State of New Hampshire

v.

Windham Road Holdings, LLC, et. al.

Docket No.: 22502-07ED

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 (the "Declaration") was filed with the board on January 10, 2007 and served on the "Condemnees," describing the property rights taken as: a fee simple taking of real property identified as Parcel 2072-A, with frontage on Windham Road in the Town of Derry, New Hampshire, consisting of 168.8 ± acres (the "Property"). See Exhibit A to the Declaration. The 168.8 acre tract is irregular in shape, contains approximately three quarters of a mile of frontage on Windham Road and is comprised of some wetlands, rolling terrain and steep terrain on the western border of the Property. Both parties utilized undated plans prepared by Edward N. Herbert Assoc. Inc. which estimated the Property consisted of 72 acres of wetlands and 96.8 acres of upland soils. The parties' appraisers agreed, however, the likely usable and developable

area was approximately 65 acres due to some of the upland soil areas not being readily accessible.

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 on October 23, 2007 and held the just compensation hearing at its offices on October 25, 2007. The Condemnor was represented by Edith L. Pacillo, Esq., Assistant Attorney General of the Department of Justice, and the "Condemnee," Windham Road Holdings, LLC, ("WRH") was represented by Mark H. Puffer, Esq., of Preti, Flaherty, Beliveau & Pachios, PLLP.

Kimberly A. Kerwin 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.

Parties' Arguments

The Condemnor submitted an appraisal performed by Mr. B. Alec Jones of Fremeau Appraisal, Inc. (the "Jones Appraisal") (Condemnor Exhibit No. 1), which estimated the Property's market value at the time of the taking, to be $1,000,000 based on the sales comparison approach. The Jones Appraisal determined the highest and best use was as a secondary or tertiary industrial location that would not immediately be developed but held by an investor for future development.

WRH submitted an appraisal performed by Mr. David Rauseo of Rauseo & Associates (the "Rauseo Appraisal") which estimated the Property's market value as of the date of taking at $2,015,000. The Rauseo Appraisal determined the highest and best use to be that for immediate industrial development. This highest and best use was predicated on municipal water and sewer being extended from Fordway Extension Road by the adjoining property owner, Tuckernuck Development, LLC ("Tuckernuck"), in accordance with a May 18, 2005 Joint Development Agreement (the "Joint Agreement") between WRH and Tuckernuck. (Tuckernuck Exhibit No. B).

WRH also argued that neither the purchase of the Property by WRH in March of 2004 for $600,000, nor the sale of the adjoining parcel to Tuckernuck in November 2003 for $350,000 were arm's-length transactions and thus could not be given any weight in estimating market value and damages due to the taking.

The parties in this docket and in Docket No. 21518-06ED agreed the board could take official notice (see RSA 541-A:33, V) of the testimony and evidence presented in each proceeding in the other in arriving at its findings. The board took views of both properties impacted by the takings in the above referenced dockets and several comparable properties on the same date, with all parties and their attorneys in attendance.

Board's Rulings

As noted earlier, the Condemnor has the burden of proving by the preponderance of evidence the amount offered is just compensation. The primary evidence submitted by the Condemnor was the Jones Appraisal estimating damages at $1,000,000. The board finds the Condemnor fails in its burden of proof because the Jones Appraisal's value conclusion is flawed for a number of reasons.

First, the Jones Appraisal used the sale of the adjoining parcel to Tuckernuck in its comparative sales analysis. While the Jones Appraisal acknowledged the Tuckernuck sale price "may have been below market" (Jones Appraisal at 67), for a number of reasons the board finds this sale was not an arm's-length transaction, was not indicative of market value and should not have been used in a sales comparison analysis. The Tuckernuck property was never really exposed to the market. While the realtor technically had the property listed on the "Multiple Listing Service" for one day, the testimony was that he brought the property to the attention of the principals of Tuckernuck with the anticipation that he would get future listings once the property was developed or ready for resale and with the representation that the seller was motivated to sell quickly without investing in any engineering or feasibility studies. The realtor also had limited experience in listing and marketing industrial property and derived the listing price from the sale of the WRH property.

The board finds, however, as stated in the concurrent Report in State of New Hampshire v. Tuckernuck Development, LLC et. al., Docket No.: 21518-06ED, that this WRH sale was also not an arm's-length transaction. One of the principals of WRH is Mr. George Taylor, who testified he was a life long acquaintance of the grantor, Mr. Edwin Sybiak. Mr. Taylor testified that Mr. Sybiak, represented by his guardian Ms. Janice Misiaszk, accepted his offer of $600,000 for the property without any negotiations and without the Property being listed and exposed to the market. Mr. Taylor stated his estimate of $600,000 was based on his belief that he could, with minimal risk, recover his investment by subdividing three lots along Windham Road and retaining the balance of the frontage and rear land for further development. Mr. Sybiak also took back a favorable short term first mortgage on the Property for $475,000. Collectively this evidence leads the board to conclude the purchase price was substantially below market and thus

the transaction does not qualify as a market sale to be given any weight in determining just compensation.

