

**State of New Hampshire**

v.

**Donald H. Wood Sr. Revocable Trust of 1991**

**Docket No.: 22603-07ED (Parcel 2)**

**Docket No.: 22604-07ED (Parcel 3)**

**REPORT OF THE BOARD**

These matters arise as a result of an RSA 498-A:5 acquisition of property rights taken for the laying out or the alteration of New Hampshire Route 123 leading to the replacement bridge over the Cold River in Walpole, New Hampshire pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:45. Declarations of Taking (the “Declarations”) were filed with the board on July 25, 2007 for Parcels 2 and 3. For Parcel 2, there was a fee taking of 0.004 of an acre and a permanent slope easement of 2,536 square feet. For Parcel 3, there was a fee taking of 0.007 of an acre, a permanent slope easement of 765 square feet; and a permanent drainage/channel easement of 4,904 square feet (collectively, the “Property”). See Exhibit A to the Declarations.

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 Condemnee. See Tax 210.12 and cases cited therein.

The board viewed the Property and held the just compensation hearing at the Town of Walpole, New Hampshire's Town Hall on September 17, 2008. The Condemnor was represented by Lynmarie C. Cusack, Esq. and the Condemnee was represented by Donald H. Wood, Jr., Trustee.

Ms. Karen L. Wright 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.

### **Parties' Arguments**

The Condemnor submitted a self-contained appraisal prepared by Mr. Stephen Bernard, an appraiser for the State of New Hampshire, Department of Transportation (the "Bernard Appraisal"). The Bernard Appraisal determined the Property's market value was \$125,000 both "before" and "after" the July 25, 2007 date of taking based on the highest and best use premise that the Property would be used for agricultural purposes, the present use. After making that determination, Mr. Bernard used a "pro-rata" methodology to estimate a \$500.00 just compensation for the property rights taken.

The Condemnee did not submit an opinion of value contrary to the Bernard Appraisal. However, the Condemnee questioned its ability to have full use of the area encumbered by the easements in the "after" situation.

### **Board's Rulings**

Based on the evidence and testimony presented, the board finds the Condemnor carried its burden of proof and the \$500.00 pro-rata estimate contained in the Bernard Appraisal to be the just compensation due the Condemnee.

The view and the testimony support the state's conclusion that the highest and best use of the Property was for continued use as agricultural land. Because the Property was located in the flood plain associated with the Cold River, it would be necessary for the Condemnee to obtain a special exception from the Town of Walpole in order to have any development occur on the Property. Additionally, Mr. Bernard determined the building materials required and the engineering necessary to facilitate development of the Property would not make development economically feasible, further supporting the conclusion that the highest and best use of the Property is as agricultural land. See Condemnor Exhibit No. 2 at pp.23-24. Mr. Bernard considered parcels 2 and 3 together as a single economic entity because of their continuity of use, unity of ownership and same highest and best use. The board finds this is a reasonable assumption given the nature of the Property.

The board finds the pro-rata methodology to be a reasonable approach to estimate the value of the property rights taken and the opinion of value in the Bernard Appraisal to be the best evidence of that value and, therefore, the best estimate of the just compensation due the Condemnee.

The Condemnee's trustee, Mr. Donald H. Wood, Jr., questioned the impact of the taking on any future development plans that may arise for the Property. He testified there had been some interest in developing the Property commercially and there were no written guarantees afforded him by the Condemnor to allow him the use of the area of the Property encumbered by the various easements. He did not, however, provide any market support for his assertion that the easements would impact the Property's value. Without some indication of value supported by market data to refute the Condemnor's position, the board has no basis to award some amount greater than that proposed and outlined in Condemnor's Exhibit

No. 2, the Bernard Appraisal. Further, based on the board's view of the taking, and the minimal grade (slope) of the land within the slope easements, the board concludes the Condemnee's historical agricultural use of those areas could likely continue without any conflict with the state's easement to maintain the slope of the adjoining highway.

In summary, the board finds the Condemnor's deposit of damages of \$500.00 is the total amount of just compensation due the Condemnee.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Cheshire 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 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

---

Paul B. Franklin, Chairman

---

Douglas S. Ricard, Member

---

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; Donald H. Wood, Jr., Trustee, Donald H. Wood Sr. Revocable Trust of 1991, Wood Hill Farm, #24 Drewsville Road, Alstead, NH 03602; and Donald H. Wood, Jr., 3700 Wyatt Earp Road, Apt. 324, Roanoke, Texas 76262.

Date: 10/15/08

---

Anne M. Stelmach, Clerk