State of New Hampshire

v.

Douglas P. Embree, Mary A. Embree & Laconia Savings Bank

Docket No.: 22559-07ED

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 230:14. A Declaration of Taking ("Declaration") was filed with the board on May 2, 2007, describing the property rights taken as a fee taking of a total of 3,509 square feet and a temporary construction easement of a total of 3,488 square feet expiring on April 1, 2008, from property located at 615 West Main Street, Tilton, New Hampshire, further identified as Map R-26, Lot 27 (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 viewed the Property, located on Route 3 in Tilton, and then held the just compensation hearing at its offices on April 7, 2009. The Condemnor was represented by David M. Hilts, Esq. and the "Condemnees" were represented by Condemnee Douglas P. Embree.

The April 7, 2009 hearing was recorded by board staff. Any requests for transcripts should be directed to the board's clerk, Anne M. Stelmach. Parties should expect at least four (4) weeks for completion of a requested transcript.

The Property before the taking consisted of 0.656 acres (28,575 square feet) and after the taking consisted of 0.5754 acres (25,066 square feet), a difference of 0.0806 acres (3,509 square feet). The Property was operated as a real estate office (Century 21 Twin Rivers Realty) at the time of the partial taking.

Board's Rulings

Based on the evidence and the board's experience, technical competence and specialized knowledge (see RSA 541-A:33, VI), the board finds just compensation for this partial taking is $15,925. This is the actual sum deposited by the Condemnor with the board as its estimate of damages when it filed the Declaration.

At the hearing, however, the Condemnor argued a lesser amount ($12,065) should be awarded as just compensation damages, based on a conclusion that the taking resulted in no actual damages and only should result in a "pro rata" award of $12,000 (plus $65 for the nominal estimated cost of repainting ("re-striping") the partially repaved parking area). The board disagrees because the board finds the Condemnor did not satisfy its burden of proof regarding a lower damage award, see RSA 498-A:19, and for the additional reasons discussed below. At the same time, the board does not agree with the Condemnees' largely unsupportable assertions that much higher damages (estimated at roughly $60,000) were caused by the partial taking.

The Condemnor submitted an appraisal dated July 22, 2008 by Duane H. Cowall, MAI (the "Cowall Appraisal," Condemnor Exhibit No. 2). The Cowall Appraisal estimated the before

and after value of the Property ($195,000) to be unaffected by the taking and its pro rata $12,000 calculation is described on pp. 59-61.

Mr. Cowall concluded the Property's highest and best use, as improved, was "as a single-tenant or owner-occupied office or retail building" and that the small amount of land taken (3,509 square feet or 0.0806 acres) did not affect this use and was "too small to extract a change in the value from the sales [market data]" available. Cowall Appraisal, pp. 39-40. He noted, however, that the partial taking reduced the number of parking spaces in the parking lot. In his estimation, the reduction was from "12 spaces to 10 legal spaces" (since the two spaces added by the Condemnor after the taking "to alleviate [the] impact" are in the Condemnor's right-of-way and can be removed "at a later date if needed" by the Condemnor). Id. at p. 34.

Mr. Cowall further reasoned any actual loss of parking did not affect the market value of the Property because the Property still has enough parking spaces to meet any minimum parking standards local planning officials may reasonably impose -- anticipated to be, at most, one parking space for every 200 square feet of gross building area for office use and the Property has an estimated 1,768 square feet of gross building area. Id. After reviewing several comparable sales, Mr. Cowall concluded "variation in the amount of on-site parking is felt to have little impact on value as long as the amount is sufficient to meet the needs of the typical buyer or tenant" and found, based upon the market data he analyzed, that no adjustment for the loss of parking was warranted. Id. at pp. 41-46. In other words, Mr. Cowall felt the Property had "super-adequate parking" and a buyer would not be likely to pay a "premium" for the extra parking. Id. at p. 2.

Mr. Cowall's reasoning and conclusions were sharply disputed by Mr. Embree. Mr. Embree argued the Property after the taking has only nine full parking spaces (compared to 12 in the before situation), reducing its market value substantially.

On balance, the board finds the evidence, viewed as a whole, supports a finding that the loss of some paved parking occasioned by the partial taking had some adverse impact on the market value of the Property to a potential buyer. Mr. Cowall is correct that there are other commercial properties in the area (along Route 3) that also do not have sufficient paved parking to meet user needs (further evidenced by the overflow parking on dirt or grass areas which the board observed on its view). While the value effect of the lack of paved parking spaces may have been difficult to quantify based on limited market data, the board finds the Condemnor failed to meet its burden of proving the up to 25% reduction in available parking spaces (where the number of spaces was not super-adequate to begin with, in any practical sense) had no detrimental impact on the market value of the Property.

