

**Town of Belmont**

**v.**

**Ronald W. Jaynes, Pamela R. Jaynes and Pemigewasset National Bank**

**Docket No.: 19399-02ED**

**REPORT OF THE BOARD**

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the construction and maintenance of a public sewer (the “Silver Lake Sewer Project”) pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 31:92, RSA 149-I-2, RSA 149-I:19 and RSA 149-I:24. A Declaration of Taking (“Declaration”) was filed with the board on October 28, 2002, describing the property rights taken as a permanent easement twenty feet in width and “[t]emporary construction easements” of unspecified duration ten feet in width “adjacent to each side of the permanent easement.” These easements are along what is described as an “existing road right of way” located on Lot 1 of Tax Map 118 in Belmont, New Hampshire (the “Property”). See Exhibit A to the Declaration.

Ronald W. Jaynes and Pamela R. Jaynes (the “Jaynes”) are fee owner “Condemnees” and filed a preliminary objection challenging the necessity, public purpose and net-public benefit of the taking. Pursuant to RSA 498-A:9-b, the preliminary objection was transferred by the board to the Belknap County Superior Court for resolution. On May 23, 2003, the superior court denied the preliminary objection.

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 viewed the Property and held the just compensation hearing at its offices on January 29, 2004. The Condemnor was represented by Philip T. McLaughlin, Esq., and the Jaynes represented themselves.

Karen L. Wright 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 approximately 10.56 acres with 575 feet of frontage on Silver Lake, including a sandy beach, boat docking and other recreational amenities, and is operated as a seasonal campground. From the deed, it appears the Property is also subject to electric utility and telephone easements and an access right-of-way easement to an abutting property.

### **Board's Rulings**

#### **A. Issues Presented**

The parties fundamentally disagree as to whether and by how much the taking affected the value of the Property. The Condemnor submitted an appraisal by William J. McLean, III, concluding there was no difference in the before and after values of the Property by reason of the taking of the easements for the Silver Lake Sewer Project. The Condemnor nonetheless deposited a sum (\$1,386) with the board as damages for the taking. The chairman of the Sewer Commission (Richard Fournier) testified this sum is obtained by rounding the damages to \$1 per lineal foot of easement, based on a calculation by the appraiser using an estimate of the market value of the land (\$246,000) and the proportion of the land subject to the easement (19,600 square feet/total land area of 459,994 square feet = 4.3%), times an estimate of the fraction of the total value of the land represented by the easement (10%). See Condemnor Exhibit 3, pp. 48 and 50.

The Condemnees challenge this computation and further assert the Condemnor is liable for substantial damages both to their campground business and to the remaining land caused by the construction of the public sewer. In response, the Condemnor argues it is not liable for any incidental or consequential damages, including damage to the campground business. The Condemnor also argues any claims for physical damages to the Property, as a result of the work performed are not properly awarded in an eminent domain action but can be redressed through other available remedies, such as the filing of claims for alleged deficiencies in the work performed by the engineer and contractor (through a "punch list" procedure).

#### **B. Specific Compensation Claims**

The board overruled the various evidentiary objections made by the Condemnor and considered in some detail various specific compensation items claimed by the Condemnees. The Jaynes itemized their claims in Condemnee Exhibit K ("Itemization of Loss"). These claims fall into five discernible categories: (i) loss of revenues pertaining to the campground business; (ii) anticipated costs of hooking up to the new sewer line; (iii) attorney's fees; (iv) physical damage; and (v) value of the easements taken. Each of these categories will be considered below.

The board heard testimony regarding the nature of the campground and how central use of the sandy beach and shoreline areas are to the business. The board finds, however, that all lost revenues flowing from business disruptions caused by the work on the sewer line (total itemized loss of \$29,940) are not compensable in this eminent domain action. These include lost revenues from “Transient Sites,” “Pre-Bookings,” boat launch fees, visitor beach and playground fees, etc.

The substantial sewer hook-up costs claimed (\$26,000) are also not compensable in this eminent domain action. The Jaynes would have incurred hookup costs even if the sewer line had not been located on the Property. Any additional cost associated with the Town’s decision regarding where to locate the sewer line are also not compensable. The entire sewer line consists of approximately 11,000 feet, including the approximately 1,386 feet located on the Property. The Town has considerable discretion in deciding where to locate the sewer line and appears to have followed the proper procedures in doing so. Cf. RSA 149-I:1 (authority to construct sewers “necessary for the public convenience”); and RSA 149-I:19 (authority of town board of sewer commissioners).

