

State of New Hampshire

v.

Mashop Development, LLC, et. al.

Docket Nos.: 20620-05ED and 23316-07ED

REPORT OF THE BOARD

These matters arise 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. Two related Declarations of Taking (“Declarations”) were filed with the board, the first on March 30, 2005 (in Docket No. 20620-05ED) and the second on September 12, 2007 (in Docket No. 23316-07ED) and served on the “condemnees.” The property rights taken are described as: a total of 0.486 hectares, more or less, in fee simple, a drainage easement of 152 square meters and a temporary driveway construction easement of 80 square meters and a temporary construction easement of 552 square meters, both set to expire on March 17, 2008, on certain land abutting or near Route 111 at 49 Range Road in the Town of Windham, County of Rockingham (the “Property”). See Exhibit A to the Declarations.

The Condemnor was represented by Edith L. Pacillo, Esq., Assistant Attorney General, of the Department of Justice. Condemnee Mashop Development, LLC (the “Condemnee”),

successor in interest to condemnee Haynes Management, Inc., was represented by Jack B. Middleton, Esq. and Jennifer L. Parent, Esq. of McLane, Graf, Raulerson & Middleton.

The September 2007 Declaration was filed approximately one month after the board took a view on August 14th and held a just compensation hearing in the earlier docket (No. 20620-05ED) on August 14th in the Londonderry Town Hall and on August 15th, at the board's offices in Concord. During the course of that hearing, the parties acknowledged there was an inadvertent omission in the March 2005 Declaration pertaining to the scope of the taking, which the parties agreed upon but had not yet been formally corrected. (See the board's August 22, 2007 Order reopening the record to hold a limited hearing on August 30, 2007 at the board's offices in Concord pertaining to this omission (pertaining to what is described as "Area B" on the Property) and how it could be corrected based on the relevant statutory requirements, including RSA 498-A:5, II.) At this limited hearing, the Condemnor presented the testimony of William P. Janelle of the State of New Hampshire Department of Transportation to explain the nature and cause of the omission.

In the Condemnor's September 18, 2007 "Assented-to Motion to Consolidate" the two dockets (the "Motion"), the Condemnor acknowledged that, "[d]ue to a property location error," the March 2005 Declaration did not include "an additional approximately eighty-six thousandths (0.086) of a hectare" of land that should have been described as part of that taking. See Motion, ¶ 3. In light of the August hearing that had already been held, the parties agreed both Declarations could be "consolidated" for decision based on the evidence presented at that hearing, id., ¶ 5, without the need for any further submissions. The Motion recited the condemnees had made certain waivers of statutory notice requirements regarding the September 2007 Declaration.

Id., ¶ 4. The parties further agreed the Condemnor would deposit with the board an additional \$66,500 “as soon as practicable” and that they had reached certain additional agreements regarding the calculation and payment of interest. Id., ¶8.

The board granted the Motion on September 28, 2007. Consequently, after considering all of the evidence presented at the August 2007 hearing, the board makes an award of just compensation applicable to both Declarations.

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.

Michelle A. H. McGirr, C.S.R., of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire, 03105 (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 Condemnee in the amount of \$370,000.

The board heard extensive testimony from the State’s appraiser, David S. Rauseo, MAI, regarding his appraisal (the “Rauseo Appraisal”). To rebut this evidence, the Condemnee presented testimony from its own appraiser, B. Alec Jones of Fremeau Appraisal, Inc., and his appraisal (the “Fremeau Appraisal”), as well as the supporting testimony of other individuals.

On the whole, the board finds the methodology and approach in the Rauseo Appraisal to be more credible than the Fremeau Appraisal. In particular, the board is unpersuaded by the

argument in the latter that the highest and best use of the Property in the “after” situation is as a “shell” and that the value of excess land ‘evaporates’ in the after situation. Instead, the board finds the Rauseo Appraisal correctly concluded the highest and best use (as an improved commercial industrial building) did not change and that the value of the excess land (4± acres of residentially zoned rear land) did not change as a result of the taking.

Apart from this general conclusion, closer scrutiny of the Rauseo Appraisal and its estimated damages from the taking (a total of \$296,000) indicates Mr. Rauseo may not have given sufficient weight to the following considerations:

1. Possible need for well relocation;
2. Proximity of building to roadway; and
3. Additional risk a nonconforming building (in the after situation, because of reduced setbacks from the highway) may necessitate future renovations not otherwise necessary, such as a fire safety sprinkler system and an upgraded electrical system.

As to well relocation, there was conflicting evidence presented as to whether relocating the well would be required. Even if such relocation is required, however, the State’s attorney indicated there may be a program available to compensate property owners if a water supply has been contaminated. See RSA 228:34. The board therefore awards no additional damages based on this possibility.

Mr. Rauseo adjusted his after taking comparables by 10% to account for the lesser desirability of the Property (because of closer access to the roadway, for example). See Rauseo Appraisal, pp. 67 and 78 (“site utility” adjustments). He also estimated and included in his damage calculations a cost to cure the “parking, lighting and screening deficiency” of \$52,000 Id., p. 79.

