

Something for Nothing? Eminent Domain and Just Compensation

BY JAMES CROWLEY

Recently, the Appeals Court rendered an eminent domain decision entitled *North Adams Apartments Limited Partnership v. City of North Adams*, 78 Mass. App. Ct. 602 (2011). In this case, a limited partnership owned two parcels in North Adams. It planned to build an apartment complex on one parcel, and to construct a subdivision consisting of single-family houses on the other parcel.

The limited partnership, however, had no access to the city's sewer system since the nearest sewer line ended about 1,800 feet south of the partnership's property. A private septic system was apparently ruled out due to cost. Then, in 1991, the partnership obtained an easement from the city to construct a sewer system under a road that would link the partnership's development to the city's sewer system. In 1992, the partnership built a pumping station and a sewer line extension at a cost of \$137,000. Shortly thereafter, an apartment complex was built and the residential subdivision was being prepared for construction.

In December 2005, the North Adams City Council voted to take the easement and sewer system by eminent domain. A study commissioned by the city had determined that it would cost the city about \$200,000 to build a sewer system parallel to the partnership's sewer system. For this reason, the city opted to take the partnership's sewer system

by eminent domain. The partnership, however, was entitled to just compensation and the order of taking included a pro tanto award of \$10,000. Dissatisfied by the amount, the partnership filed a petition in 2007 in Superior Court seeking additional compensation for the taking.

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At a jury-waived trial in 2009, the sole issue for the judge was the value of the sewer system. Expert witnesses on both sides offered testimony. Plaintiff's expert testified that the sewer system was a special-use property, which means it seldom trades on the open market and is therefore not suited to valuation by the comparable sales method. Instead, plaintiff's expert relied on the depreciated reproduction cost method, which is defined as the current cost of reproducing the sewer system less depreciation from deterioration and obsolescence. Under this method, plaintiff's expert valued the property at \$271,000.

In a secondary approach, plaintiff's expert used the income-capitalization method. On the theory that the neighboring property owners would abandon their failing septic systems and would be willing to tie into the municipal sewer system at a cost of \$20,000 per property,

the plaintiff's expert calculated that the discounted net income from tie-ins over the next five years would be \$235,000.

Not surprisingly, the city's expert disagreed with the plaintiff's expert. In his experience, the city's expert found that developers are very willing to build a connecting sewer system and then deed it to the municipality in order to avoid maintenance and upkeep of the system. For this reason, it was his opinion that the highest and best use of the sewer system would be to deed it to the city of North Adams for no consideration.

After hearing all the evidence, the trial judge ruled that the fair market value of the sewer system was zero. Since it was standard practice for developers to convey developer-built sewers to a municipality for nominal consideration, the judge ruled that the sewer system was really a liability with no value.

The judge rejected plaintiff's depreciated-reproduction cost methodology since the \$271,000 amount derived, by common sense, did not reflect the fair market value of the sewer system. The judge also rejected the plaintiff's income-capitalization method, with its \$235,000 value, since no neighboring parcel had tied into the system over the fourteen-year period prior to the December 2005 eminent domain taking. In the judge's view, the \$20,000 tie-in figure was also unrealistic and exorbitant.

The plaintiff then appealed to the Appeals Court. Plaintiff argued that the trial court judge erred as a matter of law in awarding nothing for the taking. In its decision, the Appeals Court stated that a property owner is entitled to just compensation for what the owner has lost. Just compensation is never what the municipality has gained. For this rea-

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son, the Appeals Court did not take into consideration that the city saved \$200,000 by taking plaintiff's sewer system instead of building a parallel system. The Appeals Court held that damages are measured by the fair market value of the property at the time of the taking. For this reason, the Appeals Court had to determine whether the plaintiff suffered any monetary loss when the city took the property by eminent domain. The Appeals Court was also aware from prior court decisions that

not all takings result in an obligation to pay compensation.

The Appeals Court agreed with the trial judge that the property owner suffered no monetary loss from the eminent domain taking. The plaintiff built the sewer system to permit construction of apartments, and offset the sewer construction costs with rental income from the apartments. After the eminent domain taking, the plaintiff's property continued to be tied into the sewer

system, but the plaintiff was no longer responsible for the upkeep of the system. In addition, the plaintiff in the future could derive income from the sale of lots in the subdivision, which now had municipal sewer. Consequently, the Appeals Court, in agreement with the trial court, held that the plaintiff suffered no monetary loss and was not entitled to compensation. Further appellate review was denied by the Supreme Judicial Court. ❁
