinary right to condemn private property for their uses, being an exercise of sovereign power, and in derogation of common right, must be strictly construed, and should not be extended beyond its plain and unmistakable provisions."); see also In re Pennichuck Water Works, Inc., 160 N.H. 18, 28 (2010) (holding that municipality exceeded its statutorily granted authority to exercise eminent domain in light of "plain meaning" of the statute).

b. The City's factual predicate for taking the wetlands is not a public necessity.

Even if RSA 149-I:1 and I:2 could be construed to recognize a public necessity for taking the wetlands for the purpose of maintaining a natural stormwater management system, see Pub. Serv. Co. v. Shannon, 105 N.H. 67, 69 (1963) ("condemnation statutes are entitled to a reasonable construction"), the Court finds that the condemnation here was not based on a current public necessity.

The City has presented a considerable volume of evidence to support its claim that maintenance of the wetlands in their current condition is essential for environmentally sound stormwater management. Boyle argues that the City's stated environmental concerns are a mere pretext for the taking. Given the procedural history of his legal wrangling with the City, he concludes that the real reason for the taking was to put an end to the litigation and not to further environmental goals. In support of this position, Boyle has put forth substantial evidence that the City had not done any planning or study preceding the condemnation of the wetlands and that the City had no specific plans for the wetlands.

Rather than establishing a present need for seizing the property in fee simple absolute, the overall tenor of the City's case focused on the fear of the impacts of Boyle's proposed development on water flow and water quality. In other words, the City's case is

not premised on a present public need for the land. Rather, the City has justified the taking on a speculative concern that Boyle will develop the land in a way that would undermine sound stormwater run-off practices and harm stormwater quality. These considerations are not a proper ground for the exercise of the awesome power of eminent domain. See Township of Readington v. Solberg Aviation Co., No. HNT-L-468-06, 2015 WL 11751623, *10 (N.J. Super. Ct. May 4, 2015). Rather, the New Hampshire Legislature has delegated authority to address such concerns to local land use boards through the process of zoning and planning.

In Green Crow Corp. v. Town of New Ipswich, 157 N.H. 344 (2008), the New Hampshire Supreme Court held that selectman could not consider impacts associated with proposed land development when it evaluated whether there was an occasion for the layout of a highway. The plaintiff in that case submitted a petition to the board of selectman to upgrade a town road from a class VI to a class V highway in support of a proposed cluster development of 130 new homes along the road. Id. at 346. The town denied the request. Id. The plaintiff appealed, arguing that the town could not "consider anticipated impacts associated with the potential development that could result from upgraded and reclassified highway." Id.

The Supreme Court began by reiterating that the inquiry of an "occasion" to layout a public highway is the same as the public purpose, necessity, and net public benefit test. Id. at 350 (quoting Rodgers Dev. Co, 147 N.H. at 59-60). The Court held that it was improper for the selectmen to consider the impact of land use and municipal growth on the burden prong of the analysis. Id. at 352, 355. The Court observed that the statutory authority for a town to manage land use planning and zoning is found in RSA chs. 672 through 677. Id. The Court stated: "Within this scheme, the legislature has provided a

variety of mechanisms for a municipality to utilize in conducting its land use planning, including controlling growth and managing the impact upon infrastructure." Id. at 353. The creation of a master plan and the adopting of zoning ordinances "guide[] the development of the municipality." Id. (quotation omitted). The local legislative body (i.e. the board of selectmen or city council), the zoning board, and planning board each play important roles in land use planning, management, and development. Id. at 353-55. "A significant portion of the responsibility and tasks of careful and wise land use planning falls to the planning board." Id. at 354. Given this comprehensive statutory scheme, the Court concluded that "the legislature did not intend for a board of selectmen to use its authority to determine occasion for the layout or upgrade of a highway under RSA 231:8 as a vehicle for effectively conducting land use planning or zoning." Id. at 355.

The Supreme Court reached the same conclusion upon an appeal of a superior court decision following a *de novo* trial on the issue of whether there was an occasion for laying out of a highway. See Graves v. Town of Hampton, No. 2017-0451, 2018 WL 3237957, *5 (N.H. June 21, 2018).[6] In Graves, the plaintiff requested the town layout a class V highway over his land to support a proposed subdivision development. Id. at *2. The selectmen denied the request and the plaintiff appealed to superior court for a *de novo* bench trial. Id. The trial court found a slight public interest but concluded that the net public burden outweighed the public benefit. Id. The plaintiff appealed that decision to the Supreme Court.

On appeal, the plaintiff argued that the trial court erred in refusing to consider the benefit of the proposed subdivision in its net public benefit analysis. Id. at 5. Relying on

[6] Even though Graves is a non-precedential order, see N.H. S.Ct. R. 20(2), it is enlightening because it is a very recent decision which adheres to the reasoning of Green Crow in the context of a *de novo* superior court trial.

the reasoning in Green Crow, the Supreme Court found that the benefit or burden of the impact of development on the town was not a proper consideration on the issue of whether there was an occasion for laying out the highway. Id. These considerations were more properly addressed through the zoning and planning board process. Id. The Supreme Court observed that the trial court correctly concluded that because the subdivision plan was only proposed and not approved, the court "could only speculate as to what the Planning Board will approve." Id. In other words, even if the future development was a valid consideration, an unapproved subdivision plan was insufficiently concrete to weigh on either the benefit or burden side of the equation.

This Court recognizes that the procedural context of Green Crow and Graves is different from the case at bar. In those cases the issue was not whether the town should exercise its eminent domain authority for the purpose of laying out a highway. Rather, both cases involved a property owner's petition to the town to layout a public highway over an existing town road or on the petitioner's own land. Nonetheless, the public purpose, necessity, and net public benefit test is the same whether the landowner is making the petition or the town seizes the property by eminent domain. See Rodgers Dev. Co., 147 N.H. at 59-60 (explaining the meaning of "occasion" to layout out a highway, and applying two-part balancing test where the town condemned private property for the purpose of laying out a public highway). More importantly, Green Crow and Graves both recognize that the legislature has delegated the inquiry of public burdens and benefits of land use and planning primarily to the planning and zoning boards.

In the case at bar, after careful consideration of all of the evidence the Court finds that the City's purpose in seizing the wetlands was not to construct or maintain a sewer or stormwater management system. Rather, the evidence at trial strongly supports the

conclusion that the City's actual goal in condemnation of Boyle's land was to prevent his development of the wetlands. See, e.g., Def. Ex. S (cataloguing "justifications and benefits of" acquisition of 150 Greenleaf property, including "[p]revents further development" in order to avoid anticipated impacts of such development on the environment). The City fears the impact of such development on the flow of stormwater and quality of the runoff. These concerns are entirely speculative before the development has been approved and do not support a present public necessity for the taking. See Readington, 2015 WL 11751623, *13 (setting aside condemnation where "taking of the airport property was not based on any public need but solely in response to community fears regarding the proposed use of the airport."). More fundamentally, these are not the type of public benefits contemplated by RSA 47:11 or RSA ch. 149-I.

Water flow and run off, environmental impacts, destruction of wetlands, contamination, impact on the neighboring communities, and other concerns raised by the City are all the purview of zoning ordinances and the planning board. Indeed, the City Engineer, Mr. Desmarais, testified at trial that the City's Technical Advisory Committee (the "TAC") oversees the pre- and post-development impact of water flow, especially in light of the increasing frequency of major storm events. More generally, he testified that the TAC supports the planning board by making recommendations regarding the impact of private development on the City. In Desmarais' experience over the last five years, no proposed construction has been allowed in an area of more than one acre of wetlands.

Peter Britz, the City's Environmental Planner, observed that Portsmouth ordinances are substantially more protective than state regulations. For example, unlike state regulations, the City ordinances prevent development within a 100 foot buffer zone around all freshwater wetlands. Britz related that the owner of 56 Lois Street—a lot located in the

vicinity of Boyle's property—had previously sought to build a house in the wetland buffer zone (as opposed to the actual wetlands). In that case, the City Planning Board followed the Conservation Commission's recommendation to deny the building permit because of the indirect impact on the wetlands. This example illustrates how local land use boards can properly be used to protect fragile environments.

If the land use process prevents, or even substantially curtails, Boyle's proposed development then the City has no need for the taking. If Boyle can successfully navigate these complex land use regulations and still develop the property, then there is little need to keep the land in its natural state. Thus, these competing interests are reserved to the state and local land use process which Boyle will be required to navigate before any development of the wetlands can occur. For all of these reasons, the City has not met its burden to establish there is a necessity for taking the wetlands surrounding the sewer line.

C. The Burden on Boyle's Property Rights Outweighs the Public Necessity for the Taking.

Having found some public necessity for the taking with respect to the City's need to maintain the existing sewer line, the Court must next balance the strength of that public need against the impact on Boyle's property rights. See Rodgers Dev. Co., 147 N.H. at 59-60. The Court finds that the public need to maintain the sewer line is very high.

The City presented credible evidence that to replace the existing gravity-fed line with a pumping station would impose a significant cost to the tax payers and a substantial disruption to the residents and businesses relying on that line. The existing gravity-fed system operates continuously based on the laws of nature with no mechanical systems. In order to redirect the sewer line off of Boyle's property, the City would have to construct a pumping station at the cost of more than $600,000. Pl. Ex. 6. A pumping station has

additional drawbacks over the gravity system. It involves mechanical equipment that requires service and maintenance, and has a useful life of only 20 years. Other pumping stations around the City have also been the subject of complaints from surrounding neighbors due to odors and noise. In addition to these limitations associated with a pumping station, not all of the customers who are serviced by the existing gravity system could be served by a new pumping station. Some of those customers would have to be re-directed to other sewer connections. See, e.g., Pl. Exs. 4-5. The City has not been able to fully analyze whether the existing sewer systems would be capable of handling that redirected flow of effluent. Thus, the need to maintain the existing system through the sewer line across Boyle's property is extremely high.

