City of Portsmouth

v.

Houston Holdings, LLC, Provident Bank and Portsmouth Cycle Center, Inc.

Docket No.: 24006-09ED

REPORT OF THE BOARD

This matter arises as a result of an RSA ch. 149 and RSA ch. 498-A acquisition of property rights taken by the City of Portsmouth ("Condemnor") for what was designated as the "Bartlett-Islington Sewer Separation Project." The Condemnor filed a Declaration of Taking ("Declaration") with the board on June 24, 2009, describing the property rights taken as a permanent easement and a temporary easement (described further below) on land located at 653 Islington Street (the "Property"). (See also the Condemnor's September 19, 2009 Motion to Amend to correct a scrivener's error in the original Declaration which was granted by the board.) On September 1, 2009, Condemnee Houston Holdings, LLC (hereinafter, the "Condemnee") elected, pursuant to RSA 498-A:4, III (b) (5), to have the date of valuation for the taking be January 12, 2009, the date the Condemnor's City Council voted to acquire the property rights.

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 19, 2010 and held the first day of the just compensation hearing at the Portsmouth City Hall, 1 Junkins Avenue, Portsmouth, New Hampshire. On October 20, 2010, the board continued and concluded the hearing at its offices in Concord, New Hampshire. The Condemnor was represented by Suzanne M. Woodland, Esq., Assistant City Attorney and the Condemnee was represented by John P. McGee, Jr., Esq. of Flynn & McGee.

Tina L. Hayes 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 0.32 acres. The taking is a permanent easement of 1,992 square feet, “more or less,” and a temporary easement of 1,244 square feet, “more or less,” set to expire no later than March 31, 2010. The location of the taking is along one side of the Property facing Bartlett Street, where one curb cut providing access to the parking area is located. The Property has one 3,295 square feet commercial building (constructed in 1953) occupied by a retail tenant (“Papa Wheelies”); this tenant has common ownership with the Condemnee. The taking did not affect the physical size of the Property.

Board's Rulings

Upon review of the arguments and evidence presented,[1] the board finds the total just compensation for the taking is $27,000 (rounded). The board arrived at this finding by calculating separately the damages attributable to the permanent easement ($15,000) and the temporary construction easement ($12,000), as further discussed below.

A. Overview

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 considered the voluminous evidence and arguments presented

[1] The arguments include the Condemnor's Memorandum of Law Relative to Relinquishment of Sewer-Drain Line (the "Condemnor's Memorandum") and the Condemnee's "Motion to Disallow Credit" (the "Condemnee's Motion"), both filed on October 20, 2010 at the close of the hearing; see also the Condemnee's "Requests for Findings" (reflected in Addendum A).

and its view of the Property, and after applying its judgment, 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 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).[2]

Neither party contends there were any severance damages as a result of the taking of the permanent and temporary construction easements on the Property. They disagree sharply, however, through their respective appraisals, regarding the extent of money damages that should be awarded as just compensation.

The Condemnor relied upon the "Shurtleff Appraisal" (Condemnor Exhibit No. 1), which estimates total damages of $18,500.[3] The Shurtleff Appraisal was prepared by Dale M. Gerry. His work was reviewed by another independent appraiser, Steve Bergeron of Bergeron

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[2] 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.

[3] The Shurtleff Appraisal estimates this value as of December 16, 2008. (See Condemnor Exhibit No. 1.) Neither party asserted there would be any difference in value between that date and January 12, 2009, the date of valuation elected by the Condemnee as noted above.

Commercial Appraisal, who made comments but did not disagree with the $18,500 estimate of total damages in the Shurtleff Appraisal. (See Condemnor Exhibits 15, 16 and 18.)

The Condemnee, on the other hand, relied upon the "Stanhope Appraisal" (Condemnee Exhibit A). This appraisal estimates total damages of $125,100, almost seven times higher than the Shurtleff Appraisal.

Along with these appraisals, the board received extensive documentary evidence (a total of 19 exhibits from the Condemnor and 8 exhibits from the Condemnee) and heard much testimony regarding the permanent and temporary easements, both by these appraisers, and by three other witnesses: Peter Rice, City Engineer; Frederick Taintor, City Planning Director; and Daniel Houston, the "member/manager" of the Condemnee.

