

State of New Hampshire

v.

John Carroll, et al.

Docket No.: 23335-07ED

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 (“Declaration”) was filed with the board on November 14, 2007, describing the property rights taken as a complete acquisition of 0.978 acres and improvements (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 on May 28, 2008 and held the just compensation hearing at the Londonderry Town Hall on May 14, 2009. The Condemnor was represented by Edith L. Pacillo, Esq. and the Condemnees were represented by Andrew H. Sullivan, Esq.

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 Property consisted of a 0.978 acre parcel approximately triangular in shape located between NH Route 111A and Interstate 93 southbound. The Property was improved with a 4,388 square foot metal light industrial building with an on-site septic system.

Board's Rulings

Based on an appraisal performed by Martin S. Doctor of Fulcrum Appraisal Service (the "Fulcrum Appraisal"), the Condemnor argued the just compensation for the complete acquisition of the Property was \$300,000. The Fulcrum Appraisal, after considering several sales of vacant commercial properties in Windham, determined the highest and best use of the Property was for light industrial uses such as the existing improvements provided. The Fulcrum Appraisal performed both a sales comparison approach and an income approach, but placed most weight on the sales comparison approach estimate in the reconciliation value. The Fulcrum Appraisal sales comparison approach utilized four sales of improved light industrial properties that sold in the southern portion of New Hampshire.

Based on an appraisal performed by J. Chet Rogers of R.G. Bramley & Company, Inc. (the "Bramley Appraisal"), the Condemnee estimated the just compensation for the complete acquisition of the Property was \$470,000. The Bramley Appraisal determined the highest and best use of the Property was "for owner-occupied light industrial use with yard storage." The Bramley Appraisal utilized only the sales comparison approach (and employed three of the same four comparable sales contained in the Fulcrum Appraisal) to estimate the just compensation for the Property.

After review of all the evidence submitted, including the testimony of these experts and one of the condemnees, Paul Foden, the board estimates the market value of the Property as of

the date of taking was \$350,000. In reaching this value, the board places most weight, but not exclusive weight, on the Fulcrum Appraisal comparables including the discussion of land only sales at Part III, p. 4.

Both the Fulcrum and Bramley Appraisals utilized the metal building's square footage as the unit of comparison in their respective sales comparison approaches, applying the various adjustments to the comparables based on the building's square footage. While this use of the building square footage as the unit of comparison is not fatal, the board finds that given the building's relatively small contributory value to the Property's overall value such methodology can potentially skew the overall value conclusion. The light industrial metal building showed significant deferred physical maintenance and had been used as office space in conjunction with the Condemnee's business and as a truck tire repair garage. The condition of the building and its nominal contributory value was confirmed both by the board's view of the Property and the testimony at hearing. Further, the Town of Windham's assessment of the Property included \$300,000 for the land value and only \$13,100 for all the improvements. This is an additional indication of the relatively small contributory value of the building.

Because of the building's nominal value and the very likely possibility that a potential purchaser of the Property would either continue to use the building in its deteriorated condition or raze it, the board concludes that a more direct, potentially more accurate, method to appraise the Property would be to appraise it as if vacant for commercial/light industrial uses in Windham's Gateway Commercial Zoning District and then add an estimated contributory value for the existing improvements.

Based largely on the land only sales contained in the Fulcrum Appraisal and the testimony of Mr. Doctor, the board concludes the Property, as vacant, would have a market value of approximately \$300,000. The board is familiar with some, but not all, of the land only sales

due to the board's view of them and use in another eminent domain action involving a nearby property. See State of New Hampshire v. Skip Fern Trust V, Docket No.: 23324-07ED (October 15, 2008). Fulcrum Appraisal correctly notes that the comparable land sales are all located in superior locations and would need to be adjusted significantly to account for that difference. The board agrees with Mr. Doctor's observation that the Property's location approximately a mile from an Interstate 93 exit but on a less traveled Route 111A (approximately 9,000 vehicles per day vs. 20,000 vehicles per day for the comparables) would have a market value at the high end of the range for light industrial properties but at the low end of the range for commercial properties, resulting in an estimate of approximately \$300,000.

The two appraisers had significantly different estimates of the improvements' contributory value as a percentage of the Property's overall value. Mr. Doctor estimated the contributory value was approximately 10% while Mr. Rogers estimated it at approximately 25%. Given the distinct possibility that the building could be razed by a potential purchaser of the Property, and given the building's significantly deferred maintenance, the board estimates the contributory value of the improvements (building, well and septic) at approximately \$50,000, about 14% of overall value.

The board was unable to place any significant weight on the Bramley Appraisal for several reasons. First, in an attempt to bracket the Property, the Bramley Appraisal included as one of the four comparable sales a property at 227 Willow Street in Manchester. The board finds, as Mr. Rodgers testified, the sale is not a good comparable because it is of a smaller lot (0.23 acres), is in a more urban setting and more than half of the land is consumed by the footprint of the building leaving little area for yard storage which is an important feature for potential light industrial use. Second, the Bramley Appraisal conclusion of \$470,000 minus any nominal improvement value results in an indicated vacant lot value that is higher than reasonable

for an acre lot on Route 111A with significantly less traffic than the commercial lot sales utilized as benchmark values in the Fulcrum Appraisal. Third, the Bramley Appraisal made no adjustments between the Property's building size and those buildings that are part of the comparable sales. While the board has already noted utilizing the square footage of the building as a unit for comparison may be problematic, the board believes if such a unit of comparison is used some recognition through adjustments needs to be made for buildings that range from approximately one-half of the Property's size to nearly half again its size. Such an adjustment could have been made via a "size" adjustment or a "land to building" adjustment as contained in the Fulcrum Appraisal.

