

**City of Portsmouth**

v.

**Stella B. Stokel 1993 Trust, Stella B. Stokel, Trustee; Nancy A. Stokel 1993 Trust, Nancy A. Stokel, Trustee; Patricia F. Stokel 1993 Trust, Patricia F. Stokel, Trustee; and Phillip James Stokel**

**Docket No.: 23382-08ED**

**REPORT OF THE BOARD**

This matter arises as a result of a RSA 498-A:5 acquisition of property rights taken for highway improvements<sup>1</sup> to Route 33, a/k/a Greenland Road, pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 231:2 and RSA ch. 498-A. A Declaration of Taking (“Declaration”) was filed with the board on June 18, 2008, describing the property rights taken as the extinguishment of a right of way across property of The Nature Conservancy (the “Property”). See Declaration with attached plans.

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. Pursuant to RSA 498-A:4 III(b)(4), the Condemnees have elected to have the effective date of valuation (the “Taking”)

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<sup>1</sup> Including the “replacement of a substantially deteriorated railroad bridge, changes to the approaches to the bridge to improve safety, and signalization of two intersections.” Declaration of Taking, p. 1.

be August 20, 2007, the date the City Council of Portsmouth adopted a resolution indicating its finding of necessity and public use. (See Declaration, ¶3.)

The board commenced the hearing on April 3, 2013 in the Portsmouth City Hall, Portsmouth, N.H., viewed the Property's location and comparable properties and continued the hearing on April 4, 2013<sup>2</sup> at its offices in Concord. The Condemnor was represented by Robert P. Sullivan, Esq. and Suzanne M. Woodland, Esq., and the Condemnees were represented by Roy S. McCandless, Esq.

The hearing was digitally recorded by the board pursuant to RSA 498-A:20. Any requests for transcripts should be ordered directly through the clerk of the board. Parties should expect at least four (4) weeks for completion of a requested transcript.

The Property is a single-family residence on approximately 107 acres located on Peverly Hill Road in Portsmouth, New Hampshire. The Property interest required by the Condemnor was depicted in the Declaration (pp. 2-3) and the attached recorded plan as follows:

Taking and extinguishing a right of way (also referred to as an access way or driveway) across property of The Nature Conservancy south of Greenland Road (also known as Route 33) along the boundary of Calvary Cemetery as such access way (driveway) is reserved in a deed from the Griffin Family Corporation to The Nature Conservancy recorded June 20, 2006, at the Rockingham County Registry of Deeds, Book 4670, Page 2095. See also Book 2987, Page 2914 (Stokel deed). The extinguishment of this access way (driveway) is reflected on a plan entitled 'Right of Way Easement Plan for the City of Portsmouth, NH, Greenland Road/Middle Road Portsmouth, NH' prepared by Vanasse Hangen Brustlin, Inc. dated September 28, 2007 revised April 28, 2008 and recorded as Plan D-35481 in the Rockingham County Registry of Deeds, see easement R-3 on the plan and note 6.

**Background:**

The Property consists of a 107.22-acre lot improved with a single-family residence with 665 feet of frontage on Peverly Hill Road in Portsmouth, New Hampshire. (See Condemnor

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<sup>2</sup> The parties were notified in July 2013 the Report would be delayed due to the unexpected medical leave of one of the sitting board members.

Exhibit No. 1, pp. 30-31 and Condemnee Exhibit A, Tab 13, p. 29.) Before the Taking, the Property had an easement across the abutting Nature Conservancy parcel to a 19-20 foot wide, 1,600 foot “farm road” which provided direct access to Route 33.

Historically, the Property and the abutting Nature Conservancy parcel were both owned by members of the Stokel family who operated their properties as a family owned and managed farm. The two abutting parcels shared the easement, which is the subject of the Taking and consisted of a “farm road” that provided access to the rear portions of the lots directly from Route 33. The abutting parcel was sold by members of the Stokel family in 1981 and, in 2006, to The Nature Conservancy.

The Property remains in the ownership of members of the Stokel family and, as of the Taking, members of the family continued to reside in the residence. The Property has not operated as a farm for many years, the farm road became somewhat overgrown and the driveway onto Route 33 was gated and barred. (See Condemnor Exhibit No. 1, p. 39, Exhibit No. 9 and Condemnee Exhibit A, Tab 6.)