Second, the board finds the Jones Appraisal's comparable L-2, the February 2006 sale of a property to Meadowcroft Development, LLC of over 45 acres on Ledge Road, was not purchased for similar motivations and thus is not a good sale from which to derive a reliable value indication. While this property was similarly zoned industrial, it was clear from the evidence that the primary motivation of the purchaser was not for immediate industrial development but to remove, under the guise of site development, significant aggregate fill material to be utilized on an adjoining school construction project. Both the board's view of this property and site plans shown at hearing indicate the value to the purchaser was in its ability to remove aggregates for construction purposes. While the Property would certainly entail some site work to make it suitable for industrial development, it is not of such extreme magnitude as is currently taking place on the L-2 comparable and thus, the board concludes the motivations of the purchaser and the comparability is significantly dissimilar from the Property being appraised.

Third, while Mr. Jones was aware of some topographic and wetland delineation surveys and several conceptual plans that had been performed by WRH subsequent to the purchase of the Property, WRH had not provided Mr. Jones with the unrecorded Joint Agreement and, as a consequence, the Jones Appraisal did not discuss or consider any valuation affect the Joint Agreement might have. The board finds the Joint Agreement does lend value to the Property. While not recorded, it provides certain transmissible rights between the two parties that facilitates the joint development of the properties for industrial purposes. In particular, the Joint Agreement requires Tuckernuck to pay for extending water and sewer lines to and through the Tuckernuck parcel to the WRH parcel. The Joint Agreement also anticipates the sharing in the

joint development and costs of the access road and a possible sewer pumping station. The Joint Agreement also states "[t]his agreement shall be binding on the heirs and successors of each."

Based on the plain and straightforward reading of the Joint Agreement, the board finds it does provide binding and transmissible rights to the respective parties and increases the ability for each parcel to be developed to their highest and best use as industrial properties. Given the benefits of the Joint Agreement, the board does not agree with the Jones Appraisal's conclusion that the site is a secondary or tertiary industrial site. Rather, the board concludes the Property, benefited by the municipal water and sewer to be extended by Tuckernuck and shared development potential provided by the Joint Agreement, is at worst, a secondary industrial site and likely a primary industrial site, given the scarcity of such large acreage single tracts remaining in this southern portion of the state.

After concluding the Jones Appraisal can be given no weight and thus the Condemnor had not fulfilled its burden of proof, the board looked to WRH's evidence to determine whether the estimate of damages framed in the Rauseo Appraisal was reasonable. In general, the board finds the Rauseo Appraisal's highest and best use assumption and choice of comparables are more on point with the board's perception of the highest and best use of the Property and the market value conclusion that flows from that conclusion. However, the board finds a number of further adjustments to the Rauseo Appraisal's comparables and value conclusion are appropriate to account for all the evidence presented at hearing.

As an overview, the board has considered and contrasted the value enhancing and the value detracting factors for the Property. First, on the positive side, the Property and the adjoining Tuckernuck property are industrially zoned and such large tracts are relatively scarce or limited in the southern portion of New Hampshire close to the Massachusetts border. Further,

WRH, subsequent to the Property's acquisition, has performed some preliminary engineering studies identifying the topography and wetlands and developed several conceptual plans. The Joint Agreement provides transmissible and enforceable rights of access to municipal water and sewer and shared costs for some of the necessary joint development infrastructure. Last, the board acknowledges the significant testimony presented that the Town of Derry was supportive of industrial development of this parcel and finds the risk of not obtaining approvals for reasonable proposals would be minimal.

On the negative side and to some extent offsetting the value enhancing factors is the presence of significant wetlands and fragmented areas of developable land of the Property. Also, the Property is near some existing residential properties which could present some resistance to development of the Property, despite it being zoned industrially for many years. While providing many benefits to WRH and Tuckernuck, the Joint Agreement also creates an inherent competition and market absorption concerns through the joint and likely simultaneous development of both large properties for industrial development. Further, the Property shares on its western border with Tuckernuck a steep hill, which, while providing a source of aggregate for the development of these properties, will also entail significant excavation costs to be useful for development. And last, while the Joint Agreement is generally beneficial to both properties, it "marries" the two owners of the properties and their successors to working together in the development of their properties. While this marriage is beneficial, it also requires, as with any marriage, logistical coordination and cooperation with each other's schedules and plans. Consequently, while both appraisers agreed the Joint Agreement is a substantial benefit to both land owners, the board is cognizant of this coordination and cooperation factor and has considered it when adjusting the Rauseo Appraisal.

With these enhancing and detracting factors in mind, the board has revised the Rauseo Appraisal's land comparable analysis chart on page 55 in two respects.

