

The State of New Hampshire

v.

Aranosian Oil Company, Inc.

Docket No.: 24725-09ED

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 December 16, 2009, describing the property rights taken as follows: a fee taking of eighteen hundredths (0.18) of an acre, more or less, a permanent slope easement of two thousand nine hundred seventy-five (2,975) square feet, more or less, a permanent drainage easement of one thousand seven hundred fifty (1,750) square feet, more or less, and a temporary construction easement (to expire not later than December 31, 2025 or one year after completion of construction of the project, whichever date comes first) of one thousand eight hundred sixty (1,860) square feet, more or less. 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 Condemnee. See Tax 210.12 and cases cited therein.

The board viewed the “Property” (described as “Parcel L104,” hereinafter “Lot 104”), and held the just compensation hearing at the Londonderry Town Hall and in its offices on May 25 and 26, 2011, respectively. The Condemnor was represented by Dave Hilts, Esq. of the State of New Hampshire Department of Justice and the “Condemnee” was represented by Donald Crandlemire, Esq. of Shaheen and Gordon.

Michelle Perrier Cole of Avicore Reporting & Videoconferencing, 814 Elm Street – Suite 400, 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 parties agreed the Property consisted of 1.08 acres before the taking and 0.9 acres after the taking.

Board’s Rulings

The board held the just compensation hearing for this taking in conjunction with three other takings of property owned by parties related to the Condemnee. This was done because much of the evidence presented is common to all four takings. The other three takings involve lots directly across the street (on Rockingham Road, New Hampshire Route 28) that are contiguous to each other and those takings are the subject of a second report issued concurrently herewith. (See BTLA Docket Nos. 24739-10ED, 24749-10ED and 24741-10ED.)

Lot 104 is undeveloped land zoned for commercial use located in close proximity to the Exit 5 off-ramps of Interstate 93. As noted, it has frontage on Rockingham Road with two points of access to that roadway (leading to a small paved area of unknown origin and use which the board observed on its view) and is bordered to the north by Independence Drive and to the west by Auburn Road. (See also Condemnee Exhibit A, Tab A.)

The Condemnor relied upon a May 10, 2010 appraisal by Martin S. Doctor, a certified general appraiser, of Fulcrum Appraisal Services (the “Fulcrum Appraisal,” Condemnor Exhibit No. 2). The Fulcrum Appraisal estimates the damages from the taking to be \$100,000, based upon a before value of \$420,000 and an after value of \$320,000 as of the December 16, 2009 date of taking.

The Condemnee relied upon a June 15, 2009 appraisal by Wesley G. Reeks, MAI (the “Reeks Appraisal,” Condemnee Exhibit A, Tab B). The Reeks Appraisal, as modified by a September 29, 2010 letter (Condemnee Exhibit A, Tab C), estimates the damages from the taking to be \$390,000, based upon a before value of \$630,000 and an after value of \$240,000 as of June 1, 2009, a date preceding the actual date of taking (December 16, 2009) by more than six months.

The key disputed issue in this taking is the development potential of Lot 104 and whether (and to what extent) it was materially affected by the taking. The witnesses who testified on this issue included both appraisers, a developer retained and called by the Condemnee (Dick Anagnost) and the Londonderry Town Planner (Timothy Thompson), called as a rebuttal witness by the Condemnor. At the hearing, and in their post-hearing memoranda, the parties disputed how much weight and import should be given to this testimony and the other evidence presented.

Rather than discuss each point of dispute in detail, the board will instead summarize its general findings and determination of just compensation damages here.¹

With respect to the various issues raised in the post-hearing memoranda, the board denies the Condemnor's request to have the Reeks Appraisal excluded from consideration 'in its entirety.' (See the Condemnor's June 10, 2011 "Hearing Memorandum," pp. 2-6 and 10.) While the Reeks Appraisal has a number of flaws, including, for example, a date of value different from the date of taking, the board finds it would be improper to exclude it entirely simply on these grounds. A more valid approach is to consider the Reeks Appraisal, but only give it the weight it deserves in the context of all of the other evidence presented. In turn, the board disagrees with the Condemnee's argument that the board should "discount the reliability" of the Doctor Appraisal and rely instead entirely on the Reeks Appraisal. (See the Condemnee's June 10, 2011 "Hearing Memorandum", pp. 4-13.)

