

**State of New Hampshire**

**v.**

**Ann J. Carter**

**Docket No.: 19453-03ED**

**REPORT OF THE BOARD**

This matter arises as a result of an RSA 498-A:5 acquisition of property taken for the approved highway layout pursuant to authority conferred on the “Condemnor” by RSA 230:14 and RSA 498-A. A Declaration of Taking (“Declaration”) was filed with the board on April 30, 2003, describing the property rights taken as 0.036 of a hectare (0.09 acres) in fee; a slope easement of six hundred six (606) square meters (6,523 square feet); a temporary driveway construction easement of twelve (12) square meters (130 square feet); and a temporary construction easement of ten (10) square meters (108 square feet). Said temporary easements shall expire on December 1, 2006. See Exhibit A to the Declaration.

The “Property” before and after the taking consisted of 15.32 acres and 15.23 acres, respectively.

RSA 498-A:25 authorizes the board to hear evidence relative to an eminent domain condemnation and to 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 “Condemnee.” See TAX 210.12 and cases cited therein.

The board viewed the Property and held the just compensation hearing at its offices on March 23, 2004. The Condemnor was represented by Bruce J. Marshall, Esq., and the Condemnee was represented by W. Wright Danenbarger, Esq.

Kimberly 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.

**Board's Rulings**

Based on the evidence, the board finds damages of \$39,850 for the taking, detailed as follows:

Fee taking 0.09 acres x \$350,000 per acre	\$31,500
Slope easement 0.1497 acres x \$350,000 per acre x .15	\$ 7,850
Temporary driveway and construction easements – nominal value	<u>\$ 500</u>
Total damages	\$39,850

The board finds the taking had no severance damage to the remainder; thus, the valuation of the taking is calculated on a pro-rata (per-acre) basis.

The board arrived at these conclusions after considering the comparable sales evidence and making the more detailed findings discussed below.

Both the Condemnor's appraiser (Arol J. Charbonneau, Jr. – "Charbonneau Appraisal") and the Condemnee's appraiser (Robert G. Bramley – "Bramley Appraisal") estimated market value utilizing a comparative sales approach and based their analysis on an estimated usable area of approximately 2.41 acres (Bramley Appraisal) to 2.5 acres (Charbonneau Appraisal). The board finds this general methodology employed by both appraisers is reasonable given the distinct terrain difference between the front portion of the parcel that is impacted by the taking and the rear portion.

The board has focused its analysis on the three Hooksett sales that were contained in both the Charbonneau and Bramley appraisals and which the board saw on its view. The other sales utilized in the two appraisals were from outside of Hooksett (Concord, Manchester and Hudson), and were not viewed by the board. While they may be adequate comparables, because they are located in different neighborhoods, the board is unable to make any definitive finding as to the appropriateness of any location adjustments.

The board considered the Condemnor's argument that the three Hooksett sales could have been impacted by the effect of the project because they are recent transfers and are either part of, or proximate to, the project as described by the Condemnor. While this is certainly a concern, the board, in this case, finds the sale prices did not appear to be overtly influenced by the impending highway project for two reasons: 1) both appraisers utilized these sales in their appraisals and, thus, if the Condemnor believed that the project inappropriately affected the sales price, it could have, through its review process, rejected the contracted Charbonneau Appraisal or the inclusion of those sales; and 2) both appraisers indicated that, while the parties involved in the three sales were

likely knowledgeable of the project, the project, in and of itself, did not significantly affect the sales price above and beyond all other market factors in play in this neighborhood.

A summary of the board's analysis of the three Hooksett sales is as follows:

	1248 Hooksett Road	1311 Hooksett Road	1318 Hooksett Road
Sale Price	\$375,000.00	\$385,000.00	\$230,500.00
Market Conditions	14%	10%	8%
Adjusted Price	\$427,500.00	\$423,500.00	\$248,940.00
Number of Acres	1.005	0.75	0.7
Price per Acre	\$425,373.00	\$564,667.00	\$355,629.00
"Size" Adjustment	-25%	-25%	-25%
Physical Adjustment	0	0	20%
Indicated Value/Acre	\$319,029.85	\$423,500.00	\$337,847.14

Correlated Value/Acre: \$350,000.00

The board concludes, based on giving the most weight to the evidence contained in the Charbonneau Appraisal and Mr. Charbonneau's testimony, that the sale of 1248 Hooksett Road needs to have some deduction for the fact that the sale included permit approvals obtained by the seller prior to the sale. While the value of those approvals can be debated, the board has estimated their value at \$125,000 (\$25,000 less than the Charbonneau Appraisal). We find Mr. Bramley's first-hand knowledge of the conditions of that sale was scant and, thus, we place little weight on Mr. Bramley's assertion that no adjustment for approvals is warranted.

