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From the Town Manager's Office

To: Colchester Selectboard

From: Renae Marshall, Deputy Town Manager

CC: Aaron Frank, Town Manager

Date: January 7, 2021

Re: 885 East Lakeshore Drive Decision and Order – Background (Hearing) Information

A public hearing regarding condemnation and damages related to 885 East Lakeshore Drive was held at the Colchester Town Offices, 3rd floor conference room, on Tuesday, November 9, 2021 at 5:30 p.m. The Selectboard had 45 days to render a decision following the hearing. A signed copy of your decision is attached to this memo.

Below are documents that were provided at the November 9, 2021 condemnation hearing:

1.) Documents provided to the Selectboard and made public on August 24, 2021:

https://clerkshq.com/Content/Attachments/Colchester-vt/211109_3a.pdf?clientSite=Colchester-vt

2.) Documents presented by the Town Attorney at the November 9, 2021 condemnation hearing:

https://clerkshq.com/Content/Attachments/Colchester-vt/211109_03.htm?clientSite=Colchester-vt

3.) Documents presented by Mr. Mongeon's attorney at the November 9, 2021 condemnation hearing:

https://clerkshq.com/Content/Attachments/Colchester-vt/211109_03c.htm?clientSite=Colchester-vt

Before the Selectboard of the Town of Colchester
In re: Condemnation of 885 East Lakeshore Drive and Damages
Proposed Decision and Order on Necessity and Damages

The Selectboard of the Town of Colchester, Vermont (“Town”) by its own motion made and passed at a duly warned meeting of the Selectboard on August 24, 2021, initiated proceedings pursuant to Chapter 77 of Title 24 of the Vermont Statutes to begin condemnation proceedings for the property at 885 East Lakeshore Drive, Colchester, Vermont (“the Property”) for the purpose of maintenance and improvements to stormwater drainage infrastructure and related improvements, and to determine any damages sustained by the parties owning or interested in the Property.

Notice of the condemnation and compensation hearing, scheduled November 9, 2021, was given in accordance with Chapter 77 of Title 24 with written notice being given in the following manner to the following individuals and entities:

By hand delivery to Scott Mongeon, Registered Agent for Mongeon Bay Properties, LLC (“MBP”) on or about August 31, 2021; by hand delivery to NBT Bank, N.A. on or about August 31, 2021; electronically to A.J. LaRosa, counsel for MBP on or about August 26, 2021; and to the public by publication in a local newspaper of general circulation, *Seven Days*, during the week of October 13 through 20, 2021.

At 4:00 PM on November 9, 2021 a site inspection of the Property was held. During the site inspection, the Selectboard and others went to 885 East Lake Shore Drive and observed the exterior as well as the interior of the seasonal camp located there. The attendees viewed the drainage pipe running underneath the camp and the state of the erosion on slope at the property. Representatives from MBP, including its counsel, were also present.

At the hearing that followed later the same evening, the following individuals were sworn in and gave testimony: Bryan Osborne, Director of Public Works for the Town; Richard F. Hamlin, P.E., Chief of Engineering, Donald L. Hamlin Consulting Engineers, Inc.; Roger Fay, appraiser; Bruce Mongeon, an owner of MBP. MBP’s attorney, A.J. LaRosa, Esq. provided legal argument. The testimony concerned both the necessity and damages to be paid to MBP, if any. Both parties were afforded the opportunity to cross examine witnesses and all persons in attendance were afforded the opportunity to present evidence. The proceedings were taped.

The following exhibits were introduced and admitted during the hearing:

1. Easement Deed
2. Notice of Hearing
3. Letters to Interested Parties
4. Cain Email to Attorneys re Notice of Condemnation Hearing
5. Proof of service
6. Copy of publication

7. 1/22/2021 Letter re offer to purchase; Safar email to A..J LaRosa
8. Survey
9. Memo from Bryan Osborne
10. A. Scoping Study B. Scoping Study Appendix
11. Hamlin Engineering Technical Memo
12. Technical Memo from Amanda Clayton – Town engineer
13. Drone photos taken by Hamlin Engineering, Fall 2021
14. Appraisal for 885 East Lakeshore Drive by Roger Fay, dated October 12, 2021
15. Updated Appraisal by Roger Fay, dated November 8, 2021
- M12. Memorandum of Richard Hamlin, dated September 25, 2020
- M18. Appraisal for 885 East Lakeshore Drive by Patrick Simoneau, dated July 7, 2017
- M21. Lister’s Card for 1006 East Lakeshore Drive
- M22. Lister’s Card for 1014 East Lakeshore Drive
- M24. Lister’s Card for 825 East Lakeshore Drive

