

**State of New Hampshire**

**v.**

**Artist Brook Condominium Association and Essex Mortgage Trust**

**Docket No.: 24803-10ED**

**REPORT OF THE BOARD**

On December 14, 2010, the board held the RSA 498-A:25 hearing noticed in the board's November 19, 2010 Order. The hearing concerned condemnee Artist Brook Condominium Association's ("Association") November 3, 2010 Motion for Apportionment of Damages ("Motion"), pursuant to Tax 210.06, and condemnee Essex Mortgage Trust's ("Essex") November 15, 2010 "Objection" to the Motion. Present at the hearing were: Mark T. Kremzner, Esq. of Hastings Law Office, P.A., on behalf of the Association; John F. Griffin, Jr. of Griffin & Owen, on behalf of Essex; and Mark P. Hodgdon, Esq. of the Department of Justice on behalf of the State of New Hampshire (the "Condemnor").

The Association argued:

(1) 12 of the 17 units identified in the "Condominium Declaration" are owned by individuals, but five (units 13 through 17) were never built and the property rights claimed by Essex pertain to these five units;

(2) all common area services are provided by the Association and include on-site septic, street lighting, lawn mowing and snow removal on roadways, funded by assessments paid by the other unit owners but not Essex;

(3) as stated in paragraph 15 of the Motion and shown in Condemnee Exhibit B, Essex, by reason of its property rights in the five units, owes the Association more than the proportionate share of the damages it claims; and

(4) Essex has never paid taxes or condominium association fees and it would therefore be unfair for Essex to receive any portion of the damages from the taking of land in the common area.

Essex argued:

(1) by means of a foreclosure deed in 1996 (Condemnee Exhibit A), Essex owns the property rights in the five units that were not built, paid fair consideration (\$180,000) to acquire these property rights and thus has a 29.4966% ownership interest acknowledged by the Association;

(2) Essex has never been assessed or billed for any of the services the Association claims it provides, did not “benefit” from these services and Essex has never been taxed for its property rights; and

(3) Essex objects to being excluded from its proportionate share (29.4966%) of the just compensation damages from the taking because the eminent domain statute does not contemplate resolution of what is essentially an “internal dispute” between Essex and the Association in this manner.

Prior to the close of the hearing, the board stated it would keep the record open for the Condemnor to provide to the board and the attorneys for the Association and Essex copies of the appraisal on which the \$78,000 deposit of estimated just compensation damages was based and gave them until January 14, 2011 to file any objection or comments regarding the appraisal

provided. In its response, Essex objected to the introduction of this appraisal as evidence and argued it is entitled to receive the specified percentage (29.4966%) of this deposit because of its corresponding ownership interest in the common area taken. The Association did not object to the Condemnor's appraisal and instead, in response, argued this appraisal supported the Association's argument that Essex should not receive any portion of the just compensation award.

### **Board's Rulings**

The parties agree the taking consisted of a small amount of land (0.20 acres) in the common area of a condominium development and a temporary construction easement also located in the common area of that development; they also agree Essex has a 29.4966% undivided ownership interest in the entire common area. (See Motion, ¶ II, A. 14 and Objection, ¶ 5.) They disagree, however, on whether Essex is entitled to receive any part of the just compensation award for the taking of a portion of the common area.

The board's authority to resolve this question, as framed in the Motion and the Objection, rests on two statutes. The first, RSA 498-A:25, gives the board general authority to apportion the just compensation award and the second, RSA 356-B:6, applies specifically to an eminent domain proceeding where property within a condominium development is taken.

RSA 498-A:25 directs the board to determine "the total compensation to be awarded on account of the taking" (a sum not in dispute in this proceeding -- \$78,000) and "if there is more than one person entitled to compensation, the award shall be apportioned among such persons, to each his proportionate share of the total compensation so found." Determining entitlement to a "proportionate share of the total compensation" generally involves determining each condemnee's respective property rights and the relative value of those rights.

The second statute, which none of the parties have cited in their pleadings, is RSA 356-B:6, a specific provision of the Condominium Act which applies to “Eminent Domain.”

Paragraph 1 of RSA 356-B:6 specifically deals with circumstances where common area is taken through eminent domain:

If any portion of the common area is taken by eminent domain, the award therefor shall be allocated to the unit owners in proportion to their respective undivided interests in the common area . . . . The unit owners' association shall represent the unit owners in any condemnation proceedings or in negotiations, settlements and agreements with the condemning authorities for acquisition of the common areas or any part thereof and the unit owners' association shall act as attorney-in-fact for each unit owner for the purposes of this section.

The board finds this statute controls the question of how the just compensation award should be allocated. See, e.g., In re Laurie B., 125 N.H. 784, 789 (1984) (basic rule of statutory construction is that a specific statute controls the construction of a general statute). In addition, application of this statute moots the renewed objection by Essex to the introduction of the appraisal as evidence because the board’s rulings are not based on the content or methodology of this appraisal at all, but rather on the statutory provisions in RSA 356-B:6, I.

