State of New Hampshire

v.

Vincent A. and Carol E. Malnati

Docket No.: 19397-98-ED

REPORT OF THE BOARD

This matter arises as a result of the "Condemnor's" conversion of its existing railroad right-of-way easement into a "fee simple absolute" interest, pursuant to RSA 228:60-a, V, thus extinguishing the "Condemnees" residual underlying property rights in a portion of the railroad corridor know as the "Cheshire Branch" in Walpole, New Hampshire. As provided by RSA 228:60-a,V, the Condemnees' petition, initially filed in Cheshire County Superior Court, was transferred to the board by a September 24, 2002 court order. After a limited hearing, the board issued an October 15, 2003 order ruling the "date of taking" occurred on January 10, 1998, the date the Condemnor published the second statutorily-required public notice. Due to the taking occurring as the result of the procedure laid out in RSA 228:60-a, no plan (as normally required by RSA 498-A:5,
II (e)) was submitted; however, the parties agreed the railroad right-of-way had an average width of approximately 90 feet, a length of 2,880 feet and an area of approximately 5.95 acres.

RSA 498-A:25 authorizes the board to hear evidence relative to an eminent domain condemnation and determine just compensation for the taking. In this process, the Condemnor has the burden of proving by a preponderance of the evidence the amount offered will justly compensate the Condemnees. See TAX 210.12 and cases cited therein.

The board took a view and held a just compensation hearing at the Cheshire County Superior Court on November 9, 2004. The Condemnor was represented by Craig S. Donais, Esq. and the Condemnees were represented by Thomas J. Donovan, Esq. and Rachel A Hampe, Esq.

Ms. Pamela A. Nostrand of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire, (603) 669-7922 took the stenographic record of the hearing. Any requests for transcripts should be ordered directly through the reporter. Parties should expect at least four (4) weeks for completion of a requested transcript.

The "Property" before and after the taking consisted of an operating dairy farm and residence on approximately 173 acres. The Property is bisected in a northerly/ southerly direction by the railroad right-of-way at issue with approximately 38 acres, including the residence and barns on the east side and fronting on Rte 12-A, and approximately 135 acres on the west side with extensive frontage on the Connecticut River.

Board's Rulings

Determining just compensation in this case requires the board to consider two ultimate issues: first, whether the conversion of the Condemnor's interest (from an easement to fee simple ownership as of January 10, 1998) is a compensable taking under New Hampshire law; and second, if so, the amount of just compensation arising from the taking. The board finds, for the reasons presented below, that a compensable taking did occur and the amount of just compensation to the Condemnees is $30,000.

A third disputed issue, since the Condemnees have been found to be the prevailing parties, is their request for an award of attorneys' fees. As explained below (in Section C), the board finds no basis for making such an award in this case.

A. The Taking is Compensable

The board disagrees with the Condemnor's main arguments that either because (i) of the "easement as recorded in the Railroad Records" going back to 1846 or (ii) "the authorization contained within RSA 216-F," the taking did not adversely affect the Condemnees' property rights and, therefore, nothing other than nominal (pro rata) compensation is required.

1. The Railroad Easement

The board has reviewed the documents supplied by the parties dating back to the mid-19th century when the easement was established, as well as the prior superior court and supreme court decisions involving the same parties. As noted in the supreme court opinion, the State acquired a "railroad easement" in 1846 through the property now owned by the Condemnees. Malnati v. State, 148 N.H. 94, 95 (2002). "There has been no rail activity on the easement for more than twenty-five years, and the railroad bed is overgrown." Id.

The board disagrees with the Condemnor's ultimate argument that a railroad easement, for all practical intents and purposes, conferred rights equivalent to the fee simple absolute interest, which the Condemnor has taken and thus no further diminution of the Condemnees' property rights has occurred. Stated another way, the board disagrees with the argument that in 1846 the State acquired all the rights it would need to transform the now abandoned railroad right of way (held as an easement) into a corridor owned in fee simple absolute. The board makes these findings after considering the many, somewhat conflicting, statutory, case and other authorities cited by the parties.

As a practical matter, a railroad easement (even in circumstances where the railroad is still active) involves a singular use at often predictable and relatively limited times during the day and limited to a narrow part of the right of way (the railroad track itself). The burdens on the Condemnees in this case, owners of the dominant tenement subject to the easement, are substantially less than those imposed by a recreational trail usage, especially when motorized vehicles are permitted. Similar reasoning suggests that a railroad easement (right-of-way) involves fewer burdens than a "public highway," despite the legal analogy emphasized by the Condemnor in this case.[1] Because public highways often involve frequent vehicular and pedestrian ingress and egress points, it differs in fundamental ways from railroad passenger or freight transport along a fixed track.

