

The State of New Hampshire

v.

Sidney C. Osgood, Gary R. Osgood and Town of Allenstown

Docket No.: 21156-05ED

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 31, 2005 and served on the “Condemnees,” describing the property rights taken as: 0.125 of a hectare (0.31 of an acre) in fee out of a total of 1.2 acres of land, a permanent slope easement consisting of three hundred fifty-six (356) square meters, a permanent drainage easement consisting of two hundred twenty-two (222) square meters and a temporary construction easement of nine hundred seventy-six (976) square meters set to expire on October 16, 2009 (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.

The just compensation hearing was held on December 4, 2007 at the board's offices in Concord. After the hearing the board took a view of the Property. The Condemnor was represented by Mark P. Hodgdon, Esq. The Condemnees did not attend the hearing.

Board's Rulings

The Condemnor submitted an appraisal performed by Ms. Jessie C. Tichko, a New Hampshire certified general real estate appraiser (the "Tichko Appraisal"). Ms. Tichko performed a "before" and "after" appraisal, a standard methodology in eminent domain proceedings, and determined there were no damages to the Property as a result of the taking. However, Ms. Tichko indicated it is the State of New Hampshire's policy, when a before and after appraisal has been completed that indicates no damages to the Property, to perform a "part taken" analysis. Ms. Tichko performed such an analysis and determined the value of the real estate interest taken was \$1,200.

In the Tichko Appraisal, the highest and best use for the Property was determined to be as supplemental land or recreational space because it had no development potential (Condemnor Exhibit No. 2, p. 21). The board finds this highest and best use conclusion to be reasonable based on the evidence and testimony received at the hearing and the board's view of the Property.

Based on the highest and best use conclusion in the Tichko Appraisal, the board finds the direct sales comparison approach and the comparable sales chosen by Ms. Tichko provide a good indication of the market value of the Property. The three comparable sales were all purchased as supplemental land by the abutting property owners. Ms. Tichko selected the value per square foot of land as the unit of comparison and made adjustments for the differences between the Property and the comparable sales on a grid on page 26 of her appraisal. The board finds the

sales chosen were similar to the Property and the adjustments made to them were in accordance with accepted appraisal practices.

In performing the part taken analysis (page 46 of the Tichko Appraisal) Ms. Tichko applied 25% of the unit cost value to the area of the fee taking, the permanent drainage easement and the permanent slope easement and determined their values to be \$675, \$120 and \$191, respectively. The 25% adjustment accounted for the steepness of the terrain on the side of the embankment along U.S. Route 3. Ms. Tichko estimated the value of the temporary construction easement, which expires on October 16, 2009, to be \$172. Combining the values of the four real estate interests taken yields a value of \$1,200 (rounded) (Condemnor's Exhibit No. 2, p. 46). This represents the Condemnor's estimate of the total damages to the Property.

The testimony and photographs contained in the Tichko Appraisal indicate the before taking access to the Property was steep until reaching level grade. On its view, the board noted the after taking access was better being less steep from the reconfigured Turnpike Street. As a consequence the board finds there was no severance due to the taking and the \$1,200 pro rata estate is reasonable.

In summary, the board finds the Condemnor's appraiser's methodology and calculations to be performed in accordance with acceptable appraisal standards and the \$1,200 estimate of damages to be the total amount of just compensation due the Condemnees.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Merrimack 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 the same as 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 have been mailed, this date, to: Mark P. Hodgdon, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Sidney C. Osgood, 217 St. Johns Place, Brooklyn, NY 11217, Gary R. Osgood, 217 St. Johns Place, Brooklyn, NY 11217, and Chairman, Board of Selectmen, Town of Allenstown, 16 School Street, Allenstown, NH 03275, Condemnees.

Date: December 24, 2007

Anne M. Stelmach, Clerk