Attorney’s fees (\$3,000) incurred by the Jaynes in seeking legal advice are also not compensable. It appears the Jaynes previously consulted several attorneys, but represented themselves before the board. (Awardable costs are discussed further at the end of this Report.)

Turning to the last two categories of the Condemnees’ damage claims, the board reaches different conclusions based upon its review of the evidence and the applicable law. The board’s focus must be on whether such damages are recoverable under state law, and not necessarily the “Uniform Appraisal Standards for Federal Land Acquisitions” cited by and relied upon by the Condemnor’s appraiser. The board has therefore reviewed applicable New Hampshire law, rather than accept the general statements in the appraisal regarding federal law, to determine whether the specific damages claimed by the Jaynes are compensable in this eminent domain action.

Eaton v. B.C. & M.R.R., 51 N.H. 504 (1872) contains a careful and lengthy analysis of issues analogous to the present case. In Eaton, the railroad acquired land on the plaintiff’s property and land from an adjacent owner; the railroad made a deep cut in the ridge on the adjacent land, causing water to flow onto other land belonging to the plaintiff that had not been acquired. The court concluded the railroad was liable for the resulting damage, whether the work was properly or negligently performed and whether the damage was viewed as “consequential” or not, because the additional flow of water constituted “a taking of the plaintiff’s property.” Id. at 516. Similarly in this case, the board finds the Condemnor is liable both for the easements actually taken and for any damages to other land caused by the construction of the sewer line on the easement where the construction, according to the evidence presented, caused changes in the flows of surface and subsurface waters. See also Sundell v. Town of New London, 119 N.H. 839, 845 (1979):

“One of the basic teachings of *Eaton v. B.C. & M.R.R.* is that under our law, ‘property’ refers to the right to ‘use and enjoy’ a thing, and is not limited to the thing itself. 51 N.H. at 511. Governmental action which substantially interferes with, or deprives a person of,

the use of his property in whole or in part, may therefore constitute a taking, even if the land itself is not taken. Id.”

In Paddock v. Durham, 110 N.H. 106 (1970), the question arose, as in this case, of the proper measure of just compensation for a taking in connection with the town’s construction of a sewer line on the plaintiff’s property, where the line was located along a shore line providing river recreation. In that case, a 20-foot permanent easement and a 30-foot temporary construction easement were taken and, as in this case, there was “evidence that the premises were never restored to their original condition.” Id. at 107. The court confirmed a jury award of \$6,000 in damages, noting that “the owner is entitled to recover the cost of restoring the premises to their original condition.” Id. at 108. The court also approved a jury instruction that, in an eminent domain action, condemnees “aren’t compensated for any annoyance, inconvenience or frustration that they may experience as a result of the taking . . .,” despite testimony of “noise from blasting, jackhammers, cement mixers, and heavy equipment; the stockpiling of dirt; water in the ditch; and mud from thawing and freezing.” Id. at 108-09. See also Capitol Plumbing & Heating Supply Co. v. State, 116 N.H. 513, 515, citing Paddock, supra, with approval and stating, “The usual rule of damages for a temporary taking is the fair rental value of the property for the period it was taken plus any actual damage sustained as a result of that taking. (Other citations omitted.)”

The board reads these cases to mean that a condemnee is entitled to recover the reasonable cost to cure damages caused by the work of the condemning authority, whether negligently performed or not, but not for any inconvenience or other hardship suffered while the work was being done. An analogy can be drawn to work on a public roadway adjacent to an existing business serving the public (such as a restaurant); in such cases, the property owner would not be entitled to damages based upon the inconvenience, hardship and even loss of business suffered while the road work was being performed due to diminished traffic flow, noise and so forth.

Before proceeding to resolve the specific physical damage claims of the Condemnees, the board will address the issue of “severance damages,” usually measured by the difference between the estimated “before and after” values of the Property.<sup>1</sup> The Condemnor’s appraisal, completed prior to the construction, implicitly assumed all work would be performed without damage to the remaining land (in other words, that the Property would be restored to its

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<sup>1</sup> The supreme court most recently addressed this issue in Daly v. State, \_\_\_ N.H. \_\_\_, 837 A.2d 340, 343 (November 24, 2003):