Notwithstanding the Condemnor's position, the board finds the railroad easement acquired in 1846 is <u>not</u> sufficiently broad and expansive enough to accommodate other uses fee simple ownership allows, such as recreational trails. If it were, then it would seemingly have been unnecessary for the Condemnor, as a practical matter, to go through the taking process in 1998, as the Condemnees have argued.

The board disagrees, however, with the Condemnees' further argument (in their "Post-Hearing Memorandum" at pp. 5-6) that "collateral estoppel" applies with respect to the issue of the "scope of the railroad easement." While the Condemnees did prevail in the prior superior court "quiet title" action and a ruling was made on this issue, the issue was preserved on appeal by the Condemnor and not decided in either party's favor by the supreme court: instead, the supreme court reversed the trial court on other grounds. <u>Malnati</u>, 148 N.H. 95 and 101. ("We therefore need not address the trial court's ruling regarding the scope of the original easement.") As a result, the board finds, there was never a 'final' resolution "on the merits" of this issue. <u>Cf</u>. <u>Appeal of Wingate</u>,

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[1] The Condemnor refers to a railroad (right-of-way) "as a specialized form of public highway, with public use expressly contemplated and established." <u>See</u> Condemnor's Memorandum of Law, p. 4. Whether railroads should now be viewed as "public highways," however, is clearly open to question. <u>See</u> <u>N.H. Motor Transport Assoc. v. State</u>, 150 N.H. 762, 764, 768-69 (2004) (where the State argued "railroads constitute public highways . . ." based on "several railroad cases from the 1800s," but the court ruled: "[t]he issue is not, however, whether railroads have been equated with public highways in certain legal contexts all predating the use of motor vehicles . . . . [W]e hold that Article 6-a [of the New Hampshire Constitution] was designed to insure that highway funds would be used exclusively for highway purposes and that such purposes do not include railroads.").

149 N.H. 12, 15-16 (2002) (cited by the Condemnees themselves for the elements necessary for collateral estoppel to apply).

The board therefore makes its own finding that the easement acquired by the State in 1846 was for railroad purposes, a finding amply supported by the documents submitted. For example, the "Lease to Railroad Commission" document (executed in 1847 with respect to the Cheshire Railroad Company, attached as Exhibit 1 to the Condemnees' "Post-Hearing Memorandum"), grants a lease for a maximum term of 200 years with the "right to construct a rail road [sic] . . . and for other usual and necessary purposes of a railroad."[2]

The board's finding is also supported by the case law construing railroad right of ways in New Hampshire. See, e.g., Bailey v. Sweeney, 64 N.H. 296, 297 (1887):

> [L]and that had been a part of the plaintiff's farm [was] taken for railroad purposes. The fee in the land taken for a railroad remains with the owner from whom the land was taken. The railroad [has] the possession and control of the land to use for constructing, maintaining, and operating a railroad.

While ancillary uses might be contemplated and could arguably evolve over time, using the right of way as part of a recreational trail system is not a use for railroad purposes. "The grantee of a way is restricted to the specific use set forth in his grant." Chapin v. The Sullivan Railroad, 39 N.H. 564, 567 (1859).

2. The Statutory Taking of a Fee Simple Absolute Interest

The board has also reviewed the statutory framework established by the legislature for what is popularly known as the 'rails to trails' program. RSA 216-F (Multi-Use Statewide Trail System) does authorize the commissioner of the department of resources and economic development ("DRED") to acquire "by purchase, gift or devise of any land, including but not limited to abandoned railroad . . . rights of way . . . for the purpose of protecting or developing a statewide trail system." See RSA 216-F:1.

By agreement, the State's department of transportation ("DOT") granted DRED the authority to use and maintain certain rail corridors acquired by DOT, including the right of way at issue in this proceeding, for recreational purposes as part of the "Statewide Trails System" envisioned in RSA 216-F. (See "Cooperative Agreement" dated January 23, 1996 attached as Appendix 2 to the Condemnor's "Memorandum of Law.") On January 10, 1998, DOT completed the process prescribed in

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[2] See also the Condemnees' "Reply to the State's Memorandum of Law" at p. 6: "[t]he servitude in the present matter was created by the 1844 Statute, and specifically granted the railroad the right 'to pass and repass with their locomotives, cars and vehicles of transportation thereon, and for other usual and necessary purposes of a railroad . . . .' Laws 1844, 128."; and Blake v. Rich, 34 N.H. 282, 288-89 (1856), also cited in the Condemnees' "Reply" at p. 2.

