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.

REPLY 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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INTRODUCTION

The City's Opening Brief rests heavily on two well-established principles of New Hampshire law, each ignored or misapplied by the court. In his Brief, Boyle ignores or sidesteps the first core issue, and then concedes the second.

The first is that the court has no jurisdiction to determine whether the statutes referenced in the Declaration of Taking authorized the taking. This point was repeatedly acknowledged by the court in multiple pretrial rulings, but then disregarded in the Final Order, resulting in a legally unsupportable decision. Boyle never addresses this jurisdictional failure in his Brief, providing only an inexplicable and confusing argument that the court was only making an "evidentiary" decision, or somehow acting within the proper exercise of the Court's "discretion." Further, the court repeatedly ruled that RSA 31:92 provided the City the authority to take for any "public purpose." Boyle conceded that point, but the court's earlier ruling on the matter was not mentioned in its Final Order. Boyle cannot muster up any credible argument to support the court's inexplicable reversal of course.

Second, after endless arguments that New Hampshire does not permit a taking based upon a public need for the City to eliminate the expense of nuisance liability, Boyle now concedes that this is the proper rule of law, as established by

Leary v. Manchester, and other cases. Hoping to survive this fatal, but necessary, admission, Boyle now claims the rule only applies to cases where the amount of nuisance damages has been fixed or adjudicated. This is not the holding of *Leary* and makes no sense.

Such a notion ignores the position the City was in after the court granted summary judgment on trespass liability, then scheduled the jury trial on the amount of those damages for trespass, permitted the inverse condemnation claims to continue into the actual trial, with the plaintiff-beneficiary of those erroneous rulings claiming entitlement to millions of dollars in damages. The *Leary* ruling was dispositive—the taking was clearly in accordance with New Hampshire law.

Boyle's other claims and arguments that the City could not take a fee interest are based on out-of-state, distinguishable holdings, all conflicting with well-established New Hampshire law. Boyle's over-the-top claims of the City's devious purposes and claims of misstatement of fact are powerful evidence of the inability of the City to rely on Boyle's claimed willingness to work out issues of trespass of the Line. His claims are erroneous, not borne out by the record, and unfair. This Reply will also address briefly some of the most notable misstatements present in Boyle's Brief.

ARGUMENT

I. Boyle Ignores the Court's Absence of Jurisdiction to Determine the City's Statutory Authority for the Taking as Well as the Court's Repeated Rulings that RSA 31:92 Provided a General Eminent Domain Power.

Not once in his brief does Boyle[1] refute that the court lacked jurisdiction to determine whether the City had statutory authority for the taking. This is because New Hampshire law provides that it is not within the Superior Court's province to do so. *Compare* RSA 498-A:9-b *with* RSA 498-A:9-a, I(b) & V. Instead, the issue of statutory authority is reserved to the BTLA, as the court found in multiple pretrial orders and a colloquy at trial. Add.104-05, 107-08, 109-11. It specifically found it had no jurisdiction to rule on whether RSA 47:11 and RSA 149-I:2 provided statutory authority for the taking. Boyle does not contest this but attempts to sidestep the court's core error of later reversing itself.

The court initially correctly determined that the balancing test used to determine public necessity "does not change depending on the enabling statute cited by the City," that "the City has authority for taking land for any 'public purpose,'" under RSA 31:92, and that "the enabling statutes

[1] Capitalized terms have the meaning ascribed to them in the City's opening brief.

do not limit the evidence that the City may introduce to meet its burden of proof regarding the questions of necessity, public use, and net public benefit." Add.108. It reaffirmed those rulings at trial holding that they were sound and would not be revisited, Add.109-11, and the City presented evidence in accordance with and in reliance on those rulings. It was only after trial and after the parties filed their post-trial briefs that the court reversed course and relied on the specific statutes cited in the Declaration of Taking, while ignoring its pretrial rulings based on the general powers of RSA 31:92, disregarding the City's evidence for taking the Wetlands. Add.66-67, 72.

