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QUESTIONS PRESENTED FOR REVIEW

A. Did the Trial Court err in finding and ruling that the RSA 38 eminent domain procedure for acquisition of water utility plant and property which allows for the municipal legislative body to discontinue the acquisition by voting against revenue bonds to finance the purchase price set by the Public Utilities Commission does not, per se, constitute inverse condemnation?

B. Did the Trial Court err in finding and ruling that the City filed its petition for eminent domain with the Public Utilities Commission within a reasonable time under RSA 38 and was not barred by laches from doing so?

STATEMENT OF THE CASE

This action attacked various features of the comprehensive statutory procedures set forth in RSA 38:1-13 under which the Defendant City of Nashua (“City”) is attempting to acquire the plant and property of the Plaintiff regulated water utilities (“Pennichuck”) to establish a publicly owned and controlled water works system.

The statute sets forth procedures for both local decision-making and eminent domain proceedings at the Public Utilities Commission, the administrative agency with expertise designated for the purpose.

Pennichuck filed this action seeking declaratory judgment and equitable relief as to various claims, summarized as follows:

Count I. Equal Protection. Pennichuck claimed that two aspects of RSA 38 violate its rights to equal protection: (a) The Public Utilities Commission determines the relatively technical, complex issues of “public interest” (public necessity) for the taking, unlike other eminent domain statutes that provide for determination of necessity by the Superior Court. (b) The Public Utilities Commission determines the complex issue of just compensation for utility property, unlike other eminent domain statutes that provide for a civil jury trial upon request.

Count II. Inverse Condemnation. Pennichuck claimed that two aspects of RSA 38 constitute inverse condemnation per se: (a) There is no express time limit within which a municipality must commence eminent domain proceedings if negotiations fail. (b) The municipality has an option not to complete the

acquisition if, after the PUC determines the purchase price, the municipal legislative body votes not to issue revenue bonds to finance the acquisition (the “second look” provision). Pennichuck also claimed inverse condemnation on these grounds as the statute applies in its particular case. Pennichuck also claimed that these features of the statute violate its rights to do business under N.H. Constitution, pt. 2, art. 83.

Count III. Imputed Statute of Limitations/Laches. Pennichuck claimed that in the absence of an express time limit for commencing eminent domain, a 90-day limit is implied based on a somewhat analogous provision of RSA 498-A. Pennichuck also claimed laches as to the time the City took to file with PUC.

Count IV. Request for Ruling on Extent of Municipal Taking. Pennichuck requested a ruling that, as a matter of law, RSA 38 allows a municipality to acquire only plant and property necessary to provide water services within the municipality in question.

The City filed a Motion To Dismiss for Failure To State a Claim for Relief on all counts. Pennichuck responded with a Motion for Summary Judgment based on its verified Petition. The City filed a Cross Motion for Summary Judgment based on the claims of its Motion To Dismiss, supplemented with two affidavits of city officials.

The Trial Court granted the City’s Motion for Summary Judgment as to all claims in Count III. The Trial Court ruled that the Public Utilities Commission has primary jurisdiction as to the claims in Count IV. As to Count I, the Trial Court dismissed the claim concerning the necessity determination and ruled that the

jury trial claim was not ripe for adjudication. As to Count II, the Trial Court dismissed the claims of per se inverse condemnation and deprivation of right to do business and dismissed without prejudice the claim of inverse condemnation as applied, which was then being pursued in a civil action.

Pennichuck has not appealed the rulings on Count I and Count IV.

Pennichuck has appealed: (a) the ruling on Count II that the “second look” provision of RSA 38:13 does not, per se, constitute inverse condemnation; and (b) the dismissal of the Count III claims as to a time limit for filing and laches.

STATEMENT OF THE FACTS

The claims raised by Pennichuck relate to the constitutionality of RSA 38 eminent domain procedures and the legality of the City's actions pursuant to the statute. Consequently, the statutory framework is integral to the fact pattern of the case.

The following concise summary of RSA 38 (Pen. App. 67-81)ⁱ procedures, quoted from the Trial Court's Opinion and Order (TCO, Pen. App. 7-8), provides an essential context for the particular facts of the case.