On the other side of the equation, however, the burden of the taking on Boyle is even higher. This is true for three reasons. First, the City cannot justify taking the sewer line in fee simple—as opposed to a more limited easement. Second, much of the 4.6 acre taking is not needed to maintain the existing sewer line and, for the reasons set forth above, there is otherwise no independent public necessity to take the wetlands. Third, taking all of the land in fee eliminates any opportunity for Boyle to attempt to develop the property consistent with state and local land use laws. Thus, when the Court considers the public's high need for a limited easement right along the sewer line against the aggregate impact of the fee simple taking of 4.6 acres on Boyle's property rights, the City has not met its burden of establishing that the public need outweighs the private burden.

With respect to the City's taking in fee simple, Boyle argues that even if some sort of a taking was justified in connection with the sewer line, the City's need to maintain the line cannot justify its taking of a fee interest. He contends that easements are the most common way in which the City has constructed and maintained its sewer system

throughout the city. In this way, he asserts that the taking of a fee interest was more burdensome on his property rights than it needed to be.

The City offered little to no testimony or evidence to support a fee simple taking of the sewer line. In fact, City Engineer Terry Desmarais—the City's own witness—testified that the City exercises control of most sewer lines by easement only. He acknowledged on cross-examination that the Portsmouth Department of Public Works Sewer Division would have been satisfied with an easement that gave the City sufficient rights of access to inspect and maintain the current sewer line and to replace it in the future. 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. At most, the City's fee simple ownership of the sewer line is a convenience because it allows the City to control the sewer line without having to negotiate with Boyle or navigate the property rights associated with the subservient estate. Cf. Rodgers Dev. Co., 147 N.H. at 60 (explaining that "a layout proposed for mere convenience may justify only a slight imposition on" the landowners rights).

On the other side of the equation, the impact on Boyle's property rights of taking the sewer line in fee is amorphous. He has submitted proposals to develop most of the 4.6 acres for a second car dealership. One proposal calls for the sewer line to remain in place but be buried beneath the parking lot. Pl. Ex. 17 Sheet C-2. On the other hand, he has also submitted a proposal for development which would leave the sewer line in its current earthen berm. Def. Ex. R. The ultimate success of either effort is speculative in light of the significant zoning and planning hurdles associated with paving over the wetlands. In any event, given the proposal which would allow Boyle to develop the land while leaving the existing earthen berm intact, the impact of a fee simple taking on Boyle's property rights is minimal.

In this Court's view the evidence of the public benefit and private burden associated with the City taking a fee interest in the sewer line are essentially in equipoise. This Court finds the City exceeded its authority in taking a fee simple interest—as opposed to an easement interest—in the sewer line for two reasons. First, the City has the burden of proof by a preponderance of the evidence to justify its taking. See Merrill, 127 N.H. at 16. The City has made virtually no effort to justify a fee taking of the sewer line. Where evidence favors neither side, the City has not met its burden. See Physiotherapy Corp. v. Moncure, No. CV 2017-0396-TMR, 2018 WL 1256492, at *3 (Del. Ch. Mar. 12, 2018) ("[T]he preponderance of the evidence standard also means that if the evidence is in equipoise, Plaintiff loses." (brackets omitted)).

Second, and perhaps more importantly, the New Hampshire Constitution strongly favors private ownership of property. See, e.g., N.H. Const. pt. I, art. 2 ("All men have certain natural, essential, and inherent rights—among which are . . . acquiring, possessing, and protecting, property . . . ."); id. art. 12; id. art. 12-a; Buskey v. Town of Hanover, 133 N.H. 318, 322 (1990) ("The right to use and enjoy one's property is a fundamental right protected by both the State and Federal Constitutions."). Given this principle, the tie must go to the property owner. Therefore, the net public benefit does not support the City's exercise of eminent domain to take the sewer line in fee simple absolute. See Hallock v. State, 300 N.E.2d 430, 432 (N.Y. 1973) ("In general there may not be the acquisition of a fee when only an easement is required."). Accordingly, the impact on Boyle's property rights of the City's decision to take a fee simple interest as opposed to an easement interest in the sewer line exceeds the public need for the taking.

The impact on Boyle's property rights, however, is much broader than the somewhat esoteric distinction between an easement versus a fee taking. In this case, the

City has taken far more land from Boyle than it can legally justify. As already stated, most of the condemned land is not needed to maintain the existing sewer line. Moreover, as in Graves, the City's environmental concerns about Boyle's development plans—which are only proposals at this stage—are merely speculative and all of the evidence of the impact of Boyle's proposed development is therefore entirely irrelevant as to any present public necessity.

Taking the whole 4.6 acres also impacts Boyle's property rights by cutting off any opportunity to try to develop the land. While there is no guarantee he will succeed, the City is depriving him of one to the bundle of rights associated with property ownership by preventing him from even trying. "It is hornbook law that ownership is in reality a bundle of rights to use and enjoy property . . . ." Appeal of Corporators of Portsmouth Sav. Bank, 129 N.H. 183, 218 (1987). While "the destruction of one 'strand' of the bundle is not a taking," Quirk v. Town of New Boston, 140 N.H. 124, 131 (1995), it nonetheless should be considered a burden on owner's property rights.

In a seminal dissent in Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239 (1992), Justice Horton began his analysis of the law relating to the unnecessary hardship test for variances by noting that property owners have a constitutional right to the use and enjoyment of their property. Id. at 246; See Bacon v. Town of Enfield, 150 N.H. 468, 481 (2004) (Brock, C.J., and Nadeau, J., dissenting) (noting that the Simplex hardship test was "crafted with an eye towards Justice Horton's dissent" in Grey Rocks); see also Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727, 730 (2001) (citing Justice Horton's dissent favorably). That right may give way to reasonable municipal regulations such as zoning requirements. Grey Rocks, 136 N.H. at 246. He noted that zoning regulations may still infringe on constitutional property rights by imposing an unnecessary hardship on the

property owner. Id. A variance "is the safety value of the zoning ordinance" to save it from "site-specific constitutional claims." Id. Justice Horton then went on to note:

> Crucial to the award of a variance to the complaining property owner is a finding of unnecessary hardship. Arguably, any regulatory interference with the property owner's right is a hardship. This hardship may be necessary when it affords commensurate public advantage and is required in order to give full effect to the purpose of the ordinance. One might say that if the desired use has no practical adverse effect on others and does not offend the zoning scheme, regulation forbidding the use creates an unnecessary hardship.

Id. at 246-47 (citations omitted).

These principles of law are relevant to the present case because they establish that the City does not have unfettered discretion to prevent the development of private property. Rather, City must apply zoning ordinances and variances in a way that does not unduly restrict the use of private property without any public benefit.

Boyle testified convincingly at the *de novo* trial that during the course of more than 10 years of litigation with the City he successfully prevailed in his development efforts despite repeated litigation with the City. He has either made accommodations in his development plans to address zoning or planning board concerns or he has prevailed in court over the City's efforts to block his use of the land. This Court will not undertake an analysis of how likely it is that Boyle will achieve success in the development of his proposed second car dealership. If Boyle cannot overcome zoning and planning board limitations on the use of the land, then the land will remain in its natural state and there is no public benefit to the seizure of the land. See Lynda J. Oswald, Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law, 35 B.C. Envt'l Aff. L. Rev. 45, 51 (2008) (noting that if a proposed development "were to actually pose harm to the public, the municipality would not have to resort to eminent domain, and the concomitant requirement of just compensation, in order to regulate and

prevent the harm. Instead, it could do so directly through its police powers, and without payment of compensation by passing land use regulations governing the use"). On the other side of the equation, the impact on Boyle's private interest in the land is significant. Cf. Def. Ex. T (providing preliminary opinion that N.H. Department of Environmental Services will issue Alteration of Terrain permit and standard dredge and fill permit if Boyle resolves ownership issues with respect to the property).

D. The City's Motives for the Taking Do Not Justify the Use of Eminent Domain Authority.

Boyle has vociferously argued that the City has acted in bad faith because its true motives were not to maintain a stormwater management system, but rather to put an end to his development plans and inevitable litigation that would flow from those efforts. The City, of course, disagrees that it acted in bad faith. This Court finds that taking the full 4.6 acres in fee simple absolute was not done for the purpose of constructing or maintaining a sewer or stormwater management system. Rather, the City's true purpose was to put an end to the litigation with Boyle once and for all. The Court finds that this motive provides yet further reason to set aside the taking.

University of Michigan Professor Lynda J. Oswald has authored a very insightful article addressing how the government's undeclared motives impact court review in eminent domain cases. See generally Oswald, supra. Professor Oswald explains that a municipality often seeks to block a private development through the exercise of its eminent domain power when it cannot do so through ordinary regulatory means such as municipal zoning and planning. Id. at 50-52. She notes:

> [C]ondemnors attempt to conceal their motivations in order to proceed with the condemnation they desire. Instead of forthrightly declaring their intentions—"we don't want a large-scale mixed use development at this

> location in our community, so we are condemning the property to prevent the use"—they make a flimsy excuse for their actions—"we have always needed a park and open space, right here where this development is proposed, we just hadn't realized it until now." Their dissembling is often obvious to property owners, citizens and the courts alike and leads to suspicion that something not only dishonest, but quite likely illegal, is really going on.

Id. at 48.

The Massachusetts Supreme Judicial Court has recognized that a sovereign's failure to give the true reasons for a condemnation can be grounds to set aside the taking:

> Bad faith in the use of the power of eminent domain is not limited to action taken solely to benefit private interests. It includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking are plainly valid ones. For example, when a county took land for a training area for its police and fire employees, on which a city planned to construct a sewage treatment plant and, on the facts, the reason for the county's action was to prevent construction of the sewage treatment plant, the power of eminent domain was used in bad faith and the taking was invalid.

Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington, 506 N.E.2d 1152, 1156 (Mass. 1987) (citing Carroll County v. Bremen, 347 S.E.2d 598 (Ga. 1986), and Earth Management, Inc. v. Heard County, 283 S.E.2d 455 (Ga. 1981)); see also Borough of Essex Fells v. Kessler Inst. For Rehab., Inc., 673 A.2d 856, 861 (N.J. Super. Ct 1995) (citing cases striking down condemnation where government acted in bad faith). The reason that bad faith is relevant is because the articulated public purpose for the taking does not reflect the true public need. See Borough of Essex Fells, 673 A.2d at 861. In this regard, a bad faith justification for the taking has direct bearing on the strength of the necessity. In other words, if the true purpose of the taking is different from the stated purpose, then it is reasonable for a court to conclude that the actual reason for the taking is either (1) not a valid public purpose; or (2) not a sufficiently compelling public need to justify the taking on its own merit.