B. Damage Findings

1. The Permanent Easement and the Issue of "Credit" for the Abandoned Sewer Line

One key issue dividing the parties is the question of whether the Condemnor had any property rights with respect to the pre-existing sewer. This is a key issue because the Condemnor's appraiser, Mr. Gerry, found it is reasonable to subtract as a "credit," from the permanent easement damages, the sum of $25,000, the value gained by the Property when the City abandoned all claims and interest in a preexisting sewer line ("the 'stone box' sewer") as part of the process of installing a new line over another portion of the Property in this project. (See Shurtleff Appraisal, Condemnor Exhibit No. 1, pp. 5, 57-60, 62 and 64; and Condemnor's Memorandum, p. 2.) The board agrees. In brief, the board does not accept the Condemnee's opposing contention that there was "no easement" for the Condemnor to abandon (see, e.g., Request Nos. 1 – 6 and the Motion to Disallow Claimed Credit, p. 1).

The board need not dwell at great length on the disputed historical and other evidence pertaining to this question or resolve the question entirely, but will instead briefly note the following salient points that are supported by the evidence. The Warranty Deed conveying the Property to the Condemnee in 2001 specifically states the conveyance is "subject to any drain or sewer that may now legally exist through or across the same, with all the rights that are appurtenant to the premises to use and drain into such drain or sewer." (A copy of this deed is included in the Addenda to the Stanhope Appraisal.)

A 1988 plan, recorded at the Registry of Deeds, shows "this sewer-drain line crosses the northerly portion of the Property" and "the City has been using this stone box sewer-drain line for over fifty (50) years." (Condemnor's Memorandum, p. 2.) According to the Condemnor, this same conveyancing language "was first noted in the Property's chain of title on March 14, 1911," and the language "appears in each subsequent deed," including the 2001 deed to the Condemnee. (Id., p. 5.) "The City's sewer plans from 1915 to the present show the contested sewer-drain line as part of the municipal system." (Id.)

In response, the Condemnee made detailed arguments that the Condemnor had absolutely no rights in and to this sewer line that ran directly under the building on the Property. The board finds these arguments cannot be sustained even though the Condemnor was unable to find any deed or other instrument containing an express conveyance of a sewer easement. As the Condemnor points out, an easement can arise by prescription as well as by express deed and the abandonment of the sewer-drain line, as part of the taking, "is a benefit to the Condemnee." (Id., p. 7.) In or about August, 2010, the City placed "[f]lowable fill, a form of concrete, . . . in the sewer-drain line to stabilize the old infrastructure and prevent collapse over time." (Id.) There is reason to doubt the Condemnor would have done so at no expense to the Condemnee if the

Condemnee had exclusive right to, and control of, the sewer-drain, including continuing responsibility for its maintenance or removal.

While the origins of the stone box sewer-drain under the Condemnee's building may have been related to the sewer infrastructure built in the second half of the nineteenth century for the Frank Jones Brewery (see Condemnor Exhibit No. 8 and Condemnee Exhibit No. 2), this sewer clearly became part of the Condemnor's sewer system. This is evident from the Portsmouth Board of Public Works plan dated January 1915 (Condemnor Exhibit No. 9). From at least that time in 1915 until the work associated with the taking in August, 2010, there is no evidence that anyone other than the City maintained, modified or assumed the liability of the stone box sewer or that it was somehow different or separate from the overall municipal sewer system providing "public convenience, health [and] welfare" (RSA 149-I:1[4]) to all within the municipality.

Considering the legislative authorization given to municipalities to construct, maintain and own public sewers in RSA ch 149-I, the provisions of RSA 147:8 requiring each property to be connected to a public sewer if one is located within 100 feet and the longstanding case law relating to the municipality liability for such sewers (reflected in cases such as Rowe v. Portsmouth, 56 N.H. 291 (1876)), it is difficult to believe the Condemnor, in this instance, would not have sufficient property rights to access and maintain the stone box sewer on the Condemnee's property. Given how disruptive that could be and the general encumbrance of the

[4] 149-I:1 Construction. – The mayor and aldermen of any city may construct and maintain all main drains or common sewers, storm water treatment, conveyance, and discharge systems, sewage and/or waste treatment, works which they adjudge necessary for the public convenience, health or welfare. Such drains, sewers, and systems shall be substantially constructed of brick, stone, cement, or other material adapted to the purpose, and shall be the property of the city. (Emphasis added).

