

Town of Wolfeboro

v.

James R. Ames, Laura L. Ames and Countrywide Home Loans, Inc.

Docket No.: 22597-07ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the Town of Wolfeboro's Treated Effluent Transmission Pipeline project pursuant to authority conferred on the "Condemnor" by various statutes, including RSA 31:92 and RSA Ch. 231. A Declaration of Taking ("Declaration") was filed with the board on July 16, 2007, describing the property rights taken as an easement interest consisting of 0.69 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 District Court for Southern Carroll County on November 6, 2008. The Condemnor was

represented by Mark H. Puffer, Esq., and Condemnee Laura Ames appeared on behalf of herself and her husband James R. Ames.

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 Condemnees' land before and after the taking consists of 2.7 acres.

Board's Rulings

For the reasons discussed below, the board finds the just compensation to be awarded is \$4,200.

The Town deposited the sum of \$1,620 as damages for the taking, based on the calculations and conclusions contained in the "Spring Appraisal" (a "Restricted Use Appraisal Report," contained in Tab F of Condemnor Exhibit No. 1). The Spring Appraisal noted the Property was already encumbered by "an existing 100 foot wide power line easement" and concluded the highest and best use of the Property did not change as a result of the taking.

While the board questions whether the Spring Appraisal provided sufficient information and documentation to comply with the requirements of RSA 498-A:4, II, the further testimony provided by Mr. Spring at hearing, along with the view of the Property and the comparable sales, lead the board to arrive at the following determination of damages.

The board agrees with the Condemnor's conclusion that no severance damages resulted from the taking and therefore the before and after approach would not recognize any difference in value. Consequently, the Condemnor's pro rata calculation is the best method to estimate damages. However, the board disagrees with the unit value (for the land if not encumbered) testified to by Mr. Spring (\$0.54 per square foot). Instead, the board determined a value of \$1.40 per square foot by utilizing the same comparable sales shown in Tab E of Condemnor Exhibit No. 1 and then making the same general adjustments as Mr. Spring but equating the value to a residual one acre site value.

In other words, the board applied nominal time adjustments to the sales relative to the date of taking (July 16, 2007), adjusted minus 20% for the existing power line easement, added \$10,000 because the Condemnees' land was improved (compared to the undeveloped condition of all the comparables), subtracted \$1,500 per acre for any excess land (extracted by a paired sales analysis of the comparables), and then computed a per square foot value for the primary acre. To arrive at the total just compensation estimate of \$4,200, the board multiplied the area taken (30,000 square feet) by \$1.40 per square foot times 10% (because only an easement over an existing easement was taken by the Town).

The board has considered all of the Condemnees' arguments in support of a higher award of damages, including the correspondence contained in Condemnee Exhibit A relative to the Town's assessments, but finds they are not probative. Among other things, the board does not know the basis for the assessor's adjustments contained on the assessment-record card because the assessor was not present to testify at the hearing.

In summary, the board finds the Condemnees are entitled to receive the sum of \$4,200 as just compensation for the taking.

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.

Since 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 party 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.

Attached as Addendum A hereto are the board's responses to the Condemnor's Requests for Findings.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Addendum A

The "Requests" received from the Town 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.

TOWN OF WOLFEBORO REQUESTS FOR FINDINGS

1. The date of taking in this case was July 16, 2007.

Granted.

2. The property interest acquired by the Town on July 16, 2007, was an easement interest in approximately 0.69 acres of the condemnees' property. The easement was to construct, repair, rebuild, maintain, operate, patrol, and remove underground pipes and necessary appurtenances for the transmission of treated effluent over, under and across a 100-foot wide strip of land depicted on Exhibit A attached to the Declaration of Taking.

Granted.

3. The easement interest acquired by the Town is in and to the same 100-foot strip of land in which the condemnees' predecessor in title conveyed an easement for transferring electric current and/or intelligence to the Town by deed dated May 6, 1963.

Granted.

4. The easement conveyed by the condemnees' predecessor in 1963 included the right of the Town to clear and keep clear the 100-foot strip of land of all trees and underbrush, to remove all structures or obstructions found within the strip of land, and the right to cut or trim such trees as in the judgment of the Town may interfere with the electric current lines or their maintenance or operation.

Granted.

5. In the 1963 easement deed, the condemnees' predecessor in title agreed not to erect or maintain any building or other structure, or permit the erection or maintenance of any building or other structure, upon the 100-foot strip of land.

Granted.

6. Damages as the result of a condemnation are equal to the difference between the fair market value of the entire subject property after the taking and what it would have been worth on the day of taking had it not occurred. See Edgecomb Steel Co. v. State, 100 N.H. 480 (1957).

Granted.

7. Damages in a condemnation matter are measured by the strict application of the “before and after” rule. Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73 (1973).

Granted.

8. Where there is a partial taking but no severance damage, testimony by an expert as to the value of less than the whole property is allowed as evidence of the landowner’s damages. Clancy v. State, 104 N.H. 314 (1962).

Granted.

9. In the present case, the condemnees’ damages must reflect that their property was encumbered by an existing power line easement within the same 100-foot strip of land in which the Town acquired the easement for the transmission of treated effluent.

Granted.

10. In the opinion of the Town’s appraiser, Donald V. Spring, MAI, the Town’s taking of the treated effluent line easement within the existing power line easement would result in no severance damage to the condemnees’ property, and a before and after analysis would show no difference in value.

Granted.

11. Mr. Spring valued the part taken (the treated effluent line easement), using comparable sales to value the land, and arrived at a figure for “just compensation” of \$1,620.

Neither granted nor denied.

12. The assessed valuation of property for tax purposes is not admissible as evidence of value in a condemnation proceeding or other action where fair market value is the central issue. See Beers v. Davidson, 81 N.H. 326, 327 (1924); and Interstate Bridge Authority v. Ham Estate, 92 N.H. 277, 283 (1943) (assessor’s opinion admissible only if assessor in court and subject to cross-examination).

Neither granted nor denied.

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Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to:
Mark H. Puffer, Esq., Preti, Flaherty, Beliveau & Pachios, PLLP, 57 North Main Street,
Concord, NH 03301, counsel for the Condemnor; Laura L. and James R. Ames, 325 Pine
Hill Road, Wolfeboro, NH 03894, Condemnees; and Countrywide Home Loans, Inc.,
4500 Park Granada, Calabasas, CA 91302-1613, Mortgagee.

Date: December 8, 2008

Anne M. Stelmach, Clerk