

State of New Hampshire

v.

Terra Firma Real Estate, LLC

Docket No.: 21544-06ED

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 (“Declaration”) was filed with the board on May 17, 2006 and served on the “Condemnee,” describing the property rights taken as: a conservation easement over the rear 14.67 acres, more or less, of vacant, unimproved land (the “Property”) located on Map 15/Lot 3, a parcel consisting of a total of 20.69 acres located at 8 Hall Road in the Town of Londonderry. 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.

The board viewed the Property on October 30, 2007 and held the just compensation hearing at its offices on October 31, 2007. The Condemnor was represented by Attorney

Lynmarie C. Cusack of the State of New Hampshire Department of Justice and the Condemnee was represented by Attorney Emile R. Bussiere, Jr. of Bussiere & Bussiere.

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.

Board's Rulings

The central questions posed in this proceeding are the just compensation to be awarded for a conservation easement taken on the Property and whether the Condemnor satisfied its burden of proof, where the Condemnee chose to present no alternative direct or specific evidence of damages from the taking.

The Condemnor presented testimony and an appraisal prepared by Mr. Richard Mario Leslie, MAI, of Evergreen Appraisal (the "Leslie Appraisal," Condemnor Exhibit No. 1). The Condemnee did not present any appraisal evidence of its own. The Condemnee's attorney did cross-examine Mr. Leslie at some length regarding assumptions in his appraisal and then called just one witness, Mr. Eric C. Mitchell, who had been hired by the Condemnee. Mr. Mitchell, a licensed land surveyor, expressed no opinion on damages, but only testified as to his conflicting opinion of the physical development potential of the Property. His work on behalf of the Condemnee is reflected in Condemnee Exhibit No. B (a drawing dated May 12, 2006 depicting a potential four lot subdivision Mr. Mitchell felt was feasible by adjusting the boundary of the conservation easement being taken by the Condemnor) and Condemnor Exhibit No. 5 (a drawing dated September 12, 2006).

The Leslie Appraisal estimated a value of \$160,000 per developable lot, but concluded only one residential lot was developable on the Condemnee's land, both before and after the taking of the conservation easement. Consequently, the taking resulted in "\$0" damages. Mr. Leslie relied on the fact that no subdivision plans had been approved by the Town at the time of the taking, May 17, 2006. Mr. Leslie was aware of a five lot residential subdivision proposal formulated by the Condemnee, reflected in a site plan filed with the Town's Planning Department depicted on page 26 of his appraisal. He noted the proposed development is problematic because of the existence of wetlands and location within the Town's Conservation Overlay District (a buffer of "100 feet of the edge of said wetlands") where residential development is prohibited. (See Leslie Appraisal, maps on pp. 27 – 28 and definition and permitted uses within Conservation Overlay District on pp. 22 – 23.) As he further noted, "[I]t appears that over 50% of the site is in wetlands or within the Conservation Overlay District of zoning and most of this area is on the rear of the parcel without access except through wetland areas." Id. at p. 24. Mr. Leslie concluded it was unlikely that any such plan would be approved by the Town based on his conversations with two officials in the Town's Planning Department. He also mentioned a prior variance had been approved for a two lot subdivision in 2002 but this variance had "expired." Id. at p. 15. See also Condemnor Exhibit Nos. 2 and 3, which are proposals for a seven lot and a five lot development in 2001 and 2003, respectively, but the Town's Conservation Commission did not support either of them and they were apparently not then submitted to the Town's Planning Board for any action.

Sometime after the date of taking, it appears the Condemnee applied for and received approval for a two lot residential subdivision on its remaining land (outside of the conservation easement and fronting Hall Road). Mr. Leslie testified, however, that the ultimate development

of two lots would not affect his conclusion of no damages because, while higher than his \$160,000 estimate for one developable lot, his before and after estimates of value would not differ from each other, resulting in no actual just compensation damages.

The Condemnee, through cross-examination of Mr. Leslie, argued he could have made further inquiries of Town officials and researched Town documents further before reaching his conclusion that a multiple-lot development would not be approved. As noted above, the Condemnee's sole witness, Mr. Mitchell, presented a plan and testimony tending to show the Condemnee, from an engineering standpoint, could have developed a four or five lot subdivision and had it approved by the Town, but for the taking of the conservation easement.

Significantly, however, the Condemnee chose not to present any direct evidence of just compensation damages, either through an appraisal of its own or through the testimony of any owner or other representative of the Condemnee having experience or expertise in real estate development and marketing. The Condemnee also elected not to send its attorney or any other representative on the view of the Property to show the upland and other areas of the Property that might reasonably support a multi-unit residential development.

