State of New Hampshire

v.

Cumberland Farms, Inc. and Bank of America, N.A.

Docket No.: 24804-10ED

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 August 4, 2010, describing the property rights taken as follows: a fee taking of twenty hundredths (0.20) of an acre, more or less, along with all rights of access, light, air and view over the remainder of abutting lands, a permanent drainage easement of eight hundred fifty (850) square feet, more or less, and a temporary construction easement (to expire not later than December 31, 2021 or one-year after completion of construction of the project) of one thousand five hundred (1,500) square feet, more or less. See Exhibit A to the Declaration. The "Property," a gas station and convenience store, consisted of 1.618 acres before the taking and 1.418 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. The Condemnor was represented by Kevin H. O'Neill, Esq., State of New Hampshire Department of Justice, and Cumberland Farms, Inc. (the "Condemnee") was represented by Francis X. Bruton, III, Esq. of Bruton & Berube, PLLC.

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

The Condemnor relied upon a September 12, 2011 updated appraisal by Jeffrey W. Leidinger, a certified general appraiser, (the "Leidinger Appraisal," Condemnor Exhibit No. 2). The Leidinger Appraisal calculates just compensation for the taking to be $80,000, based on estimates of the Property's market value of $1.9 million before the taking and $1.82 million after the taking.

The Condemnee relied upon a September 15, 2011 appraisal by Mark S. Reenstierna, a certified general appraiser, (the "Reenstierna Appraisal," Condemnee Exhibit A). The Reenstierna Appraisal calculates just compensation for the taking to be $162,000. (The Condemnee made a contingent claim for $18,500 in additional damages for landscaping items in the event the board did not accept the Reenstierna Appraisal's $162,000 damage estimate in full, a claim the board will address further below.)

Board's Rulings

The board has the authority to determine the just compensation to be awarded on account of the taking after hearing the evidence presented and to file a report containing its findings, pursuant to RSA 498-A:25 and RSA 498-A:26. Specifically, the board must determine "[t]he value of the [P]roperty, before and after the taking, if different, and the amount of damages." See RSA 498-A:26, II(d); and, e.g., Daly v. State of New Hampshire, 150 N.H. 277, 279 (2003), citing Edgecomb Steel Co. v. State, 100 N.H. 480, 486-87 (1957); 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)."

In each eminent domain proceeding, the board's task is to determine the just compensation to be awarded as a result of the taking, based upon its own findings of the before and after market values of the Property. In 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).

Considering the evidence as a whole, the board finds the Condemnor met its burden of proof and the just compensation for the taking is $80,000, the amount estimated by the Condemnor's appraiser, Mr. Leidinger. This estimate is based on a before value of $1.9 million and an after value of $1.82 million. (See Condemnor Exhibit No. 2, p. 59.)

On the view, the board noted the amount of land taken in fee simple (0.20 acres) by the Condemnor, as well as the general area of the temporary construction and permanent drainage easements. The board finds the taking was limited in scope and impact and involved land entirely on the periphery of the Property that did not affect its function and use. In other words, the utility and highest and best use of the Property, developed as a gas station and convenience store, was not affected at all by the taking. The points of access (curb cuts on two streets) remain the same and no building improvements on the Property were impacted at all by the taking.

The board considered the criticisms of the Leidinger Appraisal by the Condemnee's attorney because of its use of the cost approach and finds these criticisms do not warrant a higher just compensation award. Mr. Leidinger relied on both the cost approach and the sales comparison approach because he wanted to distinguish business value (arising from the operation of a gas station and convenience store) from real estate value. Loss of business value is not compensable in an eminent domain proceeding. See, e.g., Dow v. State, 107 N.H. 512, 516-17 (1967); and 2 Nichols on Eminent Domain § 5.03[6][h], citing Ranlet v. Concord R.R., 62 N.H. 561 (1883).

The Condemnee's criticism aimed at discrediting the Leidinger Appraisal rests on selective quotations from a publication drafted by the Interagency Land Acquisition Conference (titled Uniform Appraisal Standards for Federal Land Acquisitions (2000), but commonly known as the "Yellow Book"). The Yellow Book contains some cautionary statements regarding the

cost approach, but recognizes it as one of the three accepted approaches for estimating market value and does not prohibit or preclude its use by an appraiser in correlating and developing a final estimate of value. (See Yellow Book, pp. 19-23)

In a later passage of the Yellow Book (the three pages contained in Condemnee Exhibit C), there is discussion regarding why undue emphasis on the cost approach may be problematic and why "courts" might view it as the "least reliable method of valuation," but these concerns deal primarily with the concept of "reproduction cost," not necessarily replacement cost. (Id., p. 41.) Further, the board does not find the New Hampshire law cited by the Condemnee[1] precludes use of the cost approach if it is used appropriately in developing a value conclusion. The board finds Mr. Leidinger did so in this case. He did not place exclusive reliance upon his replacement cost estimate but instead also employed the sales comparison approach to arrive at a reconciled estimate of value before and after the taking and a just compensation estimate of $80,000.

