SUPREME JUDICIAL COURT

SAID S. ABUZAHRA[1] VS. CITY OF CAMBRIDGE

Docket:	SJC-12920
Dates:	November 2, 2020 - February 17, 2021
Present:	Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.
County:	Suffolk
Keywords:	Eminent Domain, Validity of taking, Right to damages. Statute, Construction. Practice, Civil, Attorney's fees, Costs, Interest, Frivolous action.

Civil action commenced in the Superior Court Department on August 17, 2017.

A pretrial motion to compel pro tanto payment was heard by Bruce R. Henry, J.

An interlocutory proceeding was had in the Appeals Court before Peter J. Rubin, J.; review by a panel of the Appeals Court was sought; and the Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

John S. Leonard for the defendant.

John E. Bowen for the plaintiff.

KAFKER, J. The issue presented is whether G. L. c. 79, the so-called "quick take" statute, permits a property owner to both accept a pro tanto payment for an eminent domain taking and simultaneously challenge the lawfulness of that taking.[2] Under c. 79, once a taking authority records an order of taking, the authority generally must tender a payment pro tanto to the property owner. G. L. c. 79, § 8A. However, the statutory framework is silent as to whether the acceptance of the pro tanto payment by the property owner precludes a challenge to the validity of the taking.

The plaintiff argues that the defendant city of Cambridge (city) must immediately tender him the full amount of the pro tanto payment, along with accrued interest since the time of taking, because G. L. c. 79 as it is currently written does not condition his acceptance of the pro tanto payment on waiving his right to challenge the taking of his real property. The city disagrees, arguing that the statutory framework and case law prohibit a property owner from accepting a pro tanto payment so long as the property owner pursues a claim challenging the lawfulness of the taking. According to the city, if the plaintiff challenges the taking, which is his statutory

right, then he will have neither his property, which has been taken pursuant to the quick take statute, nor the pro tanto amount.

We conclude that G. L. c. 79 permits the plaintiff to both accept a pro tanto payment and simultaneously challenge the validity of the underlying taking. We do so because of the enormous power that the quick take statute provides, which immediately transfers ownership of the property from the property owner to the taking authority independent of judicial processes; the clear requirement of a pro tanto payment; and the absence of any statutory provision waiving pro tanto payments when the taking itself is challenged. Therefore, we affirm the order by a single justice in the Appeals Court, vacating a decision by a Superior Court judge that denied the plaintiff's motion to compel payment of the pro tanto amount, and we remand the matter to the Superior Court for further proceedings consistent with this opinion.

Background. 1. Statutory framework. The main statutory framework for eminent domain proceedings in Massachusetts is G. L. c. 79, which has been described as the "quick take" statute.[3] Upon the recording of an order of taking by a taking authority,[4] title to the property passes immediately by operation of law to the taking authority, and the right to damages for the taking vests in the property owner, "unless otherwise provided by law." G. L. c. 79, § 3. The taking authority must pay such damages "within sixty days after the right thereto becomes vested . . . and shall, except as provided in [G. L. c. 79, § 7D], be made immediately available to the persons entitled thereto . . . ." G. L. c. 79, § 7B.[5]

In addition, G. L. c. 79, § 8A, states that, within sixty days of when the order of taking is recorded, the taking authority "shall . . . offer in writing to every person entitled to damages on account of such taking a reasonable amount . . . , either in settlement under [G. L. c. 79, § 39,] of all damages for such taking . . . or as a payment pro tanto." The statute also provides: "If such person elects to accept the offer as a pro tanto payment, such election shall be without prejudice to or waiver or surrender of any right to claim a larger sum by proceeding before an appropriate tribunal." Furthermore, "[a]fter a pro tanto payment has been made or after an offer of payment has been made in writing as required by this section and not accepted, no interest shall be recovered except upon such amount of damages as shall upon final adjudication be in excess of said payment or in excess of the written offer of payment as herein described." Id.

Finally, G. L. c. 79, § 18, provides that a property owner may challenge the lawfulness of a taking within three years from when the right to damages has vested. See Devine v. Nantucket, 449 Mass. 499, 506 (2007).