The board finds the Doctor Appraisal is, on balance, more carefully documented and supported than the Reeks Appraisal and arrives at a more reasonable estimate of market values, but that a further adjustment is warranted. In brief, the board estimates the before value of Lot 104 was \$465,000, about 10% higher than Mr. Doctor's estimate, and the after value to be \$350,000, again about 10% higher than Mr. Doctor's estimate, based on the following factors.

¹ 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 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).

The board first evaluated the location and then the size and configuration of Lot 104. The evidence presented supports a finding that, on the whole, Lot 104 had a better location than Mr. Doctor took into account in his appraisal. The board agrees with the Condemnee that the proximity and visibility from the northbound ramp to the highway (Interstate 93) is a significant influence on market value. As for its size and configuration, the board finds Lot 104, while less than the one acre minimum lot size after the taking, is likely to receive any additional variance that may be needed, if and when a development plan accommodating the other limitations of the Property is presented for approval to the Town of Londonderry (“Town”).

These findings are supported by the testimony of Mr. Thompson, an independent witness and Town official knowledgeable about its current (and prior) zoning and development requirements. Further, and because of setback and wetland issues, Lot 104 faces other development constraints that constrain its potential market value both before and after the taking. Weighing these factors, the board finds the total just compensation damages from the taking is \$115,000, the difference between the before and after market values estimated above.

The board finds the much higher values (and resulting damages from the taking) estimated in the Reeks Appraisal to be less supportable for a number of reasons. First, as noted above, Mr. Reeks used a different, incorrect valuation date. Second, his comparables were in more densely developed and valuable locations outside the Town (including two in Manchester and one in Windham) and he did not make reasonable adjustments for this difference. Third, the board is unable to place much weight on Mr. Anagnost’s views (on which Mr. Reeks placed undue reliance) that the “development potential” of Lot 104 changed markedly as a result of the taking.

While Lot 104 no doubt faces some planning and development hurdles, Mr. Anagnost, in all likelihood, overstated their severity, especially in light of the rebuttal testimony of Mr. Thompson regarding the approval process in Londonderry and how it has changed over time. In his original appraisal, Mr. Reeks applied a negative “utility adjustment” of 17%, but he increased this adjustment, with inadequate support, to 50% in his two-page revision dated September 29, 2010; as a result of this one change, his estimate of damages increased by \$100,000 (from \$290,000 to \$390,000). The board therefore finds Mr. Reeks market value estimates, and the adjustments he applied for the effects of the taking, to be excessive in amount.

For these reasons, as well as those discussed in the Condemnor’s Hearing Memorandum (pp. 2-6), the board finds the Reeks Appraisal is entitled to little weight in comparison to the Doctor Appraisal and that the Condemnor met its burden of proving by a preponderance of the evidence that a lesser award than claimed by the Condemnee is justified. In brief, the board determines \$115,000 is just compensation for the taking. See RSA 498-A:25.

If either party seeks to appeal the amount of damages determined 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

Paul B. Franklin, Chairman

Albert F. Shamash, Esq., Member

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; Donald C. Crandlemire, Esq., Shaheen & Gordon P.A., 107 Storrs Street, PO Box 2703, Concord, NH 03302, counsel for Aranosian Oil Company, Inc., Condemnee; and Boston and Maine Corporation, c/o Pan Am Railways, Inc., Robert B. Culliford, Registered Agent, 400 Amherst Street – Suite 405, Nashua, NH 03063, Easement Holder.

Date: July 7, 2011

Anne M. Stelmach, Clerk