

**State of New Hampshire**

**v.**

**Kathleen G. Sullivan, a/k/a Katherine Kilroy, David Kilroy  
and Wells Fargo Home Mortgage, Inc.**

**Docket No.: 21547-06ED (Parcel 2048)**

**and**

**State of New Hampshire**

**v.**

**Katherine Kilroy a/k/a Kathleen G. Sullivan**

**Docket No.: 21552-06ED (Parcel 1082)**

**REPORT OF THE BOARD**

The above matters were consolidated for hearing and, due to the related unity of ownership and use of each parcel, the board has issued a consolidated report.

These matters arises as a result of an RSA 498-A:5 acquisition of property rights taken for wetland mitigation related to the construction of the Manchester Airport Access Road pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:45. Declarations of Taking (“Declarations”) were filed with the board on May 24, 2006 for Parcel 2048 and on June 8, 2006 for Parcel 1082. The partial taking in Parcel 2048 was a fee taking of 42.184 acres of undeveloped land, leaving a remainder of 2 to 3 acres on Hall Road with a dwelling and other improvements. Parcel 1082 was a complete taking of 17.3 acres of

undeveloped land, abutting Parcel 2048 on the west (collectively, the “Properties”). See Exhibit A to the Declarations.

RSA 498-A:25 authorizes the board to hear evidence relative to an eminent domain condemnation and to 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 Properties and held the just compensation hearing at the Londonderry Town Hall on May 6, 2008 and at its offices in Concord on May 7, 2008. The Condemnor was represented by Lynmarie C. Cusack, Esq. and the Condemnees were represented by John W. Spencer, Esq.

Laurie A. Gelinis of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire, (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**

Based on the evidence submitted, the board finds a before taking value for both parcels of \$400,000 and an after taking value of \$250,000, resulting in total damages of \$150,000. The parties are fairly close in their after value estimates (\$250,000 for the Condemnor and \$260,000 for the Condemnees), but disagree on the before value because of differences regarding the market value of the nearly 60 acres taken, with the Condemnor contending this land added about \$63,000 of value and the Condemnees contending it added about \$189,000 of value. The board’s

finding of a \$150,000 value difference is based on consideration of a number of factors, some discrete and some related, which are discussed below.

### One Estate or Two?

Two separate Declarations were filed for Parcels 2048 and 1082 based on the title history presented and generally agreed upon by the parties at hearing. David Kilroy and Kathleen G. Sullivan, in January 1999 before they were married, received title from Kathleen Sullivan's then divorced parents, Donald Sullivan and Kathleen M. Sullivan. The deed description of the land was relatively indefinite, with only general bound descriptions and no estimate of acreage. Ms. Kilroy at hearing testified her parents acquired the Properties under a similar deed description in 1970.

Apparently, unbeknownst to the Sullivans/Kilroys, the Town of Londonderry in 1991, as a result of Parcel 1082 being shown on the updated tax maps as Map 15/Lot 005A and identified as an "owner unknown" parcel, acquired by an RSA 80:38 tax deed that portion of the Properties identified on the deed simply as "land only-Hall Rd. Rear". When Kathleen G. Sullivan (then having married and becoming Kathleen G. Kilroy) discovered the existence of this separately assessed parcel, she notified Londonderry's town administrator. After she explained it was a portion of the land formerly owned by her parents and assumed transferred to her and Mr. Kilroy in 1999, the town administrator acknowledged the tax deed transfer was in error and offered to have Londonderry deed it to her.

Consequently, Londonderry issued and recorded a deed quitclaiming its interest acquired by the tax deed to "Katherine" Kilroy. Apparently, Londonderry was inexact about obtaining the correct name of Ms. Kilroy and Ms. Kilroy did not subsequently attempt to have any corrective

deed issued to clarify the error. The Condemnor's subsequent title search reflected this title history and the two Declarations were filed in the different names for the two parcels.

