

State of New Hampshire

v.

Merwin H. Stowell and Brian Stowell

Docket No.: 21504-06ED

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 January 11, 2006 and served on the “Condemnees,” Merwin H. Stowell and Brian Stowell, describing the property rights taken as a complete fee simple taking of a vacant eight acre tract of land, recorded in Book 4374, Page 1627 at the Rockingham County Registry of Deeds (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. 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 July 24, 2007 and held the just compensation hearing at the board's offices on July 26, 2007. The Condemnor was represented by Lynmarie C.

Cusack, Esq. and the Condemnees were represented by R. John Roy, Esq.

Ms. Lynda W. Eldred took the stenographic record of the morning portion of the hearing and Ms. Laurie A. Gelinis recorded the afternoon portion. Both stenographers are from Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire, telephone: (603) 669-7922. Any requests for transcripts should be ordered directly through the stenographers. Parties should expect at least four (4) weeks for completion of a requested transcript.

Parties' Arguments

The Condemnor submitted a self-contained appraisal performed by Mr. Richard M. Leslie, MAI of Evergreen Appraisal (the "Leslie Appraisal"). Mr. Leslie estimated the Property's market value on January 11, 2006, the date of the taking, to be \$260,000 and concluded that value was the total just compensation due the Condemnees. His opinion of value was based on the highest and best use premise that the Property could be subdivided into two residential building lots.

The Condemnees submitted a summary appraisal report performed by Mr. George F. Brooks III, of Brooks Real Estate Services (the "Brooks Appraisal"). Mr. Brooks estimated the Property's January 11, 2006 market value to be \$325,000. Similarly, his estimate of value was based on the Property being developed into two residential building sites.

Board's Rulings

Based on the evidence and testimony presented, the board finds \$260,000 to be the just compensation due the Condemnees.

During the hearing the board heard testimony regarding the Property's topography and wetland areas. Two exhibits, Condemnee Exhibit Nos. F and G, delineated the Property's upland areas, wetland areas and some potential building areas. The wetland areas, based on information provided by Gove Environmental Services, Inc., included the area associated with Little Cohas Brook, as well as an area running north to south through the middle of the Property. Both appraisers, however, testified there was adequate road frontage and upland acreage to support two potential residential building lots. Consequently, the highest and best use determinations in the Leslie Appraisal and Brooks Appraisal are the same: the Property can be subdivided and developed as two residential building sites. Following this determination, each appraiser estimated the value of a single house lot and applied that value to the Property's two potential building sites.

The board finds the opinion of value in the Leslie Appraisal to be the best evidence of the Property's market value on the date of taking and, therefore, the best estimate of the just compensation due the Condemnees for the reasons discussed below.

In addition to viewing the Property, the board viewed the comparable sales used by both appraisers. The board finds the comparable sales used by Mr. Leslie with the adjustments he made to them yield the best indication of value for a single, developable residential house lot. Mr. Leslie's value of \$130,000 per lot best recognizes the Property's location (neighborhood) and its characteristics. Mr. Leslie used two of the sales used by the Condemnees' appraiser; however, he adjusted them for their superior location compared to the Property. The sales at Wiley Hill Road and High Range Road were adjusted downward 25% for their lower traffic volume and more open space, both desirable characteristics for residential building sites.

The board finds the adjustments made in the Leslie Appraisal to be reasonable, given the location and characteristics of the comparable sales compared to the Property.

As a further check, the board considered a building to land ratio of 2:1 for an improved property in the neighborhood to be reasonable. In other words, if one of the potential sites were developed with a house it would have a total value of approximately \$390,000 using the lot value determined in the Leslie Appraisal with \$130,000 attributable to the land and \$260,000 attributable to the improvements. In contrast, using the lot value determined in the Brooks Appraisal of \$175,000 would yield a total Property value using the same 2:1 building to land ratio of \$525,000. The board finds the \$525,000 estimate for an improved lot is not supported by values of properties in the neighborhood. The board finds the homes, such as those located on Wiley Hill Road, to be newer, more expensive and with proportionately higher land values than what could be expected or realized in the Property's neighborhood. For this reason, it was necessary for Mr. Leslie to make an adjustment to the sales. Mr. Leslie multiplied the value of a single lot (\$130,000) by the number of potential lots (2) to determine the amount of just compensation (\$260,000) due the Condemnees.

The board acknowledges it would be reasonable to expect there may be some subdivision costs, as mentioned in the Brooks Appraisal, associated with realizing the highest and best use of the Property in as much as the owners would need to go through the municipal subdivision process. However, the board has not reduced the Condemnor's estimate of the damages due the Condemnees and considers the determination to be liberal rather than conservative on the Condemnor's part.

The board finds it must comment on the work of Mr. Brooks relative to this particular case. As the former chairman of the New Hampshire Real Estate Appraisal Board and a

nationally certified instructor to teach the Uniform Standards of Professional Appraisal Practice (USPAP) course (see Condemnee Exhibit No. A), such an experienced appraiser should be familiar with, and adhere closely to, standard appraisal practices. We find his efforts in this case fall short of our expectations. For example, Mr. Brooks was not provided a copy of the Property's deed and did no further research either through the appropriate registry of deeds or with the parties involved. He neglected these basic and customary steps even though the Property had transferred to the Condemnees less than a year and one half before the date of the taking. If the Property's previous sale was an arm's-length transaction, it may have been appropriate to consider and discuss it during the selection of comparable sales.

Further, an important issue in this case, one that was discussed at length by the parties, was the question of the differences in neighborhoods between the Property and the comparable sales on the view. Mr. Brooks, along with the board and the parties, drove up Misty Lane, which was clearly a different neighborhood from either the Property or the comparable sales he chose to use. In addition, Mr. Brooks was unfamiliar with some basic aspects of the comparable sales he utilized such as whether they were on a municipal sewer system or had an onsite septic system. In summary, the board finds Mr. Brooks' effort in this case to be a cursory attempt at a professional assignment, one that fell short of the standards required of by anyone in his professional capacity.

If either party seeks to appeal the amount of damages awarded by the board (\$260,000), 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 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;
- 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

Certification

I hereby certify copies of the foregoing Report of the board have been mailed, this date, to: Lynmarie C. Cusack, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, Condemnor's counsel; and R. John Roy, Esq., 573 Maple Street, Manchester, NH 03104, Condemnee's counsel.

Date: October 5, 2007

Anne M. Stelmach, Clerk