A reasonably prudent buyer, all other things being equal, would likely pay less for the Property because of the reduced number of available parking spaces. There may be circumstances where a property can have a super-adequate (excess) amount of parking and the loss of a relatively few parking spaces would not affect its value, but the facts presented do not support this conclusion, especially given the layout and highest and best use of the Property, the very limited number of paved parking spaces and the unavailability of offsite (on street) parking. The board finds the amount of just compensation damages, chiefly because of this factor, is reasonably approximated by the Condemnor's deposit with the board ($15,925).

Other criticisms of the Cowall Appraisal by Mr. Embree not related to the parking issue do not have merit. For example, he faulted Mr. Cowall's decision not to use the income

approach to value the Property, but the board finds that decision to be supported by the evidence. Mr. Cowall correctly concluded the highest and best use of the Property was to an owner-occupant and that, because of prevailing commercial rents, the income approach would likely result in a lower estimate of value for the Property. The board finds these conclusions to be reasonable. (In fact, utilizing the asking rent of $1,500 per month, for the Property, deducting for reasonable expenses (taxes, insurance, maintenance, etc.) and capitalizing the resulting net operating income produces a value substantially less that the sales approach indicates.)

The board also does not agree with Mr. Embree that there are any other elements of recognizable damages which the Condemnor is obligated to pay as just compensation for the partial taking. These elements pertain to arguments regarding relocation of an electronic 'message' sign, loss of expansion potential and a possible address change.

While it is true the message sign on the Property (shown in the photographs in Condemnor Exhibit No. 5 and Condemnee Exhibits D and E) will have to be moved, and Mr. Embree believes the area of the Property where the sign will be relocated is inferior, the evidence, confirmed by the board's view, is clear the present location is partly on the pre-existing right of way of the State and would have to be moved in any event (without compensation) if the State demanded it, even if no partial taking had occurred. There simply can be no adverse possession or a right to compensation for property rights already owned by the State.[1]

Mr. Embree also contended the partial taking resulted in a loss of "expansion potential" for the building. The board took a careful view of the Property, however, and finds, based on the

[1] See RSA 539:7; and, e.g., State v. Malnati, 148 N.H. 94, 96-98 (2002), quoting from State v. Tallman, 139 N.H. 223, 225-26 (1994).

wetland, building configuration, septic system location and other physical and market factors, any expansion potential that may have existed was not materially affected by the partial taking.

Finally, Mr. Embree claimed the U.S. Postal Service may require an address change (from Main Street to Clark Road, the adjoining street) because of the partial taking and this would adversely impact the value of the Property. The board finds this potential for an address change is too speculative in nature, is not supported by the evidence presented, and, in any event, is unlikely to have a market value effect even if it is required at some point in the future. See Appraisal Institute, Uniform Appraisal Standards for Federal Land Acquisitions (2000), p. 45 at fn. 190, quoting from Olson v. United States, 292 U.S. 246, 257 (1934): "Elements affecting value that depend upon events or combinations of occurrence which, while within the realm of possibility, are not fairly shown to be reasonable and probable, should be excluded from consideration."

In summary, the board has considered all of Mr. Embree's arguments for a higher damage award. In general, however, a "laundry list" of potential damage elements (presented on an a´ la´ carte basis) is not persuasive if the sum of the items on that list exceeds the loss in actual value to the Property as a whole that the market would recognize. See, e.g., State of New Hampshire v. Malnati, BTLA Docket No. 19397-98ED (March 21, 2005), citing 4A Nichols on Eminent Domain (Rev. 3d Ed. 2004) §§ 14A.04 [3] and [6].

For all of these reasons, the board awards $15,925 as just compensation damages for the partial taking.

If either party seeks to appeal the amount of damages awarded, a petition must be filed in the Belknap 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 Condemnor is the prevailing party because the board's award does not exceed the Condemnor's 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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Douglas S. Ricard, 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: David M. Hilts, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Douglas P. and Mary Embree, 28 Liberty Avenue, Franklin, NH 03235, Condemnees; Susan Richardson, VP, Laconia Savings Bank, 62 Pleasant Street, Laconia, NH 03246, Mortgagee.

Date:

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Anne M. Stelmach, Clerk