The board considered, but could not give weight to, the much higher just compensation estimate of $162,000 in the Reenstierna Appraisal. That appraisal contained various deficiencies that lessen its credibility. From the "hundreds" of gas station valuation assignments he testified to having worked on, Mr. Reenstierna selected six gas station sales in New Hampshire and Northern Massachusetts (including several without convenience stores) and presented a "list" of five additional "older gas station/convenience store transfers," but all appear to involve

[1] See Manchester Housing Auth. v. Reingold, 130 N.H. 598, 602-03 (1988) (where the supreme court commented on the cost approach using reproduction cost and how it might unduly influence "juries unsophisticated in the methods of real estate appraisal," but found "the trial court did not abuse its discretion in admitting the reproduction cost evidence"). Cf. Fusegni v. Portsmouth Housing Auth., 114 N.H. 207, 211 (1974) (introduction of evidence of "reproduction cost" was not prejudicial). The board has allowed use of the replacement cost approach in eminent domain proceedings. See, e.g., State of New Hampshire v. Skip Fern Trust V, BTLA Docket No. 23324-07ED (October 15, 2008).

developments that were both older and on smaller lots than the Property. Mr. Reenstierna nevertheless relied on this data to contend prices per square foot for gas stations with convenience stores are "inversely proportional" to lot size. The board finds, however, his analysis does not establish a causative relationship between the price paid for a gas station and convenience store property and the size of the lot, in circumstances where the lot size difference is nominal and the acreage lost did not add any utility or measurable value.[2]

Unlike Mr. Leidinger, Mr. Reenstierna did not present a sales grid to detail his assumptions and quantify the adjustments he made to compile his estimates ($22.28 per square foot before the taking and $23.21 per square foot after the taking) but instead applied undisclosed "weights" to the sales, which "indicate(d) a range of values from $15 to $28," to derive his conclusions. The board finds this lack of disclosure lessens the credibility that can be given to Mr. Reenstierna's estimates, especially in light of the wide range of values on a per square foot basis acknowledged in his appraisal.[3] This wide range of values suggests that other factors besides lot size influence the sale prices of gas station/convenience store properties and these factors are not adequately reflected in Mr. Reenstierna's analysis or his conclusions.

Further, a valuation approach, such as reflected in the Reenstierna Appraisal, ascribing equal value to every foot of land, regardless of its location or utility, is questionable at best and can lead to misleading conclusions. See, e.g., State of New Hampshire v. GCD, Inc., BTLA

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[2] Mr. Reenstierna states, for example, that "as size doubles, price per square foot declines by 10% to 30%," (Condemnee Exhibit A, p. 53), but the size of the lot before the taking was not "double" the size after the taking. The 0.20 acre loss of acreage was in fact only about 12% of the lot size before the taking and the small amount of land lost was entirely at the periphery of the Property and did not affect its function and utility. Mr. Reenstierna presents no analysis of how, if at all, loss of a much smaller amount of land in this manner can or should affect the price per square foot a knowledgeable buyer would pay for the Property.

[3] While the board is not persuaded by Mr. Reenstierna's methodology, only a relatively minor change in Mr. Reenstierna's price per square foot estimate (from $23.21 to $24.12) after the taking would make the just compensation calculated equal to Mr. Leidinger's estimate of $80,000, because: 61,769 square feet after the taking times $24.12 equals $1,490,000 (rounded), compared to 70,481 square feet before the taking times $22.28 equals $1,570,000 (rounded), a difference of $80,000.

Docket No 24732-10ED (June 7, 2011) (with respect to land at the periphery of a property already developed and used as a hotel, "a reasonable buyer would be inclined to pay something less for the (p)roperty after the gross acreage reduction, but not the arithmetic result of multiplying the acreage lost times the average value of the land per acre.").

