

State of New Hampshire

v.

**Dennis C. Butterfield, Gary M. Butterfield, Timothy J. Butterfield and
Mako Development, LLC**

Docket No.: 23397-08ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for highway purposes 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 July 11, 2008, describing the property rights taken as 0.27 acres in fee simple from an unimproved parcel identified as “Parcel W52” by the Condemnor. See Exhibit A to the Declaration. This exhibit locates the parcel between the I-93 right-of-way and County Road and the Condemnor describes the fee taking as 0.27 acres “more or less.”¹

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

¹ The Declaration references a Warranty Deed (recorded on October 16, 2001 in Book 3658, Page 222 of the Rockingham County Registry of Deeds) which actually describes a conveyance of two parcels to the grantors: “Parcel A” (further described below), said to contain 0.88 acres “more or less”; and “Parcel B,” which matches the metes and bound description in the Declaration, and is said to contain 0.31 acres “more or less.” The Condemnor therefore concluded the taking of 0.27 acres left a remainder of 0.04 acres. The Condemnees, however, used different calculations, based on a survey indicating “Parcel B” had a total acreage of 0.425, the taking being 0.283 acres and the remainder being 0.142 acres.

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 land and held the just compensation hearing at the Londonderry Town Hall on December 1, 2008. The Condemnor was represented by David M. Hilts, Esq. of the State of New Hampshire Department of Justice and the Condemnees were represented by John G. Cronin, Esq. of Cronin & Bisson, P.C.

Sandra Day of Avicore Reporting & Videoconferencing, 25 Lowell Street – Suite 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

The board finds the just compensation from the taking is \$39,000 (rounded) for the reasons discussed below.

The Condemnor relied on an updated appraisal (the “Moore Appraisal,” dated December 31, 2008, Condemnor Exhibit No. 1) prepared by Barry W. Moore, MAI, an Appraiser Supervisor for the New Hampshire Department of Transportation. The Condemnees relied on an appraisal (the “Reeks Appraisal,” dated September 22, 2009, Condemnee Exhibit A) prepared by Wesley G. Reeks, MAI, and on the testimony of Peter Zohdi, a “designer” who prepared some planning documents for the Condemnees.

To arrive at its finding of just compensation, the board considered both appraisals and the testimony presented in order to arrive at “before” and “after” market values. 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).

A significant divergence in the parties’ respective approaches in estimating compensable damages is whether Parcel A and Parcel B were separate lots of record (and thus had separate highest and best uses) or whether the highest and best use of Parcel A and Parcel B was as one lot of record.

The board has reviewed the limited documentary evidence submitted by the parties on this question, the Town of Windham land use (planning, zoning and subdivision) regulations published on the Town’s website, and statutes relevant to the development and merger of lots (specifically, RSA 674:41 and RSA 674:39-a). While the board cannot conclude definitively that Parcel B could not be a legal stand alone lot, on the balance of probabilities (Tax 201.27(f)) the board finds the highest and best use is more likely to be for Parcel A and Parcel B (the “Property”) to be considered as one lot of record, the premise used in the Moore Appraisal.

Mr. Zohdi asserted the 2005 subdivision plan effected a merger of Parcel A with an adjoining property (Tax Map 6-C-2000A), thereby leaving Parcel B as a stand alone lot. While it is unclear whether that recorded plan effectuated what Mr. Zohdi asserted, even if it did, the board does not conclude the highest and best use of Parcel B is as a stand alone lot due to its distance from any “town-approved road” (see definition of Building Lot contained in the Section 100 definitions of the Town’s Land Use Regulations and Zoning Ordinance). Further, a review of the detailed provisions of RSA 674:41 supports the board’s conclusion that, without further review by the Town’s selectmen and planning board as outlined in RSA 674:41, I(c), Parcel B would not be buildable as a house lot before the taking.

Alternatively, to secure road access sufficient to allow development, a prospective owner could improve the approximately 350 foot remaining portion of Pine Hill Road ‘from station 29.50 to Parcel B’ to Class V (Town maintained) road standards (see, generally, the Town of Windham’s subdivision regulations). Based on the board’s experience, the cost for such Class V road construction would be in the range of \$200 - \$300 per linear foot. Given the before market value of \$61,000 estimated by Mr. Reeks, the cost to improve this portion of Pine Hill Road to provide “frontage on a town-approved road” (a requirement contained in the Town’s definition of a “Building Lot” in its land use regulations) would be prohibitive and therefore not financially feasible, the third element in a highest and best use analysis. (See, e.g., Reeks Appraisal, pp. 32 – 33.)

The board was also unable to place significant weight on the Condemnees’ assertion that Parcel B’s area could be used as “open space credit” in the adjoining proposed 15-lot subdivision to allow the creation of a 16th lot, primarily because no supporting documentation or calculations were presented, making it too speculative to be considered as a reasonable possibility. 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.