The board has adopted the market condition adjustments (0.5% average appreciation per month) contained in the Charbonneau Appraisal, as both Mr. Charbonneau and Mr. Bramley testified there is some market evidence that commercial properties were appreciating during the time of the sales. While Mr. Bramley did not apply any market condition adjustment in his appraisal, he did testify that subsequently he has identified some sales that would justify a market condition adjustment.

The Charbonneau and Bramley appraisals reflect radical differences in accounting for the size disparities between the comparables and the Property. Mr. Charbonneau applied 40% - 50% adjustments while Mr. Bramley applied a "0%" adjustment. The comparables range in size from 0.7 acres to just over an acre, while the appraisers agree the Property has approximately 2½ usable acres (out of a total 15 + acres).

The board finds some market evidence warrants an appropriate adjustment for this factor. In most instances, a significantly smaller developable lot should sell for a higher price per acre than a larger developable lot. The larger size of the Property suggests it could be subdivided into two or three developable lots in a highest and best use analysis,

but it would be inaccurate to conclude a potential buyer would pay a proportionately higher amount (based upon the same price per usable acre) because of the added uncertainties and costs associated with securing subdivision and other approvals to create two or three smaller developable lots from the Property.

While the adjustment arrived at by the board is noted as an adjustment for “size,” the board finds it is really an adjustment for the fact that, to make lots of comparable size and utility from the Property, all the direct and indirect costs (such as survey, legal, overhead and administrative expenses and holding costs) related to subdivision of the Property and the entrepreneurial profit (coordination and expertise of subdivision and assumption of risks associated with it<sup>1</sup>) that is attendant to such a process reduce the Property’s value on a per-usable-acre basis. The board’s estimate of 25% is based on its judgment and experience as to the relative cost/value of such subdivision-related activities rather than on any paired sales analysis. While a paired sales analysis is certainly an appropriate way to estimate adjustments in a comparable sales approach, the board finds it is difficult, in this case, to be sure that all other factors between sales of different size have been neutralized to attribute the resulting difference to size only.

The board has adopted Mr. Charbonneau’s 20% adjustment for the inferior physical features of the sale at 1318 Hooksett Road rather than Mr. Bramley’s 55% adjustment. As noted in the previous paragraph, the board is not convinced that the 55% indication from a paired sales analysis performed in the Bramley Appraisal is truly reflective of the inferior physical features and location of this sale. The board noted on its view that this comparable does slope below grade and is, after development, accessed from an adjoining road as opposed to directly from Route 3. However, the board is not convinced this comparable was so significantly inferior to warrant the magnitude of the adjustments contained in the Bramley Appraisal.

Last, while the board did review the three purchase and sale agreements submitted for the Property, the board chooses to give them very little weight for the following reasons. First, all the purchase and sale agreements involve, to a greater or lesser extent, adjoining property as part of a redevelopment scheme of the general area and, thus, the stated purchase price in each case is dependent upon approvals yet to be obtained and assemblage with adjoining properties. Second, the purchase and sale agreements are, in fact, just that and are not bona fide sales. Third, to the extent the various redevelopment schemes envisioned by the different purchase and sale agreements are impacted by the project or the timing of the project, it reduces their probative value as an indication of the Property’s market value as of the date of taking.

The board has applied the correlated value of \$350,000/acre on a pro-rata basis to the 0.09-acre fee taking. Only 15% of fee value is estimated as the value for the slope easement area. This area is below the grade of Route 3 and could be filled, with

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<sup>1</sup> Appraisal Institute, Appraisal of Real Estate (12<sup>th</sup> ed. 2001), pp. 358-363, 430 and 436.

permission of the New Hampshire Department of Transportation (“DOT”), to be more readily utilized in any development of the Property. The board does not find this easement significantly limits subsequent use of the easement area and, thus, has estimated its value at 15% of fee value to account for the coordination of development and review by the DOT. The board also finds the two temporary construction easements are simply meant to “blend” the new highway grade with the existing access on the Property and, thus, their values are estimated at a nominal amount of \$250 each.

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

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:  
Bruce J. Marshall, Esq., Department of Justice, 33 Capitol Street, Concord, New  
Hampshire 03301, counsel for the State of New Hampshire, Condemnor; and W. Wright  
Danenbarger, Esq., Wiggin & Nourie, P.A., Post Office Box 808, Manchester, New  
Hampshire 03105-0808, counsel for Ann J. Carter, Condemnee.

Date: 4/30/04

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Anne M. Stelmach, Deputy Clerk