2. Facts. We summarize the relevant undisputed facts and the procedural posture of this case.

In October 2016, the city effected an eminent domain taking in fee of the plaintiff's real property pursuant to G. L. c. 79. At the time of the taking, ownership of the property was in

dispute in separate litigation. Consequently, the city withheld its tender of the pro tanto payment to the plaintiff and instead paid the full $3,700,000 amount to the city treasurer pursuant to G. L. c. 79, § 7D. In August 2017, the plaintiff commenced the underlying action in Superior Court that sought to, among other things: (1) invalidate the city's October 2016 taking; and (2) either obtain an assessment of temporary damages, or, if the taking was found to have been valid, a determination of permanent damages. In its answer to the plaintiff's complaint, the city stated that it would tender the full pro tanto payment amount to the proper owner of the property once the separate ownership litigation was resolved. In October 2018, two years after the city's taking, the plaintiff secured a final judgment establishing his ownership over the property at issue.

In December 2018, the plaintiff filed a motion in this case to compel the full tender of the pro tanto payment along with accrued interest. In his motion, the plaintiff asserted that he was entitled to receive the pro tanto payment for the city's October 2016 taking of his property and simultaneously maintain a claim challenging the validity of that taking. In May 2019, a Superior Court judge issued an interlocutory order denying the plaintiff's motion to compel, reasoning that it was "somewhat incongruous" for the plaintiff to demand both payment of the pro tanto and the return of his property. The judge further ordered the city "to place the pro tanto funds, plus accumulated interest, with the Court [to] be held in an interest-bearing account" until the issue of the validity of the taking is resolved.

The plaintiff filed a petition pursuant to G. L. c. 231, § 118, first par., seeking interlocutory review of the Superior Court judge's order. A single justice of the Appeals Court reversed the order. The single justice determined that, "as a matter of law, the defendant[] must now pay [the plaintiff]" because "the [pro tanto] payment is required by [G. L. c. 79, § 7B], and the statute admits of no exception for cases in which the underlying taking is challenged." Subsequently, the city filed a motion for reconsideration, which the single justice denied. The city then appealed to the full Appeals Court pursuant to G. L. c. 231, § 118, second par., and we transferred the case here on our own motion.

Discussion. 1. Standard of review. The issue whether G. L. c. 79 permits a property owner to both accept a pro tanto payment and challenge the validity of the underlying taking is a pure question of law. Therefore, we review the Superior Court judge's decision below de novo. See Barr Inc. v. Holliston, 462 Mass. 112, 114 (2012) (no deference accorded to interlocutory order resolving pure question of law reported for appellate review by judge of Superior Court).

2. Statutory interpretation. "Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 620 (2019), quoting Ciani v. MacGrath, 481 Mass. 174, 178 (2019). However, where the statutory language is ambiguous or unclear, "we consider the cause

of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, [such that] the purpose of its framers may be effectuated" (quotation omitted). Spencer v. Civil Serv. Comm'n, 479 Mass. 210, 217 (2018), quoting Water Dep't of Fairhaven v. Department of Envtl. Protection, 455 Mass. 740, 744 (2010). We have also emphasized that "eminent domain statutes must be strictly construed because they concern the power to condemn land in derogation of private property rights." Providence & Worcester R.R. v. Energy Facilities Siting Bd., 453 Mass 135, 141 (2009), citing Devine, 449 Mass. at 506. Informed by these principles, we conclude that the statutory text, the legislative history, and the required strict construction of takings statutes compel the conclusion that, under G. L. c. 79, a property owner may both accept a pro tanto payment and challenge the validity of the underlying taking.

We begin with the recognition that "[t]he taking of land from a private owner against his will for a public use under eminent domain is an exercise of one of the highest powers of government." Devine, 449 Mass. at 506, quoting Lajoie v. Lowell, 214 Mass. 8, 9 (1913). Takings under c. 79 are especially significant because the rights of the parties vest upon the recording of the order of taking. G. L. c. 79, § 3. Not only does the taking authority have the power to impose its will on the property owner through eminent domain, but the taking itself is swift and occurs automatically outside of judicial processes. Given this dynamic, the statutorily mandated pro tanto payment ensures that property owners receive some initial recourse following the deprivation of their property, and also incentivizes taking authorities to exercise their significant eminent domain powers with discretion.

