

**State of New Hampshire**

**v.**

**The Flatley Company**

**Docket No.: 20929-05ED**

**REPORT OF THE BOARD**

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the purpose of highway construction (Rochester Project 10620D) 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 August 17, 2005, describing the property rights taken as 3.85 acres in fee, a drainage easement of 325 square feet and a temporary construction easement of 3,575 square feet set to expire on December 31, 2012. 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 “Condemnee”. See TAX 210.12 and cases cited therein.

The board viewed the “Property” and began the just compensation hearing at the Strafford County Superior Court on October 17, 2006 and reconvened in the board’s offices on October 18, 2006. The Condemnor was represented by David M. Hiltz, Esq. and the Condemnee was represented by Malcolm R. McNeill, Jr., Esq.

Karen Leach and Michelle A.H. McGirr 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 on October 17<sup>th</sup> and 18<sup>th</sup> respectively. 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.

Before the taking, the Property consisted of an approximately 49-acre vacant parcel of land (Condemnor Exhibit 1A through 1C denotes 49 acres while Condemnee Exhibit D indicates 49.21 acres) with 1,269 feet of frontage on the Spaulding Turnpike and 1,554 feet of frontage on Rte. 202. The 3.85 acre fee taking, to accommodate a new entrance ramp, is on the easterly border of the Property adjacent to the Spaulding Turnpike (Rte.16). The drainage and temporary construction easements are on the Rte. 202 frontage on the northerly portion of the Property. After the take, the Property consists of 45.15 acres. Both before and after the taking, extensive site work had occurred on the Property in preparation for anticipated commercial development.

### **Board's Rulings**

As detailed below, the board finds the taking's damages to be \$536,000. The damages are based upon a pro-rata value estimate of \$160,000 per acre for 3.35 usable acres with no severance to the remainder. This value and area is derived from the Condemnee's appraisal performed by John M. Crafts of Crafts Appraisal Associates, Ltd. ("Crafts Appraisal") with some modifications to the assumptions and adjustments contained therein.

The board is unable to give any weight to the Condemnor's appraisal performed by Stephen Bernard ("Bernard Appraisal") for several reasons. The Property is a highly visible parcel at an existing interchange (Exit 13) of Rte. 202 and the Spaulding Turnpike with a total average daily traffic count of 35,100 (7,100 on Rte. 202 and 28,000 on the Spaulding Turnpike).

The Property, due to its size and location at Exit 13, has a highest and best use for retail commercial development. None of the Bernard Appraisal comparable sales have similar potential because they are inferior in location, have less road frontage, less visibility, more wetlands and generally are not suited for “big box” retail development as the Property is. Only the Bernard Appraisal comparable #3 is somewhat similar enough to have the potential to be considered as a comparable. However, comparable #3 was only a listing, not a sale. Further, Mr. Bernard was not familiar with the proposed zoning change that was necessary for the sale to close. Also, as the view and Condemnee Exhibit P indicate, comparable #3 is best suited for development of neighborhood shopping and residences, both uses in keeping with the general neighborhood and permitted zoning but inferior to the highest and best use of the Property.

Consequently, the board finds the market data and general methodology contained in the Crafts Appraisal to be more applicable in estimating the damages. The board considered the rebuttal evidence submitted by the State to support its contention the Crafts Appraisal’s comparables were drawn from more intensely developed areas. Despite that evidence, however, we find the excellent interchange location of the Property offsets any superiority the comparables may have due to being in already developed locations. While generally accepting the Crafts Appraisal’s four comparable sales, we are cautious of their use and reliability for several reasons.

First, comparable #1 entailed two separate transactions that occurred two years apart. Without more information about the transactions, the arm’s-length nature of the sales and time adjustments applied are uncertain. Further, comparable #4 required \$8,000,000 of on-site terracing and retaining walls for development; site work of that magnitude makes it difficult to compare and adjust the comparable with much reliability.

Second, the board finds the assumption (and paired sales analysis) of a doubling of land value once all approvals have been obtained (Crafts Appraisal's "engineering" adjustment) to be excessive and not supported by the paired sales analysis on page 40. This analysis attempts to measure the effect of permit approval (both site plan and subdivision approvals) from two sales and their resales. However, the analysis did not adjust for other variables such as market conditions, size of lots and intervening improvements, and thus its conclusion is not persuasive. As a result, the board has estimated the value increase from having received approvals to be 50% rather than the 100% utilized in the Crafts Appraisal.

We do agree with the Crafts Appraisal's estimate that, as of the time of the taking, the Condemnee (or its predecessor in title with its site work) had, through its investment of direct and indirect development costs including extensive site work and meetings with local and state officials, reduced the risk of ultimate project approval to the point that 75% of the 50% increase in price attributable to approvals was a reasonable adjustment to be applied to the comparables.