For guidance as to how to treat and value these separately described parcels with related ownership, the board has reviewed the Uniform Appraisal Standards for Federal Land Acquisitions, (2000), commonly known as "The Yellow Book", and 4A, Nichols on Eminent Domain, 3rd ed., specifically at Section 14B.06. While neither publication establishes any bright line test, the common tendency is, if title is controlled by similar and related parties, then determination of unity in title is reasonable. In this case, Kathleen G. (Kilroy) Sullivan and David Kilroy own Parcel 2048 and Katherine (Sullivan) Kilroy owns Parcel 1082 solely due to the inadvertent title transfer of tax deed property by Londonderry to Ms. Kilroy only, rather than to her and her husband. It is clear, based on the testimony, there was no design or intent to have separate titles; the outcome resulted simply from a quitclaim transfer of title without any thought of any possible ramifications by Ms. Kilroy as to the exact title in which the parcel was received.

Although Londonderry separately assessed Parcel 1082 as a separate lot, this does not, in and of itself, establish it is a separate lot of record.

"(T)he fact that . . . lots are separately assessed and separately taxed is not conclusive in determining whether separate lots . . . constitute one lot for zoning purposes." Smith v. Zoning Board of Review of the Town of Westerly, 111 R.I. 359, 368, 302 A.2d 776, 781 (1973). "(S)everal contiguous lots . . . in single ownership . . . may be lumped together and treated as a 'zoning lot . . .'" Newport Associates, Inc. v. Solow, 30 N.Y.2d 263, 332 N.Y.S.2d 617, 620, 283 N.E.2d 600, 602 (1972); Heald v. Zoning Board of Appeals of Greenfield, 7 Mass. App. 286, 387 N.E.2d 170 (1979). Whether they should be so treated must be determined on a case-by-case basis.

Robillard v. Town of Hudson, 120 N.H. 477, 480 (1980). For the reasons noted earlier, the board finds the facts do not establish a reasonable basis to conclude Parcel 1082 is a separate lot of record.

Further, it appears Londonderry's acquisition of Parcel 1082 by tax deed in 1991 was nothing more than an administrative process to account for areas of land when it did not know the owner(s) after tax map modifications. It is the board's experience that this is a common process to account on the assessment rolls for parcels identified on tax maps until ownership of an unknown parcel is determined. Ms. Kilroy testified her family had understood they had acquired and used all the land encompassed by Parcels 2048 and 1082 since the land had been acquired by her parents in 1970.

Based on this history of common use, the inadvertent designation as two parcels due to tax map updates, the undisputed facts surrounding why title is not held identically and because Ms. Kilroy has common interest in both parcels, the board concludes there is unity both of title and of use in the parcels and thus they can be considered as one parcel or estate.

#### Highest and Best Use

The second consideration is how the Condemnees' unity in title and use affects the highest and best use of the two parcels. Both the Condemnor's and Condemnees' appraisers appraised the parcels separately. The Condemnor's appraiser, Mr. Richard Mario Leslie of Evergreen Appraisal, viewed the land acquired in both parcels as surplus wetland suitable for recreational use and valued it essentially at \$1,000 to \$1,100 per acre. Mr. David S. Rauseo of Rauseo & Associates, the appraiser for the Condemnees, valued both properties separately and ascribed more value on a per acre basis (\$4,000 versus \$2,845) to Parcel 1082 than to Parcel 2048. Mr. Rauseo premised the higher value on an assumption Parcel 1082 could be sold separately with the highest and best use as recreation or conservation land with the potential for camping on the northern, drier portion of it.

Considering the lack of development potential of both parcels, the questionable basis of them being described separately and their historical integrated use, the board concludes there is no marked advantage to consider them as separate parcels. The board finds the highest and best use of the parcels is as supplemental recreation/conservation wetlands for the single family home on Hall Road. This is how both parcels have been utilized historically by the Sullivan/Kilroy families and it is likely how it would have been marketed but for the Condemnor's takings. The testimony provided by Ms. Kilroy and as seen on the board's view was that the Properties, notwithstanding their challenges due to the high land being separated by various wetlands, has been used recreationally for all terrain vehicle (ATVs) uses and horseback riding in addition to the more passive uses of hiking, camping and fishing by those families. The board finds such recreational land use is attractive to a certain segment of the market, such as the Kilroys/Sullivans who are looking for a single family dwelling in southern New Hampshire with the associated recreational and buffer/privacy attributes offered by the nearly 60 acres taken by the Condemnor. The board recognizes this land has wetland and access issues that impact its utility and value which are addressed in subsequent sections of the Report. However, it is worth emphasizing at this point that, based on its view of the Properties, and a review of what use the land could have been legally put to, we conclude that it has significant more utility and value than "surplus wetlands," the conclusion of the Condemnor's appraiser.<sup>1</sup>