RSA Chapter 38 empowers municipalities to take by eminent domain privately-owned electric, gas and water utilities in order to maintain and operate the same as publicly-owned facilities. RSA 38:2. In order to initiate the process of acquiring a utility, there must first be an affirmative vote by two-thirds of the members of the municipal governing body and this vote must then be confirmed by a majority vote of the qualified voters at a regular election or special meeting called for this purpose. RSA 38:3. A favorable confirming vote creates a rebuttable presumption that the acquisition is in the public interest. Id. Within thirty (30) days of the confirming vote, the municipality must notify the utility and inquire if it is willing to sell the identified plant and property located within the municipality, as well as "that portion, if any, lying without the municipality, which the public interest may require, pursuant to RSA 38:11 as determined

ⁱ Abbreviations are as follow: as to the Trial Court Opinion and Order – "TCO"; as to Pennichuck's Appendix to Brief – "Pen. App."; as to the City's Appendix to Brief – "City App."

by the [PUC].” RSA 38:6. The utility is given sixty (60) days to respond. RSA 38:7.

The parties may then negotiate and reach a tentative agreement on the assets to be sold and the sale price, subject to ratification by a vote of the municipality to issue the necessary revenue bonds for the acquisition price. RSA 38:8 and 13. If no agreement is reached, either party may petition the PUC to determine whether it is in the public interest for the municipality to purchase some or all of the utility’s property located inside or outside of the municipality. RSA 38:9. The PUC also determines the amount of “just compensation” or damages that the municipality must pay for the assets in question. RSA 38:9 and 10. After the PUC sets the acquisition price, the municipality must decide whether or not to purchase the assets for that price by a vote to issue revenue bonds pursuant to RSA 33-B. RSA 38:13. If the vote is in the affirmative, it constitutes a ratification by the municipality to acquire the assets at the price set by the PUC. If the vote is in the negative, no further proceedings under RSA 38 can be commenced for a period of two (2) years. RSA 38:13.

The case was decided on cross motions for summary judgment on evidence consisting of Pennichuck’s verified Petition (Pen. App. 20-43) and the City’s affidavits of Mayor Streeter and Alderman McCarthy (City App. 1-28). The

following is the Trial Court's finding of the relevant material facts (TCO; Pen. App. 5-6), with added parenthetical references to the supporting evidence.

The record establishes the following pertinent facts.

Pennichuck and its subsidiaries operate public utilities which provide water supply services to approximately 35,000 customers in New Hampshire. Although most of these customers are located in Nashua and surrounding communities, Pennichuck's operations extend to communities as far away as Pittsfield, New Hampshire. All of the Pennichuck companies have their headquarters in Nashua. (Petition ¶¶ 8-9, Pen. App. 22)

On April 29, 2002, Pennichuck entered into an Agreement and Plan of Merger with Philadelphia Suburban Corporation ("PSC"). Under this agreement, Pennichuck was to become a direct and wholly owned subsidiary of PSC. On June 14, 2002, Pennichuck filed a petition with the PUC seeking approval of the merger. The City moved to intervene in the PUC proceedings and objected to the merger. (Petition ¶10, Pen. App. 22-23; Streeter Aff. ¶¶ 3-4, City App. 1)

On November 26, 2002, the City's board of aldermen adopted, by a vote of 14 to 1, a resolution to acquire the plant and property of Pennichuck's water works system. A confirming vote by the Nashua electorate was held on January 14, 2003. The referendum question asked if the voters would authorize the City to

acquire all or a portion of the water works system then serving the inhabitants of Nashua. The referendum was approved by the voters by a wide margin. (Petition ¶ 11, Pen. App. 23; Streeter Aff. ¶ 6, City App. 1-2)

Soon after the referendum, PSC terminated its plans to merge with Pennichuck. Thereafter, on February 5, 2003, the City sent written notification to each of the Pennichuck utilities, detailing the assets which it sought to acquire, and inquiring whether the utilities were willing to sell such assets to the City. On March 25, 2003, Pennichuck responded in writing, indicating that it did not wish to sell any of its assets to the City. The following day, the City notified Pennichuck that it intended to petition the PUC to condemn the Pennichuck assets identified in its inquiry letters. (Petition ¶ ¶ 12-14, Pen. App. 23-24; Streeter Aff. ¶ ¶ 7-9, City App. 2)

