

The State of New Hampshire

v.

**William Clark, Gerard Clark, Jeanne Clark, Stephen Clark,
Robert Clark, Reed Clark and Phyllis Clark**

**Docket No.: 23984-09ED
(Parcel L45)**

The State of New Hampshire

v.

**William Clark, Gerard Clark, Jeanne Clark, Stephen Clark,
Robert Clark, Reed Clark and Phyllis Clark**

**Docket No.: 23985-09ED
(Parcel L44)**

REPORT OF THE BOARD

These matters arise as a result of RSA 498-A:5 acquisitions of property rights taken for an approved highway layout pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:45. Declarations of Taking (“Declaration(s)”) were filed with the board on April 15, 2009 describing the property rights taken as follows:

#23984-09ED - Parcel L45 (“Lot 45”) – 0.47 of an acre of land in fee; and

#23984-09ED - Parcel L44 (“Lot 44”) – 0.96 of an acres of land in fee (Tract 1 – 0.82 of an acre and Tract 2 – 0.14 of an acre.

See Exhibit A to the Declarations.

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 “Properties” and held a consolidated just compensation hearing at the Londonderry Town Hall, Londonderry, New Hampshire on May 18, 2010. The Condemnor was represented by Edith L. Pacillo, Esquire for the State of New Hampshire Department of Justice and the Condemnees were represented by Francis X. Quinn, Jr., Esquire.

Tina L. Hayes, LCR, RPR, of Avicore Reporting, 25 Lowell Street, Suite 405, Manchester, NH 03101 (telephone 603-666-4100) 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 Properties before and after the taking consisted of the following:

Lot 45 – 0.47 of an acre of land in fee taken out of a total of 3.0 acres, leaving a remainder of 2.53 acres after the taking; and

Lot 44 – 0.96 of an acre of and in fee taken out of a total of 91.0 acres, leaving a remainder of 90.04 after the taking.

Board’s Rulings

The board finds the state carried its burden in determining just compensation for both Lot 45 and Lot 44. Further, the Condemnees presented no market value evidence other than asserting both lots had greater development potential than recognized by the state.

The board finds the state’s approach in valuing Lot 44 and Lot 45 separately is appropriate and consistent with generally accepted appraisal standards, in particular, the Uniform Appraisal Standards for Federal Land Acquisitions, the Appraisal Institute (2000) (commonly

known as the “Yellow Book”). While there is unity of ownership between the two lots, there is no “unity of highest and best use for all parts of the whole.” Section B-11, p. 47. In other words, Lots 44 and 45 do not have an integrated highest and best use. While both lots have an ultimate highest and best use as residential lots, given the significant difference in size of the lots (3.0 acre for Lot 45 and 91.0 acres for Lot 44) and the relative ease and immediacy of being able to subdivide Lot 45, it is appropriate to value the lots separately and by different units of comparison as Stephen Bernard, Appraiser did in Condemnor’s Exhibits 3 and 4 (“Bernard Appraisals”). Lot 45 can be readily subdivided and marketed due to its small size, abundant frontage (308 feet on Perkins Road and 329 feet on Stonehedge Road), and the by and large developable soils. Such a lot has relatively wide marketability (attractive to a large number of market participants) which inherently increases its absolute value and value per acre.

Lot 44 can also be subdivided into residential lots. However, given its large size and substantial wetland soils, the number of residential lots it can support is uncertain without significant investment of intensive soil surveying and mapping and subdivision engineering (“up front costs”). Even after Lot 44’s development potential is better determined, the marketing/absorption/holding time is significantly greater than that for Lot 45. Conversely, this diminishes the number of potential market participants which, combined with the additional up front costs, reduces Lot 44’s value per acre. Consequently, the board finds the Bernard Appraisals significantly different conclusions of value per acre (\$4,396 per acre for Lot 44 and \$61,667 per acre for Lot 45) is reflective of the market factors affecting the market values of Lots 44 and 45. Further, this conclusion indicates it is not appropriate nor is there a market basis to Attorney Quinn’s assertion that the \$61,667 pro rata value per acre for Lot 45 should be applied to the 0.96 acre part taken of Lot 44.

As noted earlier, the Condemnees presented no evidence that the market assumptions in the Bernard Appraisals (both the conclusion of same value before and after the takings and the per acre values to be applied for the pro rata part taken calculations) were unreasonable or unfounded. The board agrees the before and after values of both lots would likely be the same given the takings are relatively small in size and comprised of land of low utility due to some wetland soils and proximity to I-93 and because the takings did not change the lots' highest and best use which could have resulted in severance damage to the remainder. Because the before and after valuations are the same and because such analysis is the legal foundation for estimating just compensation (See Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 77 (1973)), the state's pro rata policy as outlined in Condemnor Exhibit No. 5 does not appear to be an unreasonable method to provide some just compensation for the part taken given the facts presented in these two condemnations.

In conclusion, the board finds the Condemnor carried its burden in determining damages in the amounts of \$4,500 for Lot 44 and \$20,000 for Lot 45.

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

offers (or deposits) 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.

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

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, 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.

STATE’S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

1. As noted by the United States Supreme Court, it is well established that “elements effecting value that depend upon events or combination of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration.” *Olson v. United States*, 292 U.S. 246, 257 (1934); *Dover Housing Authority v. George*, 107 N.H. 202 (1966).

Granted.

2. In *Roy v. State of New Hampshire*, the Court recognized the longstanding rule that a determination of market value is based upon “the value to a willing seller and a willing buyer.” *Roy v. State*, 104 N.H. 513, 517 (1963). Thus, in seeking to determine market value, there should be taken into account all considerations that might fairly be given substantial weight in bargaining between a willing buyer and a willing seller. Evidence that is “speculative, remote or nebulous,” it is not competent evidence of value. *Id.* at 517.

