Town of Hudson

v.

J & D Realty Corporation, Donald R. Dumont and William W. Jordan

Docket No.: 23360-08ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the construction of a sidewalk along a portion of Lowell Road in Hudson, New Hampshire pursuant to authority conferred on the "Condemnor" by various statutes, including RSA 31:92. A Declaration of Taking (the "Declaration") was filed with the board on April 14, 2008, describing the property rights taken as follows:

"60 Lowell Road" – a permanent sidewalk easement consisting of 587 square feet and a fifteen (15) foot wide temporary sidewalk construction easement with an approximate area of 1,200 square feet; and

"64 Lowell Road" – a permanent sidewalk easement consisting of 491 square feet and a fifteen (15) foot wide temporary sidewalk construction easement with an approximate area of 1,125 square feet (the "Properties"). Both temporary construction easements terminate four (4) years from the date of the taking or upon the earlier of the completion of the public

improvements, sidewalk, and roadway project. See Exhibits C and D to the Declaration for plans of the taking.

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 Properties and held the just compensation hearing at its offices on October 6, 2009. The Condemnor was represented by Jay L. Hodes, Esquire of HageHodes, PA and Condemnee William W. Jordan appeared pro se as stockholder and successor in interest to J & D Realty Corporation.

The hearing was recorded by the board's clerk, Ms. Anne M. Stelmach. Any requests for transcripts should be directed to Ms. Stelmach and the parties should expect at least four (4) weeks for completion of a requested transcript.

Before the taking, 60 Lowell Road consisted of 0.698 acres of land plus or minus with a multi-family dwelling and a single bay "auto service garage" and 64 Lowell Road consisted of 0.504 acres of land plus or minus with a commercial "auto repair garage", single family house, and a two-bay garage to the rear of the single family house. After the taking, the Properties' acreage and improvements remain the same but the Properties are subject to the easements described above.

Parties' Arguments

At the hearing, the Town argued the total damages were $6,038 based on an appraisal performed by Mr. Peter A. Knight, Director-Commercial Division of The Stanhope Group LLC ("Stanhope Appraisal") (Condemnor Exhibit A) who valued the Properties as of August 1, 2007,

8½ months prior to the date of taking. Mr. Knight was not requested by the Condemnor to update his values to the date of taking.

Mr. Knight noted the Properties have been used as an assemblage for many years, with the auto repair garage use at the front of 64 Lowell Road covering portions of both lots. (Condemnor Exhibit A at page 23). Two highest and best use scenarios were considered, but Mr. Knight ultimately determined the highest and best use of the Properties to be their current use as "mixed-use commercial garages and residential house and apartments" based on a determination that the lots, with improvements, have more value than the lots as vacant, either individually or as an assemblage. Based on a cursory sales analysis for the residential properties and auto service garage and an estimated rent for the auto repair garage, he determined an overall indicated value of the Properties before the taking to be $895,000 ($375,000 for 60 Lowell Road and $520,000 for 64 Lowell Road). Mr. Knight determined the utility of the Properties after the taking to be generally similar to the before situation and thus, found the highest and best use of the Properties to be the same as in the before situation. He did note the parking at the front of the auto repair garage building on 64 Lowell Road would be reduced from approximately four car spaces to two car spaces but his estimate of damages did not include any diminution in value for the loss of two car spaces. Further, Mr. Knight determined the permanent sidewalk easements and the temporary sidewalk construction easements, which he indicated were for a period of "three months" and only expected to "take a single day" to construct, would not adversely affect the value of the Properties. Because the Condemnees would no longer own the full fee simple bundle of rights to the portions of the Properties affected by the easements, Mr. Knight arrived at an opinion of the pro rata share of the underlying value of the subject lots based on a land sales comparison approach. He selected his land comparables from the Properties' market area which

he considered to be along Lowell Road in their vicinity. Based on the four land comparables (three sales and one pending sale), adjusted only for market conditions at 7.5% per year to the date of his August 1, 2007 value estimate, Mr. Knight determined an estimated land value for 60 Lowell Road of $225,000 or $7.40 per square foot and an estimated land value for 64 Lowell Road of $250,000 or $11.39 per square foot. In Mr. Knight's opinion, the permanent sidewalk easement on 60 Lowell Street created no diminution in value as a result of the taking because the Condemnees will maintain full utility of the lot for the multi-family dwelling and auto service garage use, therefore, he assigned it no value. The temporary construction easement for 60 Lowell Road was valued at $224 based on that lot being encumbered from August 1, 2007 to October 30, 2007[1] (a total of 92 days). Mr. Knight determined the permanent sidewalk easement at 64 Lowell Road and the construction of the sidewalk reduces the available number of parking spaces in the location of the easement but indicated there was still adequate parking at other locations of that lot. Mr. Knight did find a loss of utility and convenience in the area of the taking and estimated the damages as a result of the permanent sidewalk easement to be $5,592. He further determined damages in the amount of $222 for the temporary sidewalk construction easement which he indicated would encumber the lot from August 1, 2007 until October 30,2007[2] (a total of 92 days).

