

**State of New Hampshire**

v.

**New Hampshire Heritage L.P., Town of Bedford, Verizon New England, Inc.  
and Public Service Company of New Hampshire**

**Docket No.: 19423-03ED**

**REPORT OF THE BOARD**

This matter arises as a result of an RSA 498-A:5 acquisition of property taken for the laying out or alteration of a limited access highway pursuant to RSA 230:45 involving a partial taking by the State of New Hampshire (“Condemnor”) of the above captioned “Condemnees” “Property” in connection with the BEDFORD STP-MGS-X-T-5037(003), 10018-C Project. The Declaration of Taking (“Declaration”) was filed with the board on January 15, 2003.

RSA 498-A:25 authorizes the board to hear evidence relative to eminent domain condemnations and determine just compensation for the takings. 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 10 Meetinghouse Road, Bedford, New Hampshire on December 2, 2003. The Condemnor was represented by Bruce Marshall, Esq., and New Hampshire Heritage L.P. (“Heritage”), one of the Condemnees, was represented by W. Wright Danenbarger, Esq. of Wiggin & Nourie, P.A. Kim Kerwin, 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 the taking consisted of a total of a 21.24 acre parcel of land improved with a large (approximately 300,000 square foot) community shopping center. The Condemnor’s taking consisted of the following: a fee simple acquisition of 0.22 of an acre of land in fee adjacent to Route 3 (South River Road); a retaining wall access easement containing 20,700 square feet; a sign easement containing 250 square feet; a temporary driveway and slope construction easement containing 6,950 square feet which expires on October 31, 2008; and a

temporary sign construction easement containing 3,800 square feet which expires on October 31, 2008.

**Board's Rulings**

The parties stipulated the taking had no quantifiable effect on the Property's before and after values. Consequently, the testimony and evidence submitted focused on estimating the value of the rights taken on a pro rata basis.

Based on the board's analysis of the evidence and testimony submitted, we conclude that the pro rata value of the area taken should be calculated based on a \$400,000 per acre estimate of value which results in total damages for the Property taken in the amount of \$141,000. The breakdown of the calculation of damages is as follows:

<b>Fee Acquisition</b>	
0.22 of an acre @ \$400,000/acre (\$9.18 square foot)	= \$ 88,000
<b>Permanent Retaining Wall Access Easement - 20,700 square feet</b>	= 19,000
\$9.18 square foot x 10% = \$.92 x 20,700 square feet	
<b>Permanent Sign Easement - 250 square feet</b>	= 1,150
\$9.18 square foot x 50% = \$4.59 x 250 square feet	
<b>Temporary Driveway &amp; Slope Easement - 6,950 square feet</b>	
\$9.18 x 8% cap rate = \$0.73 square foot	
\$0.73 x 6,950 square feet = \$5,074/year	= 17,800
\$5,074 @ 10% for 5.8 years	
<b>Temporary Sign Construction Easement - 3,800 square feet</b>	
\$9.18 x 8% cap rate = \$0.73 square foot	
\$0.73 x 3,800 square feet = \$2,774/year	= 9,750
\$2,774/year @ 10% for 5.8 years	
<b>Landscaping</b>	= 5,300
<b>TOTAL DAMAGES</b>	<b>\$141,000</b>

The disparity in the per-acre value estimates between the two appraisers, Mr. Martin S. Doctor for the Condemnor and Mr. Joseph Fremneau for Heritage, indicates the difficulty in definitively arriving at a pro rata value for the taking. After extensive review of the evidence and deliberation, however, the board concludes that the Condemnor did not carry its burden of establishing a \$250,000 per acre land value estimate. Conversely, the board was not convinced that Mr. Fremneau's conclusion of \$600,000 is a reasonable estimate for the land value on a per-acre basis.

While it is difficult to definitively quantify the value of the land area, the board's conclusion of \$400,000 an acre is based on two general findings: 1) Mr. Doctor's analysis utilized sales and adjustments that did not adequately recognize the relatively high density of development that exists at and around the Property and its excellent visibility both on the South River Road frontage and on the I-293 exposure at the rear of the Property; and 2) a comparative analysis of Mr. Doctor's income and market valuation approaches to his cost approach indicates his land component of the cost approach is low if appropriate depreciation (both physical and functional) is applied to the improvements on the Property in the cost approach. The board will address these two general findings separately.

