

State of New Hampshire

v.

**Cooper Financial, LLC, SAT Sr. Limited Partnership,
Harold W. Watson and Public Service Company of New Hampshire**

Docket No.: 20643-05ED

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,” the State of New Hampshire, by various statutes, including RSA 230:45. A Declaration of Taking (“Declaration”) was filed with the board on June 1, 2005 and served on the “Condemnees,” describing the total property rights taken as 81.99 acres in fee in Londonderry, New Hampshire (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 Condemnees. See TAX 210.12 and cases cited therein.

The board viewed the Property and then held the just compensation hearing at its offices on October 13, 2006. The Condemnor was represented by Mark P. Hodgdon, Esq., Senior

Assistant Attorney General, and one Condemnee, Cooper Financial, LLC (“Cooper Financial”), was represented by John G. Cronin, Esq. of Cronin & Bisson, P.C. No other Condemnees appeared at the hearing.

Michelle A. H. McGirr 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 Condemnor presented an appraisal prepared by Duane H. Cowall, MAI (“Cowall Appraisal”). The Cowall Appraisal (see Condemnor Exhibit No. 10) estimated \$2.1 million as the market value of the total taking of the Property. Cooper Financial submitted a “complete appraisal in a summary format report” prepared by Peter F. Reilly (“Reilly Appraisal”) (Condemnee Exhibit No. B) and other documents in support of a \$2.965 million market value.

The parties agree the Property’s highest and best use is for future residential development and the Property has the potential to be developed into no more than 47 single-family lots. After careful review, the board finds the value conclusion in the Cowall Appraisal constitutes the best evidence of the just compensation that should be awarded and that no higher amount is justified. The board’s findings are briefly summarized below.

The Cowall Appraisal is a complete, self-contained appraisal which was updated and revised to respond to specific questions and areas of disagreement raised by Cooper Financial's representatives. (See also Condemnor Exhibit No. 8, responding to Condemnee Exhibit No. C.) Mr. Cowall testified in detail, both on direct and cross-examination, about his methodology and qualifications, which includes an MBA, an engineering background, and prior work for a residential developer. He used the comparable sales approach with two methods: one based on a price per acre (which yielded a \$1.435 million estimate, see Condemnor Exhibit No. 10, pp. 68-69) and one based on a price per developable lot (which yielded a \$2.115 million estimate, id. pp. 70-71). Mr. Cowall concluded that large tracts of this size and type "are purchased based on the potential number of lots which can be developed on a site" and therefore gave the "[m]ost weight" to the latter method. Id. at p. 72. The board finds his reconciled value estimate of \$2.1 million, which heavily weights this method, to be a well-supported and reasonable estimate of the market value of the Property.

In contrast to the quality and thoroughness of the Cowall Appraisal, the board finds the analysis of damages by the Cooper Financial's representatives to be far less credible in material respects. For example, the Reilly Appraisal is based on somewhat circular assumptions and a questionable methodology. Mr. Reilly reached his value conclusion based, for the most part, upon a general assumption (more on his "regional" experience than on comparables in the same locality) that developed lots should sell for about \$145,000 and thus, only sought comparable sales in the \$130,000 to \$150,000 range. He then utilized a "development approach" with an assumed three year absorption period in calculating a present value of \$2.965 million as his

market value conclusion as of May 26, 2004 (as shown on the spreadsheet on p. 20 and reconciliation on p. 21 of Condemnee Exhibit No. B).

The board cannot accept this approach in light of the various questionable assumptions involved, including the key assumption that the lots will be completely developed and sold within a three year period. The Reilly Appraisal assumes, in effect, that 15 lots can and will be developed and sold each year. Not only is this not supported by the evidence, but it also ignores the fact it is likely that other land owned by the Cooper Financial and certain infrastructure would be developed first because of its location and road and water issues. There was evidence, for example, that another tract owned by Cooper Financial adjacent to the Property would in all likelihood have to be subdivided and developed first, that a roadway would have to be approved and constructed and that water service to the Property would have to be extended and possibly upgraded (from the 4 inch pipe serving the adjacent areas to a 12 inch pipe). At the time of the taking in 2005, the board finds the Town of Londonderry was imposing various regulations to limit the amount of single family development that could take place, such as by imposing quotas on the number of building permits issued each year. See, e.g., Condemnor Exhibit No. 10, pp. 39-40.

The board is mindful the Property was purchased by the Condemnee from local sellers experienced in real estate development for a much lower amount (\$1.14 million) on December 13, 2004, only about six months before the date of taking. Id. at p. 15. There is reason to conclude this was an arm's-length purchase between knowledgeable parties who are likely to have known all relevant facts regarding the value of the Property as developable land. The board

is unable to conclude that any subsequent planning or other development efforts by the buyer, Cooper Financial, in the months before the taking increased the value of the Property beyond the estimate contained in the Cowall Appraisal (\$2.1 million). The board also considered the other testimony and evidence offered by Cooper Financial, including the testimony of its principals (Mark Cooper and Kevin Cooper) and a real estate consultant (Justin Bielagus) and his report (Condemnee Exhibit No. C), as well as other documents submitted in lieu of direct testimony (see Condemnee Exhibit Nos. H and I), but could not conclude this evidence supported a higher market value.

In summary, the board finds the Condemnor met its burden of proving the Property's market value as of June 1, 2005 was \$2.1 million. The Property is subject to mortgage liens held by the SAT Sr. Limited Partnership and Harold J. Watson. By letter dated June 7, 2005, Public Service of New Hampshire stated they had no interest in the deposit of damages in this matter.

If any 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 no 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 Condemnees are the prevailing party because the board's award exceeds the Condemnor's prior deposit of damages (\$1.9 million). See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). The Condemnees 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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

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CERTIFICATION

I hereby certify copies of the foregoing Report of the Board have been mailed, this date, to: Mark P. Hodgdon, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; John G. Cronin, Esq., Cronin & Bisson, P.C., 722 Chestnut Street, Manchester, NH 03104 and William R. Mason, Esq., P.O. Box 319, Salem, NH 03079, counsel for Cooper Financial, LLC; Samuel A. Tamposi, Manager, SAT SR. Limited Partnership, 20 Trafalgar Square, Suite 602, Nashua, NH 03063 and Harold W. Watson, 130 Amherst Street, Merrimack, NH 03054, Mortgagees; and Robert A. Bersak, Public Service Company of New Hampshire, 780 N. Commercial Street, Manchester, NH 03101, Easement Holder.

Date: December 18, 2006

Anne M. Stelmach, Clerk