In light of this, Boyle's argument that he could only fairly challenge the taking in reliance on the specific statutes set forth in the Declaration of Taking and not "some undisclosed theory" strains credulity. Boyle Br. 16-18. Boyle knew that the court had rejected on jurisdictional grounds his objections to the claimed lack of statutory authority under RSA 47:11 and 149-I:2. Boyle also knew that the court had ruled that RSA 31:92 allowed the City to take property for any public purpose—Boyle himself conceded that the City had this ability, as the court noted. Add.95. At the very outset of the proceedings on Boyle's Preliminary Objection, the City asserted that it "had legal authority to condemn property...for general public purposes pursuant to RSA 31:92[,]" and that it

exercised its taking power to "maintain an existing public sewer main...serving hundreds of residents, as well as to preserve flood storage capacity and wetlands values on the subject property." A-I.188-89. The City presented its case at trial consistent with these principles and the court's multiple findings that it had the authority to take property for any proper public purpose under RSA 31:92. Boyle's suggestion that he did not have a fair opportunity to respond to the City's arguments, or that the City was not or could not rely on RSA 31:92, particularly in light of the court's rulings prior to and during trial, is untenable.

Equally meritless is Boyle's contorted argument that the court's determination that the "statutory authority cited by the City does not justify taking the wetlands" is consistent with the court's pretrial rulings that it lacked jurisdiction to determine statutory authority for the taking. Add.66, 104-05, 107-08; Boyle Br. 18-21. Any reasonable reading of the court's pre-trial orders lead to the inescapable conclusion that the court correctly ruled that the City could meet its burden under the balancing test through evidence that the taking was for a valid public purpose, regardless of the particular statutory authority cited in the Declaration of Taking.[2] *Leary v. City of Manchester*, 91 N.H. 442, 443-44

[2] The City was from the beginning open about what those public purposes were. Add.86-90; A-I.125-30, 188-89.

(1941); *Molloy v. Town of Exeter*, 107 N.H. 123, 123-24 (1966). The court indisputably and inexplicably reversed course when it found that the City "must establish necessity for the condemnation in light of the particular statutory basis for the taking." Add.64.

Both Boyle and the court attempt to explain away this reversal as an "evidentiary" matter. Add.64; Boyle Br. 19. But it was error for the court to specifically rule that the City was allowed to submit evidence to meet its burden of proof and receive such evidence only to then, post-trial, deem the proffered evidence irrelevant in light of a legal determination—statutory authority—the court previously ruled it lacked jurisdiction to make.

The court erred in determining that the City lacked statutory authority for the taking and deeming the "substantial evidence" the City presented regarding the natural stormwater management function of the wetlands irrelevant. Add.68. Boyle recognizes it and his Brief fails in his attempt to sidestep the issue.

II. Boyle Admits that Avoiding the Payment of Damages For a Nuisance Claim Justifies a Taking.

Under New Hampshire law, a municipality may exercise the power of eminent domain, as the City did here, in order to "do away with the expense of avoiding a private nuisance." *Leary v. City of Manchester*, 91 N.H. 442, 443, 446-47. Boyle

does not contest this in his Brief, now admitting that *Leary* stands for the proposition that "relieving an economic burden could justify a taking." Boyle Br. 21. This concession is fatal to Boyle's legal position.

Boyle attempts to distinguish *Leary* on the curious ground that there, the condemnee had obtained a "final" judgment against the municipality, whereas here "[t]here were no damages" at the time the City filed its Declaration of Taking. *Id.* This distinction does not hold water. At the time the City initiated the taking, the court had already determined in the Boyle Damages Case that the City was trespassing on the property by virtue of the presence of the Line and the only issue on that claim was one of damages. The City also faced the prospect of being found liable for nuisance based on the alleged pooling of water on the property due to the Line. Boyle was claiming millions of dollars of damages for both prior and future years. At the time, Boyle also continued to pursue his claim for inverse condemnation of the same land over which the City exercised eminent domain. It defies logic to say that the City was required to sit on its hands and await the assessment of damages in the Boyle Damages Case before availing itself of an eminent domain procedure which under well-established New Hampshire law could mitigate and relieve some of the

economic burden of avoiding the ongoing private nuisance Boyle alleged.