Turning to the statutory text, G. L. c. 79, § 8A, requires that the taking authority offer the property owner a reasonable amount "either in settlement under [G. L. c. 79, § 39,] of all damages for such taking . . . or as a payment pro tanto." The statute also provides that the taking authority must offer the pro tanto payment to the property owner within sixty days of the recording of the order of taking. Id. This language tracks other provisions of c. 79 that provide for a strict time frame for the payment of damages, as noted by the single justice. See G. L. c. 79, § 7B ("Any check for the payment of such damages [awarded in the order of taking] shall be issued either within sixty days after the right thereto becomes vested, or within fifteen days after demand therefor by any person entitled thereto is made . . . and shall, except as provided in section [G. L. c. 79, § 7D], be made immediately available to the persons entitled thereto . . .").

Although prompt payment of the pro tanto amount is clearly required under §§ 8A and 7B, the effect of challenging the taking itself is not addressed in either provision. General Laws c. 79, § 18, the statute that permits the property owner to challenge the validity of the taking, is not cross-referenced by either § 8A or § 7B. Moreover, the only legal challenge that § 8A describes is that of a property owner who seeks greater damages before a court, which the statute

allows even after the pro tanto payment has been accepted. That section provides: "If such person elects to accept the offer as a pro tanto payment, such election shall be without prejudice to or waiver or surrender of any right to claim a larger sum by proceeding before an appropriate tribunal." G. L. c. 79, § 8A. It does not, however, in any way discuss waiver of the right to challenge the taking itself. Therefore, while §§ 8A and 7B are clear that the city must offer the pro tanto payment within a relatively short time frame, and acceptance of the pro tanto payment does not constitute a waiver of one's right to challenge the amount of the taking, c. 79 is silent as to whether acceptance of that offer affects the plaintiff's statutory right to challenge the taking itself under § 18. In this sense, § 8A is somewhat ambiguous.

"'To the extent there is any ambiguity in the statutory language, we turn to the legislative history' as a guide to legislative intent." Matter of E.C., 479 Mass. 113, 118 (2018), quoting Ajemian v. Yahoo!, Inc., 478 Mass. 169, 182 (2017). We also seek, where possible, to "construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction." Lynch v. Crawford, 483 Mass. 631, 639 (2019), quoting DiFiore v. American Airlines, Inc., 454 Mass. 486, 491 (2009).

The purpose and importance of the prompt payment of pro tanto amounts is set out in the legislative history. The idea of a statutorily mandated pro tanto payment for takings under G. L. c. 79 was first proposed by the Judicial Council in 1957.[6] At the time, the Judicial Council stated that the twin purposes of a mandatory pro tanto payment were:

"[T]o stop interest on that [pro tanto] amount, thus protecting taxpayers, and to enable the landowner, whose life, business[,] and financial condition[] may be seriously interfered with, to get some payment with reasonable promptness without waiving his claim for more, if he wishes to submit his claim to a judge or jury. . . . In proposing a mandatory requirement of an offer and pro tanto payment, we realize that in dealing with many land takings a reasonable time is needed by the taking authority to examine title, to examine the land in many cases, to consider the various factors bearing on valuation and other matters of detail in administration before a considered offer and payment can be made."

Thirty-third Report of the Judicial Council, Pub. Doc. No. 144, at 72-73 (1957). Two years later, in the 1959 legislative session, the Legislature acted on the Judicial Council's recommendation and enacted G. L. c. 79, § 8A, into law. See St. 1959, c. 626, § 3. Although G. L. c. 79, § 8A, has been amended at various points over the years, the core of the statute has not changed. See, e.g., St. 1993, c. 110, § 135 (amending interest rate). "Since 1959, a pro tanto payment of damages must be tendered to the person whose land is taken." Fifty-third Report of the Judicial Council, Pub. Doc. No. 144, at 115 (1977). We have not located, in any version of § 8A, an express exception to such payment for when the property owner challenges the taking, nor have we located any discussion of such an exception in the legislative history.

The statutory text and legislative history do, however, reflect a recognition that, given that title to the property passes immediately to the taking authority upon the recording of the order of taking, eminent domain takings made under c. 79 may impose sudden and heavy financial burdens on property owners. Such individuals must necessarily contend with a period of delay in which they have neither their property nor just compensation for the taking, as time may be required to conduct further assessments of all damages reasonably owed to the property owner. This concern does not abate when the property owner seeks to challenge the validity of the taking, and the burden on property owner in these instances is perhaps even greater than on the property owner who accepts the pro tanto payment. Not only must the property owner initiate the legal challenge on his or her own accord, see G. L. c. 79, § 18, but the challenge must come after the taking has already occurred. As this case readily demonstrates, the resolution of such litigation may not come for years.

