

**State of New Hampshire**

**v.**

**Energetic Enterprises, Inc.**

**Docket No.: 19928-04ED**

**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 various statutes, including RSA 230:14. The parties agreed the date of taking was February 12, 2002. An earlier Declaration of Taking filed on that date was withdrawn and replaced with a new Declaration of Taking filed on January 7, 2004 (the “Declaration”), describing the property rights taken as: 0.062 of a hectare (approximately 0.16 acres) in fee simple; a permanent slope easement of 242 square meters; a permanent drainage easement of 676 square meters; and a temporary construction easement, expiring October 7, 2005, of 400 square meters. See Declaration, including Exhibit A thereto.

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 74 Lockehaven Road, Enfield, New Hampshire (the Enfield Public Works Building) on September 8, 2005. The Condemnor was represented by Lynmarie C. Cusack, Esq., and the Condemnee was represented by Laurence F. Gardner, Esq.

Ms. Michelle McGirr, CSR, 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 consisted of 6.5 ± acres before the taking and consists of 6.34 ± acres after the taking. The Property had 51.91 feet of road frontage on US Route 4, which was eliminated as a result of the taking, and has continued access from Baltic Street which connects onto

US Route 4. The Property was constructed as a “mill complex” around 1900 and has an estimated 84,120 ± square feet of gross building area in several structures. The Condemnee purchased the Property in 1979, some years after the mill ceased operations, and is presently using the Property for a variety of business and personal purposes: part is being used for hydroelectric generation (from the adjacent Mascoma River) and a personal residence; part is rented to others for a blacksmith shop, woodworking business and vehicle storage; and part is vacant.

### **Board’s Rulings**

The parties disagree sharply regarding the amount of just compensation damages that should be awarded. As presented at the hearing and discussed further below, the areas of disagreement fall into three categories: parking; signage; and the drainage easement.

The Condemnor’s position is that no ‘measurable’ damages occurred as a result of the taking, because the before and after values of the Property are the same (\$550,000). This position is based on the appraisal prepared by Timothy R. Daniels, a licensed New Hampshire appraiser and president of Capital Appraisal Associates, Inc. (the “Daniels Appraisal” – Condemnor’s Exhibit 2), and his testimony. The Daniels Appraisal finds no severance damages and then makes a “pro rata” allocation for the taking in the total amount of \$9,200.

The Condemnee, on the other hand, contends damages from the taking total \$121,600 (consisting of \$96,600 for loss of parking, \$15,000 for lost signage and \$10,000 for the drainage easement). These damages are based on a May 19, 2005 analysis (Condemnee Exhibit B) and testimony by Robert E. Haynes, Jr., a licensed, commercial real estate broker, on the parking and signage issues and the testimony of Timothy M. Taylor, the principal of the Condemnee, on all three issues, including his drainage damage estimate of \$10,000.

The board will briefly present its specific findings on these issues below. These findings are influenced in part by the evidence regarding what uses are permitted by the relevant zoning and other restrictions on the Property. Although physically located in the Town’s “Community Business District,” the Town’s Zoning Ordinance (Condemnee Exhibit F at p. 7) designates the mill as a “pre-existing commercial/industrial facility,” a designation which can be interpreted to allow for more intensive uses. The parties appear to agree that the highest and best use of the Property would be to renovate the mill buildings to utilize this development potential in a manner similar to the renovation of other former mills for commercial and/or residential use as generally described in the Daniels Appraisal.

#### **A. Parking**

The evidence reflects that: (i) some parking was displaced as a result of the taking; and (ii) the full development potential of the Property is likely to be restricted, in any event, by a lack of sufficient parking.

On the first point, Mr. Taylor’s testimony and the May 24, 2004 letter from the Town’s Planning/Zoning Administrator (Condemnee Exhibit I) support a finding that a parking lot existed adjacent to the former US Route 4/Baltic Street intersection before the taking and that “this lot was used for employee parking and more recently . . . to park vehicles or equipment for

sale and as a parking/loading area.” The loss of some feasible parking area is also confirmed in the Daniels Appraisal (Condemnor Exhibit 2, Part III, p. 21) which described the area of the permanent slope easement “before” the taking as an area that “could be used for some type of parking or storage if so desired” but “in the after situation, the slopes are so steep that this area cannot be used for any parking or storage.” The site plan prepared for the Condemnee by James S. Kennedy, a landscape architect (Condemnee Exhibit C), also shows the effects of the taking and how some of the “Previous Parking Area” was adversely impacted by the taking of the fee simple and permanent slope easement areas.

The Daniels Appraisal, while concluding the highest and best use of the Property is for “Commercial and/or industrial development” (Condemnor Exhibit 2, Part I, p. 2), fails to consider adequately whether a lack of sufficient parking spaces could impact this use, an issue not fully addressed in its discussion of feasibility (id., Part III, pp. 2-4). Contrary to Part III, page 3 of the Daniels Appraisal, the testimony and documentary evidence reveals the Property is not physically located in an area of the Town where the zoning ordinance allows an ‘exemption’ from “parking requirements” (see Condemnee Exhibit E; and Condemnee Exhibit F, p. 15). Thus, the board concludes the Condemnor did not meet its burden of proof that there was no adverse impact with respect to parking.

Because of setback and other restrictions, the Kennedy site plan, according to Mr. Haynes (see Condemnee Exhibit B, p. 2), indicates the Property had, at most, 88 developable parking spaces before the taking. This number is well below the 280 needed for full renovation of the buildings for commercial use under the Town’s zoning which Mr. Haynes analyzed (requirement of 1 parking space per 300 feet of gross floor area: 84,120 s.f. / 300 ~ 280 spaces).