Under a plain reading of this statute, the “unit owners’ association” is obligated to serve as the “attorney-in-fact for each unit owner.” There is no dispute Essex owns the property rights to five units and is legally part of the Association, notwithstanding the fact these units were never built. The parties have not presented to the board any basis in the statutes, the common law or the condominium documents themselves to distinguish un-built from built units in an eminent domain proceeding involving the taking of common area. Thus, the Association is obligated by law to serve as the attorney-in-fact for each unit owner, including Essex.

This statute further requires the agreed-upon total just compensation award (\$78,000), which the parties acknowledge has resulted entirely from the taking of a small portion of the

common area, “to be allocated to the unit owners in proportion to their respective undivided interest in the common area.” Again, there is no dispute Essex owns an undivided (29.4966%) interest in the common area by reason of its property interests in these five units.

While the Association argues in the Motion and its further response that such an allocation will result in “unjust enrichment” and a “windfall” to Essex, the Association has never taken any legal steps to remove Essex as a unit owner in the Association or to divest Essex of its ownership interest in the five units and the common area.<sup>1</sup> The Association’s position, as stated in the Motion (¶ II. B), is based on disputes regarding the alleged “non-payment of taxes and the non-payment of association fees” by Essex, but these issues are not related to the taking of the portion of land in the common area that is the subject of this eminent domain proceeding. Any such disputes preceded the taking and are likely to continue until finally resolved either through a settlement or in other proceedings.

In summary, the board finds compliance with RSA 356-B:6 is required in this eminent domain proceeding. When, as here, there is a taking of a portion of the common area by eminent domain, the Association has a statutory obligation to act as the “attorney-in-fact” for each unit owner, including Essex. The law prescribes that an attorney-in-fact is a fiduciary obligated to act as an agent with enforceable duties owed to its principals. See, e.g., Chapman v. Douglas, 146 N.H. 209, 210 (2001).

This obligation requires compliance with the following two steps: (1) once the appeal timelines pertaining to the board’s rulings (set forth below) have expired, the Association can

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<sup>1</sup> For example, when a legal claim exists for unpaid assessments against unit owners, the Condominium Act and the By-Laws provide for a lien and foreclosure remedy. See RSA 356-B:46 (Lien for Assessments) and Article XII, 2 of the By-Laws. In the Motion (¶ II, A. 16), the Association cites (and attaches) Article VIII, 2 of the By-Laws, which provides for the “Payment of Assessments” before a unit owner is permitted “to convey, mortgage, sell, lease, give or devise his Unit.”

request the entire \$78,000 deposited with the board by the Condemnor, plus accrued interest, by making a written request for issuance of a check, accompanied with a completed “W-9” form; and (2) when the check is received, the Association must allocate this award “to the unit owners in proportion to their respective undivided interests in the common area,” recognizing the agreed-upon 29.4966% interest of Essex in the common area.

The board makes these rulings because it finds the evidence presented demonstrates the financial issues that are in dispute between the Association and Essex are not related to the taking. It is not the board’s role, especially in light of the clear and specific provisions in RSA 356-B:6, I, to decide those unrelated issues in this eminent domain proceeding. If the parties remain unable to resolve those issues on their own, they can be presented and decided in another forum, such as the superior court, the venue suggested by Essex in its Objection (at p. 2).

Any party that seeks to appeal the board’s rulings must file a petition in the Carroll County Superior Court. Such a petition must be filed within twenty (20) days from the clerk's date below. See RSA 498-A: 27.

Once the appeal timelines have expired or any appeal is finally decided, the Association should comply with RSA 356-B:6,VI by causing a copy of the “decree” pertaining to the allocation of the award to be recorded at the registry of deeds for Carroll County, where the property is located.

Last, the evidence presented indicates Essex has not paid any taxes on the rights it owns in the property including the five unbuilt units. While the current value of those rights is not the issue before the board in this appeal, this evidence raises a concern as to whether real estate owned by Essex has escaped taxation in the Town of Conway (the “Town”).

The board has broad authority to ensure assessments are proper and equitable. Appeal of Wood Flour, Inc., 121 N.H. 991 (1981). Specifically, RSA 71-B:16, II requires the board to order an assessment “[w]hen it comes to the attention of the board from any source... that a particular parcel of real estate... has not been assessed....” Consequently, the board is forwarding a copy of this Report to the Town and will make the record available for the Town to determine if valuable taxable property exists to be prospectively assessed and taxed.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

### CERTIFICATION

I hereby certify copies of the foregoing Report have been mailed this date, postage prepaid, to: Mark P. Hodgdon, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Mark T. Kremzner, Esq., Hastings Law Office, P.O. Box 290, 376 Main Street, Fryeburg, ME 04037, counsel for Artist Brook Condominium Association; John F. Griffin, Jr., Esq., Griffin & Owen, 109 Ponemah Road, #5, Amherst, NH 03031, counsel for Essex Mortgage Trust; and a courtesy copy to the Town of Conway, Chairman, Office of the Selectmen, 1634 E. Main Street, Center Conway, NH 03813.

Dated: 2/11/11

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Anne M. Stelmach, Clerk