State of New Hampshire

v.

Jean M. Gagnon and Constance Gagnon

Docket No.: 21487-05ED

Parcel L-61

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 November 16, 2005 and served on the "Condemnees," describing the property rights taken as: a fee simple taking of forty-two hundredths (0.42) of an acre, a permanent slope easement of eight hundred (800) square feet, a permanent drainage easement of twelve thousand six hundred seventy-five (12,675) square feet and a temporary construction easement (until October 1, 2020) of four thousand six hundred seventy-five (4,675) square feet, all more or less, from a parcel known as L-61 in the Town of Londonderry (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.

On November 27, 2007, the board viewed the Property and held the just compensation hearing at the Londonderry Town Hall. The Condemnor was represented by Edith L. Pacillo, Esq., Assistant Attorney General of the Department of Justice, and the Condemnees were represented by Emile R. Bussiere, Jr., Esq. of Bussiere & Bussiere, P.A.

Kimberly Kerwin 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 Condemnor submitted a complete, self-contained appraisal prepared by Arol J. Charbonneau, Jr., a certified general appraiser employed by Crafts Appraisal Associates Ltd. (the "Charbonneau Appraisal," Condemnor Exhibit No. 1) and his testimony at the hearing. The Condemnees did not present any appraisal or witness of their own, but their attorney did cross-examine Mr. Charbonneau briefly.

The board finds the Charbonneau Appraisal is the best evidence of the just compensation to be awarded for the taking of the Property and determines the amount of damages at $174,000 (based on a $4,765,000 before value and a $4,591,000 after value). Mr. Charbonneau used a sales comparison approach and the same basic methodology for this and two other properties taken by the Condemnor in the same vicinity, along Route 28 in the Town of Londonderry and to the west of Exit 5 to I-93, all within the town's Commercial II (C-II) District and Route 28 Performance Overlay District.

For valuation purposes, and because of "the physical characteristics…and the uses and trends in the neighborhood," he treated the land as having two "economic units" (whether or not a legal subdivision is possible), each of which was affected to a greater or lesser degree by the taking:

"Economic Unit 1" is a "pad site with a retail use that could take advantage of the visibility on Route 28," containing 29,621± square feet.; and

"Economic Unit 2" is Parcel 61's remaining land which "could be developed as a single project or subdivided into small commercial units," consisting of 20.91± usable acres.

Id., pp. 29, 30 and 69. In Economic Unit 1, the amount of land taken in fee simple is 16,117± square feet (0.35 acres), leaving a small remainder of 13,504 square feet, which Mr. Charbonneau concluded would have "no developable potential in its own right." Id. at pp. 31 - 32. Mr. Charbonneau testified the larger portion (Economic Unit 2) has some wetlands (6.42± acres) and pre-existing drainage easements, id. at p. 27, making it reasonable to estimate its usable acreage and value it separately. In Economic Unit 2, the amount of land taken in fee simple is 2,178± square feet (0.05 acres), and Mr. Charbonneau concluded the "commercial development" potential of the remainder (20.86± usable acres) would not change (would "be the same" before and after the taking). Id. at pp. 30 and 32. The Condemnees did not disagree with this approach to valuation or Mr. Charbonneau's description and measurements of the two economic units.

To estimate the impact of the taking on Economic Unit No. 1, Mr. Charbonneau used four comparable land sales to calculate a price per square foot of $5.55 per square foot which he then multiplied by the land area of 29,621 square feet to estimate a before value of $165,000 (rounded). Id. at p. 42. Although a remainder of 13,504± square feet will be left after the taking,

Mr. Charbonneau concluded the remainder will have only a nominal value of $1,000 because of its small size, irregular shape and the impact of the drainage easement which will "limit the utility of roughly 100' of frontage." Id. at p. 64. He therefore estimated the damages from the taking to be $164,000 for Economic Unit No. 1. Id.

On cross-examination, Mr. Charbonneau clarified why he applied a 30% adjustment for the two comparables to the Property having a "corner location" and how this was reasonable. In his experience, he has seen adjustments in the range of 20% to 40% to account for this factor: a corner location clearly adds value to a commercial property because it gives better access and visibility. He also explained why he used his qualitative judgment to apply a price per square foot a bit lower than the mean but within the range of the four comparables. The effective price per square foot ($5.57 = $165,000, rounded value, divided by 29,621 square feet) may be slightly less than the arithmetic mean value ($5.64) for the four comparables, but is more than the median or mid-point ($5.50), Mr. Charbonneau testified the irregular shape of the 29,621± square feet affected its utility and influenced his correlation of the indicated square foot values. The board finds his overall value estimates before and after the taking to be both supportable and reasonable.

To estimate the impact of the taking on Economic Unit No. 2, Mr. Charbonneau used four comparable commercial land sales to estimate a value of $220,000 per usable acre. Mr. Charbonneau estimated the value of the 0.05 acres taken to be $10,000 (rounded). Id. at p. 90. He found the small size of the take area in Economic Unit No. 2 would not affect the "development potential" of the remainder or its "road frontage on any one of the three streets," including Route 28, and that the easements taken would also have no effect on value. Id.

On cross-examination, the Condemnees' attorney asked Mr. Charbonneau several questions pertaining to the relative visibility of the Condemnees' land compared to several properties used as his comparables, such as the "Hannaford" and "Home Depot" properties. The board finds the evidence presented does not support any different adjustment than those made in the Charbonneau Appraisal. Mr. Charbonneau's conclusion that the easements taken by the Condemnor did not increase the damages was not challenged by the Condemnees' attorney.

Adding Mr. Charbonneau's damage estimates for Economic Unit 1 ($164,000) and Economic Unit 2 ($10,000) yields a total of $174,000. The board finds these estimates to be reasonable and well-supported and therefore finds $174,000 is the proper just compensation award.

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 Condemnees are the prevailing parties 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;

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

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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 have been mailed, this date, to: Edith L. Pacillo, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Emile R. Bussiere, Esq., Law Offices of Emile R. Bussiere, 15 North Street, Manchester, NH 03104, counsel for the Condemnees.

Date: December 13, 2007

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Anne M. Stelmach, Clerk