After the Taking, the Property was physically unchanged. The Taking consisted of the extinguishment of the right of way across The Nature Conservancy parcel, which eliminated access to the farm road and the direct access to Route 33. The parties, as well as their respective expert witnesses, determined the highest and best use<sup>3</sup> of the Property both before and after the Taking to be for residential development. (See Condemnor Exhibit No. 1, pp. 47-48, Condemnee Exhibit A, Tab 13, p. 43-45 and Tab 12, p. 4.)

The principal difference between the parties is how the extinguishment of the easement impacts the future development potential of the Property.

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<sup>3</sup> “Highest and best use” is defined as “[t]he reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.” (The Appraisal Institute, The Appraisal of Real Estate, 11<sup>th</sup> ed., p. 50.)

The Condemnor presented extensive evidence that the Property's ability to be developed at its highest and best use remains unchanged by the Taking. The Condemnor relied upon the testimony and appraisal of Leon E. Martineau (the "Martineau Appraisal", Condemnor Exhibit No. 1), who estimated the market value of the Property, both before and after the Taking, at \$838,000. Mr. Martineau's opinion was a driveway permit would not be issued for the "unimproved farm access" and thus determined a "nominal" value for the Taking was reasonable. The Condemnor also called Steven F. Parkinson, Public Works Director and Frederick Taintor, Planning Director, both with the City of Portsmouth.

The Condemnees retained Robert I. Woodland, President of Woodland Design Group, who testified the Property, based on his review of "the City of Portsmouth's Zoning Ordinances, Subdivision Regulations and Site Plan Regulations in effect at the time of the taking" could be subdivided into a planned unit development ("PUD") with a maximum of 95 residential lots. (Condemnee Exhibit A, Tab 12, p. 3.) However, he submitted a "conservative" conceptual plan with 50 residential lots. This 50-lot conceptual plan would require construction of a loop road that exceeds the City of Portsmouth's 500' maximum length<sup>4</sup> of a cul-de-sac, and taking the safety concerns of the City and "spirit" of the subdivision rules into consideration, the plan includes a secondary "emergency" access to Route 33 in the location of the taking. (Id., p. 7 (unnumbered).)

It is further my opinion that a Residential Planned Unit Development of 50 units, could be adequately served by a single general access roadway provided that a second means of emergency vehicle access could also be provided. In my opinion, a single general development access road would provide more than adequate capacity to serve as the only means of general access to the project. There is no capacity constraint created by a single general access. In addition, it is my opinion that there is ample capacity at the

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<sup>4</sup> "The maximum length of a cul-de-sac shall generally be five hundred (500) feet unless otherwise approved by the Board." City of Portsmouth, Subdivision Rules and Regulations, p. 11 (Condemnee Exhibit A, Tab 22 and Condemnor Exhibit 11.)

intersection of the PUD general access road and Peverly Hill Road to accommodate the minor traffic increases associated with 50 residential units.

The easement through the Nature Conservancy which provides a second means of access to the parcel is a critical component of the PUD development alternative. This would allow extension of the roadway serving the development further into the interior of the parcel which would otherwise be limited to a maximum cul-de-sac length of 500 feet.

It is my opinion that the easement granting rights of vehicle passage to and from the Stokel property, over the abutting property of the Nature Conservancy (Tax Map 242, Lot 1) to Greenland Road could have been developed to provide a suitable second means of access to the property. At a minimum this easement could have provided suitable emergency vehicle access to the property. The taking of the easement which had provided the only second means of access to the Stokel property will significantly reduce the development potential of the Stokel land.

Further, it was Mr. Woodland's opinion that after the taking, the Property could only be developed with a maximum of seven (7) residential lots, as the City of Portsmouth would strictly adhere to its stated 500' maximum length of a cul-de-sac.

Based on a review of the City of Portsmouth Zoning Ordinances, Subdivision Regulations and Site Plan Regulations in effect at the time of the taking, it is my opinion that the highest and best use for the parcel after the taking would be to develop the parcel as either a standard residential subdivision consisting of six single family home lots, including two (2) frontage lots on Peverly Hill Road (one of which would be used to support the existing Stokel home), and 4 interior lots served by a new subdivision roadway, with a maximum cul-de-sac length of 500 feet, or a seven (7) unit PUD residential development.