Furthermore, we must consider not just this particular property owner, who does not live on the property and appears to have the means to pursue this litigation without the benefit of the pro tanto amount. We must also consider the person of limited means who was living in his or her family home before it was taken, and who is determined to remain and contest the taking. Without the pro tanto amount, such a person may be forced to give up the family home, as without this payment, the person would have neither a place to live nor, perhaps, money to litigate.[7]

Most importantly, if the Legislature intended to condition acceptance of the pro tanto award on the waiver of one's right to contest the underlying taking, we conclude it would have written G. L. c. 79 to reflect this legislative judgment, as other States have done. For example, Cal. Civ. Proc. Code § 1255.260 (Thomson/West 2007), which governs eminent domain "quick takes" in that State, provides:

"If any portion of the money deposited [by a taking authority] pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation" (emphasis added).

Based on this clear statutory language, California courts have held that the acceptance of damages under § 1255.260 constitutes a waiver of one's right to contest the underlying taking, see Clayton v. Superior Court of San Diego County, 67 Cal. App. 4th 28, 33 (1998), as the statute reflects the California Legislature's "reasonable" judgment that a condemnee must choose between either accepting preliminary damages or contesting the taking, Mt. San Jacinto Community College Dist. v. Superior Court of Riverside County, 40 Cal. 4th 648, 665-666 (2007). Other States have enacted similarly clear laws concerning the acceptance of damages for eminent domain quick takes. See S.C. Code Ann. § 28-2-490 (condemnee who withdraws

damages deposited with court "waives all objections and defenses . . . to the taking of his property, except for any claim to greater compensation").

No such language appears in our statute. In drafting G. L. c. 79, the Legislature was attentive to the issue of waiver, as it expressly stated that acceptance of a pro tanto award would not constitute a waiver to a challenge to the amount of the award. However, no further discussion of waiver appears in the chapter. While the Legislature may choose to amend G. L. c. 79 to provide for such an express waiver, the chapter as it is currently written does not condition acceptance of the pro tanto award on waiving one's right to contest the taking. Eminent domain statutes must also, as we have previously explained, be strictly construed to protect individual property rights. See Providence & Worcester R.R., 453 Mass at 141; Devine, 449 Mass. at 506.

In sum, given the enormous power that the quick take statute provides, which immediately transfers ownership of the property from the land owner to the taking authority independent of judicial processes, the clear requirement of a pro tanto payment, the absence of any statutory provision waiving pro tanto payments when the taking itself is challenged, and the requirement to strictly construe G. L. c. 79 to preserve individual property rights, we conclude that a property owner may accept the pro tanto amount and simultaneously challenge the lawfulness of the taking.

3. Distinguishable case law. The city argues that, per G. L. c. 79, § 3, the plaintiff's right to the pro tanto payment has not yet vested because venerable case law provides that the plaintiff cannot accept the pro tanto payment so long as he contests the validity of the taking. The city relies primarily on Opinion of the Justices, 360 Mass. 894, 899-900 (1971), in which we stated that a property owner who files a petition for damages under G. L. c. 79, § 14, or accepts a settlement of damages under G. L. c. 79, § 39, cannot simultaneously challenge the validity of the taking. The city also cites Barnes v. Springfield, 268 Mass. 497, 502-503 (1929), in which this court concluded that petitioners who accepted damages awarded by the Superior Court for the taking of their real property could not thereafter contest the lawfulness of the taking.

We find the city's argument unpersuasive for several reasons. First, the very point the city relies upon in Opinion of the Justices was expressly overruled just three years later. In Raimondo v. Burlington, 366 Mass. 450, 450 (1974), we considered "whether a landowner can maintain a suit challenging the validity of a taking of her property and at the same time file a petition for the assessment of damages under G. L. c. 79, § 14." We held that a property owner may do so in light of the adoption of Mass. R. Civ. P. 18 (a), 365 Mass. 764 (1974), which eliminated the distinction between actions at law and suits in equity. Id. at 451-452.

