

DE 98-191

PENNICHUCK WATER WORKS, INC.

**Petition for Condemnation of Certain Real Property and
Appurtenant Fixtures
Located at the Pheasant Lane Mall**

Order Granting Condemnation

O R D E R N O. 23,212

May 10, 1999

APPEARANCES: Sullivan and Gregg by James L. Sullivan, Jr., Esq. for Pennichuck Water Works, Inc.; Wadleigh, Starr, Peters, Dunn & Chiesa by Alan R. Gutzmer, Esq. for the Pheasant Lane Realty Trust; and Eugene F. Sullivan III, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On October 27, 1998, Pennichuck Water Works, Inc. (Pennichuck) filed a petition with the New Hampshire Public Utilities Commission (Commission) pursuant to RSA Chapter 371 seeking authority to condemn certain assets and real property located in New Hampshire in a commercial subdivision known as the Pheasant Lane Mall (Mall).

The Mall is located in both Nashua, New Hampshire and Tyngsboro, Massachusetts but all of the commercial structures are located in Nashua.¹ Water service is currently provided to the Mall by Pennichuck through a single meter pit located adjacent to the Mall premises in Nashua. Water service is thereafter supplied to the commercial residents of the Mall through mains

¹ The Massachusetts portion of the Mall consists of a parking lot and some portion of the mains that loop the commercial structures.

and facilities that encircle the Mall in a hydraulic loop that crosses from New Hampshire into Massachusetts and back into New Hampshire.

The petition requests permission to take by condemnation only those water mains, their respective appurtenances and the necessary easements that comprise the loop that are located in New Hampshire.

By letter dated July 20, 1998, the Tyngsboro Water District (District) informed the Commission that it had the authority and was prepared to take by eminent domain those water mains, their respective appurtenances and the necessary easements required to own and operate the facilities, which comprise the Massachusetts portion of the loop. Apparently, the District would exercise this authority once Pennichuck had obtained ownership of the New Hampshire assets. The district would then retain the services of Pennichuck on a contractual basis to oversee, operate, maintain and repair these mains.

Pennichuck averred that the assets and easements were necessary to effectuate the wholesale sale of water to the District which provides water service in certain areas of the Town of Tyngsboro, Massachusetts, and to ensure that safe and adequate service is provided to the commercial establishments in the Mall, all of which are located in Nashua. The District represented that the interconnection with Pennichuck and the ownership of the mains on the Massachusetts side of the border

would allow it to provide service to two restaurants and to offer water service not currently available to new businesses that have and will commence business adjacent to the Mall in Massachusetts.

The petition requests the right to condemn easements, mains and appurtenances from Julian Cohen and Stephen R. Weiner, Trustees of Pheasant Lane Realty Trust (Pheasant Lane), May Department Stores Co. (May Stores), Dayton Hudson Corporation (Dayton Hudson), Allied Stores General Real Estate Company (Allied Stores), Sears Roebuck and Company (Sears), and J.C. Penney Properties, Inc. (J.C. Penney) (collectively Respondents) The Respondents are the owners of the several discrete tracts or parcels of land and the mains located therein that comprise the Mall in New Hampshire.²

Currently, Pennichuck provides service to these entities, which in turn provide service to themselves and the other smaller commercial inhabitants of the Mall, through a single meter pit located upstream of the mains in question. The current situation results in public consumption of water in the Mall and at two restaurants located adjacent to the Mall in Tyngsboro, Massachusetts through mains not controlled by Pennichuck or any other recognized public utility. Further, the current situation complicates the extension of service for the

² To the extent necessary the Petition also sought to condemn these property rights from Citibank, N.A., the Prudential Insurance Company of America and HRE Finance, Inc., mortgagees of the premises comprising the Mall.

wholesale sale of water to the District, which the District has requested in order to initially provide service to the two restaurants located in Tyngsboro. Moreover, the availability of water may create the potential for new business in the area.