Boyle's assertion that the City "never argued the taking was to avoid damages" likewise does not withstand scrutiny. The City repeatedly relied upon the Boyle Damages Case and the prospect of damages in the eminent domain proceedings:

- The City Council's resolution authorizing the taking and the Declaration of Taking each prominently reference the court's adverse ruling in the Boyle Damages Case that the City has no legal and permanent right in the land which contains and surrounds the Line. A-I.125; Add.87.
- The City disclosed in its response to the Preliminary Objection that it elected to proceed with eminent domain "[i]n recognition of the [Court's] adverse rulings, the limited remedies before the Superior Court and to bring the matter to closure for its residents[.]" A-1.191-92.
- At trial, the City reiterated that the taking was, in part, "to bring a close to the argument about ongoing damages" and that it "was facing the prospect of ongoing damages with regard to at least a portion of the taking...." Tr.III.25-27.
- In its post-trial memoranda, the City argued that the taking would avoid further expense and

> litigation and the potential for future liability of the City. A-III.106-07, 136.

There was nothing surprising or new about the City's purpose to eliminate its financial exposure for Boyle's claim, and he knew it. One basis for the taking was to avoid the public expense of incurring ongoing damages based on his claims of nuisance and trespass and this was repeatedly disclosed.

Boyle confuses and misstates the City's argument. He offers the strained notion that the City argued it took the property in order to "abate" the Wetlands themselves. Boyle Br. 23-24. This has never been the City's position. The Wetlands are a valuable protected natural resource that contribute significantly to stormwater management. They are not the problem that needed to be abated. The City initiated the taking to abate the public expense of addressing Boyle's claim of nuisance (the alleged creation of the Wetlands by the Line) and to preserve the stormwater management benefits the Wetlands provide. City Br. 40-41, 43, 47. This is expressly allowed under New Hampshire law. *Leary*, 91 N.H. at 443, 446-47.

III. The City Properly Exercised its Authority to Take a Fee Interest.

Relying entirely on cases outside of New Hampshire, Boyle claims that the court properly determined that the City could not take a fee interest. Boyle Br. 28-30. New

Hampshire law, however, provides that "[e]minent domain extends to the full exhaustion of private ownership." *Leary*, 91 N.H. at 447; *D. Latchis, Inc. v. Borofsky Bros., Inc.*, 115 N.H. 401, 403-04 (1975) (eminent domain "'extends to the full exhaustion of private ownership,' be it an easement or a fee"); *Turgeon v. Somersworth*, 116 N.H. 338, 339 (1976) ("There can be no doubt that cities may acquire a fee simple interest through condemnation...."). New Hampshire law is clear on this point, and Boyle cites no New Hampshire case which set aside a taking because a fee, versus an easement, interest was taken.

The general statements in the New York cases that Boyle cites to the effect that a fee interest should not be taken if an easement "suffices," Boyle Br. 28, are clearly inapplicable here. Boyle admits that City witnesses testified that a fee interest was necessary for the City to avoid future disputes with Boyle, including access issues that would continue if the City had taken only an easement. Boyle Br. 29; Tr.I.104-105. Boyle claims such disputes are speculative. The City submits that on the record here, and taking notice of both the near-decade-long litigation in the Boyle Damages Case and Boyle's defamation claim against a City official recently argued before this Court, it is fair to say that further disputes with Boyle as to access to the taken property and

otherwise would be inevitable if the City held only an easement.

Further, contrary to Boyle's claim, Terry Demarais, the City's engineer, never testified that an easement would "suffice." Boyle Br. 29. Demarais's testimony was that the City would need access to a sewer system and the ability to remove and replace it and "*if that can be done and is reasonable* through an easement, great." Tr.I, 103:11-24 (emphasis added). He never testified that it would be reasonable to acquire only an easement here. In fact, as Boyle acknowledges, he testified that the foreseeable specter of future disputes with Boyle made a fee taking the reasonable course of action. Tr.I, 104:17-105:22.