“In the context of a partial taking, the property owner is entitled to not only the fair market value of the property actually taken, but also compensation for the effect of the taking, if any, on the entire property, which is referred to as severance damages. City of Manchester v. Airpark Business Ctr. Condo. Unit Owners' Assoc., 148 N.H. 471, 473, 809 A.2d 777 (2002). The preferred method in this State for determining condemnation damages, including severance damages, in partial takings cases is the ‘before and after’ method, ‘whereby the value of the remainder of the tract after the taking is deducted from the value of the whole tract before the taking.’ Lebanon Housing Auth. v. National Bank, 113 N.H. 73, 75-76, 301 A.2d 337 (1973). This method automatically takes account of severance damages. Id. at 76.”

condition prior to the taking) and concluded the “before and after” values are the same, resulting in no severance damages. This assumption, however, proved to be invalid in this case. Arguably, if some of the items the board finds are compensable as damages caused by the project (specifically, the area of the easement not being restored to a similar condition as before construction) were not corrected, they could conceivably negatively affect the utility and value of the remaining land and thus be considered severance damages. However, because they can be cured by additional work (e.g., drainage swales, subsurface drainage, etc.), the board’s award for those items is based on the estimated cost to do the additional restorative work in keeping with the ruling in Paddock, supra.

The board’s findings rely on the testimony of the Jaynes and the documents submitted. The Condemnor chose not to cross-examine the Condemnees or to offer significant rebuttal evidence and neither the Condemnor’s appraiser nor representatives of the engineering firm or contractor were offered as witnesses. The board is also mindful that the burden of proof regarding the amount of just compensation rests with the Condemnor, not the Condemnees. See RSA 498-A:19 (“Issues of fact shall be determined upon the balance of probabilities and the burden of proof shall be on the condemnor.”); and TAX 210.12.

With regard to physical damages, the board finds compensation should be awarded for the items summarized below, with detailed findings following this summary.

Replacement of horseshoe pits	\$ 390
August, 2003 beach restoration	\$ 375 (rounded)
Cost to repair playground	\$ 700
Loss of three trees	\$ 300
Site work at beach retaining wall (Belknap Landscape Co. Item I a)	\$3,175
Installation of drainage swales (Belknap Landscape Co. Item I b and c)	\$2,500
Replenishment of beach sand (Belknap Landscape Co. Item I d)	\$ 950
Loaming and seeding remaining damaged areas (Belknap Landscape Co. Item II c)	\$ 900
Subtotal	\$9,290

The board finds the replacement and repair costs associated with the horseshoe pits and the playground due to construction disturbance and/or surface runoff are damages that were caused, or certainly exacerbated by, the installation of the sewer line and, thus, should be awarded. No evidence was submitted refuting the costs contained in the Jaynes’ “Itemization of Loss,” Condemnee Exhibit K; consequently, the board finds those estimates to be the best evidence as to the cost to restore the horseshoe pits and playground to their “before” condition.

Based on the photographs submitted and the remaining trees seen on the view, the board awards \$100, per tree, for the three trees taken by the Town on the southern property line. The board award is significantly lower than the Jaynes’ request for two reasons. First, because the trees were on the property line, it implies their value is shared between the Jaynes and their

abutter. Second, the trees did not appear to be high-value landscape trees but rather naturally-grown trees typical of what customarily grows along stone wall boundaries and provides some screening and separation between adjoining properties. Consequently, the board finds the Condemnees' estimate of \$1,500 to be quite excessive and a \$200 value per tree is more reflective of their shared value to both properties.

Further, the board finds any award for difference in the pre-taking grey, weathered stone wall rocks versus the post-taking un-weathered rocks is too subjective to justify the Jaynes' assertion of \$1,000 damages for this difference. Contributing to this determination is the fact that the stone wall was just a typical boundary wall with no evidence of having been maintained or restored since its 19<sup>th</sup> century agricultural origin. Also, the board finds the request of \$800 for installation of ferns in the disturbed area is unreasonable and not a recoverable damage in keeping with Paddock, supra. Ferns generally require a shaded habitat and with the trees gone, ferns may no longer be the appropriate landscaping to be put in place. While the property-line area is certainly different than before as the result of the sewer easement, the board finds the difference is subjective but not necessarily negative and, thus, any award for the difference, beyond the value of the easements addressed later in this Report is not warranted.

