State of New Hampshire

v.

Rita Murjani, Lawrence A. Shapiro, and Town of Newington

Docket No.: 20607-05ED

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 230:45. A Declaration of Taking ("Declaration") was filed with the board on January 19, 2005, describing the property rights taken as Lot #2 of a recorded January 31, 1985 subdivision plan entitled "151 Executive Park, Newington, New Hampshire" (the "Property"). Condemnee Rita Murjani, the fee simple owner of the Property, made a statutory election, pursuant to RSA 498-A:4, III, (b)(5), to have the date of valuation be the date the Condemnor voted to acquire the Property: December 3, 2003.

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 over two days: on June 27, 2006 at the Newington Town Hall; and on June 28, 2006 at the board's offices in Concord, New Hampshire. The Condemnor was represented by David M. Hilts, Esq. and Condemnee Murjani was represented by Donald R. Routhier, Esq.

Karen Leach and Michelle A.H. McGirr, both 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 consisted of 2.76 acres and was taken in full by the Condemnor. The Property had been developed and was operated as the "Newington Inn" before the taking.

Board's Rulings

Based upon the evidence submitted, the board finds the total damages resulting from the taking to be $1.2 million. In making this finding, the board considered carefully the analysis and estimates of value contained in the respective appraisal reports described below and the additional documents, testimony and arguments presented at the just compensation hearing.

The Condemnor presented an appraisal prepared by David S. Rauseo, MAI, of Rauseo & Associates (the "Rauseo Appraisal," Condemnor Exhibit No. 2) and Condemnee Murjani presented an appraisal prepared by Laura J. Davies of Crafts Appraisal Associates, Ltd. (the "Crafts Appraisal," Condemnee Exhibit C). Because she relied, for the most part,[1] upon the prior analysis contained in the Rauseo Appraisal, the Rauseo and Crafts estimates of the value of the Property as already developed (with a 17-room limited service motel and a manager's apartment) are quite close ($1.2 million and $1.21 million, respectively). The chief difference lies in the "expansion potential" (for 20 additional motel rooms) described in the Crafts Appraisal, which Ms. Davies estimated to contribute an additional $130,000 in damages (see Condemnee Exhibit C, p. 36). Mr. Rauseo found no damages attributable to expansion potential.

The board has reviewed the conflicting testimony and documents and concludes an award of $1.2 million is sufficient to encapsulate any arguable "expansion potential" that might be claimed to exist as of the relevant valuation date (December 3, 2003) and that no larger award is justified. In analyzing this issue, the board is guided by the law that:

> "damages which are deemed too contingent, speculative or remote as to affect present market value will not be considered. Claims of damage which are remote in time, uncertain, inaccurate or unfounded in fact, will not be the basis for recovery.
> ….
> The potential use of the taken land for the project must be that which is a reasonably probable and foreseeable fact at the time of the taking."

4A Nichols on Eminent Domain § 14A.06[4] (Rev. 3rd Ed. 2006), citing many authorities, including Dana v. Craddock, 66 N.H. 593 (1891).

The parties presented lengthy testimony and documents on whether it was legally, physically and financially feasible to expand the motel, either with a one-story addition or by building a second floor over the existing structure. According to Suresh Murjani, a second floor expansion would have been legally permitted until a change in the Town of Newington's zoning ordinance in March, 2004 to permit only three-story hotel/motel structures. (See Condemnee Exhibit A: page 6 of a June 8, 2006 letter to the board.) There is some doubt, however, as to whether sufficient additional parking spaces could be created to accommodate either type of expansion, given the layout of the existing motel and possible wetland issues that might preclude

[1] On page 10 of the Crafts Appraisal (Condemnee Exhibit C), Ms. Davies states: "I have reviewed [the Rauseo Appraisal] as part of the research conducted for this analysis and find it, for the most part, a thorough and accurate analysis of the subject property. Much of the same data and conclusions are incorporated in this analysis."

such development. See, e.g., Condemnor Exhibit No. 11 (October 6, 1994 Minutes of Newington Planning Board mentioning parking and wetland issues). See also Ms. Davies' mention of unsuccessful attempts to redevelop the Property in 1987 and 1994 (pp. 23 and 27 of Crafts Appraisal, Condemnee Exhibit C); and Mr. Rauseo's mention of a 1999-2000 failed effort to develop a Ramada Inn on the Property (p. 17 of Rauseo Appraisal, Condemnor Exhibit No. 2).