Id., pp. 3-4.

The Condemnees relied upon an appraisal prepared by Wesley G. Reeks (the "Reeks Appraisal", Condemnee Exhibit A, Tab 13), which estimated a "before" market value of \$5,580,000, an "after" market value of \$890,000, indicating total damages of \$4,690,000. It was predicated on the following "extraordinary assumption:"<sup>5</sup>

The appraiser was presented with conceptual plans for PUD of the subject site before the taking (50 units) and after the taking (7 units). These conceptual plans appear to be

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<sup>5</sup> An extraordinary assumption is defined as "an assumption, directly related to a specific assignment, as of the effective date of the assignment results, which, if found to be false, could alter the appraiser's opinions or conclusions." Uniform Standards of Professional Appraisal Practice, p. U-3.

reasonable based on current zoning and PUD regulations; however, detailed interpretation of these regulations is beyond the expertise of the appraiser. This appraisal is made under the extraordinary assumption that both conceptual plans are viable development options within the context of the site before and after the takings and that both would have meet (sic) with Planning Board approval in their respective cases. Minor changes to the conceptual plans may or may not affect the value conclusions herein. Moreover, any change in the number of units permitted will alter the value conclusions in this report.

(Reeks Appraisal, p. 14.)

### **Board's Rulings**

The board finds the evidence presented supports a just compensation award of \$11,000.

Integral to the process of awarding just compensation is a determination of the market value of the Property before and after the taking. In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals of each party, applying the board's "experience, technical competence and specialized knowledge" to this evidence. 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.")

Further, 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). Having thoroughly considered the voluminous evidence and arguments presented and its view of the Property, the board makes the findings detailed below.

The board's task is to determine just compensation and therefore the board must decide what elements of claimed damages are compensable. See RSA ch. 498-A, including RSA 498-A:3, RSA 498-A:24 and RSA 498-A:25. In New Hampshire, just compensation is measured by the difference between the 'before' and 'after' market values of the Property and severance damages, if any. See New Hampshire Department of Transportation v. Pasquale Franchi, 163 N.H. 797 (2012); Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 77 (1973); and Edgcomb Steel Co. v. State, 100 N.H. 480(1957).<sup>6</sup>

The pivotal question in this appeal is what effect the Taking has on the future development potential of the Property and how it impacts the Property's ability to be developed to its highest and best use. For a number of reasons, the board finds the Condemnor carried its burden of proving the Taking has a nominal impact on the Property.

First and foremost, the board finds the Condemnees' assertion (through Mr. Woodland) the Property could be developed with 50-lots in the before scenario and only seven lots in the "after" scenario is speculative and not credible. The evidence presented by the Condemnor clearly indicates that the development potential of the Property, before and after the taking, as a matter of right was unchanged. Further, both development scenarios prepared by Mr. Woodland would require a waiver from the City's Planning Board to exceed the 500 foot maximum length of a cul-de-sac, and the only difference in the before and after scenario is that in the before

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<sup>6</sup> In Edgcomb, the supreme court noted:

The law has long been settled in this jurisdiction that in eminent domain proceedings the owner of land condemned is entitled to damages for the taking measured by the difference between the value of his land after the taking, and what it would have been worth on the day of the taking if the taking had not occurred. . . . The value to be determined is fair market value, which may properly be defined as "the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." [Citations omitted.]

Id. at 486-87.

scenario the Condemnees would have a “bargaining chip” in the form of an emergency access road through the easement.

The testimony of Mr. Parkinson and Mr. Taintor was clear, and a careful reading of the City’s Zoning Ordinance and Subdivision Rules and Regulations confirmed that, in the City of Portsmouth, there is no requirement for an emergency access road or a secondary point of access for residential subdivisions where the length of a proposed cul-de-sac exceeds the stated maximum. (See Condemnor Exhibit Nos. 13 and 15.) Additionally, there was evidence the City had granted similar waivers for several subdivisions<sup>7</sup> which were serviced by a single access road that exceeded 500’ in length, without the benefit of an emergency access road. (See Condemnor Exhibit Nos. 14-19.)

