

The State of New Hampshire

v.

Aranosian Oil Company, Inc.

Docket No.: 24739-10ED

The State of New Hampshire

v.

Gladys Hayes, et al.

Docket No.: 24740-10ED

The State of New Hampshire

v.

Aranosian Oil Company, Inc., et al.

Docket No.: 24741-10ED

REPORT OF THE BOARD

These three 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. Three Declarations of Taking (“Declarations”) were filed with

the board on February 24, 2010, describing the property rights taken as follows:

in Docket No. 24739, a fee taking of five hundredths (0.05) of an acre, more or less, and a permanent slope easement of one thousand two hundred (1,200) square feet, more or less;

in Docket No. 24740, a fee taking of sixteen-hundredths (0.16) of an acre, more or less, and a permanent slope easement of two thousand one hundred seventy-five (2,175) square feet, more or less; and

in Docket No. 24741, a fee taking of eighty hundredths (0.80) of an acre, more or less, also taking all rights of access, light, air and view over certain abutting land, a permanent drainage easement of two hundred twenty-five (225) square feet, more or less, and a secure water quality basin permanent easement of one hundred ten thousand six hundred seventy-five (110,675) square feet, more or less, and a temporary construction easement (to expire on December 31, 2025 or one year after completion of construction, whichever date occurs first) of six thousand six hundred (6,600) square feet, more or less.

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 described in each Declaration and held a consolidated just compensation hearing at the Londonderry Town Hall and in its offices on May 25 and May 27, 2011, respectively. The Condemnor was represented by Dave Hiltz, Esq. of the State of New

Hampshire Department of Justice and the “Condemnees” were 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.

These takings involve three contiguous parcels of land in related, but distinct ownership (as designated above), that are managed in common: Parcel L129 (“Lot 129”) in Docket No. 24739; Parcel L128 (“Lot 128”) in Docket No. 24740; and Parcel L130 (“Lot 130” in Docket No. 24741. Lot 128 consisted of 1.3 acres before the taking and 1.14 acres after the taking; Lot 129 consisted of 0.52 acres before the taking and 0.47 acres after the taking; and Lot 130 consisted of 8.21 acres before the taking and 7.41 acres after the taking.

Board’s Rulings

The board held the just compensation hearing for these takings in conjunction with another taking of property across the street, described as “Lot 104.” (See BTLA Docket No. 24725-09ED). This was done because much of the evidence presented is common to all four takings. The board is issuing concurrently herewith a second report for the taking of Lot 104.

Lots 128, 129 and 130 are located on the southerly/westerly side of Rockingham Road, New Hampshire Route 28, immediately to the east of Interstate 93 (see Municipality Exhibit A, Tab A.). They will collectively be referred to as the “Property” for convenience but also because the board finds they share sufficient attributes to make it reasonable to employ the larger parcel concept to determine the just compensation damages for these takings.

Generally, the larger parcel approach is appropriate where, as here, legally distinct parcels of land are commonly managed and in common ownership. See, e.g., State v. Tana Properties, LP, BTLA Docket No. 22545-07ED (February 10, 2010), at p. 11; and the “Yellow Book” (the Uniform Appraisal Standards for Federal Land Acquisitions published by The Appraisal Institute, 2000 ed.), at p. 17 and fn. 1 (‘elements of consideration’ for determining a larger parcel are: “contiguity, or proximity, as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use”). Two of the lots are presently undeveloped (Lots 128 and 129), but it is reasonable to conclude that they could be developed in conjunction with Lot 130 by a potential purchaser in their highest and best use. From the evidence presented, the board concludes these elements are satisfied for the Property.

The Condemnor did not follow the larger parcel approach but instead relied upon separate appraisals of each of the three lots, all dated June 4, 2010, by Martin S. Doctor, a certified general appraiser, of Fulcrum Appraisal Services (the “Fulcrum Appraisals,” marked as separate exhibits in each docket.). The Fulcrum Appraisals estimate the total damages from these three takings was \$285,000, an aggregation of the following discrete estimates:

for Lot 128, \$65,000 (based on a before value of \$515,000 and an after value of \$450,000);

for Lot 129, \$20,000 (based on a before value of \$185,000 and an after value of \$165,000); and

for Lot 130, \$200,000 (based on a before value of \$3,680,000 and an after value of \$3,480,000).

In effect, the Fulcrum Appraisals reflect the aggregate value of the Property before the taking was \$4,380,000 and the after value was \$4,095,000.

The Condemnees relied upon a February 4, 2010 appraisal signed both by Robert G. Bramley, MAI and J. Chet Rogers, MAI, who did the bulk of the work, of R.G. Bramley & Co., Inc. (the “Bramley Appraisal,” Condemnee Exhibit A, Tab B, as corrected in a spreadsheet dated May 27, 2011, Condemnee Exhibit B) valuing the Property as of December 14, 2009, rather than the date of taking more than two months later. The Bramley Appraisal treated the three lots as a larger parcel.

Because of what turned out to be a very significant error discovered just prior to the hearing, Mr. Rogers reduced his estimate of just compensation damages by almost one-half: from an original estimate of \$2,040,000 (in the Bramley Appraisal) to \$1,070,000. The sole reason for this correction was a change in his estimate of the total “buildable” area taken -- from 1.81 acres to 0.95 acres. (Compare Condemnee Exhibit B and Condemnee Exhibit A, Tab B at p. 45.) Mr. Rogers estimated the market value of the Property was \$1,130,000 per buildable acre, which led him to derive, as corrected, a before value of \$5,750,000 and an after value of \$4,680,000. (Id.)

