



City of Lowell - Law Department

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February 21, 2018

City Manager Kevin J. Murphy
Mayor William Samaras
Members of the Lowell City Council

Re: **Council Motion 2/27/18 7.6. C. Kennedy** - Req. City Mgr. instruct the Law Department to begin procedures and preparation necessary for the eminent domain taking of 75 Arcand Drive.

Dear City Manager Murphy, Mayor Samaras, and Members of the City Council,

I write in response to your request that the Law Department provide a timeline and anticipated steps required to take the property at 75 Arcand Drive via the eminent domain pursuant to M.G.L. c. 79. Please note that this assessment has been provided as a general overview for the eminent domain process. Should you have any specific legal questions regarding the eminent domain process or potential litigation, such communications should be discussed with counsel in executive session.

I. Pre-Taking Steps

Before acquiring property through eminent domain, the taking authority must first take appropriate preliminary steps, which include performing the appropriate background research, conducting the necessary appraisals of the property, establishing the fair-market value of the property, making the necessary arraignments to relocate tenants, and securing the necessary funding to provide the award to the prior owners:

1. The City Council, as the taking authority, should make and pass a motion as soon as possible directing the City Manager to take all appropriate steps necessary to effectuate an eminent domain taking of all land necessary for the Lowell High School project. The motion both sets the process in motion, demonstrates the City's intention to move forward, and provides initial notice to affected parties of the City's intent.
2. The City must retain professional appraisers to establish the fair-market value of the property when it is taken via eminent domain. Under M.G.L. c. 79, §7A, an award of damages cannot be made unless the taking authority has performed at least one appraisal of the fair-market value of the property taken. Best practices strongly recommend that a minimum of two independent appraisers be retained to provide the City with an accurate

and impartial evaluation of value. The appraisers should be retained through the impartial bidding and services procurement process under M.G.L. c. 30B.

3. The Department of Planning and Development (DPD) would prepare a title examination of the property which identifies all current owners of the property and ascertains any defects in title. The examination should also determine the presence of other legal interests on the property, such as easements.
4. The City Engineer's Office would prepare a complete legal description of the property to be taken via eminent domain. The description must include all required meets and bounds for the property in conformance with all recorded deeds, as well as buildings, fixtures, landmarks, and prominent environmental features such as trees and landscaping.
5. The City Engineer's Office would prepare a Taking Plan to establish how the property would be taken, secured, and managed throughout the eminent domain process.
6. The City's Chief Financial Officer must secure a funding source from which the *pro tanto* award to the prior owners would be derived. The City cannot take property via eminent domain unless it provides reasonable compensation to the owners. U.S. Const. Amend. V and XIV; Mass. Cont., Part the First, Art. X.
7. The City's CFO should also establish a separate interest bearing account into which all funds offered by the City as an award for the eminent domain taking will be deposited and from which funds will be drawn.
8. The City must perform an assessment on the relocation and assistance costs for the former owners. A person whose property is taken by eminent domain is also entitled to be paid reasonable costs of moving his personal property to another location of the Commonwealth, within certain limitations. M.G.L. c. 79, §6A. Furthermore, no acquisition involving the displacement of occupants of dwelling or business units shall be made until the Bureau of Relocation in the Massachusetts Department of Housing and Community Development qualifies a relocation advisory agency to provide relocation assistance to the occupants to be displaced. M.G.L. c. 79A, §2; 760 CMR 27.02. The City must therefore reach out to the Department of Housing and Community Development as soon as possible to determine what necessary steps it must follow.
9. If the property to be taken contains more than five dwelling units or business units, the City must submit to the Bureau of Relocation a plan that provides advance notice or assistance for displaced parties. The displacing agency shall submit a relocation plan to the Bureau at least 45 days before the anticipated date of property acquisition or project commencement. 760 CMR 27.03(1). Displacement of legal occupants shall not proceed until the Bureau approves the relocation plan and any applicable appropriate conditions or restrictions. 760 CMR 27.03(5).
10. If the property taken contains less than six dwelling or business units, the displacing agency shall not be required to submit any relocation plan, but shall instead provide a

relocation assistance program, set forth under M.G.L. c 79A, §6, as well as pay any moving costs for displaced occupants as set forth under M.G.L. c. 79A, §7.

II. The Order of Taking

In order to take the property via eminent domain, the City Council must vote to adopt an Order of Taking. The Order of Taking must accurately describe the property, state the interest in the land taken, indicate whether the property is being taken in fee or in easement or right, and state the purpose behind the taking. M.G.L. c. 79, §1. The Order of Taking must also list trees, structures, or other landscaping. Id.

1. The City must provide proper notice to the parties of the eminent domain proceeding prior to the vote on the order of taking. Under M.G.L. c. 79, §5C, no property can be taken via eminent domain unless notice of such intent is provided to the property owner at least thirty days prior to the date of the actual taking. However, the provisions of this section "shall not apply to takings on behalf of the commonwealth, county, city or town" (emphasis added). Thus, compliance with the notice requirements under the Open Meeting Law would likely be deemed sufficient.
2. After a public hearing, the City Council would then vote on the Order of Taking. Additionally, the City Council should also simultaneously vote to authorize the *pro tanto* award of damages to the owners of the property at this meeting as well.
3. Upon approval of the Order of Taking, a certified copy must be recorded at the Middlesex North Registry of Deeds within thirty days of the approval M.G.L. c. 79, §3. Upon recording of the Order of Taking, ownership of the property vests with the City on behalf of the reason the taking was made. Id. Recording also vests the previous owners' right to damages, both *pro tanto* or otherwise. Id.
4. Immediately after the right to damages vests, the City must act promptly to pay the *pro tanto* damages owed to the previous owners. Any payment of damages must be issued within sixty days after the right to damages vests or within fifteen days of a demand made upon them. M.G.L. c. 79, §7B. Thus, having the City Council authorize payment at the same time as approving the Order of Taking ensures that prompt offer of payment can be made within the strict statutory timeline.