During its deliberations, the board looked extensively at all sales utilized by both appraisers to try to identify those which are most comparable to the Property based on the testimony and cross examination that occurred during the hearing. No one or set of sales, however, stands out as being strikingly comparable to the Property. On the one hand, the board is unable to give much weight to Mr. Doctor's sales, adjustments and resulting value conclusion because most of his sales are in areas of lower development density and inferior visibility than the Property. The board finds convincing Mr. Fremeau's general description of the development patterns in the area and that the Property is in an area where significant redevelopment is occurring due to the lack of availability of large land parcels in similar proximity to I-293 and Route 101. The board concludes Mr. Doctor's \$250,000 per acre value underestimates the significant attributes of the Property including: its close proximity to the intersection of I-293 and Route 101; its location and visibility from Route 3 (South River Road) and (in the rear) from I-293; its excellent topography and soils allowing full development potential of the parcel; and its location within existing high density development that is being redeveloped in several locations including the Caldor parcel across Route 3.

On the other hand, the board is not convinced that the \$600,000 per acre value arrived at by Mr. Fremeau accurately depicts the market value of the Property. First, Mr. Fremeau's sales L3 and L4 were each approximately 10-acre parcels that sold in Nashua to large, national, "big box" type of users (Target and Home Depot). As was argued during the hearing, it is possible the prices paid for those parcels exceeded market value due to business decisions by either Target or Home Depot to dominate or control the competition in a certain marketing area. While concerns regarding competition are often behind any commercial entity buying real estate, it is the board's experience that such big box operators frequently pay at the upper end or above the general market because of undue business motivations. Consequently, the board has given little weight to sales L3 and L4 in Mr. Fremeau's appraisal.

The board does find merit, however, in sales L1 and L2 in Mr. Fremeau's appraisal. Sale L1 is the Caldor/Super Stop-and-Shop sale directly across from the Property. While extensive testimony was received as to the multi-faceted aspect of the sale, the board concludes it would be inappropriate not to consider this sale given its proximity and similar physical features to the Property. The board does recognize and agree with the Condemnor that this sale was likely significantly affected by the knowledge of the positive affects of the highway project that is the subject of the taking and, thus, the sale price has to be adjusted for that factor. The board was unconvinced by Mr. Fremeau's argument that most commercial sales of this scale inherently anticipate additional off-site public access costs and thus no adjustment is necessary to the

Caldor sale for the highway project's "saved" off-site costs. Further, the board finds the existence of a long-term lease of one of the large, existing tenants at the time of the sale (Home Goods) requires some contributory value of that building to be estimated because of the very strong likelihood that Home Goods would continue to occupy the property as it has. Additionally, there was extensive testimony about a land swap, municipal sewer line installation and additional \$450,000 cash paid to an abutter property (Lindner) and the subsequent demolition of the Caldor store that complicates utilizing the sale as an indicator of land value. While it is not possible to definitively quantify these various adjustments, the board finds it is not likely that such adjustments would reduce the \$6,600,000 sale price for 10.968 acres (\$601,751/acre) down to a value to support the Condemnor's \$250,000 price per acre. The board finds that adjustments for the various items mentioned above, would likely result in an adjusted sale price of \$4,000,000 to \$4,500,000 and thus, an indicated market value per acre of approximately \$400,000.

Mr. Fremeau's comparable L2 is a sale of approximately nine acres on Brown Avenue in the City of Manchester purchased for an inn and airport parking use. The board acknowledges the type and density of development in the immediate area of L2 is different from what exists at the Property. However, the board finds that these uses are oftentimes competing for land of similar value and thus, has given some weight to Sale L2. The board believes sale L2's location and configuration warrant less significant adjustments than Mr. Fremeau did for the difference between it and the Property. The board also finds that some slight size adjustment is necessary in adjusting the sales utilized by Mr. Fremeau that are approximately one-half the size that of the Property. Any purchaser of a property of approximately 21 acres (such as the Property) would not pay on an acre-per-acre basis the same price that it would for one approximately half that size. Such adjustment takes into account the carrying costs and risks that would be inherent in subdividing the Property and finding a noncompetitive/compatible owner for approximately half the acreage. Consequently, applying these series of adjustments, the board finds L2 also provides an indicated market value of approximately \$400,000 per acre.