Between March and November 2003, the City and Pennichuck engaged in negotiations concerning the possible sale of some or all of Pennichuck's assets to the City. On November 30, 2003, Nashua extended a formal offer to purchase Pennichuck for \$121 million. Pennichuck rejected this offer on December 15, 2003, terminated negotiations with the City on January 27, 2004, and commenced the present lawsuit on February 4, 2004. (Petition ¶ ¶ 15-16, Pen. App. 24-25; Streeter Aff. ¶ ¶ 10, City App. 2-3; McCarthy Aff. ¶ ¶ 6-20, City App. 11-14)

On March 24, 2004, the City filed a petition with the PUC, asking the agency to find that the City's condemnation of Pennichuck's assets is in the public interest and to determine the damages which the City must pay Pennichuck as a result of the taking. (Petition ¶ 34, Pen. App. 30; Streeter Aff. ¶ 12, City App. 3)

The other allegations of the Pennichuck verified Petition were not deemed pertinent enough to mention by the Trial Court.

SUMMARY OF THE ARGUMENT

The legislature has great discretion to determine eminent domain procedures, subject to the protection of the constitutional rights of condemnees. The fundamental property right of a condemnee is to not be deprived of title or possession of property until just compensation is paid or assured. It is well-established that there is no constitutional right to compel a condemnor to complete an eminent domain acquisition, nor a right to payment of expenses or other losses if eminent domain is discontinued before the condemnor takes title or possession. Expenses of resisting eminent domain and incidental reduction of income or property value during eminent domain proceedings do not constitute inverse condemnation.

The Trial Court correctly dismissed Pennichuck's claim of inverse condemnation directed at RSA 38:13, which allows a municipality to discontinue eminent domain by voting not to issue revenue bonds to acquire water company plant and property.

In the absence of an express statutory time limit, a condemnor is required to file for eminent domain within a "reasonable time" of voting to do so. RSA 38 requires a special election to vote on a taking within 12 months after a board of aldermen vote to acquire a water company. Then another 90 days are allowed before a utility must accept or reject a general request to sell. No time is specified for filing with PUC after the utility replies. The most analogous time limit in RSA 38 is the two years required before commencing eminent domain again if the municipality votes to discontinue eminent domain.

The parties' affidavits established that the City filed with the Public Utilities Commission 16 months after the board of aldermen vote to acquire Pennichuck's plant and property, and 12 months after Pennichuck's rejection of the City's formal request to sell, following unsuccessful negotiations which were abruptly terminated by Pennichuck's filing of this action.

Based on the specific relevant facts in the parties' affidavits, the Trial Court correctly ruled that the City filed its eminent domain petition with the PUC within a reasonable time as a matter of law.

Likewise, based on the specific relevant facts in the parties' affidavits and the extraordinary burden required to prove laches against governmental action of this sort, the Trial Court correctly ruled that laches is inapplicable as a matter of law.

ARGUMENT

- A. The Trial Court was correct in finding and ruling that the RSA 38 eminent domain procedure for acquisition of water utility plant and property, which allows the municipal legislative body to discontinue the acquisition by voting against revenue bonds to finance the purchase price set by the Public Utilities Commission, does not per se constitute inverse condemnation.

RSA 38 first establishes that manufacture and distribution of electricity, gas and water are municipal governmental functions. RSA 38:2. Second, it empowers municipalities to establish plants and property for those purposes by acquisition from public utilities through a carefully crafted “comprehensive process” including specialized eminent domain proceedings before the Public Utilities Commission. Appeal of Ashland Elec. Dept., 141 N.H. 336, 339 (1996).