Pheasant Ridge Assocs. Ltd. P'ship is a good illustration of these principles. The property owner had submitted an application to build 202 apartments with 20% of the units to be designated as low and moderate income housing. 506 N.E.2d at 1154. The town exercised its power of eminent domain to seize the land for the stated purpose of a public park and recreation area. Id. In that case, the Massachusetts Supreme Judicial Court struck down the use of eminent domain. Id. at 1155. The Court found that the true reason for the taking was to prevent the land from being used to build low and moderate income housing. Id. at 1157. The court noted that where the municipality had not prevented other residential development in town, it could not use its power of eminent domain to avoid the proposed development's impact on water, sewer, traffic, or other infrastructure concerns. Id. at 1156-57.

The court then examined the town's declared purpose in the condemnation: to use the land for a public park. Id. at 1157. The court noted that even though the town had studied the need for a public park for several years, the plaintiff's land was never identified as a possible site for such recreational use. Id. The recreational use for the condemned land was only made after the proposed development came to light. Id. The Court further observed that the town did not follow any of the ordinary procedures for exercising its power of eminent domain. Id. The court noted: "The town agencies, such as the Housing Authority, recreation commission, conservation commission and planning board, that were responsible for town activities in the areas for which the land was to be taken were not consulted, as they normally would have been, either as to the merits or feasibility of the proposed use or the cost of any such use." Id. Instead, the plan to condemn the land was developed exclusively by the board of selectman and town counsel shortly before the

public meeting. Id. Based on all of these factors, the Massachusetts high court upheld the trial court's finding that the taking was made in bad faith.

As the Massachusetts high court has noted: "It is not easy to prove that particular municipal action was taken in bad faith." Pheasant Ridge, 506 N.E.2d at 1156; Borough of Essex Fells, 673 A.2d at 863 (evidence of bad faith must be "strong and convincing"). In conducting this inquiry courts must consider not only what the government officials "have said but we also draw inferences concerning their intentions from what they have done and what they have not done." Id.

Boyle's bad faith arguments carry no weight as they relate to the condemnation of the sewer line. Throughout the Sewer Line Litigation, the City has consistently taken the position that it has a permanent legal interest the sewer line. This land along the existing sewer line would have rightfully belonged to the City when it first constructed the line if it had not been for an apparent error 50 years ago. The City's condemnation was simply an effort to correct a technical oversight that occurred long ago. In fact, this Court suggested this course of action when it ruled that the City only had a revocable license and owed Boyle rent until it took the property by eminent domain or moved the sewer line. Sewer Line Litigation Doc. #167 at 20. The City cannot be faulted for acting in bad faith when it followed the obvious and least burdensome course of action after this Court ruled against it in the Sewer Line Litigation.

On the other hand, this Court is skeptical of the City's articulated need to take the wetlands for a natural stormwater management system—even if such a system were authorized by RSA ch. 149-I. There is no evidence in the case at bar that the City had considered taking Boyle's wetlands for environmental preservation before the eve of trial in the Sewer Line Litigation. The City's environmental planner acknowledged that he did not

recommend to the City Council taking Boyle's wetlands. He admitted that during his tenure he never expressed an interest in acquiring the property, and it played no role in his long range planning for the City. Indeed, the lack of any study prior to the taking or plans for the land after the taking is particularly problematic for the City's necessity argument. Pheasant Ridge, 506 N.E.2d at 1157. "Eminent domain doctrine has long cast a skeptical eye upon takings that appear speculative in nature." Robert C. Bird & Lynda J. Oswald, Necessity as a Check on State Eminent Domain Power, 12 U. Pa. J. Const. L. 99, 118 (2009).

There are a number of other factors presented in the evidence at trial indicating that the taking in this case was out of the ordinary. The timing and procedure for the acquisition creates a strong inference that the exercise of eminent domain over the wetlands was an eleventh hour ploy to gain an advantage in the Sewer Line Litigation. For instance, Portsmouth Ordinance § 11.601 (Def. Ex. Q) requires all proposed municipal land acquisitions be "considered in the context of the City's comprehensive planning." Section 11.602 further requires all land acquisitions to be referred to the City Planning Board, and Subparagraph B provides that no final action on a land acquisition may take place unless the Planning Board has reported to the City Council or not taken action for 60 days following referral of the matter to the Planning Board. Id. § 11.602(B). The City did not follow these procedures with respect to the exercise of eminent domain over Boyle's property. There is a strong inference that the City bypassed this ordinary procedure in order to ensure that the City Council could make a decision on the taking before the impending trial in the Sewer Line Litigation.

Similarly, the Portsmouth Conservation Commission only voiced support for the taking after the City Council voted to acquire the property. Pl. Ex. 21 at 11; Pl. Ex. 22. Of

the 94 sites in the City identified on the Public Undeveloped Land Assessment report, Portsmouth Environmental Planner Peter Britz testified that only Boyle's property was seized through the exercise of eminent domain authority during his 17 ½ year tenure. See Readington, 2015 WL 11751623, at 24 (in finding improper purpose to seize land, the court relied on the fact that the municipality had not used eminent domain to acquire any other open space). The City's expert witnesses at trial also were consulted about the acquisition only after-the-fact. There is also no dispute that the only witnesses who presented the proposed taking to the City Council were City Attorney Robert Sullivan, Assistant City Attorney Suzanne Woodland and Attorney Charles Bauer, who led the Sewer Line Litigation on behalf of the City. Def. Ex. V.

All of these facts create a strong inference that the taking of wetlands was not part of a careful study of the environmental benefits for proper stormwater management. Rather, it was a last minute effort to have the final word in the decade-long litigation battle with Boyle over the use of the land. For these reasons, the Court finds the City's true motive for seizing Boyle's land was to cut off any future litigation over the development. This is not a proper purpose of exercising eminent domain authority—certainly not within the statutory framework of RSA 47:11 and RSA ch. 149-I, cited by the City as grounds for the seizure. The fact that there was an ulterior motive for taking the majority of the 4.6 acres provides yet another reason to set aside the exercise of eminent domain. Cf. Bianco, 143 N.H. at 87 (recognizing that a taking can be set aside based on an unsustainable exercise of discretion); Town of Rumney v. Banel, 118 N.H. 786, 789 (1978) (recognizing that evidence of "fraud, bad faith or abuse of discretion" provide grounds for setting aside a taking).

CONCLUSION

For the reasons set forth above, the City has not established a sufficiently compelling public need to take all 4.6 acres in fee simple absolute under the statutory authority upon which it relied. Regardless of whether Boyle can develop the land in the way he wants or not, there can be no question that removing private ownership of the property imposes a burden on him. In the absence of a sufficient public need, even a slight imposition on the private owner's interest defeats the taking. See Rodgers Dev. Co., 147 N.H. at 60. When, as here, the private interest outweighs the public need, the condemnation is not justified. Id. The Court need not go on to weigh the public benefits against the public burdens. Id.

This Court does not have authority to amend or limit the taking to support the public need to maintain the sewer line. See RSA 498-A:5, III ("The declaration of taking may be amended by order of the board, upon agreement of the parties, or upon appropriate motion filed by the condemnor. Such amendments shall be permitted for the purpose of correcting errors and omissions which may exist in the declaration of taking, but shall not be permitted for the purpose of increasing or decreasing the physical extent of the taking or the nature of the property taken." (emphasis added)). Consistent with the foregoing, Boyle's preliminary objection to the Declaration of Taking is SUSTAINED. The condemnation must be set aside in its present form.

SO ORDERED.

10/17/2018
DATE

N. William Delker
Presiding Justice

BOARD OF LAND AND TAX APPEALS

City of Portsmouth
1 Junkins Avenue, Portsmouth, NH 03801

v.

150 Greenleaf Avenue Realty Trust
James Boyle, Trustee
150 Greenleaf Avenue, Portsmouth, NH 03801
Service through John Kuzinevich, Esq.

Minato Auto, LLC
150 Greenleaf Avenue, Portsmouth, NH 03801
Service through John Kuzinevich, Esq.

Toyota Motor Credit Corporation
19001 S. Western Avenue, Torrance, CA 90509-2958
Service through Legal Department

Public Service Company of New Hampshire d/b/a/ Eversource
780 North Commercial Street, P.O. Box 330, Manchester, NH 03105-0330
Service through Christopher J. Allwarden, Esq.

Fairpoint Communications, Inc.
521 E. Morehead Street – Suite 500, Charlotte, NC 28202
Service through Abigail Terhune, Esq.

Docket No.: 28443-16 ED

DECLARATION OF TAKING AND DEPOSIT OF DAMAGES
PROCEEDING IN REM

NOW COMES the City of Portsmouth, hereinafter the "City", a municipal corporation with a principal place of business at 1 Junkins Avenue Portsmouth, New Hampshire, 03801, and states:

Background

1. In 1967 the State of New Hampshire Board of Education granted approval to the City of Portsmouth to lay a public sewer line across swamp land in the rear of

land owned by the State of New Hampshire located at 150 Greenleaf Avenue, Portsmouth, NH ("the Property") to alleviate failed septic systems north of the Property.

2. The City of Portsmouth constructed a municipal sewer line ("Sewer Line") in 1967 and 1968, but no easement deed from the State of New Hampshire was obtained or recorded.

3. Although from 1967 through 2003, no landowners objected to or complained about the wetlands or sewer line. The current landowner demanded the removal of the Sewer Line from the wetlands and claimed the City created the wetlands.

4. The Sewer Line currently serves residential customers in the Lois Street neighborhood as well as the residents of the Riverbrook Condominium 777 Middle Road (approximately 75 units).

5. In 2013 and 2014 the Rockingham County Superior Court ruled that the City does not have a legal and permanent right in the land which contains and surrounds the Sewer Line.

6. Although the City has contested that it has unlawfully flowed and detained water on the Property, the City has no properly recorded deed or right to permanently flow or detain water on the Property in the area to be acquired.

7. The City identified approximately 4.6 acres of the 13.67 acre parcel through which the Sewer Line crosses and which is, and has been, wetlands, as the area to be acquired through eminent domain ("Acquisition Area").