While there was much conflicting testimony on the issue of expansion potential as of the valuation date, the board finds Mr. Rauseo's conclusion that "expansion of the existing motel use is not considered feasible" (Condemnor Exhibit No. 2, p. 36) is supported by the evidence and that the Condemnor met its burden of proof on this question. In other words, the board finds the expansion potential was too contingent, speculative and remote to affect the market value of the Property and, because of considerable uncertainty, this potential was not reasonably probable or foreseeable as of the date of valuation.

The board has not relied solely on this conclusion, however, because it further finds a $1.2 million damage estimate is high enough to include any arguable expansion potential. Mr. Rauseo arrived at this conclusion by reconciling (on the very high side) his estimates of value using the sales comparison and income approaches ($843,000 - $1,080,000 and $1,220,000, see Condemnor Exhibit No. 2, p. 59).

In addition, the assumptions made in his income approach appear to have been overly generous towards the Condemnee. For example, in estimating expenses (as a percentage of gross income), Mr. Rauseo used a "relatively low" 2% replacement reserve (id., pp. 54-55), which equates to less than $5,000 per year. For a motel property dating back to the 1950's, with an old building and fixtures, a higher reserve (5%) would be more realistic to take into account the probable useful life of the depreciating assets; in this regard, the financials supplied by the Condemnee and used by Mr. Rauseo exclude "Non-Cash items such as amortization and depreciation." Id. at p. 70.

The board also finds it questionable that no management fee has been applied in the expense estimate. Mr. Murjani testified that he actively managed the Property. Even though an onsite "innkeeper" was employed in the day-to-day operations, the "Notes to Income & Expense Statement" further indicate that management fees were charged to the business, but were eliminated from the numbers reported to Mr. Rauseo. Id. Adding a management fee to the expense estimate, like increasing the replacement reserve, reduces the net operating income to be capitalized under the income approach.

The board further notes some of the expenses reported for the Property were based on prorations of actual expenses incurred in common with two other motel properties owned by a related management company, id., raising questions regarding the reasonableness of the expenses and whether they should be adjusted in arriving at a more accurate valuation.

Mr. Rauseo used a 10% capitalization rate, which is considerably lower than the rate reflected by the comparable sales (12.8% - 13.0%) and the industry average for this type of business (12.25%). (Cf. Condemnor Exhibit No. 2, pp. 56-57; and Condemnee Exhibit C,

pp. 32-33 and 35.) Use of a higher capitalization rate would have decreased Mr. Rauseo's value estimate significantly: for example, an 11% capitalization rate reduces his estimated market value by over $110,000. (See Condemnor Exhibit No. 2, p. 57-58: $1,240,200 estimate with 10% capitalization rate versus $1,127,500 (rounded) estimate with 11% capitalization rate, before $20,000 adjustment for personalty in each estimate.)

The board makes these observations, not to overturn the assumptions employed by Mr. Rauseo, but rather to point out that his estimate of damages from the taking ($1.2 million) contains a more than an ample 'cushion' even if, contrary to his supportable and reasoned conclusion, some expansion potential is considered. For all of these reasons, the board finds the Condemnor met its burden of proof and determines that the total compensation awarded for the taking under RSA 498-A:25 is the $1.2 million deposited with the board.

If either party seeks to appeal the amount of damages awarded, 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 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 Condemnor is the prevailing party because the board's award does not exceed the Condemnor's offer (or deposit) of damages. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). The Condemnor 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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Michele E. LeBrun, 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; Donald R. Routhier, Esq., The Wentworth House, 217 High Street, PO Box 671, Somersworth, NH 03878-0671, counsel for the Condemnee; Lawrence A. Shapiro, 6440 Sienna Court, Falls Church, VA 2204, Mortgagee; and Town of Newington, Chairman, Board of Selectmen, 205 Nimble Hill Road, Newington, NH 03801, Tax Lien Holder.

Date: August 1, 2006

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Anne M. Stelmach, Clerk