

State of New Hampshire

v.

**The Anup S. Sandhu Revocable Trust of 1997, Anup S. Sandhu, Trustee,
The Jaswinder K. Sandhu Revocable Trust of 1997, Jaswinder K. Sandhu, Trustee and
Sandhu Properties, Inc.**

Docket No.: 23364-08ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the Manchester Airport Access Road pursuant to authority conferred on the “Condemnor,” the State of New Hampshire (the “State”), by various statutes, including RSA 230:45. A Declaration of Taking (“Declaration”) was filed with the board on April 30, 2008, describing the property rights taken as a fee taking of 0.58 acres, a temporary slope easement of 2,300 square feet, a temporary drainage easement of 600 square feet and a limitation of access to one point (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 September 15, 2009 and held the just compensation hearing at its offices on September 15 and 16, 2009. The Condemnor was represented by Lynmarie C. Cusack, Esq. and the Condemnees were represented by Nicholas J. Lazos, Esq.

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

Before the taking, the Property consisted of 2.18 acres of undeveloped land with approximately 378 feet of frontage on the west side of South River Road (Rt. 3). After the taking, the Property consisted of 1.60 acres with one legal point of access and a similar amount of frontage on Rt. 3 as in the before situation. The remaining acreage is encumbered with 2,300 square feet of temporary slope easements and a 600 square foot drainage easement, both set to expire either by December 31, 2019 or one year after the completion of the construction project, whichever date comes first.

Board's Rulings

For the reasons outlined below, the board finds total damages of \$330,000 based on a before market value estimate of \$550,000 and an after market value estimate of \$220,000.

At hearing, the State argued the damages were \$205,000 based on an appraisal performed by Mr. Jeffrey W. Leidinger of Leidinger Appraisals ("Leidinger Updated Appraisal") (Condemnor Exhibit No. 1) which valued the Property before the April 30, 2008 date of taking at \$350,000 and \$145,000 after the taking. The State argued the board should place little weight on an earlier appraisal performed by Mr. Leidinger nearly a year earlier (May 23, 2007) which estimated a before market value of \$715,000 and an after value of \$525,000 ("Leidinger Initial Appraisal") (Condemnee Exhibit A). The State argued the Leidinger Updated Appraisal was

more accurate as it was based upon subsequent engineering plans performed by TF Moran, Inc. on behalf of the Condemnees. The subsequent plans identified the potential buildable, usable, pavement and septic areas in both the before and after situations based on certain assumptions and the application of the provisions of the Town of Bedford zoning ordinance.

The Condemnees, while not performing an appraisal of their own, submitted a review of the Leidinger Initial Appraisal performed by Mr. John M. Crafts of Crafts Appraisal Associates, Ltd. (“Crafts Review”). The Crafts Review concurred with the Leidinger Initial Appraisal’s before value of \$715,000 and estimated an after value of \$285,000 by reducing the before value by 60% for the site’s diminished developability due to the reduced buildable area in the after situation.

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 an analysis of pertinent market data. See Lebanon Housing Auth. v. National Bank, 113 N.H. 73, 77 (1973).

In the before situation, the parties agreed the highest and best use of the Property was for present or future commercial development. There was a divergent opinion, however, of the before market value of the Property with the State relying on the Leidinger Updated Appraisal before market value of \$350,000 and the Condemnees relying on the Leidinger Initial Appraisal before market value of \$715,000.

To estimate a before value, the board gives most weight to the Leidinger Updated Appraisal comparables #1 and #4 and less weight to comparables #2 and #3 for the following reasons. Both comparables #1 and #4 are land only sales on the west side of Rt. 3A with similar development potential and utility as the Property. Comparable #4, while located in Merrimack,

is only two properties away from the Property and, thus, the April 2007 sale price of \$650,000 was likely influenced by the then pending Manchester Airport Access Road and interchange project adjacent to the Property. Comparable #4 also has a slightly larger buildable area and, thus, in the before situation, offers more flexibility as to the configuration and type of commercial development that could occur on it. Comparable #1 is approximately 2 acres in size of mostly open land with adequate access and exposure to Rt. 3. This property was purchased in March 2006 for \$550,000 as an investment for long term lease or “build to suit” potential. Comparable #1 in many ways appears to have similar development potential as the Property.

