

State of New Hampshire

v.

Tuckernuck Development, LLC and Ellen L. Nickerson

Docket No.: 21518-06ED

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 February 8, 2006 and served on the “Condemnees,” describing the property rights taken as: a fee simple taking of real property identified as Parcel No. 108-0265-2, known as 12 Bowers Road in the Town of Derry, New Hampshire, consisting of 59 ± acres (the “Property”). See Exhibit A to the Declaration. The 59 acre tract is somewhat irregular in shape, contains 1276 feet of frontage along Bowers Road and is comprised of some wetlands, rolling terrain and steep terrain on the eastern border of the Property. The parties differed in their estimate of wetlands and usable acreage with the Condemnor estimating approximately 44 usable acres, while the Condemnee, Tuckernuck Development, LLC (“Tuckernuck”) estimated approximately 49 usable acres based on wetland delineations submitted at hearing.

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 board viewed the Property on October 23, 2007 and held the just compensation hearing at the Londonderry Town Hall on October 23, 2007 and at its offices in Concord, New Hampshire on October 24, 2007. The Condemnor was represented by Edith L. Pacillo, Esq., Assistant Attorney General of the State of New Hampshire Department of Justice, and the Condemnee, Tuckernuck, was represented by Jack B. Middleton, Esq. and Jennifer L. Parent, Esq. of McLane, Graf, Raulerson & Middleton.

Michelle A.H. McGirr 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.

Parties' Arguments

The Condemnor submitted an appraisal performed by Mr. B. Alec Jones of Freneau Appraisal, Inc. (the "Jones Appraisal"), which estimated the Property's market value at the time of the taking to be \$472,000 based on the sales comparison approach. The Jones Appraisal determined the Property's highest and best use was as a secondary or tertiary industrial location that would not immediately be developed but held by an investor for future development. Of the six comparables used in the sales approach, the Jones Appraisal gave most weight to comparable L-1, the sale of the adjoining 130 acre parcel to Windham Road Holdings, LLC ("WRH").

Tuckernuck submitted an appraisal performed by Mr. David S. Rauseo of Rauseo & Associates (the “Rauseo Appraisal”) which estimated the Property’s market value as of the date of taking at \$1,815,000. The Rauseo Appraisal determined the highest and best use to be for immediate industrial development . This highest and best use was predicated on extending municipal water and sewer from Fordway Extension Road and obtaining primary access to Windham Hill Road across the adjoining property owned by WRH as set out in a May 18, 2005 Joint Development Agreement (the “Joint Agreement”) between Tuckernuck and WRH (Condemnee Exhibit No. B).

Tuckernuck also argued neither the purchase of the Property by Tuckernuck in November 2003 for \$350,000 nor the sale of the adjoining parcel to WRH in March of 2004 for \$600,000 were arm’s-length transactions and thus could not be given any weight in estimating market value and damages due to the taking.

The parties in this case and in Docket No. 22502-07ED agreed the board could take official notice (see RSA 541-A:33, V) of the testimony and evidence presented in each proceeding in arriving at its findings. The board took views of both properties impacted by the takings in the above referenced dockets and several comparable properties on the same date, with all parties and their attorneys in attendance.

Board’s Rulings

As noted earlier, the Condemnor has the burden of proving by preponderance of the evidence the amount offered is just compensation. The primary evidence submitted by the Condemnor was the Jones Appraisal estimating damages at \$472,000. The board finds the Condemnor fails in its burden of proof because the Jones Appraisal’s value conclusion is flawed for a number of reasons.

First, the Jones Appraisal gave most weight to the sale of the adjoining parcel to WRH in the correlation of indicated values in its comparative sales analysis. The board finds this sale was not an arm's-length transaction and is not indicative of the Property's market value. One of the principals of WRH is Mr. George Taylor, who testified he was a life-long acquaintance of the grantor, Mr. Edwin Sybiak. Mr. Taylor testified that Mr. Sybiak, represented by his guardian Ms. Janice Misiaszk, accepted his offer of \$600,000 for the property without any negotiations and without the property being listed and exposed in the open real estate market. Mr. Taylor stated his offer of \$600,000 was based on his belief that he could, with minimal risk, recover his investment by subdividing three lots along Windham Road and retaining the balance of the frontage and rear land for further development. Mr. Sybiak also took back a favorable short term first mortgage on the property for \$475,000. Collectively, this evidence leads the board to conclude the purchase price was substantially below market and thus the transaction does not qualify as a market sale to be given any weight in determining just compensation.