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<sup>1</sup> The Condemnor submitted Exhibit No. 8 which appears to be a poster derived from the New Hampshire Department of Environmental Services' site ([see www.des.state.nh.us/wetlands/pdf/atv\\_poster.pdf](http://www.des.state.nh.us/wetlands/pdf/atv_poster.pdf)) to undermine the Condemnees' assertion that the ATV recreational use of such rear land encompassing wetlands was prohibited by state law. The Condemnor laid no foundation as to the origin of this poster and to its applicability to private property. The board reviewed the statutes and rules relating to "off highway recreational vehicles" ("OHRVs") and was unable to discern any statute or rule that establishes the prohibition of OHRV use of the Properties which appeared to be the purpose for which the exhibit was submitted by the Condemnor.

Access

As testified to and as seen on the board's view, the Kilroy/Sullivan access to the rear 60 acres has occurred in two ways: (1) direct access from the dwelling's back yard across a cribbing of logs and pallets bridging approximately 250 feet of wetland to reach the largest upland area of Parcel 2048 where much of the ATV and horseback riding occurred; and (2) access down the "trolley lane" that the board drove on during its view along the northern boundary of both parcels and by a driveway across the "Gagnon" property (Map 15 Lot 3) that the Kilroys/Sullivans have also used to access the same upland area of Parcel 2048.

As to the first means of access, the board agrees with Mr. Rauseo the Condemnees had a right to fill, after applying for and receiving a permit from the New Hampshire Department of Environmental Services, the area behind their house which had been bridged by wood cribbing. While this would involve some cost, it is a viable option for providing reasonable access to most of the upland areas that are used for recreational purposes.

Second, the Condemnor's appraiser, Mr. Leslie, assumed the Condemnees had 'no access' to the land taken via the "trolley lane" or the "Gagnon" road, while the Condemnees asserted a "prescriptive easement" by adverse possession existed, at least over the trolley lane since it had been used by them and the general public for many years. The board finds the Condemnor failed to meet its burden of proving there was no access to support the lower value conclusion of Mr. Leslie.

The board was disappointed that neither party submitted any history or background information as to the nature of the "trolley lane" access, but instead chose to engage in the inconclusive legally sparring that occurred on this issue during the hearing. Neither submitted a

memorandum of law or documentary evidence in support of their respective positions on the access issue, even though this evidence is public record and available.

Much background information as to the origin and holders of the rights to the “trolley lane” was readily discernible from the brief (two hour) title research the board performed from its offices on the Rockingham County Registry of Deeds website. Without an exhaustive recitation of all the deed references, this title review determined the “trolley lane” was initially created in 1906 when, by various deeds, the Manchester and Derry Street Railway acquired in fee a linear strip of land to run a street trolley line along the northern boundary of the Properties. Subsequently, when the Manchester and Derry Street Railway was abandoned, the land of the trolley line was acquired by the current owner of Map 15/Lot 2 (Crowning Holding, Inc., the abutter to the north of the Properties) from predecessors in title (Webco Development Corporation and Seppala and Aho Construction Company, Inc.). In 1938 the Manchester and Derry Street Railway granted Public Service Co. of New Hampshire a 100 foot wide utility easement and in 2000 Crowning Holding, Inc. granted AES Londonderry, LLC a 20 foot easement for its pipeline in the same general vicinity. This history is helpful in understanding why there is the current “trolley lane” and who has deeded rights to it, but does not necessarily resolve the question of whether the Condemnees’ claim to a prescriptive easement by adverse possession is or is without merit.

In this case, Ms. Kilroy testified her family has, on a frequent and uninterrupted basis, utilized the “trolley lane” and the “Gagnon” drive to access the rear portions of their land for recreational purposes. Ms. Kilroy also testified that the “trolley lane” had historically been used by the public in general to access the Town “dump” and for people to access the Cohas Brook

dam just past the northwestern corner of the Properties. The board noted on the view the “trolley lane” (physically a road for 4-wheel drive vehicles that passes between the rear of the industrial building on Crowning Holding, Inc.’s parcel and the northern boundaries of the Properties) appeared to be fairly regularly used by the public as reflected by its rutted nature and the presence of some litter and trash.

