

State of New Hampshire

v.

Stephen P. Kniaz Realty, LLC, Stephen P. Kniaz Investments, Inc., Kathlyn G. Box, Kathlyn G. Box Revocable Trust, Kathlyn G. Box, Trustee, Jesse N. Box, Jesse N. Box Revocable Trust, Jesse N. Box, Trustee and KeyBank National Association

Docket No.: 24707-09ED

REPORT OF THE BOARD

This matter arises as a result of 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 October 14, 2009, describing the property rights taken as 1.05 acres with improvement thereon (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 and began the just compensation hearing at its offices on December 2, 2010. It continued and concluded the hearing on December 3, 2010. The parties had verbally agreed to a change in venue. The Condemnor was represented by David M. Hilts,

Esq. of the State of New Hampshire Department of Justice and Craig S. Donais, Esq. represented Stephen P. Kniaz Realty, LLC and Stephen P. Kniaz Investments, Inc.

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.

Board's Rulings

The board finds damages in the amount of \$1,100,000 payable to all Condemnees of record.

The board acknowledges the Property embodies some unique property rights that are difficult to find comparable sales with similar rights. On the positive side, the Property has excellent visibility from the Spaulding Turnpike with over 70,000 vehicles per day. While in 1955 the state acquired "all rights of access, air, view, and light...", the state did not have any impending proposal to exercise the restriction of view and, thus, the Property continued to enjoy the desirable attribute of visibility for commercial purposes. Associated with that right is the large, two-sided, electric sign whose size is grandfathered under the Dover zoning ordinance and which amplified the commercial use of the Property. The entire lot is usable, level and fully developed with a well maintained retail property and adequate paved parking. Its access, however, was rather circuitous via the lighted intersection of Dover Point Road and Route 4 because the state had restricted access from the Spaulding Turnpike as part of the 1955 taking. Also, the immediate neighborhood is a mix of residential and commercial use with the predominate use being residential. On balance, however, the board concludes the Property was a very desirable commercial site for destination type uses where advertising and high visibility would be beneficial to the businesses occupying the Property.

With this general description of the Property rights, the board reviewed both the Stephen J. Bergeron Appraisal (“Bergeron Appraisal”) submitted by the Condemnor (Condemnor Exhibit No. 1) and the Duane H. Cowall Appraisal (“Cowall Appraisal”) submitted by the Condemnee (Condemnee Exhibit E).

The board finds the Cowall Appraisal estimate of market value of \$1,720,000 overstates the Property’s market value for two reasons: 1) the comparable sales relied upon are generally superior in various manners to the Property; and 2) the income capitalization contributory value of the web cam lease of \$270,000 is not a value related to a compensable property right (see separate section detailing the board’s findings).

The Cowall Appraisal’s comparables are of commercial properties that have both reasonable traffic exposure and good direct access. While certainly the Spaulding Turnpike has significant traffic volume, the traffic, except during backup commuting times, is at high speed common to the arterial commuter nature of such a highway. The Cowall comparables (with the exception of comparable number 2) are generally located on more collector or secondary streets where the traffic speed is slower to accommodate the associated retail uses. Sale comparable number 2, located at 80 Spaulding Turnpike in Portsmouth, has direct access from the Spaulding Turnpike and is thus significantly superior to the Property. Further, its improvement is a plain, flat roof, rectangular building with no windows and roughly one-quarter the size of the Property’s building. Because the unit of comparison used is sale price per square foot of building, significant subjective adjustments would need to be made to this comparable to account for its direct access, its inferior quality and its small size. Because of the magnitude of the necessary adjustments, the board is unable to give much weight to the adjusted sale price per square foot of comparable number 2. Similarly, because the remaining three comparables have

better access and are in more homogeneous commercial/retail neighborhoods, the adjusted sale prices per square foot are not sufficiently similar to the Property to provide a reliable basis for a market value estimate. Adjustments would need to be made to the comparables for these superior attributes of access and retail location. The board has estimated the correlated price per square foot of \$225 is approximately 25-30% high as a result of these factors and, if adjusted accordingly, would arrive at an indicated price per square foot of approximately \$160 to \$170 of building area.

In the Bergeron Appraisal, the comparables were not specifically adjusted for their inferior traffic and visibility but that factor was considered as an offset to the better direct access offered by the comparables. The board agrees these factors are somewhat offsetting, but we conclude the excellent visibility and signage of the Property results in its location being overall superior than the comparable sales employed in the Bergeron Appraisal. We acknowledge Mr. Bergeron's testimony that adjusting for these differences are subjective as they are difficult to quantify empirically from the market. However, given the Property's unique high visibility, we believe the comparables should be adjusted by a relatively significant factor of approximately 25%. This results in an indicated price per square foot ($\$130 \times 1.25 = \162.50) similar to that arrived at by adjusting the Cowall Appraisal correlated price. As a result, the board concludes the Property has a market value of approximately \$1,100,000 (6,554 square feet \times \$165 = \$1,100,000 rounded). The board finds no contributory value for the web cam lease for the reasons discussed in the following paragraphs.

Contributory Value of Web Cam Lease

While the parties agreed the view (in addition to the access, air and light) easement taken along the Spaulding Turnpike frontage of the Property does not, from a practical manner, affect

the comparables to be considered in the sales approach, the board finds the only motivation for locating the web cam on the Property relates to the ability to “view” traffic on the Spaulding Turnpike. Because this view was taken by the state by an earlier easement, it is very questionable whether the ability to locate a web cam on the Property rises to the level of a compensable right under this taking. Moreover, the instrument between Mr. Stephen Kniaz and Clear Channel is simply an unrecorded two-page “letter of agreement.” The Cowall Appraisal contained no evidence that the market would recognize a real property right value of \$270,000 for the ability to enter into an unrecorded letter of agreement between the business operator on the Property and Clear Channel. This arrangement certainly benefited the Condemnee’s business that occupied the Property. It provided advertising the business had previously paid for at a now negligible cost, thus increasing the profitability of the business. However, no evidence was submitted that such arrangement was uniquely or intricately tied to the property rights and would thus be valued by any prospective purchaser of the Property. The board is not convinced this letter of agreement memorializes or creates a transmissible real estate right similar to such rights which commonly occur, for instance, between cell tower owners and the fee owner of the land, billboard tenants and fee owners or other such arrangements where the right that is leased clearly relates to the real estate rights and not a specific business occupant.

Even if, for argument purposes, the web cam is considered a compensable property right, the Cowall Appraisal a la carte valuation of the web cam may overstate any contributory value it has as it is not compliant with the “unit rule” (See Uniforms Appraisal Standards of Federal Acquisitions, Appraisal Institute (2002) (commonly known as the “Yellow Book”), section B-13 (“[D]ifferent 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.”)

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Strafford 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 parties 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

Michele E. LeBrun, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: David M. Hiltz, Esq., Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, counsel for the Condemnor; Craig S. Donais, Esq., Donais Law Offices, 15A High Street, PO Box 1778, Manchester, NH 03105, counsel for Stephen P. Kniaz Realty, LLC and Stephen P. Kniaz Investments, Inc.; Kathlyn G. Box Revocable Trust, Kathlyn G. Box, Trustee, 90 Ridge Road Top, New Durham, NH 03855; Jesse N. Box Revocable Trust, Jesse N. Box, Trustee, 90 Ridge Road Top, New Durham, NH 03855; and Keybank National Association, Matthew Inks, Collections and Recovery, OH-01-51-0620, 4910 Tiedeman Road, Brooklyn, OH 44144, Mortgagees.

Dated: 1/6/11

Anne M. Stelmach, Clerk