Eminent domain is the inherent right of the sovereign government to acquire private property for public use without consent of the owner upon payment of just compensation. Goodrich Falls Co. v. Howard, 86 N.H. 512, 519 (1934). See Loughlin, Local Government Law, 14 New Hampshire Practice, Secs. 811-12. Eminent domain procedures are the prerogative of the legislature, O.K. Fairbanks v. State, 108 N.H. 248, 252-53 (1967), and there is no inherent requirement for uniformity. Due process does not guarantee a particular form of eminent domain procedure. Manchester Housing Authority v. Fisk, 102 N.H. 280, 283 (1959). Historically, there were as many as ten different methods of eminent domain in New Hampshire. Opinion of the Justices, 98 N.H. 533, 535 (1954). Although the Eminent Domain Procedures Act, RSA 498-A, was enacted

in 1971 to simplify and standardize procedures for condemnation and assessment of damages, Keene v. Armento, 139 N.H. 228, 231 (1994), RSA 498-A:3 expressly exempts RSA 38 proceedings and condemnation by public utilities (RSA 371).

One of a condemnee's fundamental rights is that a condemnor cannot take title to property before payment in full is made or assured by posting of security or otherwise. Goodrich Falls Co. v. Howard, 86 N.H. 512, 522-28 (1934) and cases cited therein. In a strange twist of this principle, Pennichuck is complaining that it might have to continue to own and operate its plant and property instead of cashing out its market value at the end of RSA 38 eminent domain proceedings. Pennichuck claims that it constitutes "inverse condemnation" for RSA 38:13 to provide that, once the Public Utilities Commission determines the price to be paid as just compensation for plant and property, the municipality then makes a final decision on the acquisition in the form of a vote by the legislative body to issue revenue bonds necessary to pay the price.

1. Inverse condemnation requires an unauthorized physical invasion of property or confiscatory governmental regulation that denies the owner all economic use and substantially destroys value that is based on "legitimate investment-backed expectations."

"Inverse condemnation" occurs when there is an unauthorized physical invasion of property or confiscatory governmental regulation. Appeal of Public Serv. Co. of N.H., 122 N.H. 1062, 1071 (1982). Such regulation must be so

extreme as to deny the owner of all economic use of the property and substantially destroy its value, especially legitimate “distinct investment-backed expectations”. Sanderson v. Candia, 146 N.H. 598, 600 (2001). There is no inverse condemnation because of decrease or fluctuation in value attributable to the time it takes to pursue a statutory remedy during the process of governmental decision-making. Smith v. Wolfeboro, 136 N.H. 337, 345-46 (1992); Alton Land Trust v. Town of Alton, 745 F.2d 730 (1st Cir. 1984)

2. The municipal option not to complete an eminent domain acquisition under RSA 38 does not constitute inverse condemnation.

It is well-established that in the absence of a statute to the contrary, eminent domain may be discontinued at any time before the rights of the parties become vested. 6 Nichols on Eminent Domain (3d Ed.) §26D.01 [3][a], p. 26D-37 et seq.; Annotation: Abandonment of Eminent Domain Proceedings, 68 A.L.R. 3d 610, 613 §2(a); 27 Am Jur 2d Eminent Domain (2d Ed.) §505, p. 133. 11 McQuillin, Municipal Corporations (3d Ed.) § 32.76, pp. 541 et seq. Unless or until title passes or possession is taken, a condemnee has no vested right to compensation. Nichols, supra, §26D.01 [6] pp. 26D-65 et seq.; McQuillin, supra, §32.77, pp. 541 et seq.; 27 Am Jur 2d, supra, §515, pp. 142 et seq.

Pennichuck is attacking the statutory eminent domain process to which it is always potentially subject as a water utility. See Nichols, supra, §26D.01[6], pp. 260-72. The economic impacts of delay, or even failure, to commence announced eminent domain proceedings does not constitute inverse

condemnation. City of Buffalo v. Clement Co., 28 N.Y. 2d 241, 321 N.Y.S. 2d 345, 269 N.E. 2d 895 (1971); Cayon v. Chicopee, 360 Mass. 606, 277 N.E. 2d. 116 (1971). Likewise, the decrease in income or temporary loss of value during pending eminent domain proceedings is not compensable. See Nichols, supra, §26D.01[6], p. 26D-72.

If the City votes not to issue revenue bonds, Pennichuck will be in the same position as it will be if the PUC rules that the acquisition is not in the public interest: Pennichuck will still own and operate its company with the same value it had, free of municipalization for two years. RSA 38:13. This does not fulfill the elements of inverse condemnation. Pennichuck will have incurred litigation and other expenses, but the expense of resisting eminent domain is not itself a “taking”. Hinesburg Sand & Gravel v. Chittenden, 959 F. Supp. 652, 658 (D. Vt. 1997).