On December 22, 1998, the Commission issued an Order of Notice scheduling a prehearing conference for January 13, 1999, requiring publication of the Notice in a newspaper of general circulation in the Nashua area. Pheasant Lane was the only property owner that appeared at the prehearing conference. At the prehearing conference, Pheasant Lane, Staff and Pennichuck noted that although the Order of Notice had been published as required, individual notice had not been served on all of the property owners. In light of this procedural infirmity, the Commission rescheduled the prehearing conference and technical session for January 29, 1999, and provided individual notice to each of the Respondents and mortgagees via registered mail, return receipt requested. A duly noticed prehearing conference and technical session was held on January 29, 1999. Again, Pheasant Lane was the only property owner to appear. On January 12, 1999, the Commission received another letter from the District supporting the proposed condemnation. A hearing on the merits of the Petition was held on February 23, 1999.

II. POSITIONS OF THE PARTIES AND STAFF

A. Pennichuck

Pennichuck asserted that the condemnation was necessary to effectuate the provision of service to the commercial establishments and their customers conducting business at the Mall by a public utility with the managerial, financial and technical expertise to ensure safe, adequate and reliable service given the changes occurring in the provision of water service as the federal Safe Drinking Water Act (SDWA) continues to be implemented. Moreover, Pennichuck maintained that the provision of wholesale service to the district would allow the District to provide a greater level of service in new and existing service territories.

Pennichuck asserted that the value of one dollar assigned to the subject assets for the purposes of the condemnation was appropriate because Pennichuck would be assuming all of the liabilities for the maintenance and repair of these facilities, and all of the environmental responsibilities under the SDWA.

Both Pennichuck and Pheasant Lane indicated that there was no opposition to the acquisition of these facilities and easements by any of the property owners but that the petition was necessitated because a number of the Respondents simply would not answer repeated efforts by Pennichuck to acquire these assets.

B. Pheasant Lane

Pheasant Lane supported the proposed condemnation and

the assigned value of one dollar for the subject assets. Pheasant Lane in letters and orally indicated that because the provision of water service was not one of its business objectives, it looked upon its current activities in that area as a liability rather than an asset and, therefore, believed the condemnation was in the best interest of the public and the assigned value for compensation was just, reasonable and appropriate. Moreover, Pheasant Lane supported the wholesale sale of water to the District.

C. Dayton Hudson

By letter dated February 22, 1999, Dayton Hudson indicated that it supported the Petition as filed.

D. May Stores, Allied Stores, Sears, J.C. Penney

These parties failed to appear in response to general and personal notice.

E. Tyngsboro Water District

On January 12, 1999, the Commission received a letter from the District strongly supporting the Petition. The District indicates that Pennichuck currently provides service to the Mall in New Hampshire and that the Mall is currently reselling water service to two restaurants located in Tyngsboro. Moreover, water service has been requested of the District by another mall which consists of twenty-four tenants including a restaurant and a

cinema, located in the vicinity of these two restaurants. The proposed condemnation would facilitate the provision of service to these establishments because it would allow the district to condemn those lines located in Massachusetts, owned by the respondents, that currently supply the two restaurants with the assurance of a secure source of water supply from Pennichuck.

F. Staff

Staff supported the Petition with regard to both necessity and valuation.

III. COMMISSION ANALYSIS

RSA 371:1 (1971) provides in relevant part that whenever it is necessary in order to meet the reasonable needs of the public, for a public utility to acquire land for facilities of the utility, and the utility cannot agree with the owners of such land as to the necessity of the land or its value, the utility may petition the Commission for permission to take such lands or rights as may be needed. Thus, the issues for our consideration are the necessity of the proposed condemnation and the compensation to be paid the landowners should we find the condemnation necessary to meet the reasonable needs of the public. RSA 371:4.

Although the emphasis of the Petition, and this proceeding in general, has been the necessity of Pennichuck's acquisition of the existing transmission mains encircling the

Mall which are located in New Hampshire, RSA 371 does not provide the Commission with specific authority to condemn facilities. Rather, RSA 371 provides the Commission with the authority to permit the acquisition of "such land or rights as may be needed" RSA 371:1.

This does not conclude our analysis, however. The Petition requests not only the right to condemn the mains but the right to acquire the necessary easements or "rights in land" to operate, service and repair the mains. Based on this request, we believe we may address the Petition as a request to condemn an easement which includes the appurtenant fixtures, namely the mains encircling the Mall located in New Hampshire.

