

**State of New Hampshire**

**v.**

**Iris L. Labrie, Johnson & Dix Fuel Corporation and  
Great Northern Tire & Alignment, Inc.**

**Docket No.: 19515-03ED**

**REPORT OF THE BOARD**

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for an approved highway layout pursuant to authority conferred on the “Condemnor” by RSA 230:14 and RSA ch. 498-A. A Declaration of Taking (“Declaration”) was filed with the board on July 31, 2003, describing the property rights taken as fifty thousandths (0.050) of a hectare in fee, a retaining wall easement of one hundred ninety-four (194) square meters, a permanent sign easement of sixty (60) square meters and a temporary construction easement of one thousand six hundred ten (1,610) square meters that will expire on December 1, 2006.

The “Property” is located at 1293-1301 Hooksett Road, Hooksett, New Hampshire. The Property before and after the taking consisted of 0.474 hectares (1.17 acres) and 0.424 hectares (1.05 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 “condemnees.” See TAX 210.12 and cases cited therein. On apportionment issues, the burden rests with each condemnee claiming entitlement to a portion of the award to prove its claim by a preponderance of the evidence.

The board viewed the Property and held the just compensation and apportionment hearing at its offices on October 19 and 20, 2004. The Condemnor was represented by Craig S. Donais, Esq., condemnee Iris L. Labrie (“Labrie”) was represented by Francis X.

Quinn, Jr., Esq. and condemnee Johnson & Dix Fuel Corporation (“J&D”) was represented by Carolyn Cole, Esq. The other condemnee, Great Northern Tire & Alignment, Inc. (“Great Northern”), chose not to attend the hearing, as stated in a letter received on October 21, 2004 from its attorney, Kermit J. Zerr, Esq.

The hearing was tape recorded by the board. If any party wishes a transcript of the hearing, the board will make arrangements to have a certified transcript prepared upon request and the cost will be borne by the requesting party.

### **Board’s Rulings**

As noted in the board’s Order and Hearing Notice dated June 9, 2004, the board must determine the total compensation award on account of the taking and then how the total award should be apportioned among the condemnees in this case: Labrie, the owner of the Property; J&D, a tenant claiming ownership of certain improvements; and Great Northern, a subtenant of J&D.

#### **I. Total Compensation Award**

Based on the evidence, the board finds the sum of \$255,000 is the total compensation to be awarded on account of the taking pursuant to RSA 498-A:25. This amount results from finding the value of the Property before the taking was \$865,000 and the value of the Property after the taking was \$610,000.

The Condemnor presented a self-contained appraisal report and testimony by Martin S. Doctor of Fulcrum Appraisal Service. The “Doctor Appraisal” utilized the sales comparison and cost approaches and made a reconciliation to arrive at its value conclusions. See Doctor Appraisal (Condemnor Exhibit 2), pp. 1-5, Part I, pp. 3-4, and Part III, pp. 83-84. Noting the Property had previously been subdivided into two lots, one of which (“Parcel 11 North”) was used as a service garage and gas station and the other (“Parcel 11 South”) as a used car lot, with a common building overlapping the lot line, Mr. Doctor analyzed the highest and best use of each lot (assuming their sizes and configurations could be modified and approved by the municipality in order to make each developable and transferable separately). Id. and Part III, p. 4. The board finds the Doctor Appraisal is the best evidence submitted of the value of the Property before and after the taking.

Labrie did not present an appraisal of her own in support of a higher just compensation award.<sup>1</sup> Instead, her attorney questioned the merits of the Doctor Appraisal and presented, over an objection by the Condemnor, a prior appraisal prepared

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<sup>1</sup> Her husband, George Labrie, testified another appraiser (Peter Stanhope of The Stanhope Group) had been contacted, but they decided not to undertake the cost of hiring this appraiser or another appraiser of their own choosing. Under the newly amended statute effective July 1, 2003, the board notes condemnees are entitled to cost reimbursement for up to \$1,000 from a condemnor should they choose to obtain their own appraisal. See RSA 498-A:4, II (b).

as of December 15, 2002 for the Condemnor by Arol J. Charbonneau, Jr. of Crafts Appraisal Associates, Ltd. (the “Charbonneau Appraisal,” Condemnee Exhibit B). The board overruled the Condemnor’s evidentiary objection to the Charbonneau Appraisal; the board indicated, however, that it would give the Charbonneau Appraisal only the weight it deserved.

