State of New Hampshire

v.

Pasquale Franchi

Docket No.: 22574-07ED

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" by various statutes, including RSA 230:45. A Declaration of Taking (the "Declaration") was filed with the board on June 6, 2007, describing the property rights taken as 6.38 acres (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 and held the just compensation hearing at the Conway Town Hall on September 29, 2009. The Condemnor was represented by Lynmarie C. Cusack, Esq. of the State of New Hampshire Department of Justice and the Condemnee was represented by Randall F. Cooper, Esq.

Tina L. Hayes of Avicore Reporting & Videoconferencing, 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 approximately 80 acres and was severed into two parcels as a result of the taking of the 6.38 acres.

Parties' Arguments

The Condemnor relied on an "updated" appraisal prepared by Duane H. Cowall, MAI, of Cowall Appraisal & Consulting dated July 17, 2009 (the "Cowall Appraisal," Condemnor Exhibit No. 2) estimating the total damages from the taking to be $560,000. The Condemnor made an initial deposit of damages of $165,000 on June 6, 2007, based on a prior appraisal,[1] and a supplemental deposit of damages of $395,000 on October 1, 2009, several days after the hearing. Page 2 of the Cowall Appraisal states he relied upon "an analysis of the development potential" by Ken Rhodes of CLD Consulting Engineers (the "CLD Site Evaluation" dated April 10, 2009, Condemnor Exhibit No. 4) in making his $560,000 damage estimate.

The Condemnee, on the other hand, relied on an appraisal by Steven H. Berg, MAI, of Sargent Consulting, Ltd. (the "Berg Appraisal," consisting of Condemnor Exhibit A, the original appraisal, and Exhibit A-1, a correction to this appraisal). Mr. Berg's corrected estimate of total damages from the taking is $2,710,000 (reducing his estimate by $360,000 in road construction costs). Mr. Berg relied on "a plan drawn by Thaddeus Thorne Surveys of Conway" to derive his

[1] Mr. Cowall's prior appraisal (dated June 5, 2008, Condemnor Exhibit No. 3) did not contain a determination of how many units could be developed either before or after the taking and made a much lower estimate of total damages ($160,000).

estimates of the development potential of the Property and his estimate of damages from the taking. Berg Appraisal, p. 46.

This five-fold difference in the parties' damage estimates results from two key points of disagreement: the number of developable units on the Property before and after the taking and the value of each unit. The board considered the arguments presented in arriving at the findings and rulings presented below.

Board's Rulings

The board finds the total damages for the taking are $1 million (rounded). The reasoning and bases for this finding are stated below.

As noted above, the Property is a large parcel of land divided into two as a result of the taking of 6.38 acres by the Condemnor to construct a highway bypass road. The resulting parcel west of the bypass is approximately 35.6 acres and the parcel east of the bypass is approximately 35.23 acres, according to the NHDOT plans reviewed by Mr. Cowall. See Cowall Appraisal, p. 42. In his appraisal, Mr. Cowall further notes the west side "has access to municipal water and sewer along Artist Falls Road" and the "eastern portion of the site would still have access to public water . . . but would need a pump station feeding a sewer line down Thompson Road to the Peaked Mountain development." Id. at p. 45. These factors, along with wetlands, topography and zoning issues, influenced each party's estimate of the number of developable units on the western and eastern parcels (quantified below).

Both appraisers agreed the highest and best use of the Property is for residential development. The appraisers agreed the Property's location, being physically close to a destination ski area (the Cranmore Mountain Ski Resort) and to the North Conway shopping district, is of importance. See, e.g., Berg Appraisal, p. 48. They also agreed estimating "before"

and "after" market values based on the number of developable units and an average value per unit is reasonable and appropriate for this appraisal assignment.

In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals of each party, applying the board's "experience, technical competence and specialized knowledge" to this evidence. See RSA 71-B:1; and former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it").

Further, in making findings where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence because "judgment is the touchstone." See, e.g., State of New Hampshire v. Frederick, BTLA Docket No. 23317-07ED (December 3, 2008); cf. Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras v. Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

As noted above, the parties, through their experts, disputed two key issues. The first issue involves how many developable residential units were lost as a result of the taking. The second issue involves estimating an average value for each unit.

On the first issue, there is no question the Property was acquired in the mid-1980's for future residential development. The evidence presented indicates the Condemnee made several efforts over the years to implement a residential development plan, but had not yet received approvals from the Town of Conway to do so for various reasons. At some point in the future, however, it is likely that some form of development will be approved, but the intensity of likely

development is in dispute. Both parties used the "development approach," an approach described in the Uniform Appraisal Standards for Federal Land Acquisitions (2000), commonly known as the "Yellow Book," drafted by the Interagency Land Acquisition Conference and published by the Appraisal Institute. This approach, discussed on pages 44-45 and 19, is particularly useful where "undeveloped acreage having a highest and best use for subdivision into lots" is involved and there is a lack of truly comparable sales, but undue reliance on purely "conjectural and speculative" evidence should be avoided.

