

City of Concord

v.

**Harbor/Hillside Investment, LLC and
LaSalle Bank, National Association, Trustee**

Docket No.: 21620-06ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the layout of the “Langley Parkway” as a limited access highway under RSA 231:53-56 pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 31:92 and RSA 231:1. A Declaration of Taking (the “Declaration”) was filed with the board on August 14, 2006, and served on the condemnees, Harbor/Hillside Investment, LLC and LaSalle Bank, N.A., describing the property rights taken as follows: a public right of way easement for a limited access highway containing 40,826 square feet; a drainage easement containing 2,698 square feet; and slope easements totaling 4,980 square feet (the “Property”). See Exhibits A and B 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 board viewed the Property and held the just compensation hearing at its offices on June 3, 2008. The Condemnor was represented by James F. Raymond, Esquire and “Condemnee” Harbor/Hillside Investment, LLC was represented by Walter L. Maroney, Esquire.

The Property before the taking consisted of 6.0 acres of land and the Property after the taking consisted of 6.0 acres of land encumbered by the easements described above.

Board’s Rulings

The crux of this matter is whether the Condemnor prevailed by the evidence it submitted in proving the Property suffered no severance damage and thus damages can be calculated on a pro rata basis. For the reasons that follow, we find the Condemnor carried its burden.

Condemnor Exhibit No. 14, an appraisal performed by Spring Appraisal Company (the “Spring Appraisal”), contains a detailed discussion and analysis of both the Property’s vacancy rates and nine other competitor apartment complex vacancy rates. This analysis arrived at the conclusion the market showed no differentiation in either rents charged or vacancy rates based on the proximity of units to a busy roadway. Further, the testimony of Ms. Catherine Capron indicated that a follow-up interview with representatives of most of the nine apartment complexes indicated no change from the earlier comments in the Spring Appraisal as to unit location influence.

The Property’s rental and vacancy history analyzed in Condemnor Exhibit No. 16 also shows no statistically valid difference in the vacancy rates for the four buildings. In fact, building #1 (located on Pleasant Street directly across from the entrance to Concord Hospital and of similar distance to Pleasant Street as building #4 is to the Langley Parkway in the after situation) has shown no statistically measurable difference in vacancy rates from the other buildings. The board acknowledges the vacancy rate for building #4 from June 1, 2007 to

May 31, 2008 (see Condemnor Exhibit No. 16) was approximately 3% higher than the overall average for the entire complex. However, the board is unable to give any weight to the Condemnee's assertion the increase is directly related to the construction or presence of the Langley Parkway because it is contrary to the more extensive market evidence presented by the Condemnor and indeed that of Condemnor's building #1 that shows no difference in rents or vacancies.

Moreover, the board finds merit in Ms. Capron's testimony that an interview with the management of the South Concord Meadows apartment complex located on Clinton Street, and according to the Condemnee's testimony, their main competitor, indicated there was no affect on either rental rates or vacancies due to the two-year construction disruption of Clinton Street associated with the construction of the Langley Parkway. Both based on the testimony and the board's own experience¹, such disruption on Clinton Street would potentially have had a more significant impact on South Concord Meadows than on the Property.

The board was unable to give any weight to the testimony of a real estate appraiser, Mr. Peter Stanhope, as his testimony was general and hypothetical in nature rather than being specific to any analysis or market value opinion of the Property. Further, the board considered the testimony of Mr. Michael Kiley, Director of Property Management of Harbor Management, but also was unable to give it much weight because of the lack of any documented evidence to support his assertion of the impact of the project.

¹ The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. See RSA 541-A:33, VI; Appeal of City of Nashua, 138 N.H. 261, 264-65 (1994); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence).

Last, the board is also unable to give any weight to Attorney Maroney's argument of \$140,000 in damages, based on some uncertain loss in rent capitalized at 7%, as this argument was unfounded and speculative.

In conclusion, the board finds the Condemnor carried its burden in supporting its estimated damages of \$13,000 and the Condemnee failed to submit any evidence to undermine the Condemnor's basis of its estimate of damages. Consequently, the board need not make further detailed findings other than to generally adopt those submitted in the Condemnor's requests for findings of fact and rulings of law (with the exception of any findings relative to any "special benefits" as offsets to further damages).

