State of New Hampshire

v.

JJAMBS, LLC and Ocean Bank

Docket No.: 24771-10ED

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 June 9, 2010, describing the property rights taken (the "Taking") as follows: a fee taking of three one-hundredths (0.03) of an acre, more or less, along with all rights of access, light, air and view from and to the same from the remainder of abutting lands; and a temporary construction easement for a period of twenty-four (24) months (to expire not later than December 31, 2021 or one-year after completion of construction of the project) of one thousand seven hundred fifty (1,750) square feet, more or less. See Exhibit A to the Declaration. The "Property," improved with a used car lot and a two-family residence, consisted of 1.271 acres before the Taking and 1.268 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 condemnees. See Tax 210.12 and cases cited therein.

The board viewed the Property and held the just compensation hearing at the Rockingham County Superior Court in Brentwood, New Hampshire on April 10, 2012 and then resumed the hearing in its offices on April 11, 2012. The Condemnor was represented by David M. Hilts, Esq., State of New Hampshire, Department of Justice and Condemnee JJAMBS, LLC (the "Condemnee") was represented by Donald C. Crandlemire, Esq. of Shaheen & Gordon, P.A.

The hearing was recorded electronically by the clerk of the board. Any requests for transcripts should be ordered directly through the clerk. Parties should expect at least four (4) weeks for completion of a transcript.

The Condemnor relied upon an October 19, 2010 appraisal by Martin S. Doctor of Fulcrum Appraisal Services (the "Doctor Appraisal," Condemnor Exhibit No. 1). The Doctor Appraisal calculates just compensation to be $140,000.

The Condemnee relied upon an August 10, 2011 appraisal by Peter A. Knight of The Stanhope Group LLC (the "Stanhope Appraisal," Condemnee Exhibit A). The Stanhope Appraisal calculates just compensation to be $290,000.

Board's Rulings

The board is authorized to determine the just compensation after hearing the evidence presented and to file a report containing its findings, pursuant to RSA 498-A:25 and RSA 498-A:26. To this task, the board applies its own "experience, technical competence and specialized knowledge" to the evidence presented. 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 market value findings, 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).

On the view, the board noted the small strip of land taken in fee simple (0.03 acres), as well as the temporary construction easement, are located along the front of the Property, adjacent to the Condemnor's existing rights-of-way (primarily on Plaistow Road and to a lesser extent on Rose Avenue). As discussed further below, the board finds the Taking was quite limited in scope and had a lesser impact than claimed by the Condemnee on its *legal* right to use the Property to display used cars for sale, specifically in this road frontage area. In addition, while other factors may cause the highest and best use of the Property as a used car lot to change over time, the board finds the Taking, in and of itself, did not cause or lead to such a change in use.

The board does not find it credible that a knowledgeable buyer of the Property would, in effect, have paid $290,000 less for the Property after the Taking than before, given there was no significant impairment to the Property's utility or its highest and best use. To the contrary, the board finds the $140,000 damage estimate in the Doctor Appraisal sets a reasonable upper bound on just compensation (both for the fee taking and the easement) and the Condemnor met its burden of proof on this issue. In making these findings, the board disagrees with both appraisers that the highest and best use of the Property changed as a result of the Taking from a used car lot to a different and less valuable commercial use.

The Doctor Appraisal states the Taking "along the frontage will reduce the space between the front of the building and the right-of-way to the point where it will be impossible to display used cars along the front of the property as had been done in the past." (Condemnor Exhibit No. 1, Part I, p. 22.) While noting the Taking was only 0.03 acres, "which seems like a very small area, and only averages 9 feet deep," this appraisal concludes the Taking eliminated "the space necessary to attract customers who are passing by and see the 'frontline' cars on display." (Id.)[1] For this reason, the Doctor Appraisal concludes the Taking caused a change in the highest and best use of the Property from a "Used Automobile Sales Facility With Two Family Residence" to a "Retail/Office Building" and "Two Family Residence" and "0.82 acres Surplus Land for Future Development." (Id., pp. 5-6.) Mr. Doctor testified he "gave the condemnee every benefit of the doubt" in valuing the impact of the taking.

