State of New Hampshire

v.

Primo Pasta Realty Trust, Evangelos Papaioannou, Sotirios Papaioannou, and George Papaioannou, Trustees, and Ocean Bank

Docket No.: 24823-10ED

REPORT OF THE BOARD

This matter arises as a result of a RSA 498-A:5 acquisition of property rights taken for highway improvements, 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 11, 2010 describing the property rights taken as six hundredths (0.06) of an acre of land in fee with "all rights of access, light, air and view… from the remainder of abutting lands to the new highway" with the exception of two points of access reserved, and a temporary construction easement containing 1,750 square feet (to expire on December 31, 2021 or one year after completion of the construction of the project, whichever date would come first). The total acreage in the before situation was 0.77 of an acre and after the taking, the Property has 0.71 of an acre encumbered by the temporary easement.

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 in the Rockingham County Superior Court, Brentwood, New Hampshire, on April 15, 2014. The Condemnor was represented by Brian W. Buonamano, Esquire and "Condemnee" Primo Pasta Realty Trust was represented by James H. Schulte, Esquire.

The hearing was digitally recorded by the Clerk of the board pursuant to RSA 498-A:20. Any requests for transcripts should be ordered directly through the Clerk. Parties should expect at least four (4) weeks for completion of a requested transcript.

At the conclusion of the hearing, the parties were granted additional time to file memoranda of law with respect to whether the Condemnee was entitled to an award of damages relative to the sign which was removed by the Condemnor during the construction process. Memoranda were filed by the parties on April 25, 2014. The board reviewed and considered these memoranda in arriving at its decision in this matter.

Board's Rulings

The board's task is to determine just compensation and therefore it must decide what elements of claimed damages are compensable. See RSA ch. 498-A, including RSA 498-A:3, RSA 498-A:24 and RSA 498-A:25. In New Hampshire, just compensation is measured by the difference between the 'before' and 'after' market values of the Property and severance damages, if any. See New Hampshire Department of Transportation v. Pasquale Franchi, 163 N.H. 797

(2012); Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 77 (1973); and Edgcomb Steel Co. v. State, 100 N.H. 480(1957).

Integral to the process of awarding just compensation is a determination of the market value of the Property before and after the "Taking." In making market value findings, the board considers and weighs all of the evidence, including any appraisals, 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). Having thoroughly considered the evidence, arguments presented, its view of the Property and the memoranda filed by the parties, the board makes the findings detailed below.

The Condemnor relied upon an appraisal prepared by Jeffrey W. Leidinger of Leidinger Appraisals (the "Leidinger Appraisal," Condemnor Exhibit No. 2) with an effective date of August 11, 2010. The Leidinger Appraisal estimated the value of the Property both before and after the Taking to be $540,000. He arrived at his final estimate of value based upon a sales

comparison analysis and an income approach to value. Based on the determination there was no difference in the before and after value of the Property, Mr. Leidinger performed a "pro rata" allocation of $20,000 for the part taken. He utilized this value based on the State of New Hampshire Department of Transportation's ("DOT") policy not to exceed $20,000 in compensation when there is no difference in the before and after value. Additionally, he indicated the DOT policy did not include damages related to the estimated replacement costs of the landscaping improvements and existing paving. Thus, he arrived at a total value of $31,600 as damages resulting from the Taking, which included damages for the acquisition of six shrubs, seven medium ornamental trees, 2,800 square feet of irrigation, 600 square feet of paving and 6,400 square feet of lawn. (See Condemnor Exhibit 2 at p. 51.) The Leidinger Report assigned no value to the double sided sign (with poured concrete foundation, illuminated by two side lights) located on the edge of the existing right of way, abutting the parking area (see photos at Condemnor Exhibits #6 and #7) as it was outside the scope of the appraisal assignment and he assumed it was to be "relocated" as part of the project.

As part of his assumptions, Mr. Leidinger determined the impact on parking was the loss of four parking spaces (from 36 to 32 spaces); however, he found this could be mitigated by utilizing the "two turn around areas" on the lot which could be made into four additional spaces. He acknowledged there was a question as to the sufficiency of the amount of parking before and after the Taking and the loss of the parking spaces, if not mitigated, may present some issue. However, he determined the loss of parking did not affect the seating of the restaurant or gross building area and it was his conclusion there would be no measureable effect on the market value of the real estate to a prospective buyer.

