

**State of New Hampshire**

**v.**

**107 Indian Rock Road, LLC, 106 Indian Rock Road, LLC, GW Trust,  
John M. Wolters, Jr., Trustee, Public Service Company of New Hampshire,  
Verizon New England, Inc., and Granite State Electric Company**

**Docket No.: 23384-08ED**

**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, Interstate 93, pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:45. A Declaration of Taking was filed with the board on June 23, 2008, describing the property rights taken as a total of 32.22 acres of land in fee simple situated on three commercially zoned parcels, identified as W93, W101 and W102 on New Hampshire Department of Transportation plans, containing a total of 62.143 acres (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 November 12, 2009 and held the just compensation hearing at the Londonderry Town Office. The Condemnor was represented by Attorney Mark P. Hodgdon, of the State of New Hampshire Department of Justice and Condemnees 107 Indian Rock Road, LLC, 106 Indian Rock Road, LLC and GW Trust were represented by Attorneys Michael J. Connolly and John H. Sokul, Jr. of Hinckley Allen Snyder, LLP.

Lori Bonafide of Avicore Reporting & Videoconferencing, 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.

The Property before and after the taking consisted of 62.143 acres and 29.92 acres, respectively.

### **Evidence and Arguments Presented**

The Condemnor relied on an appraisal prepared by Joseph G. Fremeau, MAI, and Joseph E. Fahey, III (the "Fremeau Appraisal," Condemnor Exhibit No. 1). The Condemnees did not present an appraisal of their own.

The Fremeau Appraisal, confirmed by Mr. Fremeau's testimony at the hearing, found a before value of \$9,700,000 (62.13 acres x \$210,000 per acre = \$13,000,000, rounded, minus excess off-site improvement costs of \$3,300,000) and an after value of \$5,900,000 (the present value of 29.92 acres based on an estimate of its value upon highway construction project completion in June, 2016), resulting in total damages of \$3,800,000.<sup>1</sup>

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<sup>1</sup> Through cross-examination of Mr. Fremeau, the Condemnees established he had completed several prior appraisals of the Property. (Cf. Condemnee Exhibits E and F.)

The Condemnees argued the Property had a value approximated by the September, 2009 sale of property at 725 to 835 Gold Street in Manchester, New Hampshire of 18 acres to Wal-Mart Real Estate Business Trust for about \$1 million per acre. (An \$18 million total sale price is reflected by the tax stamps on the deeds. Condemnee Exhibits A and B.) The Condemnees argued the Wal-Mart sale was an arm's-length transaction. Further, the Condemnees argued that the November 30, 2007 purchase and sales agreement between the Condemnees and Centro US Acquisition Company (the "Centro Agreement," see Condemnor Exhibit No. 1, Addendum, pp. 57-67) stating a purchase price of \$62 million for 62 acres of land also supported the \$1 million per acre market value estimate. The unique value of the Property is also reflected by the board's findings in the State of New Hampshire v. Skip Fern Trust V, BTLA Docket No.: 23324-07ED (October 15, 2008) which had estimated the 1.2 acres of useable land in that case at \$935,000. Consequently, the Condemnees argued the board should find damages from the taking are "north of \$30 million."

In response, the Condemnor argued the Property is unique, but its value is limited. While located "between the barrels" near Exit 3 of the heaviest traveled interstate in New Hampshire (I-93), the Property had a limited market in 2008 due to the declining economy. Nonetheless, the Fremeau Appraisal did not negatively adjust for this factor but rather gave the Property the "benefit of the doubt." The Condemnor further argued the Centro Agreement was little more than a sham and had little or no chance of coming to fruition. The Centro Agreement was executed at a time when the Condemnor's intentions to effect a taking were well known and it contains unusual provisions, such as making the seller responsible for obtaining development approvals and none were ever applied for.

### **Board's Rulings**

Based on the evidence submitted, the board finds just compensation to be \$3.8 million based on a before market value of \$9,700,000 and an after value of \$5,900,000.

The board finds the Condemnor carried its burden based on the Fremeau Appraisal. The Fremeau Appraisal's determination of highest and best use, its valuation analysis and adjustments and its finding of special benefits were supported by the testimony of Mr. Fremeau and not refuted by any credible evidence submitted by the Condemnees.

The board finds the Wal-Mart sale, emphasized by the Condemnees but considered and disregarded by Mr. Fremeau, is not comparable and does not provide a reliable basis on which to estimate the Property's market value in the before or after situation. As testified to by Mr. Fremeau, the Wal-Mart property is significantly superior to the Property's location on Gold Street and the synergy of surrounding retail development and proximity to the Mall of New Hampshire. The board agrees with Mr. Fremeau's conclusion that the price paid by Wal-Mart of nearly \$1 million per acre was in excess of market value because Wal-Mart was uniquely motivated to relocate its store in that general vicinity.<sup>2</sup>

The board, like Mr. Fremeau, gives zero weight to the Centro Agreement as an indication of market value. The Centro Agreement was entered into in November, 2007 with the parties to the agreement being knowledgeable of the impending condemnation. (See paragraph 9 of Centro Agreement, Condemnor Exhibit 1, Addendum, p. 61.) The 700,000 square feet of conceptual development was never acted upon, no permits were sought and, as testified to by Mr. Fremeau and discussed in the Feldman Development Partners October 27, 2009 report (Condemnor

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<sup>2</sup> Mr. Fremeau testified he appraised the Wal-Mart site prior to its sale in September 2009 and, based on his knowledge of the market forces in that area, he concluded that Wal-Mart had overpaid due to its desire to stay in the immediate area.

Exhibit No. 1, pp. 75-82), the assumptions contained in the Centro Agreement were unrealistic and unattainable both legally and economically.

The board finds little comparability between the \$935,000 lot value estimate for the adjoining Skip Fern property and this Property. The Skip Fern property was at grade with Route 111, was fully developed and had an effective area of only 1.2 acres. The Property, in comparison, is essentially undeveloped, is significantly larger with approximately 62 acres and most of the 62 acres is significantly above grade from Route 111 with significant terrain changes that would require substantial blasting of ledge to make it developable. Most importantly, the Skip Fern property had immediate access onto Route 111 while the Property to be developed would require substantial off site development (widening of Route 111 and widening of at least one of the two I-93 bridges to accommodate the wider Route 111) to have comparable accessibility.

In brief, the board finds the evidence submitted by the Condemnor carried its burden and the limited rebuttal evidence submitted by the Condemnees did not refute or cast any doubt on the Condemnor's evidence of the damages from the taking.

If either party seeks to appeal the amount of damages awarded by the board (\$3,800,000), 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 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 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 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

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Paul B. Franklin, Chairman

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Albert F. Shamash, Esq., Member

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**Certification**

I hereby certify copies of the foregoing Report have been mailed, this date, to: Mark P. Hodgdon, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Michael J. Connolly and John H. Sokul, Jr. of Hinckley Allen Snyder, LLP, 11 South Main Street, Suite 400, Concord, NH 03301, counsel for the Condemnees; Public Service Company of New Hampshire, Robert A. Bersak, 780 North Commercial Street, Manchester, NH 03105; Verizon New England, Inc., c/o CT corporation System, 9 Capitol Street, Concord, NH 03301; and Granite State Electric Company, William T. Sherry, 9 Lowell Road, Salem, NH 03079, Easement Holders.

Date: 11/18/09

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Anne M. Stelmach, Clerk