

State of New Hampshire

v.

Alfred D. Wallace, Henry P. Wallace and Harold M. Wallace

Docket No.: 23361-08ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the laying out or alteration of a limited access highway pursuant to authority conferred on the “Condemnor”, the State of New Hampshire, by various statutes, including RSA 230:45. A Declaration of Taking (the “Declaration”) was filed with the board on April 16, 2008 and served on the “Condemnees” describing the property rights taken as 3.13 acres of vacant land in fee simple (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 to 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 October 20, 2009 and held the just compensation hearing at its offices on October 21, 2009. The Condemnor was represented by Kevin H. O’Neill, Esq. and the Condemnees were represented by Michael J. Kenison, Esq.

The board's staff recorded the hearing. Any requests for transcripts should be directed to the board's clerk. Parties should expect at least four (4) weeks for completion of a requested transcript.

Before the taking, the Property consisted of 26 acres of land with 1,150 feet of frontage located on the east side of Perkins Road in Londonderry, New Hampshire (Condemnor Exhibit No. 1 at p. 33). The Property is improved with a single family residence and some outbuildings located near Perkins Road. The land area is a mix of fields near Perkins Road and wooded areas as it approaches Interstate 93, its most easterly boundary. The Property is generally rectangular in shape and slopes downward from Perkins Road into the wooded area, rises slightly in the woods and then continues sloping gradually downward to the 1,093 feet of frontage along the interstate highway.

After the taking, the Property contained 22.87 acres with the same improvements. The area taken (3.13 acres) was located along the interstate highway on the Property's easterly boundary and reduced the Property's depth by an average of 140 feet (Condemnor Exhibit No.1 at p. 59).

Parties Arguments

The Condemnor submitted a Self-Contained Appraisal Report prepared by Leon E. Martineau of Martineau Appraisal Company, LLC. Mr. Martineau estimated the amount of damages as a result of the taking to be \$56,000 based on a market value of the Property before the taking of \$447,000 and a market value of the Property after the taking of \$391,000 (Condemnor Exhibit No.1, pp. 58 and 73).

The Condemnees submitted a Summary Appraisal Report prepared by John K. Rizzi of Souhegan Valley Evaluation, LLC. Mr. Rizzi estimated the just compensation due the

Condemnees to be \$85,000. Mr. Rizzi estimated the Property's before value to be \$662,500 and its after value to be \$579,555 resulting in a difference of \$82,945 which he rounded to \$85,000 (Condemnee Exhibit A, p. 41).

Board's Rulings

Based on the evidence, testimony and the board's experience and knowledge (see RSA 541-A:33, VI), just compensation is determined to be \$75,000.

Both Mr. Martineau and Mr. Rizzi followed the guidelines for valuing partial acquisitions contained in the Uniform Appraisal Standards for Federal Land Acquisitions (the "UASFLA") sometimes referred to as "The Yellow Book." Each appraiser determined the "whole" Property could be separated into the "larger parcel" containing 25 acres of vacant land suitable for residential development and the "smaller parcel" containing the house and outbuildings on one acre. They made this determination because: 1) there was a unity of ownership in all parts of the whole property; and 2) there was a unity of highest and best use for all parts of the whole (UASFLA, p. 47). Similarly, each appraiser determined the price per acre was the appropriate unit of comparison to be used in valuing the area taken. Further, and appropriately, both appraisers used land sales of larger tracts of land that were suitable for residential development in determining the unit value to be applied to the part acquired rather than valuing the area taken as a separate parcel.

Mr. Martineau performed a typical "before and after" appraisal. This methodology is the preferred valuation procedure in estimating the damages involved in the condemnation of real property. See, e.g., Daly v. State, 150 N.H. 277, 280 (2003); and Lebanon Housing Authority v. National Bank, 113 N.H. 73, 75-76 (1973). He determined the total damages as a result of the taking to be \$56,000 based on a unit value of \$17,885 per acre. He applied this unit value to

determine the Property's \$447,000 value "before" the taking and its \$391,000 value "after" the taking (Condemnor Exhibit No. 1 at p. 74).