The board further reviewed Mr. Doctor's appraisal, which is the only appraisal submitted that did a complete before and after valuation by the three approaches to value (cost, market and income), to see if a comparison of the three approaches sheds any light on the land component of the Property's overall value. One of the benefits of performing a complete appraisal is the use of the three approaches as checks on each other as to the reasonableness of their respective assumptions and value conclusions. While no testimony was received on Mr. Doctor's two other approaches to value (market and income), the board has reviewed those approaches with the cost approach and concludes that Mr. Doctor's land value component of the cost approach understates the land value when appropriate depreciation is applied to the improvements and the then lower depreciated improvement value is subtracted from the other two value conclusions. On Part III, page 78 of Mr. Doctor's appraisal, his value conclusions by the three approaches are summarized indicating a range of \$22,200,000 by the income approach to a high of \$22,800,000 by the sales approach with a cost approach in the middle at \$22,500,000. Reviewing the depreciation of the improvements made by Mr. Doctor on Part III, page 29, the board notes the two principal buildings received physical depreciation of only 5% and 6%. The board finds this significantly understates both the physical and functional depreciation that is warranted for the existing improvements on the Property. As both appraisers indicated, the Bedford Mall was developed in

the 1960s and has an older configuration of malls for that period of time, different than how it would likely be developed if vacant today. Mr. Fremeau indicated, in his opinion, some functional depreciation would be warranted for this obsolescence. Further evidence of the Property's "as built" functional obsolescence is the relatively high vacancy noted in the income approach analysis and the general description of the Property in Mr. Doctor's appraisal. Given the Property's excellent location, its relatively high vacancy of the smaller rentable retail spaces is some indication of the lack of desirability of the Property as built.

Based on its specialized experience and knowledge (RSA 71-B:1 and RSA 541-A:33, V(c)), the board estimates a depreciation of 10% physical and 15% functional is appropriate to account for the observed physical depreciation and age of the Property and the inherent functional aspects of the older mall configuration. Applying such depreciation to the replacement cost of the improvements (Doctor appraisal, Part III, page 29), adding the entrepreneurial profit and then subtracting the resulting value from an indicated overall value of \$22,500,000, results in an indicated value per acre of just under \$400,000. The board acknowledges the potential pitfalls of this analysis including the partial circularity of the entrepreneurial profit addition being based on the cost of the improvements before depreciation and an estimated site value.<sup>1</sup> Nonetheless, this analysis provides a secondary reasonableness check to the board's analysis and findings on the sales discussed in the earlier paragraphs of this report.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Hillsborough 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; 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.

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<sup>1</sup> This analysis is also based on the assumption that the overall value conclusion of approximately \$22,500,000 is accurate. The board acknowledges that no testimony was received on Mr. Doctor's two other approaches to value. The board has reviewed them to determine if there are any overt shortcomings or errors and have found none. The primary disagreement that the board has with Mr. Doctor's overall value is in the cost approach of applying minimal depreciation for a building that is 30 years old (albeit having had some renovations) and the lack of any recognition of functional depreciation that the historical configuration and current vacancy indicates.

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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Albert F. Shamash, Esq., Member

**Certification**

I hereby certify that copies of the foregoing Report have been mailed, this date, to Bruce Marshall, Esq., Department of Justice, 33 Capitol Street, Concord, New Hampshire, counsel for the State of New Hampshire, Condemnor; W. Wright Danenbarger, Esq., Wiggin and Nourie, P.A., 20 Market Street Manchester, New Hampshire 03105, counsel for New Hampshire Heritage L.P., Condemnee; Mr. Keith R. Hickey, Town of Bedford, 24 North Amherst Road, Bedford, New Hampshire; Verizon New England, Inc., CT Corporation Systems, 9 Capitol Street, Concord, New Hampshire 03301; and Christopher J. Allwarden, Esq., counsel for Public Service Company of New Hampshire, Post Office Box 330, Manchester, New Hampshire 03105, Easement Holders.

Date: February 2, 2004

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Anne M. Stelmach, Deputy Clerk