

State of New Hampshire

v.

Soffron Trust No. 1

Docket Nos.: 20572-04ED and 20573-04ED

REPORT OF THE BOARD

This matter arises as a result of a RSA 498-A:5 acquisition of property rights taken for an approved highway layout pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:45. The date of taking was October 27, 2004 for both “Parcels” (Docket No.: 20572-04ED referred to as “Parcel 315” and Docket No.: 20573-04ED referred to as “Parcel 314”) based upon the Declarations of Taking (“Declarations”) filed with the board on October 27, 2004. Each Parcel had an area of vacant land taken in fee as well as a permanent slope easement. See Declarations 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.

On October 18, 2005 the board opened a just compensation hearing at the Conway Town Hall in Conway, New Hampshire. The board marked several exhibits and heard the parties’ opening arguments before recessing the hearing until November 15, 2005. After recessing the hearing, but before leaving Conway, the board took a view of the Parcels accompanied by the parties. The Condemnor was represented by Attorney Stephen G. LaBonte at the initial hearing. The Condemnee was represented by Attorney Arthur G. Greene. Ms. Sheila Spencer Jarvis of Bragan Reporting Associates, Inc., PO Box 1387, 1117 Elm Street, Manchester, New Hampshire (603) 669-7922 took the stenographic record.

The hearing was reconvened on November 15, 2005 at the board’s offices in Concord, N.H. At the reconvened hearing, the Condemnor was represented by Attorney Mark P. Hodgdon, and the Condemnee continued to be represented by Attorney Greene. At this hearing, the stenographic record was taken by Ms. Kimberly A. Kerwin, CSCR of Bragan Reporting

Associates, Inc. Any requests for transcripts should be ordered directly through the reporters. Parties should expect at least four (4) weeks for completion of a requested transcript.

Board's Findings and Rulings

Parcel 314 consists of approximately 1.8 acres of vacant land of which approximately 0.62 acres are usable due to severe slopes at the rear of the lot. The fee taking for this Parcel consists of 0.02 acres which runs along the entire length of the Parcel's frontage on Route 16/302. The fee taking is slightly irregular in shape with an average depth of approximately 5 feet and a width of approximately 169 feet. Additionally, a permanent slope easement containing 2,605 square feet running along the entire length of the Parcel's frontage was taken. The easement area has a generally rectangular shape with a maximum depth of 18 feet. The fee taking and the permanent slope easement areas have generally level topography and before the taking had some moderate tree cover. Parcel 315 contains 1.52 acres of which approximately 0.58 acres are usable due to the similarly severe slopes at the rear of the lot. Parcel 315 is improved with a 2,613 square foot single-family residence. The fee taking on this Parcel consists of 0.04 acres and runs along the entire length of the Parcel's frontage. The fee taking is generally rectangular in shape with an average depth of 8 feet and a width of 182 feet. A permanent slope easement containing 1,464 square feet running along the majority of the Parcel's frontage was also taken. Parcel 315 had two points of access before the taking. After the taking, the access was reduced to one 27 foot-wide driveway.

The parties disagree sharply regarding the amount of just compensation that should be awarded. As presented at the hearing and discussed further below the major areas of disagreement fall into two categories: 1) the value of the real estate rights taken; and 2) the value of the removed trees.

The Condemnor's position is that no measurable severance damages occurred as a result of the taking because the before and after values of the Parcels are the same (Parcel 314--\$85,000 and Parcel 315--\$330,000). This position is based on the appraisals performed by Mr. Peter Nault, a New Hampshire Certified General Appraiser and president of McManus and Nault Appraisal Company, Inc. (the "Nault appraisals," Condemnor's Exhibits 2 and 3) and his testimony. The Nault appraisals find no severance damages but do make a pro-rata allocation for the taking in the total amount of \$5,000 for Parcel 314 and \$11,700 for Parcel 315.

The Condemnee contends damages from the taking total \$31,000 for Parcel 314 and \$61,000 for Parcel 315. These damages are based on an October 4, 2005 appraisal (Condemnee Exhibit A) and testimony from Mr. Bruce A. Taylor, MAI, a New Hampshire Certified General Appraiser.

The appraisers generally agree, and the board concurs, that the highest and best use of the Parcels, given their zoning characteristics and location in a neighborhood that is in transition, is for some adaptation for commercial use with the possibility of some continued residential use of the existing improvements on Parcel 315.

A. Value of the Real Estate Taken (fee taking and slope easement)

To determine the amount of just compensation due the Condemnee, the appraisers estimated the value of the fee taking and the slope easement for each Parcel. The evidence and testimony was clear that most, if not all, of the fee taking and the permanent slope easement on each of the Parcels was contained in the setback areas dictated by the zoning ordinance for this section of the Town of Conway. Therefore, the pivotal issue in determining the appropriate value for the area lost or encumbered is: what is the appropriate per-acre value that is to be applied to the fee takings and permanent slope areas. The primary difference between the per-acre value estimates of the two appraisers lies in the comparable sales they utilized and the neighborhoods the sales were located in.

After reviewing the testimony and evidence submitted, the board, on Tuesday, November 22, 2005, returned to Conway and took a subsequent view of all the comparable sales and the neighborhoods where they were located. The board thoroughly reviewed the appraisals submitted by both parties as well as the testimony of the individual appraisers and concludes the appraisal, with some revisions, performed by Mr. Nault, the Condemnor's expert witness, offers a more supportable and well founded estimate of the damages due the Condemnee.