III. Post-Order of Taking

5. Immediately after the right to damages vests (recording the Order of Taking) the City shall give notice to every person, including every mortgagee of record, whose property have been taken or is otherwise entitled to damages. M.G.L. c. 79, §7C. Notice must be in writing and shall describe the purpose and extent of the taking, the amount of damages awarded, the time and place they can obtain payment, the time within they may petition for an award if not damages have been awarded, and the time within which he may petition the Superior Court to determine damages pursuant to M.G.L. c. 79, §14. Notice may be served by personal service, or by leaving an attested copy thereof at the last and

usual place of abode of the person to be notified if he is a resident of the commonwealth, by any person authorized to serve civil process, or notice may be given to persons within or without the commonwealth, by registered mail or other suitable means.

6. After notice is provided, the City will receive its *pro tanto* forms back from owners that wish to receive the payment. The City should have releases drafted and send letter to mortgage companies to receive payoffs for the sale of the property if applicable.
7. The Assessor's Office should obtain pro-forma real estate taxes and final water and sewer bills.
8. A new deed will be drafted for the property and will be circulated to the appropriate departments to obtain the required signatures.
9. The new deed will then be recorded at the Registry of Deeds, along with any applicable mortgage discharges.
10. The City must also implement its relocation plan to the extent one is required by the Bureau of Relocation.

IV. Vacating the Property

1. No person in the possession of property taken by eminent domain is required to vacate the property until four months after notice of the taking has been given pursuant to M.G.L. c. 79, § 7C. M.G.L. c. 79, §8B.
2. In the event the person refuses to allow the city or town to take possession of the property after thirty days written notice sent to him by registered mail or posted on the property, the taking authority may issue its warrant to the sheriff of the county, or his deputy, directing him to make entry and take possession of the property on behalf of the city or town. The sheriff or his deputy will thereupon execute such a warrant, using whatever force is necessary for the purposes. M.G.L. c. 79, §3.
3. A person whose property is taken by eminent domain is also entitled to be paid reasonable costs of moving his personal property to another location of the Commonwealth, with certain limitations. M.G.L. c. 79, §6A.
4. Furthermore, no acquisition involving the displacement of occupants of dwelling or business units shall be made until the Bureau of Relocation in the Massachusetts Department of Housing and Community Development qualifies agency to provide relocation assistance to the occupants to be displaced. M.G.L. c. 79A, §2. Any taking authority shall provide relocation assistance and payments upon undertaking a project which results in displacement of occupants by the acquisition of real property. M.G.L. c. 79A, §3. Displacement of more than five dwelling or business units requires the taking authority provide the Bureau of Relocation with a relocation plan for those displaced. M.G.L. c. 79A, §4. Displacement of the occupants of less than six dwelling or

commercial units only requires the provision of a relocation assistance program as set forth in M.G.L. c. 79A, §6, as well as payment of relocation costs under M.G.L. c. 79A, §7.

V. Hypothetical Calendar/Timeline

The following is a hypothetical timeline of the eminent domain process. This timeline assumes that the date of the City Council's vote on the Order of Taking would take place on the first available Tuesday in June, which would be June 5, 2018. This timeline is neither meant to be exhaustive nor definitive, but designed to aid the City Council in anticipating general timelines and milestones.

- February, 2018 and ongoing up to Order of Taking.
 - City issues M.G.L. c. 30B bids for independent appraisers.
 - Applicable City departments perform all required pre-taking research on property.
 - City contacts Bureau of Relocation in the Massachusetts Department of Housing and Community Development to develop relocation plan.
 - City secures necessary funds for taking and prepares interest bearing account to deposit award in.
- April 20, 2018.
 - Last day for City to provide Bureau of Relocation a relocation plan if required under M.G.L. c. 79A. 760 CMR 27.03(1). Taking cannot proceed unless approved by Bureau.
- May, 2018.
 - Notice of public meeting provided to all affected parties of eminent domain taking. (30 day notice requirement under M.G.L. c. 79, §5C "shall not apply to takings on behalf of the commonwealth, county, city or town." However, advanced notice to parties beyond that required by Open Meeting Law advised.)
- **June 5, 2018.**
 - **City Council holds public hearing and votes on Order of Taking and authorizes *Pro Tanto* Award of damages to owners.**
- July 5, 2018.
 - Last day for City to record certified copy of Order of Taking with Middlesex North Registry of deeds.
- August 6, 2018.
 - Last day City must provide notice of eminent domain taking and award of damages (assuming recording date of July 5, 2018.)
- September 6, 2018.
 - Last day when City must provide any payment of damages. (60 days after recording of taking. Right to damages vests upon recording of taking. Alternatively, payment must issue within fifteen days of demand made upon them.) M.G.L. c. 79, §7B.
- November 5, 2018.

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- Last day of four month period where tenants are not required to vacate property. (Note: Does not take into account timelines set forth in any relocation plan if required).

VI. Conclusion

I hope this assessment is of help and assistance to you. Please contact the Law Department should you have any additional questions.

Sincerely,



Elliott J. Veloso
Assistant City Solicitor

cc. Christine P. O'Connor, City Solicitor