Authority to Condemn
Public Use and Necessity

8. Pursuant to NH RSA 47:11 the City Council has the lawful power to undertake the "layout" of sewers and drains (for stormwater) and to acquire by eminent domain property necessary for that effort following procedures set out in RSA 230 et seq. and RSA 498-A et seq.; further authority exists under NH RSA 149-I:2 and other statutes.

9. On September 6, 2016, the Portsmouth City Council took a view of the Acquisition Area and held a public hearing to determine the public use and necessity of the taking. Subsequent to the hearing, on the same evening, the City Council adopted a Resolution indicating its finding of public use and the necessity for the acquisition and authorizing the City Manager to take action.

10. The City Council made the following findings:

> The City Council finds it necessary and useful for the public benefit to acquire the Proposed Acquisition Area for sewer, drain and stormwater management purposes.

The Proposed Acquisition Area will be for public use.

The City Council further finds that in balancing the public interest in the acquisition with the private interest of the property owner, the public interest outweighs the private interest.

The City Council also finds that in balancing the public interest in the acquisition against the burden it imposes on the City, the public interest is greater than the burden.

11. The Resolution and minutes of the hearing are public records available from the City.

Condemnees

12. The City identified the following Condemnees:

150 Greenleaf Avenue Realty Trust, James Boyle, Trustee (Owner)
See Warranty Deed dated December 30, 2003 and recorded at Book 4215, Page 227 at the Rockingham County Registry of Deeds (RCRD).

Minato Auto, LLC (Lessee)
See Notice of Lease recorded at Book 4215, Page 293 at RCRD.

Toyota Motor Credit Corporation (Mortgage Holder)
See Mortgage dated December 1, 2006 recorded at Book 4740, Page 255 at RCRD and Mortgage dated August 27, 2010 recorded at Book 5138, Page 1878 at RCRD.

Public Service Company of New Hampshire d/b/a/ Eversource (Easement Holder)
See Easement Deed recorded at Book 4962, Page 1 at RCRD.

Fairpoint Communications, Inc. (Easement Holder)
See Easement Deed recorded at Book 4962, Page 1 at RCRD.

Acquisition Area

13. The Acquisition Area is located on the northerly side of Greenleaf Avenue, in the City of Portsmouth, Rockingham County, State of New Hampshire and as shown on a plan identified as "Acquisition Plan Tax Map 243-Lot 67" dated 12/8/16 prepared by Ambit Engineering Inc. and to be recorded this date at the Rockingham County Registry of Deeds, copy attached.

14. The Acquisition Area to be taken in fee is more particularly described as follows:

Beginning at an iron road at the north east corner of the Grantors property; thence S 32°38'30" E a distance of 38.90 feet along the U.S. Route One By-Pass to a point; thence turning and running across land of the Grantor the following eight courses; S 40°27'13" W a distance of 419.61 feet to a point; thence S 49°34'22" E a distance of 61.50 feet to a point; thence S 40°25'38" W a distance of 118.76 feet to a point; thence S 09°12'28" E a distance of 157.41 feet to a point; thence S 10°34'20" W a distance of 63.63 feet to a point; thence S 35°45'02" E a distance of 217.81 feet to a point; thence N 62°29'11" E a distance of 70.56 feet, to a point; thence S 27°30'50" E a distance of 32.16 feet, to a point at land now or formerly of Media One of NE, Inc.; thence turning and running S 56°09'36" W a distance of 372.71 feet to a point at land of the Chase Home for Children; thence turning and running N 35°31'26" W a distance of 435.15 feet to an iron pipe at land now or formerly of Reichl and Richmond; thence turning and running along land now or formerly of Reichl and Richmond and an unimproved right of way known as Joseph Street N 40°27'18" E a distance of 534.73 feet to a point near land now or formerly of Alden Watson Properties at a NH Highway Bound; thence along said Alden Watson land N 40°31'39" E a distance of 143.63 feet to an iron rod and N 41°23'43" E a distance of 280.35 feet to the point of beginning.

The parcel having an area of 200,156 square feet, more or less.

The Acquisition Area is subject to the following reservation of rights:

Excepting from this taking and reserving to Public Service Company of New Hampshire d/b/a Eversource Energy and Fairpoint Communications their affiliates, successors, assigns and licensees a permanent right and easement to install, operate, maintain, repair and replace any poles, conduits, cables, wires and other equipment on, over, under and across the acquired premises, that may be necessary or convenient to the provision of electrical or telecommunication services; however this right and easement shall in no way interfere with the City of Portsmouth's use of the acquired premises for municipal purposes for an underground sewer main pipeline.

PROCESS

15. The City has complied with the provisions of RSA 498-A:4. A qualified and impartial appraiser, Brian Underwood, completed an appraisal of the property interest to be acquired. Although the before and after analysis produced zero damages as the Acquisition Area is predominately wetlands; the City requested that the appraiser also employ a pro-rata allocation of the part taken. Using that methodology, which the City has used in the past for other takings, the City offered to pay $345,000 as just compensation to acquire the Acquisition Area as described in paragraphs 12 and 13 above.

16. On November 15, 2016, the City issued its written Notice of Offer to purchase the Acquisition Area as described in paragraphs 12 and 13 in the form prescribed by statute. The City's offer of compensation of $345,000 was not accepted by the Condemnees within thirty (30) days after service of the Notice of Offer.

17. The City hereby deposits with the Board of Tax and Land Appeals the sum of three hundred forty-five thousand dollars ($345,000.00), representing the City's determination of the amount of just compensation due to the Condemnees.

18. In accordance with RSA 498-A:5 and RSA 498-A:11, the City takes title to and possession of the above described Acquisition Area as of the date this Declaration of Taking is filed.

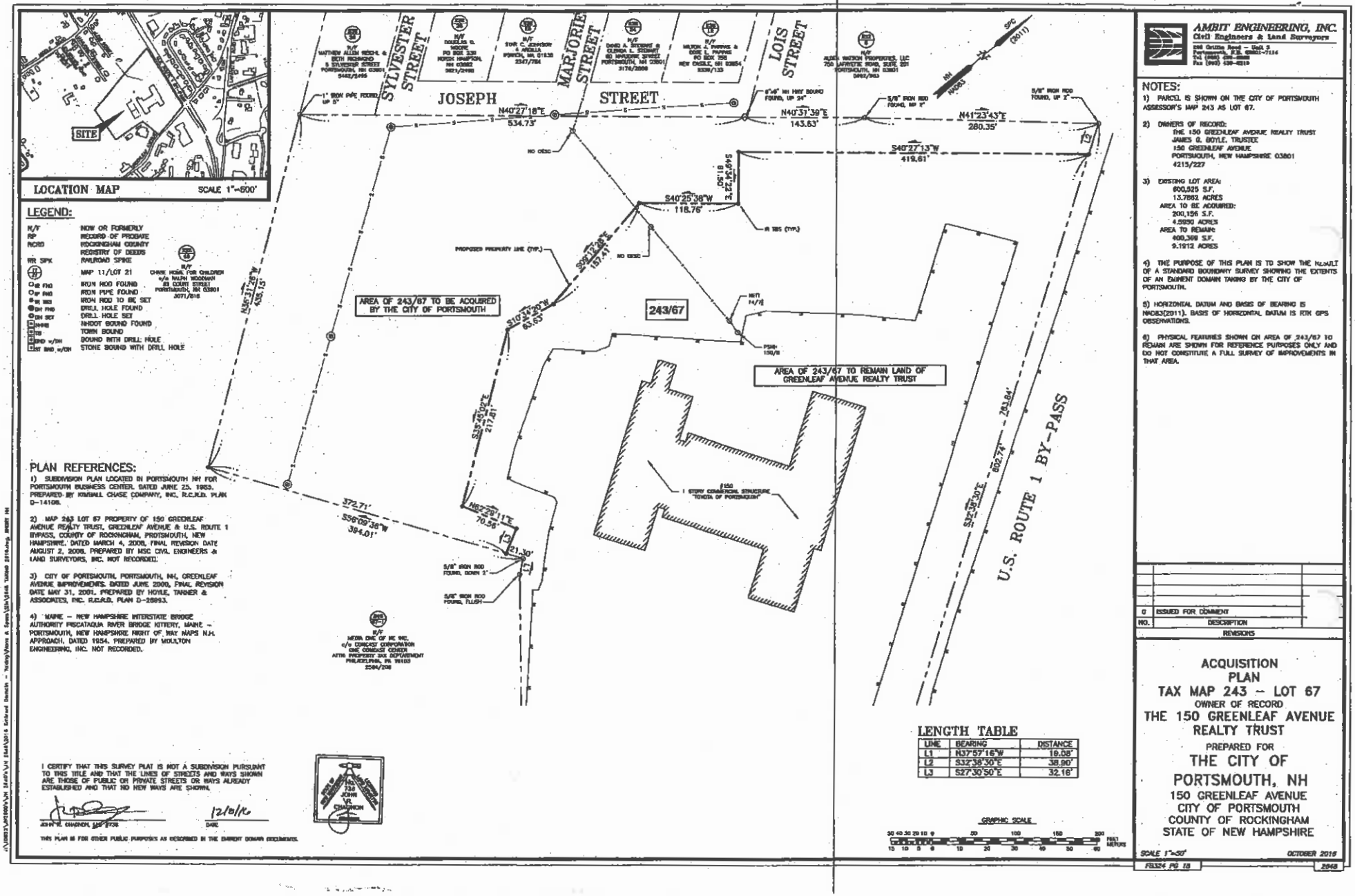
CITY OF PORTSMOUTH

Dated: 12-19-16

By: _____
John P. Bohenko
City Manager
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
(603) 610-7201

Dated: 12-19-16

By: _____
Suzanne M. Woodland
Deputy City Attorney
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
(603) 610-7240



AMBIT ENGINEERING, INC.
Civil Engineers & Land Surveyors
200 Griffin Road – Unit 3
Portsmouth, N.H. 03801-7114
Tel (603) 430-9282
Fax (603) 436-2315

NOTES:
1) PARCEL IS SHOWN ON THE CITY OF PORTSMOUTH ASSESSOR'S MAP 243 AS LOT 67.
2) OWNERS OF RECORD:
THE 150 GREENLEAF AVENUE REALTY TRUST
JAMES G. BOYLE, TRUSTEE
150 GREENLEAF AVENUE
PORTSMOUTH, NEW HAMPSHIRE 03801
4215/227
3) EXISTING LOT AREA:
600,525 S.F.
13.7782 ACRES
AREA TO BE ACQUIRED:
200,156 S.F.
4.5930 ACRES
AREA TO REMAIN:
400,369 S.F.
9.1912 ACRES
4) THE PURPOSE OF THIS PLAN IS TO SHOW THE RESULT OF A STANDARD BOUNDARY SURVEY SHOWING THE EXTENTS OF AN EMINENT DOMAIN TAKING BY THE CITY OF PORTSMOUTH.
5) HORIZONTAL DATUM AND BASIS OF BEARING IS NAD83(2011). BASIS OF HORIZONTAL DATUM IS RTK GPS OBSERVATIONS.
6) PHYSICAL FEATURES SHOWN ON AREA OF 243/67 TO REMAIN ARE SHOWN FOR REFERENCE PURPOSES ONLY AND DO NOT CONSTITUTE A FULL SURVEY OF IMPROVEMENTS IN THAT AREA.