As a matter of right, the Property could be subdivided into six to seven residential lots serviced by a cul-de-sac not to exceed 500 feet in length. This is true in both the before and after scenarios. The Condemnees argued that with the secondary point of access from Route 33 in the before scenario, they could “likely” receive approvals for a 50-lot PUD. However, no plans have ever been presented to the City and all PUD approvals are at the discretion of the City’s Planning Board and are not permitted as a matter of right. In other words, no property has by right the ability to be subdivided according to the City’s Residential Planned Unit Development (PUD) provisions. (See Condemnor Exhibit No. 15.) There is no evidence before the board that would allow it to determine the Property would satisfy the Planning Board’s requirements before the taking but not after the taking.

The board was able to place no weight on the Reeks Appraisal due to its reliance on the conceptual plans prepared by Mr. Woodland and the extraordinary assumption used by Mr.

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<sup>7</sup> The subdivisions were Laurel Court, Lang Road and Tidewatch, all of which received necessary approvals since 1991 when similar zoning and subdivision regulations were in place.

Reeks in his report. As stated in the Uniform Appraisal Standards for Federal Land Acquisitions (commonly referred to as the “Yellow Book”) at p. 81: “Appraisers are increasingly forced to rely on consultants’ reports on technical issues. However, the appraiser cannot merely accept such consultant reports as accurate, but rather must review such reports and adopt them only if reasonable and adequately documented and supported.” Further,

In the conduct of appraisals for federal land acquisitions purposes, there is a presumption that the existing use of land is its highest and best use. Therefore, when there is a claim that the highest and best use of a property is something other than the property’s existing use, the burden of proving that different highest and best use is on the party making the claim.

However, if the property is clearly adaptable to a use other than the existing use, its marketable potential for such use should be considered to the extent that potential affects market value. But, market value cannot be predicated upon potential uses that are speculative and conjectural; as the Supreme Court has said:

Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value - a thing to be condemned in business transactions as well as in judicial ascertainment of truth.<sup>8</sup>

Yellow Book, p. 34.

The board finds the Condemnees failed to provide convincing evidence the Property’s development potential was substantially curtailed by the Taking. The evidence presented would require the board to make significant assumptions that are not based in fact but instead are purely speculative. The Condemnees could have submitted the conceptual plans to the City for Planning Board approvals, but they did not do so.

The Condemnees also argued they were entitled to compensation for a “cost to cure,” as it would cost them a substantial amount of money to replace the farm road lost due to the Taking. (See Condemnee’s Exhibit A, Tabs 14-17.) As previously discussed, the farm road was used to

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<sup>8</sup> Olson v. United States, 292 U.S. 246, 257 (1934).

access the interior and rear portions of the Property from Route 33 when it was operated as a farm. The Property has not been farmed in many years, and the farm road was disused, gated and barred. Additionally, the uncontroverted evidence before the board is the highest and best use of the Property is for residential development, not for farming or agricultural use. Therefore, the reconstruction of a farm road is unlikely at best and consideration of a cost to cure in this instance is not substantiated.

For these reasons, the board finds the Condemnor carried its burden<sup>9</sup> and awards \$11,000 as a result of the Taking. The board finds the Condemnees' much higher estimate of just compensation (\$4,690,000) to be speculative and unsupported by the record and agrees with the Condemnor that just compensation for the taking is no more than \$11,000.

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 Condemnor is the prevailing party. 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

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<sup>9</sup> Pursuant to RSA 498-A:19, "Issues of fact shall be determined upon the balance of probabilities and the burden of proof shall be upon the condemnor."

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.

Attached as Addendum A hereto are the board's responses to the Condemnees' Request for Findings of Fact and Rulings of Law.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Chair

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Theresa M. Walker, Member

### **ADDENDUM A**

The “Requests” received from the Parties 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.

### **CONDEMNNEES’ PROPOSED FINDINGS OF FACTS AND RULINGS OF LAW**

1. The Respondents’ Parcel is a uniquely situated parcel zoned SRA 1 and SRA 2, consisting of 107 acres of land abutting Peverly Hill Road in Portsmouth, with access to Interstate 95, exit 3 (0.5 miles away), Route 1 (one mile away), downtown Portsmouth (two miles away), Portsmouth Hospital (1 mile away) and Pease International Tradeport (one mile away).