The board considered the evidence as a whole and examined the possibility of a four or five lot subdivision, given the limitations posed by the wetlands and the Town's Conservation Overlay District. While such a development may not be impossible from a physical feasibility or engineering standpoint, the political uncertainties and undocumented costs of such development may be so great so as to make it financially infeasible, especially when feasibility is compared to a two lot subdivision, the development plan ultimately proposed by the Condemnee and approved by the Town. For reasons of its own, the Condemnee chose not to present the sworn testimony of any witness or other evidence of its own regarding the costs of such development,

including the substantial engineering and road construction costs that would be involved, relying instead on the very limited information contained in the Leslie Appraisal submitted by the Condemnor. The Condemnee also did not explain why it delayed in seeking approval of a multi-lot subdivision from 2001 until 2006.

On the record presented, the board cannot conclude the Condemnor failed to meet its burden of proof on the issues of highest and best use and the lack of actual damages resulting from the taking of the Property. The Condemnor cited the so-called ‘yellow book’ (“Uniform Appraisal Standards for Federal Land Acquisitions” promulgated at the Interagency Land Acquisition Conference in 2000) in response to the Condemnee’s arguments regarding the burden of proof. This publication states (in Section B-3):

[T]here is a presumption that the existing use of land is its highest and best use. (Citations omitted). Therefore, when there is a claim that the highest and best use of a property is something other than the property’s existing use, the burden of proving that different highest and best use is on the party making the claim.

Accord, 5 J. Sackman, Nichols on Eminent Domain § 18.02[3] (3rd Ed. 2006) (“it is clear that when one party asserts a highest and best use of the condemned property which is different from the present use, that party has the burden of proof. (Citations omitted.)”). The Condemnee is such a party and therefore has some burden on this issue.

This leading treatise further states:

The burden of proof in eminent domain depends largely upon what issue is at stake. It is well established that the burden of proof is on the party asserting the affirmation of any issue. (Citations omitted.) In a single eminent domain action the burden of proof may shift several times....

Admissibility of a proposed use requires a showing that the property is both physically adaptable for that use and that there is a demand for such use in the reasonably near future. (Citations omitted.)...

The owner may introduce evidence of the highest and best prospective use....

The prospective use will not be admissible, however, if the asserted use is fanciful, speculative or conjectural.

Id. at §§ 18.02[1] and 18.05[3]. The board agrees with these statements regarding the requisite burden of proof.

The board is, of course, familiar with RSA 498-A:19, which states “[i]ssues of fact shall be determined upon the balance of probabilities and the burden of proof shall be upon the condemnor.” Cf. State v. Garceau, 118 N.H. 321, 323 – 24 (1978) (quoting this statute). See also RSA 498-A:25: “The board shall proceed to a determination of just compensation and shall hear evidence in that regard offered by the parties.” (Emphasis added.) The use of the plural in this statute implies a process, specifically envisioned by the legislature, whereby condemnees, as well as a condemnor, have some obligation to present evidence sufficient to support a specific just compensation amount.

Here, however, the Condemnee’s attorney chose to present no facts as evidence to develop an award of just compensation as an alternative to the estimate in the Leslie Appraisal, suggesting instead, in his closing argument, that the board undertake the following exercise for itself: compute the value of three lost “lots” from a five lot subdivision (based on the Leslie Appraisal estimate of \$160,000 per developable lot) and deduct from this computation (\$480,000) whatever costs (engineering, legal, construction, marketing) might be applicable. The board cannot and will not do so on the record presented, because there is an insufficient evidentiary basis for doing so and because it would require the application of very crude, if not fanciful, speculative and conjectural assumptions regarding the land development process.

In other words, the board finds the Condemnor’s burden should not be stretched so far as to require disproving any alternative methodology for computing damages. Here, the Condemnor satisfied its burden by proving, by a preponderance of the evidence, the estimate of

its own qualified expert of no actual damages is reasonable. The board is not required to engage in very crude and abstract speculations regarding what could be presented had the Condemnee chosen to present relevant evidence of actual damages from the taking, which it chose not to do for reasons of its own.

Notwithstanding the finding of no actual damages resulting from the taking, Mr. Leslie made a pro rata damage computation using an estimate of \$2,000 per acre for the conservation easement rights taken by the Condemnor (80% of the full fee simple value of the land). The board finds this approach and the estimate to be reasonable. Mr. Leslie noted, however, he was limited, by “NHDOT ROW policy,” to a maximum of \$20,000 in any such calculation. See Leslie Appraisal, p. 81. No legal basis or equitable rationale was presented to adhere to this arbitrary monetary ceiling and the board therefore makes the pro rata damage award \$30,000 (14.67 acres x \$2,000 per acre, rounded).

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

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to:
Lynmarie C. Cusack, Esq., State of New Hampshire Department of Justice, 33 Capitol Street,
Concord, NH 03301-6397, counsel for the Condemnor; and Emile R. Bussiere, Jr., Esq.,
Bussiere & Bussiere P.A., 15 North Street, Manchester, NH 03104, counsel for the Condemnee.

Date: November 14, 2007

Anne M. Stelmach, Clerk