

State of New Hampshire

v.

Jean M. Gagnon

Docket No.: 21488-05ED

Parcel L-65

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 “Condemnee,” describing the property rights taken as: a fee simple taking of thirty-one hundredths (0.31) of an acre, a permanent slope easement of three thousand seven hundred twenty-five (3,725) square feet and a permanent drainage easement of one thousand four hundred fifty (1,450) square feet, all more or less, from a parcel known as L-65 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 Condemnee. 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 Condemnee was 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 Condemnee did not present any appraisal or witness of its own, but did cross-examine Mr. Charbonneau.

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 \$189,000 (based on a \$190,000 before value and a \$1,000 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.

Based on four commercial land comparable sales, all located on Route 28 and in the same vicinity, he estimated a price per square foot of \$5.75 and multiplied it by the square footage

taken (32,670) to calculate a land value of \$187,853, which he rounded to \$190,000. See Condemnor Exhibit No. 1, p. 34. This rounding results in a slightly higher value per square foot (\$5.82).

Because the Property taken left a relatively small remainder (19,144 ± square feet), Mr. Charbonneau concluded the land after the taking will have no development value on its own, but may have some value as supplemental land to abutting property owners. He therefore assigned a nominal value of only \$1,000 to this remainder.

On cross-examination, the Condemnee challenged the Charbonneau Appraisal on two points: the appraiser's decision not to use the "mid-point" of the four comparable sales' indicated values and his assumption that the remaining land would have some value to an abutter. The board finds neither challenge to have substance.

Looking at the prices per square foot of the four comparables shown on page 35 of the Charbonneau Appraisal, which the Condemnee did not challenge, the mean (or average) is \$5.87 per square foot and the median is \$5.85 per square foot (midway between \$5.60 and \$6.10, the middle values). Both are within a nickel of the effective price per square foot (\$5.82) in Mr. Charbonneau's estimate and the board does not find the difference to be material. This is especially true given the 20% size adjustment Mr. Charbonneau gave to Comparable 3, which is quite favorable to the Condemnee in light of their relative size differences: if a more consistent 15% size adjustment had been applied, for example, the price per square foot of this comparable would drop from \$6.10 to \$5.76, resulting in a mean of \$5.79 and a median of \$5.68 for the four comparables, which are lower than Mr. Charbonneau's effective price per square foot (\$5.82). Thus, even if another 'hypothetical' appraiser might have employed these measurements, the estimate of value would have been lower rather than higher and would not have increased the

damage estimate. In any event, the board makes its findings on the appraisal evidence actually presented, not on speculation regarding what assumptions another appraiser may have made if one had been retained by the Condemnee.

The challenge to the nominal after value of \$1,000 assigned to the residual land by Mr. Charbonneau is also without merit. Cross-examination of Mr. Charbonneau suggested the Condemnee's attorney felt another 'hypothetical' appraiser may have assigned either a higher or lower residual value to this land. A higher value (say \$5,000) would reduce, not increase, the just compensation award and a lower value (say zero, which the board finds is quite unrealistic and suspect) would have only a marginal effect (\$1,000) on the award. (Mr. Charbonneau's conclusion that the easements taken by the Condemnor did not increase the damages was not challenged by the Condemnee's attorney.)

In summary, the board finds Mr. Charbonneau's conclusions to be reasonable and well-supported and therefore finds \$189,000 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 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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

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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

Anne M. Stelmach, Clerk