Eminent Domain and Restricted Lands

Attorney Advisory Panel of the Mass Land Trust Coalition

Land trusts and private landowners periodically raise concerns regarding the effect of conservation restrictions on eminent domain proceedings. In particular, there are concerns that: (1) eminent domain proceedings would more be likely against restricted land because public authorities will be able to pay less for the property taken; and (2) less compensation will be paid in an eminent domain proceeding because a property is restricted.

There are no statutory provisions or judicial precedents under Massachusetts law that provide conclusive answers to these questions. Nonetheless, for the reasons described below, it appears that a court is unlikely to allow a public authority in Massachusetts to pay less than the unrestricted fair market value of property when taking land subject to a conservation restriction.

A court is unlikely to allow a public authority to pay less than the unrestricted fair market value of the property for two reasons: (1) Massachusetts law requires valuation based on the value of the whole estate, and thus does not appear to permit the argument that the parts of the property (the restricted fee title and the restriction itself) are worth less than the whole (the unrestricted fee); and (2) even if the parts were valued separately, the restriction would likely be viewed as a property interest for which compensation is lawfully due and which is properly valued on a "before-after" basis (that is, based on the difference between the value of the land unrestricted and restricted). As so viewed and valued, the parts of the property would be equal in value to the whole.

General Laws c. 79, s. 29 provides that if multiple parties hold interests in a single property that is taken, then the following rule applies: "there shall first be found and set forth the total amount of damages sustained by the owners of such property, estimating the same as an entire estate and as if it were the sole property of one owner in fee simple; and such damages shall then be apportioned among the several parties who are found to be entitled thereto, in proportion to their several interests." (This rule applies to takings by the Commonwealth or by cities, towns or counties.) Although there are no cases applying this principle to restricted land in particular, it would appear to preclude an argument by the taking authority that the parts of the property (the restricted fee title and the restriction itself) are worth less than the whole (the unrestricted fee).

Even if a taking authority were allowed to value the individual property interests separately, a conservation restriction would likely be viewed as a property interest for which compensation is lawfully due and which is properly valued on a "before-after" basis (that is, based on the difference between the value of the land unrestricted and restricted). As so viewed and valued, the parts of the property would be equal in value to the whole. There are no Massachusetts cases directly

addressing these points. In the only out-of-state case which appears to address the subject, Hartford Nat'l Bank & Trust Co. v. Redevelopment Agency of the City of Bristol, 321 A.2d 469 (Conn. 1973), the Supreme Court of Connecticut concluded that that an easement in gross which functioned like a restrictive covenant was a compensable property interest (even though not appurtenant to any other property), id. at 471-72, and that such interest was properly valued on a "before-after" basis. Id. at 473-74. On the former point, that a conservation restriction is a compensable property interest, it should be noted that G.L. c. 184, s. 32 provides that conservation restrictions are "interests in land." On the latter point, regarding value, the Restatement on Property also supports a "before-after" approach in its commentary. In addition, such a valuation method is also set forth in the IRS regulations governing the charitable contribution of conservation restrictions.

This is not to say whether any given public authority may be more inclined to take a restricted property on the subjective belief that it may be allowed to pay less than the unrestricted fair market value. The subject is complicated and, given the lack of clear guidance, there may well be public authorities that are advised that the eminent domain award would be lower when a restricted property is taken. Moreover, there are several other reasons why public authorities are inclined to look at open space properties when acquiring public land (no need to compensate for the value of substantial improvements, no displacement of residents or businesses, etc.).

There are certain circumstances in which an opportunity to pay less than full value may arise. First, the holder of the restriction may waive its damage claim or fail to vigorously contest a low valuation of its position. This may happen if the holder is a public entity itself (perhaps even the taking authority) or a nonprofit susceptible to political pressure. This may also happen in the event of a partial taking (for example, a road widening), if the court concludes that the partial taking did not "injure" the position of the holder of the restriction. See, e.g., Boston Chamber of Commerce v. City of Boston, 195 Mass. 338 (1907) (in the taking of a public roadway easement across property, no compensation is due to holders of a pre-existing private roadway easement across the property in the same location, since there was no adverse effect on their interests).

Some land trusts and landowners have considered the possibility of including in a conservation restriction a provision that any taking proceeds otherwise payable to the holder of the restriction would be paid to the owner of the restricted fee. There does not appear to be any case law addressing the validity of such a provision. It seems likely to be valid as an assignment of whatever is actually received in the proceedings (though there may be tax consequences worth considering). It is not so clear that it is effective as an assignment of the right to appear in the proceedings themselves as the representative of the holder of the restriction. For this reason, such a provision may not fully offsets the concerns raised above about taking claims that are waived or not vigorously pursued.

ZG6J01_.DOC (803027 v. 1)