No party raised any objection to the admission of any exhibits, and therefore, every exhibit listed above was admitted into evidence. Based on the evidence and exhibits presented at the hearing, the Board of Trustees makes the following findings of fact and conclusions of law:

1. The Property is a seasonal dwelling unit or “camp” consisting of approximately 1,300 square feet of living space and located on a parcel of land containing several other dwellings on the shore of Malletts Bay, a part of Lake Champlain.
2. The Property is owned by MBP.
3. The Property is encumbered by an easement granted to the Town for a 24-inch drainage pipe and that drainage pipe runs on the Property from a stormwater catch basin in the Town’s right of way on East Lakeshore Drive, directly under the camp, to connect to a discharge outfall pipe that runs through a concrete retaining wall, under the beach at the bottom of a slope, and into Lake Champlain.
4. The easement requires the Town to maintain the drainage pipe and discharge pipe and all appurtenances in good order and repair at all times.
5. The easement is 10 feet wide, centered on the pipe; similar easements are typically 20 feet wide.
6. The conditions of the easement are covenants that run with the land.
7. The easement was granted by a quitclaim deed, Exhibit 1, recorded on October 2, 1979.
8. There is a steep slope where the drainage outfall runs under the camp.
9. The outfall at 885 East Lakeshore Drive is unique in its configuration, in part because of the slope, and in part because the pipe runs underneath a dwelling unit; the Director of Public Works is not aware of any other stormwater outfall in Colchester that is located directly underneath a dwelling unit.
10. There are challenges in accessing the pipe for maintenance or repairs; the outfall is inaccessible by conventional means.
11. There is erosion on the Property, leaving decks affixed to the camp unsupported.
12. At least some of the erosion was caused by alterations in the historical drainage pattern. In particular, MBP changed the historical drainage patterns along approximately 500 feet of roadway through the construction of a berm as well as

other significant changes to the historical topography both in and out of the public right-of-way, directing more water to the catch basin at 885 East Lakeshore Drive. MBP appropriately covered the catch basin grate during construction times with filter material to prevent sediment from entering the drainpipe; however when leaves would build up, they did not keep the filter pad clear. As a result, the opening to the catch basin would become blocked. Field reports from MBP's engineer advised 8 times between August 30, 2018 and November 13, 2018, that sediment and debris be cleaned from the filter. Exhibit 13. The berm directed water to the plugged catch basin where the water would pond and overtop the berm and then flow under the camp, causing erosion under the camp and on the rear slope of the Property. See Exhibit 12.

13. A major erosion event occurred around the "Halloween Storm" on October 31, 2019, when a sinkhole opened. No erosion had ever been observed or reported in the past at the Property prior to MBP's construction of the berm or the installation of the new rock and concrete block retaining walls on either side of retaining structure for 885 East Lakeshore Drive.
14. The Town has had to spend funds backfilling the void in the slope created by the worsening of the sinkhole through continued erosion. Repairs were performed in December, 2020.
15. The berm remains in place.
16. The State of Vermont has determined Lake Champlain to be impaired by phosphorus. The Town, along with other large Vermont communities, is required to reduce the levels of phosphorus draining into Lake Champlain.
17. The Town is trying to reduce the discharge of other pollutants into Malletts Bay, including sediment, oils, and debris.
18. The drainage outfall at the Property services a stormwater catchment area totaling over 9 acres. The percentage of impervious surfaces in this area is approximately 30%.
19. The water that discharges from the outfall associated with the Property is currently untreated.
20. The report from the Malletts Bay Stormwater Management System & Transportation Scoping Study was completed in November 2017. Exhibit 10.
21. The Scoping Study was completed when conditions at the Property were different than they are currently; there have been major site changes since the Scoping Study was done, including MBP's constructing the berm after the Scoping Study was completed.
22. While the Scoping Study recommended a curb along East Lakeshore Drive, that curb was contemplated as part of a larger, more comprehensive plan that involved other stormwater improvements at other sites that would have reduced the amount of overland flow reaching East Lakeshore Drive. These improvements were not part of MBP's construction of its berm. The Scoping Study's overall recommended improvements did not contemplate the absence of other upland stormwater improvements which were expected to reduce surface flows to the basin. The Scoping Study therefore did not contemplate the volume of water created by MBP's site