RSA 228:60-a, V, of declaring ownership in fee simple absolute of the railroad right of way. Malnati, 148 N.H. at 96.

Overruling the earlier due process and equal protection challenges of the Condemnees (as the plaintiffs in a "quiet title" action), the supreme court concluded the Condemnor, pursuant to RSA 228:60-a, V, "has taken the railroad right-of way through the plaintiffs' property in fee simple absolute." Id. at 101. Far from ruling that such a taking could not be a compensable taking, however, the supreme court expressly acknowledged that even owners of "heavily burdened property" (such as, in this case, property subject to a long-term railroad right of way) could be entitled to compensation, id. at 99, when there is a showing that their rights are further diminished by the taking. Consistent with this supreme court decision, the board finds the declaration published by the DOT enlarged the Condemnor's property rights from a non-possessory ("easement") to a possessory ("fee simple absolute") interest and correspondingly diminished the Condemnees' property rights.

In brief, neither the statutes nor the cases cited by the Condemnor imply that the acquisition of rights in a rail corridor, when it extinguishes or diminishes private property rights, can or should occur without compensation to the affected property owner. To the contrary, and regardless of whether an express constitutional mandate exists, the supreme court has consistently construed the New Hampshire Constitution to require the payment of compensation when private property rights are taken for public uses. City of Manchester v. Airpark Business Ctr. Condo. Unit Owners' Assoc., 148 N.H. 471, 473 (2002). Consequently, the board finds a compensable taking did occur when the Condemnor acted to enlarge its rights from an easement to a "fee simple absolute" interest in the railroad right of way running over the Property and therefore will next consider what just compensation the Condemnees are entitled to receive.

B. Just Compensation

Determining just compensation damages requires the board to consider, in more detail, how the Condemnees' property rights have been adversely affected by the taking. The board normally finds the evidence for such damages in the appraisals submitted by the parties' experts. In this case, however, the board finds the Condemnor's appraisal (the "Leidinger Appraisal," Condemnor Exhibit 1) to be less than satisfactory. The Leidinger Appraisal, while informative in other respects, made a critical assumption as directed by the Condemnor's attorney, which the board disagrees with, that the effect of converting the Condemnor's interest from an easement to a "fee simple absolute" interest is "limited."[3] Therefore, the Leidinger Appraisal assumed no change occurred in the "before" and "after" value of the Property. Based on the evidence presented, the board disagrees with these conclusions.

[3] On page 47, for example, the Leidinger Appraisal concludes: "Neither the utility, access between portions of the owners' [Condemnees'] site, nor the authority to use the ROW [right of way] area changes in the Before and After situations."

The board recognizes the Condemnor will likely not agree with the board's rulings and findings. The pivotal issue in this case is whether the original easement acquired by the State in 1846 for railroad purposes was broad enough to encompass subsequent recreational purposes and that the fee acquisition pursuant to RSA 228:60-a did not add to or significantly change the nature of the State's rights to the former railroad right-of-way. For the reasons enunciated earlier in this Report, the board has ruled the fee acquisition did, to a significant and compensable degree, expand the burden of the original easement. Having ruled so, the Condemnor has failed in its burden of proof (again, see TAX 210.12 and cases cited therein) because its estimate of damages, embodied in the Leidinger Appraisal, is predicated on an incorrect legal premise.

After the board's ruling on the pivotal legal issue, its findings relative to damages is based on its review and choice of the best evidence of the taking's effect on the Property's market value. All evidence clearly indicates the highest and best use of the Property is as a dairy farm or other forage/livestock type enterprise. Therefore, to determine if the taking results in any severance damages, market factors that relate to the utility of the Property as a forage/livestock farm need to be considered. These must be factors the typical owner/purchaser would consider, not factors that relate to a specific owner's relationship to a property. The Condemnees presented testimony of individuals that are knowledgeable both firsthand (Raymond Nicol, a farmer) and academically (John Porter, University of New Hampshire Cooperative Extension Service, Dairy Specialist) as to the effects of increased exposure of recreational vehicles to crop land. The Condemnee's appraiser, Laura Davies, also interviewed several landowners (that have similar exposure to recreational trails) as to their experiences and perceived effect on the utility of their land for agricultural purposes. While recognizing this evidence may not be entirely objective, the board nonetheless concluded that exposure to public recreational trails is generally a negative market factor that would be considered by the agricultural sub-market.