#### **Granted.**

2. The Stokel family has owned and lived on the site since 1913, conducting farming operations thereon up to about the 1960s, with primary access to the farm being the roadway and easement which was taken by the City in the Route 33/bridge renovation project.

#### **Neither granted nor denied.**

3. The taking did not just eliminate the “access” point where the roadway met Route 33, but, as stated in the Notice of Condemnation, eliminated that access way and extinguished the easement from the Stokel Property over the The Nature Conservancy land: “Taking and extinguishing a right of way (also referred to as an access way or driveway) across property of The Nature Conservancy south of Greenland Road (also known as Route 33) along the boundary of Calvary Cemetery as such access way (driveway) is reserved in a deed from the Griffin Family Corporation to The Nature Conservancy recorded June 20, 2006 at [RCRD] at Book 4670,Page 2095.” See City Exhibit 3.

#### **Granted.**

4. The easement was created in 1934 when Peter Stokel and Stella Stokel partitioned their farmland with Peter keeping the farm south and east of the railroad and the 15 acre triangular parcel between the railroad and the cemetery which is between the driveway and Route 33 and the Cemetery, and Stella keeping what is now the Stokel Property (see Stokel Exhibits A-2 and A-3), with the Partition Deed stating with regard to the parcel partitioned to Stella:

Together with the right to use said driveway in common with Peter Stokel and his heirs from said Greenland Road, along by said Cemetery, and along the boundary between the lands of said Peter and said Stella to said Railroad, and subject to said Peter's right to use the same in common. [See Rockingham County Registry of Deeds Book 895, page 487, Stokel Exhibit A-33 at page 33F.]

**Granted.**

5. These rights of access to the Stokel Property have been recognized by the successors to Peter Stokel down to The Nature Conservancy, which presently owns the land over which the Route 33 access and Stokel right of way had passed before the taking (see Rockingham County Registry of Deeds Book 4670 Page 2099) with the grant to The Nature Conservancy stating it was subject to a:

"Driveway Use reservation as described in a deed recorded at the Rockingham County Registry of Deeds at Book 2402, Page 0549." [Stokel Exhibit A-33 at page 33A-1.]

[The Deed at Book 2402, Page 0549 provides:]

Together with the right to use said driveway, in common with Stella Stokel, along the boundary between the lands now or formerly of Peter Stokel and said Stella Stokel, and subject to said Stella Stokel's right to use the same in common, from said Greenland Road, along said Cemetery, and along said boundary to said Railroad, containing 184 acres, more or less. And also all water and well rights as conveyed to Peter Stokel by Stella Stokel by deed dated July 10, 1934 and recorded in Rockingham County Registry of Deeds at book 895, page 480. [Stokel Exhibit A-33 at page 33C.]

**Granted.**

6. Historically the Route 33 access had been used by the Stokel family as the primary means to the farm located on the northeastern-most portion of the Stokel land next to what is now the railroad right-of-way, with the width of the roadway being approximately 20 to 22 feet, and used on a daily basis, year round, for access by milk trucks, sawdust and hay deliveries, cattle trucks, automobiles, and tractors, and at one point in the 1950's, serving as the access for the entire St. Johnsbury trucking fleet when the drivers went on strike and parked their trucks on the Stokel farm.

**Neither granted nor denied.**

7. **Burden of Proof.** The burden of proof with respect to establishing the amount of damages is on the City. RSA 498-A:19 (“Issues of fact shall be determined upon the balance of probabilities and the burden of proof shall be upon the condemnor”).

**Granted.**

8. **Damages.** Under New Hampshire law, damages caused by a taking are determined by the “before and after formula” which adds (a) the fair market value of the land taken (b) to whatever severance damages there are to the remaining parcel of land. *Daly v. State*, 150 N.H. 227, 279-80 (2003) (“[i]n the context of a partial taking, the property owner is entitled to not only the fair market value of the property actually taken, but also compensation for the effect of the taking, if any, on the entire property,’ which is referred to as severance damages”).