Condemnee's Property due to the stone box sewer essentially bisecting the building and lot, its deactivation is a benefit to the long term use and enjoyment of the Property.

Further, even if the Condemnee could somehow establish (in a separate quiet title or other action) that the Condemnor had absolutely no such property rights, that resolution would, in all likelihood, require years of costly litigation and, in the interim, the old stone box sewer would constitute a material cloud on the title of the Property, diminishing its market value to at least some degree and, in all likelihood, affecting its development potential, a possibility supported by the testimony of Mr. Taintor, the City Planning Director. The gist of his testimony is that, in general, the existence of a sewer line under a building could complicate the development approval process because municipalities do no favor buildings or other structures located over existing public or private sewer lines and might require removal and relocation as a condition for further development.

For these reasons, the board finds the Gerry Appraisal "credit" of the offsetting benefit of deactivating the stone box sewer was not the result of some nefarious collusion on behalf of the Condemnor, as the Condemnee attempted to establish, but is in keeping with new Hampshire case law. State v. 3M Nat. Advertising Co., Inc.139 N.H. 360, 365 (1995) ("We have held that where benefits inure to the condemnee, those benefits may be considered by the finder of fact as a reduction in damages and may be deducted or set off from the compensation award."); and Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 75 (1973) ("A frequent question in condemnation cases involving partial taking is whether benefits inuring to the condemnee from the project requiring the taking may be deducted or set off from the damage

compensation award. The traditional rule has been that 'special' benefits may thus be considered by the finder of fact as a reduction in damages but that 'general' or public benefits may not be so considered.").

Although questioned by the Condemnee, the Shurtleff Appraisal methodology of estimating the encumbered area as approximately 15 feet wide was not shown to be unreasonable given the area necessary to accommodate equipment if maintenance was necessary. Further, the board finds the Shurtleff Appraisal methodology of weighting the impact of the encumbered area, both for the new permanent easement and for estimating the offsetting benefit of the unencumbered stone box sewer area, is a practical way to quantify the net damages from the taking. Thus the board finds the net damages of $15,000 ($40,000 for the encumbrance of the new permanent easement minus $25,000 for the offsetting benefit of the deactivating the stone box sewer) is reasonable.

The board considered, but could not accept, the much higher damage estimate in the Stanhope Appraisal. That appraisal contained various deficiencies that lessen its credibility. For example, the board finds properties utilized by Mr. Stanhope were not truly comparable to the Property; in addition, in cross-examination he testified he was not aware that one of them (a gas station) had a 25 foot sewer easement (reflected in Condemnor Exhibit No. 9). The board further finds the $940,000 estimated market value of the Property in the Stanhope Appraisal is excessive based on the quality of the building and its location in relation to the comparables selected.

For all of these reasons, the board finds the Condemnor met its burden of establishing its estimate of damages for the permanent easement presented ($25,000) is just and reasonable.

2. The Temporary Construction Easement

The board then analyzed how best to estimate the value of the temporary construction easement. On this question, the board finds the evidence supports a conclusion that the Property, as of the date of taking, suffered a diminution in projected rental income for the approximately nine month term of the Temporary Easement (June 24, 2009 through March 31, 2010).

"The recognized rule of damages where temporary easements are condemned calls for determination of the value of the use of which the owner is temporarily deprived by reason of the taking. 4 Nichols on Eminent Domain (3d ed.) ss.12.5, 14.24, Annot. 7 A.L.R.2d 1297. This is commonly measured by the diminution of the rental value of the property as a whole." Paddock v. Durham, 110 N.H. 106, 109 (1970) (easements taken in eminent domain for a sewer project). Condemnees cannot be compensated "for any annoyance, inconvenience or frustration that they may experience as a result of the taking", but can be compensated based on "evidence of conditions affecting the value of the use of the property to prospective lessees or purchasers." Id. at 109 and 110.

