

State of New Hampshire

v.

Korean Methodist Church of New Hampshire and Donna L. Bradley

Docket No.: 22487-06ED

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 November 1, 2006, describing the property rights taken as a conservation easement interest in 4.443 acres (the “Part Taken”) from a parcel of land consisting of 5.87 acres at 517 Mammoth Road in the Town of Londonderry (the “Property”). See Exhibit A to the Declaration.

Condemnee Korean Methodist Church of New Hampshire (the “Condemnee”) filed a preliminary objection challenging the necessity, public purpose and net-public benefit of the taking. Pursuant to RSA 498-A:9-b, the preliminary objection was transferred by the board to the Rockingham County Superior Court for resolution. On March 29, 2007, the superior court denied the preliminary objection and the Condemnee then appealed this decision to the supreme court. On May 16, 2008, the supreme court affirmed the decision of the superior court denying the preliminary objection, thereby returning jurisdiction to the board.

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 on November 3, 2009 at the Londonderry Town Hall. The Condemnor was represented by Lynmarie C. Cusack, Esq. of the State of New Hampshire Department of Justice and the Condemnee was represented by John G. Cronin, Esq. of Cronin & Bisson, P.C.

Michele R. York of Avicore Reporting & Video Conferencing, 25 Lowell Street - #405, Manchester, NH 03101, (888) 212-2072, 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 5.87 acres. In the after situation, 4.443 acres, including some frontage on Mammoth Road and some rear wetland and upland (the Part Taken), is encumbered with a conservation easement, leaving 1.427 acres of land unencumbered. The conservation easement is a taking “in perpetuity” and precludes any residential, industrial or commercial activities and any subdivision of the land.

Board’s Rulings

For the reasons discussed below, the board finds just compensation for the Part Taken is \$66,900.

The Condemnor relied on a May 15, 2007 appraisal prepared by Richard Mario Leslie, MAI, of Evergreen Appraisal (the “Leslie Appraisal,” Condemnor Exhibit No. 1) estimating the damages from the taking to be \$24,000, based upon a before value of the Property of \$364,000 and an after value of \$340,000. Mr. Leslie used the sales comparison approach to value the

Property in two components: a primary 0.5 acres improved with a church building (formerly a post office) (the “Improved Portion”); and 5.37 acres of rear land (the “Rear Land”). Leslie Appraisal, p. 36 and 39 – 44. This reference to Rear Land includes the 4.443 acres in the Part Taken.

Mr. Leslie concluded the value of the Improved Portion (\$332,000) did not change as a result of the taking. Id. at p. 55. He stated the Rear Land “consists of undeveloped land that is not developable without access from an abutting site and is a mixture of upland and wetland.” Id. Weighing the effects of the conservation easement on the air, surface and subsurface rights transferred to the Condemnor (easement holder) from Condemnee (property owner), Mr. Leslie concluded the taking reduced the value of the Part Taken by 90% (rounded). Id. at p. 58. He then applied this percentage to his estimate of the value of the Part Taken as rear land (\$26,658) to calculate his estimate of damages from the taking (\$24,000, rounded). Id.

The Condemnee did not present an appraisal, but instead relied on several witnesses to contend the value of the Part Taken was much higher. These witnesses included a land planner (Mark Fougere), the Condemnee’s treasurer (Sue Porter) and the deacon of another church (Ivan Dorofeev of the Slavic Baptist Church) situated on abutting land at 7½ Hall Road. The testimony and a December 16, 2006 letter (in Condemnee Exhibit C) tended to establish the Slavic Baptist Church was interested in purchasing two acres of upland on the Part Taken abutting their church for \$100,000. The Slavic Baptist Church is on a small (0.63 acre) lot which is ‘grandfathered’ for the church use, but does not meet the Town of Londonderry’s current minimum lot size requirements (2 acres); without additional land, this church was informed by

Town officials that it could not make any physical improvements to the structure (to allow handicap access and increase parking) until it meets this minimum lot size requirement. With this motivation, the Slavic Baptist Church approached the Condemnee to acquire the two acres of upland.