- alterations. The failure to adequately keep the basin top cleared of debris significantly compounded this problem.
23. The Scoping Study also called for the drainage system at the Property to be connected to an adjacent catchment area, resulting in it servicing the highest amount of impervious surface area along East Lakeshore Drive.
 24. The Town has identified the Property as an appropriate site for stormwater treatment to be located, as it is a key stormwater discharge point where untreated stormwater currently discharges directly into Malletts Bay and Lake Champlain.
 25. The Town wishes to install stormwater treatment devices on the Property and has determined the existing camp must be removed to accommodate the installation, based on initial conceptual plans. Exhibit 9.
 26. The current concept includes potentially three levels of treatment. The first level would separate out larger solids and grit and would also remove contaminants. The next level of treatment would consist of filtration tanks that could remove smaller particulate matter or provide other forms of treatment. The third and final level of treatment would be a series of planting strips to encourage nutrient uptake from the stormwater before it discharges into Lake Champlain.
 27. During his testimony, engineer Richard Hamlin characterized the site at the Property as presenting unique engineering challenges because of the unorthodox configuration of a drainpipe running down a steep slope underneath a dwelling, but also unique opportunities for stormwater treatment because of the gradient of the slope.
 28. Mr. Hamlin opined that there would be sufficient room for the stormwater treatment structure to be installed, if the Property were to be condemned and the camp removed.
 29. Mr. Hamlin prepared a written memorandum in which he opined that there would be several positive outcomes to the Town taking the Property. Exhibit 11. It would allow the Town to improve the drain system's outfall, which services many other private properties and public facilities; it would provide space for the Town to install stormwater treatment; and it would remove the risk posed by the camp sitting on top of the eroded slope.
 30. The Town's goal in taking the Property would be to address water quality in Malletts Bay, improve access to the stormwater discharge point, reduce ongoing maintenance and repair costs to an unorthodox stormwater outfall configuration, address the potential for safety threats presented by that configuration and remove an ongoing liability to the community and the property owner.
 31. The Town contends that the stormwater treatment facility cannot be built at the site without the Town taking the Property and removing the camp and that failure to take the Property will lead to recurring expenses of maintaining the drainage outfall and ongoing liability for the Town.
 32. The boundaries of the proposed taking are defined in a survey. Exhibit 8.
 33. The Town began discussing a purchase of the Property with MBP in December 2020.
 34. The Town asked MBP's prior counsel, Attorney Rod McPhee, whether his client would consider selling the Property to the Town in lieu of condemnation.
 35. Attorney McPhee did not communicate a willingness on the part of MBP to sell the property.

36. The Town again inquired on January 22, 2021 whether MBP would sell the Property. Exhibit 7.
37. MBP was not willing to sell the Property at that time. Exhibit 7.
38. The Town attempted to renew discussions about purchasing the Property on July 9, 2021 in communications to Attorney LaRosa. The Town staff understood that MBP was apparently unwilling to discuss a sale, but if it would even consider it, a price would have had to be well beyond fair market value for the Property.
39. The Selectboard voted to proceed with the condemnation on August 24, 2021.
40. The Town published a notice, Exhibit 2, and sent it to MBP's agent as well as another interested party, a bank, as a mortgage holder. Exhibit 3. Notice was also provided to MBP's counsel. Exhibit 4. All parties were served, and the notice was also tacked on the Property. Exhibit 5.
41. Notice was published in Seven Days during the week of October 13-20, 2021. Exhibit 6.
42. Notice was therefore proper for the November 9, 2021 site visit and hearing.
43. Roger Fay appraised the Property in October, 2021. Roger Fay initially valued the Property at \$359,500.00, but later revised the valuation upwards, to \$364,500.00 after receiving the survey in order to correct for the exact acreage of the proposed taking.
44. Mr. Fay took into account market fluctuations caused by the Covid-19 pandemic.
45. Mr. Fay examined comparable properties in his valuation.
46. No comparable property had an easement for or actually had a drainpipe running underneath the residence. No such comparable property could be found.
47. The evidence offered by MBP included the testimony of Bruce Mongeon on both necessity and damages, as well as an appraisal dated July 7, 2017. Exhibit M18; lister's cards for other properties, Exhibits M21, M22, and M24; as well as another memorandum from Mr. Hamlin from September 25, 2020, describing proposed repair procedures for the drainpipe. Exhibit M12.
48. Mr. Mongeon offered no expert testimony that went to the issue of necessity of the Town taking the Property.
49. Mr. Mongeon offered no expert testimony on valuation of the Property.
50. MBP did not proffer testimony from any engineer it hired about alternative sites for stormwater treatment.
51. MBP offered into evidence a 2017 appraisal prepared by Patrick Simoneau valuing the Property at \$380,000.00. Simoneau did not testify.
52. Mr. Mongeon testified as to his belief that, should the Property be taken, MBP would be entitled to damages from lost rental income which he estimated to be \$45,000.00 per year based on renting it out 100 nights a year for \$450.00 per night. MBP provided no supporting documentation for this estimate or corroborating evidence.