3. The municipal option not to complete an eminent domain acquisition under RSA 38 does not violate any right to do business under NH Const. pt. 2, art. 83.

As for the business provisions of NH Const. pt. 2, art. 83, the clause was adopted to prevent growth and expansion of monopolies. Appeal of Omni Communications, Inc., 122 N.H. 860, 862 (1982). To the extent that pt. 2, art. 83 can be stretched to protect a monopoly under RSA 38, the above inverse condemnation analysis applies. See Appeal of Public Serv. Co. of N.H., 120 N.H. 1062 (1982).

4. The municipal option to discontinue an acquisition at the end of RSA 38 eminent domain proceedings is a practical necessity because the magnitude of the purchase requires a vote to issue revenue bonds under RSA 33-B.

Utilities such as waterworks and electric plants are more allied to business than regular governmental functions. They require large capital investment for which the legislature makes allowance in authorizing the issuance of bonds to be sold to pay for them.

Goodrich Falls Co. v. Howard, 86 N.H. 512, 522 (1934). Under RSA 38:13, municipal acquisition is funded by revenue bonds pursuant to RSA 33-B, which are secured by the revenues derived from water rates paid by customers, not by the full faith and credit of the municipality, like general obligation bonds.

Revenue bonds may be issued only after the Wall Street investment community is satisfied with the soundness of the rate structure that will be put in place to pay the annual debt service and operating costs. As a practical matter, therefore, the acquisition of a water company cannot be assured until after just compensation is determined. Only then can a vote be taken on revenue bonds by the legislative body of the municipality. "The purpose of allowing a public agency to abandon a condemnation action is to permit the agency to avoid a project made impracticable or undesirable by subsequent events or an excessively high award." McQuillin, *supra*, §32.76, p. 535.

B. The Trial Court was correct in finding and ruling that the City filed its petition for eminent domain with the Public Utilities Commission within a reasonable time under RSA 38 and was not barred by laches from doing so.

RSA 38 does not contain an express statute of limitations as to the filing of a petition with PUC under RSA 38:9 to determine public interest and valuation. (Neither does RSA 371, applicable to eminent domain by public utilities.)

In the absence of a statutory deadline the rule is that a condemnor may commence eminent domain proceedings within a reasonable time. Nichols, supra, §24.07[1], p. 24-89; 29A C.J.S. Eminent Domain, §208, p. 493.

The Trial Court ruled that, under all the circumstances, twelve (12) months between Pennichuck's initial refusal to sell and the filing with PUC in March 2004 was a reasonable time within which to file, and the filing was not barred by laches.

1. The statutory scheme of RSA 38 anticipates that more than 15 months will elapse between the Board of Aldermen vote and PUC filing in a normal case.

RSA 38 anticipates a deliberate process before a formal filing with the Public Utilities Commission. After the vote of the governing body, a city has up to one (1) year to hold the special election for a "confirming vote". RSA 38:3. The city then has up to thirty (30) days to request the utility to sell identified plant and property. RSA 38:6. The utility then has up to sixty (60) more days to reply. RSA 38:7. Only then can a municipality, or the utility itself, petition the Public Utilities Commission. RSA 38:9 – 11. Thus, fifteen (15) months is projected as

normal to reach the point where the parties know that eminent domain proceedings are necessary. On this basis, a reasonable time to file with PUC would be no less than 18 – 24 months after the Board of Aldermen vote.

In this case, fourteen (14) months elapsed between the vote of the Board of Aldermen and Pennichuck's sudden letter unequivocally terminating negotiations. In the next sixty (60) days, the City marshaled resources and filed the PUC petition under RSA 38:9. This is prima facie reasonable under the statute.

2. The statutory scheme of RSA 38 indicates that the underlying circumstances for a vote on eminent domain remain valid for two years.

