

State of New Hampshire

v.

Allard Family, LC

Docket No.: 20017-04ED

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” in Parcel 53 of the Manchester #10622A project (“Project”), 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, describing the property rights taken as a temporary slope easement expiring on December 31, 2008 and a limitation of access on the easterly side of Parcel 53. See Exhibit 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 board viewed the “Property” on June 20, 2006, began the just compensation hearing at the BCTV Building in Bedford on that date and completed the hearing at the board’s offices in

Concord on June 21, 2006. The Condemnor was represented by Stephen G. LaBonte, Esq. and the Condemnee was represented by Arpiar G. Saunders, Jr., Esq.

Michelle A. H. McGirr 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 before the taking consisted of a 0.58-acre lot improved with a one-story, unheated, metal warehouse building. Before the taking, access to the parcel was provided by the 464 feet of frontage on Allard Drive on the east, and 490 feet of frontage on Lumber Lane on the west. The taking eliminated the access on Allard Drive and encumbered the parcel on the east with a 300 square-foot temporary slope easement that expires on December 31, 2008. After the taking, new access was provided by a new Allard Drive being constructed on the west of Parcel 53 and as a result, Parcel 53 was enlarged by approximately 0.40 acres as the result of the former Allard Drive and Lumber Lane being discontinued as part of the Project.

Parties' Arguments

The Condemnor presented an appraisal performed by Mr. Leon E. Martineau ("Martineau Appraisal") that estimated a market value prior to the taking of \$765,000 and after the taking of \$789,000 based on both the sales comparison and income approaches. The Condemnor argued as part of the Project the Condemnee acquired 0.40 of an acre from the discontinuation of Allard Drive and Lumber Lane and thus the value in the after situation is higher. Nonetheless, the Martineau Appraisal estimated damages of \$39,800 based on an estimated nominal value of \$500 for the temporary slope easement and \$39,300 damages as a cost-to-cure estimate of having to

relocate the loading doors to the west side of the warehouse due to loss of access on the east side of Parcel 53.

The Condemnee argued seven parcels impacted by the Project (several of which the Condemnor had acquired either partially or totally without condemnation) had been used in an integrated fashion by two businesses of the Allard family. The other parcels provided office space, bathroom facilities, vehicle maintenance and parking spaces for the warehouse building on Parcel 53 (used by “Ray-the-Mover, Inc.”) and for parking and potential expansion for the Alpha-Bits Learning Center, Inc. on Parcel 47. Consequently, the Condemnee argued the value of Parcel 53 was substantially impacted not only by the taking that occurred to Parcel 53, but also by the Condemnor’s acquisition of these interrelated parcels.

The Condemnee presented an appraisal performed by Mr. Robert G. Bramley (“Bramley Appraisal”) which estimated a market value before the taking of \$1,025,000 and after the taking of \$523,500 based largely on the sales comparison approach. The damages were predicated upon the assumption the warehouse is functionally obsolete after the taking because it cannot be used without heat, toilet facilities and office space, and thus, Parcel 53 has value only as vacant land. Further, the Bramley Appraisal did not consider the increased acreage due to the discontinuance of Allard Drive and Lumber Lane because they were only discontinued as a result of the Project.

Board’s Rulings

The arguments presented by the parties raise two threshold questions: 1) should Parcel 53’s integrated use with the adjoining parcels owned by the Condemnee be considered in estimating Parcel 53’s damages when the Condemnor has acquired without condemnation the adjoining parcels; and 2) is the acreage gained by the discontinuance of Allard Drive and

Lumber Lane a special benefit to the Condemnee that can be considered in estimating the damages to Parcel 53.

Arguments and testimony presented during the hearing indicate the Condemnor and the Condemnee reached agreements on the property rights and their values being acquired from Parcels 52, 57 and 58 (also owned by Allard Family, L.C.) in lieu of condemnation. The parties did not reach agreement on Parcel 53, and thus this condemnation proceeding was initiated. The board finds the “unity in use” rule does not apply in this instance because the parties had agreed and settled as to the value of the rights being acquired from the non-condemned parcels. The board must assume the parties, acting in good faith and in their own best interest, adequately accounted for all rights the Condemnee lost in those adjoining parcels. Thus, in valuing Parcel 53, the board will consider it as a “stand alone” property in determining its before and after value and the damages resulting from the taking.