NO.	DESCRIPTION
0	ISSUED FOR COMMENT

REVISIONS

ACQUISITION PLAN
TAX MAP 243 – LOT 67
OWNER OF RECORD
THE 150 GREENLEAF AVENUE REALTY TRUST
PREPARED FOR
THE CITY OF PORTSMOUTH, NH
150 GREENLEAF AVENUE
CITY OF PORTSMOUTH
COUNTY OF ROCKINGHAM
STATE OF NEW HAMPSHIRE

SCALE 1"=50' OCTOBER 2018
RS324 PG 18 2848

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **City of Portsmouth v 150 Greenleaf Avenue Realty Trust, et al**
Case Number: **218-2017-CV-00071**

Enclosed please find a copy of the court's order of June 06, 2017 relative to:

Procedural Order on Preliminary Objection

June 13, 2017

Maureen F. O'Neil
Clerk of Court

(523)

C: State of New Hampshire; Suzanne M. Woodland, ESQ; John P Bohenko, City Manager; George R. Moore, ESQ; John J. Kuzinevich, ESQ; Mark P. Hodgdon, ESQ

The State of New Hampshire
Superior Court

Rockingham

CITY OF PORTSMOUTH

V.

150 GREENLEAF AVE. REALTY TRUST, ET AL.

No. 218-2017-CV-0071

PROCEDURAL ORDER ON PRELIMINARY OBJECTION

On December 19, 2016, the City of Portsmouth filed a Declaration of Taking and Deposit of Damages with the Board of Tax and Land Appeals ("BTLA"). The City exercised its eminent domain power to take 4.6 acres owned by 150 Greenleaf Ave. Realty Trust. James Boyle is the Trustee of that trust. The other named parties hold lesser interests in the property, including a leasehold, easements, and a mortgage. Boyle has filed a preliminary objection to the taking with the BTLA pursuant to RSA 498-A:9-a. On January 11, 2017, the BTLA transferred the objection concerning "necessity, public purpose or net-public benefit" to this Court pursuant to RSA 498-A:9-b. The BTLA reserved ruling on the remaining objections after this Court rendered its decision.

After the transfer, the parties filed several pleadings regarding the objection and scope of this Court's review. The parties sharply disagree about the nature of the review and the issues to be decided by this Court. The Court held a hearing on these procedural matters on May 23, 2017. Boyle takes the position that this Court is required to conduct a "record review" to determine if the Portsmouth City Council had sufficient evidence to make findings on necessity, public purpose, and net public benefit. He also

contends that this Court is required to determine if the City acted in "bad faith" when it condemned his land. The City counters that this Court must conduct a de novo hearing. The City contends this Court has broad discretion about how to structure that hearing, and urges the Court to conduct a "legislative style" hearing. Finally, the City's position about the bad faith inquiry is somewhat unclear, but it appears that the City takes the position that that question is subsumed in the necessity, public purpose, or net public benefit analysis.

The Court finds that neither party has fully set forth the proper procedure in their pleadings. Based on an analysis of the statutes and case law, this Court concludes that it is required to conduct an evidentiary hearing and make de novo findings based on a preponderance of the evidence that the taking satisfies the necessity, public purpose, and net public benefit requirements of eminent domain law.

The starting place for the analysis of eminent domain law lies in the state constitution. "Part I, Article 12 grants all persons the right to enjoy their property and the right to just compensation should the State take their property." Kennedy v. Town of Sunapee, 147 N.H. 79, 82 (2001). Part I, Article 12-a of the New Hampshire Constitution provides: "No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property." The issue of "necessity," "public purpose," and the concept of "net public benefit" all are related and derive from these constitutional guarantees. See In re Pennichuck Water Works, Inc., 160 N.H. 18, 30 (2010); Appeal of City of Keene, 141 N.H. 797, 802 (1997).

RSA chapter 498-A is the beginning of the analysis because this statutory framework establishes a comprehensive procedure for all eminent domain cases. See RSA 498-A:1, I; City of Keene v. Armento, 139 N.H. 228, 231 (1994). RSA chapter 498-A does not empower the municipality to take property. Armento, 139 N.H. at 231. Rather, the Court looks to other statutes for enabling legislation. Id. In addition, the Court must "look to those same statutes for the proper procedures in situations where RSA chapter 498-A does not exclusively control procedure, particularly where additional procedures are necessary to establish the power to condemn or preserve the condemnee's right to challenge necessity." Id. RSA 498-A:1, I, preserves pre-existing procedures by providing that RSA chapter 498-A "is not intended to enlarge or diminish the rights given by law to any condemnee to challenge the necessity for any condemnation." See Armento, 139 N.H. at 232.

In its declaration of taking, the City cites RSA 47:11 and RSA 149-I:2 as the basis for its authority to take Boyle's property. See Declaration of Taking and Deposition of Damages Proceeding in Rem ¶¶8, 18, attached to BTLA Order of Notice (Doc. #3).[1] RSA 47:11 gives the City the authority to take private land "to construct drains and common sewers." Damages are to be assessed by the mayor and alderman "with the same right of appeal from their decision as in case of the laying out of highways." Id. RSA 149-I:1 gives the City authority to "construct and maintain main drains or common sewers, sewage and/or waste treatment works which they adjudge necessary for the public convenience, health or welfare." RSA 149-I:2 authorizes the

[1] Although not cited specifically by the City in its Declaration of Taking, Boyle recognizes that the City has general authority to take land for any "public purpose." RSA 31:92; see Preliminary Objection, Procedural Objection and Claim of Bad Faith at 7 (Doc. #2) [hereinafter Preliminary Objection]. This statute contains the same language regarding procedure as RSA 47:11.

City to take private land "[w]henever it is necessary to construct such main drains or common sewers and/or waste treatment facilities." The mayor and alderman may take land and assess damages "in the same manner as in the case of taking land for highways pursuant to RSA 230 and the owner shall have the same right of appeal, with the same procedure." The present problem is that these two eminent domain statutes provide a different appeal process.

It is unclear exactly what procedure is referred to in RSA 47:11 when that statute refers to the process for the "laying out of highways." The general process for all municipalities to lay out a highway is found in RSA chapter 231. RSA 231:34 provides: "Any person aggrieved by the decision of selectmen . . . may appeal therefrom to the superior court for the county in which such land or other property is situate . . . ." In V.S.H. Realty, Inc. v. City of Manchester, 123 N.H. 505 (1983), the New Hampshire Supreme Court outlined the procedure for a superior court appeal under RSA 231:34. In that case, the Court held, "that the plaintiff is entitled to a trial de novo before the superior court on the issues of occasion and necessity" under RSA 231:34. Id. at 508. That right, however, does not include the right to a jury trial on these issues. Id. at 506–07.

RSA 149-I:2, the other statutory authority cited by the City for the taking, refers to the process contained in RSA chapter 230. RSA chapter 230 is the procedure for the laying out of highways by the State of New Hampshire. This requires action by Governor and Council. RSA 230:13 establishes the procedure for Governor and Council to determine whether there is necessity for the taking of private land. The statute provides that if the State is required to exercise its eminent domain authority, the

land "may be acquired in accordance with RSA 498-A and all issues that are appealed relating to necessity, public use, and net public benefit shall be determined in accordance with RSA 230:19." RSA 230:19, in turn, establishes the process for Governor and Council to make findings regarding the "occasion for the laying out of the highway." That statute provides Governor and Council findings on necessity, public use, and net public benefit cannot be appealed "in the absence of fraud or gross mistake." Id.

In State v. Korean Methodist Church, 157 N.H. 254 (2008), the Supreme Court analyzed the process for a preliminary objection under RSA 230:19. The Court noted that if an property owner files a preliminary objection on the grounds of necessity, public purpose, or net public benefit, the BTLA transfers the case to superior court pursuant to RSA 498-A:9-b, I. Korean Methodist Church, 157 N.H. at 256. The Court noted that RSA 498-A:9-b, II, gives the superior court discretion about whether to hold an evidentiary hearing. Korean Methodist Church, 157 N.H. at 256. The Court held that the superior court properly refused to hold an evidentiary hearing where the Korean Church did not allege that the taking was the result of fraud or gross mistake. Id. at 257.

These two lines of statutory authority are difficult to reconcile. Under RSA 47:11 and RSA 231:34, the superior court is required to hold a de novo trial on the issue of necessity. Under RSA 149-I:2, RSA 230:34, and RSA 498-A:9-b, II, the Court has discretion to hold an evidentiary hearing and its review is limited to a determination of fraud or gross mistake. In the case at bar, neither party has made any attempt to

reconcile these two divergent lines of authority or to provide this Court with guidance about which should control.