However, based on the lack of adequate and detailed evidence submitted by either side relative to the conditions necessary to obtain adverse possession, the board is unable to conclude the Kilroys’/Sullivans’ claim of a prescriptive easement is without merit or, alternatively, that Mr. Leslie, the Condemnor’s appraiser, was correct in his assumption regarding ‘no access.’ See the factors pertaining to adverse possession discussed in, for example, Blagbrough Family Realty Trust v. A & T Forest Products, Inc., 155 N.H. 29, 33 (2007), and the cases cited therein.<sup>2</sup>

Given this indefinite finding, how does the board weigh the access question and its impact on the value of the taken property? The board places most weight on the ability for the Condemnees to have direct access over their own land through some filling of wetlands to provide reasonable access for the level of recreational use to which they had historically used the Properties. The uncertain potential of being able to transfer their Properties with an adverse possession right, while considered by the board, was given little weight in its ultimate

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<sup>2</sup> “In order to obtain title by adverse possession, the adverse possessor must prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. Flanagan v. Prudhomme, 138 N.H. 561, 571-72, 644 A.2d 51 (1994). In addition, adverse use is trespassory in nature, and the adverse possessor’s use of the land must be exclusive. See Kellison v. McIsaac, 131 N.H. 675, 679, 559 A.2d 834 (1989); Seward v. Loranger, 130 N.H. 570, 576-77, 547 A.2d 207 (1988). The success or failure of a party claiming adverse possession is not determined by the subjective intent or the motives of the adverse possessor. Kellison, 131 N.H. at 680, 559 A.2d 834. Rather the acts of the adverse possessor’s entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of the cause of action. Id. In evaluating the merits of an adverse possession claim, courts are to construe ‘[e]vidence of adverse possession of land . . . strictly.’ Bellows v. Jewell, 60 N.H. 420, 422 (1880) (citations omitted).”

determination of the value of the land taken by the Condemnor. However, the board found it frustrating to be presented with such incomplete facts and arguments when more could have been presented by either parties' through further research and focused arguments on this issue.

### Value

The board finds the Condemnor did not carry its burden by valuing the Properties as only surplus wetlands. The "Leslie Appraisals" relied exclusively in making adjustments to the comparables in its sales approach based upon the wetland extraction estimate of \$1,100 per acre from the one sale at 17 Buckingham Drive. The board viewed 17 Buckingham Drive and finds the associated surplus wetlands for that parcel had almost no or very limited recreational value as land adjacent to a residence. It had neither upland areas available for the horseback riding and ATV use that the Kilroys'/Sullivans' Properties had, nor did it have any open water areas to provide the common amenities of canoeing or fishing or waterfowl hunting provided by the Cohas Brook as the Condemnees' Properties do. Thus, the board was unable to place any weight on the value conclusions of the Leslie Appraisals.

The board reviewed the comparables in the "Rauseo Appraisals" and was able to give them some, but not exclusive, weight in its value determination of \$2,500 per acre. In general the properties employed in the Rauseo Appraisals are of better quality land (more upland, more directly accessible) than the Properties. While the board understands the Rauseo Appraisals employed a "parcel to parcel" comparison as opposed to an acreage comparison, the board has utilized the sales and general concepts employed in the Rauseo Appraisal for Parcel 1082 and made adjustments for the inferior access and quality of the land to arrive at a correlated conclusion of \$2,500 per acre as opposed to the \$4,000 per acre of the Rauseo Appraisal (for

Parcel 1082). The board acknowledges such adjustments are subjective in nature; however, based on the board's specialized knowledge and experience and its view of the Properties, we believe such adjustments arrive at a value that embodies both the positive and negative aspects already addressed in this report of the Properties acquired by the Condemnor.

In summary, the board makes a total just compensation damage award of \$150,000 for both takings.

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

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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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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, counsel for the Condemnor; John W. Spencer, Esq., Spencer & Spencer,  
LLC, 18 Bluff Road Hull, MA 02045, counsel for the Condemnees; and Wells Fargo Home  
Mortgage Inc., c/o Lawyers Incorporated Service, 14 Centre Street, Concord, NH 03302,  
Mortgagee.

Date: June 27, 2008

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Anne M. Stelmach, Clerk