The board also does not accept Mr. Reenstieirna's analysis of the impact of the temporary construction easement and permanent drainage easement (estimated at $27,000, but included in his total damage estimate of $162,000). Among other things, his use of a so-called "income capitalization approach" is faulty because it confuses a theoretical, and very doubtful, rental value to the owner with the value in exchange (market value) for a small area of peripheral land having no discernible impact on the function and utility of the Property as a gas station and convenience store. The board also finds Mr. Reenstierna overestimated the impact by assuming the temporary easement would encumber the Property "for eleven years and five months." While this was theoretically possible, in actuality the easement will affect the Property for a much shorter duration (24 months during construction of the project, expiring on the earlier to occur of one year after completion of construction or December 31, 2021). The board finds a knowledgeable market participant would conclude the temporary construction easement would have a very short and finite duration (observing or confirming when the Condemnor's construction work would begin) and, along with the permanent drainage easement, would not affect the function or utility of the Property or have any discernible separate impact on market value.

As noted at the hearing, the board does not find it credible that a knowledgeable buyer of the Property would, in effect, have paid $162,000 less for the Property after the taking than before the taking, given there was no impairment to the Property's utility or its highest and best

use. To the contrary, the board finds the damage estimate of $80,000 documented and supported by the Leidinger Appraisal presented by the Condemnor places a reasonable upper bound on just compensation (both for the fee taking and the easements) and the Condemnor met its burden of proof on this issue.

As noted above, the Condemnee presented a contingent claim for $18,500 for landscaping costs for the first time just prior to the close of the just compensation hearing. This claim was not mentioned at all in the Reenstierna Appraisal or in Mr. Reenstierna's testimony and was not presented as an issue on the view of the Property taken by the board at the start of the hearing or in the Condemnee's opening statement. Instead, the Condemnee simply called one managerial employee (Kenneth W. Camille, Jr., an area sales manger) to testify who did not have any firsthand knowledge of the facts pertaining to this claim and was used only to present several documents pertaining to the claim and its origin. (See Condemnee Exhibits E and F.)

A fair reading of these documents is that the municipality (in August, 2010) expressed a general concern regarding the loss of "trees" resulting from the road improvement project to four property owners, including the Condemnee, and the Condemnee had written to the Condemnor earlier (in April 2010) expressing an interest in salvaging certain "shrubs within the acquisition area." The Condemnee did obtain a "Proposal" from a landscaping company for the planting of ten types of foliage in undesignated areas of the Property at a total cost of $18,500. Although more than one year has elapsed since the date of this Proposal, there is no indication the Condemnee has ever acted on it or proceeded with any such additional landscaping or that the municipality has taken any enforcement steps to require it to do so.

Further, the Condemnee's attorney, in his closing arguments, stated the $18,500 would not have to be added if the $162,000 Reenstierna Appraisal estimate was accepted by the board.

In its requests for findings (see Addendum A), the Condemnee makes no mention of this additional claim for $18,500, further reflecting the belated nature and lack of substance of this issue. The board therefore finds there is a lack of credible evidence to allow further consideration of the $18,500 Proposal regarding additional landscaping as an additional element of just compensation for the taking.

In summary, the board finds the total just compensation for the taking is $80,000. This sum includes all damages arising from the taking, including both the fee taking and the easements discussed above.

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.

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). 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.

Attached in Addendum A hereto are the board's responses to the Condemnee's Requests for Findings of Fact and Rulings of Law.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Addendum A

CONDEMNEE'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

With respect to the Condemnee's "Requests for Findings of Fact and Ruling of Law" ("Requests"), in these responses "neither granted nor denied" generally means one of the following:

a. the Request contained multiple requests for which a consistent response could not be given;

b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;

c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;

d. the Request was irrelevant; or

e. the Request is specifically addressed in the Report.

The Requests are replicated in the form submitted without any changes, typographical or otherwise, made by the board.

1. Under New Hampshire law, in eminent domain proceedings, the owner of land condemned is entitled to damages for the taking measured by the difference between the value of the land after the taking, and what is would have been worth on the day of the taking if the taking had not occurred. *Daly v. State*, 150 N.H. 277, 279 (2003).

Granted.

2. In determining value, the owner is entitled to have the property appraised at the most profitable or advantageous use to which it could be put on the day of the taking. *Id.*

Granted.

3. The value to be ascertained is fair market value, which is the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Id.*

Granted.

4. In a partial taking, damages include not only the fair market value of the property actually taken, but also compensation for the effect of the taking, if any, on the entire property, which is referred to as severance damages. *Id*. at 280.

Granted.

5. The method in New Hampshire for determining condemnation damages, including severance damages, in partial takings cases is the "before and after" method, whereby the value of the remainder of the tract after the taking is deducted from the value of the whole tract before the taking. *Id*.

Granted.

6. The above referenced matter involves an eminent domain taking by the State of New Hampshire (hereinafter referred to as the "State"), comprised of the following components:

a) Twenty Hundredths (0.02) of an Acre Commercial Land;
b) Eight Hundred Fifty (850) Square Foot Drainage Easement; and
c) One Thousand Five Hundred (1,500) Square Foot Temporary Construction Easement, said easement to expire by December 31, 2021, with an effective usage time of twenty-four (24) months.