Under New Hampshire law, any acquisition of land includes all permanent fixtures that are so intertwined with the land as to be included in any conveyance. See eg., Dana v. Burke, 62 N.H. 627, 629 (1883); Langdon v. Buchanan, 62 N.H. 659, 660-661 (1883). In the case at hand, the mains, which are buried in the requested easements, are a necessary aspect of the rights in land sought to be acquired.

With regard to the issue of necessity, the New Hampshire Supreme Court has held that the broad and general language of RSA 371 requires it be given an interpretation and that, therefore, the statute should be sensibly construed to effectuate its objectives of serving the public good. White Mountain Power Co. v. Maine Central Railroad, 106 N.H. 443

(1965).

In light of this acknowledgment, we conclude the public interest would be best served if Pennichuck were to acquire the easements and appurtenant mains located in New Hampshire. Pennichuck's acquisition of these assets and its contractual control over the mains located in Massachusetts will ensure safe and adequate service is provided to the commercial tenants of the Mall and their customers. It will also allow the District to provide greater service to its customers in Massachusetts, which in turn will allow Pennichuck to make wholesale sales to the District thereby reducing overall costs to its New Hampshire ratepayers.

We find the value of one dollar (\$1) to be fair and equitable under the circumstances presented in this petition.

Based upon the foregoing, it is hereby

ORDERED, Pennichuck Water Works, Inc.'s Petition to condemn an easement and the appurtenant fixtures located therein as set forth in its petition from Julian Cohen and Stephen R. Weiner, Trustees of Pheasant Lane Realty Trust, May Department Stores Co., Dayton Hudson Corporation, Allied Stores General Real Estate Company, Sears Roebuck and Company, and J.C. Penney Properties, Inc., and Citibank, N.A., the Prudential Insurance Company of America and HRE Finance, Inc., as mortgagees of the premises comprising the Pheasant Lane Mall is GRANTED; and it is

FURTHER ORDERED, that just compensation to each of the above listed property owners under the circumstances set forth in this petition is one dollar (\$1).

By order of the Public Utilities Commission of New Hampshire this tenth day of May, 1999.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary

rec'd 4/26/99

ATTACHMENT B

JAMES L. SULLIVAN
(1905 - 1996)

JAMES A. NADEAU
OF COUNSEL

April 22, 1999

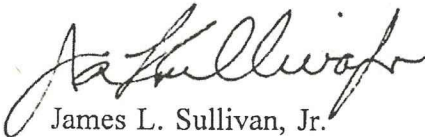
Thomas B. Getz, Executive Director
N. H. Public Utilities Commission
80 Suncook Road
Concord, NH 03301-7319

Re: DE 98-191 Pennichuck Water Works, Inc. v. Julian Cohen and Stephen R. Weiner, Trustees of Pheasant Lane Realty Trust, et al - Petition for Condemnation

Dear Mr. Getz:

Pursuant to the request of the Hearings Officer on February 23, 1999, enclosed you will find a signed counterpart of the Water Supply Agreement between Pennichuck Water Works, Inc. and Tyngsborough Water District, dated April 13, 1999. My understanding at the end of the February 23 hearing was that upon submission of this agreement the Commission would be issuing an order in the above-captioned matter. Please let me know if you need any further information. I am enclosing a diskette with a WordPerfect 5.1 digital version of the text of the agreement.

Very truly yours,



James L. Sullivan, Jr.

JLS,JR/slm
No. 47495
Enclosures

cc: Parties on distribution memo
Michael W. Holmes, Esquire
✓ Stephen J. Densberger
Christine Hanley, Esq.
Kathleen Sullivan, Esq.
Edward J. Owens, Esq.

*Circulated copy to MA/CS/BH/DW
BR/mx/RP/PJ*

WATER SUPPLY AGREEMENT

AGREEMENT made this 13th day of April, 1999, by and between Pennichuck Water Works, Inc., a New Hampshire regulated water utility, with a principal place of business at Four Water Street, Nashua, New Hampshire (hereafter called "Pennichuck") and the Tyngsborough Water District, a municipal water utility, with a principal place of business at P. O. Box 305, Tyngsborough, Massachusetts (hereafter called the "District").