In general, the market value of the real property rights taken and not the business value (including goodwill, or the loss or frustration of it) is the compensable property interest in an eminent domain action. See Dow v. State, 107 N.H. 517 (1967; see also 2 Nichols on Eminent Domain § 5.03[6][h], citing Ranlet v. Concord R.R., 62 N.H. 561 (1883) ("Loss of business … [has] been determined to be consequential, and therefore noncompensable. Other damages classified as consequential include: damage to business, loss of or damage to goodwill, future loss of profits…."). "The rental value of a commercial site, not the business income of the enterprise occupying it, provides an index of property value." Joan Youngman, Legal Issues in

Property Valuation and Taxation: Cases and Materials (1994: The International Association of Assessing Officers), p. 12.

State v. Shanahan, 118 N.H. 525 (1978) involved a claim that "unrestricted" access to a 10,000 foot corner lot from two streets was impacted and impaired when the existing paving from the lot to the streets was improved with curbing that restricted vehicle access to two points (each 25-feet wide) on one street and one point (82 feet wide) on the other. Id. at 526. The supreme court disagreed with the condemnee's contention that "any restriction on the amount of access, no matter how limited, entitles him to compensation for any decline in the value of the property," id. (italics in original), but went on to reason as follows:

> [T]he difference between a non-compensable exercise of the police power and a compensable exercise of the eminent domain power "is one of degree of harm to the property owner. To be compensable, the damage must be substantial and amount to . . . 'severe interferences which are tantamount to deprivations of use or enjoyment of property.'" [Citation omitted.] Each case must be examined on its facts.
>
> A finding that alternative means of access are available to a landowner would militate against the conclusion that a restriction of a particular point of his access is a taking. However, the alternative means of access must be reasonable. [Citation omitted.]
>
> Also, what might be considered a merely inconvenient or circuitous alternative means of access for one landowner might be an unreasonable alternative for another. See Note, . . ., 26 Syracuse L.Rev. 899, 901 n.19 (1975) (a restriction of access might be "particularly damaging to land with a commercial use which depends on ease and convenient access or an established traffic flow for its continued patronage"). In weighing the private against the public interests, the particular use or uses of the regulated property must be taken into account. . . .

Shanahan, 118 N.H. at 527-28.

The reasoning and holdings in these cases and other authorities is applicable here. While the Condemnor itself acknowledges the taking resulted in a "tough" situation for the Condemnee and his business, the board must determine what is and is not compensable as damages in an eminent domain action. Here there was sufficient testimony by Mr. Houston of changed

temporary access to the premises, impacted visibility of the building and reduced parking. These are factors that would affect the marketability or rental rates for the term of the temporary easement.

To estimate that impact on the market value of the Property, the board has employed a "discounted cash flow" (DCF) approach (see Exhibit A attached hereto) to estimate the difference in value caused by the taking of the temporary easement. The income approach is useful when the income stream from a property is not consistent such as during the rent-up phase of a new commercial building or when the desirability of a property is temporarily impacted, as is the case here due to the temporary easement.

In using the income approach, the board used a market rent assumption of $24 per square foot, a rate that reconciles the various market value indications presented. The board relied in part on Mr. Houston's testimony regarding the Property's estimated market value (approximately $775,000). Application of an 8.5% capitalization rate (the rate used in the Stanhope Appraisal, see Condemnee Exhibit A, p. 53) to this estimate would indicate a gross rental rate of $24. (This gross rental rate is derived by dividing the imputed NOI of $65,875 ($775,000 x .085) by .85 (the net income percentage after deducting for vacancy and expenses). This imputed rate is similar to the contract rent between the related lease parties (inasmuch as the Condemnee and the tenant are both owned by Mr. Houston). Mr. Houston testified the contract rent in 2009 was $23.67 ($6,500/month x 12 months / 3,295 square feet). While the rental rate between closely related parties is not always indicative of market rent, this rate appears to be supported by the other market evidence submitted. The rental rate of $24 is also significantly lower than the imputed rent from the Stanhope Appraisal (approximately $28 - $29), but given the board's experience, and its earlier finding that the Stanhope Appraisal market value estimate of $940,000 is

excessive, the $24 rental rate appears to be reasonable for the purpose of applying the DCF method.