Unlike Labrie, J&D had no disagreement with the value estimates in the Doctor Appraisal. As discussed further in the next section, J&D accepted the estimate in the Doctor Appraisal of a \$125,000 value for the gas station improvements (not including paving of \$8,500). See Condemnor Exhibit 2, p. 84 and fn. 5.

The board finds the sum of \$255,000 is just compensation for the taking. On balance, the Charbonneau Appraisal, and Mr. Charbonneau’s testimony (under subpoena from Labrie), are far less probative than the Doctor Appraisal and Mr. Doctor’s further testimony. The Condemnor requested and paid for the Charbonneau Appraisal. Upon review, and because it had substantial questions and reservations regarding its use, the Condemnor chose to disregard it and instead commission an entirely new appraisal from Mr. Doctor, independent of any work or analysis already done.

The Charbonneau Appraisal estimated a value as of December 15, 2002, but Mr. Charbonneau testified further analysis and work, which he had not undertaken, would be required to update his appraisal to the date of taking (July 31, 2003). A more serious problem with the Charbonneau Appraisal is that it places undue reliance on just one questionable measure (volume of gasoline pumped in the prior year) to estimate value using the sales comparison approach: using this ‘metric,’ he concluded the market value of the gas station real property (referred to as Parcel 11B in his analysis) was \$700,000 (computed on the basis of \$1 of value per gallon pumped). He reached this conclusion despite much lower selling prices (in the \$300,000 - \$350,000 range) and corresponding pump volumes for the three comparison properties (in Dover, Wolfeboro and Merrimack) used in his analysis. See Condemnee Exhibit B, pp. 68-72. While it is not implausible that potential gas pump volumes can influence the sales price of a gas station property, many other business factors not considered or discussed by Mr. Charbonneau, such as sales trends, “goodwill,” hours of operation, the number, configuration and type of gasoline bays at each station and so forth, also should be taken into account in adjusting sales price information and estimating value.

Having found the total just compensation award should be \$255,000, the board will present its findings regarding how the total award should be apportioned among the three condemnees in the next section of this Report.

## II. Apportionment

The apportionment issue involves the question of who is entitled to the value of certain gas station improvements, which include three underground storage tanks and other items, estimated at \$125,000 in the Doctor Appraisal, a value accepted by J&D and

not substantially disputed by Labrie. After considering and weighing all the evidence and arguments presented, the board finds merit in J&D's claim and therefore apportions the full \$125,000 to J&D, \$130,000 to Labrie and nothing to Great Northern.<sup>2</sup>

In brief, J&D established its ownership of the gas station improvements as of the date of taking by a preponderance of the evidence. The board finds J&D purchased and installed the three underground tanks and other gas station equipment and had complete responsibility (in contrast to Labrie) for the permitting and monitoring process required by the state of this highly regulated business.

In general, "[b]oth lessors and lessees are entitled to share in the [condemnation] award according to their respective interests. Compensation is due to lessors for damage to their reversionary interests and to the lessee for damage to his leasehold." 2 Nichols on Eminent Domain § 5.02[6] [b], at 5-82 – 5-83. The board will present its more detailed findings below based upon the written "Agreement of Lease" dated October 16, 1995 (the "Lease")<sup>3</sup> and the dealings between the parties before and after the date of taking.