**Granted.**

9. When the City cut off the Route 33 access the Stokels suffered two distinct losses: first, they suffered severance damages to the 107 acre Parcel being the diminution in value to the parcel due to the taking of the access; second, they lost the value of the lost access itself, valued as the cost to build a road similar to that which had been cut off, with the replacement road running from Peverly Hill Road to the internal roadways that had been tied to the Route 33 access

**Neither granted nor denied.**

10. As a result of the taking, the Respondents are left with a Parcel of land where only a small fraction of its 107 acres is likely developable – that small portion which can be accessed as of right by a 500 foot cul-de-sac from Peverly Hill Road – as compared to what they had before the taking – a 107 acre Parcel with two separate access points, where, because of the multiple access points, a much greater portion of the land would likely be developed, particularly the southeastern portion that had been serviced directly by the Route 33 access taken by the City. Stokel Ex. A-12 (Woodland Report); Stokel Ex. A-14 (Reeks Appraisal).

**Neither granted nor denied.**

11. The taking eliminated the second access point to the Parcel, thereby limiting access by way of Peverly Hill Road to a cul-de-sac (i.e., defined under the Portsmouth Subdivision Regulations as “A local street *with only one outlet* and having an appropriate terminal for the safe and convenient reversal of traffic movement” Stokel Ex. A-22 page 2] and subject to the 500 foot cul-de-sac limitation, which limitation is and was recognized by both appraisers retained by the City as the legally permitted “maximum length” of a cul-de-

sac – Mr. Martineau for this takings case (City Ex. 1 at p. 45) and Mr. Fremeau for the tax abatement proceeding (City Ex. 23 at 25-26).

**Neither granted nor denied.**

12. Indeed, while there have been developments approved in Portsmouth in the past with cul-de-sacs greater than 500 feet, presently the City of Portsmouth is seeking to create an emergency access for one of those neighborhoods, Atlantic Heights; there is no guarantee that the Planning Board would approve a PUD on the Parcel with a waiver of the 500 foot limitation and thus the loss of the access detrimentally affects the value of the Parcel. See Stokel Ex. A-25 (Atlantic Heights Emergency Access Report).

**Neither granted nor denied.**

13. As Mr. Woodland testified, the Portsmouth PUD provisions were practically drafted with the Stokel Parcel in mind, with the proposed 50 unit PUD set out by Mr. Woodland being a conservative estimate of the number of units that could be developed under the City's Zoning Ordinance, if the development were not hindered by the 500 foot cul-de-sac limitation. Stokel Ex. A-12.

**Neither granted nor denied.**

14. With regard to the Stokel parcel, the Respondents demonstrated that the use of the property for PUD development was its highest and best use: there is great market demand for such developments in Portsmouth; the economic development for such PUD developments is readily available in the area; many developers have approached the Stokels before 2008 to make inquiry as to their interest in selling for development; the Stokels have worked with a planner to set forth PUD plans; and there is a scarcity of comparable land.

**Neither granted nor denied.**

15. The proposed use of the roadway by the Stokels' as an emergency access to allow the development of the parcel beyond the 500 foot cul-de-sac limitation in the Portsmouth subdivision regulations is reasonable and would not over burden the easement, as the proposed gated access would have been used only in the case of an emergency should the Peverly Hill Road access be shut down, which is certainly a use no more burdensome than had been when used regularly as a farm road.

**Neither granted nor denied.**

16. Moreover, as testified to by Mr. Woodland, the Stokels' engineering expert, any safety concerns concerning use of the Route 33 access point as an emergency access are easily met as (a) the site line distance for an emergency vehicle like a fire truck is 400 feet, 200 feet more than required by City ordinances, (b) the use will be infrequent, (c) emergency vehicles use flashing lights and sirens that further eliminate any safety concerns of using the access in an emergency, and (d) site line distances would even be adequate to meet City

standards for use by the access by regular vehicles (i.e. 200 feet) if the temporary Jersey barriers were eliminated and replaced by a different, but adequate, railing system. See e.g. Stokel Ex. A-12 and A-35A and 35B (site line evaluations).

