

State of New Hampshire

v.

**The Reagan Trust, Joan R. Herrington and Normand Beauchesne, Trustees and
Citizens Bank New Hampshire**

Docket Nos.: 22503-07ED; 22504-07ED; and 23968-08ED

PRELIMINARY ORDER

The board has reviewed Condemnee The Reagan Trust's November 25, 2009 Motion for Costs ("Motion") and the Condemnor's December 1, 2009 "Objection" to the Motion. The Motion seeks an award of costs in the amount of \$3,185, as reflected in an attached invoice for this amount from its expert witness (David Rauseo, MAI), pertaining to a just compensation hearing held on August 11, 2009. See the October 20, 2009 Report of the Board ("Report"), which the Condemnees have not appealed to the superior court. The main issue presented in the Motion is whether the board should order the Condemnor to pay for time (a total of 15 hours) spent by Mr. Rauseo 'preparing,' including meeting with Condemnee's counsel (James E. Morris, Esq.), in the days and weeks prior to the hearing (from July 15 through August 10, 2009), more than one year after the completion of his appraisal. The board denies the Motion for the reasons explained below.

The issue of what costs are recoverable is addressed by statute (RSA 498-A:26-a) and by administrative rule (Tax 210.13 and Tax 201.39(d)), as well as by controlling case law pertaining

specifically to RSA ch. 498-A eminent domain proceedings: see, in particular, Appeal of The Ribblesdale, Inc., 128 N.H. 370 (1986); and Fortin v. Manchester Housing Authority, 133 N.H. 154 (1990). In Ribblesdale, the supreme court found the board “properly denied Ribblesdale’s motion for appraisal costs other than expenses for travel and appearance before the board.” 128 N.H. at 374. In Fortin, the supreme court noted the condemnee’s recoverable costs “should include reasonable charges made incidental to appearing and testifying before the superior court,” and did not extend recovery to other items, such as a claim for attorney’s fees, because “attorney’s fees are not embraced within the ‘just compensation’ provisions of either the Federal or the State Constitution,” even where the condemnor arguably made an “unreasonably low” offer requiring the condemnee to litigate the just compensation issue. 133 N.H. at 158, 159. See also State v. Wilson, 115 N.H. 99, 102 (1975) (quoted and cited with approval both in Ribblesdale, 128 N.H. at 373-74, and Fortin, 133 N.H. at 158), where the supreme court ruled that, in an eminent domain proceeding:

We agree with the State [the Condemnor] that [recoverable costs] . . . for an expert witness are limited to charges made incidental to appearing and testifying before judicial or administrative bodies. Accordingly, we hold that defendants [condemnees] may not recover that part of the \$680 awarded by the trial court attributable to pretrial conference work by the expert.

While it makes reference to the Ribblesdale and Fortin cases (but not to Wilson), the Motion contends the board should apply Martinez v. Nicholson, 154 N.H. 397 (2006), to make a larger award of costs (pertaining to “review and preparation” of an expert witness for testimony). The board disagrees because Martinez is distinguishable on its facts and because nothing in Martinez, either explicitly or by implication, reverses or limits the relevant holdings in Ribblesdale, Fortin and Wilson.

Martinez was a quiet title/adverse possession action, not an eminent domain proceeding, where an expert land surveyor testified and his testimony could have been “reasonably relied upon” by the trial court and was “reasonably necessary for the adverse possession action to go forward.” 154 N.H. at 397-98 and 401. In Martinez, one party claimed recovery of his costs pursuant to Superior Court Rule 87; this rule permits the superior court to “allow other costs,” but solely “in its discretion.” Id. at 398 and 400. The supreme court noted costs allowable under this rule “did not include all fees paid to an expert witness (citations omitted),” but did affirm a superior court award of costs for “expenses directly related to the witness’s appearance and testimony in court.” Id. at 402.¹ The supreme court reached this conclusion under the “unsustainable exercise of discretion” standard, not because the superior court was obligated to award such costs, further noting that “such decisions are best left to the discretion of the trial court (quoting from Cutter v. Town of Farmington, 126 N.H. 836, 843 (1985)².” Id.

Acceptance of the premise stated in the Motion (that time spent for “review and preparation” of an expert appraiser is a recoverable cost) would be counter to the established practice of the board, stated in Tax 201.39(d), allowing expert witness costs only for actual travel to, and attendance at, the hearing, but not for “research or preparation” by the expert. Cf., Gilhooly v. Town of Gilsum, BTLA Docket No. 3775-87 (March 23, 1989 Decision), awarding costs for the appraiser’s “transportation to and from the hearing” and “the fee for appearing at the hearing.”

¹ Citing Flanagan v. Prudhomme, 138 N.H. 561, 577 (1994), the supreme court in Martinez held the recoverable costs contemplated in Superior Court Rule 87(c) “do not include charges such as those related to pretrial conference work.” 154 N.H. at 402. The court further stated no part of the cost award at issue “was related to any pretrial conference work.” Id.

² The Cutter decision was also cited by the supreme court in Fortin, 133 N.H. at 158.

Sound policy underlies this cost award rule, stated in the Report at p. 13 (“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.”). Entertaining the possibility of additional recoverable costs, such as for the expert’s “preparation” time requested in the Motion, would result in an open ended exposure to the other party, since the magnitude or extent of preparation time and resulting cost could not be predicted or anticipated with any reasonable degree of certainty. The board finds such cost items, like the attorney’s fees considered in Fortin (quoted above), cannot be shifted to the other party to an eminent domain proceeding and are not subject to award at the board’s “discretion,” unless and until the statutes or case law provide otherwise.

In this regard, the eminent domain statute has been amended, as the parties are aware, to allow a condemnee to recover up to \$1,000 for “the usual and customary cost of [an] appraisal” pursuant to RSA 498-A:4, II(b). This is a mandatory provision which the Condemnor, as stated in its Objection (at ¶5), intends to comply with upon the Condemnee’s submission of an invoice to the New Hampshire Department of Transportation. The Motion (at ¶2) states “[t]he Condemnee is prepared to follow that process.” Thus, with regard to the request for this separate item in the Motion, no order from the board is warranted.

Finally, and because of the further factual questions raised by the Condemnor in the Objection (see ¶¶ 1, 2 and 5) regarding the time spent by Mr. Rauseo on the day of the hearing (9.5 hours) regarding whether it includes both recoverable and unrecoverable cost components, the Condemnee shall submit, within 10 days of this order, a revised motion for costs containing more detailed information responsive to the Condemnor’s questions pertaining to this one item.

After receipt of the revised motion for costs and any objection to it by the Condemnor, the board will issue a final order on the Condemnee's motion for costs incorporating this Preliminary Order.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify copies of the foregoing Preliminary Order 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; James E. Morris, Esq., Orr & Reno, P.A., One Eagle Square, P.O. Box 3550, Concord, NH 03302-3550, counsel for the Condemnee; and Cathleen A. Schmidt, President, Citizens Bank New Hampshire, 1000 Elm Street, Manchester, NH 03101, Mortgagee.

Date: December 22, 2009

Anne M. Stelmach, Clerk