Consequently, the board concludes the Condemnor’s premise of a combined lot consisting of Parcel A and B is reasonable. The board then reviewed the Moore Appraisal development costs at pgs. 37 – 38 and considered the testimony of the parties’ witnesses before making its own findings of the damages from the taking, as follows:

Retail lot value estimate	\$135,000
Less: allocated road cost estimate	\$37,500
Less: water hook-up	none
Less: estimated cost of approvals	\$5,000
Less: developer's profit	none
Less Selling/Closing costs	\$10,800
Subtotal:	\$81,700
Discount factor (4 years; 15% per year)	0.572
Before value as of date of taking	\$46,732
After value as of date of taking	\$7,900
Damages from the taking	\$38,832
(Rounded)	\$39,000

The board finds the Moore Appraisal “before” retail lot value of \$135,000 is adequately supported by the general lot sales data at pgs. 36 & 37 and the market extracted adjustment of 20% for its proximity to I-93 (the same adjustment made by the Condemnees’ appraiser, see Reeks Appraisal, p. 48).

The board has deducted the pro rata (one of sixteen lots) amount for the road construction costs of \$600,000 for extending Sheffield Street and Pine Hill Road and creating the loop road for the adjoining 15 lot subdivision. The board understands the Property would gain frontage by the new loop road of the adjoining subdivision, but finds it unreasonable to not deduct a pro rata

share of the road as argued by the Condemnees. Some deduction has to occur to recognize its inaccessible state as of the date of taking and the pro rata share is the least expensive manner for the Property to gain “frontage on a town-approved road”.

The board has not deducted any “water hook-up” cost as the preponderance of the evidence was that most lots in the area (and those used as comparables to estimate market value) had on-site wells which would be installed at the time any dwelling is built as a cost to the buyer.

Arguably, no approvals would have been needed for combined Parcels A and B to be a separate lot of record before the taking. However, because its value as a buildable residential lot is dependent on the adjoining 15 lot subdivision receiving all necessary approvals, the board has deducted the \$5,000 contained in the Moore Appraisal. This deduction can also be viewed as a partial offset (lowering of risk once approvals have been obtained) to use of a higher discount rate.

The board has not, however, deducted for any developer’s profit as such profit is meant to reflect the reward the developer receives for the risk and management expertise for “orchestrating” and completing a development plan, such as that necessary for the adjoining 15 lot subdivision to occur. Because the board has found combined Parcels A and B could have been a legal lot of record before the taking, it is difficult to attribute any developer’s effort, and thus profit, to the effort necessary to create the adjoining subdivision.

Both parties agreed that some deduction for marketing/closing costs was reasonable to reflect that the Property has not reached its final retail end user; thus the board has used the Moore Appraisal estimate of 8% of the retail value.

The board finds the Moore Appraisal discount rate of 20% is too high for the relative risk in having the adjoining subdivision approved to allow for the Property to “piggyback” on the

newly created frontage. There was some general testimony as to the desirability of Windham for residential development and certainly the board's view indicated successful high-end development had occurred in the Property's neighborhood. Also, because the board has already deducted for "approvals" (which tends to mitigate against a higher discount rate), the board concludes a lower discount rate of 15% is more appropriate. The board has calculated a four year absorption rate due to the softening real estate market as of the date of taking (July 11, 2008) and the fact the Property would inherently be competing with the 15 lots of the adjoining property once approved and the roads were constructed.

All these factors, as summarized above, result in a "before" value estimate of \$46,732.

While the evidence was somewhat inconclusive regarding whether the "after" size of Parcel A and the remaining area of Parcel B would or would not be sufficient for a buildable lot,² the board has accepted the Moore Appraisal premise that it would not be and, thus, finds the Moore Appraisal "after" value of \$7,900 as supplemental land is reasonable.

Consequently, the board finds damages of \$39,000 (rounded) based upon the "before" value of \$46,732 and the "after" value of \$7,900.³

² According to Mr. Moore, after the taking there would only be 52,576 square feet remaining in combined Parcels A and B (with the area on County Road included). Moore Appraisal, p. 44. For soils of this type, the Town of Windham requires a minimum of 55,000 square feet for a buildable lot. Id.

³ The board considered the higher estimate of damages contained in the Reeks Appraisal (\$61,000), but could place no weight on it for several reasons. At the hearing, cross-examination revealed Mr. Reeks relied on information some of which was not accurate. For example, he used the legal description of the land acquired by the Condemnor, not the land owned by the Condemnees, and assumed the acquisition was a "100% Taking," rather than recognizing there would be a remainder after the taking. In addition, Mr. Reeks' sale comparables, by and large, consisted of land with well defined road access, unlike the uncertainties surrounding access to Parcels A and B. There is also reason to doubt whether Mr. Reek's technique of converting each sale price to a per acre value and then applying his estimated value per acre (\$215,000) to 0.283 acres results in a reasonable estimate of value for this appraisal assignment. See Reeks Appraisal, pp. 49-50.

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

Albert F. Shamash, Esq., Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: David M. Hilts, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; John G. Cronin, Esq., Cronin & Bisson, P.C., 722 Chestnut Street, Manchester, NH 03104, counsel for the Condemnees; and Mako Development, LLC, P.O. Box 642, Windham, NH 03087.

Date: December 22, 2009

Anne M. Stelmach, Clerk