Granted.

3. In condemnation cases, the trial court must exclude from jury consideration those uses for which the land owner has not produced credible evidence that the use is “reasonably practicable and reasonably probably within the near future.” *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir. 1980); *See also, Uniform Appraisal Standards for Federal Land Acquisitions*, § B-9 (explaining only reasonably probable elements affecting value should be considered in appraisal for federal land acquisitions).

Granted.

4. In the instant case, the landowner did not produce any credible evidence that it was reasonably likely on the date of take that Parcel L-45 could be developed into more than 2 lots.

Granted.

5. In the instant case, the landowner did not produce any credible evidence that it was reasonably likely on the date of take that Parcel L-44 could be developed into a specific number of lots.

Neither granted nor denied.

CONDEMNNEES’ REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

Findings of Fact

1. This case involves two lots of vacant land in Londonderry, New Hampshire that are zoned for residential uses. L-44 is a 91±-acre parcel with a tax map and lot number of 13, Lot 20. It is located in an area of Londonderry with single-family residential homes.

Granted.

2. L-45 is a 3.0-acre parcel directly across the street from L-44 with a tax map and lot number of 13, Lot 22.

Granted.

3. L-45 was appraised using the development method. The State’s appraiser, Mr. Stephen Bernard, concluded that this parcel had a potential for “2.8” lots; however, it was appraised based on its development potential for two lots.

Granted.

4. Despite the fact that the State took .96 acres from L-44 and .47 acres from L-45, the State has concluded that neither parcel suffered damages.

Granted.

5. The State then applied a “pro-rata” damages analysis and concluded that L-45 had a per acre value of \$61,667.00/acre. This translates into damages in the amount of \$29,000. The State then concluded that it would “cap” the condemnees’ damages for L-45 at \$20,000.00. The \$20,000 figure was an amount established generically by the State that is not based on an evaluation of the specific property.

Neither granted nor denied.

6. The State applied a different per acre analysis to L-44, the comparable sales method. The State concluded that the per acre value of this lot is \$4,396.00, and the State estimated damages at \$4,500.00, although \$4,700.00 was paid to the Board when this action was commenced.

Granted.

7. The State made no effort on either L-44 or L-45 to determine the potential for zoning the parcels into multiple lot subdivisions despite admitting to the fact that each parcel contains more than sufficient for development.

Neither granted nor denied.

8. The State conducted no soil testing for either parcel and based its soil science information on informal discussions with soil scientists from the State of New Hampshire, the Federal Government and another individual.

Neither granted nor denied.

9. There are no comparable properties in Londonderry for L-44.

Neither granted nor denied.

10. The State’s appraisal concludes that fair market value for building lots in Londonderry range from \$100,000.00 to \$160,000.00 per acre. See pp. 63-67L4S appraisal.

Denied.

Rulings of Law

1. The “cap” of \$20,000.00 as applied is arbitrary and capricious and violates the 5th and 14th amendments of the U. S. Constitution and Part 1 and 19 of the New Hampshire Constitution.

Neither granted nor denied.

2. The cap is contrary to RSA 498-A, et seq and New Hampshire Supreme Court case law which provides just compensation based on fair market value as of date of taking. See Daly v. State, 150 NH 277 (2003).

Neither granted nor denied.

3. Elimination of the cap does not provide any “windfall” to the condemnee for parcel L-45 as it amounts to approximately \$9,000 in damages relative to a .47-acre taking. In fact, if any party would receive a “windfall” it would be the State because the value of the taken land to the State (as an essential part of the Interstate 93 expansion) is clearly worth far more than \$29,000.

Neither granted nor denied.

4. The State’s appraisal for L-45 is unreliable because it made no effort to determine the suitability for subdividing the lot into three building lots versus the two building lots set forth in the appraisal report. See Uniform Appraisal Standards for Federal Acquisition at page 83. The State conceded that the appraisal of L-45 would increase if it was determined that L-45 could be subdivided into 3 lots.

Denied.

5. The State’s appraisal report is unreliable with regard to L-44 in that no effort was made to determine the development potential of multiple building lots despite the fact that the parcel has ample acreage, is located in an agricultural/residential zone; is located in an area of Londonderry that contains single-family residences.

Denied.

6. The State’s appraisal for L-44 is unreliable in that the appraisal of L-44 as a 90-acre field yields unjust and unfair value for the amount taken from the condemnees where the New Hampshire law requires:

The owner is entitled to have the property appraised at the most profitable or advantageous use to which it could be put on the day of the taking.

See Daly at page 279 (citing Edgcomb Steel Co. v. State, 100 NH 480, 486-487 (1957)).

Denied.

7. Here, because there is no dispute that the most advantageous use of land on L-44 is one- to two-acre buildings lots, the per acre valuation method should have been performed on a one-to-two acre building lot, rather than the entire 90 acre field. The State’s appraisal report recognized that conducting the per acre evaluation on a larger parcel results in a smaller per acre valuation.

Denied.

8. In any event, the State should have considered the development method for appraising the value of the taken land from L-44, in light of the number of developed lots in the neighborhood and the fact that the State determined that L-45, which was located directly across the street, could be developed into multiple buildable lots.

Denied.

9. The per acre valuation method is an accepted appraisal method and is not simply an “accounting” mechanism as represented by the State in its appraisal report.

Neither granted nor denied.

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 Francis X. Quinn, Jr., Esq., Boynton, Waldron, Doleac, Woodman & Scott, P.A., P.O. Box 418, 82 Court Street, Portsmouth, NH 03802-0418, counsel for the Condemnees.

Date: May 27, 2010

Anne M. Stelmach, Clerk