

State of New Hampshire

v.

Jefco Land Services, LLC

Docket No.: 21483-05ED

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,” State of New Hampshire, by various statutes, including RSA 230:45. A Declaration of Taking (the “Declaration”) was filed with the board on November 16, 2005 and served on the “Condemnee”, describing the property rights taken as: 0.15 of an acre in fee simple and a temporary construction easement containing 4,325 square feet, more or less, with an expiration date of October 1, 2020 (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 Condemnee. See Tax 210.12 and cases cited therein.

The board viewed the Property and held the just compensation hearing on October 9, 2007 at the Londonderry Town Hall. The Condemnor was represented by Attorney Mark P.

Hodgdon of the New Hampshire Department of Justice and the Condemnee was represented by Attorney Craig S. Donais of Getman, Stacey, Schulthess & Steere, P.A.

Ms. Laurie A. Gelinis 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. The parties should expect at least four (4) weeks for completion of a requested transcript.

Parties' Arguments

The Condemnor provided an appraisal performed by Mr. Richard Mario Leslie, MAI of Evergreen Appraisal (the "Leslie Appraisal") which estimated the just compensation due the Condemnee to be \$63,000. The Leslie Appraisal estimated the Property's value before the taking to be \$273,000 and the value after the taking to be \$210,000.

The Condemnee requested \$35,000 in addition to the \$63,000 estimate determined by the Condemnor and argued the additional funds were warranted to cover the significant amount of unanticipated engineering costs incurred by the Condemnee as a direct result of the taking.

Board's Rulings

The board finds the Condemnor carried its burden of proof and the Condemnor's estimate of just compensation of \$63,000 represents the total just compensation due the Condemnee.

The Leslie Appraisal determined the Property's highest and best use to be "... for commercial development over the entire site with the existing building being a minor contribution to value" (Leslie Appraisal at p. 33). Mr. Leslie testified any minimal contributory value attributable to the residential structure on the Property would be offset by the cost of its demolition. For this reason, the Leslie Appraisal valued the Property in the "before" situation as

a commercially developable tract of vacant land. Using the sales comparison approach to value, the Leslie Appraisal estimated the value of the Property before the taking to be \$273,000. In New Hampshire, the supreme court has recognized that no single method of valuation is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976), and the tribunal that is reviewing valuation is authorized to select any one of the valuation approaches based on the evidence. Brickman v. City of Manchester, 119 N.H. 919, 920 (1979). Given the evidence in this case, the board finds Mr. Leslie's use of the sales comparison approach, a well recognized appraisal method to value vacant land, is a reasonable method to estimate the Property's value. The Leslie Appraisal estimated the Property's value using a price per square foot unit of comparison. Based on his analysis, Mr. Leslie determined a \$7.40 per square foot value should be applied to the total area of the Property. The Condemnee's counsel agreed the \$7.40 unit value determined by Mr. Leslie was reasonable and not in dispute. Using this unit value and the entire area of the Property, the "before" value of the Property was determined to be \$273,000 [$\$7.40 \times 36,895 = \$273,023$ (rounded), Leslie Appraisal at p. 39]. Mr. Leslie followed a somewhat similar methodology to value the Property after the taking. Using the same price per square foot as in the before situation and the area remaining after the taking, Mr. Leslie estimated the value of the remaining land to be \$224,671 ($\$7.40 \times 30,361 = \$224,671$). In addition to the value of the lost area due to the taking, the Leslie Appraisal included a \$15,000 expense to the Condemnee as a result of the taking for the cost of reengineering the site for development. Mr. Leslie testified the \$15,000 cost estimate was determined after conversations with the Condemnee and the Condemnee's engineering firm, TF Moran, Inc. ("TFM"). The engineering firm estimated an additional \$10,000 in reengineering costs and the Condemnee estimated the amount to be approximately \$20,000. Mr. Leslie testified he "split" the difference in making his

\$15,000 determination. Taking into account the loss of land area and the additional engineering costs, the Leslie Appraisal estimated the Property's market value in the "after" situation to be \$210,000 [$\$224,671 - \$15,000 = \$209,671$ (rounded)]. Comparing the before value with the after value coupled with the extra engineering costs results in damages to the Property due to the taking of \$63,000 ($\$273,000 - \$210,000 = \$63,000$).

