

State of New Hampshire

v.

Dana D. Post

Docket No.: 20566-04ED

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 October 13, 2004 and served on the “Condemnee,” describing the property rights taken as: a temporary construction easement containing two thousand two hundred (2,200) square meters, more or less (the “Property”). Said temporary construction easement expired on November 10, 2007. See Exhibit A to the Declaration.

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 on October 18, 2007 and held the just compensation hearing at the Plaistow Town Hall on the same date. The Condemnor was represented by Lynmarie C. Cusack, Esq. and the Condemnee was represented by Bruce J. Marshall, Esq.

Ms. Pamela A. Nostrand, CCR of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire 03105 (Telephone: (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.

Parties' Arguments

The Condemnor submitted an appraisal performed by Mr. Stephen J. Bergeron, MAI of Bergeron Commercial Appraisal (the "Bergeron Appraisal"). Mr. Bergeron performed a complete "before" and "after" appraisal, a standard appraisal methodology used in eminent domain proceedings, and determined the taking of the easement did not impact the Property's market value. His damage estimate, therefore, was \$0. As the Bergeron Appraisal quotes at page 65 "[a] so-called 'part taken' appraisal by the condemnor may be employed only when the appraiser has determined that, if he had completed a full 'before and after' appraisal of the subject property, the before and after values would be exactly the same." Mr. Bergeron performed such a "part taken or "pro rata" analysis and determined the value of the temporary construction easement (the real estate interest taken) to be \$8,600 (Bergeron Appraisal at p.70).

The Condemnee submitted an appraisal performed by Mr. Joseph G. Fremeau, MAI of Fremeau Appraisal, Inc. (the "Fremeau Appraisal"). The Fremeau Appraisal was a complete before and after appraisal which indicated the damages to the Property and the just compensation due the Condemnee to be \$75,000.

Board's Rulings

After a review of the evidence and testimony presented at the hearing, the board finds the Property did suffer some diminution in value due to the taking of the easement, the placement and construction of the new private bridge and the loss of some of the parking spaces. There was conflicting evidence presented regarding whether the taking has affected the number of available parking spaces. The Condemnor's appraiser concluded there was no impact on the number of available parking spaces while the Condemnee's appraiser concluded there was a "nearly 50% reduction" in the number of spaces. While not entirely free of doubt, the board finds there were approximately 30± parking spaces, including one for handicap parking, in the before situation. In the after situation, the board finds there are approximately 24± parking spaces, some paved and some unpaved, including one handicap space. The board determined the number of remaining spaces using the plan on page 58 of the Fremeau Appraisal coupled with the board's view of the Property and testimony at the hearing.

In eminent domain proceedings, the Condemnor has the burden of proof. Fortin v Manchester Housing Authority, 133 N.H. 154, 157 (1990) and Merrill v. City of Manchester, 124 N.H. 8, 16 (1983). In this case, and contrary to the board's findings, the Condemnor's appraiser made no adjustment for the parking loss. For this reason, the board finds the Condemnor did not carry its burden. The board would note, however, the "before" values in the Fremeau Appraisal (\$500,000) and the Bergeron Appraisal (\$512,000) were very similar and were determined using a similar methodology.

Because there was a loss in the number of parking spaces, there may be some restrictions in the use of the Property due to the Town's zoning requirements regarding the amount of retail space allowable due to the reduced parking area. The board finds the methodology employed by

Mr. Fremeau to determine the impact on the Property's market value due to the loss of some parking spaces to be reasonable. In the Fremeau Appraisal, rentals of properties with adequate parking were compared to rentals with inadequate parking to estimate an appropriate adjustment to be applied in the "after" situation. The board finds, however, the extent of the lost parking is not to the same degree as that used by Mr. Fremeau and the board has applied a negative 5% adjustment rather than Mr. Fremeau's negative 15% factor to determine the damages to the Property. Using Mr. Fremeau's comparable sales approach and income approach and adjusting the previously discussed factor, the board finds the Property's market value after the taking to be \$470,000. Both appraisers agreed the most probable purchaser of the Property would be an owner-user (Condemnor Exhibit No. 1 at p. 40 and Condemnee Exhibit No. A at p. 25) and gave the estimate of value provided by the sales comparison approach the most weight. The board concurs with this reasoning and used it in its reconciliation of the revised value indications.

Based on the evidence, the board finds the before and after values and damages to the Property are as follows:

Value of the Property Before the Taking: (Fremeau Appraisal p. 25)	\$ 500,000
Value of the Property After the Taking:	<u>\$ 470,000</u>
Total damages:	\$ 30,000

The board finds the \$30,000 just compensation award includes the pro rata value and any severance damages.

The parties noted the new bridge provided improved access to the Property but also that, being privately owned, it involved some offsetting disadvantage of new maintenance and insurance costs. However, because the Condemnor did not assert it was a special benefit, the board need not consider it further in its damage estimate.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Rockingham 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: Lynmarie C. Cusack, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, counsel for the Condemnor; Bruce J. Marshall, Esq., Getman, Stacey, Schulthess & Steere, P.A., 3 Executive Park Drive, Suite 9, Bedford, NH 03110, counsel for the Condemnee.

Date: 12/31/07

Anne M. Stelmach, Clerk