A stated purpose of the time limitation for commencing eminent domain proceedings under the Model Eminent Domain Act "is to assure that the factual basis for authorization formally adopted by a condemnor is reasonably current." Nichols, supra, §24.07[2], p. 24-90. RSA 38 twice uses two years as the period during which eminent domain cannot be restarted if proceedings are discontinued: when disapproved by the voters at special election, RSA 38:3, or when the legislative body votes not to issue bonds. RSA 38:13. This implies a legislative finding that at least two years must elapse before circumstances can change enough to allow a new decision. By the same token, a reasonable time to commence eminent domain after the vote to proceed would be two years; i.e., before November 2004.

3. The limitation periods of RSA 498-A, the Eminent Domain Procedures Act, and the Model Eminent Domain Act are not applicable.

Pennichuck faults the Trial Court (Pen. Brief 19-20) for not referring to RSA 498-A, the Eminent Domain Procedures Act, and the Model Eminent Domain Act, in determining what is a reasonable time to file for eminent domain under RSA 38.

The Model Act, of course, is only a model available for adoption in whole or in part. RSA 498-A:3 expressly exempts condemnation proceedings by municipalities under RSA 38. The legislature has recognized the unsuitability of RSA 498-A for utility acquisitions with their complex public interest and valuation issues and large acquisition prices payable only by revenue bonds. It would be particularly unreasonable to graft onto RSA 38 the 90-day deadline of RSA 498-A:4 III. That deadline refers to filing with the Board of Tax and Land Appeals after the condemnee rejects a formal offer including a price supported by an appraisal. Under RSA 38:6 and 7, the utility is responding to a general inquiry without a price or appraisal value. Given the complexity of issues and anticipated pace of RSA 38, ninety (90) days is no measurement of a reasonable time.

Reported cases concerning a “reasonable time” typically deal with lengthy intervals. E.g., Public Service Co. of Indiana, Inc. v. Decatur County Rural Elec. Membership Corp., 363 N.E. 2d 995 (1977) (11 years); Urban Rev. Authority of Pittsburgh, 544 A.2d 87 (1988) (10 years); Lewis County v. McCutcheon, 101 P. 1089 (1909) (12 years).

4. Laches is allowed against government entities only in extraordinary and compelling circumstances.

“[L]aches has been allowed against government entities only in ‘extraordinary and compelling circumstances Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights Ascertaining whether the doctrine of laches applies is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced Because it is an equitable doctrine, laches will constitute a bar to suit only if the delay was unreasonable and prejudicial Factors germane to the analysis include “the knowledge of the plaintiffs, the conduct of the defendants, the interests to be vindicated, and the resulting prejudice The party asserting laches bears the burden of providing both that the delay was unreasonable and that prejudice resulted from the delay.” [Citations omitted].

Seabrook v. Vachon Management, 144 N.H. 660, 668 (2000).

The general inapplicability of laches to government action is compounded in this case by additional public policy concerns. Where delay is explained by negotiations aimed at settlement without litigation, laches may not be claimed.

N.H. Donuts, Inc. v. Skiptaris, 129 N.H. 774, 785 (1987). “[P]ublic policy encourages voluntary acquisitions from landowners before conducting involuntary condemnation proceedings.” Petition of Bianco, 143 N.H. 83, 85 (1998).

5. There was no genuine issue of material fact as to “reasonableness” or laches related to the period between the special election and the City’s eminent domain filing with the Public Utilities Commission.

In reviewing the superior court’s grant of summary judgment, “we consider the affidavits and other evidence, as well as all inferences properly drawn from them, in the light most favorable” to the [nonmoving party]. *Boissonnault v. Briston Federated Church*, 138

N.H. 476, 477, 642 A.2d 328, 328 (1994). If our review of that evidence discloses no genuine issue of material fact, and if the [moving party is] entitled to judgment as a matter of law, we will affirm the grant of summary judgment. *Id.* at 477, 642 A.2d at 328; see RSA 491:8-a, III (1983). An issue of fact is “material” for purposes of summary judgment if it “affects the outcome of the litigation” under the applicable substantive law. *Horse Pond Fish & Game Club v. Cormier*, 133 N.H. 648, 653, 581 A.2d 478, 481 (1990) (quotation omitted).

