State of New Hampshire

v.

Charles F. Rolecek Revocable Trust, Charles F. Rolecek, Trustee, Keybank, N.A., Banknorth, N.A. and The Event Center, Inc.

Docket No.: 19958-04ED

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", the State of New Hampshire, by various statutes, including RSA 230:45. A Declaration of Taking (the "Declaration") was filed with the board on March 17, 2004 and served on the above named "Condemnees", describing the property rights taken as: 0.19-acre of land in fee, a permanent slope easement consisting of 2,775 square feet, a temporary slope easement consisting of 7,500 square feet, a temporary construction easement consisting of 5,175 square feet and a temporary driveway construction easement consisting of 2,450 square feet, out of a total of 4.5 acres, leaving to the Condemnees, 4.31 acres with the improvements, encumbered with said easements (the "Property"). The temporary easements are scheduled to expire on October 31, 2008. See Exhibit No. A to the Declaration.

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 Condemnor was represented by Steven G. LaBonte, Esq. of the New Hampshire Department of Justice and Condemnee "Rolecek" was represented by Arthur G. Greene, Esq. of Greene Perlow, PLLC. No other appearances were filed by the other Condemnees, nor did they attend the hearing. Throughout this Report the term "Condemnees" will be used to reflect both the Rolecek evidence and all named Condemnees.

The board viewed the Property and commenced the just compensation hearing on May 24, 2006 at the BCTV Building, 10 Meetinghouse Road, Bedford, NH. At the conclusion of the first day of the hearing, it was recessed until June 2, 2006 when it was reconvened at the board's offices at 107 Pleasant Street, Concord, NH. Following the May 24 and June 2 hearings, it was determined an additional limited hearing was necessary. This limited hearing was held on August 21, 2006, at which time the board ruled it was appropriate and necessary to take another view of the Property. The board took its subsequent view on December 4, 2006. A final day of hearing was held at the board's offices on December 18, 2006.

Lynda Eldred, Pamela A. Nostrand and Kimberly A. Kerwin of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, NH, 03105, Telephone: (603) 669-7922, took the stenographic record of the first three days of hearing and the fourth day was tape recorded by the board's clerk, Anne M. Stelmach. Any request for transcripts should be coordinated with Ms. Stelmach and Bragan Reporting Associates. Parties should expect at least four (4) weeks for completion of a requested transcript.

Board's Rulings

The board finds the just compensation due the Condemnees to be in the amount of $200,000.

The Property is a multi-use property containing a restaurant, an event center, where functions such as wedding receptions or corporate meetings are held, and the facilities for an airline catering business. These three businesses are all contained in one structure and are served by one parking area with a single point of ingress and egress on Kilton Road. The board acknowledges this is a unique property to value and has thoroughly reviewed the extensive amount of submissions and testimony provided by the parties.

To determine the appropriate amount of just compensation, the board has focused on the loss of real estate rights to the Condemnees and what is the best approach to value the loss. The board finds the Condemnees are entitled to compensation for the area taken in fee, the various easements, both permanent and temporary, and the landscaping items removed as a result of the highway construction project. The board acknowledges some negative affect may exist on some of the businesses on the Property as a result of the taking but those business losses, if any, are not compensable. In general, business goodwill, or the loss or frustration of it, is not a compensable property interest in an eminent domain action. See 2 Nichols on Eminent Domain § 5.03[6][h], citing Ranlet v. Concord R.R., 62 N.H. 561 (1883). Therefore, the board did not consider or place a value on any potential business loss.

The Condemnor submitted the "Doctor Appraisal" (Condemnor Exhibit No. 2) and the Condemnees submitted the "Bramley Appraisal" (Condemnees Exhibit No. W) to support their respective positions regarding the amount of just compensation due the Condemnees. After a

review of the two appraisals, the board finds the sales comparison approach to be the more reasonable approach to value the real estate rights lost as a result of the taking.