George Papaioannou, one of the Trustees, testified the total permitted seating of the restaurant is 90. As a result of the State's project, four parking spots have been lost which has resulted in a weekly impact to the business. Mr. Papaioannou testified before the Taking, the parking was adequate but, subsequent to the Taking, there has been an impact on the business as a lack of parking results in empty seats in the restaurant with the parking lot being full. He also stated it is not feasible to use the "turn-around area" for parking as that would result in a lack of area for snow to be plowed into during the winter. Mr. Papaioannou stated in the before situation, there was a 10 foot area between the Property and the edge of the road to store snow which is no longer an option because the Property ends at the edge of the right-of-way. He also indicated the restaurant business recently sold for $550,000, which was approximately $100,000 less than its actual value before removal of the parking spaces impacted the business.

Mr. Papaioannou testified the sign was replaced with concrete/rebar in 2006. It was on a granite clad concrete slab built on the site with posts dropped into the concrete, with exterior lights. The sign weighed over 1,000 pounds and was not feasible to move it to another location on the site. A quote from New England Signs & Awnings estimated its replacement value to be $14,200. See Condemnee Exhibit B.

Based on the evidence, the board finds damages in the amount of $38,000. The board has taken into consideration Mr. Leidinger's testimony and his report (Condemnor Exhibit B) and finds it arrives at a reasonable estimate of value with two exceptions. Mr. Leidinger arrived at an estimated unit price of the fee taking of $8.00 per square foot which indicates a value of $20,912 which he rounds down to $20,000 based on DOT's "pro rata" policy. (For a further understanding of this policy, see State of New Hampshire v. GCD, Inc., Docket No. 24732-10ED (June 7, 2011) at pp. 5-6.) As the board stated in GCD, it is not bound by the Condemnor's pro

rata policy or the ceiling of $20,000 contained in the policy. Mr. Leidinger arrived at an indicated price of $8.00 per square foot for the fee taking which indicates a rounded value of $21,000; thus, the board has determined the damages resulting from the fee taking to be $21,000. The board finds Mr. Leidinger estimates for the shrubs, ornamental trees, irrigation, paving and lawn are reasonable for these items and thus finds damages for those items in the amount of $11,622 which the board has rounded to $12,000. The Condemnee provided an estimate of $2,550 to $3,400 for the irrigation installation (Condemnee Exhibit C). However, the board finds the Condemnee's estimate is more speculative and therefore has relied on the Leidinger estimate of $2,100.

The board finds additional compensation for the four lost parking spaces, beyond the $8.00 per square foot of the fee taking, is not appropriate. Mr. Leidinger testified the permitted number of seats in the restaurant did not change because of the reduction in the number of parking spaces. Instead, the number of permitted seats is tied primarily to the capacity of the Property's septic system, which was not impacted by the Taking.

The only remaining issue to be addressed is the compensability of the double sided sign which was located adjacent to the right-of-way. Mr. Leidinger did not assign any value for the sign as it was "assumed to be relocated as part of the project." (See Leidinger Appraisal at p. 51.) The State argues the sign is a "removable trade fixture." The board finds the cases cited in the State's memorandum are not on point. As testified to at the hearing, depicted on the photographs (Condemnor Exhibit No. 6) and as stated in the Condemnee's memorandum at p. 2, "[s]tate contractors used a saw to cut through the posts that supported the sign and connected to its concrete foundation. They then used an excavator to break up and remove the concrete and reinforcement bar foundation." Thus, the board finds the custom built 8' x 8' sign, on a

permanent reinforced concrete foundation, is not personal property and is a fixture and part of the realty and thus should be compensated as such in this condemnation proceeding, not through the relocation process as prescribed in RSA 124-A. The board concurs with the citations in the Condemnee's memorandum and need not reiterate them in this Report.

As to the value of the sign, the board finds the best evidence to be the estimate of Preferred Sign Installers for $5,425. (See Condemnor Exhibit 4.) The board is not convinced the 8' x 8' sign, which was located at the back of the building on the Property on the board's view on April 15, 2014, will not be utilized by the new owner of the Property. The photograph submitted as Condemnor Exhibit No. 7 shows a new name plate (AT'S PLAISTOW PIZZA CO.) has been nailed over the Primo Pasta logo. Thus, the board believes the Condemnee is not entitled to the value of the sign itself which was not taken by the State, but instead should be compensated for the reinstallation of the existing sign.

In conclusion, the board finds damages to the Condemnee in the amount of $38,500 (rounded). 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. 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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Theresa M. Walker, Member

Certification

I hereby certify a copy of the foregoing Report has been mailed this date, postage prepaid, to: Brian W. Buonamano, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; James H. Schulte, Esq., 660 Central Avenue, Suite 101, Dover, NH 03820, counsel for the Condemnee; Ocean Bank, Philip Plante, VP, 76 Main Street, P.O. Box 1648, Plaistow, NH 03865; and People's United Bank, Attn: Craig Lougee, 122 West Street, Keene, NH 03431.

Dated: July 21, 2014

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Anne M. Stelmach, Clerk