Applying these revisions and giving no weight to comparable #4, the board arrives at a correlated value estimate of \$160,000 per acre for the 3.35 usable acres lost due to the taking or a damage estimate of \$536,000.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Strafford 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.

Attached as Addendum A hereto are the board's responses to the Condemnee's Requests for Findings and Rulings.

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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Douglas S. Ricard, 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.

#### **The Flatley Company’s Requests for Findings and Rulings**

1. The Highest and Best Use of the subject property would be for commercial retail development.

**Granted.**

2. Prior to Flatley’s acquisition of the subject premises, the property was owned by Exit 13 Shopping Center Limited Partnership, who had acquired the property in June 1989 from 102 Realty Trust for a purchase price of \$3,500,000.00 (Strafford County Registry of Deeds, Book 1453, Page 9).

**Granted.**

3. In 1990, municipal approvals were granted to the prior owner to construct a 371,500 sq. ft. retail shopping plaza with two detached buildings (fast food restaurant and gasoline convenience store totaling 7,500 sq. ft.).

**Granted.**

4. The subject premises is zoned “B-2” under the Rochester Zoning Ordinance and, as such, may be permissibly used for its Highest and Best Use.

**Granted.**

5. As of June 15, 2005, the Commissioner of the Department of Transportation and her Deputy, as well as the Rochester Economic Development Committee, Rochester City Manager, and City department heads were aware of and supported the development of the Flatley site as a mixed use retail development.

**Granted.**

6. The State's appraiser, on January 5, 2006 appraised the entire value of the subject premises on the date of taking, namely August 17, 2005, in the amount of \$1,900,000.00. Therefore, between the first appraisal and the second appraisal, there was a time differential of approximately six months, but yet the value of the property increased from \$760,000.00 on February 2, 2005 to \$1,900,000.00 as of August 17, 2005.

**Neither granted nor denied.**

7. As of the date of taking, Flatley was actively involved with state and local officials in the permitting of the subject premises and expended \$11,301.00 for a traffic study and spent \$62,327.00 for site plan approval costs.

**Granted.**

8. The State's appraiser originally appraised the value of the entire subject premises, before taking, at \$760,000.00 as of February 2, 2005.

**Granted.**

9. The State's appraiser has received no specialized training in shopping center property appraisals and is not aware of the retail lease rates and purchase prices paid by shopping center users, such as Kohl's, Loews, and other big-box users.

**Granted.**

10. The State's appraiser did not contact any City officials regarding the permitting status of the subject premises, other than the Code Enforcement Officer and the Tax Assessor.

**Granted.**

11. The State's appraiser did not consult with any engineers or other qualified developers with regard to the development potential of the area being taken by the State.

**Neither granted nor denied.**

12. The comparables chosen by the State's appraiser do not bear a reasonable relationship to the subject premises.

**Neither granted nor denied.**

13. It was unreasonable for the State's appraiser not to consider comparable shopping center uses similar to the comparables chosen by the appraiser for Flatley.

**Neither granted nor denied.**

14. The State's appraiser provided no credit for the excavated status for the premises which would facilitate the development of the site for the Highest and Best Use.

**Granted.**

15. Comparable L3, which is the primary comparable relied upon by the State, is not comparable to the subject premises, in that Comparable L3 is only partially zoned commercial, and that the development has proceeded under a new Zoning Ordinance that requires mixed use of the subject premises, for residential and commercial use.

**Neither granted nor denied.**

16. The State's appraiser presumed that Comparable L3 was zoned entirely commercial at the time the appraisal was completed.

**Granted.**

17. The State's appraiser made no investigation as to the permitting status of Comparable L3.

**Granted.**

18. The State's appraiser made no assessment of the wetland status of Comparable L3.

**Denied.**

19. It was unreasonable for the State's appraiser to rely on the contract for L3, where said contract had not been finalized and that the appraiser was unaware of the conditions of the contract.

**Neither granted nor denied.**

20. Comparable L1 is not a reasonable comparable, in that it does not have sufficient frontage, visibility and traffic counts to be comparable to the subject premises and the adjustments made by the State's appraiser are inadequate.

**Granted.**

21. As a result of the fee taking, the retail development must be reduced in size, and the retail space has been reduced by a total of 26,140 sq. ft.

**Denied.**

22. The comparables used by Crafts Appraisal Associates Ltd. represent meaningful units of comparison and bear a reasonable relationship to the subject premises.

**Granted.**

23. The appropriate compensation for the taking of the 3.85 acres is \$670,000.00.

**Denied.**

### **CERTIFICATION**

I hereby certify copies of the foregoing Report have been mailed, this date, to: David M. Hiltz, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Malcolm R. McNeill, Jr., Esq., McNeill, Taylor & Gallo, P.A., P.O. Box 815, 180 Locust Street, Dover, NH 03821, counsel for the Condemnee.

Date: November 28, 2006

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Anne M. Stelmach, Clerk