At the hearing, and in their post-hearing memoranda, the parties disputed how much weight and import should be given to the respective appraisals 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

The board will begin by deciding several issues raised in the post-hearing memoranda.. First, the board denies the Condemnees’ “Motion to Reopen the Record . . .”; in this motion, the Condemnees seek to introduce additional documentary evidence and further testimony pertaining to one comparable discussed by both appraisers (124-126 Rockingham Road) on the question of whether a “site plan” for that property had been approved. The board finds reopening the record for this reason is neither appropriate nor necessary since each party had a full and fair opportunity to examine and cross-examine each witness who testified, including the respective appraisers (Mr. Doctor and Mr. Rogers) as to their knowledge of this comparable. Impeachment of testimony can and should be done generally through cross-examination and rebuttal, not a request to reopen the record after both parties have rested and the record is closed. As stated in the Condemnor’s “Objection” (at p. 2, paragraph 5), the Condemnees could have discovered the evidence they now seek to introduce “with due diligence in time for the hearing of this matter.”

Second, the board denies the Condemnor’s request to have the Bramley Appraisal excluded from consideration ‘in its entirety.’ (See the Condemnor’s June 10, 2011 “Hearing Memorandum,” pp. 6-10.) While the Bramley Appraisal has a number of flaws, including, as examples, a date of value different from the date of taking and Mr. Roger’s failure to value the

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).

improvements (on Lot 130) at all or to update his appraisal for at least one more recent sale (32 Indian Rock Road located next to his comparable at 30 Indian Rock Road), the board finds it would be improper to exclude the Bramley Appraisal entirely on these grounds. A more valid approach is to consider the Bramley Appraisal, but only give it the weight it deserves in the context of all of the other evidence presented.

Third, the board disagrees with the Condemnees' argument that the board should "discount the reliability" of the Doctor Appraisal and rely instead entirely on the Bramley 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 Bramley Appraisal and arrives at a more reasonable estimate of market values, but that a further adjustment is warranted. The board further notes that, despite the wide divergence in their damage estimates (\$285,000 in the Doctor Appraisals and \$1,070,000 in the Bramley Appraisal, as corrected by Mr. Rogers), these appraisals, using somewhat different methodologies, estimate an aggregate after value of the Property that is somewhat closer (\$4,095,000 in the Doctor Appraisals and \$4,680,000 in the Bramley Appraisal—less than a 15% difference).

After considering the evidence as a whole, the board finds the before value of the Property, considered as a larger parcel, was \$4,825,000, about 10% higher than Mr. Doctor's aggregated estimate, and the after value was \$ 4,500,000, again about 10% higher than Mr. Doctor's estimate (but reasonably close to Mr. Roger's \$4,680,000 estimate of the after value). These findings are based on the somewhat offsetting factors discussed below.

The board finds it is somewhat likely that at least two, and possibly all three, of the lots would be merged, either before or after a sale to a reasonable buyer, if the Property is developed in its highest and best use. That buyer is likely to be motivated to do so because of the greater

buildable area that would result if side setbacks are eliminated due to lot merger, a point made by the Condemnees. On the other hand, such a buyer would likely be willing to pay a lower price per acre for a larger parcel than three individual buyers might pay for the separate lots. There is also some uncertainty regarding what that integrated use of the larger parcel might be since Lot 130 is already developed as a truck stop and convenience store (with some buildable land for expansion). This may be a reasonable use to continue given its location in proximity to Exit 5 of Interstate 93 and such use might impact what uses would be made of the other two lots because of aesthetic and other factors.

On the whole, the board finds the comparables employed by Mr. Doctor to be more reasonable than those employed by Mr. Rogers. In particular, the board does not agree with Mr. Rogers that three small properties in a higher density area in Nashua are truly comparable to the Property, even after taking his location adjustments into account. Mr. Rogers also included sales in Windham and Manchester, which sold for relatively high values per buildable acre. He gave each of his six comparables 'equal weight,' but used only one comparable in Londonderry, where the Property is located. Mr. Doctor used this same comparable: 124-26 Rockingham Road along with others in the town that were closer to and more similar to the Property.

As to this comparable, which was under agreement rather than being a consummated sale, the board finds an agreed-upon sale price conditioned upon development approvals will, all other things being equal, be higher than a sale price not subject to such a material contingency. Mr. Doctor gave this sale a -15% adjustment, which seems to be more reasonable than the +10% adjustment given by Mr. Rogers for its "location." The board finds no basis for concluding the location of this comparable is superior to the Property, which is located across the street.

Weighing all of these factors and considerations, the board finds the just compensation for the taking is \$325,000. This amount results from the difference in the estimated before value of \$4,825,000 and the estimated after value of \$4,500,000.

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.

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; and Donald C. Crandlemire, Esq., Shaheen & Gordon P.A., 107 Storrs Street, PO Box 2703, Concord, NH 03302, counsel for Aranorian Oil Company, Inc., The Isabelle E. Hodgson Rev. Trust Of 1994, The John Aranorian Rev. Trust Of 1994, and Gladys Hayes, Condemnees.

Date: July 7, 2011

Anne M. Stelmach, Clerk