Based on the CLD analysis, Mr. Cowall concluded "147 townhome-style condominium units could have been developed on the site" before the taking; after the taking, however, he concluded 45 units could be developed on the western parcel and 57 units on the eastern parcel (provided additional sewer pump and line construction and road paving took place), for a total of 102 units. Cowall Appraisal, pp. 48-49. The net reduction in developable units, according to Mr. Cowall, is 45 units as a result of the taking.

Mr. Berg, on the other hand, relied on the Thorne survey and other considerations to conclude, in the before situation, "a 241 unit development can be configured without undo crowding," compared to, in the after situation, 35 units on the western parcel and 28 units on the eastern parcel, for a total of 63 units. See Berg Appraisal, pp. 46, 77, 91 and 93. The net reduction in developable units, according to Mr. Berg, is 178 units.

During the view of the Property, the board noted the wetlands, terrain and other attributes pointed out by the parties, and also considered the extensive evidence presented, noting the points of agreement and disagreement between two expert witnesses (Mr. Kenneth Rhodes, an engineer, of CLD and Mr. David Douglass, a land surveyor and owner of the Thorne company) on the central question of estimating the number of developable units before and after the taking. On

balance, the board finds the Condemnee's argument that 241 units could reasonably be developed in the before situation is overly optimistic and that the Condemnor sustained its burden of proving the Property had a reasonable development potential for 147 units had the taking not occurred.

An equally critical variable, of course, is the number of units that could reasonably be developed after the taking. Here, the board finds the Condemnor's estimate (a total of 102 units) is overly optimistic and not sufficiently supported by the evidence presented, including the conflicting testimony of Mr. Rhodes and Mr. Douglass. Mr. Rhodes' plan showing more units is neither signed nor certified and he made an extraordinary assumption that the Town would grant a "waiver" to allow more than 35 units to be developed on each side, even in light of existing dead end street restrictions. Mr. Douglass demonstrated greater familiarity with the Town's subdivision process and had direct land use planning experience with the Property for several decades, having also done work for the prior owner. Upon consideration of the evidence as a whole, and recognizing the Condemnor's burden of proof, the board finds a lower estimate of 63 total units (35 on the western parcel and 28 on the eastern parcel, as quantified in the Berg Appraisal, p. 87) is reasonable. The board therefore finds the net loss of developable units as a result of the taking is 84 units (147 - 63 = 84).

On the second issue, the value of the Property on a per developable unit basis, the two experts were less far apart in their respective estimates. Mr. Cowall used an $11,500 value in the before situation; in the after, he estimated a value of $15,000 per unit for the western parcel and $13,000 per unit for the eastern parcel. He then applied a "subjective" 20% "bulk ownership" discount to his final estimate, which was not adequately explained or supported. See Cowall Appraisal, pp. 61, 63 and 65.

Mr. Berg, on the other hand, used an estimated value of $18,012 per unit in the before situation; in the after situation, he estimated a per unit value of $19,774 for the western parcel and $20,619 for the eastern parcel. Berg Appraisal, pp. 77, 91 and 93. (In arriving at his final corrected estimate of damages, as noted above, Mr. Berg deducted an estimate for road construction for a road to connect to Skimobile Road of $360,000.)

The board finds the most reasonable estimate of damages can be calculated by estimating a per unit value of $18,012 in the before situation and $19,774 per unit for the western parcel and $20,619 for the eastern parcel in the after situation. The board finds Mr. Berg's per unit value estimates to be more supportable and credible based on the evidence presented, again taking into account the Condemnor's burden of proof. The board finds the Property's proximate location to the Cranmore Mountain Ski Resort and the North Conway village and shopping was not adequately considered by Mr. Cowall. The board also deducted Mr. Berg's $360,000 cost estimate for road construction from the before value.

Applying these findings results in the following estimate of damages from the taking:

	Number of Developable Units	Value Per Unit	Totals
Before (total parcel):	147	$18,012	$2,647,764
Less: road construction cost estimate			($360,000)
Net before value			$2,287,764
After (western parcel)	35	$19,774	$692,090
After (eastern parcel)	28	$20,619	$577,332
After total value			$1,269,422
Difference in before and after values			$1,018,342
(Rounded) estimate of total damages from the taking			$1,000,000

The board's total damage award is therefore $1 million.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Carroll 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 due the Condemnee shall be determined pursuant to RSA 524:1-b and Tax 210.11. As noted above, the Condemnor made an initial deposited of $165,000 on the date of taking (June 6, 2007) and a subsequent, additional deposit of $395,000 on October 1, 2009. In computing the interest due, the Condemnor should keep these additional facts in mind in order to make the appropriate interest computations and payment.

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 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

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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: Lynmarie C. Cusack, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Randall F. Cooper, Esq., Cooper, Cargill, Chant, 2935 White Mountain Highway, North Conway, NH 03860, counsel for the Condemnee.

Date: 11/25/09

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Anne M. Stelmach, Clerk