

State of New Hampshire

v.

D.J.R. Realty, LLC, Citizens Bank New Hampshire and Next To Nothing, Inc.

Docket No.: 20618-05ED

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 (“Declaration”) was filed with the board on March 18, 2005 and served on the “Condemnees,” describing the property rights taken as: 0.105 hectares in fee; a permanent 286 square meter slope easement; a permanent 36 square meter drainage easement; a temporary 4 square meter driveway construction easement; a temporary 236 square meter construction easement; and another temporary 4 square meter construction easement. The Declaration also took all but one point of access. The “Property” contained 1.87 acres before the “Taking” and 1.61 acres after. 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 Condemnees. See TAX 210.12 and cases cited therein.

The board viewed the Property on October 26, 2006 and held the just compensation hearing at its offices on November 1, 2006. The Condemnor was represented by Edith Pacillo, Esq. and one Condemnee, D.J.R. Realty, LLC, was represented by Attorneys John W. Spencer and Evan W. Spencer. No other Condemnees appeared at the hearing.

Ms. Kimberley Kerwin, CSCR of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire, 03105-1387 (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.

Board's Rulings

The board awards just compensation to the Condemnees in the amount of \$130,000.

The board reviewed the appraisals submitted by both parties and finds the methodology contained in the Condemnor's appraisal performed by Martin S. Doctor of Fulcrum Appraisal Service ("Doctor Appraisal") (Condemnor Exhibit No. 2) to be the most reasonable in this case. Mr. Doctor performed a "before" and "after" appraisal, a recognized appraisal methodology employed in appraising real property for eminent domain purposes.

The board gives no weight to the appraisal performed by Robert P. LaPorte, Jr. and Sandra J. Driscoll of the firm of Meredith & Grew ("LaPorte Appraisal") (Condemnee Exhibit No. A). Mr. LaPorte's appraisal and his testimony at the hearing was based on a hypothetical approach and did not include any value estimate for what he determined to be excess land. It is unreasonable and inappropriate to make a highest and best use determination in either the "before" or "after" scenarios without considering the entire Property including the excess land. Mr. LaPorte did not use such an approach.

As mentioned above, the board considered the Doctor Appraisal's methodology to be reasonable and, with some adjustments, provided the best evidence of the Property's market value.

In estimating the Property's market value before the Taking, the board has revised the Improved Sale Grid (Doctor Appraisal, Part III, p. 11), by making an additional positive adjustment to each of the comparable sales, CB-1, CB-2 and CB-3, which the board viewed, for their lower overall commercial appeal compared to the Property. The board gives no weight to comparable CB-4 due to its location, visibility and lack of comparability. The board adjusted sale CB-1 plus 20% for the overall commercial appeal factor. An adjustment of plus 10% was applied to CB-2 and plus 20% to CB-3 under the same heading. These adjustments yield a revised indicated unit value for the Property of \$102.34 per square foot for comparable sale CB-1, \$99.02 for comparable sale CB-2 and \$108.12 for comparable sale CB-3. The board reconciled the Property's value at \$103.00 per square foot, giving equal weight to sales CB-1, CB-2, CB-3 and no weight to CB-4. Multiplying this unit value by the 3,907 square feet of gross building area of the two structures yields a market value for the Property before the Taking of \$402,421.00. The board rounded this value to \$400,000.

To estimate the Property's market value after the Taking, the board used the Doctor Appraisal's improved Sales Grid at Part III, p. 38 and used the same adjustments used in the "before" situation of plus 20%, plus 10% and plus 20% respectively for sales CB-1, CB-2 and CB-3 for the overall commercial appeal factor. Making these additional adjustments yielded revised per square foot unit values of \$111.24 for comparable CB-1, \$107.63 for comparable CB-2 and \$117.95 for comparable CB-3. The board reconciled these three values at \$112.00 per

square foot. Applying this reconciled value to the gross building area in the after situation of 2,446 square feet yields an after value of \$274,000 (rounded).

Subtracting the “after” value from the “before” value yields a value of \$126,000 for the property rights taken in fee. The board reviewed all the easements taken and determined they have a nominal value of \$4,000.

The board considered the additional legal arguments by Attorney Spencer regarding the “special benefits” rule and whether it has applicability when no separate “severance” damages are claimed by a condemnee. These arguments need not be addressed here, however, in light of the board’s findings which are based upon the before and after values of the Property. See, generally, Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 76 (1973) (explaining the “before and after method” and how it incorporates both special benefits and severance damages if either exist.), quoted in Daly v. State of New Hampshire, 150 N.H. 277, 280 (2003).

In summary the board finds a total award of just compensation payable to the Condemnees in the amount of \$130,000.

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.

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

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: Edith L. Pacillo, 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, 120A Pembroke Street, Boston, MA 02118, counsel for D.J.R. Realty, LLC; Thomas M. Metzger, President, Citizens Bank New Hampshire, 875 Elm Street, Manchester, NH 03101, Mortgagee; and Maurice Brancatto, President, Next To Nothing, Inc., 33A Rockingham Road, Windham, NH 03087, Leasehold Interest.

Date: 1/08/07

Anne M. Stelmach, Clerk