The Condemnor objected to this evidence because of the date of the Slavic Baptist Church letter (sometime after notice of the taking) and because the described “agreement” was not an enforceable contract for the purchase and sale of land. While the Condemnor may be technically correct regarding the enforceability of this agreement in a court of law, the board finds the evidence does tend to establish the Part Taken has more value than simply being treated as undevelopable “rear land” in the Leslie Appraisal.

The board finds that at least two acres of the Part Taken consisted of upland soils that had significantly more value than just “rear land”. Those areas of upland soils of at least two acres are shown on several plans submitted, including the unfinished (unsigned and undated) site plan by Duval Survey Inc. (Condemnee Exhibit B). Those upland acres had utility before the taking, either to the Condemnee for an accessory use to the existing building, or to an abutter, such as was envisioned by the discussions and agreement the Condemnee had with the Slavic Baptist Church for expansion of their site and parking. Based on the board’s view and evidence submitted, the board finds neither the wetland crossing that would be necessary to access it from Mammoth Road nor the grade difference from the rear of the Hall Road parcels would be of such magnitude or difficulty to preclude its utility as a “secondary” site or annexation land for expanded use by a nonconforming lot, such as that owned by the Slavic Baptist Church.

The board is unable, however, to give conclusive weight to the \$100,000 price referred to by the Condemnee and the Slavic Baptist Church for a couple of reasons.¹ First, the abutting Slavic Baptist Church can be viewed as an atypically motivated purchaser as it had no other option to annex land to allow it to expand and renovate the existing church. Thus, it would be apt to overpay with a price not reflective of market value.² Second, the \$100,000 price was not based on any appraisal but rather on anecdotal residential benchmarks testified to both by Sue Porter and Ivan Dorofeev. Both individuals associated the value of the Part Taken to the value of a primary residential house lot, which it is not. Its highest and best use is not as a separate residential lot but as expansion or supplemental land for expansion of existing uses.

¹ Referencing Section B-16 of The Appraisal Institute's Uniform Appraisal Standards for Federal Land Acquisitions (commonly referred to as the "Yellow Book"), the Condemnor argued the board should give no weight to an unconsummated agreement. While, in general, the board agrees with the principle stated in this publication (that a "mere offer, unaccepted" is less reliable than a completed transaction), this section goes on to state such an offer "nonetheless should be considered by appraisers," citing a USPAP standard (Rule 1-5) and a leading treatise (The Appraisal of Real Estate, 11th edition at p. 400, published by The Appraisal Institute). The board finds the agreement between the Condemnee and the Slavic Baptist Church appeared to be based upon a good faith understanding between them (arrived at prior to the notice of taking) to the extent the Slavic Baptist Church had identified funding (borrowing and membership fund raising) and committed funds to have the area surveyed for subdivision (in the spring of 2005). Because of these additional facts, the board finds the agreement had proceeded to such a stage that the board can give it some weight at least as an indication of the Part Taken's highest and best use, but not as conclusive evidence as to its market value.

² A standard definition of what constitutes market value, formulated by The Appraisal Institute in The Appraisal of Real Estate (12th ed.), is as follows:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and each acting in what he or she considers his or her own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U. S. dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale. (Emphasis added.)

Cf. Society Hill at Merrimack Condominium Association v. Town of Merrimack, 139 N.H. 253, 255 (1994) (when utilizing sales as the basis for estimating market value, a number of factors must be considered in determining whether sales are indicative of market value, "including whether the sale was an arm's length transaction, whether additional incentives were offered, whether unusual duress existed against either the buyer or seller, and whether some relationship existed between the buyer and seller that would influence the sale price").

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

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 G. Cronin, Esq., Cronin & Bisson, P.C., 722 Chestnut Street, Manchester, NH 03104, counsel for the Condemnee; and Donna L. Bradley, 581 Hall Hill Road, Somers, CT 06071, Mortgagee.

Date: January 15, 2010

Anne M. Stelmach, Clerk