The board reviewed all the comparable sales submitted by Mr. Doctor and Mr. Bramley to determine a per-acre value to be assigned to the area taken in fee. The board places the most weight on sale L-4 in the Doctor Appraisal and sale L-1 in the Bramley Appraisal. The board places little weight on the other sales in the Doctor Appraisal because: sale L-1 was an assemblage of properties for a speculative investment; sale L-2 was a sale between family members calling into question its arm's length nature; and sale L-3 had questionable comparability given its more remote location. The board gave no weight to sales L-2 and L-3 in the Bramley Appraisal due to their location along Amherst Street in Nashua, New Hampshire, one of the busiest roadways in the state with more than twice the traffic count of either Kilton Road or South River Road near the Property in Bedford. Considering the two sales and relying on its judgment, the board has determined a $400,000 per-acre value is applicable in this case. This determination was more qualitative than quantitative and was arrived at utilizing the board's judgment rather than a strict mathematical calculation.

Accordingly, the value of the 0.19-acre fee taking is determined to be $76,000 ($400,000 per acre x 0.19 acres).

The board determined the value of the 2,775-square foot permanent slope easement to be $6,400 ($6,369 rounded). [$9.18 per sq. ft. ($400,000 per acre ÷ 43,560 sq. ft. per acre) x 2,775 sq. ft. x 0.25 = $6,369]. The board concurs with Mr. Doctor that, for this easement, a 25% of the fee value adjustment is reasonable and appropriate for the less than fee nature of the easement acquisition.

Again, following a similar methodology, the board determined the value of the three temporary easements (a temporary slope easement, a driveway construction easement and a temporary construction easement). The board used the $9.18 per square foot value, the 15,125 square foot total area of the three easements and a 10% of fee adjustment to calculate an annual rent of $13,885 or $1,157 per month ($9.18 x 15,125 x 0.10 = $13,885 ÷ 12 = $1,157). Using this monthly rent in conjunction with the 56-month time period and 12% discount rate contained in the Doctor Appraisal, the board estimated the value of these temporary easements to be $49,400 ($49,427 rounded).

The board finds the $68,065 estimate contained in Condemnee Exhibit No. J to be the best evidence of the value of the lost landscaping components. While it is not feasible to replace some of the more mature vegetation, the board finds this estimate provided by Pellettieri Associates more accurately depicts the cost to replace the vegetation removed as a result of the taking. The board finds the landscaping estimate in the Doctor Appraisal at Part III, page 42 and in Condemnee Exhibit No. H does not adequately account for the substantial reduction in the amount and size of the removed landscape items. It should be noted, however, not all the vegetation removed was on the Property, some was on the land of the abutter or in the right-of-way.

The total amount of damages due the Condemnees, therefore, is calculated by combining the value of the fee taking, the various easements and the landscaping items. This value is determined to be $200,000 ($76,000 + $6,400 + $49,400 + $68,065 = $199,865, rounded),

The Bramley Appraisal contained an analysis based on an income approach to value. The board finds the income approach, while one of the three generally recognized and accepted appraisal methods for determining the market value of a property, as employed in this case by

Mr. Bramley, raises several questions regarding the reliability of its value conclusion. Mr. Bramley's income approach included a business value component and is apparently based on the gross sales of the various businesses on the Property. Mr. Bramley testified he appropriately removed this component when he deducted the 7% management fee (owner's salary) under the operating expense heading on page 30 of his appraisal (Condemnees' Exhibit No. W). The board is not persuaded this methodology fully removes all the business acumen (e.g. specialized and skilled management, assembled workforce, client lists, contracts, good will associated with "C.R. Sparks" name, etc.) in this scenario and is one reason the board placed more weight on the sales comparison approach methodology. Further, the majority of the mitigation costs contained in the Bramley Appraisal were based on Robert Duval's, a professional engineer associated with T.F. Moran, Inc., construction cost estimates which the board found were not appropriate because they were based on a 50-year storm rather than the 10-year storm design standard established for federally funded highway construction in New Hampshire.

During the several days of hearing, the board heard a substantial amount of testimony regarding the drainage and flooding issues associated with the Property. There is a drainage easement encumbering a portion of the Property as well as a portion of the abutting property, owned by Bedford Farms VI Limited Partnership ("Bedford Farms"), to the west. A copy of the drainage easement is recorded at the Hillsborough County Registry of Deeds, Book 2456, Page 810, and was provided the board in the Comdemnor's July 3, 2006 Response and Motion to Strike. The Condemnor acquired, by warranty deed, a portion of the Bedford Farms property in fee simple plus a number of permanent and temporary easements. This conveyance gave the Condemnor the rights and authority to move the drainage easement.

