

State of New Hampshire

v.

ADP, Inc.

Docket No.: 24067-09ED

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 5, 2009, describing the property rights taken as follows: a fee taking of one and seventy-nine hundredths (1.79) of an acre, more or less; and a temporary construction easement of five hundred seventy-five (575) square feet, more or less (to expire not later than November 1, 2016 or completion of the construction for the project, whichever comes first).

See Exhibit A to the Declaration. The “Property” consisted of 18.07 acres before the taking and 16.28 acres after the taking.

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 “Condemnee.” See Tax 210.12 and cases cited therein.

The board viewed the Property on November 2, 2010 and began the just compensation hearing at the Londonderry Town Hall. Then, at the request of the parties, the board continued the hearing. The hearing was rescheduled and concluded on June 7, 2011.

The Condemnor was represented by Kevin H. O'Neill, Esq., State of New Hampshire Department of Justice. The Condemnee was represented by Erik R. Newman, Esq. and Samantha D. Elliot, Esq. of Gallagher, Callahan and Gartrell.

Pamela J. Carle of Avicore Reporting & Videoconferencing, 814 Elm Street - Suite 400, Manchester, NH 03101, (888) 212-2072 took the stenographic record at the start of the hearing in the Londonderry Town Hall on November 2, 2010. The board recorded the hearing on June 7, 2011 electronically at its offices. Any requests for transcripts should be ordered directly through the board's clerk. Parties should expect at least four (4) weeks for completion of a requested transcript.

Board's Rulings

The board has the authority to determine the damages to be awarded as just compensation on account of the taking after hearing the evidence presented and to file a report containing its findings. See RSA 498-A:25; RSA 498-A:26; and, e.g., Daly v. State of New Hampshire, 150 N.H. 277, 279 (2003); see also Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 77 (1973) ("the measure of damages in the final analysis and simply stated will be the difference in value before and after the taking (Citations omitted)."

The taking involved a total of 1.79 acres in fee, mostly on the southern boundary of the Property with a narrow strip along the western boundary. (See Condemnor Exhibit No. 2.) The Property was acquired and developed in 1996 as a single-user, corporate headquarters facility with a three-story, "Class A" 115,000 square foot office building situated in the northerly portion

of the Property and 420 parking spaces in the middle of it. The southerly portion, however, remained undeveloped. This may have been because it was not needed for an office building use, there is a detention pond effectively separating it from the rest of the Property and maps at that time showed the existence of substantial wetlands in the area of the Property beyond the detention pond. (See the photographs in Condemnor Exhibit Nos. 1 and 2, pp. 6–11.)

The Condemnor relied on appraisals prepared by B. Alec Jones and Joseph G. Fremeau, MAI, of Fremeau Appraisal, Inc. (See the “Fremeau Appraisal” dated January 18, 2011, Condemnor Exhibit No. 6; see also Condemnor Exhibit No. 1, hereinafter the “Prior Fremeau Appraisal” estimating the same values, but dated February 9, 2010.) These appraisals estimated the before and after values of the Property as of the date of taking to be \$13,500,000. Since the Fremeau Appraisal (and Prior Fremeau Appraisal) concluded there was no change in value, the Condemnor argued there were no damages from the taking, but did deposit the sum of \$20,000 with the board based on its “pro rata policy.” (See, e.g., Condemnor Exhibit No. 6, p. 134; for a further discussion of the board’s understanding of this policy, see State of New Hampshire v. GCD, Inc., BTLA Docket No. 24732-10ED (June 7, 2011) at pp. 5-6.)

The Condemnee disagreed and argued for a much higher just compensation award of \$200,000, relying upon appraisals prepared by Jerry N. Walls, MAI (see Condemnee Exhibit C, the “Final Walls Appraisal” dated February 22, 2011, as well as Condemnee Exhibits A (the “First Walls Appraisal” dated March 17, 2009) and B (the “Second Walls Appraisal” dated July 15, 2010).¹

¹ It is not exactly clear why Mr. Walls prepared three appraisals. The First Walls Appraisal has an incorrect valuation date (February 28, 2009) and estimates the damages at \$110,000. The Second Walls Appraisal has the correct valuation date (August 5, 2009) and estimates higher damages of \$200,000. As noted above, the hearing began on November 2, 2010 was continued and, in the interim, Mr. Walls prepared his third and final appraisal (the Final Walls Appraisal) and made the same \$200,000 estimate of damages. The board notes these points only to reduce any confusion resulting from the parties’ submittal of the multiple appraisals into the record.