The board finds damages in the amount of \$13,000 payable to Harbor/Hillside Investment, LLC. The Property is subject to a mortgage lien held by LaSalle Bank, N.A., as trustee for registered holders of GE Commercial Mortgage Corporation. See Declaration.

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 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.

Attached as Addendum A hereto are the board's responses to the Condemnor's Request for Findings of Fact and Rulings of Law.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Addendum A

The “Requests” received from the parties 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.

City of Concord’s Proposed Findings of Fact and Law

1. The City of Concord acquired easements over the rear, undeveloped portion of the apartment complex owned by Harbor/Hillside Investment, LLC (“Harbor/Hillside”), known as Hillside View Apartments (the “Hillside Apartments”), at 243 Pleasant Street, Concord, by Declaration of Condemnation recorded on August 15, 2006, for the construction of Langley Parkway, a limited access parkway that runs from Clinton Street to Pleasant Street in Concord.

Granted.

2. The easement interests acquired by the City included a right of way easement of approximately 40,826 square feet, a drainage easement of approximately 2,698 square feet, and a slope easement of approximately 4,980 square feet, all located in the undeveloped rear of the Harbor/Hillside property, behind the buildings and parking lots.

Granted.

3. The Hillside Apartments consist of four building groups on Pleasant Street, a busy arterial street, across the street from Concord Hospital, and are abutted by the Dartmouth Hitchcock Clinic parking lot on the west, and by the Pleasant View Retirement Home parking lot on the east.

Granted.

4. The area taken by the easements was primarily wetlands; no improvements were located in the easement area; and, because of wetlands and density restrictions, the land subject to the easements could not be developed.

Granted.

5. Construction began on Langley Parkway in September, 2006, and was substantially completed by May 31, 2008, but during that time, most construction activity focused on other portions of the Parkway, not on the Harbor/Hillside property.

Granted.

6. Harbor/Hillside was aware of the City's plans for constructing the Parkway when it purchased the Hillside Apartments in 2003.

Granted.

7. When constructing the Parkway, the City made additional improvements to the Harbor/Hillside property, which constitute a special benefit to the Hillside Apartments property, including:

a. Repairs to the failed drainage system in the lower parking lot of Hillside Apartments, which had failed from lack of maintenance and resulted in periodic flooding of the parking lot during rain storms, which the City rebuilt at a cost of \$8,000.00;

b. Installation of a berm and landscaping, requested by Harbor/Hillside, at a cost of \$11,275.00;

c. Installation of a break in the guardrail along the Parkway to allow pedestrian access from Hillside Apartments to the Parkway sidewalk, at a cost of \$850.00; and

d. Installation of an ADS underdrain system to allow drainage of standing water on the Harbor/Hillside property, not caused by the construction of the Parkway, at a cost of \$7,980.00.

Engineering fees for these improvements totaled approximately \$6,000.00, for total special benefits costing approximately \$34,105.00.

Neither granted nor denied.

8. The noise studies conducted for the Parkway projected no adverse noise impacts from the Parkway on the Hillside Apartments that require a noise abatement.

Granted.

9. The traffic studies for the Parkway projected traffic on Langley Parkway of about 6,000 vehicles per day, which is a level experienced by residential streets such as Rumford Street and is about one-third of the traffic volume projected for Pleasant Street in front of the Hillside Apartments.

Granted.

10. The appraisal by Spring Appraisal Company, by Donald Spring and Catherine Capron, based its calculations of the value of the easement interests acquired as of the date of the taking on the value of the part taken from the whole, and concluded that the value of the right of way easement was \$4,490.00, the value of the drainage easement was \$4,480.00, and the value of the slope easement was \$4,040.00, for a total value rounded to \$13,000.00.

Granted.

11. On the basis of extensive analysis of similar apartment complexes, Donald Spring and Catherine Capron of Spring Appraisal Company found no evidence that the Hillside Apartments would experience an income loss from the acquisition, construction, and use of Langley Parkway, and concluded that no award of severance damages is appropriate.

