

State of New Hampshire

v.

Edward J. Kelley, Public Service Company of New Hampshire, Northern New England Telephone Operations, LLC and Town of Londonderry

Docket No.: 23410-08ED

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 August 6, 2008, describing the property rights taken as 1.35 acres, more or less, from a parcel of vacant land identified as Parcel L144 located at 40 Seasons Lane in the Town of Londonderry, New Hampshire (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 October 20, 2009 and held the just compensation hearing at its offices on October 29, 2009. The Condemnor was represented by

David M. Hiltz, Esq. of the State of New Hampshire Department of Justice. One of the Condemnees, Edward J. Kelley, attended the view, but did not attend the hearing.

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

The taking consisted of 1.35 acres fronting Interstate 93, reducing the size of the Property from 6.47 acres to 5.12 acres.

Board's Rulings

The Condemnor relied upon a self-contained appraisal report (the "Bernard Appraisal," Condemnor Exhibit No. 2) prepared by Stephen Bernard, a certified general appraiser employed by the New Hampshire Department of Transportation, Bureau of Right-of-Way. The Bernard Appraisal employed the sales comparison approach, finding four comparable sales in the same town (Londonderry), and concluded the "before" and "after" value of the Property was \$175,000, resulting in an indication of "zero damages." Bernard Appraisal, p. 1.

As noted above, Condemnee Kelley did not attend the October 29, 2009 just compensation hearing or submit an appraisal or any other evidence to support a higher award of damages as a result of the taking.

Neither the highest and best use ("a single, residential building lot") nor the estimated market value of the Property changed as a result of the taking, according to Mr. Bernard. *Id.*, p. 27. While there was an actual loss of 1.35 acres, the extent of wetlands in the part taken influenced Mr. Bernard's conclusion of "zero damages." *Id.*, pp. 19 – 26 (photographs, maps and description of Property, stating "[a]pproximately 60% . . . is considered wetlands").

As part of the project, the Condemnor is constructing a 14 foot high sound wall along

portions of Interstate 93 including the Property. Mr. Bernard weighed the effect of the project on the Property, taking this factor into account, and concluded “there have not been any adverse impacts.” Id., pp. 38-39. The board understood his testimony to be that any negative impact of the closer proximity of the highway to a potential building site is offset by the construction of the sound wall. Consequently, no different adjustment for closer proximity to the highway in the “after” situation was warranted.

The board finds the Condemnor met its burden of proving the damages as a result of the taking did not exceed the amount of just compensation (\$20,000) deposited with the board. As a test of the reasonableness of this conclusion, the board notes an estimated value per acre for excess land extracted from a comparison of sales L1 and L2 with L3 and L4 in Mr. Bernard’s analysis, when applied to the 1.35 acre taken, results in a value less than the \$20,000 damage deposit. Cf., Bernard Appraisal, pp. 34 and 44.

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 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

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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; Edward J. Kelley, 60 Whitehall Road, Hooksett, NH 03106, Condemnee; Robert A. Bersak, Public Service Company of New Hampshire, 780 North Commercial Street, Manchester, NH 03105; Northern New England Telephone Operations, LLC, c/o CT Corporation System, 9 Capitol Street, Concord, NH 03301; and Town of Londonderry, 268-B Mammoth Road, Londonderry, NH 03053, Easement Holders.

Date: 11/5/09

Anne M. Stelmach, Clerk