The Stanhope Appraisal arrives at a similar conclusion that the Property's highest and best use changed as a result of the Taking. This appraisal states, for example, that the Taking "in effect makes the display of 12 vehicles along Route 125 impossible," vehicles "must now be parked parallel to the street" and "the facility no longer has prime vehicle display space of any significance." (Condemnee Exhibit A, p. 52.)[2]

The board finds these statements rest on factual assumptions that are incorrect and that exaggerate the impact of the Taking. It is not true the Taking eliminated the ability of the Condemnee to have a row of parking spaces for display of vehicles available for sale between the

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[1] In his testimony at the hearing, Mr. Doctor stated he viewed the Property a second time after road construction was completed. He therefore expressed considerable doubt as to whether the Taking resulted in a loss of frontline display of vehicles.

[2] The analysis and value conclusion in the Stanhope Appraisal is fundamentally flawed because Mr. Knight made no attempt to ascertain what property rights the Condemnee actually owned before the Taking. His testimony regarding his task of comparing what was "legal" or "permitted" before the Taking and what was "legal" or "permitted" after the Taking is simply not credible.

dealership building and Plaistow Road. It is clear from the photographs in Condemnor Exhibit No. 3, and as the board noted during its view, the Property continues to have a frontline row of parking spaces for the display of vehicles facing Plaistow Road and this was not made "impossible" as a result of the Taking.

While there is evidence the Condemnee may have formerly (prior to the Taking) parked two rows of cars in front of the dealership building (see the aerial photographs in the Doctor Appraisal, Part I, p. 15), the majority, if not all, of the front row of vehicles unquestionably encroached into the existing right-of-way already owned by the Condemnor before the Taking. While the Condemnor's decision to install curbing along the right-of-way precluded the Condemnee from continuing this practice, the Condemnor could have installed curbing at any time (even without the Taking) and could have legally prevented the Condemnee from parking vehicles in the right-of-way, with or without curbing.

The fact the Condemnee did not have fee ownership of the area utilized as display spaces and did not have a legal right to park vehicles in that area along Plaistow Road is evidenced by the site plan approved by the Town of Plaistow Planning Board in July 1988 (Condemnee Exhibit E). This site plan permits one row of parking spaces on the Property facing Plaistow Road. Thus, the Taking did not cause the Condemnee to lose any legal right to park a second row of vehicles between the dealership building and Plaistow Road.

It is fundamental that a condemnor is not obligated to compensate condemnees for the loss of property rights they did not own before the taking. In this regard, "individuals conducting business within the bounds of a public highway are not thereby vested with a property right" and "are not entitled to compensation in a proceeding that entails the removal of such encroachments." 2 Nichols on Eminent Domain §5.07[2][f] (3rd Ed. 2006). Here, the asserted

impact to the Condemnee from the Taking stems in large part from no longer being able to encroach on the Condemnor's pre-existing property rights (on the rights-of-way adjacent to Plaistow Road and Rose Avenue), not the very small amount of land actually acquired in the Taking. In other words, the Condemnee's "bundle of rights" before the Taking did not include the right to park and display vehicles on the public right-of-way. Therefore, the Condemnee cannot claim compensation for the loss of such property rights.

The Condemnee's owner (George Kalil) testified at some length that his used car business suffered following the Taking. The board finds, however, factors unrelated to the Taking contributed to any such decline in his business. Mr. Kalil acknowledged changes had occurred in the automobile industry during the relevant timeframe, including the effects of an economic recession and its impact on consumer credit, the rise of internet advertising for used cars and increased competition from both dealers and private sellers with lower overhead costs.

For these reasons, the board finds the Condemnee's much higher estimate of just compensation ($290,000) to be inflated and unsupported by the record and agrees with the Condemnor that just compensation for the taking is no more than $140,000.

If either party seeks to appeal the $140,000 just compensation 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.

Since 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

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Michele E. LeBrun, Chair

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Albert F. Shamash, Esq., Member

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Theresa M. Walker, 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, Condemnor; Donald C. Crandlemire, Esq., Shaheen & Gordon, P.A., P.O. Box 2703, Concord, NH 03302-2703, counsel for Condemnee; and Mr. Philip Plante, VP, Ocean Bank, P.O. Box 1648, Plaistow, NH 03865, Mortgagee.

Date: 7/2/12

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Anne M. Stelmach, Clerk