



TOWN OF FRAMINGHAM
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MEMORANDUM

To: Town Meeting Members

From: Christopher J. Petrini
Town Counsel

cc: Board of Selectmen
Finance Committee
Standing Committee on Ways and Means
Valerie W. Mulvey, Interim Town Manager
Peter A. Sellers, Director of Public Works
William Sedewitz, Acting Town Engineer

Date: March 17, 2006

Subj: Grontzos v. Town of Framingham,
Middlesex Superior Court Civil Action Nos. 04-1723, 04-1724, 04-1725 (consolidated)
Article 1, Special Town Meeting—May 3, 2006
Recommendation of Approval of Settlement

INTRODUCTION

For the reasons described below, I recommend that Town Meeting approve a settlement and appropriate One Hundred Two Thousand Dollars (\$102,000.00) to settle three pending eminent domain actions arising from the Routes 126 and 30 Road Reconstruction and Widening Project (“Project”). The source of funding for this settlement will be the Chapter 90 highway funds received by the Town that are utilized to pay for expenses related to road projects, including the cost of eminent domain takings. The Board of Selectmen has unanimously voted to approve this settlement subject to Town Meeting approval pursuant to the bylaws.

ANALYSIS

In November of 2002, the Town took portions of various parcels owned by property owners along Rtes. 30 and 126 as required for the Project. The Town paid \$20,215 in pro tanto awards to Arthur and Fotini Grontzos based on temporary and permanent takings required by the road work to parcel owned by the Grontzos at 209 Cochituate Road, 199 Cochituate Road, and 849 Concord Street. The amount paid by the Town to the Grontzos was based on summary appraisals performed by Steven Elliott, an appraiser hired by the Town Engineer, to value the properties of various landowners subject to takings.

The Grontzos subsequently filed three separate eminent domain actions in Middlesex Superior Court challenging the adequacy of the pro tanto awards. In order to conserve expenses, I filed a motion to consolidate these three cases into one proceeding, and the Court allowed the motion. The parties then exchanged written discovery, including documents and answers to interrogatories. Both the Town and the Grontzos had separate appraisals of the value of the takings completed.

The plaintiff's appraiser, Robert Noone, concluded that the damages sustained by the Grontzos due to the takings was **\$259,310**, and considerably more (in the **\$350,000** range or more) if the highest and best use of the properties was determined to be a commercial one. The parcels presently are zoned residential. The Town's first comprehensive appraisals, performed by Horne & Hastings, concluded that the \$20,215 pro tanto award by the Town was approximately **\$68,405** too low. In order to confirm the accuracy of Horne & Hastings' appraisals, help explain the large discrepancy between the appraisals of Horne & Hastings and Mr. Noone, and perhaps further mitigate the Town's potential damages, I retained Joseph Green of Green & Moody Associates, to conduct peer review appraisals. According to the appraisals conducted by Joseph Green, the \$20,215 pro tanto award was **\$44,317** too low. The end result is that the Town's two appraisers were of the opinion that the pro tanto awards of the Town were between \$44,317 and \$68,405 too low.

Comparing the appraisals performed for the Town and the Grontzos, the Town's appraisals concluded that the takings did have some impact on the market price of the properties but did not limit their functionality. According to the Town's appraisers, even after the takings, each of the properties continued on as separate buildable residential lots. In contrast, the plaintiffs' appraiser determined that the takings resulted in a 30% reduction in total value to the properties using a before and after appraisal approach, and further calculated the duration of the temporary takings to be of a longer duration than the Town's appraisers.