The board heard extensive testimony from Mr. Duval concerning the affects of the

100-year Mother's Day 2006 storm which caused flooding on the Property. Mr. Duval testified there would be a significant amount of drainage work necessary to construct a drainage system which would prevent similar flooding of the Property now that the highway project has been completed. Because the drainage swale that was in the easement area prior to the taking was replaced by a series of catch basins and a drainage pipe, Mr. Duval considered the capacity of the pipes to handle the flowage of excess water to be less than what was available in the drainage swale before the project was undertaken and less than what was necessary to control any flooding caused by a storm similar to the one on Mother's Day 2006.

The Condemnor called David Smith from the New Hampshire Department of Transportation ("DOT") to address the change in drainage facilities as a result of the project. Mr. Smith is a member of the DOT's highway design section and was involved in the Kilton Road project since 1999. He reviewed Mr. Duval's analysis and concluded it was flawed for several reasons. First, the calculations and drawings prepared by Mr. Duval in his design of a remedial drainage plan were based on a 50-year storm. Mr. Smith testified the design standard for work in federally funded New Hampshire highway construction projects is based on a 10-year storm. Mr. Smith stated it would be cost prohibitive to design and build any highway construction project if it had to accommodate a 50 or 100-year storm. Second, Mr. Smith testified Mr. Duval, in his analysis, had used incorrect numbers for the number of and measurements for the pipes and culverts that had been installed during the Kilton Road project in what had previously been the drainage swale. More specifically, Mr. Duval used 42 inches as the diameter for the main pipe installed in the former drainage swale, when in fact, the installed pipe was 48 inches in diameter (see Condemnee Exhibit No. X). Additionally, Mr. Duval did not include in his calculations the storage capacity of the 12 inch pipe shown in Condemnor's

Exhibits Nos. 5 & 6. This pipe/culvert collects and carries the water runoff from portions of the Property's parking area. Third, Mr. Duval had asserted an additional amount of flowage/storage capacity was necessary to contain and control the increase in the amount of water that would occupy this portion of the overall drainage system due to the widening of Kilton Road from two traffic lanes to five and the attendant increase in water runoff collected from the enlarged impervious area. Mr. Smith testified the inclusion of this additional volume is inappropriate as the water on the reconfigured Kilton Road is captured and directed to the drainage system in the area of the Kilton Road and South River Road (U.S. Route 3) intersection, not the drainage system associated with the Property.

After a thorough review of Mr. Duval's and Mr. Smith's testimony and the submissions and photographs submitted in various exhibits by both parties, the board could not definitively determine any loss of water flowage capacity existed for the drainage of the Property. Further, the board finds the Condemnor, through its submissions and the testimony of its witnesses, provided more probative evidence and, therefore, carried its burden.

In summary, to determine the value of the real estate rights lost, the board focused on the area taken in fee, the easement areas and the loss of landscaping. The board finds these are the only items the Condemnees may be compensated for and the just compensation is determined to be $200,000.

The "Requests" received from the Condemnees are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect the Request, "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 overly broad or narrow so 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 decision.

The Rolecek Requests for Findings of Fact and Rulings of Law

1. The State did not include in its Declaration of Taking all of the property rights owned by Rolecek that were necessary to complete the road construction.

Denied.

2. Rolecek is entitled for damages sustained as a result of the State's taking of its property rights in the drainage easement to the West of its property.

Neither Granted Nor Denied.

3. The State has substantially eliminated the benefits of the northerly portion of said drainage easement and has not met the conditions for relocating it which requres: (i) the State bear the cost of relocation; (ii) the relocated drainage ditch "shall not materially adversely affect drainage"; and (iii) the "site and description of the relocated easement shall be set forth in a conveyance or grant to be recorded in the Hillsborough County of Deeds."

Denied.

4. The exception to the Campbell Rule provides that "a landowner may recover damages to the remainder of his property when the owner can establish that 'his property was indispensable to the overall project, and that damages flowing from the overall project cannot be separated between the use put to the property taken from the property owner and the use put to the abutting property taken'" Manchester v. Airpark Business Center Condominium Units, 148 N.H. 471 (2002).

