

State of New Hampshire

v.

Irving S. Paley Irrevocable Trust, et al.

Docket No.: 20577-04ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the alteration of a highway pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:14. A Declaration of Taking (“Declaration”) was filed with the board on November 3, 2004, describing the property rights taken as Parcels 16 and 16A (the “Property”). 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 “Condemnee”. See TAX 210.12 and cases cited therein.

The board viewed the Property and held the just compensation hearing at the Plaistow District Court on April 25, 2006. The Condemnor was represented by Lynmarie C. Cusack, Esq. and the Condemnee was represented by Bruce J. Marshall, Esq.

Laurie A. Gelinas 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 total of 2.95 acres (2.83 in Plaistow and 0.12 in Atkinson) (Condemnee Exhibit No. A). The taking acquired approximately 0.07 acres in fee, 1088 square feet as a temporary driveway construction easement and 355 square feet for a permanent slope easement. Both prior to and after the taking, the Property was improved with an industrial/warehouse building of approximately 22,000 square feet and a concrete foundation of 17,325 square feet.

Board's Rulings

Based on the evidence submitted, the board finds the damages as a result of the taking to be \$13,569. This determination is based upon the parties stipulated value of the land of \$3.75 per square foot applied to the state's appraisal methodology contained at page 19 of the Condemnor appraisal (Condemnor Exhibit No. 2). (This stipulation was made at the hearing.)

There remains an unanswered question due to the state's appraiser (Mr. Louis Manias) not attending the hearing as to whether a non-presented subsequent appraisal performed to update the value from the initial November 12, 2003 appraisal date to the November 3, 2004 date of taking would have resulted in Mr. Manias including any severance damage. However, based on the board's view and the extensive testimony and evidence relative to the effect of the taking making the foundation no longer compliant with the Town of Plaistow's 50 foot set-back requirements, the board concludes that such severance would be very minimal. Both attorneys agreed the risk of the Condemnee not receiving a variance from the Town of Plaistow, for this non-compliance due to the taking, was very slight. Consequently, the board concludes any severance damage due to this non-conformity is related simply to the cost and time of pursuing such a variance. The board finds the indicated prorata value, based on the parties stipulated value of \$3.75 per square foot, is adequate for both the taking of the land and for the minimal variance application process. The board gives little weight to the HTA/Kimball Chase 2004 estimate for an updated site plan (Condemnee Exhibit No. D) as a basis for estimating damages as a result of the taking. The evidence brought forward through both the minutes of the planning board (Condemnor Exhibit No. 3) and the examination of Mr. Jack Paley, principle beneficiary of the Condemnee trust, indicates that due to inaction on the building permit for the foundation (for a period exceeding four years) the Condemnee or any potential purchaser at the time of the taking would have had to pursue a new site plan and renewal of the permit regardless of whether or not the taking occurred.

Ideally, and hypothetically, a before and after value of the Property would be the test for determining the total damages as a result of the taking both in land and in any severance damage. See Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73 (1973). While none was presented in this case, by either the Condemnor or the Condemnee, the board concludes that \$13,569 is a reasonable estimate of value lost for the land taken and severance damage due to the loss of setback compliance and is reflective of what the Property's net value would have been reduced by the day after the taking.

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 of the Board have been mailed, this date, to: Lynmarie C. Cusack, Esq., State of New Hampshire Dept. 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; and US Small Business Administration, William K. Phillips, District Director, 55 Pleasant Street - Suite 3101, Concord, NH 03301, Mortgagee.

Date: 6/2/06

Anne M. Stelmach, Clerk