Because the Property is in current use, the Rauseo Appraisal adjusts comparables L-1, L-3, L-4 and L-5 10% because they are not enrolled in current use. The board finds the 10% current use adjustment is more properly handled by adjusting the indicated market sale price per acre either before or after the application of the cumulative adjustments factors. This more accurately recognizes any effect of the current use lien separately from the combined individual features adjustment factor. Consequently, the board has for these comparables revised and reduced the market condition adjusted sale price per acre by 10% before all remaining adjustments are applied.

The board has modified the "development potential" adjustment for all five comparables by approximately 25% of the existing adjustment shown for each in the Rauseo Appraisal. This modification is to acknowledge both the concern the Property may take longer to develop than anticipated by the Rauseo Appraisal due to its development "marriage" to the adjoining Tuckernuck parcel (absorption rate) and the logistical coordination in development that the Joint Agreement necessitates.

The board believes these two factors were not adequately considered in the Rauseo Appraisal adjustments for relative development potential. Making those revisions, the board arrives at an estimated and correlated price per usable acre of $29,000, which when multiplied by the 65 usable acres indicates a market value of $1,885,000.

In summary, the board acknowledges the Property and the adjoining Tuckernuck property are difficult to appraise with any absolute certainty given their undeveloped state, the presence of wetlands and all the development uncertainties testified to during the hearing. However, the

board believes the Property's market value is substantially higher than its acquisition price because the purchase was not an arm's-length transaction and thus below market. Further the board finds the Property's market value is less than the value estimated in the Rauseo Appraisal because of the uncertainties contained in the Joint Agreement and the potential absorption time and coordination of the development of these two properties. On balance, the board believes $1,885,000 is just compensation for the Property.

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

_____
Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Addendum A

The "Requests" received from the Condemnee 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.

Windham Road Holdings, LLC's Requests for Findings and Rulings

1. The subject property consists of approximately 168.8 acres and ¾ of a mile of frontage on Windham Road, a State-maintained highway. The subject property has approximately 96.8 acres of "uplands" of which approximately 65 acres are developable for industrial purposes.

Grant.

2. Following substantial residential growth in the 1970's, 1980's and 1990's, the Town of Derry has been strongly supportive of commercial and industrial growth in order to strengthen the Town's tax base.

Grant.

3. Jack Dowd, the Executive Director of the Derry Economic Development Corp. ("DEDC"), testified that DEDC supported the development of the subject property and the Tuckernuck property for industrial purposes.

Grant.

4. DEDC viewed the extension of utilities to the Windham Road area and the development of the subject property and the Tuckernuck property industrially as important steps to the desired development of the Karas property commercially.

Grant.

5. "Fair market value" is defined as the price which, in all probability, would have been arrived at by fair negotiations between a willing buyer and a willing seller taking into account all considerations that might reasonably be expected to affect the sale. See Davis v. State, 94 N.H. 321 (1947). Implicit in the definition of fair market value is the consummation of a sale as of a specified date and the passing of title from seller to buyer under the following conditions:

A. Buyer and seller are typically motivated;

B. Both parties are well informed or well advised, and each acting in what they consider to be their best interests;

C. A reasonable time is allowed for exposure in the open market;

D. Payment is made in cash or its equivalent;

E. Financing, if any, is on terms generally available in the community and typical for the property type and its locale.

See Loughlin, New Hampshire Practice Series, Local Government Law, § 828 (1995).

Grant.

6. The purchase of the subject property by the condemnee in March, 2004, was not an arms-length transaction.

Grant.

7. Among the factors indicating that the sale of the subject property to the condemnee in March, 2004, was not an arms-length transaction are the following:

A. The Taylors and the Sybiaks had a long-term relationship, George Taylor having known the Sybiaks since he was a child;

B. George Taylor had done work for the power of attorney/guardian representing Edwin Sybiak;

C. The property was not exposed for sale in the open market;

D. George Taylor made an offer of $600,000 for the property believing that he could make substantially more than that by developing the property for industrial purposes;

E. Mr. Taylor at no time had an appraisal done of the subject property; nor did the guardian representing Edwin Sybiak commission an appraisal of the subject property;

F. The Purchase and Sale Agreement between the condemnee and Edwin Sybiak was signed by Janice Misiaszek acting under power of attorney for Mr. Sybiak. The purpose of the Probate Court proceeding was to have Janice Misiaszek appointed guardian for Mr. Sybiak. The Probate Court did not require the subject property to be appraised or make any finding that the proposed purchase price of $600,000 was fair market value.

G. The seller of the property financed the property on favorable terms; and no real estate commission was paid as a result of the sale.

Grant.

8. The sale in November, 2003, of the adjacent Tuckernuck property was not an arms-length transaction because it was not exposed to the open market for a reasonable time before its purchase and the asking price ($399,000) was based on the pending sale of the Windham Road Holding's property for $600,000.