Granted.

12. The condemnee did not offer, by way of appraisal or otherwise, a specific amount for the damages that it believed should be awarded.

Granted.

13. The only evidence of damage offered by the condemnee was an alleged short term rental loss, to which it sought to apply a capitalization rate of seven percent. The condemnee's own appraisal expert, however, advised that capitalization of that loss is an improper measure of damages for short term loss, and that instead it would be more appropriate to use an internal rate of return/discounted cash flow analysis, but the condemnee offered no evidence as to what that rate should be.

Granted.

14. Moreover, as a member of the condemnee's management testified, there were several potential causes for rental loss since 2006, including a general softening of the rental market, and the condemnee offered no specific evidence of what portion of that loss, if any, was caused by the construction of the Parkway.

Granted.

15. Instead, as presented by Catherine Capron, the condemnee's vacancy records showed that since the taking, in Building Four, the building closest to the Parkway, the units facing Langley Parkway had fewer vacancy days than the units facing the interior of the property, and the units in Building One, the building closest to Pleasant Street, had a lower rate of vacancy days than Buildings Two and Three, the interior buildings, thereby showing that the condemnee's vacancy records did not support a finding that the acquisition of the easements and construction of the Parkway would cause a reduction in rental income.

Granted.

16. The condemnor has the burden to prove, based upon a balance of the probabilities, that its offer of compensation to the condemnee was reasonable. *See Fortin v. Manchester Housing Authority*, 133 N.H. 154, 157 (1990); N.H. Admin. R. Tax 210.12.

Granted.

17. "In New Hampshire, the owner of condemned property is entitled to damages based upon the difference between the property's fair market value before and after the taking." *City of Manchester v. Airpark Business Center Condominium Unit Owners' Assoc.*, 148 N.H. 471, 473 (2002).

Granted.

18. In the context of a partial taking, the property owner is entitled to not only the fair market value of the property actually taken, but also compensation for the effect of the taking, if any, on the entire property. *O.K. Fairbanks Co. v. State*, 108 N.H. 248, 250 (1967). This form of compensation is known as severance damages. *City of Manchester*, 148 N.H. at 473.

Granted.

19. Damages caused by temporary construction of a public project for which a portion of a landowner's property was taken is not relevant when calculating fair market value. *See e.g. Hillman v. Dept. of Trans.*, 359 S.E.2d 637 (Ga. 1987); *Hurst v. Starr*, 607 N.E.2d 1155 (Ohio 1992); *South Dakota v. Baken Park*, 257 N.W.2d 448 (S.D. 1977); 26 Am. Jur. 2d, *Eminent Domain*, sec. 156 (2000).

Neither granted nor denied.

20. Where no income was generated from the portion of the Harbor/Hillside property acquired by the City, and there is no severance damage, the correct appraisal approach is a mathematical allocation based on the land value taken as a part of the whole.

Granted.

21. To the extent the condemnee are entitled to compensation for the City's taking, the amount compensation should be reduced to reflect any special benefits conferred upon the condemnee as a result of the project. *See Lebanon Housing Auth. v. National Bank*, 113 N.H. 73, 74 (1973).

Neither granted nor denied.

22. The value of the easements acquired by the City as of August 15, 2006, was \$13,000.00.

Granted.

23. The landowner is entitled to no severance damages.

Granted.

24. The City of Concord has satisfied its burden of proving that its offer of compensation to the condemnee was reasonable.

Granted.

25. The compensation otherwise payable to the landowner is offset by the special benefits given Harbor/Hillside.

Neither granted nor denied.

Harbor Hillside Investment, LLC's Proposed Findings of Fact and Law

1. Under New Hampshire law, the extent of damages to a property subject, in whole or in part, to a taking by eminent domain is determined by "the difference in the fair market value of the property before and after the taking." *State v. 3M National Advertising Co.* 139 N.H. 360; 362 (1995), citing *Edgcomb Steel Co. v. State*, 100 N.H. 480, 486 (1957).