A key issue in determining the just compensation for the taking is whether the Property consists of ‘one or two economic units,’ insofar as the evidence presented indicates part of the area taken (roughly 1.25 of the total 1.79 acres) could conceivably be developed separately at some point. On this issue, the Condemnee placed primary reliance upon an “Office Concept . . . Conceptual Plan” dated April 21, 2010 showing what a two-story office building (consisting of 12,800 square feet) might look like if this part of the Property was considered for a potential development (with or without a formal subdivision) and the testimony of the creator of this plan. (See Condemnee Exhibit D and Condemnor Exhibit No. 6, the plan prepared by Robert Baskerville of Bedford Design Consultants, Incorporated; hereinafter the “Bedford Conceptual Plan”).

The Bedford Conceptual Plan, however, as its name indicates, is simply conceptual in nature and was prepared (at the request of the Condemnee’s law firm) more than eight months after the date of taking. There is no evidence such a conceptual plan, with the assumptions and contingencies noted on it, was actually considered by the Condemnee prior to the taking. The board noted both when it was prepared (after the date of taking) and that there was no testimony this plan (or any predecessor concept or plan) was ever reviewed or accepted by the Condemnee’s management or submitted to the municipality for review or approval. In other words, there is no evidence to suggest the Condemnee, either at or before the time of the taking, had any intention to subdivide, sell or develop the part taken in this or a similar manner.

Notwithstanding the Bedford Conceptual Plan, the board finds the highest and best use of the Property as a whole (a large headquarters facility owned and occupied by a corporate user) did not change as a result of the taking. The board finds the most likely purchaser of the Property, including the part taken, if offered for sale, is a corporate owner/occupant, not a

developer interested in subdividing the Property for varied uses. Moreover, the existence of surplus parking spaces on the rest of the Property makes it unlikely any purchaser would place a high value on this additional land for parking or a similar purpose.

The board finds limited merit in the Condemnee's counter-arguments that some development potential may have existed for the part taken and finds more merit in the Condemnor's factual and legal arguments that such potential is more speculative than probable. In this regard, the developed law is that "market value cannot be predicated upon potential uses that are speculative and conjectural" and therefore "[a] proposed highest and best use requires a showing of reasonable probability that the land is both physically adaptable for such use **and** that there is a need or demand for such use in the reasonably near future." 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 pp. 34-35 (emphasis in original), citing Olson v. United States, 292 U.S. 246, 255-57 (1934) and other authorities.²

The board recently applied these principles, as follows:

The "highest and best use" has been defined as "[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and results in the highest value." The Appraisal of Real Estate, 10th Ed. (Chicago, Ill., Appraisal Institute, 1993), p. 274; The Dictionary of Real Estate Appraisal, 2d Ed. 1989, p. 149 . . . [S]ee also Yankee Development Association v. Town of Durham, BTLA Docket No. 9346-90 (November 22, 1993): "The (highest and best use) must be a probable use and not a highly speculative one. There must be a demand for the use either in the present or in the near future. International Association of Assessing Officers, Property Assessment Valuation, 1977").

² The Olson case is further quoted in the Yellow Book, in a section titled "Conjectural and Speculative Evidence," as follows: "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration." Id.; see also United States v. 320 Acres of Land, 605 F.2d 762, 814-20 (5th Cir. 1979), where these principles are further discussed and applied. Accord, 4 Nichols on Eminent Domain Section 12B.14 at p. 12B-140.

When an appraiser employs an alternative highest and best use assumption, it cannot be so speculative as to lead to an improbable or misleading outcome. In other words, a proposed highest and best use of property “requires a showing of reasonable probability” of accomplishing that use, both physically and with respect to other factors, because “physical adaptability alone is insufficient” and “conjectural and speculative evidence” must be discounted because elements affecting value, while within the realm of possibility, that are “not fairly shown to be reasonably probable, should be excluded from consideration.” Cf. State of New Hampshire v. Labrador Enterprises, LLC, BTLA Docket No. 20615-05ED, citing the (Yellow Book) [Fn. omitted.]

Where an appraiser places great weight on one factor (such as a specialized highest and best use concept), it must be shown to be credible, not speculative, and must have adequate supporting documentation in order to be considered in the valuation process. See Paras v. City of Portsmouth, 115 N.H. 63, 67-68 (1975).

Coroc Lakes Region, LLC v. Town of Tilton, BTLA Docket Nos. 23508-07PT/24302-08PT

(June 10, 2010) at pp. 5-6.³

Applying this established body of law and eminent domain practice to the evidence presented, the board finds there is no showing of reasonable probability by the Condemnee that the part taken would have been developed in the manner presented in the Bedford Conceptual Plan or that there was a “need or demand” for such development as of the date of taking. Consequently, the board finds the \$200,000 estimate of damages in the Walls Appraisal to be much too high and not supported by the evidence presented.

On the other hand, the board cannot entirely accept the Condemnor’s conclusion, based on the two Fremeau Appraisals, that the taking resulted in zero damages. The second Fremeau Appraisal reaches the same conclusion as the first, even after correcting certain assumptions regarding the extent of wetlands in the part taken, and this conclusion is not entirely credible.