Mr. Rizzi estimated the value of the land taken and the just compensation due the Condemnees to be \$85,000 based on a unit value of \$26,500 per acre and rounding the difference between the before and after values contained in his appraisal (Condemnee Exhibit A at p. 41).

Both appraisers utilized the sales comparison approach to value the Property and there were two comparable sales which were common to both appraisals. The common sale properties were located on Kelley Road in Londonderry, New Hampshire (referred to as Sale #2 in the Rizzi appraisal and Sale #1 in the Martineau appraisal) and a sale on Stonehenge Road in Londonderry, New Hampshire (referred to as Sale #3 in the Rizzi appraisal and Sale #4 in the Martineau appraisal). The Stonehenge Road sale contained a single family residence on approximately 65 acres. Further, it was located in a neighborhood which included the abutting Wagon Wheel Mobile Home Park as well as several six-family dwellings across the street. According to the appraisers and based on discussions they had with the broker involved with the sale, the value of the dwelling with two acres was about \$375,000 (Condemnor Exhibit No. 1, appendix, p. 21 and Condemnee Exhibit A, Part IV at Land Sale 3). The value of the improvements and the two acres was deducted from the transfer price by both appraisers in order to get the residual value of the approximately 63 acres of remaining, vacant land. Although this methodology is frequently used by appraisers to estimate the residual value of excess land associated with an improved property, the board did not receive any testimony or evidence as to whether either of the appraisers performed any independent research or analysis to determine the accuracy of the realtor's estimate. Given the subjective nature of the realtor's estimate and the lack of additional information regarding the Stonehenge Road sale, the board did not rely on that

sale and focused and gave most weight to the Kelley Road sale. Both appraisers gave this sale the most weight in their analyses as well. (The before and after values determined by Mr. Martineau are the exact value indications provided by the Kelley Road sale in Condemnor Exhibit No. 1 at pp. 54 & 69. Similarly, Mr. Rizzi states “Sale No. 2 ... is given the most weight.” Sale No. 2 on p. 40 of Condemnee Exhibit A is the Kelley Road sale.) Further, the board finds the most probable purchasers/developers of the Property or the Kelley Road comparable would be developers of smaller subdivisions with more short term sell out periods. The smaller developer would be interested in the Property for several reasons. It has a substantial amount of road frontage which could be readily subdivided into multiple residential lots and it would require a smaller investment to recoup the purchase price. In contrast, someone who would be interested in purchasing the substantially larger 63 acres involved in the Stonehenge Road comparable sale would be a developer/investor who could secure more financing and be better able to construct and carry the development until it was completely built out.

After a thorough review of the testimony and evidence, the board finds the best estimate of the damages resulting from the taking, based on the Kelley Road comparable sale, is somewhere between the per acre values determined by each of the appraisers (\$17,875 and \$26,762), but more closely towards the upper end of the range. Mr. Martineau testified he may have been “a little light” in his adjustment for “access” to the Kelley Road sale. Further, the board finds the -50% “land area” factor adjustment applied to the Kelley Road comparable sale by Mr. Martineau overstates the impact of the difference in area between this comparable sale and the larger parcel.

While ideally the board would desire to quantify its determination of damages through a specific unit value finding and/or some further calculations, in this case the board's award of just compensation is based on its collective experience and a thorough review of each appraiser's analysis of the Kelley Road sale. The relatively small difference between the two appraisals (less than \$30,000) is reflective of the subjective opinions of two qualified appraisers. Without more definitive evidence to support more specific adjustments, the board finds a \$75,000 determination of just compensation from the taking is proper (reflective of a per acre value close to \$24,000).

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 Condemnees are the prevailing party 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

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: Kevin H. O'Neill, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Michael J. Kenison, Esq., McLane, Graf, Raulerson & Middleton, P.O. Box 326, 900 Elm Street, Manchester, NH 03105-0326, counsel for the Condemnees.

Date: 11/25/09

Anne M. Stelmach, Clerk