

**State of New Hampshire**

**v.**

**December 1, 1982 Trust, Paul Garabedian, Jr., Trustee and  
Unitil-Exeter Hampton Electric Company**

**Docket No.: 22548-07ED**

**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 (the “Declaration”) was filed with the board on April 11, 2007, describing the property rights taken as “control of access,” a slope easement of 8,175 square feet and a drainage easement of 3,800 square feet on Parcel 150, located at 186 Plaistow Road (Route 125) in Plaistow, New Hampshire (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 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 opened the record and viewed the Property on September 9, 2008 and reconvened and completed the just compensation hearing at its offices on October 6, 2008. The Condemnor was represented by Edith L. Pacillo, Esq., Assistant Attorney General with the New Hampshire Department of Justice, and the Condemnee was represented by Russell F. Hilliard, Esq., of Upton and Hatfield, and Frederick W. Murdock, Jr., Esq.

Laurie A. Gelinis 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 and after the taking consisted of 1.9 acres of unimproved, commercially-zoned land.

### **Board's Rulings**

The Condemnor presented as Condemnor Exhibit No. 1 an appraisal prepared by Fulcrum Appraisal Service (the "Fulcrum Appraisal") that performed a "before" and "after" valuation and determined the taking had no effect on the Property's value. The Fulcrum Appraisal estimated the Property had a market value both before and after the taking of \$325,000. The Fulcrum Appraisal, nonetheless, calculated a pro rata estimate of just compensation for the permanent drainage and permanent slope easements at \$9,000. The Fulcrum Appraisal predicated its finding of no damages on the observation that most, if not all, of the drainage and slope easements were contained within either the highway or wetlands setbacks of the Plaistow zoning ordinance and thus those areas were not developable either before or after the taking.

The Condemnee submitted as Condemnee Exhibit A an appraisal performed by Joseph Degen of Real Property Services (the “Degen Appraisal”) which estimated the Property’s market value before the taking at \$252,000. The Degen Appraisal then separately calculated a market value for the property rights taken by eminent domain at \$19,100 and subtracted that value from the before value to conclude a market value of \$232,900 for the Property after the taking. The Degen Appraisal estimate was predicated on primarily the drainage easement taking diminishing the physical developable land of the Property and that access to the Property is worse in the after situation due to the change of the road position and grade relative to the Property.

The board finds the best evidence of just compensation is the \$9,000 pro rata estimate contained in the Fulcrum Appraisal and, for the following reasons, gives no weight to the calculations contained in the Degen Appraisal.

First, the board finds, based on its view of the Property and the photographs submitted at hearing that access to the Property was not measurably impacted by the taking. Both in the before and after situation, a ditch line or “swale” existed which would have to be crossed to provide access for development. The board finds the state’s work of moving the road further to the north was within its existing right of way and thus does not result in any compensable damages. Further, the board finds the state’s limitation of access to one point essentially to the east of the construction center line at station 322 + 19.15 (see Declaration at par. 4) did not result in any limitation of the ability to use the Property as that access area is the logical one that would have been utilized before the taking through the process of obtaining the appropriate “curb cut” (driveway permit) from the New Hampshire Department of Transportation.

Second, the board agrees with the Condemnor, based on the evidence submitted, that all the area within the drainage and slope easements were contained within existing highway or

wetland setbacks, and thus would not have been legally developable with a building. Said another way, the easements do not diminish the building envelope of the Property beyond what already existed due to Plaistow's land use regulation setbacks. The Degen Appraisal appears to be predicated upon a loss of physically developable land. However, both in the before and the after situation those areas impacted by the easements, while physically developable, would not have been legally developable due to the Town of Plaistow's land use regulations setback restrictions. (No credible evidence was presented that variances from these restrictions could be applied for and obtained easily and without risk.) Thus, the slope and drainage easements had no impact on the developable potential of the Property. Further, the testimony presented at hearing was that such setback areas and easement areas could be continued to be used to satisfy the Town of Plaistow's zoning requirements of maintaining 25% of the lot as undeveloped.

Third, while not pivotal in the board's decision, we note that the Degen Appraisal did not perform the preferred and traditional before and after appraisal but rather attempted to separately value the bundle of rights contained in the drainage and slope easements to then be subtracted from the before value estimate. The board notes the general law in New Hampshire is to value the property before and after the date of taking with the damages being the difference between the two values. "Under the settled law of the State, '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, 100 N.H. 480, 486-87 (1957)." Daly v. State, 150 N.H. 277, 279 (2003). The board notes the difficulty at times in performing a reliable before and after valuation when there is a paucity of comparable market data from which to measure the effect of the taking. However the exercise should be attempted with discussion as to

the basis of any adjustments. Because the Degen Appraisal did not perform a true before and after, the board was inclined to give it less weight.

Last, the board would note that both the Fulcrum Appraisal and the Degen Appraisal did not recognize the drainage easement and slope easements overlap to a large extent and thus the area calculations that were utilized into both appraisals' calculations were duplicative to some extent. A close review of the plan submitted as Condemnor Exhibit No. 2 indicates the vast majority of the drainage easement area is also encumbered with the slope easement. Thus, the calculations contained in the Fulcrum Appraisal that result in a \$9,000 estimate of just compensation err to the benefit of the Condemnee and help buttress the conclusion that no additional compensation is warranted.

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 Condemnor is the prevailing party because the board's award does not exceed the Condemnor's offer (or deposit) of damages. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). The Condemnor 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

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Albert F. Shamash, Esq., Member

**Certification**

I hereby certify copies of the foregoing Report have been mailed, this date, to: Edith L. Pacillo, Esq., Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Russell F. Hilliard, Upton & Hatfield, LLP, P.O. Box 1090, Concord, NH 03302 and Frederick W. Murdock, Jr., Esq., P.O. Box 125, Methuen, MA 01844, counsel for the Condemnee; and Sandra L. Whitney, Registered Agent, Unitil-Exeter Hampton Electric Company, 6 Liberty Lane W, Hampton, NH 03842, Easement Holder.

Date: 10/22/08

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Anne M. Stelmach, Clerk