State of New Hampshire

v.

Labrador Enterprises, LLC, et al.

Docket No.: 20615-05ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for highway purposes 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 March 2, 2005, describing the property rights taken as a fee acquisition of 0.055 of a hectare (0.14 acres), more or less, excepting and reserving two points of access, along the front of the Parcel No. 211 (the "Property"), along with a permanent drainage easement of 4,114 square meters, a temporary driveway construction easement of 240 square meters and a temporary construction easement of 568 square meters. See Exhibit A to the Declaration. As shown in this exhibit, part of the Property is in Windham and part is in Salem.

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.

On December 10, 2009, the board began the just compensation hearing at the Londonderry Town Hall, recessed to take the view of the Property and then resumed the hearing at the board's offices which concluded on December 11, 2009. The Condemnor was represented by Kevin O'Neill, Esq. of the State of New Hampshire Department of Justice and the Condemnee Labrador Enterprises, LLC, was represented by John Spencer, Esq. and Evan Spencer, Esq. of Spencer & Spencer, LLC.

Sandra E. Bussell of Avicore Reporting & Videoconferencing, 25 Lowell Street – Suite 405, Manchester, NH 03101, (888) 212-2072 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 3.9 acres and the Property after the taking consisted of 3.76 acres, based on a fee taking of 0.14 acres with part of the remaining land subject to the easements described above. The parties generally agreed approximately 75% of the permanent drainage easement was over existing wetlands on the Property. The Condemnor utilized the permanent drainage easement for a detention pond with a berm and additional buffer, as shown in Condemnor Exhibit No. 3.

Board's Rulings

For the reasons discussed below, the board finds the damages from the taking are $200,000.

The Condemnor relied on an updated September 23, 2005 appraisal prepared by Martin S. Doctor, a certified general appraiser, of Fulcrum Appraisal Service (the "Fulcrum Appraisal") estimating the damages from the taking at $130,000 as of the date of taking (March 2, 2005). Mr. Doctor concluded the Property, as improved, would have the same highest and best use (an

automobile repair and service facility with some land available for future development or expansion) and used the cost and sales comparison approaches to estimate the value of the improvements and the land both before and after the taking. He estimated the reconciled total value of the Property was $860,000 before the taking and $730,000 after the taking because the taking did not affect the value of the improvements but did reduce the land value. Fulcrum Appraisal, Part III, pp. 27 and 57. According to Mr. Doctor, this loss of value occurred because of a reduction in the amount of usable acres on the Property (from 2.2 acres to 1.55 acres in his analysis) and its value (from $165,000 to $150,000 per acre), a net difference of $130,000 (based on an estimated site value of $360,000 before the taking and $230,000 after the taking). Id., pp. 15 and 43. He noted the fee taking and permanent drainage easement had a "measurable effect on the value of the remainder." Id., p. 30.

The Condemnee relied on the testimony of three experts: James P. Gove, a certified soils scientist and wetlands scientist, of Gove Environmental Services, Inc., who prepared the June 23, 2009 "Gove Report"(included in Condemnee Exhibit F, pp. 153-170); David R. Jordan, a registered professional engineer and licensed land surveyor, of SFC Engineering Partnership, Inc., who prepared a "hypothetical development plan" depicted in Condemnee Exhibit C and discussed in a July 28, 2009 report (the "SFC Report" included in Condemnee Exhibit F, pp. 172-176); and Dale M. Gerry, ASA, a certified general appraiser, of Shurtleff Appraisal Associates, Inc.(the "Shurtleff Appraisal," Condemnee Exhibit F). While Mr. Gerry, the Condemnee's appraiser, estimated the value of the improvements to be slightly lower, he essentially agreed with Mr. Doctor, the Condemnor's appraiser, that their value did not change as a result of the taking.

The thrust of the Condemnee's presentation for much higher damages ($500,000 rather than $130,000) is based on the testimony and evidence of these experts who contended the Property could be subdivided (into two lots) and that a second commercial building could be developed on a newly created lot on the southern portion of the Property, as shown in Condemnee Exhibit C. Notwithstanding the date shown on the bottom of this exhibit ("2/27/2005"), however, Mr. Jordan was not asked to prepare this "conceptual" or "hypothetical" plan (called the "2005 Site Development Option") until late 2008 and he completed the plan in 2009 to show where a subdivision might occur and a second commercial building of 3,520 square feet might be located. Based on this plan and the Gove Report, the Shurtleff Appraisal (at pp. 82 and 108-09) estimated the total damages from the taking to be $500,000 (valuing the Property at $1.4 million before the taking and $900,000 after the taking), based on a significant "hypothetical condition" that a "second marketable site" for commercial development was available before the taking but was no longer available as a result of the taking. Id., p. 5 and transmittal letter, p. 2.

The board has considered this testimony carefully insofar as it impacts the issue of just compensation from the taking. At the time of the taking (March 2, 2005), the Condemnee had already engaged Mr. Gove to obtain a dredge and fill permit for additional parking along the northern driveway of the Property, but did not ask him to examine whether the existing wetlands would allow a second commercial building to be developed on the Property. There is no evidence the Condemnee had any plan whatsoever to subdivide the Property for a second commercial building on the southern portion of the Property in that time period. Mr. Gove had no knowledge of such a plan and, if he had such knowledge, he testified he would have been

obligated to disclose this information to the Wetlands Bureau, the state agency authorized to grant "dredge and fill" permits, including the one needed for the additional parking.