The board finds the potentially available parking was impacted by the taking, but not in the manner or to the extent indicated by Mr. Haynes’ methodology based on information given to him by Mr. Taylor. Their position fails to consider whether more parking could be available if some part of the existing mill structures were torn down as part of a development plan. More importantly, Mr. Haynes’ assumption that 14 spaces have been permanently eliminated and calculation that this caused an “economic loss” of \$96,600, based on the difference between the estimated value of renovated office space (\$264,600) and the estimated cost of the renovation (\$168,000), is too speculative and too critically dependent on questionable assumptions regarding renovation costs, anticipated rents and whether all of the renovated space could be absorbed by the market. It is also hard to imagine how the alleged loss of 14 parking spaces can impact the estimated value of the Property (“list price” estimated by Mr. Haynes at \$500,000 before the taking) by almost 20%. Id., p. 3.

The board finds a more reasonable and supportable estimate of damages that takes into account the anticipated parking limitations on future development can be derived using Mr. Daniels’ comparative sales approach. One of the three sales used in his analysis (Comp. B-2 in Tilton, New Hampshire) should have been adjusted because of parking limitations reflected in his descriptions of that property (in Parts III and IV of Condemnor Exhibit 2). From the “grid analysis” shown on page 13 of Part III of the Daniels Appraisal, this adjustment can be undertaken as follows: characterize the parking of the Property as similar to Comp. B-2 and inferior (by 5% in the “before” and by 10% in the “after” situations) to the parking available in Comp. B-1 and Comp. B-3; carrying out these adjustments in the calculations results in an average indicated value per square foot of \$6.34 before the taking situation and \$6.00 after the

taking. This reduction in value caused by the taking (\$0.34 per square foot) can then be multiplied by the total estimated square footage of 84,120 used in Mr. Daniels' analysis to compute a damage estimate of \$28,600 (rounded). The board finds this estimate, while admittedly based on a comparative and somewhat subjective conclusion on the probable impact of parking on mill property values, is more reasonable and supportable than either extreme presented by the parties: *i.e.*, the Condemnor's conclusion of no measurable damage or the Condemnee's estimate of \$96,600.

### B. Signage

On the view and at the hearing, evidence was presented by the Condemnee that its right to position one sign was affected by the taking. Before the taking, the Condemnee had received a sign permit from the Town to locate one sign on the Property just 18 feet from US Route 4 (where it had 51.91 feet of frontage and better visibility from that highway). The evidence indicates that a sign at that location is likely to be more visible and, therefore, more valuable because of placement close to a heavily trafficked state highway and because the mill buildings are below the grade of the road.

As a result of the taking, all frontage on US Route 4 was eliminated and the indicated new location of the sign is below the grade of the roadway by about six feet because of existing topography. It is reasonable to expect a knowledgeable investor to take these changed conditions pertaining to signage into account and lower any valuation of the Property to some degree.

The board must emphasize, however, that under the applicable zoning the Condemnee has not lost the right to construct a sign, but only the location of a sign (permitted by the Town's regulations as a matter of right rather than discretion) and its visibility at the new location from US Route 4 have been impacted by the taking. Consequently, the board finds Mr. Haynes' damage estimate of \$15,000 "on account of the lost signage" (Condemnor Exhibit B, p. 4) to be unsubstantiated and too high. Again, however, the board finds the Condemnor did not carry its burden in showing no loss in value for the "after" inferior sign location; given the undisputed highest and best use assumption of office/commercial conversion, the Haynes' testimony and the board's experience support a conclusion of some loss in value for this affect of the taking. Consequently, a damage estimate of \$7,500 is more reasonable in light of the board's review of the evidence.

### C. Drainage Easement

As part of the taking, the State acquired a permanent drainage easement from the roadway to the river across a section of the Property where a prior drainage system was in use by the Condemnee and the Town. The evidence indicated the Town had used this drainage for some period of time. Attorney Gardner stated this use could more accurately be described as a "license" rather than a deeded easement, but it is also possible the Town may have acquired a drainage easement by implication or by prescription, even if there is no recorded instrument granting such use. See, generally, Local Government Center, A Hard Road to Travel 174-175 (2004). Mr. Taylor stressed that now a formal recorded easement in favor of the Condemnor limits his future ability to develop the Property (such as by expanding the driveway over the easement from one lane to two lanes, for example) since he would need to seek permission from the Condemnor in order to do so.

The board finds, however, that any such perceived limitation is more than offset by the Condemnee now being relieved of most maintenance obligations and liability because, as part of the highway construction project, the Condemnor has upgraded the drainage and assumed responsibility and liability for its operation through the drainage easement it has taken. Therefore, the board finds no damages should be awarded for the drainage easement claim.

#### D. Summary of Damages Awarded

In summary, the board makes a total award of just compensation in the amount of \$36,100 because of its findings, noted above, that the taking resulted in a diminution in the value of the Property. (This amount is in lieu of the “pro rata” damages calculated by Mr. Daniels based on a contrary conclusion that there was no difference in value caused by the taking.)

#### E. Further Proceedings

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

Since 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.

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.

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:  
Lynmarie C. Cusack, Esq., Department of Justice, 33 Capitol Street, Concord, New Hampshire  
03301, counsel for the State of New Hampshire; and Laurence F. Gardner, Esq., Gardner, Fulton  
& Waugh, PLLC, 78 Bank Street, Lebanon, New Hampshire 03766, counsel for Energetic  
Enterprises, Inc., Condemnee.

Date: September 26, 2005

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Anne M. Stelmach, Clerk