The board finds it could give little weight to the value conclusions drawn by Mr. Taylor in his appraisal. Generally accepted eminent domain authorities caution against valuing only a component of an impacted property and not performing a "before and after" appraisal to determine the type and magnitude of the damages. See Nichols 8A 16.01 [2] – Before and After Rule; Uniform Appraisal Standards for Federal Land Acquisitions, (Interagency Land Acquisition Conference, 1992), Standard A-13 pp. 39-42 ("The property is to be valued as a whole and its constituent parts considered only in the light of how they enhance or diminish the value of the whole....") Id. at 42; Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 76 (1973).

RSA 498-A:4 I(a) and amended RSA 498-A:4 II(c), when read together, require the condemnor to cause to be performed a **before** and **after** appraisal in every case where there is a difference between the before value and the after value. Thus, a "**part taken**" appraisal may be performed only where the appraiser has reached the conclusion that there will be absolutely no difference between the value of the subject property prior to the taking and the value of the subject property remaining after the taking. Part Taken Appraisals, N.H. Op. Att'y Gen. No. 66 (June 18, 1986)

Mr. Taylor did not perform a "before and after" analysis to determine if there was any diminution in value to the Parcels due to the takings. He simply performed a "part taken" appraisal. Conversely, Mr. Nault, within his appraisal, performed a before and after analysis to determine whether or not the Parcels had been diminished in value due to the takings. After concluding they had not, he proceeded to calculate the pro-rata value of the rights taken and the trees removed. The board finds Mr. Nault's methodology follows the most generally accepted appraisal practice for appraisals performed for condemnation in New Hampshire. The board

finds the Condemnor's cross-examination question to Mr. Taylor telling, regarding the fact that the damage estimates in Mr. Taylor's appraisal, if they are accurate, constitute an approximate 20% diminution in value to the Parcels and that an amount so substantial should have been recognized in a before and after appraisal.

The board finds the sales selected by Mr. Nault to be more comparable than those selected by Mr. Taylor. As noted by the Condemnor at the hearing, the Condemnee's comparable sales were located in the area known as the "strip," an area predominately occupied by nationally known, name brand outlets rather than in the areas north and south of the strip occupied by more ancillary, local businesses. The Parcels are located north of River Road's intersection with Route 16 and 302 which is north of the strip. The comparable sales selected by Mr. Nault were in the south end, nearer Conway Village, and south of the intersection of Route 16 and 302, a neighborhood more similar to that of the Parcels, albeit less densely developed.

Further, the Condemnee submitted a list of properties (Condemnee Exhibit E), ostensibly to show the commercial development of the Parcels' neighborhood. All the properties on the list are outside the area Mr. Taylor used to select his comparable sales. During the board's view of the neighborhoods, we found the Condemnor's selection of comparable sales to be more similar to the Parcels and the Condemnee's list of properties than those submitted by the Condemnee's appraiser. The board did, however, note the greater density of uses in the north end beyond the strip verses that of the south end before the strip. Based on its subsequent view of the neighborhoods and the review of the sales comparison grid in the Condemnor's appraisal, the board finds an additional 20% adjustment as a location factor is warranted to reflect the greater intensity of use in the Parcels' neighborhood compared to the Condemnor's comparable sales' neighborhood.

In light of this determination, the board adjusted the sales grids in Condemnor's Exhibits 2 & 3 by an additional 20%, yielding an indicated value per acre of \$164,000. Applying the revised per-acre value to the damage calculation for Parcel 314, changes the values to \$3,280 for the fee taking and \$2,449 for the permanent slope easement for a total of \$5,750 (rounded). For Parcel 315, the revised damages are \$6,560 for the fee taking and \$1,376 for the permanent slope easement.

B. Value of the Removed Trees

On Parcel 315, there were several trees removed that the Condemnee should be compensated for. In Condemnor's Exhibit 2, Mr. Nault allowed \$810 per tree, based on estimates he obtained, for six trees that were removed. Alternatively, the Condemnee submitted a list (Condemnee Exhibit D) showing eleven trees had been removed. During cross examination, however, Attorney Greene suggested to Mr. Nault that "there were actually more than six trees removed, maybe seven." On its subsequent view, the board was unable to definitively determine the actual number of trees removed. In its determination of the value of the trees removed, the board has utilized seven, the number put forth by the Condemnee's counsel, in the calculation. The board used Mr. Nault's \$810 per-tree value rather than Mr. Taylor's unsupported, \$2,000 per-tree estimate. The resulting compensation due the Condemnee for the removed trees is \$5,670 ($\$810 \times 7 = \$5,670$).

Consistent with the findings of each appraiser, no value was given for the trees removed from Parcel 314, the unimproved lot.

C. Summary of Damages Awarded

In summary, the board finds a total award of just compensation payable to Soffron Trust No. 1 for both Parcels in the amount of \$19,350 (\$5,750 for Parcel 314 and \$13,600 for Parcel 315) based on its findings noted above. This amount is based upon the pro rata damage calculations by Mr. Nault with the previously discussed revisions.

D. Further Proceedings

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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Mark P. Hodgdon, Esq. and Stephen G. LaBonte, Esq., Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Arthur G. Greene, Esq., Greene & Perlow, 4 Bell Hill Road, Bedford, NH 03110, counsel for the Condemnee.

Date:

Melanie J. Ekstrom, Deputy Clerk