Second, and more importantly, the Massachusetts cases cited by the city are inapposite. Opinion of the Justices and Barnes concerned a property owner's petition for, or

acceptance of, judicially awarded final damages, and not a statutorily mandated pro tanto award as provided for in G. L. c. 79, § 8A. We have long recognized that:

"A payment pro tanto is merely what is implied by its name and is not a final settlement. It is a payment '(f)or so much; for as much as may be; as far as it goes.' Black's Law Dictionary [1364 (4th ed. rev. 1968)]. The statute plainly distinguishes between a payment pro tanto and a final [damages] settlement."

Horne v. Boston Redev. Auth., 358 Mass. 460, 464 (1970). Cf. G. L. c. 79, § 39 ("Every settlement under this section shall be in writing and in full satisfaction of all damages for such taking with interest thereon and taxable costs, if any" [emphasis added]). This distinction is also supported by the fact that pro tanto awards are often far below the final damages amounts that are ultimately awarded to the property owner. See, e.g., R. H. White Realty Co. v. Boston Redev. Auth., 371 Mass. 452, 453 (1976) (pro tanto award was $1,171,000 while jury awarded damages in amount of $2,850,000); M.B. Claff, Inc. v. Massachusetts Bay Transp. Auth., 59 Mass. App. Ct. 669, 671 (2003), S.C., 441 Mass. 596 (2004) (pro tanto award was $80,000 while jury awarded damages in amount of $700,000). For these reasons, the Massachusetts cases cited by the city do not constitute authorities "otherwise provided by law," G. L. c. 79, § 3, that would prevent the plaintiff from accepting the pro tanto award.[8] Accordingly, we conclude that the case law as well as the text of G. L. c. 79, as informed by its legislative history, do not condition a property owner's acceptance of the pro tanto payment under G. L. c. 79, § 8A, on waiving his or her right to contest the validity of the taking under G. L. c. 79, § 18.[9]

4. Appellate attorney's fees and compounded interest. Finally, the plaintiff seeks an award of double appellate attorney's fees, costs, and compounded interest on the pro tanto amount under Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), which permits such an award where an appellate court determines that an appeal is frivolous. "An appeal is frivolous, so as to risk potential imposition of a sanction, where there can be no reasonable expectation of a reversal under well-settled law." Marabello v. Boston Bark Corp., 463 Mass. 394, 400 (2012), citing Avery v. Steele, 414 Mass. 450, 455 (1993). In addition, the determination "whether an appeal is frivolous is left to the sound discretion of the appellate court." Oxford Global Resources, LLC v. Hernandez, 480 Mass. 462, 478 (2018), quoting Marabello, supra. Furthermore, "[w]e are hesitant to deem an appeal frivolous and grant sanctions except in egregious cases." Symmons v. O'Keeffe, 419 Mass. 288, 303 (1995). Although we affirm the single justice's order, the city's appeal here was not frivolous, because it involved a novel question of law that this court previously did not have occasion to address. Therefore, we decline the plaintiff's request.[10]

Conclusion. We hold that G. L. c. 79 permits the plaintiff to accept the pro tanto payment under G. L. c. 79, § 8A, and simultaneously challenge the validity of the underlying taking under G. L. c. 79, § 18. Accordingly, we affirm the order of the single justice in the Appeals Court,

vacating the decision by the Superior Court judge that denied the plaintiff's motion to compel payment of the pro tanto amount, and we remand the matter to the Superior Court for further proceedings consistent with this opinion.

So ordered.

footnotes

[1] Individually and as trustee of Equity Realty Trust.

[2] Our decision is limited to takings made pursuant to G. L. c. 79 and does not address takings made under any other authority, including G. L. c. 80A.

[3] Massachusetts also has a statutory framework for so-called "straight condemnations," in which no taking occurs until the amount of valuation of the property is determined by a court. See G. L. c. 80A. However, the vast majority of eminent domain takings in Massachusetts are made under G. L. c. 79. See Massachusetts Municipal Law § 30.2, at 30-2 (Mass. Cont. Legal Educ. 2d ed. 2015) (characterizing G. L. c. 80A as "a rarely used alternative procedure" for eminent domain takings because "it is a lengthy, cumbersome procedure with its own pitfalls that may offset any perceived advantages [compared to G. L. c. 79]").