While the Davies consulting report (Condemnee Exhibit B) attempted to quantify the severance damages, the board also considered the Condemnees' testimony of other additional measures of damages, such as the cost of fencing and gating the trail in the area of the farm road crossing, the loss of privacy and the cost to move the haylage bunker silo (visible in the photographs in Condemnee Exhibit A). Collectively, these estimates attempt to measure the severance damage generally by the "cost to cure" method (some expenses are capitalized to estimate a loss in value, while others (such as fencing costs) were argued to be direct value reductions).

For the reasons already stated, the board gave some weight to the elements of the cost to cure method, as long as they were not overly speculative and were directly related to the Property and not necessarily the owners. (For example, we determined the increased loss of privacy for personal uses of the farm as testified to by the Malnatis, while a genuine concern to them, was not of such a magnitude as to be widely recognized by the agricultural sub-market). Further, the board, in its deliberations, acknowledged the "cost to cure" method tends to "laundry list" damages that are a consequence of the

taking and this process inherently equates, dollar for dollar, cost to loss of value. Often, as is the case here, however, the cost to cure exceeds the actual loss in value that the market would recognize as a whole. (See 4A Nichols on Eminent Domain, 14A.04[3] and [6] (Rev. 3d Ed. 2004)). Said another way, the damage must be shown to affect the Property's overall market value rather than being consequential damages calculated on an álá carte basis. Consequentially, the board has tempered the estimate of damages that results from the Condemnee's cost to cure method, but we conclude the damages result in a reasonable estimate of the Property's loss of market value as a whole.

In making its findings on just compensation, the board considered the evidence as a whole, including the analysis done by each expert (Mr. Leidinger and Ms. Davies) and the relevant testimony on the likely impact of such a taking on the market value of farm property. Among other things, the board took into account Ms. Davies' estimate of impacted area and Mr. Leidinger's physical measurements and the per acre value estimate both experts agreed upon, but concluded Ms. Davies' severance damage estimate is overstated (based on her calculations: 300 feet impacted x 6,280 linear feet = 43.25 acres x $1,800 per acre x 50% "change in use" adjustment ~ almost $40,000).

The factors the board finds participants in the agricultural sub-market would likely consider, and thus be reflected in the Property's market value, are some additional farm operating expenses related to litter control, nuisance abatement, and installation and maintenance of fences and gates, particularly in the area of the "at-grade" crossing.[4]

During the view of the Property, the board noted the Malnatis had, in areas of the former right-of-way, cut the trees and brush so their growth and shade would not impede the growing and harvesting of forage crops in the adjoining field edges. The right for the underlying fee owner to cut the "herbage" within the right-of-way is long established in case law. Bailey v. Sweeney, 64 N.H. 296 (1887); Chapin v. Sullivan, 39 N.H. 564 (1859); Blake v. Rich, 34 N.H. 282 (1856). After the taking, however, the Malnatis no longer have that legal right to cut the trees and brush on the state corridor, and thus, some of the effective area of the fields along the corridor is lost for unimpeded growth of forage crops. In essence, having an approximately 100 foot wide strip of land bisecting the fields and no longer having the ability to control the tree growth on that strip is a factor that would be recognized by the agricultural sub-market.

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[4] The Condemnor argued the "at-grade" crossing was not a legal crossing as the Malnatis had never made application for a crossing at that location. The board did review RSA 373:1-a, III (the statute authorizing the department of transportation to adopt rules relative to such crossings) and the TRA 801 rules (expired October 4, 2003) which, when in effect, required an initial $350 application fee and a $50 annual renewal fee. However, the board need not rule on the legality of the crossing to note the Malnatis purchased the Property in 1988 with the "at-grade" crossing in place and with knowledge that the two historical underpasses were not adequate due to size and, in one instance, adjacent wetlands and to conclude that any purchaser subsequent to the taking would likely continue to use the "at-grade" crossing, thus necessitating some fencing and gates to restrict any public use of the state corridor from straying onto the Malnatis' fields.

The board also considered, but rejects, the Condemnees' assertion that the cost of moving the haylage bunker silo out of the state corridor is an element of damages. No compensation for the relocation of the bunker silo is warranted as it was an encroachment in the easement area before the taking and would have been in the way if the railroad had needed to utilize the area where the portion of the bunker silo is located for its own purposes.

Considering these factors, and again acknowledging that compensable damages are not necessarily dollar for dollar consequential damages, but rather those that would manifest themselves in a reduction of the Property's overall market value, the board finds $30,000 is the most reasonable estimate of just compensation for the taking.