What is clear, however, is that in all situations the issue of public purpose is a legal question for this Court to determine de novo. Pennichuck Water Works, 160 N.H. at 30; Rodgers Dev. Co. v. Town of Tilton, 147 N.H. 57, 62 (2001). The issue of whether there is a necessity and net public benefit is a factual question requiring evidence and findings. See Jackson v. Ray, 126 N.H. 759, 762 (1985). In the first instance, it is a legislative question for the taking authority, *i.e.*, the Governor and Council, the city council, or the board of selectman, as the case may be. RSA 230:19 (establishing that the Governor and Council shall examine the property, hear from interested parties, may admit or reject evidence); see generally Waisman v. Board of Mayor and Alderman of the City of Manchester, 96 N.H. 50 (1949) (describing procedure for initial determination of necessity for layout of a road and appellate process which originated in common law). The court's role in an appeal of these legislative determinations is a more difficult question that depends on the particular statutory procedure.

This Court finds that it must hold a de novo trial on the preliminary objection as it relates to necessity and net public benefit. To accept Boyle's argument that it is appropriate only to conduct a record review of the City Council hearings would be plain error. See State v. Richards, 160 N.H. 780, 788 (2010) (invited error does not preclude plain error review on appeal). In Waisman v. Board of Mayor and Alderman of the City of Manchester, the Supreme Court grappled with a similar claim. Prior to the current procedure for the laying out of road, the municipality (through mayor and alderman)

made the initial determination regarding the necessity of the taking. Waisman, 96 N.H. at 52. Any party adversely affected by the taking had a right to a de novo appeal to the county commissioners. Id. at 53. The decision of the commissioners could be further appealed to the superior court, whose review was limited to gross mistake or fraud. Id. The Supreme Court characterized the appeal to the commissioner as the equivalent of a new trial. Id. The property owner had a right to notice and to be heard before the commissioners. Id. The commissioners were required to take evidence and making findings on the issue of necessity. Id. In Waisman, the plaintiff argued that the decision by the mayor and alderman should be vacated without the needed expense of a new trial before the commissioners because the record before the city council was devoid of evidence to support the necessity of the taking. Id. at 54. The Court rejected this argument reasoning that the city could simply renew the condemnation proceedings before the board of alderman and present the missing evidence. Id. Instead, the Court concluded that "[t]he plaintiff's right to be heard, and to offer evidence upon the question of necessity will be fully protected upon her appeal. It would be futile, in view of the scope of the appeal, to require that the proceedings be instituted anew, even if the record were thought to demonstrate error." Id. (citation omitted).

For these same reasons, this Court rejects Boyle's argument that its review is limit to the record before the Portsmouth City Council. In V.S.H. Realty, the Supreme Court analyzed Waisman and concluded the legislature amended the appeal process for the laying out of highways by eliminating the trial before the county commissioners. 123 N.H. at 507. The Court held that in the absence of a trial before the commissioners, the property owner was entitled to the same right to a trial de novo

before the superior court. Id. at 507-08. In all other respects, the current process is no different than that involved in Waisman. Whoever loses before the superior court now has a right to appeal to the Supreme Court, where the review is limited to fraud or gross mistake. Jackson, 126 N.H. at 762. Thus, as in Waisman, Boyle's rights are adequately protected by a trial de novo in superior court at which the City must establish the necessity for the taking.

The City's position that this Court conduct a "legislative-style" hearing is equally groundless. When the State acts in its sovereign capacity through Governor and Council, it is logical that the superior court would have a limited role in reviewing the question of necessity and net public benefit. See generally R. Bird & L. Oswald, Necessity as a Check on State Eminent Domain Power, 12 U. Pa. J. Const. L. 99, 105–13 (2009) (discussing role of judiciary in review of necessity determinations and limitations on judicial review). By statute and common law in this state, however, the court exercised broad discretion on the issue of necessity when municipalities exercised eminent domain authority for the construction of roads. See Rodgers Dev. Co., 147 N.H. at 61 (finding that the trial court properly conducted a de novo trial by taking two days of testimony and taking a view of the property); Jackson, 126 N.H. at 762 ("[E]vidence of necessity or of the occasion, as well as findings with respect thereto, are necessary to the proceedings before the [court]") (quotation omitted); Caouette v. Town of New Ipswich, 125 N.H. 547, 553 (1984); V.H.S. Realty, 123 N.H. at 506-07 (requiring a de novo trial on the issue of necessity); Merrill v. City of Manchester, 124 N.H. 8, 15-16 (1983) (requiring a full evidentiary de novo trial in superior court after initial finding of necessity was made by municipal board). The City has cited no authority for its

proposition that the superior court should conduct a legislative hearing. None of the cases that refer to the issue of necessity as a "legislative question" involve an appeal to superior court for the laying out of a road under either RSA chapter 231 or RSA chapter 230. See, e.g., Brouillard v. Atwood, 116 N.H. 842, 845 (1976) (hearing before county commissioners to take land for county courthouse is a legislative question not subject to judicial review except for fraud, gross mistake, or abuse of discretion); Wilton-Lyndesboro Co-op School Dist. V. Gregg, 111 N.H. 60, 62 (1971) (finding that taking of land by school board for access to public school was not governed by process in RSA chapter 230); State v. 4.7 Acres of Land, 95 N.H. 291, 294 (1948) (taking of land by Governor and Council for a public park). While the legislature can establish that condemnation proceedings are legislative in nature subject to limited review for gross mistake or fraud, it has not done so here. See Waisman, 96 N.H. at 55; V.H.S. Realty, 123 N.H. at 506–07. Unlike the Governor and Council, a county commission, a city council, or board of selectmen, this Court is simply not a legislative body. The Court makes findings of fact based on properly admissible evidence in a trial. Accordingly, the Court will hold a bench trial at which the City has the burden of proof by a preponderance of the evidence to establish necessity and net public benefit.

This Court may be justified in limiting its review to gross mistake or fraud under RSA 149-I:1 and RSA 230:19. In this situation the Court would presume that the legislative findings of the City Council were justified in the absence of evidence of fraud or gross mistake. Waisman, 96 N.H. at 55-56. Because Boyle has alleged neither of these grounds in his preliminary objection, the Court would be justified in denying the objection without further proceedings. See Korean Methodist Church, 157 N.H. at 257.

RSA 498-A:5, II(c), however, requires the City to identify the "specific reference to the statute, chapter and section thereof, under which the condemnation is authorized." The City has not limited its taking authority to RSA 149-I:1. Rather, the City has specifically relied on RSA 47:11. By doing so, the City has incorporated the greater procedural protections which are afforded to landowners in the context of the laying out of roads under RSA 231:34. The Eminent Domain Procedures Act "is not intended to enlarge or diminish the rights given by law to any condemnee to challenge the necessity, public uses, and net-public benefit for ay condemnation." RSA 498-A:1, I. Accordingly, Boyle is entitled to all of the procedural protections afforded to landowners for a taking under RSA 231:34, which includes the right to a de novo trial in superior court.

In order to facilitate the resolution of this matter, the Court will address some additional preliminary matters. First, the Court can resolve the issue of public purpose without evidence or argument. As noted, this is purely a question of law. See Pennichuck Water Works, 160 N.H. at 30. The New Hampshire Supreme Court set out the following test to evaluate whether a taking is for a public purpose:

> In gauging the constitutionality of a proposed condemnation, we must determine whether the expenditures will be primarily of benefit to private persons or private uses, which is forbidden, or whether they will serve public purposes for the accomplishment of which public money may properly be used.

Id.

In the case at bar, Boyle's preliminary objection and subsequent pleadings fail to establish that the taking here was for anything other than a public purpose. There is no allegation anywhere in the pleadings that the taking was made for the benefit of any

private person or entity. In the absence of such information, this Court can deny the preliminary objection on the pleadings. Cf. Korean Methodist Church, 157 N.H. at 257 (denying preliminary objection without hearing when there was no allegation of gross mistake or fraud in the pleadings).

Boyle's argument that the City condemned his land in bad faith to prevent him from developing his land and/or punish him for challenging the City over the years could be construed as an assertion that the taking was not for a "public purpose." Preliminary Objection, supra, at 28–38. The public purpose test is limited to whether the taking would benefit public or private interests. See Pennichuck Water Works, 160 N.H. at 30; see also RSA 498-A:2, VII(a)(1) (defining "public use" to mean "[t]he possession, occupation, and enjoyment of real property by the general public or governmental entities"). If Boyle is correct that the taking was in bad faith, the property would still be owned by the City and it would still benefit only the municipality and not some private individual or entity. Boyle's bad faith claim fits more neatly into the factual questions of necessity and net public benefit.

The necessity of the taking and the net public benefit requires a balancing of interests. More specifically, in the context of the "occasion" for the laying out of a highway, the Supreme Court has noted: "we have used different terms to describe our consideration of the same basic question-referring variously to the 'need,' 'necessity,' 'exigency,' 'convenience,' and 'interest' of the public, and balancing those public considerations in various ways against the rights of the affected landowners and the burden of the layout on the town." Rodgers Dev. Co., 147 N.H. at 59. In other words, "[t]he first step is to balance the public interest in the layout against the rights of the

affected landowner. If the rights of the affected landowner outweigh the public interest in the layout, the layout is not justified and there is no occasion for it." Id. at 59–60. The greater the public need for the taking the more the infringement on the landowner's rights will be tolerated. Id. at 60. In contrast, "a layout proposed for mere convenience may justify only a slight imposition on those rights." Id. If the public interest outweighs the landowner's interest, then the Court proceeds with the second step of the balancing test. Id. Here, the Court must "balance the public interest in the layout against the burden it imposes upon the town." Id. Only if the public interest outweighs the public burden will the taking be upheld. Id.

For purposes of the present analysis, if—as Boyle alleges—the City acted in bad faith the infringement on his property rights would be high. Presumably the public need would be low in this circumstance, for example the desire to end the "annoyance" or "inconvenience" of the defendant's attempts to develop his land. The City would need to justify its actions by a coordinately higher public need for the taking. However, because the current proceeding is based on a de novo trial, the City's motives become secondary. Rather, the question becomes whether the objective evidence of public need outweighs the private interests. In other words, Boyle's arguments about bad faith became a challenge to the credibility of the City's claimed public necessity.

Boyle argues that the City did not have statutory authority to take the land. See Preliminary Objection, supra, at 5–7. This is essentially a jurisdictional argument. See Waisman, 96 N.H. at 54. This Court is limited to reviewing the preliminary objection concerning "necessity, public use, or net public benefit." RSA 498-A:9-b, I. Other objections, including objections to "any other procedure followed by the condemnor" are

reserved for the BTLA. See RSA 498-A:9-a, I(b). Accordingly, this Court will not address this or arguments unrelated to "necessity, public use, or net pubic benefit" raised in the Preliminary Objection.