Second, the board finds the Jones Appraisal's comparable L-2, the February 2006 sale of a property to Meadowcroft Development, LLC of over 45 acres on Ledge Road, was not purchased for similar motivations and thus is not a good sale from which to derive a reliable value indication. While this property was similarly zoned industrial, it was clear from the evidence and testimony the primary motivation of the purchaser was not for immediate industrial development but to remove, under the guise of site development, significant aggregate fill material to be utilized on an adjoining school construction project. Both the board's view of this property and site plans shown at hearing indicate the value to the purchaser was in its ability to remove aggregates for construction purposes. While the Property would certainly entail some site work to make it suitable for industrial development, it is not of such extreme magnitude as is

currently taking place on the L-2 comparable, and thus the board concludes the motivations of the purchaser and the comparability is significantly dissimilar from the Property being appraised.

Third, while Mr. Jones was aware of some topographic and wetland delineation surveys and several conceptual plans that had been performed by Tuckernuck subsequent to the purchase of the Property, Tuckernuck had not provided Mr. Jones with the unrecorded Joint Agreement and, as a consequence, the Jones Appraisal did not discuss or consider any valuation affect the Joint Agreement might have. The board finds the Joint Agreement does lend value to the Property. While not recorded, it provides certain transmissible rights between the two parties that facilitate the joint development of the Property for industrial purposes. In particular, the Joint Agreement provides for Tuckernuck to receive a 50' right of way across WRH to Windham Road, a state maintained highway, which improves the Property's access and enhances the feasibility of it being developed industrially. The Joint Agreement requires Tuckernuck to in return pay for extending water and sewer lines to and through the Property to the WRH parcel. The Joint Agreement also anticipates the sharing in the joint development and costs of the access road and a possible sewer pumping station. The Joint Agreement also states "[t]his agreement shall be binding on the heirs and successors of each."

Based on the plain and straightforward reading of the Joint Agreement, the board finds it does provide binding transmissible rights to the respective parties and increases the ability for each parcel to be developed to their highest and best use as industrial properties. Given the benefits of the Joint Agreement, the board does not agree with the Jones Appraisal's conclusion that the site is a secondary or tertiary industrial site. Rather, the board concludes the Property, benefited by the improved access capability and shared development potential provided by the Joint Agreement, is, at worst, a secondary industrial site and likely a primary industrial site,

given the scarcity of such large acreage single tracts remaining in this southern portion of the state.

After concluding the Jones Appraisal can be given no weight and thus the Condemnor had not fulfilled its burden of proof, the board looked to Tuckernuck's evidence to determine whether the estimate of damages framed in the Rauseo Appraisal was reasonable. In general, the board finds the Rauseo Appraisal's highest and best use assumption and choice of comparables are more on point with the board's perception of the highest and best use of the Property and the market value conclusion that flows from that conclusion. However, the board finds a number of further adjustments to the Rauseo Appraisal's comparables and value conclusion are appropriate to account for all the evidence presented at hearing.

As an overview, the board has considered and contrasted the value enhancing and the value detracting factors for the Property. First, on the positive side, the Property and the adjoining WRH property are industrially zoned and such large tracts are relatively scarce or limited in the southern portion of New Hampshire close to the Massachusetts border. Further, Tuckernuck, subsequent to the Property's acquisition, has performed some preliminary engineering studies identifying the topography and wetlands and developed several conceptual plans. The Joint Agreement provides transmissible and enforceable rights of improved access and shared costs for some of the necessary joint development infrastructure. Last, the board acknowledges the significant testimony presented that the Town of Derry was supportive of industrial development of this parcel and finds the risk of not obtaining approvals for reasonable proposals would be minimal.

On the negative side and to some extent offsetting the value enhancing factors is the presence of significant wetlands and fragmented areas of developable land of the Property. Also,

the Property is near some existing residential properties which could present some resistance to development of the Property, despite it being zoned industrial for many years. While providing many benefits to Tuckernuck and WRH, the Joint Agreement also creates inherent competition and market absorption concerns through the joint and likely simultaneous development of both large properties for industrial development. Further, the Property shares on its eastern border with WRH a steep hill, which, while providing a source of aggregate for the development of these properties, will also entail significant excavation costs to be useful for development. And last, while the Joint Agreement is generally beneficial to both properties, it “marries” the two owners of the properties and their successors to working together in the development of their properties. While this marriage is beneficial, it also requires, as with any marriage, logistical coordination and cooperation with each other’s schedules and plans. Consequently, while both appraisers agreed the Joint Agreement is a substantial benefit to both land owners, the board is cognizant of this coordination and cooperation factor and has considered it when adjusting the Rauseo Appraisal.

