

State of New Hampshire

v.

**Ziad Lababidi,
Bank of New England and U.S. Small Business Administration**

Docket No.: 24772-10ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the laying out or alteration of a highway 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 as the fee simple interest in a total of approximately 5.29 acres of land (the “Part Taken”) located in three tracts: one and eight tenths (1.8) acres, more or less, from “Tract 1” (“Parcel 70” on the Condemnor’s plans), one and four tenths (1.4) acres, more or less, from “Tract 2” (“Parcel 71” on the Condemnor’s plans) and two and nine hundredths (2.09) acres from “Tract 3” (“Parcel 72” on the Condemnor’s plans). (These three tracts will collectively be referred to as the “Property.”) See Exhibit A to the Declaration. The Property as a whole consisted of 57.2 acres before the taking and consists of 51.91 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 Rochester District Court on July 20, 2011. The Condemnor was represented by David M. Hilts, Esq. and John Vinson, Esq. Condemnee Ziad Lababidi (the “Condemnee”) attended the hearing and represented himself.

The board recorded the hearing electronically. 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.)”).

A. Evidence and Arguments Presented

The Condemnor relied on a January 5, 2011 appraisal prepared by Jesse C. Tichko, a staff appraiser employed by the New Hampshire Department of Transportation (“DOT”): the “Tichko Appraisal” (Condemnor Exhibit No. 4) is an update of an earlier appraisal (which the

condemnees received previously) and estimates the just compensation damages from the taking to be \$150,000.

The Tichko Appraisal employed the cost and sales comparison approaches to arrive at reconciled estimates of the before and after values of the Property. In using the cost approach, Ms. Tichko first estimated a site contribution value of \$30,000 per acre “using the Sales Comparison Approach” and three industrial land sales (in Hooksett, Exeter and Concord). Next, she estimated the value of the improvements making substantial “economic obsolescence” adjustments (\$900,000 before and \$830,000 after). She then added her land and improvement estimates to arrive at total values and the just compensation for the taking. (See Condemnor Exhibit No. 4, pp. 47, 51, 55 and 81.) For the sales comparison approach, the Tichko Appraisal used four sales (in Manchester, Plaistow, Merrimack and Chesterfield). “Based on the strengths and weaknesses” she discerned in each approach, she derived “reconciled” estimates of value of \$1,830,000 before the taking and \$1,680,000 after the taking, resulting in her just compensation estimate of \$150,000 which the Condemnor relies upon. (Id., pp. 88 and 89.)

The Condemnee disagreed with the Tichko Appraisal and argued for a much higher just compensation award of \$350,000. He did not present an appraisal of his own or provide estimates of the before and after values of the Property. He did, however, raise questions regarding several of the assumptions contained in the Tichko Appraisal, including the assumption about inferior road access to the Property (an unpaved right of way) as a factor diminishing its value. He also submitted a February 16, 2010 letter prepared by David S. Rauseo, MAI, of Rauseo & Associates (the “Rauseo Letter,” Condemnee Exhibit A).

The board has evaluated each party’s arguments in light of the evidence presented and has made its own findings on just compensation in Section B.

The Rauseo Letter contains Mr. Rauseo's "observations" about the Tichko Appraisal. The Condemnor objected to its introduction as evidence and also objected to allowing Mr. Rauseo to testify. The board overruled these evidentiary objections insofar as they were based on alleged violations of "USPAP," the "Uniform Standards of Professional Appraisal Practice" promulgated by the Appraisal Standards Board for the Appraisal Foundation. In light of the emphasis placed on these repeated objections by the Condemnor, the board will summarize its evidentiary rulings below (in Section C).

After Mr. Rauseo testified, and in rebuttal, the Condemnor offered an April 22, 2010 internal memorandum prepared by Barry W. Moore, MAI (the "Moore Memo," Condemnor Exhibit No. 6). Mr. Moore, who is an "Appraisal Supervisor" employee of the Condemnor, did not attend the hearing and therefore did not testify and was not available for cross-examination by the Condemnee or questions from the board. The Moore Memo is a detailed response to the Rauseo Letter, contains allegations of USPAP violations by Mr. Rauseo and concludes, as a result, the Condemnor "legally . . . is not bound to reply to Rauseo's letter." (*Id.*, p. 1.) According to the Condemnor's attorney, the Moore Memo was offered in the 'alternative' (in light of the board's overruling the objections to the Rauseo Letter and Mr. Rauseo's testimony). The Condemnee did not object to the introduction of the Moore Memo as evidence.

B. Valuation Issues

Notwithstanding the parties' fairly wide disagreement regarding just compensation (\$150,000 and \$350,000), they do agree the Part Taken consists of 5.29 acres and that the "larger parcel" consists of three tracts owned by the Condemnee. As noted above, the Condemnor took all of Parcel 70 and Parcel 71 and a portion of Parcel 72, leaving the Condemnee with a total of 51.91 acres (in Parcel 72) after the taking.