Granted.

2. "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." *Edgcomb Steel Co. v. State*, at 486-87. In determining value, the owner 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. *Id.* at 487. 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." *State v. 3M*, supra, at 362.

Granted.

3. In the context of a partial taking, the property owner is entitled to not only the fair market value of the property actually taken, but also compensation for the effect of the taking, if any, on the entire property," which is referred to as severance damages. Id., (emphasis added) citing, City of Manchester v. Airpark Business Ctr. Condo. Unit Owners' Assoc., 148 N.H. 471, 473 (2002). The preferred method in this State for determining condemnation damages, including severance damages, in partial takings cases is the "before and after" method, "whereby the value of the remainder of the tract after the taking is deducted from the value of the whole tract before the taking." Id., citing Lebanon Housing Auth. v. National Bank, 113 N.H. 73, 75-76 (1973).

Granted.

4. Fair market value is generally determined by one of the following appraisal methods: (1) the market data approach, which establishes value on the basis of comparison with contemporaneous sales or offerings of similar properties; [or] (2) the income approach, which establishes value on the basis of capitalized net income; and (3) the cost approach, where the appraiser determines the value of the land without the buildings and then adds to that sum the depreciated current cost of reconstructing [any] buildings. Id., at 363. See, Manchester Housing Authority v. Reingold, 130 N.H. 598, 601, 547 A.2d 219, 221 (1988).

Granted.

5. Use of the "mathematical allocation" formula as the sole basis for determining value of property taken is only permissible where there is no severance damage, i.e., where the taking causes no measurable diminution in the value of the parcel as a whole. RSA 498-A:4 (annotation 2); see also, 1986 Op. Atty Gen. 111 ("part taken" appraisal only permissible where the "before and after" values of the burdened Property would be identical.)

Granted.

6. Hillside Apartments is a one hundred and four (108) unit apartment complex located on Pleasant Street, Concord, NH. One hundred four units are two bed room units; four units are one bedroom units.

Granted.

7. The owner of Record is Harbor/Hillside Investment, LLC, ("HHI") with a principal place of business at 23 Central Avenue, Lynn MA 01901.

Granted.

8. HHI purchased the property on December 18, 2003 for a purchase price of \$7,000,000.00

Granted.

9. The Property consists of approximately 6.0 acres

Granted.

10. The improved portion of the property is comprised of four buildings as follows:

- a. Building 1 (Units 1-24) containing 21,768 square feet of finished living area;
- b. Building 2(Units 25-60) containing 32, 652 square feet of finished living area;
- c. Building 3 (Units 61-84) containing 21,768 square feet of finished living area;
- d. Building 4 (Units 85 -108) containing 21,768 square feet of finished living area.

Granted.

11. Building 4 fronts on the taking area and will front on the Langley Parkway in perpetuity.

Neither granted nor denied.

12. The taking at issue, with proposed compensation is as follows:

Taking	Description	Square Footage	Zoning	Price per square foot	Proposed Compensation
Permanent ROW Easement	Roadway and wooded land behind roadway	40,826 sq. ft. (.937 acres)	RO	\$0.11	\$4,490.86
Permanent Slope Easement	Located along northern boundary of roadway within two zoning districts	2,589 sq. ft. (0.059 acres)	RO	\$0.11	\$85.44
		2,391 sq. ft. (0.055 acres)	IS	\$5.50	\$3945.15
Permanent Drainage Easement	Abutting ROW Easement near northeast corner parking lot	1714 sq. ft.	RO	\$0.11	\$150.83
		984 sq. ft.	IS		

Neither granted nor denied.

13. As constructed, the Parkway and related slope easement runs directly behind the apartment complex and abuts the corner of the back driveway and within 84 feet of the back corner of Building four.

Granted.

14. It lies on a higher grade relative to Building 4 atop a berm of approximately four feet in height

Denied.

15. The City’s appraisal was conducted by Spring Appraisal Company (the “Appraisal” and the “Appraiser,” respectively)

Granted.

16. The Appraiser has also conducted Appraisals of all other Properties subject to taking for the Langley parkway.

Granted.