The parties shall submit a joint proposed scheduling order within 30 days. While the parties are encouraged to pursue alternative dispute resolution, the Court will not require further ADR methods in light of the length and history of the litigation. The parties' dispute over the presence of the sewer line, associated wetlands, and the future of this land has been pending in this Court for more than 7 years. The parties have attempted ADR on multiple occasions. Further delay to pursue additional court-ordered ADR efforts is not justified.

SO ORDERED.

6/6/2017
DATE

N. William Delker
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
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http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **City of Portsmouth v 150 Greenleaf Avenue Realty Trust, et al**
Case Number: **218-2017-CV-00071**

Enclosed please find a copy of the court's order of May 24, 2018 relative to:

Order on Boyle's Motion in Limine Concerning Statutory Authority

Order on Boyle's Motion in Limine to Exclude Evidence

Order on Boyle's Motion to Admit City Council Record

Order on Boyle's Motion in Limine to Exclude Testimony of Juliet Walker

May 25, 2018

Maureen F. O'Neil
Clerk of Court

(278)

C: Suzanne M. Woodland, ESQ; George R. Moore, ESQ; John J. Kuzinevich, ESQ; Mark P. Hodgdon, ESQ

The State of New Hampshire
Superior Court

Rockingham

CITY OF PORTSMOUTH

V.

150 GREENLEAF AVENUE REALTY TRUST, ET AL.

No. 218-2017-CV-00071

ORDER ON BOYLE'S MOTION *IN LIMINE* CONCERNING STATUTORY AUTHORITY

The factual and procedural history of this case has been fully outlined in prior orders which are incorporated by reference herein. The matter is scheduled for a *de novo* bench trial beginning on May 29, 2018, to address the landowner's Preliminary Objection challenging the "necessity, public purpose or net-public benefit." James Boyle, as trustee of 150 Greenleaf Avenue Realty Trust, which owns the land, filed a Motion *in Limine* Concerning Statutory Authority. In summary, Boyle filed to motion to limit the City's reliance on RSA 47:11 and RSA 149-I:2 as authority for the taking. The City has objected.

This Court has fully addressed the relevance of the various enabling statutes in its June 6, 2017 Procedural Order on Preliminary Objection (Doc. #17) (hereinafter Procedural Order). Neither party has referenced that Order. The parties are strongly encouraged to review that order prior to trial and before filing any additional motions so that they follow the procedure described in that order during this trial. As this Court explained in more detail in that order, the enabling statutes simply set the appropriate procedure and standard of review for eminent domain proceedings. As the New

Hampshire Supreme Court has observed, the case law uses different terms to describe "the same basic question," *i.e.*, "balancing [the] public considerations in various ways against the rights of the affected landowners and the burden" of the taking on the public. Rodgers Dev. Co. v. Town of Tilton, 147 N.H. 57, 62 (2001). This test does not change depending on the enabling statute cited by the City. Indeed, Boyle himself has recognized in the Preliminary Objection that the City has authority for taking land for any "public purpose." Procedural Order at 3 n.1 (citing RSA 31:92). Citation to the enabling statute is important because, as explained in detail in the Procedural Order, it may dictate whether this Court's review is limited to "fraud or gross mistake" or involves a more comprehensive *de novo* trial. Id. at 6-10. In other words, citation to the enabling legislation will establish the procedure for this appeal. For the reasons articulated in the Procedural Order, the City's reliance on RSA 47:11 requires this Court to conduct a *de novo* trial. The enabling statutes do not limit the evidence the City may introduce to meet its burden of proof regarding the questions of necessity, public use, and net public benefit. For the reasons set forth above, Boyle's Motion *in Limine* Concerning Statutory Authority is DENIED.

SO ORDERED.

5/24/2018
DATE

N. William Delker
Presiding Justice

your case is deficient for that. That's what -- that's the gist here.

MR. KUZINEVICH: Right. Yeah.

THE COURT: Okay.

MR. KUZINEVICH: Second, Your Honor, we believe that the Court must find, as a matter of law, there is no necessity under RSA 4711. It says, "The city council shall have the power to construct drains and common sewers", and you know, that goes on. The testimony was unequivocal that there -- the city did not take the land to construct anything concerning the sewer line.

It was taken to keep a sewer line that was already constructed. The taking statutes for public utilities specifically allow for the taking of existing utility properties, but in this case the statute is prospective and clearly there is no evidence of prospective construction. Likewise, the other identified basis for the taking, 149 I2 says, "whenever it's necessary to construct mains, commons sewers, storm water treatment", et cetera, the City may take.

Again, the testimony has been unequivocal that there are no plans to construct, there are -- maybe in the future something, but there was no necessity to take the property now to construct anything because nothing is being constructed on. This is a situation of the clear words of each statute. Now, I'm asking the Court for this ruling.

I'm not getting into the issue of whether some (indiscernible) taking power is there, as much as trying to narrow the focus. But the City just does not meet either standard, and since it doesn't meet either standard, there -- as a matter of law, could be no necessity for the taking under each statute.

MR. HODGDON: Do --

THE COURT: Sure.

MR. HODGDON: Okay. First of all, Your Honor, we believe the City has proved its case, and we'll certainly provide you -- in our closing memorandum, those arguments. The construct the sewer line argument was raised in the preliminary objection. It was addressed in the City's answer to that with citations and appropriate argument, and we will, of course, incorporate that.

However, I would note, I don't believe there was any argument on the storm water side in the preliminary objection. We will certainly go back and check that. If it isn't, then it's waived under the statute. Finally, I would note that on the issue before the Court for this hearing, those matters are irrelevant, as the Court has already found your issues -- as I understood the Court to order -- and I'm not trying to tell you what you meant, but I'm telling you what I understood you to mean was that the issues before you were the public benefits from the proposed taking, the public burden from the

proposed taking, and of course the burden on the landowner from the taking; and the appropriate weighing of those factors individually as set forth in Rogers development and all the other cases.

Those issues of the enabling statutes are not before the Court at this proceeding. And that's what I understood the Court's ruling to be recently, and if I misunderstood I'm sure you'll correct me, but those issues are -- to some extent, they've already been dealt with -- at least on the public use side in the procedural order, and they are not before the Court at this time.

THE COURT: Okay. All right. I think I've already ruled on these issues, and I think Kenny Hutchins (phonetic) correct -- has correctly summarized the gist of the rulings -- those written orders, obviously, speak for themselves on these issues, so the motion for judgment as a matter of law is denied. The record's preserved, so are you ready to proceed?

MR. KUZINEVICH: Thank you, Your Honor. And I do apologize to the Court if I keep --

THE COURT: No, no -- you -- that's fine. I understand. Don't need to apologize.

MR. KUZINEVICH: And the Court might not be happy with me for the next thing because --

MR. HODGDON: Why don't you tip your hand?

EXHIBIT 2


GREENLEAF AVE
U.S. ROUTE 1 BYP
Remaining Parcel
Area: 400,077 sqft
Proposed Acquisition
Area: 200,333 sqft
Legend
Sewer Pipe
Wetlands (Gove, 2
reenleaf Avenue – Acquisition Plan
2024 Aeria

CHAPTER 31
POWERS AND DUTIES OF TOWNS

Miscellaneous

Section 31:92

31:92 Taking of Land. – Whenever any town cannot obtain by contract, for a reasonable price, any land required for public use, such land may be taken, the damages assessed, and the same remedies and proceedings had as in case of laying out highways by selectmen.

Source. 1872, 38:1. PS 40:6. PL 42:71. RL 51:90.

CHAPTER 47
POWERS OF CITY COUNCILS

Section 47:11

47:11 Sewers. – The city councils shall have power to construct drains and common sewers through highways, streets or private lands, paying the owners such damages as they shall sustain thereby, the damages to be assessed by the mayor and aldermen in the same manner and with the same right of appeal from their decision as in case of the laying out of highways; and may require all persons to pay a reasonable sum for the right to open any drain into any public drain or common sewer.

Source. 1846, 384:19. 1855, 1699:19. GS 44:9. GL 48:8. PS 50:8. PL 54:10. RL 66:11.

CHAPTER 149-I
SEWERS

Section 149-I:1

149-I:1 Construction. – The mayor and aldermen of any city 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 for the public convenience, health or welfare. Such drains, sewers, and systems shall be substantially constructed of brick, stone, cement, or other material adapted to the purpose, and shall be the property of the city.

Source. 1870, 5:1, 6. GL 78:6, 11. PS 79:2. PL 95:3. RL 111:3. 1945, 188, part 22:4. RSA 252:4. 1961, 120:4. 1981, 87:2, eff. April 20, 1981. 2008, 295:1, eff. Aug. 26, 2008.

Section 149-I:2

149-I:2 Taking Land. – Whenever it is necessary to construct such main drains or common sewers, stormwater treatment, conveyance, and discharge systems, sewage and/or waste treatment facilities across or on the land of any person and the city cannot obtain for a reasonable price any land or easement in land required by it, the mayor and aldermen may lay out a sufficient quantity of such land for the purpose and assess the owner's damages in the same manner as in the case of taking land for highways pursuant to RSA 230 and the owner shall have the same right of appeal, with the same procedure.

Source. 1873, 29:1. GL 78:13. PS 79:3. PL 95:4. RL 111:4. 1945, 188, part 22:5. RSA 252:5. 1967, 300:3. 1981, 87:2, eff. April 20, 1981. 2008, 295:2, eff. Aug. 26, 2008.

CHAPTER 482-A
FILL AND DREDGE IN WETLANDS

Section 482-A:1

482-A:1 Finding of Public Purpose. – It is found to be for the public good and welfare of this state to protect and preserve its submerged lands under tidal and fresh waters and its wetlands, (both salt water and fresh-water), as herein defined, from despoliation and unregulated alteration, because such despoliation or unregulated alteration will adversely affect the value of such areas as sources of nutrients for finfish, crustacea, shellfish and wildlife of significant value, will damage or destroy habitats and reproduction areas for plants, fish and wildlife of importance, will eliminate, depreciate or obstruct the commerce, recreation and aesthetic enjoyment of the public, will be detrimental to adequate groundwater levels, will adversely affect stream channels and their ability to handle the runoff of waters, will disturb and reduce the natural ability of wetlands to absorb flood waters and silt, thus increasing general flood damage and the silting of open water channels, and will otherwise adversely affect the interests of the general public.