[4] General Laws c. 79 refers throughout to the "board of officers" who have made a taking and the "body politic or corporate" on behalf of which a taking was made. For brevity, in this opinion we simply refer to the "city" or "taking authority."

[5] General Laws c. 79, § 7D, expressly provides two bases on which a damages payment can be withheld: (1) when the taking authority cannot ascertain the identity of the property owner; or (2) when the property owner is "under a legal disability" from receiving the payment. In either case, the taking authority is required to place the damages award in a savings account, where it is to remain until the property owner can withdraw it. Id. Neither of these exceptions apply here.

[6] As we recently noted:

"The Judicial Council was created in 1924 when a legislative commission suggested it be implemented to 'make a continuous study of the courts, report annually to the Governor on the work of the judicial branch and suggest rules of practice and procedure to the courts.' Johnedis, 'Creation of the Appeals Court and Its Impact on the Supreme Judicial Court,' The History of the Law in Massachusetts: the Supreme Judicial Court 1692-1992, at 451 (1992). It was comprised of judges from various courts and lawyers, and eventually played a significant role in the founding of the Appeals Court. Id."

Commonwealth v. Billingslea, 484 Mass. 606, 611 n.8 (2020).

[7] We acknowledge that challenges to takings also impose significant burdens on taking authorities. The city notes that construction financing of public projects is unavailable to municipalities so long as there is an outstanding challenge to the title of the property. Allowing

property owners to both accept pro tanto amounts and contest the lawfulness of the takings may also increase the number of such challenges. In addition, the city contends that if the taking is ultimately found to be unlawful, the detriment it would suffer from the stalled public project is compounded by the risk that the property owner may not be able to repay the full pro tanto amount. Therefore, according to the city, the plaintiff would be unjustly enriched, insofar as he could contest title to the property and "have the benefit of spending the [p]ro [t]anto award while the [c]ity is deprived of any productive use of the property."

We note, however, that G. L. c. 79, § 8A, provides that, should final damages be less than the pro tanto award, the property owner is required to repay the difference back to the taking authority, along with interest. Thus, the Legislature has already accounted for the possibility that a property owner may be required to return some undefined portion of the pro tanto amount to the taking authority, and the taking authority assumes the "risk" that the property owner may not be able to do so. That risk also exists in the event a property owner successfully challenges the taking, although obviously the amount of money that must be returned would be greater. In such cases, as the single justice reasoned, the city's interest in recouping the pro tanto amount can be protected by the imposition of a judicial lien on the property. See G. L. c. 223, § 42. Accordingly, we agree with the single justice that "[u]nder the statutory scheme, the risk, if any, is to be borne by the city, not by landowners who have been deprived of the use and enjoyment of their property."

[8] The city also relies on a number of out-of-State cases. Because those cases involved statutes that differ from ours, we decline to adopt their reasoning. We also discern no "universal principle" concerning the acceptance of pro tanto amounts for eminent domain "quick takes," as the case law and statutes in other jurisdictions appear to differ widely.

[9] However, our decision does not address or resolve the issue of "accrued interest" on the pro tanto amount. General Laws c. 79, § 8A, states:

"After a pro tanto payment has been made or after an offer of payment has been made in writing as required by this section and not accepted, no interest shall be recovered except upon such amount of damages as shall upon final adjudication be in excess of said payment or in excess of the written offer of payment as herein described."

Here, interest on the pro tanto amount was frozen when it was offered by the city at the time of the taking. If the plaintiff is ultimately successful in challenging the taking, then he would be required to return the full pro tanto amount to the city, "plus costs and interest at the rate calculated pursuant to the provisions of [G. L. c. 79, § 37,] from the date when such damages were assessed." Id. Conversely, if the plaintiff is ultimately unsuccessful in challenging the validity of the taking, then G. L. c. 79, § 8A, permits the plaintiff to recover interest on the final

damages amount, provided that the amount of final damages exceeds the amount of the pro tanto payment. We also note that the plaintiff's pending action in Superior Court also contests the adequacy of the pro tanto amount, and the resolution of this claim could further affect the calculation of any interest owed to the plaintiff. Given these pending considerations, we conclude that an award of accrued interest on the pro tanto amount is premature at this time.

[10] We also decline the plaintiff's request that this court retain jurisdiction over this case until the city has tendered the pro tanto payment.