State of New Hampshire

v.

Industrial Way Associates, LLC, Granite State Electric Company and Verizon New England, Inc.

Docket No.: 23342-07ED

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 December 5, 2007, describing the property rights taken as: 1) a fee simple take of 0.24 of an acre; 2) two permanent drainage/utility easements totaling 2,900 square feet; and 3) a temporary construction easement of 8,250 square feet set to expire on August 1, 2011 or one year after completion of the construction of the project (the "Property"). See Exhibit A to the Declaration.

The entire parcel before the take comprised of 16.6 acres of vacant property with frontage on Industrial Way and on Brookdale Road. The fee and easements taken occurred on the Property's Brookdale Road frontage which is residentially zoned. The Industrial Way frontage and approximately 90% of the area of the Property is zoned industrially.

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 on November 13, 2008 at the Londonderry Town Hall. The Condemnor was represented by Edith L. Pacillo, Esq., Assistant Attorney General of the New Hampshire Department of Justice and the "Condemnee" was represented by Edward A. Haffer, Esq. of Sheehan, Phinney, Bass & Greene, P.A.

Ms. Kimberly A. Kerwin 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 Condemnor relied upon an appraisal performed by Stephen Bernard (the "Bernard Appraisal") which estimated the damages to be $50,000 based on a before taking value of $2,450,000 and an after taking value of $2,400,000. The Bernard Appraisal utilized the sales comparison approach analyzing sales of three vacant industrial or commercial properties in Windham and Londonderry, New Hampshire. The Bernard Appraisal estimated the highest and best use of the Property was for industrial purposes and assumed a variance could be obtained to utilize the residentially zoned portion on Brookdale Road for industrial purposes.

The Condemnee estimated the value of the taking to be $78,273 based on an opinion provided by David Morin, a commercial real estate broker in Salem, New Hampshire. Mr. Morin opined the sale of 6 Manor Parkway in Salem was the best comparable sale to utilize as it was in relatively close proximity to the Property and reflective of the higher land values of Salem rather than in Windham or Londonderry.

Board's Rulings

Based on the evidence submitted, the board finds the Condemnor carried its burden in estimating just compensation by relying on the market analysis contained in the Bernard Appraisal. The comparables utilized in the Bernard Appraisal are reasonable based on the zoning of the Property as industrial and the similar potential uses of the comparables. The board agrees with Mr. Bernard that the 6 Manor Parkway is not a good comparable without significant adjustments despite its relative proximity to the Property. The 6 Manor Parkway property is in a commercial zone which has a significantly different lot coverage ratio of 70% versus the Property's 30% maximum coverage. Also, the 6 Manor Parkway property is located at, and bounded by, the I-93 Exit 2 egress ramp and thus has significantly superior accessibility and visibility for traffic associated with Interstate I-93. The Condemnee argued the Property had the potential for signage visibility on its high point very near the "cell tower" property which is adjacent to Interstate I-93. However, the board does not believe that any potential signage visibility, once trees are cut, is equivalent to the accessibility and visibility that the 6 Manor Parkway property's proximity to I-93 and Exit 2 provides. Further, the 6 Manor Parkway property is significantly smaller, 5.03 acres, versus the Property's area of 16.6 acres. 6 Manor Parkway's size being less than one third the size of the Property's coupled with its considerably greater maximum lot coverage significantly enriches the value when analyzed on a per acre basis. The Bernard Appraisal at page 35 presented some general market data that supports this phenomenon, to wit that commercially zoned property in the Salem market area sold for approximately twice that of industrially zoned property.

The board considered Mr. Morin's testimony as to the marketing efforts of the Property at the listing price of $5,000,000 but was unable to give that asking price any weight in estimating the value for the area taken. Mr. Morin testified that no serious offers have been

made and that the asking price was premised upon the market utilizing the property for an office complex as opposed to industrial uses. While an office use is a permitted use by zoning, the asking price is most likely predicated upon some future economic utilization of the Property that may not have been financially feasible as of the date of taking.

The board also considered Mr. Morin's general location economic arguments that properties located in closer proximity to Boston and Interstate 495 have higher value than properties further away, such as the Bernard Appraisal's comparables in Windham and Londonderry. While the board agrees with such general macro location economic observations, there are also many micro locational influences that come into play in affecting the desirability and value of a property, such as proximity to interstate highways, malls, central commercial districts etc. These micro locational influences can blur any distinctions that might exist between the general market values of the Salem market and the Windham/Londonderry markets.

The board is unable to give any weight to Mr. Morin's calculations, because, in addition to the reasons noted above, his methodology is not in keeping with preferred valuation procedures in eminent domain. "The preferred method in this state for determining condemnation damages, including severance damages, partial taking cases is the "before and after" method, 'whereby the value of the remainder of the tract after the taking is deducted from the value of the whole tract before the taking." Lebanon Housing Authority v. National Bank, 113 N.H. 73, 75-76 (1973); Daly v. State, 150 N.H. 277, 280 (2003). Further, the board finds Mr. Morin's valuation of the permanent drainage easement, as if it were a fee taking, is incorrect and counter intuitive in as much as the landowner retains some rights for use of the Property within the drainage easements for setbacks, density requirement purposes, etc. and thus, the easement taking does not comprise 100% of the Condemnee's bundle of rights.

In summary, the board finds the Condemnor's estimate of damages of $50,000 is reasonable given the nature and location of the property rights taken.

The "Requests" 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 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 Decision.

CONDEMNEE INDUSTRIAL WAY ASSOCIATES, LLC'S
REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

1. The most reasonable comparable property to consider in this case is the Workout Club property at 6 Manor Way in Salem, N.H. ("Condemnee's Comparable Property").

