

New England

Flynn Law obtains 3.4 million eminent domain settlement from city of Malden for local developer

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MALDEN, MA After many years of consideration and study of various locations in the City of Malden, the Redevelopment Authority (MRA) made a wise choice for locating a new police station.

The land is ideally located on Eastern Ave., which is a primary feeder and connector road. The subject property was taken for the site of the new police station and provides a strategic location for emergency responses in all directions within the city. It is centrally located near Malden Sq., Maplewood Sq. and Linden Sq.

The site was formerly owned by a local contractor and developer, Gregory T. Antonelli. The land area consists of 1.38 acres and was acquired by eminent domain on March 6. The case involved a unique procedural history beginning in September 2014. As soon as Antonelli, a successful real estate developer and philanthropist, was informed that his property was being targeted for a taking by eminent domain for the new police station, a quick number of procedural steps were taken by his counsel at the Law Offices of Peter E. Flynn, P.C. in Saugus. Counsel intervened on behalf of the landowner and established contact with the taking authority. In ultimately agreeing upon the terms of a settlement, a resolution was effectuated without a pro tanto payment process and without litigation.

The landowner is entitled to be paid a value based upon not only the highest and best use of the property but also its highest value. That is not necessarily the value in use (here, auto body and storage) or even subjective value to the owner using it for storage of equipment and fill. Nor is it the

value to the taking authority. Rather, it is what an informed buyer would pay fully understanding that the market for multiple family residential apartments and condominiums has been extraordinary in 2014 and into the early part of 2015. Market conditions in the local area certainly support this claimed highest and best use, as evidenced by a major complex of 195 market rate units less than a mile away in Malden Sq.

Nevertheless, often times a big "BUT" in an eminent domain case is raised when no permits had been obtained for the highest and best use being asserted by the landowner. With a host of variances and/or special permits being required for such a use, this created a serious conflict in negotiations.

Wild-eyed expectations of use and value will be rejected by the courts. Generally, however, when there is a presentment of evidence that reflects a sensible use for a site, and there is market data to support the value for that use, landowners will often get to the jury with their claim. At the same time, success is uncertain and there is other case law suggesting that, if a landowner had not taken any steps to pursue the actual project they would claim in the eminent domain trial, any and all evidence as to such a use may

be excluded.

Here, both sides had very strong points, and the MRA did not leave a stone unturned. In cities or towns in which less than 10% of existing residential units are considered affordable housing, Mass. Gen. Laws c. 40B allows exemptions from most zoning regulations for a developer putting in affordable housing units. As MRA correctly pointed out, since the city of Malden is very close to, or perhaps at, that 10% threshold, whether there was any realistic chance of this location being an affordable housing site became a major question and a heavily disputed issue. However, the landowner was fully prepared to present a case based on straightforward,



market rate units.

There is a strong demand for residential use, and this Eastern Avenue site is almost identical in size to the Malden Sq. site. Further, courts have ruled that it only has to be "reasonably probable" that the landowner would have achieved the necessary zoning relief. Not having permits in hand, or even having applied for them prior to negotiations, nor being located in the proper zoning district, the landowner's claimed use was deemed speculative by the MRA. The taking authority also points out that the landowner must establish the likelihood of a real project being realized in March 2015 in order to get the case to the jury for consideration.

Fortunately, a trial was avoided here. In eminent domain trials, the jury is asked to stand in the shoes of a hypothetical buyer of the land on the date of the taking. The jurors hear evidence about a fictional real estate closing and determines how much would the property have sold for on a certain date had it not been taken. In the mythical world of an eminent domain trial a jury is put on a magic carpet ride back in time to the date of taking to determine value. Because it often takes years to get to trial, in some



instances jurors are asked to look back many years. Often times economic conditions and the neighborhood where a taken property was located has changed, for better or for worse.

It would have been very difficult here for the city at trial to take the position that, in March, although it had been encouraging residential development, including high rises and affordable units all over the city, it would not have allowed it on this Eastern Ave. site.

In eminent domain cases a jury takes a view of not only the subject property, but also the various neighborhoods of arguably comparable high rise residential developments. In this case, the view may have included a high rise residential complex visible from this site and only 300 feet away as well as the former Rowe Quarry site nearby to the east. Further, quite a picture would be continued to be drawn with the view of 195 market rate units being built in Malden Sq. and multiple units still being built at nearby Quarrystone. Here sits the site of the proposed police station, with major multi-residential projects to the east and west. It would certainly put the taking authority in a tough situation trying to maintain the position that the site is good enough for the police station but not for development by a private land owner with the same residential units the City is allowing everywhere else.

Other comparable sale properties in question were in different zoning districts, but they still benefitted from the City's encouragement of development and granting of variances and special permits. Comparable land sales in Revere, Everett, Malden, Medford, and Somerville would range \$40,000 - \$70,000 per unit. Analysis of comparable sales could itself be the subject of a separate article. Here, it suffices to say that many factors existed, and once the achievable and reasonable number

of units with structured parking and deductions for costs could all be estimated, the determination of value was consistent with a pure land value on a per unit basis.

Again, under the surface of all of this were two experienced parties fully aware of their respective monetary exposures at trial and the additional expense of at least three hundred thousand dollars each in litigation costs. In the event of a runaway jury verdict in either direction, prolonged appeals, etc., everyone would end up looking at each other—and themselves—years down the road wondering why the case was not settled. This case was settled with thoughtful—and at times heated and intense—negotiations. In the end, the result was somewhat less than what the landowner would claim and somewhat more than what the taking authority would claim to be the fair market value.

Every facet of the settlement was finalized by the parties prior to the actual recording of an Order of Taking on March 6. In fact, the taking was only recorded primarily to perfect title in the name of the MRA. The value, environmental issues, removal of tenants, demolition, relocation, fill removal, use and possession rights, were all resolved in advance. Most importantly, the client is made whole with certainty in a short time and the city is now proceeding to build their much-needed new police facility with no litigation costs or uncertainty about a jury verdict in the \$4 million range plus interest. The city of Malden and its Redevelopment Authority came prepared, but in the end, the landowner had a reasonable claim at some big numbers. Thanks to the cooperation of the taking authority's very experienced director, board members, and counsel, the settlement represents a win-win for all parties involved. The landowner can go on with his real estate developments, and the city can immediately start building the police station with its citizens being justifiably proud.

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