C. Costs/Attorneys' Fees

If neither party appeals the board's award, the board shall award costs to the prevailing party. RSA 498-A:26-a; see also RSA 71-B:9; TAX 210.13 and 201.39. In this case, the Condemnee is the prevailing party because the board's award exceeds the Condemnor's offer (or deposit) of damages. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). The Condemnee may file a motion for costs within forty (40) days from the date of this Report if neither party appeals the board's award. The motion must include the following:

1) an itemization of the requested costs, TAX 201.39;

2) a statement that the prevailing party sought the other party's concurrence in the requested costs, TAX 201.18(b); and

3) a certification that a copy of the motion was sent to the other party, TAX 201.18(a)(7).

If the other party objects to the request for costs, an objection shall be filed within ten (10) days of the motion.

A list of recoverable costs can be found in Superior Court Rule 87. Expert fees are limited to reasonable fees incurred for attending the hearing. No fees are recoverable for preparing to testify or for preparing an appraisal. See Fortin, supra, 133 N.H. at 158.

The Condemnees' argument for an award of attorneys' fees, however, is denied. While RSA 71-B:9, as amended effective January 1, 2004, gives the board authority to make such an award ("Costs and attorney's fees may be taxed as in the superior court"), circumstances where the superior court in its discretion awards such fees are extraordinary and quite limited.

In the earlier Malnati case, the supreme court reversed an award of attorney's fees to the Condemnees (as plaintiffs) by the superior court. 148 N.H. at 101. (The superior

court had based its award of attorneys' fees on a finding the Condemnees "prevailed on their constitutional challenges . . . and that they 'substantially [benefited] themselves, similarly situated citizens, and the public in general.'" Id.)

Here, the Condemnees base their claim for attorney's fees on "two grounds" stated in their "Post-Hearing Memorandum" at pp. 24-25. The board finds no merit in either ground.

First, the board disagrees with the Condemnees that the position taken by the State and its appraiser that no damages resulted from the taking, while it has been found to be unsustainable in this Report, was a product of "oppressive, arbitrary, capricious and bad faith conduct . . . ." The parties clearly disagreed regarding the substantive issues in this case, but the board cannot find, given their uniqueness, and the extensive preparation and briefing by both sides on issues of first impression, that an award of attorney's fees against the Condemnor should be entered. The board notes, in passing, that the prior Malnati "quiet title" superior court case was also closely contested and that ultimately the Condemnor prevailed in that action as a result of the supreme court's reversal of the superior court's decision. The fact that the Condemnor did not prevail here in meeting its burden of proving just compensation does not mean an award of attorney's fees is proper.

Second, the board finds the case authority cited by the Condemnees for the proposition that fees should be awarded "for defending the public interest from improper takings under RSA 228:60-a" to be distinguishable. Post-Hearing Memorandum at p. 25. Neither the supreme court nor the board has found the taking to be "improper" under RSA 228:60-a; rather the board is simply finding that a higher award of just compensation is warranted for this statutory taking.

In addition, Burrows v. City of Keene, 121 N.H. 590, 601 (1981), cited by the Condemnees, is clearly distinguishable both in facts and in its holding. As explained in Arcidi v. Town of Rye, 150 N.H. 694, 704-05 (2004) (also cited by the Condemnees), Burrows involved a sustained claim founded on inverse condemnation, not a properly declared taking where the amount of just compensation is the central issue. More importantly, as noted in Arcidi, further findings (such as that "an appeal is frivolous, immaterial, intended for delay or in bad faith") are needed to merit an award of attorney's fees. Id. The board finds no sufficient basis exists for making such findings in this case.

In summary, the Condemnees in this proceeding are entitled to their costs, but not attorney's fees.

D. Appeal Rights and Interest on Award

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Cheshire County Superior Court to have the damages reassessed. This petition must be filed within twenty (20) days from the clerk's date below. See RSA 498-A:27.

If the board's award exceeds the damage deposit, and if neither party appeals this determination, the Condemnor shall add interest to the excess award. The interest rate is established under RSA 336:1. Interest shall be paid from the taking date to the payment date. See RSA 524:1-b; TAX 210.11.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Craig Donais, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, New Hampshire 03301-6397, counsel for the State of New Hampshire, Condemnor; and Thomas J. Donovan, Esq. and Rachel Hampe, Esq., Mclane Graf Raulerson & Middleton, Post Office Box 326, Nine Hundred Elm Street, Manchester, New Hampshire 03105, counsel for the Condemnees.

Date: March 21, 2005

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Anne M. Stelmach, Deputy Clerk