At the hearing, MBP argued that the Town commenced condemnation incorrectly under Title 24, Chapter 77, and that the instant proceedings should have been brought under Title 24, Chapter 97. Chapter 77 provides general authority for a municipality to condemn property "when, in the exercise of any of the powers or functions authorized by its charter or bylaws, it becomes necessary for public use and benefit to take, damage, or affect lands, and the owner refuses to release or convey the same to such municipality for a reasonable price." 24 V.S.A. §

2805(a). The Charter for the Town of Colchester provides that the Town “may acquire real property within its corporate limits for *any Town purpose*, in fee simple or any lesser interest or estate, by purchase, gift, devise, lease, or *condemnation*, ... consistent with the Constitution and laws of the State of Vermont, and may sell, lease, mortgage, *hold, manage, and control such property as its interests may require.*” 24A V.S.A. Ch. 113 § 103 (emphasis added). Chapter 97 is a narrower statute, concerned only with sewage, including stormwater. Because the Town’s purpose in bringing this condemnation action concerns purposes other than stormwater disposal—managing the risks created by the erosion that MBP caused and managing inherent risks that exist by having any municipal infrastructure located underneath a private dwelling—we apply the more general statute. Considering what Chapter 77 provides: the notice requirements; the ability to be heard and present evidence and cross-examine witnesses at a hearing before this Selectboard; as well as appeal rights described below, MBP is afforded at minimum equal, if not greater, due process protections than does Chapter 97.

MBP argued at the hearing before this Board that *Rosetti v. Chittenden County Transportation Authority*, 165 Vt. 61, 63, 674 A.2d 1284, 1286 (1996) was controlling and that *Rosetti* served as support for the proposition that Title 24, Chapter 77 is the inappropriate Chapter for this condemnation. In *Rosetti*, however, the Vermont Supreme Court did not review whether CCTA’s condemnation was commenced under the appropriate statute. The parties to that case jointly dismissed an appeal on this issue, and thus we find that this decision does not provide guidance on whether Chapter 77 is appropriate here, nor does it support MBP’s position. We also note that *Rosetti* is factually distinct in that it involved condemnation for a bus storage, bus maintenance and office facility. This case involves risk mitigation concerns that were not present in *Rosetti*. Accordingly, that case is inapposite. Notwithstanding that conclusion, we do take from *Rosetti* a definition of necessity that provides guidance for any condemnation proceeding. *Rosetti* cites 19 V.S.A. § 501 for its definition of necessity which provides that it is “a reasonable need which considers the greatest public good and the least inconvenience and expense to the condemning party and to the property owner. Necessity shall not be measured merely by expense or convenience to the condemning party.” 165 Vt. At 66. Further, *Rosetti* upholds the Vermont Supreme Court’s long held standard for necessity as “not mean[ing] an imperative or indispensable or absolute necessity but only that the taking provided for be reasonably necessary for the accomplishment of the end in view under the particular circumstances.” 165 Vt. At 66-67. We find that standard to be met here.

Based on the preceding findings, the Town of Colchester Selectboard concludes that it is necessary for public use and benefit to order the condemnation of the Property, that is the property located at 885 East Lakeshore Drive, as described on the survey entered into evidence, Exhibit 8. The taking of the Property is necessary for the Town to have improved access to the stormwater discharge point, to reduce ongoing maintenance and repair costs to an unorthodox stormwater outfall configuration, to install a stormwater treatment facility, to address a safety and liability issue created by the recent erosion and to mitigate potential hazards in the future. The condemnation of the Property is hereby ordered.

Based on the preceding findings, specifically the appraisal of Roger Fay, the Town of Colchester Selectboard orders that Mongeon Bay Properties, LLC, be compensated Three

Hundred Sixty-Four Thousand, Five Hundred Dollars (\$364,500.00) for the property interests that have been condemned by the Selectboard.

If Mongeon Bay Properties, LLC does not accept the damages award by the Selectboard, it may agree with the Selectboard to refer the question of such damages to one or more disinterested persons, whose award shall be made in writing and shall be final.

The landowners affected by this order shall have a period of three (3) months from the date of this order to remove their buildings, fences, timber, wood, or trees but the landowners shall not be required to remove their buildings, fences, timber, wood, or trees until compensation is tendered.

Any person interested in the land to be condemned, if dissatisfied with the action of the Selectboard in locating and setting it out or with the damages awarded therefor by the Selectboard, may within 60 days of the recording of this decision apply by petition to the Chittenden County Superior Court, Civil Division, in writing. 24 V.S.A. § 2810; V.R.C.P. 75.

Dated at Town of Colchester, Vermont this 7th day of January, 2022.


Pam Lonanger, Chair


Tom Mulcahy, Vice-Chair


Jacki Murphy, Clerk


Herb Downing


Charlie Papillo