WHEREAS Pennichuck is the franchise holder for supplying water to the City of Nashua, New Hampshire (including the portion of Nashua occupied by the Pheasant Lane Mall), under the laws of the State of New Hampshire, and the rules and regulations of the New Hampshire Public Utilities Commission ("PUC"); and

WHEREAS the District is duly authorized under Massachusetts law to supply water to all or a portion of the Town of Tyngsborough, including the portion of Tyngsborough occupied by a portion of the Pheasant Lane Mall and the Middlesex Turnpike in the vicinity of the Pheasant Lane Mall; and

WHEREAS Pennichuck supplies water to the Pheasant Lane Mall, easterly of Daniel Webster Highway (which becomes Middlesex Turnpike at the New Hampshire-Massachusetts state line) in Nashua, by means of a connection at a meter pit at the easterly end of Dan Chan Drive, a public way running from Daniel Webster Highway to the Pheasant Lane Mall property; and

WHEREAS Pheasant Lane Mall has heretofore owned, operated, and maintained the water pipes and facilities for furnishing water to the mall buildings at the Pheasant Lane Mall, including certain pipes and facilities lying in the portion of the Town of Tyngsborough occupied by the Mall (see Water Distribution Plan, attached to this agreement, and made a part hereof); and

WHEREAS Pennichuck has commenced an action before the PUC to condemn and take the pipes and water utilities at the Pheasant Lane Mall, together with sufficient easements to operate and maintain said pipes and facilities; and

WHEREAS Pennichuck is about to obtain an order from the PUC granting the condemnation sought by Pennichuck; and

WHEREAS a reason for seeking such condemnation is for Pennichuck to sell water to the District for provision of water to properties in the Town of Tyngsborough, through the water facilities at the Pheasant Lane Mall;

NOW THEREFORE the parties agree as follows:

1. Pennichuck agrees to sell water to the District, up to an aggregate amount not to exceed five hundred thousand gallons

per day (with a peak flow not to exceed seven hundred (700) gallons per minute), at the price or prices fixed by the tariff of Pennichuck filed with the PUC. The obligation of Pennichuck to sell water, and of the District to take water, will be subject to the following conditions:

a. Taking of water in excess of the amounts set forth above for fire fighting purposes or other declared emergencies will not be deemed a violation of the provisions of this paragraph.

b. In the event Pennichuck's water supply is impaired due to unusual circumstances beyond the reasonable control of Pennichuck, Pennichuck will have the right in its discretion upon twenty-four (24) hours notice to the District to temporarily reduce the amount thereafter to be taken by the District. Pennichuck will promptly notify the District when the circumstances, which led Pennichuck to its decision to so reduce takings by the District, have ceased to exist, and thereupon the rights of the District to take water as herein set forth will be restored.

c. It is recognized that during the term of this Agreement, the parties intend that Pennichuck will provide the District with a source of supply of water within the scope provided herein, absent unusual circumstances or the temporary interruption of any other source of supply of the District. The District agrees to provide Pennichuck with reasonable notice of any unusual circumstances, malfunction of equipment, or interruption of other supply, which would necessitate the District's use of Pennichuck's source of water for purposes other than as a source of supply within the scope provided herein. In the event the District expects its consumption requirement to exceed the amounts set forth above, the District will provide Pennichuck with notice sufficient for Pennichuck to evaluate the capacity of its facilities to produce water to meet the demands of such increased consumption. In such event Pennichuck will provide such additional service only at its option.

d. In the event that natural conditions (such as weather) or interruption of supply will require Pennichuck to institute consumption control measures within its Nashua Core System, the District, upon reasonable notice from Pennichuck, will institute consumption control measures within its system at least as strict as those instituted by Pennichuck.

e. The water being provided to the District under this Agreement is intended for consumption within the Town of Tyngsborough. In the event that the District will enter into an agreement with any other entity, under which agreement the District agrees to provide water outside the Town of Tyngsborough, the District will immediately notify Pennichuck of such agreement. In such event, Pennichuck shall have the option of terminating this agreement.