N.E. Tel. & Tel. Co. v. Franklin, 141 N.H. 449, 452 (1996). “Conclusory assertions” do not satisfy the burden in opposing summary judgment. *Id.* Nor do “general allegations.” Gamble v. University of New Hampshire, 136 N.H. 9, 16 (1992) (asserting that certain acts were “unfair” or “intended” was insufficient to raise disputed questions of fact). RSA 491:8-a IV.

Pennichuck suggests that the Trial Court erroneously dismissed the reasonable time/laches claim because the Trial Court failed to apprehend that Pennichuck’s Petition was verified for purposes of the motions for summary judgment. (Pen. Brief 16) Clearly the Trial Court did not overlook the verified petition because Pennichuck raised the issue in its Motion for Reconsideration, which was denied. (City App. 29-36)

Actually the reasonable time/laches claim was properly dismissed because the verified Petition affidavit simply did not offer the requisite “specific facts showing that there is a genuine issue for trial.” RSA 491:8-a IV. The Trial Court recognized this in the following language:

Here, Nashua has produced proof by way of the affidavits of Mayor Streeter and Alderman McCarthy detailing the efforts the City undertook between March 2003 and January 2004 to reach a negotiated acquisition of Pennichuck’s assets. Pennichuck has offered no counter affidavits or other competent evidence to refute the sworn averments of Messrs. Streeter and McCarthy.

(TCO, Pen. App. 16)

Pennichuck's Petition generally consisted of a recitation of the basic undisputed facts interspersed with irrelevant facts, opinion, conjecture, and conclusory allegations of bad faith. These allegations, albeit sworn to, do not raise questions of material fact sufficient to avoid summary judgment in the City's favor. "A reviewing court 'need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation,' Correa-Martinez, 903 F.2d 49, 52 (1st Cir. 1990), even when such phantoms are robed by the pleader in the guise of facts." Gilbert v. City of Cambridge, 932 F.2d 51, 62 (1st Cir. 1991).

This is illustrated by the allegations Pennichuck, itself (Pen. Brief 17-18), chooses to highlight as sufficient to prevent summary judgment in favor of the City:

- After Pennichuck declined to sell under RSA 38:7, the City wrote a letter dated March 26, 2003 saying it would now proceed to file for eminent domain at PUC.
- In the next ten months, more than a dozen times the City said it still intended to use eminent domain.

Other than the passage of time, it is difficult to see any relevance in these facts. Should Nashua not have indicated it intended to use eminent domain? Did Nashua reiterate it too many times? Too few? Would it have been better if the City said it hadn't made up its mind? Nothing relates to the elements of laches.

- Characterizing the negotiations, Pennichuck labeled them “occasional,” “general,” superficial,” “perfunctory,” and “all form and no substance.”

These are general, conclusory allegations.

- The principal allegation, made “on information and belief,” was that Nashua had not engaged the requisite consultants, which supposedly proved that Nashua was not serious.

This “information and belief” turned out to be, in a word, false, as demonstrated by the Streeter and McCarthy affidavits detailing the good faith basis for the negotiations.

- Pennichuck described the PUC Petition as “bare bones” and not complying with PUC rules.

The fact of the matter is that the petition remains pending and has been moving forward, ever since the Superior Court denied Pennichuck’s requests, in this action, to stop the process.

Finally, Pennichuck claims (Pen. Brief 13-14) that the City acknowledges that there are material issues of fact with regard to the reasonable time/laches issues and quotes from the City’s motion and supporting memorandum and oral argument. However, these arguments were obviously made in the alternative to the City’s primary position that the City, itself, was entitled to summary judgment.

CONCLUSION

On cross motions for summary judgment, the Trial Court correctly found and ruled that there was no genuine issue of material fact and the Defendant City was entitled to judgment as matter of law on all claims. The decision of the Trial Court should be affirmed so that this matter can be resolved, as intended by RSA 38, at the Public Utilities Commission.

Respectfully submitted,

City of Nashua
By its Attorneys

Dated: _____

By: _____

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REQUEST FOR ORAL ARGUMENT

The Defendant City of Nashua requests the same time for oral argument as may be assigned to the Plaintiff. David R. Connell will argue orally.

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief have been forwarded to Thomas J. Donovan, Esquire, and Robert Upton, Esquire on this day of March, 2005.

Date:

David R. Connell, Esquire