With these enhancing and detracting factors in mind, the board has revised the Rauseo Appraisal’s land comparable analysis chart on page 56 in two respects.

Because the Property is not in current use, the Rauseo Appraisal adjusts his comparable L-2 (the Harvey Industries property) 10% because of its enrollment in current use. The board finds the 10% current use adjustment is more properly handled by adjusting the indicated market sale price per acre either before or after the application of the cumulative adjustments factors. This more accurately recognizes any effect of the current use lien separately from the combined individual features adjustment. Consequently, the board has revised and increased the market

condition adjusted sale price per acre for this comparable L-2 by 10% before all remaining adjustments are applied.

The board has modified the “development potential” adjustment for all five comparables by approximately 25% of the existing adjustment shown for each in the Rauseo Appraisal. This modification is to acknowledge both the concern the Property may take longer to develop than anticipated by the Rauseo Appraisal due to its development “marriage” to the adjoining WRH parcel (absorption rate) and the logistical coordination in development that the Joint Agreement necessitates.

These two factors, the board believes were not adequately considered in the Rauseo Appraisal adjustments for relative development potential. Making those revisions, the board arrives at an estimated and correlated price per usable acre of \$30,000, which when multiplied by the 49 usable acres indicates a market value of \$1,470,000.

In summary, the board acknowledges the Property and the adjoining WRH property are difficult to appraise with any absolute certainty given their undeveloped state, the presence of wetlands and all the development uncertainties testified to during the hearing. However, the board believes the Property’s market value is substantially higher than its acquisition price because the purchase was not an arm’s-length transaction and thus below market. Further, the board finds the Property’s market value is less than the value estimated in the Rauseo Appraisal because of the uncertainties contained in the Joint Agreement and the potential absorption time and coordination of the development of these two properties. On balance, the board believes \$1,470,000 is just compensation for the Property.

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

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Addendum A

The “Requests” received from the Condemnee are replicated below, in the form submitted and without any typographical corrections or other changes. The board’s responses are in bold face. With respect to the Requests, “neither granted nor denied” generally means one of the following:

- a. the Request contained multiple requests for which a consistent response could not be given;
- b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;
- c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the Request was irrelevant; or
- e. the Request is specifically addressed in the Report.

Tuckernuck Development, LLC’s Requests for Findings and Rulings

1. This Eminent Domain proceeding concerns property owned by Tuckernuck Development, LLC ("Tuckernuck") located off Bowers Road in the Town of Derry, New Hampshire, by virtue of a deed recorded December 3, 2003, at the Rockingham County Registry of Deeds in Book 4202, Page 1848.

Grant.

2. The date of Taking is February 8, 2006.

Grant.

3. The subject is comprised of a single tract of land totaling 60.5± acres in size.

Grant.

4. Approximately 5.2 acres of wetlands are located on the subject site, leaving uplands totaling 55.3 acres in size with two distinct building areas – 46.5± acres along the southeastern bound and 2.5 acres along Bowers Road.

Grant.

5. The subject tract is located within the Industrial I zone.

Grant.

6. The Town of Derry is proactive in the development of industrial uses.

Grant.

7. Much of the southern bound of the subject tract is shared with the abutting Windham Road Holdings, LLC tract, an undeveloped 169± acre industrial property.

Grant.

8. Tuckernuck and the abutting property owner to the south, Windham Road Holdings, LLC, entered into a Joint Development Agreement dated May 18, 2005, which agreement facilitates the mutual development of these two tracts of land.

Grant.

9. In the Joint Development Agreement, Tuckernuck agreed to extend water and sewer utilities to the boundary between the two tracts. In return, Windham Land Holdings granted Tuckernuck a 50 foot right of way from Windham Road, a state road, to the boundary line between the properties. Both parties agreed to share the costs of installation of a sewer pump station and a roadway from Windham Road across the property to the subject site. Lastly, both agreed to cooperate in the engineering and construction of the project.