The parties agree the Property has a very desirable location with a large amount of frontage on the Spaulding Turnpike (Route 16). It is also close to Exit 16, which is presently being improved and resituated by the Condemnor, and has “excellent visibility” (see Condemnor Exhibit No. 4), both before and after the taking. In addition, Route 16 is an important north/south artery linking the seacoast with the Lakes Region and northern New Hampshire. Access to the Property is via Elmo Lane at the rear of the Property, which is presently graded and useable, but unpaved. There was some evidence presented the Condemnee was in the process of developing the entire larger parcel as an industrial subdivision consisting of seven discrete sites. These sites are depicted on a map located near the entrance to the Property, which the board observed during the view.

The board finds the best evidence of the just compensation for the taking is the Tichko Appraisal provided it is adjusted in several respects. The board will discuss this appraisal and the adjustments needed below.

In estimating site value, the Tichko Appraisal employed a useable acre approach and assumed in her analysis and conclusions that the Property had a total of 25 useable acres because of the existence of some wetlands. Ms. Tichko acknowledged some of this acreage on the Property may not be accessible or developable because of the intervening wetlands and agreed in the course of her testimony the useable acreage for commercial/industrial development purposes is actually about 11 acres, not the 25 acres assumed in the Tichko Appraisal.

The board finds this correction has a significant effect on Ms. Tichko’s before and after “Site Contribution” grids (id., pp. 49 and 75), where she estimates land value per useable acre based on three properties located in Hooksett (Comparable L-1), Exeter (L-2) and Concord (L-3).

In lieu of the adjustments Ms. Tichko utilized, which the board finds are questionable and not adequately supported,¹ the board made two basic adjustments to determine just compensation.

First, the board applied a 5% positive size adjustment for Comparable L-1, because it has, according to Ms. Tichko, 36 useable acres. No size adjustment is warranted for the other two comparables, which are closer in size to the 11 useable acres on the Property.

Second, the board made an adjustment to reflect the fact the Property has private well water and a private septic system, which makes it less valuable than properties that have town water and town sewer available, like Comparables L-2 and L-3. The board therefore adjusted these two comparables by a minus 10% and Comparable L-1 by a minus 5% because the latter has town water but a private septic system, according to the Tichko Appraisal.

The board finds these two adjustments are reasonable and are more adequately supported than the alternative adjustments in the Tichko Appraisal. Adjusting the sale prices per usable acre by the above percentages, the board finds the net adjustments are 0% for Comparable L-1, minus 10% for Comparable L-2 and minus 10% for Comparable L-3, resulting in net price per useable acre estimates of \$37,500 for Comparable L-1, \$30,000 for Comparable L-2 and \$37,193 for Comparable L-3. Ascribing equal weight to each of these three comparables, as Ms. Tichko apparently did, the best estimate of the average value of the useable acres on the Property is \$35,000 per acre, rounded.

While there are alternate methods of estimating just compensation for a taking of this type, the board finds the Condemnor's method for doing so is reasonable. The board therefore

¹ For example, Ms. Tichko concluded the Property has no road frontage or direct access and was "located off a private road, Elmo Lane." (See Condemnor Exhibit No. 4.) In fact, as the Condemnee testified, a bond was posted with the Town to pay for paving Elmo Lane and to make it a Town-maintained road, which would occur whenever the paving was completed. The board therefore does not agree with the substantial "Road Frontage/Access Location" adjustments Ms. Tichko made to her comparables. (Id. at p. 49 and 75.) In addition, the board finds her "Physical Features" adjustments due to "wetland crossings" (id.) to lack adequate support and justification.

applied this corrected per useable acre estimate and multiplied it by the acreage taken, all of which consisted of uplands, not wetlands. Multiplying the 5.29 useable acres in the Part Taken by this estimate yields just compensation of \$185,000, rounded. While this finding is somewhat higher than Ms. Tichko's final conclusion (\$150,000), it correlates more closely with her before and after value estimates using the sales comparison approach (\$1,830,000 - \$1,655,000 = \$175,000). (See Condemnor Exhibit No. 4, p. 89.)

In summary, the board determines the just compensation for the taking is \$185,000. This finding is based on an estimated before market value of \$1,830,000 and an after value of \$1,645,000.

C. The Condemnor's Evidentiary Objections

The board arrived at these findings after considering the evidence as a whole. The Condemnor's repeated objections to the Condemnee's presentation are apparently based on the written comments of Mr. Moore, an MAI appraiser. Mr. Moore did not testify or attend the hearing but apparently believed the Rauseo Letter (and presumably Mr. Rauseo's subsequent testimony) are "violations" of USPAP. (See the Moore Memo, issued in April, 2010 two months after the Rauseo Letter, at p. 1.) The board will briefly discuss the nature of the Condemnor's objections and restate its reasons for overruling them at the hearing.