Conflicting evidence was submitted as to the nature of the existing soil and subsoil conditions generally in the campground and specifically in the area where the sewer line was installed. Nonetheless, based on the board's view of the Property and the chronology of damage that occurred to the beach and retaining wall area (Condemnee Exhibit B), the board finds the Town's installation of the sewer line likely affected the subsurface drainage in the beach area and contributed to some of the erosion conditions at the beach and retaining wall area. However, the board is not convinced all the damage that occurred was solely the result of the Town's work but rather could be partially attributed to the summer of 2003 being one of the wettest seasons in recent memory. Consequently, the board has awarded one-half of the Jaynes' requested compensation for the site work to install drainage behind the beach retaining wall and one-half the restoration cost request for the erosion to the beach from both the August and September wash-outs. Evidence was submitted (Condemnee Exhibit H) that the Town has already applied for and received approval from the New Hampshire Department of Environmental Services to perform the remaining beach restoration (for the September wash-out). The parties should work together to facilitate the transferral of that permit to the Jaynes, if such transferral is necessary for the Jaynes to complete the beach restoration this spring.

Based on the Jaynes' description of the drainage prior to the taking and the photographs submitted by both parties, the board concludes the after-construction grading of the land in the easement area and associated new paving does not accommodate the surface drainage in as adequate a fashion as it did prior to construction. Consequently, the board finds the several drainage swales listed in Belknap Landscape Co. Inc.'s Items I, b and c are reasonable mitigations for such surface drainage and pooling problems in the area of the easement and road.

The board was not convinced by the testimony and view that the pine trees at the northern half of the Property had sustained awardable damage either above ground or below. While some limbs had been snapped during construction, some pruning was subsequently done by the Condemnor. Again, these pine trees are not highly manicured landscape specimens, but rather,

typical “field grown” pine trees. Based on the photographic evidence of root disturbance during construction (Condemnee Exhibit Q), the board concludes the root disturbance was neither so proximate nor extensive to likely cause the traumatic damage to justify the \$2,500 (inclusive of pruning also) request of damages for “deep root feed[ing].”

The board has awarded one-half of the Jaynes’ request for loaming and seeding the remaining areas damaged by construction because the evidence (photographs and view, albeit with some snow cover) did not indicate, in the board’s opinion, as extensive a loaming and reseeded area as the \$1,800 request would indicate.

In all, the board’s award for the physical damage claims described above total \$9,290. The board has noted the Condemnor’s argument that at least some of these items could be addressed through the “punch list” procedure shown in Condemnee Exhibit E because, in theory, the contractor and engineer hired for the project remain responsible for deficiencies in the quality of work performed and the Town retains a portion of the contract price to secure the resolution of these problems. The board finds, however, the Condemnees are not precluded from recovering these items in this eminent domain proceeding and need not rely on future consideration and negotiations of uncertain duration with these parties that may or may not prove successful. By the same token, the Condemnees should not be able to recover twice for the same damage items. Therefore, any award for specific items in this Report are intended to be in place of, not in addition to, the “punch list” procedure suggested by the Condemnor, who may, of course, have recourse for reimbursement on these items from the contractor and engineer of the project.

With regard to the value of the easements taken, the board finds the Jaynes’ claim (\$25,620) to be inflated and the Condemnor’s approach to be more reasonable and just. The Jaynes’ use the same 4.3% factor as the Condemnor (computed as the ratio described above), but apply it to their estimate of the whole value of the Property (including the buildings) rather than just the land value. They also failed to adjust for the fact that only an easement to the land, and not the land itself, was the subject of the taking. The Condemnor’s appraiser stated the practice in New Hampshire, when underground utility easements are involved, is to award compensation in the range of 15% of the full land value, but where there are previously existing easements “compensation in the range of 5% - 10% is typical.” Condemnor Exhibit 3 at p. 48. There is no indication in his report, however, that he placed any value on the temporary easement for construction (of unspecified duration) taken by the Condemnor, along with the permanent easement. Consequently, the board finds 15% is more reasonable than the 10% used by the appraiser. This results in a calculation of approximately \$1,600 (about \$200 higher than the deposit made by the Town based upon \$1 per lineal foot of easement).

In summary, the total just compensation awarded due to the permanent and temporary easements taken and the remaining damages is \$10,890 (\$9,290 + \$1,600).

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Belknap 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 (Supp. 2003). Interest shall be paid from the taking date to the payment date. See RSA 524:1-b (Supp. 2003); TAX 210.11.

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 (Supp. 2003); TAX 210.13 and 201.39. In this case, the Condemnees are 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 Condemnees 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.

Attached as Addendum A hereto are the board's responses to the Condemnor's Request for Findings of Fact and Rulings of Law.