Thus, based on the Stanhope Appraisal and Mr. Knight's testimony, the total estimated value of the permanent sidewalk easements and temporary sidewalk construction easements is as follows:

60 Lowell Road – Permanent Sidewalk Easement	$ 0
60 Lowell Road – Temporary Sidewalk Construction Easement	224

[1] The board notes the date of taking of the Properties was April 14, 2008 thus the dates utilized for the temporary construction easement would not have occurred at the time noted in the Stanhope Appraisal.
[2] Id.

64 Lowell Road – Permanent Sidewalk Easement	5,592
64 Lowell Road – Temporary Sidewalk Construction Easement	222
Total damages estimated by Stanhope Appraisal	**$6,038**

Town Planner John Cashell testified access to the Properties was not impeded by the taking of the easements and the construction of a customized construction sidewalk flush with the roadway was an accommodation made by the Town in order that there would be no change to the useable area available for vehicles to back out of the auto repair garage. He further testified the taking was only an easement, not a fee taking, and did not affect the setback requirements of the Properties' pre-existing non-conforming use. Mr. Cashell also testified (and exhibits were submitted in support of his testimony) to the fact that used car sales were not an allowed use of the Properties. The board need not discuss this testimony as the Condemnees' estimate of value was not based on such a use.

Condemnee Jordan submitted an aerial photograph (Condemnee Exhibit No. 2) which depicted the Properties and the access as it existed in the before situation. Condemnee Exhibit No. 1 was submitted which included a series of photographs of the construction of the sidewalk depicting the impact on the Properties in the after situation when attempting to maneuver box trucks, pick-up trucks and compact cars out of the auto repair garage. Mr. Jordan asserted most of his work is fleet truck repairs and, as a result of the taking, he could no longer utilize the auto repair garage on 64 Lowell Road to repair the box trucks and was now required to move the truck bay to the auto service garage on 60 Lowell Road. He indicated the installation of the sidewalk had created a safety issue which impaired the access to maneuver the trucks out of the garage as was done in the before situation. See February 26, 2008 board of selectmen meeting where significant discussion took place regarding his concerns (Condemnee Exhibit No. 3). By doing so, the auto service garage on 60 Lowell Road would need to be modified to accommodate

the height of the trucks. See Condemnee Exhibit No. 4 (a letter of intent dated July 18, 2008 from P.M. MacKay Group (MacKay quote) estimating the total cost of demolition and relocation and construction of $26,263 and a revised letter of intent dated October 5, 2009 estimating the total cost to be $28,889).

Board's Rulings

For the reasons outlined below, the board finds total damages in the amount of $20,000.

As in all eminent domain cases, key to the determination of damages is an estimate of market value before and after the date of taking premised upon a determination of the highest and best use of the property in both instances and analysis of pertinent market data. See Lebanon Housing Auth. v. National Bank, 113 N.H. 73, 77 (1973).

The board finds the highest and best use of the Property is as improved as an assemblage. The grandfathered mixed-use commercial garages and residential housing and the rental income derived from such uses produces a parcel that has a higher utility and value than if considered as separate economic units. The challenge then is to estimate what affect the permanent sidewalk easements and temporary sidewalk construction easements had on the utility and thus the value of this highest and best use of the Properties. In condemnation proceedings, "[e]very easement acquisition is a partial acquisition leaving a remainder estate in the owner. This is true even where the entire ownership is impressed with the easement: because an easement is less than the fee, there is a remainder estate in the land within the easement. Uniform Appraisal Standards for Federal Land Acquisitions, 63 (2000), commonly known as the "Yellow Book," drafted by the Interagency Land Acquisition Conference and published by the Appraisal Institute. Courts have held the measure of damages as a result of a partial taking is "the difference between the value of the whole parcel before the acquisition and the value of the remainder of the acquisition." Id.

