State of New Hampshire

v.

Boston & Maine Corporation

Docket No.: 20016-04ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights for highway purposes taken from the "Condemnee," pursuant to authority conferred on the "Condemnor" by various statutes, including RSA 230:45. A declaration of taking ("Declaration") was filed with the board on July 28, 2004, which describes the "Property" taken as 0.13 acres in fee simple from land shown on Plan of Manchester #10622-A and temporary slope and driveway construction easements expiring on December 31, 2008. See Declaration, ¶4 and Exhibit A thereto.

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 board viewed the Property and held the just compensation hearing at the BCTV Building in Bedford on June 20, 2006. The Condemnor was represented by Stephen G. LaBonte, Esq. and the Condemnee was represented by Arthur G. Greene, Esq.

Lynda W. Eldred 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 is part of the remnant of a railroad spur formerly operated by the Condemnee, which had a total size of 16,988 square feet (approximately 0.39 acres) and an average width of 20 feet and an average length of 860 feet. The taking from the remnant consisted of 5,662 feet (approximately 0.13 acres) in fee simple and the temporary slope and driveway construction easements described above.

Board's Rulings

The Condemnor presented an appraisal performed by Leon E. Martineau (Condemnor Exhibit No. 2) estimating total damages of $44,500. The Condemnee presented an appraisal performed by Robert G. Bramley (Condemnee Exhibit A) estimating total damages of $208,800.[1]

While these damage estimates are somewhat apart, the parties substantially agree, and the board finds, the highest and best use of the Property is as supplemental land for purchase by abutting land owners to fulfill future development and/or parking needs and that a calculation based on value per square foot of land taken is appropriate. Because of the small size, narrow width and limited utility of the Property to anyone other than an abutter, the board finds the so-called 'at'/'over'/'across the fence' concept of valuation is applicable. Both appraisers used the

[1] In Condemnor Exhibit A, p. 26, Mr. Bramley arrived at the $208,800 estimate by applying a "PW" (present worth or present value factor), which the board questions. He finds no "severance" damages from the taking, but argues the remainder of the remnant will be "unmarketable" until the end of the potential construction time period as indicated by the expiration of the temporary easements at the end of 2008. The board disagrees. There is no evidence to support this very questionable assumption that the Condemnor would essentially landlock the Condemnee's remaining property during the term of the easement. Excluding the "PW" factor, Mr. Bramley's damage estimate falls to $116,700 (rounded), considerably closer to Mr. Martineau's estimate.

comparable sales approach to calculate a price per-square-foot value and included one common sale (1589 Elm Street) in their respective analyses. The differences in their estimates arise mainly from the type and magnitude of adjustments each applied to the comparables.

The board has considered the appraisals and other evidence carefully and concludes a total just compensation award of $80,000 is appropriate. This equates to roughly $14 per square foot (applied to the 5,662 square feet taken) plus the value of the temporary easements. It is, of course, somewhat problematical to estimate how an abutter is likely to value the Property, since it will be dependent in part on how much need may exist for the additional land and the abutter's relative bargaining strength. The comparable sales provided some, but not complete, guidance on this value question. The range of adjusted values in the two appraisals is roughly from $7 to $21 per-square-foot and the board finds an estimate in the middle of this range is the most likely, taking into account the size, shape and likely utilization factors mentioned above.

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. 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: Stephen G. LaBonte, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, counsel for the Condemnor; and Arthur G. Greene, Esq., Greene Perlow, PLLC, 4 Bell Hill Road, Bedford, NH 03110, counsel for the Condemnee.

Date: August 3, 2006

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Anne M. Stelmach, Clerk