Although only a relatively small amount of land was taken in fee (0.14 acres), the vast difference in the amount of damages estimated in the Fulcrum and Shurtleff Appraisals ($130,000 and $500,000 respectively) stems from differences in the per acre valuation of the land and disagreement regarding whether, before the fee taking and imposition of the permanent drainage easement, a second lot could be subdivided and a commercial building developed.

In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals of each party, applying the board's "experience, technical competence and specialized knowledge" to this evidence. See RSA 71-B:1; and former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it").

Further, in making findings where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence because "judgment is the touchstone." See, e.g., State of New Hampshire v. Frederick, BTLA Docket No. 23317-07ED (December 3, 2008); cf. Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras v. Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

The board finds the valuation methodology in the Shurtleff Appraisal is too speculative to be given weight and the "hypothetical condition" stated in this appraisal regarding future development, if accepted at face value, would overcompensate the Condemnee for the taking. In

this regard, the "Yellow Book" (the Uniform Appraisal Standards for Federal Land Acquisitions published by The Appraisal Institute and cited in the Shurtleff Appraisal at page 4) is instructive. A proposed highest and best use of property "requires a showing of reasonable probability" of accomplishing that use, both physically and with respect to other factors, because "physical adaptability alone is insufficient" and "conjectural and speculative evidence" must be discounted because elements affecting value, while within the realm of possibility, that are "not fairly shown to be reasonably probable, should be excluded from consideration. (Citations omitted.)" See Yellow Book, pp. 34-35 and 45.

While, in the words of the Condemnee's attorney, a "knowledgeable, sophisticated buyer" might recognize some development potential for a second commercial lot if presented with the expert input of Mr. Gove and Mr. Jordan as of the time of the taking (rather than in hindsight almost four years later), the board finds that same buyer would also be likely to recognize the inherent risks and not overpay the seller for that developmental potential, given the need for wetland and other permits and the fact the proposed lot is situated in two towns, each of which has its own zoning and permit approval requirements. A knowledgeable, sophisticated buyer in the market would recognize these development risks and discount the value of the potential second lot accordingly, because of the presence of identified, longstanding wetlands and wetland buffers and the need to get permit and other approvals from the State Wetlands Bureau and both towns (Windham and Salem). The process of obtaining these approvals could be lengthy and somewhat complicated, as well as being somewhat risky, discouraging at least some potential buyers interested in immediate development of a second commercial building even if, contrary to the evidence, the land had been offered for sale at the time of the taking (March, 2005) with a proposed subdivision plan already conceived and prepared. As the

Condemnor's attorney further pointed out, increasing the amount of land for dredge and fill approvals from the Wetlands Bureau would necessitate mitigation measures, which were not accounted for at all in the Shurtleff Appraisal. One of the Condemnee's experts (Mr. Gove) conceded on cross-examination that such mitigation might be necessary.

Another difficulty is that, even if a second building could someday be approved and developed despite the significant wetland and buffer issues, cross-examination of Mr. Jordan, the Condemnee's expert, indicated there would be no room on the potential second lot for a septic system and sewage would have to be pumped to the existing leach field on the first lot. An easement or other encumbrance to allow such discharge onto the first lot would reduce its value if such development occurred.

In addition, the board gives no weight to the capitalized "expenses attributable to the easement and areas of low utility" computed by Mr. Gerry to reduce the after value in the Shurtleff Appraisal (pp. 105-06 and 108). Mr. Shurtleff estimated expenses of $5,251 for maintenance (lawn mowing, landscaping and clearing the inlet/outlet areas of the detention pond) and property taxes and capitalized this estimate at 10%. Id. Mr. Gerry gave no testimony to explain his rationale for including these items as compensable damage, however, and the board finds including them as damages for the taking is illogical and unwarranted for two reasons. First, the rights granted to the Condemnor in the Declaration obligate the Condemnor, not the Condemnee, to "maintain" the drainage easement and there was no evidence regarding the Condemnor's failure, refusal or inability to do so if or when it is asked to do so. Second, the Condemnee cannot shift the tax burden pertaining to the property rights retained after the taking to the Condemnor once the Condemnee has been compensated for the reduction in those property rights.

On the whole, the board finds the approach taken in the Fulcrum Appraisal to be more reasonable, credible and better supported than the Shurtleff Appraisal, but also finds the site value of the land before the taking was approximately 20% higher than estimated in the Fulcrum Appraisal. A higher value ($360,000 x 120% = $430,000, rounded) is indicated because, upon consideration of all of the evidence, including cross-examination, it appears the adjustments Mr. Doctor made to his comparables do not fully capture the desirability of the location of the Property and some added developmental potential for the remaining land (if a potential buyer used a realistic discount factor to estimate the likelihood that some of the suppositions by the Condemnee's experts regarding the wetlands and buffers could become reality in the future).

Adjusting Mr. Doctor's reconciled market value estimate of $860,000 for these factors leads to an estimated value of $930,000 (rounded) before the taking. Subtracting his after value estimate of $730,000, which the board finds is reasonable, results in a total damage award of $200,000. The board finds, notwithstanding the conflicting testimony and arguments presented by the Condemnee for a higher amount, the damages from the taking did not exceed $200,000.

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

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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: Kevin O'Neil, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; John W. Spencer, Esq., and Evan W. Spencer, Esq., Spencer & Spencer, LLC, 55 Union Street, Boston, MA 02108, counsel for the Condemnee; and Thomas M. Metzger, President, Citizens Bank New Hampshire, 875 Elm Street, Manchester, NH 03101, Mortgagee.

Date: January 25, 2010

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Anne M. Stelmach, Clerk