Considering all the evidence, the board finds a 15% (rather than a 10%) adjustment is appropriate to take into account the above factors which increases the damage estimate (from the

amount calculated by Mr. Rauseo) to \$370,000 (rounded). The board finds this amount represents the total just compensation awardable to the Condemnee in these consolidated proceedings.

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.

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.

Attached as Addendum A hereto are the board's responses to the Condemnee's requests for "Findings of Fact and Rulings of Law."

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

Addendum A

The “Requests” received from the Condemnee are replicated below, in the form submitted and without any typographical corrections or other changes. The board’s responses are in bold face. With respect to the Requests, “neither granted nor denied” generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the Report.

Mashop Development, LLC’s Requested Findings of Fact and Rulings of Law

1. The date of partial Taking is March 30, 2005.

Neither granted nor denied.

2. The Northern (front) and central sections of the subject Property (comprising roughly 72%) of the site are located within the Professional, Business, and Technology (PBT) District. The rear sections of the subject Property (about 28%) are zoned Residence A.

Neither granted nor denied.

3. The Highest and Best Use of the Property Before Taking is for continued office/R&D use.

Granted.

4. The Taking consists of the following:

- 52,711± SF (1.21± acres) in fee along the northern bound (fronting Route 111) and eastern bound (fronting proposed spur road showing as Connection "F");
- Two permanent drainage easements totaling 1,636±SF;
- Temporary driveway construction easement of 861±SF expiring 3/17/08;
- Temporary construction easement of 6,028±SF (revised) expiring 3/17/08.

Neither granted nor denied.

5. As a result of the Taking, there is loss of the front paved parking lot with 15 parking spaces therein and paved driveway leading thereto, leaving only remote paved parking lot southwest of the building with 102 spaces.

Neither granted nor denied.

6. As a result of the Taking, the north and east sides of building become non-conforming with respect to setbacks, and front office areas are within 4.2' of the realigned ROW in the building's northeast corner.

Neither granted nor denied.

7. As a result of the Taking, the existing front building entrance on north side is inaccessible.

Denied.

8. As a result of the Taking, northern office portions of the building are judged to have "below average" appeal due to the close relocation of the realigned ROW.

Granted.

9. As a result of the Taking, 366± SF non-contiguous Remainder on north side of Route 111 offering no utility.

Granted.

10. As a result of the Taking, the existing well location results in the protective area of said well not being fully located on the property and/or under the control of the property owner.

Neither granted nor denied.

11. The property as a result of the take is unique as to its close proximity to a high traffic state highway.

Neither granted nor denied.

12. In New Hampshire, the owner of the condemned property is entitled to damages based upon the difference between the property's fair market value before and after the taking. City of Manchester v. Airpark B. Ctr. Condo. Unit Owners', 148 NH 471 (2002); State v. 3M Nat'l Advertising Co., 139 NH 360 (1995).

Granted.

13. In the context of a partial taking, the property owner is entitled to not only the fair market value of the property actually taken, but also compensation for the effect of the taking, if any, on the entire property, which is referred to as severance damages. Daly v. State, 150 N.H. 277 (2003); O.K. Fairbanks Co. v. State, 108 NH 248 (1967).

Granted.

14. The Condemnor has the burden of proving, by a preponderance of the evidence, that the amount offered will justly compensate the Condemnee.

Granted.

15. The building on the Property Before Take was conforming.

Granted.

16. The building on the Property After Take is nonconforming.

Granted.

17. An estimate for the work required to reconfigure the existing building for cure after the Take is \$1,608,201.

Denied.

18. Estimated costs for engineering and consulting to cure after Take is \$60,000.

Denied.

19. Estimated site improvements to cure after Take is \$542,430.

Denied.

20. The Highest and Best Use of the subject Property After Taking is as a "shell" structure requiring significant renovation and retrofit, with excess land offering some development potential.

Denied.

21. Just compensation due for the partial Taking of the Property, the difference between the market value before the Take and the market value after the Take, is \$636,000.

Denied.

22. Any improvements for cure to the Property for the Taking will require site plan approval.

Neither granted nor denied.

23. The Sales Comparison Approach Before Take to determine fair market value of the subject Property is reasonable.

Granted.

24. The Income Capitalization Approach Before Take to determine fair market value of the subject Property is reasonable.

Neither granted nor denied.

25. The Cost Approach After Take to determine the fair market value of the subject Property is reasonable because of the extensive renovation necessary to cure building deficiencies, including the relocation of the front entryway and relocation of the office areas.

Denied.

Certification

I herby certify copies of the foregoing Report have been mailed, this date, to: Edith L. Pacillo, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, counsel for the Condemnor; Jack B. Middleton, Esq., and Jennifer L. Parent, Esq., McLane, Graf, Raulerson & Middleton, PO Box 326, Nine Hundred Elm Street, Manchester, NH 03105, counsel for the Condemnee; Anne D. Peterson, 28 Peabody Row, Londonderry, NH 03053, Mortgage Holder; and Verizon New England, Inc., c/o CT Corporation Systems, Registered Agent, 9 Capitol Street, Concord, NH 03301, Easement Holder.

Date: November 16, 2007

Anne M. Stelmach, Clerk