State of New Hampshire

v.

Bruce H. Richardson and TD Banknorth, NA

Docket No.: 20930-05ED

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 (the "Declaration") was filed with the board on August 17, 2005 and served on the "Condemnees," describing the property rights taken (the "Taking") from the "Property" as: 0.07 acres in fee; a permanent drainage easement containing 1,184 square feet; a temporary driveway construction easement containing 495 square feet; and a temporary construction easement containing 2,002 square feet. See Exhibit A to the Declaration.

RSA 498-A:25 authorizes the board to hear testimony and receive evidence relative to an eminent domain condemnation and to 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 27, 2006 and held the just compensation hearing at its offices on November 15, 2006. The Condemnor was represented by David M. Hilts, Esq. and one of the Condemnees, Mr. Bruce H. Richardson, appeared pro se.

Ms. Lynda W. Eldred 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 $85,000.

The board reviewed Condemnee Richardson's testimony and the Condemnor's expert's testimony and appraisal and finds the methodology and results contained in the Condemnor's appraisal performed by Martin S. Doctor of Fulcrum Appraisal Service (the "Doctor Appraisal," Condemnor Exhibit No. 6) to be the most reasonable in this case, with some adjustments. Mr. Doctor performed a "before" and "after" appraisal, a recognized appraisal methodology employed in appraising real property for eminent domain purposes.

In his appraisal, Mr. Doctor performed an income approach and a cost approach to value in an attempt to estimate the Property's market value before and after the taking. Mr. Doctor gave equal weight to the value indications of each approach.

In his income approach, Mr. Doctor determined the Property's market value before the Taking to be $460,000 and after the Taking to be $365,000. Upon review of the income approach analysis contained in the Doctor Appraisal, the Condemnor at the hearing acknowledged the income attributed to three of the parking spaces (for a used car business) should have been removed from the potential gross income calculation in the "after" scenario. To reflect this change, the board revised the Property's Pro Forma Statement contained on Page 43 of Part III of the Doctor Appraisal and calculated a revised net operating income of $32,672. Capitalizing this revised net operating income by the 9% capitalization rate contained in the Doctor Appraisal yields a market value indication for the Property after the Taking of $363,022. The board rounded this value to $365,000.

In Mr. Doctor's cost approach he valued the Property before the taking at $465,000 and after the taking at $410,000. After thoroughly reviewing Mr. Doctor's cost approach along with the testimony at hearing and the information gathered on the view, the board finds an additional adjustment to the after value of the cost approach is appropriate to account for the impact on the Property's functionality due to the Taking. To reflect this impact, the board has added 10% to the depreciation factor of the improvements. Making this adjustment, while keeping the site value the same and using the appropriate entrepreneur profit margin, yields a revised market value indication by the cost approach in the after situation of $396,249 which the board has rounded to $395,000.

The board has reconciled the Property's market value "before" the Taking at $465,000 and its market value "after" the Taking at $380,000. The $85,000 difference between these two values represents the total damages awarded to the Condemnees. This amount includes the value of the part taken in fee as well as the easements.

While Condemnee Richardson argued for an award well in excess of this amount (see Condemnee Exhibit No. D), he did not present any appraisal or other market based evidence to support this outcome. The Property is leased to the operator of a used car business and this use has continued, on the same economic terms, before and after the Taking. The board finds the before and after approach, with the adjustments noted above, adequately encompasses all damages resulting from the Taking.

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 Condemnees are 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 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;
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> 2) a statement that the prevailing party sought the other party's concurrence in the requested costs, TAX 201.18(b); and
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> 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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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Certification

I hereby certify copies of the foregoing Report of the Board have been mailed, this date, to: David M. Hilts, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Bruce H. Richardson, 105 Rockingham Road, P.O. Box 358, Windham, NH 03087, Condemnee; and Meredith E. Christensen, TD Banknorth, NA, 61 Main Street, Andover, MA 01810, Mortgagee.

Date: 1/19/07

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Anne M. Stelmach, Clerk