The board finds the acreage acquired by the condemnee due to the discontinuance of Allard Drive and Lumber Lane is a special benefit that must be considered in determining just compensation. In State v. 3M Nat’l Advertising Co., 139 NH 360, 364 (1995), the supreme court upheld the superior court’s deduction of the rental income received by the condemnee subsequent to the date of taking from the damage reward. Such enrichment to be considered as an offset to damages is similar to the approximately 0.40 acre the Condemnee received as a result of the Project discontinuing Allard Drive and Lumber Lane. “We have held that where benefits inure to the condemnee, those benefits may be considered by the finder of fact as a reduction in damages and may be deducted or set off from the compensation award. See Lebanon Housing Auth. v. National Bank, 113 N.H. 73, 74, 301 A.2d 337, 339 (1973).” Id at

364. Thus, the board in determining damages here must consider the special benefit the Condemnee received by acquiring the 0.40 acre as part of the Project.

This is a difficult property to estimate the takings damages because of the lot's and building's narrow configuration and the lack of any setbacks due to its old millyard setting. Nonetheless, the board finds the Property did suffer severance damages due to the taking eliminating access to the easterly side of the building and the two at-grade (to interior building floor level) loading docks. Based on the testimony of Mr. Chip Allard, this severance damage is difficult to cure due to the grade difference in the building in its east to west plane. The Condemnor estimated the damages based on the cost-to-cure of installing two doors on the west side of the warehouse, but as Mr. Allard pointed out, those would not be as functional due to the change in grade from the loading dock height to the interior warehouse floor height. Also, the loading docks' ultimate relocation on the north end of the building (as borne out by the subsequent addition) is not as functional as being located in the mid-portion of either the east or west side of the building.

Consequently, the board finds there is more severance damage than that estimated in the Martineau Appraisal of \$39,300 for the door replacement. On the other hand, however, the board does not agree with the Bramley Appraisal damages because it is premised on the unity in use of Parcel 53 with the other parcels and does not consider the 0.40 acre special benefit. As a result, the board does not accept the Bramley Appraisal severance damages premised on the property having value only as vacant land in the after situation.

Equally difficult to estimate is the value of the 0.40 acre special benefit land the Condemnee acquired as a result of the Project. The evidence received provides a wide range of indicated values for the land. First, Mr. Martineau did a before and after appraisal for the

Property, with the only difference being the size of the parcel having increased in the after situation. Mr. Martineau found a \$24,000 increase (\$789,000 after value, \$765,000 before value) for the 0.40 acre. Mr. Bramley in the after situation assumed the building had no utility and thus performed a sales comparison approach valuing the land only. The Bramley Appraisal at page 34 arrives at an estimated value of \$21 per square foot for the land. Applying this value to the 0.40 acre special benefit indicates a value of \$365,904 (\$21 per square foot x 17, 424 square feet).

Without having to definitively determine an actual value for the 0.40 acres, this wide range of value (\$24,000 to \$366,000) provides a reasonable and sufficient cushion for any additional severance damage above the \$39,300 Martineau Appraisal estimate due to the loss of the loading dock doors and any reconstruction necessary to relocate them and make them of equal utility.

As a consequence the board finds the Condemnor's estimate of damages of \$39,800 coupled with the special benefit value of the 0.40 acre is sufficient just compensation. Because the Condemnor had filed a deposit of damages of \$29,500, the total additional damages the Condemnor is responsible for is the difference between the \$29,500 deposit and the \$39,800 damage finding by the board.

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

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

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 Arpiar G. Saunders, Jr. Esq., Shaheen & Gordon P.A., P.O. Box 2703, Concord, NH 03302-2703, counsel for the Condemnee.

Date: August 9, 2006

Anne M. Stelmach, Clerk