The basic issue framed by the Condemnor is whether or not the Rauseo Letter, under the USPAP definitions, is an "appraisal," an "appraisal review" or "appraisal consulting." The formal definitions of these terms are set forth below.² While USPAP defines these three terms, it

² An "appraisal" is defined as "the act or process of developing an opinion of value; an opinion of value." "Appraisal review" is "the act or process of developing and communicating an opinion about the quality of another appraiser's work that was performed as part of an appraisal, appraisal review, or appraisal consulting assignment." "Appraisal consulting" is defined as "the act or process of developing an analysis, recommendation, or opinion to solve a problem, where an opinion of value is a component of the analysis leading to the assigned results."

also states they “are intentionally generic and are not mutually exclusive,” indicating the lines drawn between them are by no means clear cut in every instance. (See, e.g., USPAP (2010-11 edition) at p. U-1.)

The Condemnor cross-examined Mr. Rauseo at some length concerning his understanding of USPAP and whether or not he ‘violated’ various sections contained in the standards. (The Condemnor had Mr. Rauseo read some of these sections at the hearing, but did not introduce them into evidence. The board reviewed this testimony and has also done further research on USPAP. The USPAP volume includes the relevant standards, elaboration of the standards in the form of advisory opinions and other explanatory materials.)

Mr. Rauseo testified most of his practice consists of preparing appraisals and that he is familiar with the standards governing them, but not as knowledgeable regarding what is and is not required in an appraisal review or appraisal consulting. A fair reading of his testimony (in response to the questions and citations of the USPAP standards by the Condemnor’s attorneys) is that Mr. Rauseo did not feel, at the time he prepared the letter, that the work he performed for the Condemnee constituted either appraisal review or appraisal consulting.

The board agrees with Mr. Rauseo that his letter is not an appraisal because it does not develop or express an opinion of value. Notwithstanding the cross-examination of Mr. Rauseo by the Condemnor and the board’s own review of various USPAP definitions, the standards and other material, it is less clear whether the Rauseo Letter should be viewed as an appraisal review or appraisal consulting or whether the USPAP standards have been violated.

Regardless of whether the letter falls within either “generic” term (appraisal review or appraisal consulting), it is not the board’s role to interpret or enforce USPAP in eminent domain proceedings. In such proceedings, the board’s authority is focused on determining just

compensation for the taking (see RSA 498-A:25). Significantly, and as the Condemnor acknowledged at the hearing, the board is not “bound by the strict rules of evidence adhered to in the superior courts of the state.” (See RSA 71-B:7, RSA 541-A:33, II and Tax 201.30.) The discretion conferred by these statutes and rules allows the board to assess and weigh the evidence presented, using its own judgment and experience, and give it the weight it deserves,³ whether or not any discrete piece of evidence would or would not be admissible in another forum.

While the Rauseo Letter raises a number of questions about the Tichko Appraisal, in all likelihood these questions would have surfaced through the board’s own examination of the evidence as a whole, even if that letter and Mr. Rauseo’s testimony had not been presented by the Condemnee. It is, after all, the Condemnor’s burden to prove the amount offered for the taking is just compensation. The board has evaluated the merits of the Tichko Appraisal and has applied the applicable standard of proof to all of the evidence presented. The board finds it would have made the same adjustments discussed above to determine just compensation irrespective of the Rauseo Letter or his testimony.

³ See, e.g., State of New Hampshire v. Tana Properties, LP, BTLA Docket No. 22546-07ED (February 10, 2010) at pp. 4-5:

In making market value findings, the board considers and weighs all of the evidence, . . . 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).

In addition, the board finds no reason to pursue a USPAP inquiry or reach definite conclusions regarding whether Mr. Rauseo violated USPAP⁴ by completing what may be an appraisal review or appraisal consulting for his client, the Condemnee. While USPAP compliance can be a factor going to the weight and credibility of appraisal evidence presented to the board, determining whether a “violation” of USPAP has occurred is not required and is not contemplated either by the board’s enabling statute or its rules.

C. Further Proceedings

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.

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;

⁴ For example, the Moore Letter faults the Rauseo Letter for “contain(ing) no scope of assignment, no certification, and (sic) the purpose of the letter.” (See Condemnor Exhibit 6, p. 1.) But these allegations surely apply also to Mr. Moore, who is an MAI appraiser but did not include these items with his own letter.

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: David M. Hiltz, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Ziad Lababidi, 21 Garrison Lane, Madbury, NH 03820, Condemnor; Daniel P. Luker, Esq., Preti Flaherty Beliveau & Pachios, P.O. Box 1318, Concord, NH 03302, counsel for Bank of New England; and Robert Welch, U.S. Small Business Administration, 55 Pleasant Street, Suite 3101, Concord, NH 03301.

Date: August 25, 2011

Anne M. Stelmach, Clerk