In conclusion, the board is unable to place any weight on the Bramley Appraisal value conclusion and, as noted earlier, the board's finding of \$350,000 is based on sales information contained in the Fulcrum Appraisal.

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 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 Condemnee is the prevailing party because the board's award exceeds the Condemnor's offer (or deposit) of damages. See Fortin v. Manchester Housing Auth., 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.

Attached as Addendum A hereto are the board's responses to the Condemnees' Proposed Findings of Fact.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Addendum A

The “Proposed Findings of Fact” received from the Condemnee 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 Proposed Findings of Fact, “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 overly broad or narrow so 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 decision.

CONDEMNES’ PROPOSED FINDINGS OF FACT

Tax 201.36(c) limits each party to a total of 25 requests unless prior leave is granted by the board. Because the Condemnees did not request leave and their proposed findings of fact exceed this number, the board will only respond to the first 25 requests.

1. The metes and bounds description of the Fee being taken as described in Paragraph 4 of the State’s Declaration of Taking and Deposit of Damages, A Proceeding In Rem, is the same as that land, with improvements thereon, with street address of 90 Range Road (aka NH Rte 111A), Rockingham County, New Hampshire and in location as being shown on Windham Tax Map 17G a Lot 45 (hereinafter, “Subject Property”).

Granted.

2. Prior to the taking, the owners of the Subject Property were:

- Paul C. Foden** 1/7 undivided interest as tenant in common;
See Rockingham County Registry of Deeds (hereinafter, "RCRD")
Book 2529, Page 865.
- Theresa M. Foden** 3/7 undivided interest as tenant in common;
See RCRD Book 3437, Page 118 and Book 3732, Page 60.
- John Carroll** 1/7 undivided interest as tenant in common;
See RCRD Book 2528, Page 865.
- Ken Walsh** 1/7 undivided interest as tenant in common;
See RCRD Book 3406, Page 71.
- Mark Gorey** 1/7 undivided interest as tenant in common;
See RCRD Book 3179, Page 153.

Granted.

3. The Subject Property land area is 0.978 +/- Acres.

Granted.

4. The Subject Property is 100% usable.

Neither granted nor denied.

5. The building(s) located on the Subject Property contain 4,388 +/- square feet at or above grade.

Granted.

6. The buildings on the Subject Property are (a) a one-and-a-half story steel pre-engineered light industrial building with mezzanine, and (b) an 80 +/- square foot shed.

Granted.

7. The Subject Property is improved with 5,000 +/- square feet of asphalt paving providing driveway and parking area.

Granted.

8. The Subject Property is served by municipal water, electricity, telephone, and an on-site septic system.

Granted.

9. The Subject Property is located in the Town of Windham's Gateway Commercial Zoning District.

Granted.

10. The current use of the Subject Property is allowed in the Gateway Commercial Zoning District.

Granted.

11. The Subject Property is a legal, conforming site and use under the Gateway Commercial Zoning District.

Granted.

12. The current use of Subject Property is of a light industrial building with large amount of yard storage.

Granted.

13. The Gateway Commercial Zoning District allows a maximum building coverage of 70%.

Granted.

14. Subject Property is 220+/- feet deep at its maximum depth, has 231+/- feet of frontage on the north side of Range Road and 496+/- feet of frontage on the southbound lane of Route I-93, a Limited Access Right-of-Way.

Granted.

15. Subject Property has two access points on Range Road, but no access to I-93.

Granted.

16. Shape of Subject Property is triangular.

Granted.

17. No easements were found which would adversely impact the Subject Property.

Granted.

18. Surrounding land uses along Range Road are mostly commercial or residential.

Granted.

19. Immediately south of the Subject Property and across Range Road *was* a children's daycare facility at time of State's taking.

Granted.

20. Immediately east is the Common Man restaurant.

Granted.

21. According to the NH Department of Transportation the average daily traffic count in front of the subject was 9,100 in 2004.

Granted.

22. No observed detrimental or hazardous neighborhood influences were observed.

Granted.

23. The major transportation routes in Windham are I-93, NH Route 111, and to a lesser extent, NH Route 28.

Granted.

24. Subject Property is about 2 miles from the Exit 3 interchange for I-93 and about ½ mile southwest of the intersections of NH Routes 111 and 111A (Range Road).

Neither granted nor denied.

25. NH Route 111A intersects with NH Route 28 to the southwest of Subject Property, heading into Massachusetts.

Neither granted nor denied.

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 Andrew H. Sullivan, Esq., PO Box 10354, Bedford, NH 03110, counsel for the Condemnees.

Date: June 22, 2009

Melanie J. Ekstrom, Deputy Clerk