As set forth in the Lease, J&D, the "Tenant," rented the premises for the purpose of "retail gasoline sales and related activities" from Labrie, the "Landlord." With Labrie's consent, J&D entered into a sublease with Great Northern to operate the facility; Great Northern was J&D's subtenant on the date of the taking. See also Declaration, ¶ 3. The initial term of the Lease was eight years (through October 31, 2003), with J&D having two five-year options to renew. Section 3 of the Lease required J&D to provide notification to the Landlord "in writing no later than" 90 days before the end of the term of the Lease if it wished to exercise the renewal option. On July 21, 2003, J&D delivered to Labrie a typed document (the "Document")<sup>4</sup> which stated J&D "exercises its option to extend the period of the Lease for an additional five years or until the date of the taking of the leased premises by the State of New Hampshire, whichever is the first to occur."

The parties presented extensive testimony, evidence and arguments regarding whether J&D validly exercised the option to renew. To the extent the issue is relevant to the matters at issue in this proceeding, the board finds the option to renew was exercised by J&D in a timely and legally sufficient manner. Contrary to Labrie's arguments, the notice provisions in Section 3 and 27. a of the Lease simply requires a "writing" sent to the other party. While the parties could have specified the writing must be "signed," they did not do so and the Document delivered on July 21, 2003 to Labrie meets the accepted

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<sup>2</sup> Although Great Northern did not attend the just compensation hearing, the board has nonetheless considered whether it is entitled to an apportionment of the damages awarded. Cf. TAX 210.09.

<sup>3</sup> A copy of the Lease and a corrective Amendment to Lease are attached as Exhibits 2 and 3 to the "Request for Withdrawal of a Portion of Deposit of Damages" filed by J&D with the board on May 20, 2004 (hereinafter, the "Request").

<sup>4</sup> The Document is attached as Exhibit 7 to the Request identified in footnote 3.

definition of a “writing.” See, e.g., Black’s Law Dictionary 1787 (4<sup>th</sup> ed. 1968). There is no dispute J&D physically delivered the Document to Labrie on July 21, 2003, more than 90 days before the lease expiration date.

The board further finds no merit in Labrie’s argument that the Document is not a valid exercise of J&D’s option to renew the Lease either because it included additional provisions or was allegedly conditional upon acceptance by Labrie. Among the provisions in the Document is Section 2, which clearly states: “[a]ll applicable provisions of the underlying Lease Agreement shall remain in effect . . . and are hereby incorporated herein by reference.” Moreover, an option generally confers a unilateral right upon the optionee (J&D, the party given the right to exercise the option) and is not conditional upon acceptance of the exercise by the optionor (Labrie, the party granting the option).<sup>5</sup>

Labrie also relies upon Section 6 (Leasehold Improvements) of the Lease to support her position that she purchased the gas station improvements “for the sum of \$1.00” when the lease was terminated by reason of the condemnation. This reliance is misplaced for a number of reasons.

First, it appears that any “election” to purchase the equipment by Labrie was so late in the process as to make it untimely at best. On November 6, 2003, some three months after the date of taking (July 31, 2003, when title to such equipment passed to the Condemnor), her attorney sent a letter by certified mail to J&D, stating “Labrie hereby exercises her option to purchase the below ground equipment (tanks, pumps, piping, etc.) referenced at paragraph 6(c) and pursuant to paragraph 6(c) encloses herewith the sum of \$1.00 to exercise said option.” See Condemnee Exhibit F.

Second, this letter relies only on J&D’s alleged failure to renew the Lease as the ground for termination, not Section 15 (entitled “Condemnation”) discussed further below. Following this logic, lease termination occurred, if at all, no earlier than October 31, 2003. This supports the conclusion that J&D still owned the gas station on the date of taking (July 31, 2003), the date which controls the apportionment issue now decided by the board. Following the date of taking, as J&D correctly points out, any attempt to purchase the gas station improvements (through exercise of the option) would be ineffective, since the Condemnor took title to both the land and these improvements on that date as a matter of law. See Request at pp. 10-11.