Denied.

5. The State's project widening the road to the west of the Rolecek property could not have been accomplished without the taking of Rolecek's property rights.

Neither Granted Nor Denied.

6. The damages suffered by Roleck as a result of filling in the drainage swale is substantial and cannot be separated from the damage he sustained from the taking of the property rights related to his property that is the subject of the Declaration of Taking in this case.

Denied.

7. Property rights cannot be materially abridged without, ipso facto, taking the owner's property. Burrows v. Keene, 121 N.H. 590, 597 (1981).

Neither Granted Nor Denied.

8. Public officials have a duty to obey the Constitution and they have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting the expense on an individual. Burrows v. Keene, 121 N.H. 590, 599 (1981). The Burrows case also points out on p. 599 that damages for bad faith violations of a landowner's constitutional rights may go beyond condemnation damages.

Neither Granted Nor Denied.

9. The de facto expropriation of the drainage swale, if not the easement itself, is a loss of property rights for which Rolecek must be compensated.

Denied.

10. The State's appraiser, Mr. Doctor, did not take into consideration or allocate any damages for the taking of Rolecek's property rights in said drainage easement or in the loss of the benefit of the drainage ditch along the westerly side of his property.

Granted.

11. In awarding damages for a temporary easement taking, a landowner is entitled to recover the cost of restoring the premises to its original condition. Paddock v. Durham, 110 N.H. 106 (1970); Nichols, *supra, s.* 12.5.

Granted.

12. In awarding damages for a temporary easement taking, a landowner is entitled to have the landscaping restored to its pre-take condition to the extent possible.

Granted.

13. If restoring landscaping to its pre-take condition is impossible due to the size of the trees taken, at a minimum the landowner is entitled to be reimbursed the cost of restoring the landscaping to the standards of the local ordinances for new construction.

Neither Granted Nor Denied.

14. The loss of landscaping of the Rolecek property has affected its value.

Granted.

15. The taking which has removed a portion of the drainage swale has resulted in additional annual expenses to Rolecek to maintain the subject property occasioned by changes in snow plowing and snow removal.

Denied.

16. In its appraisal, the State has failed to account for the additional cost of snow plowing and snow removal.

Neither Granted Nor Denied.

17. The Taking which has removed a portion of the drainage swale has resulted in a loss of water storage capacity which will subject the property to more frequent flooding in the future.

Neither Granted Nor Denied.

18. The increased risk of flooding in the future affects the value of the property.

Denied.

19. The cost to cure the increased flooding risk involves replacing the loss of water storage with underground storage which will need to be constructed under the parking lot.

Denied.

20. The subject property is in a neighborhood which includes a shopping center, big box stores, upscale restaurants, and class A and B office buildings.

Granted.

21. The location of the subject property in a neighborhood which includes a shopping center, big box stores, upscale restaurants, and class A and B office buildings make it superior to all four comparables utilized by the State.

Neither Granted Nor Denied.

22. The damages to Rolecek are $725,000 plus the cost of restoring the landscaping to meet the standards of the Bedford ordinances for new construction.

Denied.

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 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.

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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Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Report of the Board has been mailed this date, postage prepaid, to: Stephen G. LaBonte, Esq., Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the State of New Hampshire, Condemnor; Arthur G. Greene, Esq., Greene Perlow, PLLC, 4 Bell Hill Road, Bedford, NH 03110, counsel for Charles Rolecek, Condemnee; Noel Graydon, Senior Vice President, Keybank, N.A., One Canal Plaza, Portland, ME 04101, Condemnee; Carolyn A. Cloutier, SVP, Banknorth, N.A., 300 Franklin Street, Manchester, NH 03101, Condemnee; Philip R. Currier, Esq., Reg. Agent, The Event Center, Inc., 221 Main Street, Suite 300, Nashua, NH 03061, Condemnee; and William Ingalls, Bedford Town Assessor, 24 N. Amherst Road, Bedford, NH 03110, Interested Party.

Dated: May 17, 2007

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Anne M. Stelmach, Clerk