**Neither granted nor denied.**

17. Per the opinion of Mr. Reeks, the severance damages suffered by the Stokels are in the range of \$4.7 million dollars, being the difference in value of the Parcel before the taking (\$5,580,000, with the right to primary access more than 500 feet thus sustaining a 50+ unit PUD) and after the taking (\$890,000, the parcel limited by a 500 foot cul-de-sac and thus a seven unit PUD) using the August 20, 2007 valuation date keyed to the date of the City's vote to take the property (as elected by the Stokels). Stokel Ex. A-13 (Reeks Appraisal).

**Denied.**

18. The City failed to carry its burden of proof that the Planning Board would be able to find a basis to waive the 500 foot cul-de-sac limitation, rather, both of its experts relied on the 500 foot limitation as being the legally permissible maximum length of a cul-de-sac serving the Stokel Property, and the City provided simply no evidence that it was likely that 2/3<sup>rd</sup> of the entire planning board would find that all of the elements needed to establish a variance were met (i.e., necessary hardship, that the variance will do substantial justice, relieve the hardship, secure the public interest secured, and will not nullify the spirit and intent of the Master Plan and the subdivision regulations). See Stokel Exhibit 22 at 8 (Section VI ("The following shall be considered as minimum requirements and will be varied by the Board only under the conditions and circumstances set forth in these regulations[.]")) and at 26 (Section X – standards for variance).

**Denied.**

19. Absent such proof, the Board can only find that the Stokel property was hindered with the 500 foot cul-de-sac limitation as a result of the taking, which, as Mr. Woodland and Reeks testified, would severely discount its value to a developer, with fair market value limited to what a developer could count on developing or just a fraction above that, here, in the \$800,000 to \$1 million range, consistent with the Fremeau and Martineau appraisals that recognized the 500 foot cul-de-sac limitation and appraised the property in those same value ranges post-taking.

**Denied.**

20. **Damage Due to the Loss of the Access Itself: Replacement Cost.** The City's position that the Stokels have suffered no damage by the taking is not reasonable, as the taking physically eliminated an established roadway, useable throughout all seasons, that provided access by the Stokels to the southeastern portion of their property out by where the farm used to operate, for year round access to a well with valuable water rights, timber, and providing them and the local authorities the ability to patrol, maintain, and protect their

property with the assistance and use of motor vehicles.

**Neither granted nor denied.**

21. The cost estimates to replace the roadway with a driveway from Peverly Hill Road to the former access point near the Cemetery as provided by the City and the Stokels only differ with respect to the assumption concerning the width of the roadway: with the City using a ten foot width and the Stokels using a 20 foot width. See City Exhibit 11.

**Neither granted nor denied.**

22. But even the City's own expert, Mr. Martineau, testified that he measured the roadway's width at 20 feet, consistent with Mr. Stokel's testimony that the road averaged 20 to 22 feet wide, and thus in estimating replacement costs a width of 20 feet is the only reasonable assumption.

**Neither granted nor denied.**

23. The Board finds that, in addition to the severance damages, the most reasonable damage estimate for the elimination of the roadway is the cost to build a replacement roadway from Peverly Hill road to where the driveway meets the Stokel Parcel near the corner of the Cemetery, at a cost of \$97,581, which cost is calculated by taking the City's cost estimate (\$48,790.57 – see City Ex. 11, bottom row) and doubling it because the City's cost estimate inaccurately assumes a roadway width of 10 feet but its own expert, Mr. Martineau testified that the roadway taken was 20 feet in width.

**Neither granted nor denied.**

24. Damages. The Stokels are awarded the following damages:
- a. \$4.7 million in severance damages;
  - b. \$97,581 for the value of the roadway, calculated as the cost to build a replacement roadway using a 20 foot width;
  - c. interest;
  - d. costs; and
  - e. attorneys' fees.

**Denied.**

State of New Hampshire v. Stella B. Stokel 1993 Trust, et. al.

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**Certification**

I hereby certify copies of the foregoing Report have been mailed, this date, to: Suzanne M. Woodland, Esq., City of Portsmouth, 1 Junkins Avenue, Portsmouth, NH 03801, counsel for the City; and Roy S. McCandless, Esq., 6 Loudon Road, Suite 403, P.O. Box 4137, Concord, NH 03302-4137.

Date: 10/17/13

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Anne M. Stelmach, Clerk