IV. Numerous Factual Assertions of Boyle Are Unsupported by the Record.

Boyle's Brief is replete with alleged factual assertions which are not supported by his record citations or are taken out of context. The City will not point out every such instance in this Reply and will focus on those most material to the issues in dispute:

- Boyle erroneously and unfairly contends that the City had not planned or studied the Wetlands prior to the taking. Boyle Br. at 9. Mark West, the City's wetlands expert, examined and assessed the Wetlands in 2006

and 2011-13.[3] Tr.I, 162; Tr.II, 8-9. West conducted a thorough functional assessment of the Wetlands both prior to and after the taking. Tr.II, 15-20. Peter Britz, the City's environmental planner and sustainability coordinator, first assessed the site in 2006 and estimated that he had made 20-plus visits over the years. Tr.II, 59. Boyle's notion that the City did not conduct a specific Wetlands study immediately prior to filing the Declaration of Taking is immaterial to the reality that the City had conducted a longstanding assessment of the Wetlands.

- Boyle erroneously contends that the City had no specific plans for the Wetlands. Boyle Br. 9. What he no doubt means is that the City had no specific plan to build treatment infrastructure. This is a strawman, which the record of the State's and City's protection and functional evaluation of wetlands in stormwater management demolish. The City planned to preserve the Wetlands and utilize them for their natural stormwater management and water quality benefits. Tr.I, 26-34.
- Boyle's assertion that the wetlands "do not serve any significant stormwater functions as they are currently

[3] West again examined the Wetlands in 2017.

configured" is not supported by the record. Boyle Br. 12. Despite Boyle's detrimental and unauthorized self-help excavation measures in 2011, West testified that if the Wetlands were preserved without further impact, they would be reclaimed. Tr.II, 29:8-20. Moreover, West testified that even after Boyle's actions, the Wetlands were at the time of the taking performing five of the seven wetland functions, including flood flow alteration and nutrient retention and removal. Tr.II, 37:14-22, 16:10-18:24.

- The taking was not some "11th-hour ploy" or effort to get the last word. Boyle Br. 11. The City litigated the issue of its legal rights in the Line and related issues, such as Boyle's title to the property, for years. It was not until April 2016, following a summary judgment ruling in Boyle's favor on a title issue, that the court set the Boyle Damages Case for trial in January 2017. Faced with adverse legal rulings from the court and a trial on damages for trespass, as well as Boyle's nuisance and inverse condemnation claims, the City chose to initiate eminent domain proceedings. A-1.191-92.
- Boyle references the Consent Decree he had to enter into with DES as a result of his 2011 unauthorized excavation activities. Boyle Br. 12-13. The City was forced to seek and obtain an injunction stopping those

activities. Months later DES commenced an enforcement action which it resolved through the Consent Decree. The Consent Decree established a process for Boyle to apply for two required permits and a framework for their review by the State/DES. He never received those permits prior to the taking. Moreover, the letter Boyle cites to specifically states that Boyle needed to address at least 4 items in DES's request for information before a wetlands permit could be issued. Boyle.App.236.

- Boyle claims that he drained the Wetlands in 2011 through his excavation activities. Boyle Br. 12. If Boyle is so confident that the Wetlands were dried out, then he has no claim for nuisance or trespass with respect to the alleged flooding of the Wetlands since that time.

CONCLUSION

For the foregoing reasons and the reasons stated in its opening Brief, 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.

Respectfully submitted,

Dated: June 11, 2019

CITY OF PORTSMOUTH

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2019, I served the foregoing REPLY FOR APPELLANT CITY OF PORTSMOUTH, by email to the parties on the electronic service list, and by first-class mail to parties without email addresses.

/s/ Bruce W. Felmly
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CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 2,984 words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service, and certification of word count.

/s/ Bruce W. Felmly
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