Source. 1989, 339:1, eff. Jan. 1, 1990.

City of Portsmouth Zoning Ordinance
Section 10.1010 Wetlands Protection

10.1011 Purpose

The purposes of this Section are:

(1) To maintain, and where possible improve, the quality of surface waters and ground water by controlling the rate and volume of stormwater runoff and preserving the ability of wetlands to filter pollution, trap sediment, retain and absorb chemicals and nutrients, and produce oxygen.

(2) To prevent the destruction of, or significant changes to, wetlands, related water bodies and adjoining land which provide flood protection, and to protect persons and property against the hazards of flood inundation by assuring the continuation of the natural or existing flow patterns of streams and other water courses within the City.

(3) To protect, and where possible improve, potential water supplies and aquifers and aquifer recharge areas.

(4) To protect, and where possible improve, wildlife habitats and maintain ecological balance.

(5) To protect, and where possible improve, unique or unusual natural areas and rare and endangered plant and animal species.

(6) To protect, and where possible improve, shellfish and fisheries.

(7) To prevent the expenditure of municipal funds for the purpose of providing and/or maintaining essential services and utilities which might be required as a result of misuse or abuse of wetlands.

(8) To require the use of best management practices and low impact development in and adjacent to wetland areas.

CHAPTER 498-A
EMINENT DOMAIN PROCEDURE ACT

Condemnation Procedure

Section 498-A:4

498-A:4 Preliminary Steps to Initiating Action. –

I. Disclosure. At the initial contact with a property owner, the condemnor shall provide to the condemnee information regarding acquisition and relocation. Such information shall include a disclosure, conspicuously located, which states that the condemnor does not represent the rights of the condemnee and that the condemnee may want to obtain independent advice or unbiased counsel.

II. Appraisal.

(a) The condemnor shall have an impartial, qualified appraiser make at least one appraisal of all property proposed to be acquired. The appraiser shall make reasonable efforts to confer with the condemnees or their personal representatives.

(b) Condemnees who are the subject of a property acquisition shall have a reasonable opportunity to have their property appraised by an independent, qualified appraiser, employed by the condemnees. The condemnor shall reimburse the usual and customary cost of the appraisal up to $1,000 for each property.

(c) Before making the offer provided for in paragraph III, the condemnor shall make reasonable efforts to negotiate with the condemnees or their personal representatives for the purchase of the property, but failure to confer or negotiate shall not be a defense to condemnation of a property. Any sum of money or other consideration discussed by either the condemnor or the condemnee during any such negotiations shall not be admissible in evidence and shall not be referred to in any proceedings for the determination of just compensation.

(d) Within 10 days of receipt of a notice of offer provided for in paragraph III of this section a municipal condemnee shall, at the request of the condemnor, furnish the condemnor with the estimated amount of unpaid taxes, fees and interest for which notice has not been recorded at the registry of deeds for the county in which the property is located. Failure to timely provide such estimate shall not affect any right of a municipal condemnee under this chapter.

(e) The condemnor shall review any independent appraisals prepared under this paragraph for accuracy before formulating a notice of offer.

(f) The condemnor shall provide a copy of the appraisal, and if requested,

any official appraisal review notes upon which the negotiations are based, to the condemnee at the time of negotiation or at least 45 days prior to making the notice of offer, whichever comes first.
III. Notice of Offer.
(a) The condemnor shall make its notice of offer within a reasonable time after the governmental entity, with the statutory authority to condemn, votes to acquire a property.
(b) No property shall be taken unless the condemnor shall serve upon the condemnee a written notice of offer to purchase, which shall set forth:
(1) The purpose for which the property will be taken.
(2) A description of the property to be taken sufficient for the identification thereof, including sources of title, if ascertainable.
(3) The amount of compensation offered and whether the offer is based on the appraisal required by RSA 498-A:4, II(a), or on some other basis.
(4) The effective date of the appraisal.
(5) That an action to condemn the property in the manner provided by this chapter will be commenced if the offer is not accepted within 30 days after service of the notice. Just compensation for the taking shall be based on the value of the property as of the date of taking or at the sole election of all condemnees, compensation may be based upon the property's value based upon the date the governmental entity, with the statutory authority to condemn, votes to acquire the comdemnee's property. Any such election shall occur not later than 30 days from the return date of the RSA 498-A:8, I order of notice by written notice to the board of tax and land appeals and the condemnor.
(c) The offer shall remain outstanding and may be accepted by the condemnee until such time as either the condemnor or the condemnee files a petition in the superior court to have the damages reassessed under RSA 498-A:27.
(d) The condemnor shall make public a complete list of such offers showing the name of each condemnee and the amount of the offer in each case, including the value of the property before and after the taking, if different, and the amount of damages.
IV. Service of Notice.
(a) The giving of the notice of offer is a jurisdictional prerequisite to instituting condemnation proceedings. The notice may be served by certified mail and service shall be complete on the date of mailing. If the condemnee is a minor, an incompetent person, unknown, or is one whose whereabouts are unknown, the condemnor shall serve such notice upon the legal guardian of the condemnee. If there is no such guardian, the condemnor shall petition the board and request that a guardian ad litem be appointed to represent such condemnee. If the condemnee is

unknown or one whose whereabouts are unknown, such notice shall also be published once in a newspaper of general circulation in the county where the property is located.
(b) If the offer is accepted, the transfer of title shall be accomplished within 30 days after acceptance, including payment of the considerations set forth in the offer or as agreed upon between the parties, unless such time is extended by mutual written consent by the condemnor and condemnee. In the event the condemnee fails to convey the property within the specified time, the condemnor may commence condemnation proceedings.
(c) If the offer is not accepted within 30 days after the service of the notice, the condemnor shall commence condemnation proceedings within 90 days after the expiration of such 30-day period.

Source. 1971, 526:1. 1973, 256:2-6. 1977, 363:3-8. 1981, 493:4. 1982, 42:79. 1983, 297:1-3. 1991, 241:2. 2003, 211:1. 2004, 93:1, eff. May 10, 2004.

Section 498-A:5

498-A:5 Condemnation; Passage of Title; Declaration of Taking. – I. Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in the board of a declaration of taking, with sufficient copies for giving notice as required by RSA 498-A:8. The declaration shall be considered filed after receipt by the board and review by the board for compliance with paragraph II. If the board finds the declaration of taking is not compliant with paragraph II, the board may direct the filing of a more specific declaration of taking. After the giving of any bond and security as may be required under RSA 498-A:6, the title which the condemnor seeks in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in RSA 498-A:11. A declaration may include more than one parcel and multiple condemnees so long as the identity of the property taken of each condemnee and the nature of their interests are readily ascertainable.
II. The declaration of taking shall be in writing and executed by the condemnor, shall be captioned as a proceeding in rem and shall contain the following:
(a) The name and address of the condemnor;
(b) The name and address of each condemnee and the nature of each condemnee's interest;

(c) A specific reference to the statute, chapter and section thereof, under which the condemnation is authorized;
(d) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when such action was taken, and the place where the record thereof may be examined;
(e) A brief description of the purpose of the condemnation, the need therefor, and the public use to which the real property will be put;
(f) A description and plan of the property taken sufficient for the identification thereof, specifying the town, city and county wherein the property taken is located; and
(g) A statement of the nature of the property being taken.
III. The declaration of taking may be amended by order of the board, upon agreement of the parties, or upon appropriate motion filed by the condemnor. Such amendments shall be permitted for the purpose of correcting errors and omissions which may exist in the declaration of taking, but shall not be permitted for the purpose of increasing or decreasing the physical extent of the taking or the nature of the property taken.

Source. 1971, 526:1. 1973, 256:9, 10. 1977, 363:9, 10. 1981, 493:5, 6. 1982, 42:79. 2005, 171:2. 2006, 324:12, eff. Jan. 1, 2007.

Section 498-A:9-a

498-A:9-a Preliminary Objections. –
I. Within 30 days after the return day, any condemnee may file a motion in the office of the board raising preliminary objections to the declaration of taking. The board upon cause shown may extend the time for filing preliminary objection. Preliminary objection shall be limited to and shall be the exclusive method of challenging:
(a) The sufficiency of the security;
(b) Any other procedure followed by the condemnor; or
(c) The necessity, public use, and net-public benefit of the taking.
II. Failure to raise any matters by preliminary objection shall constitute a waiver thereof.
III. Preliminary objection shall state specifically the grounds relied upon.
IV. All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.
V. The board shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require. If preliminary objections are finally sustained, which have the

effect of finally terminating the condemnation, the condemnee shall be entitled to damages, including costs and expenses, to be determined by the board in the manner prescribed in RSA 498-A:24. The board may allow amendment or direct the filing of a more specific declaration of taking.

Source. 1981, 493:10. 1982, 42:79. 1995, 194:3. 2006, 324:13, eff. Jan. 1, 2007.

Section 498-A:9-b

498-A:9-b Determination of Preliminary Objections Based on Necessity, Public Use, and Net-Public Benefit. –
I. If a condemnee files a preliminary objection under RSA 498-A:9-a, I(c) concerning necessity, public use, or net-public benefit, the board shall transfer that preliminary objection to the superior court of the county in which the property is located. There shall be no filing fee for such transfer.
II. Upon receipt of the transfer from the board, the superior court shall require a response from the condemnor and may conduct an evidentiary hearing before it rules on the preliminary objection. Parties may appeal the superior court's decision to the supreme court. Once the decision is final and nonappealable, the superior court shall send to the board a copy of its decision.
III. If the superior court denies the condemnee's preliminary objection, the board shall then proceed under RSA 498-A:25 to determine the amount of just compensation.
IV. If the superior court grants the preliminary objection, the board shall determine the damages, if any, in accordance with RSA 498-A:9-a, V and then dismiss the declaration of taking and record such dismissal order in the registry of deeds.

Source. 1995, 194:4. 2006, 324:14, eff. Jan. 1, 2007.