Third, even after this purported lease termination, Labrie continued to accept regular monthly rent payments from J&D in amounts reflecting that the Lease was still

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<sup>5</sup> Cf. Robinson Company v. Drew, 83 N.H. 459, 462 (1928) (“While the option is in force the owner’s hands are tied to its extent, and for its term the optionor has made an offer which may not be withdrawn.”).

in effect and had not been terminated.<sup>6</sup> Labrie did so even though the Lease contains a “Holdover” provision in Section 21 which provides for a higher monthly rent (125% of the Lease rental rate) if the tenant “remains in possession . . . after the expiration of this Lease.”

Fourth, it is well established that “[t]he law does not look with favor on clauses causing forfeiture of the tenant’s interest upon condemnation, [and] hence, a lease provision will be construed not to have that effect if it can be avoided under the circumstances.” 7A Nichols on Eminent Domain, *supra*, § 11.06[2](1) at 11-28.<sup>7</sup> To permit Labrie to acquire improvements with an estimated value of \$125,000 for the sum of only \$1 would cause such a forfeiture of J&D’s interest. As Nichols further notes, “Termination of the lease upon condemnation does not automatically negate the tenant’s right to compensation for the value of his leasehold and trade fixtures.” *Id.*

Finally, the board finds Section 15 of the Lease is ambiguously drafted, making it unclear whether the rights described are triggered, “at the election of Landlord,” only if 25% or more of the leased premises are taken or whether “any part” taken during the last two years can trigger a termination of the Lease. The portion of the Property taken by the Condemnor is far less than 25% of the leased premises.

For all of these reasons, the board apportions the total just compensation award of \$255,000 as follows: \$125,000 to J&D; \$130,000 to Labrie; and nothing to Great Northern, which has presented no cognizable claim to a share of the award.

### **Additional Issues**

If any party seeks to appeal the amount of damages awarded by the board, including the apportionment, 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 there is an appeal of 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.

If no 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. The prevailing

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<sup>6</sup> Evidence of payments of \$3,500 per month (the amount specified in Section 4 of the Lease) made by J&D to Labrie through April, 2004 is contained in Exhibit 8 to the Request identified in footnote 3. Labrie did not return any of these payments or place them into an escrow account, which would have been a reasonable response pending resolution of the parties’ ongoing disputes regarding termination of the Lease.

<sup>7</sup> Cited in Mullis v. Division of Admin., 390 S.2d 473, 474 (Fla. App. 1980) (reversing and remanding order denying apportionment of eminent domain award to lessee).

party is determined by determining if the board's award exceeds the Condemnor's offer of damages. See Fortin v. Manchester Housing Auth., 133 N.H. 154, 156-57 (1990). A motion for costs may be filed within forty (40) days from the date of this Report if there is no appeal of the board's award. The motion must include the following:

- 1) an itemization of the requested costs, TAX 201.39(c);
- 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 copies of the foregoing Report have been mailed, this date, to: Craig S. Donais, Esq., Department of Justice, 33 Capitol Street, Concord, New Hampshire 03301, counsel for the State of New Hampshire, Condemnor; Francis X. Quinn, Jr., Esq., Boynton, Waldron, Doleac, Woodman & Scott, P.A., Post Office Box 418, 82 Court Street, Portsmouth, New Hampshire 03802, counsel for Iris L. Labrie, Condemnee; Howard Myers, Esq. and Carolyn Cole, Esq., Myers Associates, PLLC, 240 Mechanic Street, Lebanon, New Hampshire 03766, counsel for Johnson & Dix Fuel Corporation, Lessee; and Kermit J. Zerr, Esq., Kelley & Tilsley, P.A., Post Office Box 3280, Manchester, New Hampshire 03105, counsel for Great Northern Tire & Alignment, Inc., Lessee.

Date: November 24, 2004

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Anne M. Stelmach, Deputy Clerk