2. The amount of water sold to the District will be fixed by means of a meter to be set in a pit located in the ten (10)

inch water line that proceeds southerly from the ten (10) inch loop, which surrounds the mall building. The District will apply to Pennichuck for the meter to be set. The meter will be set by the District's plumber, subject to Pennichuck's inspection, in an appropriate meter pit provided by the District. In the event that the District will opt for a meter larger than the standard three (3) inch domestic meter, the District will pay the difference in cost. (For example, the charge for a Neptune Prospectus III 4"/1" fire meter will be \$4,180.60 after application of credit by Pennichuck.) There will be a monthly meter charge in addition to the regular water rate. The meter will be the property of Pennichuck, which will maintain and read the meter, though the pipe, in which it is set, will be the property of the District.

3. This Agreement will have a term of ten (10) years from the date hereof (as first set forth above) (said term hereafter being called the "Initial Term"). During the period commencing one and one-half (1 1/2) years prior to the termination of the Initial Period and ending one (1) year prior to the termination of the Initial Term, the District may, at its option, notify Pennichuck of its intention to renew this Agreement for an additional five (5) year term. In substantially the same manner as set forth above, the District may exercise an option to renew this Agreement for a second five (5) year renewal term. In all events, this contract will terminate twenty (20) years from the date hereof (as first set forth above).

4. The District will be the owner of all pipes or other water facilities of the Pheasant Lane Mall water system located in the Town of Tyngsborough. The District will have the responsibility for maintaining and repairing said pipes and facilities within the Town of Tyngsborough, though Pennichuck will have the right and power to make repairs and maintenance upon said pipes and facilities, if Pennichuck shall determine that such maintenance and repairs will be necessary or advisable for maintaining the safety, quality, and quantity of water flowing through said pipes back into the State of New Hampshire.

5. The District agrees that it will not make any connections, or allow any other person or entity to make any connections to any pipes (including any connection to hydrants on the Pheasant Lane Mall property, other than for fire-fighting or fire-protection purposes at the Pheasant Lane Mall property) in the Town of Tyngsborough lying northerly of the point of the meter referred to in paragraph 2., above.

6. The parties agree that the point of sale of water between Pennichuck and the District will be in New Hampshire, and will be governed by the laws of the State of New Hampshire.

7. The obligations of the parties hereunder are contingent

upon the issuance of a final, unappealed, order of the PUC granting Pennichuck's petition (case DE 98-191) to condemn and acquire that portion of the water system at Pheasant Lane Mall located within the bounds of the State of New Hampshire. In the event that this Agreement will be signed by the parties prior to the issuance of such order by the PUC, the operative terms of this agreement will begin upon the issuance of such order.

7. This Agreement, including all exhibits and schedules attached hereto, represents the entire understanding between the parties, and no other oral or written agreements or representations with respect to the subject of this Agreement, unless incorporated herein, shall be binding upon the parties. No provision of this Agreement shall be amended, waived, or modified except by an instrument in writing signed by the parties hereto.

8. This Agreement will inure to, and will be binding upon, the successors and assignees of the parties hereto.

IN WITNESS WHEREOF Pennichuck Water Works, Inc. and the Tyngsborough Water District have caused their duly authorized officers to set their hands on the date first set forth above.

WITNESS

Sharon A. Weston

PENNICHUCK WATER WORKS, INC.

By

Its

Maurice Greel
President

TYNGSBOROUGH WATER DISTRICT

By

Its

David W. Gentry
Chairman

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH, ss.

Before me, the undersigned officer, personally appeared Maurice Greel, who acknowledged himself to be the President of Pennichuck Water Works, Inc., and that he, as such President, executed the foregoing instrument for the purposes therein contained.

WITNESS my hand and official seal, this 1 day of April, 1999.

Justin Curtis
Notary Public/Justice of the Peace

JUSTIN CURTIS, Notary Public
(My Commission Expires January 20, 2004)

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX, ss.

Before me, the undersigned officer, personally appeared Warren W. Allgryn, Jr., who acknowledged him/herself to be the Chairman of the Tyngsborough Water District, and that he/she, as such Chairman, executed the foregoing instrument for the purposes therein contained.

WITNESS my hand and official seal, this 13th day of April, 1999.

Elizabeth M. Choate
Notary Public/Justice of the Peace

Elizabeth M. Choate
Notary Public of Massachusetts
Commission Expires 1-13-2002