³ Further, as noted in Coroc, “The supreme court has held the ‘definition’ or concept of “fair market value for eminent domain purposes” is “in harmony with [the] definition for tax purposes.’ 590 Realty Co. Ltd. v. City of Keene, 122 N.H. 284, 287 (1982), citing Amoskeag-Lawrence Mills v. State, 101 N.H. 392, 399 (1958).” Id. at p. 6.

Although initially a point of dispute, the parties now appear to agree a sizable portion of the part taken is potentially usable because it is not wetlands. It is therefore reasonable to conclude it has some value for which the Condemnee is entitled to compensation, even if the value is hard to measure using standard appraisal techniques, such as those employed in the Fremeau Appraisals. Mindful of these measurement issues, the board has arrived at the value conclusion discussed below using a modified approach that is workable and reasonable. (See GCD at pp. 5-11.)

In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals of each party and the testimony of the experts, 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, 115 N.H. at 68 (1975); see also Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994).

After weighing all of the evidence and arguments presented, and applying its judgment and experience, the board finds the Condemnee is entitled to a just compensation award of \$40,000. The board arrived at this determination by using the Walls Appraisal as a starting point

and discounting its \$200,000 estimate substantially (by a total of 80%) because of a number of factors.

First, as noted above, the evidence failed to establish it was reasonably probable that a development such as that envisioned in the Bedford Conceptual Plan (prepared more than eight months after the taking) would have occurred. While some potential development of the part taken at some future point in time is not entirely speculative, the board finds a significant discount should be applied in light of all of the relevant factors involved.

Second, even if development of the part taken with a two-story office building is plausible, there are some risks associated with obtaining the necessary approvals for such a development, both from the Town and also from the holder of the recorded easement for the right of way access to the Property along the extension to Northeastern Boulevard. In addition, the board notes the Condemnor did not take the existing frontage but rather left the Condemnee with ownership of a strip of land bordering the roadway. This means the part taken has less value than land with deeded road frontage ready for development. Mr. Walls, the Condemnee's appraiser, made no mention of this factor and the board finds a downward adjustment is appropriate.

Third, on the basis of the disputed evidence presented, including vacancy rates and the fact some commercial projects were delayed or postponed indefinitely, it is more likely than not there was insufficient market demand at the time of the taking to warrant immediate development rather than development at some future point when the market improved. (See, e.g., the Freneau Appraisal (Condemnor Exhibit No. 6) at pp. 68-70.) In addition, some portion of the existing office building is presently vacant and available for lease. Thus, even if other development hurdles were not present, some discounting for market conditions is necessary.

Fourth, the most likely purchaser of the Property at its then highest and best use (another corporation looking for a headquarters facility) is likely not to be persuaded that the arguable developable potential of the part taken should increase the price it is willing to pay for the Property. In other words, using the before market value estimate of \$13,500,000 in the Fremeau Appraisal, which the board finds to be reasonable, a knowledgeable buyer for a corporate headquarters facility is unlikely to agree to pay an extra \$200,000 simply based on the Condemnee's arguments regarding the development potential of the part taken.

Fifth, Mr. Walls' estimate is based on a speculative conclusion that the development site is a separate economic unit, which the board does not agree with and which is at variance with accepted valuation principles. (See discussion of the "Unit Rule" in the Yellow Book.⁴)

Finally, although the board employed this estimate as a starting point, the board finds the Final Walls Appraisal (like its predecessors) has various problems that lessen its credibility and the weight it can be given. In addition to the issues already noted, Mr. Walls did not perform a complete before and after analysis and valuation of the Property as a whole. The Fremeau Appraisal, in contrast, valued the Property as a whole in arriving at its \$13,500,000 estimate of value. Because of these and other flaws, the board cannot give the Final Walls Appraisal much weight.

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The first aspect of the unit rule requires that property be valued as a whole rather than by the sum of the values of the various interests into which it may have been carved,

A second aspect of the unit rule is that different elements or components of a tract of land are not to be separately valued and added together. . . . Such a procedure results in a *summation* or *cumulative* appraisal, which is forbidden in appraisals for federal acquisitions, as it is in general real estate appraisal practice. (Fn. omitted.)

Yellow Book, pp. 53-54 (italics in original).

In sum, the board finds these and other factors warrant a just compensation award of \$40,000 for the taking, reflecting an estimated before value of \$13,500,000 and an estimated after value of \$13,460,000. See RSA 498-A:26, II.

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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Kevin H. O'Neill, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Erik R. Newman, Esq. and Samantha D. Elliott, Esq., Gallagher, Callahan & Gartrell, P.C., 214 N. Main Street, Concord, NH 03302-1415, counsel for the Condemnee.

Date: July 22, 2011

Anne M. Stelmach, Clerk