The board then considered the effect of the taking on the rental rate negotiations between a knowledgeable tenant and a knowledgeable landlord. The board concluded such a participant could be successful in negotiating a 25% rent discount (to $18) for the entire nine-month period of the temporary construction easement. Therefore, in the DCF calculations, the board in the "after" situation applied a weighted rental rate of $19.50 per square foot for the first year (9/12 x $18 + 3/12 x $24). Employing other reasonable income approach assumptions (pertaining to expenses and so forth) the board calculated the after value would be about somewhat lower as a result of the temporary easement ($655,112 – $643,481 = $11,631).

The board has rounded this estimate to $12,000 and finds this is the reasonable just compensation resulting from the taking of the temporary construction easement. The board considered the Condemnor's evidence that it took all possible steps to accommodate the Condemnee and lessen the impact of the taking by scheduling the construction work and completing it expeditiously (in less than three months) and these steps are reflected in the "special covenants" set forth in the Declaration and Amended Notice. The board finds, however, that a knowledgeable market participant would have to assume the encumbrance would affect, either actually or potentially, property rights for the entire nine month period prescribed in the easement.

The board does not agree with the Condemnee's multifaceted arguments that the damages for the temporary easement should be higher ($57,700). This estimate is simply not credible and is not reasonably supported by the evidence considered as a whole.

C. Summary

In summary, the board finds the total just compensation for the taking of the permanent and temporary easements on the Property is $27,000. 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 Condemnee 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 Condemnee 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 Condemnee's Request for Findings of Fact and Rulings of Law.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
Paul B. Franklin, Chairman

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Albert F. Shamash, Esq., Member

Addendum A

The "Requests" received from the Condemnee 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 Report.

The board's rules prescribe a maximum of 25 Requests may be submitted, unless prior leave to file more is granted by the board. See Tax 201.36(c). Consequently, the board has responded to the first 25 of the Requests.

1. The Condemnor has no grant of easement across, through or under the Condemnee's land for purposes of maintaining a sewer or drain line. (Admission by Condemnor that it can find no such grant of easement.)

Neither granted nor denied.

2. That no implied easement, often called an easement by necessity exists in favor of the Condemnor across, through or under Condemnee's land for purposes of maintaining a sewer or other drain. (For circumstances warranting the finding of an "implied easement" see: Eliot vs. Fergusson, 104 NH 25 (1962); Johnson vs. Labonborg, 94 NH 417 (1947); Goudie vs. Fisher, 79 NH 424 (1920).

Neither granted nor denied.

3. That no easement by prescription for sewer or drain purposes in favor of the Condemnor has been established by any Court (failure of Condemnor to produce any such evidence).

Neither granted nor denied.

4. That the City has claimed a fifteen foot wide easement for sewer purposes such easement having a length of 110 feet for a total area of 1,650 square feet (Page 58 Shurtleff Appraisal of December 16, 2008, Exhibit 1 and Testimony of Dale M. Gerry).

Denied.

5. That Condemnor has not established it has any easement through, across or under land of the Condemnee in terms of a defined strip.

Denied.

6. That the only fact which the City can establish as to its "use" of Condemnee's land is that since 1915 and probably since 1894 the City has used a drain under Condemnee's land for purposes of flowing sewage and storm water in the direction of the North Mill Pond. (1915 Sewer Survey based on 1894 Plan, Exhibit 9).

Denied.

7. That the Condemnor has been under EPA mandate to cease and desist use of combined sewer storm drains such as the one that the Condemnor used until its recent plugging of the sewer drain under Condemnee's premises.

Granted.

8. That the building on Condemnee's premises currently is situated upon the sewer/drain line which had been used by the Condmnor for many years and such building has existed over such sewer/drain line since at least 1953 (see Affidavit of Sharon R. Jassmond, Exhibit F).

Granted.

9. That Dale Gerry in his Appraisal Report for Condemnor determined that the former combined sewer/drain line did not adversely affect the best use of Condemnee's property. (See Page 58, Shurtleff Report, Exhibit 1).

Neither granted nor denied.

10. That the testimony of Richard Taintor, City Planner of Condemnor established nothing more than if Condemnee wished to move his building the issue of the sewer would have to be dealt with in some fashion depending on the circumstances which existed at the time and he

had no idea how the Condemnor's old "sewer line" affected value. (Testimony of Richard Taintor).