The plaintiffs also believe that they can convince a judge or jury that the highest and best use of the property is commercial, thus entitling them to damages in the \$350,000 range or more. The plaintiffs believe they will be able to prove at trial that they would be able to obtain approval from Town Meeting for the properties to be zoned commercial. The plaintiffs bear the burden of proving that such a zoning change would be forthcoming if such a zoning change was presented to Town Meeting in the future. Whether favorable action by public authorities or other 'was so likely to eventuate and so imminent as to deserve being taken into account, is a matter

for demonstration' through evidence." Salem Country Club v. Peabody Redevelopment Authority, 21 Mass. App. Ct. 433, 435 (1986)(citing Skyline Homes, inc. v. Commonwealth, 362 Mass. 684, 687 (1972)). "To be excluded from the calculation, however, are possible uses that are unduly speculative or conjectural." Skyline Homes, Inc., 362 Mass. at 686 (citing Tigar v. Mystic River Bridge Auth., 329 Mass. 514 (1952)). While my office would vigorously oppose plaintiffs' claims that the value of the properties should be measured using comparable sales of commercial properties, the result of this dispute is uncertain. Even if we succeed in keeping the commercial values of the takings out of evidence, the Town is nonetheless faced with the fact that plaintiffs would undeniably be able to introduce evidence (through their expert) that they have sustained at least \$259,310 in damages due to the takings.

Based on my review of the entire case, and particularly based on the fact that the three appraisers who had conducted detailed appraisals of the premises had concluded that the Grontzos were underpaid between \$44, 317 and \$259, 310, plus applicable interest, I recommended to the Board of Selectmen in November of 2005 that they authorize me to attempt to negotiate a settlement. The plaintiffs initially demanded \$300,000 to settle all three cases and the Town offered \$44,400, slightly more than the amount due the plaintiffs according to the appraisal prepared by Mr. Green. After various negotiations, offers and counteroffers, the Grontzos eventually agreed to settle all three cases, execute stipulations of dismissals, and sign a Settlement Agreement and General Release in exchange for payment of \$102,000.00. The Board of Selectmen voted to approve this settlement and I am now bringing this proposed settlement to Town Meeting to seek approval pursuant to Art. II, Sec. 1.4 of the General Bylaws.

I recommend that Town Meeting approve this settlement for three principal reasons. First, in all likelihood, this is a liability case against the Town. All appraisers (both for the Town and for the Grontzos) agree that the Grontzos properties were impacted by the takings to some extent and that the Town's original pro tanto awards were either somewhat or substantially below the damage amounts that should have been awarded. The Town has had the benefit of two professional appraisals performed on these properties and both of the Town's appraisers have concluded that the Town's pro tanto awards were inadequate given the nature and duration of the property interests taken. The Green appraisals, which show that the Town owes the Grontzos \$44,317 more than it paid in pro tanto awards (plus interest of 12% per year), represent the floor of the Town's potential liability in this matter.

Second, the settlement amount negotiated is significantly less than the midway point between the appraisal numbers of the Town and the Grontzos. It is quite common in eminent domain cases for juries to split the difference between the amounts due as estimated by the appraisers retained by the property owner on the one hand and the appraiser for the governmental entity on the other. Assuming the plaintiffs' appraiser is allowed to offer testimony regarding commercial values, a jury might award approximately \$200,000 plus interest of 12% per annum, which is roughly the midpoint between the Town's low appraisal number of \$44,317 and the plaintiffs' commercial appraisal number of \$350,000+. Even assuming the Court does not allow testimony regarding commercial values, the settlement amount of \$102,000 is still significantly

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less than \$151,813.50, which is the midpoint between the Town's low appraisal number of \$44,317 and the plaintiffs' appraisal numbers of \$259,310.

Third, I recommend that the settlement be approved to avoid the 12% per annum statutory interest that would be added to any award, which could be 25-30% depending on when the trial is conducted. Similarly, approving the settlement now avoids the need for the Town to incur further legal fees and expert fees necessary to prepare the expert to testify at trial and to try the three cases in Middlesex Superior Court.

For the foregoing reasons, I recommend that the Town vote to approve Article 1 of the May 3, 2006 Special Town Meeting and authorize the Town to settle the three pending eminent domain actions discussed above for the sum of \$102,000.00, such funds to be appropriated from the Chapter 90 Account with the Town.

Thank you for your consideration.