

State of New Hampshire

v.

Evans Family Limited Partnership

Docket No.: 23367-08ED

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 May 7, 2008, describing the property rights taken as a fee simple taking of 4.58 acres (the “Part Taken”) from a parcel of 207.554 acres (the “Property”) in the Town of Londonderry, New Hampshire. 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 “Condemnee.” See Tax 210.12 and cases cited therein.

The board viewed the Property and held the just compensation hearing at the Londonderry Town Hall on October 20, 2009. The Condemnor was represented by Edith L. Pacillo, Esq. of the State of New Hampshire Department of Justice and the Condemnee was represented by Charlie Evans, a general partner.

Ms. Tina L. Hayes of Avicore Reporting & Video Conferencing, 25 Lowell Street - #405, Manchester, NH 03101, (888) 212-2072 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.

Board's Rulings

For the reasons described below, the board finds the damages from the taking did not exceed the \$20,000 deposited by the Condemnor with the board.

The board will begin by describing the Property and the Part Taken. The Property consists of land in two zoning districts. Eighteen (18) acres are in the Town of Londonderry's agricultural/residential zone and the remaining land, including the Part Taken, is in an industrial zone; the Part Taken is vacant land fronting Interstate 93 ("I-93"). See the "Tichko Appraisal" (Condemnor Exhibit No. 1), a self-contained appraisal report prepared by Ms. Jessie C. Tichko, a certified general appraiser employed by the New Hampshire Department of Transportation, Bureau of Right-of-Way, at p. 2. The 18 acres in the agricultural/residential zone has a single-family residence "on a carved out one acre lot" and there is also a "cell tower lease" on land at the northern portion of the Property that is unaffected by the taking. Id. The Part Taken is situated in the large amount of undeveloped land on the Property (189.55 acres before the taking) available for "future industrial development, as demand dictates," id. at p. 36; the taking reduced the amount of this undeveloped land by less than 2.5% in total (to 184.97 acres). Id. at p. 2.

The location and topography of the Property and the Part Taken is of some importance. The Part Taken has frontage along I-93, close to Exit 5, but is a considerable distance away from any existing road access; development will also entail solving some planning and permitting issues pertaining to adjacent wetlands; and most of the land in the Part Taken is also encumbered

by a Public Service of New Hampshire power line easement. Id. at p. 22; see also Condemnor Exhibit No. 5. The board finds these factors, along with the large amount of adjacent land on the Property available for future industrial development, diminishes the value of the Part Taken from what it would be if it were a free standing site with more utility and without these value-detracting factors.

The Tichko Appraisal employed the sales comparison approach and concluded the “before” and “after” value of the Property was \$7,150,000, resulting in an indication of “\$-0-” damages. Id., p. 3. For the industrial land, (described as “Economic Unit #2,” in the Tichko Appraisal), Ms. Tichko found three comparables on which to base her value estimate, id., pp. 48-49, but concluded she could find “[n]o measurable adverse impacts” due to the relatively small amount of land taken (less than 2.5% of the undeveloped land area) and other factors, including the “designated wetland areas, open water and streams encompassing the terrain,” the need for a “high intensity soil study” before subdivision can take place, and issues pertaining to both potential means of access to the Part Taken (Auburn Road and Gerry Road). Id. at p. 66.

The Condemnee’s representative, Mr. Evans, testified at the hearing, but did not submit an appraisal or any other evidence to quantify the higher damages claimed. Instead, Mr. Evans argued the Condemnor’s conclusion of no measurable damages is incorrect since the Tichko Appraisal used a value of \$25,000 per acre and this estimate should be multiplied by the acreage in the Part Taken (4.58 acres) to arrive at a higher just compensation award (\$114,500).

The Condemnee relied on several plans (described as “Concept A” and “Concept B,” as shown in Condemnee Exhibits A and B). These plans are also described in a letter from an engineer (Condemnee Exhibit C) which comments on their feasibility. The Tichko Appraisal notes none were “drawn and submitted” to the Condemnor until “at least 6 months after the

original appraisal date,” and the “conceptual development plan” was developed for the “owner’s benefit” and has not been presented to the Town of Londonderry. Id. at p. 66.

In considering the development potential of vacant land, factors that are too “conjectural and speculative” in nature cannot be a basis for a damage award. See Uniform Appraisal Standards for Federal Land Acquisitions (2000), commonly known as the “Yellow Book,” drafted by the Interagency Land Acquisition Conference and published by the Appraisal Institute, at p. 45. The board finds the reasoning presented by the Condemnee and reflected in the exhibits presented by its representative regarding the proposed means of access and the number of developable industrial lots in the before and after situation is too conjectural and speculative to be relied upon as the basis for a damage award.

It is also misleading to conclude or argue, as the Condemnee’s representative did at the hearing, that a value estimate based on an “average” value (\$25,000 per acre) applied to hundreds of acres in the Tichko Appraisal is indicative of the value of the Part Taken (4.58 acres). This is especially true because the Part Taken does not have a high degree of utility or primary value, but only has limited value as ancillary or “rear” land useable, if at all, only to support development on other areas of the Property.

On the other hand, the board is unable to place much weight on the valuation approach employed by the Condemnor’s appraiser. Her sale comparables were much smaller in size and the adjustments required were quite large, diminishing their reliability as comparables. These comparables were subdivided industrial lots with road improvements already in place, compared to the Property, which is still undeveloped, has considerable wetland access issues and lacks internal road improvements. Based on the descriptions provided in the Tichko Appraisal, the comparables appear to contain a higher percentage of useable land and no access issues such as

exist on the Property, including the Part Taken. All told, the Property has significant wetlands and will likely require substantial internal road improvements involving wetland crossings that will, at a minimum, require detailed engineering and extensive permitting to allow for future development, if any, of the Part Taken for it to be used for industrial development.

Ideally, a reasonable estimate of the damages for land of this type should involve consideration of the incremental value of the Part Taken to the Property as a whole. Here, the Part Taken is a relatively small portion of a large parcel of undeveloped industrial land subject to significant topography and access constraints, as well as being encumbered by a power line easement. In this instance, the board finds no evidence to support a measurable incremental value beyond a nominal amount. While Ms. Tichko found no measurable difference in the before and after values, another way to recognize the actual value of the Part Taken might be to apply market information from the “Wetland Sales” considered by Ms. Tichko and shown in Condemnor Exhibit No. 7. Analysis of this exhibit leads the board to find the value of the Part Taken (a per acre value in the \$4,000 to \$5,000 range) is no more than the amount (\$20,000) deposited by the Condemnor.

Based on these considerations, the board finds the Condemnor met its burden of proving the damages as a result of the taking did not exceed \$20,000.

If either party seeks to appeal this \$20,000 damage award, 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. The board's award does not exceed the damage deposit and therefore no statutory interest is due. See RSA 336:1.

If neither party appeals the damage 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 does not exceed the Condemnor's 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

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: Edith L. Pacillo, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and John Robert Evans, Jr., Reg. Agent, Evans Family Limited Partnership, 14 Old Derry Road, Londonderry, NH 03055, Condemnee.

Date: 12/9/09

Anne M. Stelmach, Clerk