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: Philip T. McLaughlin, McLaughlin Law Office, P.C., Post Office Box 6275, 501 Union Avenue, Suite 2, Laconia, New Hampshire 03247, counsel for the Town of Belmont; Ronald W. and Pamela R. Jaynes, 389 Jamestown Road, Belmont, New Hampshire 03220, Condemnees; and Pemigewasset National Bank, Post Office Box 29, West Plymouth, New Hampshire 03264, Mortgagee.

Date: March 9, 2003

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Anne M. Stelmach, Deputy Clerk

**Addendum A**

**REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW**

With respect to the Requests for Findings of Fact (“Requests”), in these responses, “neither granted nor denied” generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the Report.

The Requests are replicated in the form submitted without any changes, typographical or otherwise, made by the board.

1. The underlying dispute between the parties began as a consequence of the Town of Belmont (the Town), by its Sewer Commission, filing a declaration of taking with the Board of Tax & Land Appeals (BTLA) on October 28, 2002.

**Granted.**

2. The Petitioners filed a preliminary objection to the declaration of taking which was transferred for trial to the Belknap County Superior Court.

**Granted.**

3. The Belknap County Superior Court heard the Jaynes’ objection and after trial issued an order of May 23, 2003.

**Granted.**

4. The Court found that the Town had the authority to place sewer lines as part of its commitment to improve the Town sewer system and that there was no evidence that the Town’s decision was unreasonable.

**Granted.**

5. The Court Order of May 23, 2003, also addressed issues raised before the Belknap County Superior Court by the Jaynes regarding just compensation, and concluded that, “the Jaynes’ claim regarding the amount of compensation is governed by RSA 498-A:27 and not currently before this court.”

**Granted.**

6. Just compensation is properly in issue before the BTLA, and a hearing on the just compensation issue was duly noticed by BTLA Order of November 3, 2003.

**Granted.**

7 The BTLA has the authority and responsibility to determine just compensation and to hear evidence offered by the parties, RSA 498-A:25.

**Granted.**

8. The property acquired by the Town of Belmont by condemnation from the Jaynes was an easement over the Jaynes’ property for the installation of a sewer line servicing the Jaynes’ property and other properties in the Silver Lake area of the Town of Belmont.

**Neither granted nor denied.**

9. The Silver Lake Sewer Project was funded in part by federal funds.

**Granted.**

10. New Hampshire RSA 124-A:13-II provides that any agency acquiring real property using federal funds or state funds shall comply with the provisions of Title 3 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (p.l. 91-646), as amended, and RSA 498-A; see also Loughlin, *supra*, §834.

**Granted.**

11. The “Uniform Appraisal Standards for Federal Land Acquisitions,” include standards for non-compensability of consequential damages and provide that a landowner is not entitled, at least within the framework of a condemnation suit, to be compensated for such consequential damages as the loss of business, relocation expenses and the like. Standard A-15 (Page 3, Tab “Easement,” Appraisal Report of William J. McLean, III).

**Neither granted nor denied.**

12. The condemning authority has the burden of proving by a preponderance of evidence that the price it offers for condemned land, in fact, justly compensates the condemnee, State v. Garceau, 118 NH 321 (1978) and Loughlin, Local Government Law, Eminent Domain,

§816 (1995). Damages as a result of condemnation are to be measured by the difference between the fair market value of the whole subject property after the taking and what it would have been worth on the day of the taking had it not occurred, Edgecomb Steel Co. v. State, 100 NH 480 (1957); Loughlin, *supra*, §827.

**Neither granted nor denied.**

13. The Appraiser concluded (Appraisal, p. 46) that, “Based upon the prescribed appraisal methodology as previously outlined, it is my conclusion that there is no difference in the ‘before’ and ‘after’ valuations and that, therefore, no damages result as a result of the imposition of the easement.”

**Granted.**

14. The Appraiser, using a methodology (set forth on p. 50 of the Appraisal), estimated the depreciated value of improvements associated with that portion of the land subject to the installation of the sewer system to be in the sum of One Thousand One Hundred Dollars (\$1,100.00).

**Denied.**

15. The Town has deposited with the BTLA the sum of One Thousand Three Hundred Eighty-Six Dollars (\$1,386.00) which represents the Town’s best estimate of the amount of just compensation due to the Jaynes.

**Granted.**

16. The Town’s estimate of just compensation in the sum of One Thousand Three Hundred Eighty-Six Dollars (\$1,386.00) is just compensation in circumstances wherein the acquisition and use of an easement and construction incident thereto has not diminished, and has probably increased, the value of the Jaynes’ property.

**Neither granted nor denied.**