The Condemnee argued the project of developing this site was "held hostage" by the taking of the Property due to the necessity of reengineering the development plans multiple times. The board finds the Condemnee's argument to be without merit and the majority of the additional expenses, due to the redesign work, were based on two factors: 1) the need to meet all of the Town of Londonderry's (the "Town") requirements; and 2) the low initial estimate given by TFM.

The Condemnee testified there had been previous offers to purchase the Property made to the owner prior to the Condemnee purchasing the site. However, the previous offers were contingent on the approval by the Town of development plans for other uses and they never came to fruition. The Condemnee acknowledged the site was "tight" for many of the proposed usages. The board finds the \$270,000 purchase price reflected some of the risk (costs) involved with such a constrained site and the need to meet all of the Town's requirements.

Further, at the hearing, Mr. Richard Radwanski, who was the access and utility engineer for the New Hampshire Department of Transportation at the time of the taking and who is currently the assistant district engineer in this area, testified the Town's approval process for development projects frequently takes an extended period of time compared to some other municipalities due to the many Town requirements that need to be met and the length of time it takes to receive approvals. Additionally, the Condemnee was somewhat constrained by its

decision to keep the single family residence on the site as this impacted the amount of parking and the location of access points. In November, 2002, the “Special Committee” appointed by the Governor and Executive Council held public hearings on the proposed highway project in the Property’s area. In May, 2004, the Special Committee’s report (the “Report”) made a finding of necessity for the highway alteration as proposed. The Report is a public record. The Condemnee purchased the Property in June 2004. At the time of purchase, there was publicly available information depicting where the impacted area of the Property was located. Many of the invoices contained in Condemnor Exhibit No. 3 were for work performed to receive Town approvals. The board questions why TFM, an experienced engineering firm, initially designed a detention pond in the easement area (see Condemnor Exhibit No. 5) given available information regarding the highway project. For these reasons the board finds the March 18, 2004 \$17,000 proposal by TFM (Condemnee Exhibit No. A) to be a low estimate for the costs involved to meet the Town’s requirements for approvals to develop the Property.

The Condemnee requested an additional \$35,000 in damages (\$98,000 total) to compensate for the unanticipated expenses incurred to redesign the site as a result of the taking. The Condemnee, however, did not submit an appraisal or other independent evidence of market value to support such a claim. The board finds Mr. Leslie’s testimony stating the take resulted in a loss of a 20 foot wide strip of land along the Property’s frontage on Route 28 and the resulting reduction in the size of the lot by approximately 6500 ± square feet would necessitate some redesign expenses for the site to be accurate. Further, the board finds Mr. Leslie’s \$15,000 estimate for the redesign costs to be reasonable based on the conversations he had with personnel at TFM and the Condemnee. As previously discussed, the board finds the majority of the additional costs incurred by the Condemnee were the result of an unreasonably low initial

estimate for the cost of the engineering and the necessary time required to receive approvals from the Town. For these reasons, the board finds the Condemnor's estimate of just compensation of \$63,000 to be the best estimate of the damages to the Property and the total just compensation due the Condemnee.

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. 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 Condemnor is the prevailing party because the board's award is in the amount of the Condemnor's offer (or deposit) of damages. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). The Condemnor 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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

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 03301-6397, counsel for the Condemnor; and Craig S. Donais, Esq., Getman, Stacey, Schulthess & Steere, P.A., 3 Executive Park Drive - Suite 9, Bedford, NH 03110, counsel for the Condemnee.

Date: December 5, 2007

Anne M. Stelmach, Clerk