Neither granted nor denied.

7. The State originally offered, as total damages, the Respondent $75,000.00, based upon an appraisal conducted by Leidinger Appraisals, dated March 24, 2010 (hereinafter referred to as the "Initial Leidinger Appraisal"). Prior to a hearing on this matter, the Initial Leidinger Appraisal was modified to reflect an increase in the estimate of total damages to $80,000.00 (hereinafter referred to as the "Revised Leidinger Appraisal").

Granted.

8. The Respondent relies upon an appraisal conducted by T.H. Reenstierna, LLC, which estimates totals damages as a result of the taking at $162,000.

Granted.

9. The Initial Leidinger Appraisal and the Revised Leidinger Appraisal analyze the taking, and rely most heavily upon the utilization of the so-called "Coast Approach," where the appraiser determines the value of the land without buildings, and then adds the depreciated current cost of reconstructing the buildings, to determine the value as a whole. *See* Page 58 of the Initial Leidinger Appraisal and Page 61 of the Revised Leidinger Appraisal. *See also* Manchester Housing Authority v. Reingold, 130 NH 598, 601 (1988).

Neither granted nor denied.

10. Both Leidinger appraisals indicated that the Coast Approach "…is considered to produce a reliable indication of value, as the subject improvements were constructed in 2005 and are considered to be at the beginning of its economic life…" See page 7 of both appraisals.

Granted.

11. The Reenstierna appraisal utilizes the so-called "Comparable Sales Approach," which establishes value with reference to the selling prices of similar properties around the time of the taking. *Id*. at 601.

Neither granted nor denied.

12. The law in New Hampshire permits the use of the Cost Approach as evidence of market value where the structure has "special characteristics" not found in other comparable properties and that there are limits on the admissibility of such evidence, such that this type of evidence is best admitted only in the "exceptional case." *Id*. at 602, citing Fusegni v. Portsmouth Housing Auth., 114 N.H. 207 (1974). Further New Hampshire, such evidence is not conclusive on the issue of damages, but merely an element or circumstance for the fact finder to consider with other evidence in arriving at a proper award. *Id*. 602.

Neither granted nor denied.

13. Pursuant to the Uniform Appraisal Standards for Federal Land Acquisitions (a resource generally accepted as appropriate guidance for appraisals in eminent domain taking cases), "…the cost approach is general viewed by the courts as the least reliable method of valuation, *Id*. at 41.

Neither granted nor denied.

14. The Board finds that there are no "special circumstances" associated with the Respondent's property, which is a typical gas station/convenient store, and, as such, the Board finds both Leidinger appraisals fundamentally flawed in their assumptions and methodology, and, as a result, unreliable in terms of calculating the fair market value of the damages suffered by the Respondent as a result of the taking.

Denied.

15. The Board finds that the land sales of the Leidinger appraisals are inappropriate due as two of the sales are not land sale, one sale of a 1/3 acres unusable parcel, and the fourth comparable was adjusted erroneously and requires too many excessive adjustments, and further finds the comparable sales used in the Leidinger appraisals are inappropriate as three are foreclosure sales, and one is a condominium sale based upon an exercise of an option to purchase with a 2004 price.

Denied.

16. The Board finds that the Leidinger appraisals, and the State of New Hampshire's offer of damages fails to account for payment of the loss of certain landscaping and trees that are required by the Town of Plaistow to reinstalled after removed to due to construction activities caused by the State, which cost has been determined to by $18,500.00.

Denied.

17. The Board finds that the damages as a result of the taking must relate to the fair market value of the property, considering its highest and best use, which necessarily requires that the value of the improvements must be taking into account, and that the correct unit of comparison, whether it be "per acre" or "per square foot," should include all components of the property as improved.

Granted.

18. The Board finds that the State has failed to meet its burden of proof in establishing the reasonable damages associated with the taking.

Denied.

19. The Board finds the estimates of damages in the Reenstierna Appraisal to be reasonable and reliable, and adopts the statement of damages, of $162,000.00, and awards such damages to the Respondent.

Denied.

Certification

I hereby certify copies of the foregoing Report have been mailed this date, to: Kevin H. O'Neill, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Francis X. Bruton, III, Esq., Bruton & Berube, PLLC, 798 Central Avenue, P.O. Box 756, Dover, NH 03821, counsel for the Condemnee; and Bank of America, N.A., 100 Federal Street, Mail Code: MA5-100-11-02, Boston, MA 02110.

Date: 11/15/11

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Anne M. Stelmach, Clerk