

State of New Hampshire

v.

General Auto Sales, Inc.

Docket No.: 21749-06ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for highway purposes pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:45. A Declaration of Taking (“Declaration”) was filed with the board on August 23, 2006 describing the property rights taken as a fee taking of access reserving two points of access, a slope easement of 2,777 square feet, a drainage easement of 3,229 square feet and a temporary driveway construction easement of 215 square feet expiring on December 31, 2010 (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 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 Property and held the just compensation hearing in the Sullivan County Superior Court on November 18, 2008. The Condemnor was represented by David M. Hiltz, Esq. and the Condemnee was represented by Mark H. Puffer, Esq.

Karen L. Wright 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.

The Property before the taking consisted of 19.85 acres of land with 698 feet of frontage on Routes 103 and 11. The front 9.40 acres are generally at or slightly above road grade with the balance of the land (10.45 acres) falling away significantly to the flood zone of the Sugar River. Before the taking, the Property had three points of access identified in a 1987 driveway permit granted by the New Hampshire Department of Transportation (Condemnor Exhibit No. 5). The Property, adjacent to Routes 103 and 11, is improved with a one story commercial building that has had various uses and tenants including a machine shop, a construction company, automobile service and a used automobile business office. Even more proximate to the highway is a one story single family residence.

After the taking, the acreage owned in fee and the improvements remain the same but access has been reduced to two points along Routes 103 and 11. Further, after the taking, a slope easement near the residence encumbers the fee as do a drainage easement and a temporary construction easement.

Based on an appraisal performed by Ms. Jessie C. Tichko (“Tichko Appraisal” – Condemnor Exhibit No. 1) who estimated the same before and after value of \$450,000, the Condemnor argued the taking had no measurable impact on the Property’s market value. Because the Property is in the City of Claremont’s rural residential zone, the Tichko Appraisal concluded the highest and best use was as developed with the grandfathered commercial uses and the interim rental of the single family dwelling. The Tichko Appraisal nonetheless calculated damages at \$2,400 based on a

“mathematical allocation” of the part taken. This calculation was derived from an estimate of \$30,000 per acre for commercial land reduced 25% for the slope easement and 50% for the drainage easement and a nominal value for the temporary construction easement.

Mr. Allen Whipple, a principal of General Auto Sales, Inc., testified, in his opinion, the effect of the taking was two-fold: 1) the slope easement impacted the utility of the parking spaces for displaying used autos in front of the single family dwelling; and 2) the loss of one access point reduced the utility of the Property. Mr. Whipple estimated the slope easement reduced the number of parking spaces by eight and, at an estimated value of \$5,000 per space, argued the damages due to loss of parking was \$40,000. He further estimated the loss of one access point was \$35,000 resulting in a total estimate of damages of \$75,000.

Board’s Rulings

Based on the evidence and the board’s experience and knowledge (see RSA 541-A:33, VI), just compensation is estimated at \$10,000. The board agrees the highest and best use of the Property is as improved. The grandfathered mix of uses of auto sales, the other various uses in the commercial building and rental income of the single family home appear to collectively produce a greater value than if as vacant as residential lots. The challenge then is to estimate what affect the taking had on the utility and thus the value of this highest and best use of the Property.

The board disagrees with the Condemnee’s representation as to the extent of loss of parking due to the slope easement. While it is difficult to unequivocally determine the actual number of vehicles that could be parked between the dwelling and the highway before the taking and whether the parking that was shown in various photographs was facilitated by encroachment into the existing state right-of-way, the board finds the impact of the slope easement is less than that argued by the Condemnee. We do agree, however, the parking is less convenient in the after situation than

the before situation and could result in some loss of auto display proximate to the dwelling.

However, as noted during the hearing, the residence's close proximity to the right-of-way both before and after the taking limits the auto display capabilities in that area. In fact, Mr. Whipple noted he had considered moving or demolishing the residence to maximize the auto sales use of the Property.

Second, the board finds the loss of one access point is a property right that needs to be considered in determining just compensation. However, Mr. Whipple's estimate of \$35,000 was not supported by any market evidence and appears excessive given the ability for any further development or subdivision of the Property to be accessed by shared driveways. Further, the board concludes the loss of one access point, while a significant property right and compensable, was not of such magnitude that it would be able to be extracted from the market and identified in a before and after appraisal. Said another way, a minimum adjustment to the Tichko Appraisal of 5% for loss of access results in a market value conclusion of \$25,000 to \$30,000, too high a value given the Property's capability to be used reasonably with the remaining two access points.

However, the board finds the Tichko Appraisal's "mathematical allocation" of the part taken does significantly omit the one right in fee taken by the Declaration, one access point. While the board understands the pro rata allocation calculations intend to estimate just compensation when the before and after value indicates no affect of the declaration of taking, it should be reflective of those rights that are impacted or lost by the taking. Real estate rights include all tangible and intangible rights associated with real property (see RSA 21:21). While such rights vary from property to property, these ownership rights are often viewed as the "bundle of rights." Ownership rights include the right to use real estate, to sell it, to lease it, to access it, to exclude others, to give it away

or to choose to exercise all or none of these rights. The bundle of rights is often compared to a bundle of sticks with each stick representing a distinct and separate right or interest.

IAAO, Appraisal of Real Estate, at 7 (11th ed. 1996).

The shortcoming of not considering this loss of one access point is highlighted if one considers a hypothetical situation where a condemnor takes only a right of access and the before and after shows no difference in value. In this hypothetical situation, performing a mathematical allocation similar to that utilized in this taking would result in no compensation for the loss of access, an important stick in the bundle of rights. Surely, such a significant right as access should be considered and compensated for.

Valuing that loss is difficult in this case because no market evidence was presented from which to definitively quantify the loss of one access point. Access to public roads are commonly regulated under the police powers of the state or its subdivisions to ensure safety on highways by limiting the points of ingress and egress. One method of mitigating the loss of access points is through the sharing of driveways. Shared driveways, in the board's experience, generally have more impact on the value of residential property than commercial property. Because commercial properties are generally located in more heavily traveled areas, where there is a concentration of commercial uses, it is quite common in those situations for two or more commercial properties to share access points onto the main public highway. Thus, the board finds the Condemnee's estimate of \$35,000 is excessive as it is similar to the loss of one commercial acre as estimated in the Tichko Appraisal. (See pg. 90 of the Tichko Appraisal.) Based on the board's view of the Property, we conclude the loss of one access point is not equal to the loss of one potential lot or site, but rather affects the potential configuration and ease of any subdivision or future development of the Property.

Given the residential zoning and the nature of the improvements that exist on the Property, the board estimates, based on its judgment and experience and the general market evidence provided in the Tichko Appraisal, the collective value for any inconvenience due to the slope easement affecting the parking of sale vehicles and the loss of one access point is \$10,000. While ideally the board would desire to quantify its estimate, given the lack of market data presented as evidence, the board's estimate of just compensation is indeed just an estimate based on its collective experience.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Sullivan 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 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

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to:
David M. Hiltz, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Mark H. Puffer, Esq., Preti, Flaherty, Beliveau & Pachios, PLLP, 57 North Main Street, Concord, NH 03301, counsel for the Condemnee.

Date: January 6, 2009

Anne M. Stelmach, Clerk