Grant.

9. The topography of the Ledge Road property (State's appraiser's Sale L-2) differs dramatically from the topography of the subject property; and it would appear that the buyer's purpose was the extraction of earth materials, not industrial development.

Grant.

10. The sale to the Seacoast United Soccer Club (L-5) was for use as athletic fields, not industrial development.

Grant.

11. The State's appraiser used the sales of the Tuckernuck property (L-1) and of the soccer field property (L-5) in a paired sales analysis, in order to make adjustments when comparing all of his comparable sale properties to the subject property.

Grant.

12. Of the six (6) comparable sales used by the State's appraiser, only the Tuckernuck sale (which was not an arms-length transaction) and the Soccer Club sale (which was not developed industrially) have a time adjusted per acre value reasonably close to the State's final adjusted per acre value for the subject property of $15,500. The State's remaining four (4) sales (L-2, L-3, L-4 and L-6) all have time adjusted per acre values that are more than twice the State's appraiser's final adjusted value of $15,500 per acre. See State's report, p. 66.

Grant.

13. Both the condemnee's appraiser and the State's appraiser agreed that the Joint Development Agreement was a significant benefit both to the subject property (due to the availability of utilities to the property line) and to the Tuckernuck property (due to access to Windham Road); and that if the owners did not carry out that Agreement, they would not be using their properties to their highest and best use.

Grant.

14. Every contract imposes upon each party a duty of good faith and fair dealing in the contract's performance and its enforcement. Barrows v. Boles, 141 N.H. 382 (1996); Restatement (2d) of Contracts, § 205.

Grant.

15. The New Hampshire Supreme Court has held that "while it is true that contracts must be definite in order to be enforceable, the standard of definiteness is one of reasonable certainty and not 'pristine preciseness.'" Chisholm v. Ultima Nashua Industrial Corp., 150 N.H. 141, 145 (2003). Thus as long as the structure and provisions of a written agreement are "reasonably clear," even if the agreement does not resolve every issue, a court may find the existence of an enforceable contract. Id.

Grant.

16. While the Joint Development Agreement may not spell out every detail of the parties' contract, the obligations of the parties are reasonably clear and enforceable. An ambiguity in a contract does not mean that the contract is not enforceable; it simply means that a court might have to use extrinsic evidence to aid in interpretation of the contract. See Behrens v. S.P. Construction Company, Inc., 153 N.H. 498, 501 (2006) ("Extrinsic evidence is admissible when it serves to aid in interpretation, or to clarify an ambiguity rather then to contradict unambiguous terms of a written agreement.").

Grant.

17. Joint venturers, like partners in a partnership, owe a fiduciary duty to one another. See Miami Subs Corp. v. Murray Family Trust, 142 N.H. 501, 513 (1997). This duty imposes an obligation of loyalty to the joint concern in all matters affecting the conduct of the venturers' business, and requires good faith and full disclosure among joint venturers. Id.

Grant.

18. The Joint Development Agreement would have been binding upon subsequent owners of either the Tuckernuck or subject property. ("This agreement shall be binding on the heirs and successors of each [party].").

Grant.

19. According to the State's appraiser, the highest and best use of the subject property is for future industrial development, to be held on a long-term basis. This opinion ignores the subject property's substantial amount of at-grade, dry frontage that could be developed in the relatively near future with little or no off-site development costs.

Grant.

20. The subject property has the ability to accommodate large industrial users on two (2) 20-acre areas of contiguous dry land, as well as the ability to accommodate smaller industrial users.

Grant.

21. The condemnee's appraiser, David Rauseo, used a comparable sales approach to valuation in which he used comparables which were all arms-length transactions and were purchased for industrial purposes.

Grant.

22. Mr. Rauseo made reasonable adjustments to his comparable sales when comparing them to the subject property, and arrived at a reasonable adjusted price per acre for the subject property of $31,000.

Neither granted nor denied.

23. Both appraisers improperly adjusted the comparable sales for the fact that the subject property was subject to current use taxation by decreasing the sale prices per acre by ten percent (10%). The proper way to adjust comparable sales to account for the current use status of the subject property would be to make all other adjustments to the comparable sales to arrive at an adjusted price per acre without regard to current use status; and then adjust that figure by ten percent (10%).

Neither granted nor denied.

24. The condemnee's appraiser testified that had he accounted for the current use status of the subject property in the manner described above, he would have arrived at a price per acre for the subject property of approximately $34,000, which would result in a fair market value for the property's 65 developable acres of $2,210,000.

Neither granted nor denied.

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Edith L. Pacillo, 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, PO Box 1318, Concord, NH 03302-1318, counsel for the Condemnees.

Date: December 14, 2007

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Anne M. Stelmach, Clerk