Denied.

1.1 The Condemnee's Comparable Property is close (approximately a half mile) from the Subject Property.

Granted.

1.2 Although the Condemnee's Comparable Property fronts Pelham Road, whereas the Subject Property fronts Industrial Way on one side and Brookdale Road on its opposite side, both properties are close to Exit 2 from I93.

Neither granted nor denied.

1.3 The Subject Property is within the Salem Industrial Park, and the Condemnee's Comparable Property is at the Park's edge.

Granted.

1.4 The Salem Industrial Park is intensively developed, with the Subject Property being the sole vacant land of its size within the Park.

Granted.

1.5 The Condemnee's Comparable Property is located in a commercial zone, while the Subject Property is located primarily in an industrial zone (approximately 90% industrial and 10% residential) — with the part of the Subject Property to be taken being within the residential zone along Brookdale Road. (State Appraisal, pp. 15-16).

Granted.

1.6 Although the part of the Subject Property fronting Brookdale Road is located in the residential zone, the probability of obtaining a variance to permit a change of use on this residential portion would be favorable. (State Appraisal, p. 16.)

Granted.

1.7 Salem Zoning Regulations permit the following uses within industrial districts: business and professional office space, banks, studios, research and development facilities, manufacturing, indoor skating and tennis, municipal buildings, motels, hotels, and accessory uses. (State Appraisal, p. 16.)

Granted.

1.8 The high point of the Subject Property could accommodate signage that would be easily visible from I93, whereas signage for the Condemnee's Comparable Property is not so easily visible from I93.

Neither granted nor denied.

2. The three properties relied on by the State ("the State Comparables") are not as reasonably comparable to the Subject Property as the Condemnee's Comparable Property.

Denied.

2.1 Two of the State Comparables (L1 and L3) are located in Windham, and one (L2) is located in Londonderry (State appraisal, p. 34) — none of them as close to Boston or I495 as the Subject Property.

Neither granted nor denied.

2.2 State Comparable L2 (Londonderry) is located in an area that still contains significant amounts of industrial-developable land — in stark contrast with the Subject Property.

Neither granted nor denied.

2.3 State comparables L1 (Windham) is located in a commercial zone; yet it is much more reasonable to make a comparison to a commercial-zone property located in Salem, particularly one located close to the Subject Property — such as the Condemnee's Comparable Property.

Neither granted nor denied.

2.4 Although L1 and the Condemnee's Comparable Property are both commercially zoned, for L1 the State makes a "downward adjustment of **5%** for zoning compared to the subject" (State appraisal, p. 33), whereas for the Condemnee's Comparable Property the State makes a downward adjustment of **25%** (State Appraisal, p. 35) — a **5-fold** difference.

Neither granted nor denied.

2.5 In explaining this difference, the State's appraiser testified that commercially zoned property in Windham, such as L1, is allowed only 30% maximum coverage, whereas commercially zoned property in Salem, such as the Condemnee's Comparable Property, is allowed 70% maximum coverage; but the difference between 70% and 30% is a **2-1/3 fold** difference.

Neither granted nor denied.

2.6 Hence, to be fair, if L1 necessitated a 5% adjustment downward for zoning, the downward adjustment for zoning for the Condemnee's Comparable Property should not have been 25% (a 5-fold difference), but 11.67% adjustment (a 2 1/3-fold difference).

Neither granted nor denied.

2.7 With such a fair downward adjustment for zoning — i.e., 11.67% — the per-acre value of the Condemnee's Comparable Property would have been reduced from $270,875 (State Appraisal, p. 35) to $239,263 — rather than to $203,156, which the State obtained by using a 25% downward adjustment. (State Appraisal, p. 35.)

Neither granted nor denied.

2.8 Significantly, the $239,263 figure obtained by making the State's downward adjustment fair is **$14,000 more** per acre than Mr. Morin's estimate of $225,000 — a fact that underscores the reasonableness of Mr. Morin's estimate.

Neither granted nor denied.

3. For purposes of determining just compensation to the Condemnee, the Board finds reasonable a value of $225,000 per acre for the Subject Property as of the time of the taking (December 5, 2007).

Denied.

3.1 The Board accordingly applies that value to the taking of the Fee and the Permanent Easement.

Denied.

3.2 For the taking of the Temporary Easement, which is estimated to last two years, the Board finds it reasonable to apply 10% of the underlying land value per year.

Neither granted nor denied.

4. Based on all the evidence, the Board concludes that just compensation for the taking of the Condemnee's property as of the time of taking (December 5, 2007) is $78,273, consisting of the following elements:

Denied.

4.1 For the Fee: $54,000(0.24 acres at $225,000 per acre).

Denied.

4.2 For the Permanent Easement: $15,750 (0.7 acres at $225,000 per acre).

Denied.

4.3 For the Temporary Easement: $8,523 (8,250 sq. ft., which is 0.1894 acres, at $225,000 per acre x 10% x 2 years).

Denied.

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 is the same as 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

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

_____
Douglas S. Ricard, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Edith L. Pacillo, Esq., Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Edward A. Haffer, Esq., Sheehan, Phinney Bass & Green, 1000 Elm Street, Manchester, NH 03101, counsel for the Condemnee; William T. Sherry, Reg. Agent, Granite State Electric Co., 9 Lowell Road, Salem, NH 03079; and Verizon New England, Inc., CT Corporation System, Reg. Agent, 9 Capitol Street, Concord, NH 03301, Easement Holders.

Date: December 11, 2008

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Anne M. Stelmach, Clerk