Denied.

11. That a deed from Benjamin Cheevers, et al to the City of Portsmouth in 1866 establishes that a drain existed on Condemnee's premises in 1866 which ran to the North Mill Pond while a deed in the chain of title to Condemnee's premises from Benjamin Cheevers, et al to Hemon Eldredge and George Bilbrook in 1868 establishes that a drain existed from the front portion of Condemnee's premises on Islington Street directly back to property owned by the Eastern Railroad (now B & M). (See Exhibit 2 containing deeds in the chain of title and especially see Memorandum of Robin O'Leary to John P. McGee, Jr. dated 10/13/10 which is part of the Exhibit.

Granted.

12. That the Condemnor gave its City Manager the authority to abandon the combined sewer/drain existing on Condemnee's property by vote of February 11, 2008 almost a year and a half prior to the City's Declaration of Taking. (See proposed Quitclaim Deed, Page 57 of Shurtleff Appraisal Report, Exhibit 1).

Granted.

13. That in fact, the decision of the Condemnor to use a route involving the easement takings against Condemnee involved herein determined that the combined sewer/drain which existed under Condemnee's building would be abandoned.

Granted.

14. That during the summer of 2010, the Condemnor filled and rendered useless the old combined sewer/drain line running from Islington Street through Condemnee's premises as well as the line as it existed under the B & M Railroad property and on to other properties on the other side of the B & M property. (Testimony of David Price, Project Manager for the City of Portsmouth).

Neither granted nor denied.

15. That the City's actions in filling the old sewer/drain line not only as it existed under Condemnee's premises but also as it existed under the B & M premises and under premises on the other side constituted an unequivocal abandonment by the Condemnor of its right to flow sewage and storm water thru same.

Neither granted nor denied.

16. That any knowledgeable and informed Buyer on January 12, 2009 would know and appreciate that the Condemnor would be abandoning the old combined sewer/drain line that ran through Condemnee's property.

Granted.

17. That a knowledgeable and informed Buyer on January 12, 2009 would not increase his offering price to a Seller on the basis of any factors involving abandonment of the combined storm/sewer drain knowing that the Condemnor had no easement, had at a bare minimum the right to flow sewage/storm water and that the Portsmouth City Council had already authorized on February 11, 2008 the City Manager to abandon the old sewer/storm water sewer line which would need to be abandoned in any event because of EPA mandates.

Denied.

18. That the Condemnor in its original Declaration of Taking filed June 24, 2009 as well as in its Amended Notice of Condemnation dated October 16, 2009 provided that its taking would be subject to special covenants.

Granted.

19. That such special covenants included various provisions including a provision that the Condemnor would not commence construction activities within the temporary or permanent easement areas before September 1, 2009 and further provided that such construction activities would be completed within sixty (60) days from the commencement of the work.

Granted.

20. That a further provision of such special covenants provided that the Condemnor would quitclaim its right and interest in the existing combined sewer and drain on the property of the Condemnee after the Condemnor's sewer project was complete.

Granted.

21. That while said covenants were made by the Condemnor in its Declaration of Taking and Amended Declaration of Taking it was specifically provided as follows: "Breach of any of these covenants may result in a claim for money damages but not for right of entry or equitable relief."

Granted.

22. That any knowledgeable and informed Buyer on January 12, 2009 would know that the inability to specifically enforce such covenants gave them little if any positive value.

Denied.

23. That a knowledgeable and informed Buyer would be aware that numerous factors could come into play which would cause the Condemnor to breach such covenants and that an action for money damages after the fact would most likely be impractical.

Denied.

24. That in fact, the Condemnor did breach and/or representations (according to counsel for Condemnee's recollection) before the Board made it clear that even given the City's starting date of November 16, 2009 for the commencement of construction, construction was not completed within sixty (60) days following thereafter but needed to be continued into the spring of 2010.

Denied.

25. That further, the Condemnor's principal appraiser Dale Gerry gave credence to the Condemnor's covenant that it would not start construction until after September 1st and allotted approximately seven (7) months as a duration for the temporary easement not the full period starting with the filing of the Declaration. (See Exhibit 1)

Granted.