The board gives little weight to comparables #2 and #3 because they are both improved properties and the evidence was either unclear or conflicting as to the motivations of the purchasers. Comparable #2, at the time of the sale, was improved with an older, single family residence that was purchased by the owner of the two adjoining properties for future commercial redevelopment. It is a question as to how much, if any, of the existing improvements contributed to the sale price and whether there was any interim value to the residence. (On the view, the board observed repairs were occurring to the residence). On comparable #3, there was conflicting testimony by Mr. Leidinger and Mr. Crafts on whether the sizable improvements at the time of the sale contributed value (subsequent to the sale the building was substantially renovated) or whether comparable #3 was purchased with the optional plan to either raze or renovate the existing structure and, thus, should be viewed as a land only sale.

Consequently, adjusting the sale price of comparable #4 for the “effect of the project”¹ and its slightly superior utility and giving significant weight to comparable #1, the board

¹ It is an accepted principle that the “effect of the project” not be considered in the valuation process of determining just compensation. Daley v. State of New Hampshire, 150 N.H. 277, 280 (2003).

estimates the market value of the Property before the taking was \$550,000. The board's analysis and comparison is on a "lot to lot" (or "whole to whole") basis considering the sale prices of the two similarly developable properties of comparables #1 and #4. While the board does not out of hand reject either the Leidinger Initial Appraisal or the Leidinger Updated Appraisal unit of comparisons of either total acreage or buildable square foot area, the board finds comparables #1 and #4 provide similar development potential and, thus, a "lot to lot" comparison is appropriate, eliminating any subjectivity involved in the adjustments for either lot size or lot utility.

The board finds the evidence does not support either the higher \$715,000 before value estimated in the Leidinger Initial Appraisal and accepted by Mr. Crafts in the Crafts Review or the lower Leidinger's Updated Appraisal before value of \$325,000. As noted, the sales of comparables #1 and #4 are the best benchmarks presented of similarly developable land in the general proximity to the Property.

To determine the amount of damages, the Property's market value after the taking must be estimated. In arriving at an after value, the board gave significant weight to the descriptive effects of the taking testified to by Ms. Deborah L. Brewster, P.E., civil engineer of TF Moran, Inc. Even if the building height assumptions of a potential building made by Mr. Leidinger are assumed to be reasonable (see Leidinger Updated Appraisal, page 16), the buildable envelope allowed by the Town of Bedford's Zoning Ordinance is significantly reduced to approximately 8,150 square feet. More importantly, however, as Ms. Brewster testified, the area available for on-site septic, paving and driveways to accommodate commercial development are severely impacted and would require a waiver from the New Hampshire Department of Environmental Services of the septic setbacks and a variance from the Bedford Zoning Board of Adjustment for

a portion of the building being outside the building envelope and for a substantially reduced number of parking spaces.

While the impacts of the taking noted above are significant, it is difficult to determine with any certainty, until further plans and permits are sought, the definitive affect of the taking on the Property's value. Nonetheless, the board notes both the Leidinger Updated Appraisal after value and the Crafts Review after value are approximately 40% of their before value estimates. Lacking any more definitive estimate of the impact of the taking, the board finds the 60% reduction in value as a result of the taking is a reasonable estimate by which to reduce the before value.² The board recognizes this is not a true before and after valuation, but given the difficulty of finding sales of small developable envelopes that are similarly impacted by the Town of Bedford land use regulations, the judgment of two qualified appraisers is the best evidence the board has to adjust its "lot to lot" before taking value finding to estimate an after value.

Consequently, the board finds the before market value to be \$550,000, the after value to be \$220,000 and the damages as a result of the taking to be \$330,000.

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

² The Leidinger Initial Appraisal had only an approximately 26% reduction in value between the before and after value due to the results of the taking. The board finds such a relatively minimal reduction in value is unrealistic given the significant reduction in the various usable areas of the lot as a result of the taking and, thus, the board gives little weight to the Leidinger Initial Appraisal adjustments and after value.

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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Lynmarie C. Cusack, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, counsel for the Condemnor; and Nicholas J. Lazos, Esq., Stebbins Lazos & Van Der Beken, 66 Hanover St.- Suite 301, Manchester, NH 03101, counsel for the Condemnees.

Date: 10/23/09

Anne M. Stelmach, Clerk