17. These Properties are:

- a. Pleasant View Retirement Community, 227 Pleasant Street, Concord NH
- b. The Dartmouth Hitchcock Medical Clinic 251-253 Pleasant Street, Concord, NH
- c. The Tuttle Residence, 257 Pleasant Street, Concord, NH (taking in fee, including residence)
- d. The Carmelite Monastery, of Concord, 275 Pleasant Street Concord, NH.

Granted.

18. The City has reached agreement with respect to these Properties as follows:

- a. Pleasant View: \$20,000.00 subject to mortgagee approval
- b. Dartmouth Hitchcock: \$136,000.00.
- c. Tuttle residence: \$220,000.00 (Tuttles may file a claim for location expenses)
- d. Carmelite Monastery: \$19,890.00 plus certain improvements.

Neither granted nor denied.

19. In addition, the City has constructed the following amenities with respect to certain properties subject to taking:

- a. Pleasant View: an underpass beneath the Parkway in the location of an existing pathway which will provide residents with access to a trail system connecting the Pleasant View Property with abutting land owned by the state of New Hampshire known as White Farm. The Trail and abutting trail system are designed to be used by Pleasant View residents for walking, cross country skiing and recreation.
- b. Dartmouth Hitchcock: a retaining wall along the frontage of the property along Pleasant Street and an access road into its existing parking lot from the Langley parkway.

Neither granted nor denied.

20. By contrast to the treatment of Pleasant View, the taking at Hillside Apartments provides for no means of access to its back land for any purpose.

Neither granted nor denied.

21. By contrast to the treatment of Dartmouth Hitchcock, the taking at Hillside Apartments does not include provision for an access road onto the Langley Parkway. Moreover, the City provided Dartmouth Hitchcock with a stairway access to the Parkway sidewalk and the taking at Hillside Apartments\Condos provides for no means of access to the sidewalk other than the “break in the guardrail” which is at best marginally accessible to the residents of Hillside owing to the significant 9-10% slippery slope up the berm; and is wholly inaccessible to any resident of Hillside Apartments who suffers from any impairment of mobility.

Neither granted nor denied.

22. The Hillside Apartments differ from all other properties subject to taking in connection with the Langley Parkway in that they are a commercial apartment complex, which rents to individuals and families for purely residential purposes, generally under year to year renewable leases.

Granted.

23. The resident population for a complex such as Hillside Apartments is not generally tied to the Property by considerations other than those directly associated with a residential apartment. – such as the quality of residential life afforded by the conditions and location of the Apartment Complex and by available apartments within the complex.

Granted.

24. Moreover, the resident population for a complex such as Hillside Apartments in generally transitory, in the sense that residents have no incentives inherent to the Property beyond the comfort, convenience and quality of the residential spaces offered.

Granted.

25. This observation is evidenced by the fact that Hillside Apartments has historically experienced an approximately 50% yearly turnover rate among residents since HHI purchased and began managing the Property in late 2003. As such, it is both distinct from and subject to market and other conditions which do not affect the other properties taken in connection with the Parkway. To be more precise, the effect of the Parkway on Hillside apartment is one that affects peoples’ homes, not, as at the Dartmouth Hitchcock site, their parking spaces.

Granted.

Pursuant to the board’s June 13, 2008 order, the board is not responding to Requests 26 through 87. See Tax 201.36(c), (“[u]nless granted leave by the board prior to or at the hearing,

parties shall be limited to a combined total of 25 requests for findings of fact and/or rulings of law.”

CERTIFICATION

I hereby certify copies of the foregoing Report have been mailed this date, postage prepaid, to: James F. Raymond, Esq., Upton & Hatfield, P.O. Box 1090, Concord, NH 03302-1090, counsel for the Condemnor; Walter L. Maroney, Esq., Maroney Law PLLC, 40 Bay Street, Manchester, NH 03104, counsel for the Condemnee; and LaSalle Bank, 135 South LaSalle Street, Suite 1625, Chicago, Illinois 60603, Mortgagee.

Dated: 7/18/08

Anne M. Stelmach, Clerk