The board finds several deficiencies in the Stanhope Appraisal and therefore finds the Condemnor did not carry its burden in this case. The Stanhope Appraisal had an effective date of value of August 1, 2007. Mr. Knight was not asked to update the value to the date of taking which was April 14, 2008. At the very least, the values would need to be time adjusted to the date of taking, some 8½ months later. Mr. Knight's "mathematical allocation" of the part taken is also inconsistent. While the board understands the pro rata allocation calculations intend to estimate just compensation when the before and after values indicate no affect of the taking, it should be reflective of those rights that are impacted or lost by the taking. Real estate rights include all tangible and intangible rights associated with real property (see RSA 21:21). While such rights vary from property to property, these ownership rights are often viewed as the "bundle of rights." Ownership rights include the right to use real estate, to sell it, to lease it, to access it, to exclude others, to give it away or to choose to exercise all or none of these rights. The bundle of rights is often compared to a bundle of sticks with each stick representing a distinct and separate right or interest. IAAO, Appraisal of Real Estate 7 (11th ed. 1996). Mr. Knight found no difference in the before and after values of the Properties yet, when calculating a pro rata, allotted no damages for the property right taken (the permanent sidewalk easement) at 60 Lowell Road. With respect to the temporary sidewalk construction easements, Mr. Knight's calculations were not based on the actual property rights taken, which terminate four (4) years from the Declaration, but made his calculations based on the Properties being encumbered from August 1, 2007 to October 30, 2007 (a total of 92 days), a time period which obviously is incorrect given the Declaration had not been filed until April 14, 2008. Further, whether or not the actual construction took three months or three years is irrelevant as the Declaration encumbered those properties rights for a period of up to four (4) years. The Condemnees are

entitled to be compensated for the rights taken regardless of how long the construction took. Mr. Knight did find a loss of utility and convenience in the area of the taking at 64 Lowell Road and estimated the damages as a result of the permanent sidewalk easement but assigned no value for the loss of two parking spaces. However, the board finds this estimate is lacking because it is based on land sales (not improved properties), does not consider the loss of two parking spaces and, as stated above, is not reflective of the date of taking.

The board disagrees with Mr. Knight's assumptions and representation as to the extent of damages resulting from the permanent and temporary easements. While it is difficult to unequivocally determine whether the egress from the garage on 64 Lowell Road as shown in various photographs (see Condemnor Exhibit A, Condemnees Exhibits 1 and 2) was facilitated by encroachment into the existing state right-of-way, the board finds the impact of the easements is more than that argued by the Condemnor and would have more properly been determined through a before and after analysis as improved based on the Properties' highest and best use as an assemblage. Lacking this analysis, the board, in making its findings, considered and weighed all of the evidence, and applied its "experience, technical competence and specialized knowledge" to the evidence presented at the hearing. See RSA 71-B:1; and former RSA 541-A:18, V(b), now RSA 541-A:33, VI, quoted in Appeal of City of Nashua, 138 N.H. 261, 265 (1994) (the board has the ability, recognized in the statutes, to utilize its "experience, technical competence and specialized knowledge in evaluating the evidence before it"). Based on all the evidence presented at the hearing and its view of the Properties, the board finds the easements impacted the utility of the auto repair garage including the loss of parking spaces resulting in the necessity to relocate the truck service to the auto service garage on 60 Lowell Road thus

requiring construction enlarging an overhead door, along with other modifications, to accommodate the trucks to maximize the use of the Properties.

Even if the board concurred with the Stanhope Appraisal, which it does not, a time adjustment would need to be applied to reflect values as of the date of taking, the square footage for the taking of the permanent sidewalk easement at 60 Lowell Road would need to be calculated and the term for the temporary sidewalk construction easements would have to be extended to the life of the easements (four years). These adjustments would equate to a value of approximately $15,000. This adjusted value does not reflect a loss of parking from which the board received no evidence of value.

While the board finds the Condemnor did not carry its burden in this case, it was also not convinced by Condemnee Jordan's estimate of damages based on the MacKay quote "cost to cure" of demolition and relocation and restructuring the garage at 60 Lowell Road in the amount of $26,263 as of July 18, 2008. In making findings where there is conflicting evidence, the board must determine for itself the weight to be given each piece of evidence because "judgment is the touchstone." See, e.g., State of New Hampshire v. Frederick, BTLA Docket No. 23317-07ED (December 3, 2008); cf. Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 484 (1984), quoting from New England Power Co. v. Littleton, 114 N.H. 594, 599 (1974), and Paras v. Portsmouth, 115 N.H. 63, 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994). The board finds some of the modifications in the MacKay quote may overstate the cost to cure the damages affected by the taking. Some of these modifications would ultimately be required regardless of the taking as increasing business and the size of vehicles get larger which would necessitate modifications being made for advanced use of the auto service garage.

Therefore, the board, based on its analysis of all of the evidence, has determined a reasonable determination of the just compensation due the Condemnees is in the amount of $20,000.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Hillsborough 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 Condemnees are the prevailing parties 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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Jay L. Hodes, Esq., HageHodes, PA, 440 Hanover Street, Manchester, NH 03104, counsel for the Condemnor; J&D Realty Corporation, 10 County Road, Hudson, NH 03051, Donald R. Dumont, 10 County Road, Hudson, NH 03051 and William W. Jordan, 64 Lowell Road, Hudson, NH 03051, Condemnees.

Date: December 15, 2009

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Anne M. Stelmach, Clerk