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, Condemnor; John P. McGee, Jr., Esq., Flynn & McGee, P.A., P.O. Box 507, Portsmouth, NH 03802, counsel for Houston Holdings, LLC and Portsmouth Cycle Center, Inc.; and John K. Bosen, Esq., Bosen & Springer, P.L.L.C., One New Hampshire Avenue, Suite 215, Portsmouth, NH 03801, counsel for Provident Bank.

Date: December 2, 2010

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Anne M. Stelmach, Clerk

EXHIBIT A
"Before" Valuation

		2009	2010	2011	2012	2013	2014	2015	2016	2017
INCOME:										
Rent / SF (NNN)		$24.00	$24.00	$24.00	$24.48	$24.97	$25.47	$25.98	$26.50	$27.03
Building Size		3,295	3,295	3,295	3,295	3,295	3,295	3,295	3,295	3,295
Gross Income		$79,080	$79,080	$79,080	$80,662	$82,275	$83,920	$85,599	$87,311	$89,057
Vacancy & Collection Loss	10%	$7,908	$7,908	$7,908	$8,066	$8,227	$8,392	$8,560	$8,731	$8,906
Effective Gross Income:		**$71,172**	**$71,172**	**$71,172**	**$72,595**	**$74,047**	**$75,528**	**$77,039**	**$78,580**	**$80,151**
EXPENSES:										
Management	3%	$2,135	$2,135	$2,135	$2,178	$2,221	$2,266	$2,311	$2,357	$2,405
Reserves	2%	$1,423	$1,423	$1,423	$1,452	$1,481	$1,511	$1,541	$1,572	$1,603
Total Expenses:		**$3,559**	**$3,559**	**$3,559**	**$3,630**	**$3,702**	**$3,776**	**$3,852**	**$3,929**	**$4,008**
NET INCOME:		**$67,613**	**$67,613**	**$67,613**	**$68,966**	**$70,345**	**$71,752**	**$73,187**	**$74,651**	**$76,144**
Reversion:										$634,530
Discount Rate:	**9%**									
Reversion Cap Rate:	**10%**									
NET PRESENT VALUE:										
Cash Flow:										$386,010
Reversion:										$269,103
"Before" NPV:										**$655,112**
"After" NPV (see next page):										**$643,481**
Difference:										$11,631
ROUNDED DIFFERENCE:										**$12,000**

EXHIBIT A
"After" Valuation

		2009	2010	2011	2012	2013	2014	2015	2016	2017
INCOME:										
Rent / SF (NNN)		$19.50	$24.00	$24.00	$24.48	$24.97	$25.47	$25.98	$26.50	$27.03
Building Size		3,295	3,295	3,295	3,295	3,295	3,295	3,295	3,295	3,295
Gross Income		$64,253	$79,080	$79,080	$80,662	$82,275	$83,920	$85,599	$87,311	$89,057
Vacancy & Collection Loss	10%	$6,425	$7,908	$7,908	$8,066	$8,227	$8,392	$8,560	$8,731	$8,906
Effective Gross Income:		**$57,827**	**$71,172**	**$71,172**	**$72,595**	**$74,047**	**$75,528**	**$77,039**	**$78,580**	**$80,151**
EXPENSES:										
Management	3%	$1,735	$2,135	$2,135	$2,178	$2,221	$2,266	$2,311	$2,357	$2,405
Reserves	2%	$1,157	$1,423	$1,423	$1,452	$1,481	$1,511	$1,541	$1,572	$1,603
Total Expenses:		**$2,891**	**$3,559**	**$3,559**	**$3,630**	**$3,702**	**$3,776**	**$3,852**	**$3,929**	**$4,008**
NET INCOME:		**$54,936**	**$67,613**	**$67,613**	**$68,966**	**$70,345**	**$71,752**	**$73,187**	**$74,651**	**$76,144**
Reversion:										$634,530
Discount Rate:	**9%**									
Reversion Cap Rate:	**10%**									
NET PRESENT VALUE:										
Cash Flow:										$374,379
Reversion:										$269,103
"After" NPV (carried to first spreadsheet):										**$643,481**