State of New Hampshire

v.

Kenneth D. Frederick

Docket No.: 23317-07ED

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 ("Declaration") was filed with the board on September 19, 2007, describing the property rights taken as a 4.01 acre parcel improved with an earth-sheltered residential dwelling (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 Rockingham County Probate Court in Brentwood on September 9, 2008. The Condemnor was represented by Edith L. Pacillo, Esq., Assistant Attorney General with the New Hampshire Department of Justice, and the "Condemnee" represented himself.

Laurie A. Gelinas 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 taking was a complete take of the Property located on the westerly side of Route 125 in Kingston, New Hampshire. The Property's lot consists of 4.01 acres with approximately 250 feet of frontage on Route 125, a portion of its frontage encumbered by a 50 foot access easement benefiting the adjoining lot to the north. The site of the earth-sheltered house and adjoining garage is approximately 300 feet from Route 125 and accessed via a steep gravel driveway. The dwelling consists of approximately 2,466 square feet of living area partially built underground utilizing the earth as a thermal mass to moderate the temperature differentials between the exterior air temperature and that inside the dwelling. The dwelling also has windows primarily on its south face to provide passive solar heating and lighting of the interior space.

The Condemnor estimated the market value of the Property as of the date of taking to be $340,000 based on an appraisal prepared by Dale M. Gerry, II (the "Gerry Appraisal"). The Gerry Appraisal determined the highest and best use of the Property was as residential, notwithstanding its location within the Kingston "C-III" commercial

zoning district which was established after the dwelling was constructed. The Gerry Appraisal estimated the $340,000 market value utilizing both the cost and sales comparison approaches giving equal weight to their value conclusions.

The Condemnee argued the Property's market value was approximately $400,000 as of the date of taking based on an appraisal performed by Christopher T. Ruel (the "Ruel Appraisal") and by equalizing the Town of Kingston's property tax assessment. The Ruel Appraisal determined the Property's highest and best use was for commercial purposes and estimated a market value based on that assumption utilizing the three approaches to value but placing most weight on the sales comparison approach.

Board's Rulings

The Condemnor has the burden of proving that the amount offered is just compensation for the taking. For the reasons that follow, the board finds the Condemnor carried its burden.

The board agrees with the Gerry Appraisal conclusion that the Property's highest and best use is for residential purposes. While the Property is located within a commercial zone, the board finds its residential development and its steep topography and limited visibility and accessibility from Route 125 would make it unfeasible, both physically and financially, to be utilized for most, if not all, commercial uses. The developed portion of the Property is located significantly above grade from Route 125 and while perhaps some improvements could be made to moderate the grade of the driveway, the terrain is quite steep and would discourage most commercial uses with the Property. While several potential commercial uses were suggested by the Condemnee, such as an architect or other similar office use, the board finds the improvement's lack of

visibility, its steep access and the difficulty of renovating the unique dwelling construction to be handicapped accessible would not make commercial use financially feasible.

The board reviewed the Gerry Appraisal's cost and sales approaches and finds the adjustments to be reasonable and the land and improved sales to be the most comparable of all evidence submitted at hearing. Specifically, the board notes that the Gerry Appraisal comparable sales 1 and 2 were also of similar earth-sheltered, passive solar heating homes in southern New Hampshire and are good benchmarks for how the market would recognize such unique construction. The Condemnee argued the energy savings and low environmental impact of such construction should be recognized for all the costs that are saved for both the individual and society in general. While such goals are laudable and certainly desirable, especially in today's economy, the board must look to market value evidence for the basis of determining just compensation. Thus, the two Gerry comparable sales of earth-sheltered homes provide good evidence as to how the market recognizes this type of construction. The indicated sale prices after adjustments of the two earth-sheltered homes are below the correlated value of the Gerry Appraisal. Thus, the board finds the Gerry Appraisal gives the benefit of the doubt (to the Condemnee) as to the market value of the Property.

The board is unable to place any weight on the value conclusion of the Ruel Appraisal offered by the Condemnee for several reasons. First, Mr. Ruel was not present to provide testimony at the hearing. Second, the Ruel Appraisal determined the highest and best use was for commercial purposes, but, for all the reasons the board noted earlier, the board finds such a conclusion is not valid based on the topography, accessibility,

visibility and unique residential improvement of the Property as of the date of taking. This incorrect highest and best use conclusion led to the choice of commercial land and building sales utilized in the Ruel Appraisal cost and sales comparison approaches, which arrived at inflated estimates of market value for the Property. Based on the view of the Property and a number of the commercial properties utilized in the Ruel Appraisal, the board finds they are not comparable to the Property given the Property's steep grade and lack of good visibility and accessibility onto Route 125. Said another way, the Property could not achieve the same commercial use as the comparables due to its features.

Similarly, the board was unable to give any weight to the equalized assessed value of approximately $402,000 proposed by the Condemnee as the damages to be awarded for the taking. He did not submit the assessment-record card for the Property; nor was there any evidence or testimony presented as to the accuracy of the data and adjustments on the assessment records of the municipality or the valuation models that comprised the land and building components of the assessment.

In these proceedings, the board has the statutory authority to consider and weigh market value evidence utilizing its "experience, competence and specialized knowledge." RSA 541-A:33, VI and generally RSA 71-B:1. Further, in making its findings, where there is conflicting evidence, the board must determine for itself the credibility of the witnesses and the weight to be given to the evidence submitted. Here we find the best evidence, as noted above, is contained in the Gerry Appraisal; neither the Ruel Appraisal due to its incorrect highest and best use determination nor the equalized assessment value, due to the lack of any supporting documentation, can be given any weight by the board.

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 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;
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> 2) a statement that the prevailing party sought the other party's concurrence in the requested costs, Tax 201.18(b); and
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> 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., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Mr. Kenneth D. Frederick, 32 Route 125, Kingston, NH 03848, Condemnee.

Date: December 3, 2008

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Anne M. Stelmach, Clerk