Grant.

10. Municipal water and sewer are available to the subject property about 1,800 to 2,000 feet to the northwest on the Fordway Extension Road.

Grant.

11. The anticipated costs to bring municipal sewer and water service to the site from the Fordway Road is estimated by Continental Paving, Inc. at \$273,255 and by George E. Merrill and Son at \$268,195.

Grant.

12. Primary access to the subject site will be via a shared drive and right of way through the abutting Windham Land Holdings lot to Windham Road, a state maintained road, consistent with the Joint Development Agreement. [sic].

Grant.

13. Bowers Road will likely serve as an emergency second access to the site and it may be improved with minor filling and overlays following utilities work from Fordway Road.

Grant.

14. Any excavation of slopes near the boundary with the abutter will be facilitated by the Joint Development Agreement and the sharing of costs of development. Said excavation material may be used for road layout on the site or material for sale.

Grant.

15. It is settled law in New Hampshire that "in eminent domain proceedings the owner of land condemned is entitled to damages for the taking measured by the difference between the value of his land after the taking, and what it would have been worth on the day of the taking if the taking had not occurred." *EdgcombSteel Co. v. State*, 100 NH 480, 486-87 (1957); *Daly v. State*, 15 NH 277 (2003); *State v. 3M Nat'l Advertising Co.*, 139 NH 360, 362 (1995).

Grant.

16. In determining value, the condemnee is entitled to have the property appraised at the most profitable or advantageous use to which it could be put on the day of the taking. *EdgcombSteel*, 100 NH at 487.

Grant.

17. The value to be ascertained is fair market value, which is "the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." *EdgcombSteel*, 100 NH at 487 (quotation omitted).

Grant.

18. The Condemnor has the burden of proving, by a preponderance of the evidence, that the amount offered will justly compensate the Condemnee.

Grant.

19. The Highest and Best Use of the Property is for industrial development.

Grant.

20. Although several conceptual plans have been created which identify alternatives for development of the subject site and the abutting property, the subject property would likely appeal to large industrial users that value the industrially zoned area, proximity to the interstate highway system (only 2.5 miles from I-93), and southern New Hampshire location near the Massachusetts state line.

Grant.

21. Considering the development potential, a prospective buyer of the subject site would highly value the Joint Development Agreement, and consider the high probability of making such utility and access improvements in the near future.

Neither Grant nor Deny.

22. It is not reasonable to consider the subject sale to Tuckernuck to be an arm's length transaction given the circumstances surrounding that sale.

Grant.

23. It is not reasonable to consider the neighboring tract owned by Windham Land Holdings to be an arms' length transaction given the circumstances surrounding that sale. [sic].

Grant.

24. The Sales Comparison Approach to determine fair market value of the subject Property is reasonable.

Grant.

25. Just compensation due for the Taking of the Property as of February 8, 2006 is \$1,815,000.

Deny.

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 03301-6397, Condemnor's counsel; Jack B. Middleton, Esq. and Jennifer L. Parent, Esq., McLane, Graf, Raulerson & Middleton, PO Box 326, Nine Hundred Elm Street, Manchester, NH 03105, Condemnee's counsel; and Ellen L. Nickerson, PO Box 642, 2 Link Street, Windham, NH 03087, Mortgagee.

Date: December 14, 2007

Anne M. Stelmach, Clerk

State of New Hampshire

v.

Tuckernuck Development, LLC and Ellen L. Nickerson

Docket No.: 21518-06ED

ORDER

After review of the “Condemnee’s” December 2, 2009 Motion for Costs (“Motion”) and the “Condemnor’s” December 16, 2009 Opposition to the Motion, the board denies the Motion. The board agrees with the Condemnor’s argument that because an appeal was taken to Superior Court, the board no longer has authority to award costs in accordance with RSA 498-A:26-a as the board only has authority to award costs if neither condemnor nor condemnee appeal the award. In this case, the issue of costs rests with the Superior Court.

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: Kevin H. O'Neill, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, Condemnor's counsel; and Jack B. Middleton, Esq. and Jennifer L. Parent, Esq., McLane, Graf, Raulerson & Middleton, PO Box 326, Nine Hundred Elm Street, Manchester, NH 03105, Condemnee's counsel.

Date: December 31, 2009

Anne M. Stelmach, Clerk