State of New Hampshire

v.

Joseph C. Davey, IV, Internal Revenue Service,
Federal National Mortgage Association and People's United Bank

Docket No.: 25428-10ED

ORDER APPORTIONING DEPOSIT OF DAMAGES

The board held a noticed hearing on January 17, 2012 to receive testimony and hear arguments regarding the apportionment of the $85,000 deposit of damages (the "Deposit") for the taking of certain interests in the "Property" by the "Condemnor." (See the November 14, 2011 Order.) The Property consists of two merged lots (described further below) located on Route 125 (Plaistow Road) at the intersection with Joanne Drive.

The fee owner is condemnee Joseph C. ("Jay") Davey, IV ("Davey"), but the Property is encumbered by several mortgages. Attending the hearing were:

Davey, accompanied by his father, Joseph C. Davey, III;

Paul Galanes, Vice President and Lizabeth M. MacDonald, Esq., attorney, for condemnee People's United Bank ("People's"), the holder of one mortgage;

J. Laurence von Barta, Esq. of Harmon Law Offices, P.C., attorney for Wells Fargo Bank, N.A. "as servicer for Federal National Mortgage Association" (or "FNMA"), a

named condemnee who is the holder of another mortgage (hereinafter "Wells Fargo"); and Michael McCormack, Esq. of the United States Attorney's Office for condemnee Internal Revenue Service ("IRS").

Also in attendance at the hearing was Andrew Nadeau, a professional land surveyor with Horizons Engineering, Inc., who testified on behalf of People's. The Condemnor did not attend the hearing.

The board held the apportionment hearing to hear and decide People's claim that it is entitled to receive the entire Deposit because of the nature of the taking and its mortgage interest in the Property. (See the "Declaration" filed by the Condemnor, including Exhibit A attached thereto, and the exhibits submitted by Peoples at the hearing, marked as Condemnee Exhibit A-D, F and G; see also People's Requests for Findings of Fact and Rulings of Law (the "Requests"), which the board has responded to in Addendum A to this Order.) There was no dispute at the hearing that the outstanding indebtedness on the People's mortgage exceeds the amount of the Deposit, as stated in Request No. 17. At the hearing, Wells Fargo, the holder of another mortgage, filed an "Answer" stating its own claim on the Deposit (admitted as Condemnee Exhibit E).

The board finds, based on the evidence and arguments presented, People's is entitled to receive the entire Deposit. Because of the multiple parties and the nature of the issues presented, the board will summarize each party's position with respect to the Deposit and state its findings in this Order.

At the hearing, the IRS conceded People's mortgage and the Wells Fargo mortgage are both "ahead of" the IRS lien. This representation is confirmed by the recorded dates of the

mortgages and the IRS lien. Therefore, the IRS made no claim to the Deposit. Davey, in his testimony at the hearing, did not claim any right to receive the Deposit and testified People's should receive the Deposit.

Wells Fargo, on the other hand, did object for the reasons stated in the Answer which were repeated during the hearing and are summarized here. Davey took title to 71 Plaistow Road, Plaistow, NH (Lot 36) on July 28, 1998.[1] Davey took title to 69 Plaistow Road, Plaistow, NH (Lot 37) on September 17, 2002. Subsequently, Davey merged Lots 36 and 37 without the consent or knowledge of Wells Fargo. Subsequent to the merger, Davey mortgaged the entire Property with People's. As a result, Wells Fargo holds a mortgage on the prior Lot 36 and People's carries a mortgage on both Lot 36 and Lot 37. Through these actions, a "cloud on title" has been created. Therefore, Wells Fargo disputes People's claim it is entitled to the Deposit, asks the board to place the entire Deposit "into an escrow account with the Rockingham County Superior Court" and further argued the board should not make any ruling regarding the Deposit until Wells Fargo has an opportunity to file (unspecified) pleadings in that forum.[2] The board disagrees with these arguments and requests by Wells Fargo regarding the Deposit for the three reasons discussed below.

First, the board's clear statutory authority is to decide the issue presented, rather than suspending such decision until such time in the future as Wells Fargo may choose to file

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[1] Wells Fargo is the current servicer of the mortgage (on Lot 36) given by Davey to Mortgage Electronic Registration System, Inc. dated September 20, 2004.

[2] See Answer, p. 7, where Wells Fargo asks the board to "[s]chedule a status conference for [sic] sixty days" or, "[i]n the alternative, deposit the funds into an escrow account with the Rockingham Superior Court once [Wells Fargo] has filed its petition and notified the [b]oard of the docket number" and "[h]old the $85,000.00 [Deposit] pending an Order from the Superior Court."

pleadings in a new superior court action to raise "title" issues it contends exist by reason of Davey's conduct. (See Answer, ¶¶12, 14, 16 and 23.) The legislature has given the board primary jurisdiction over "condemnation (eminent domain) proceedings," including the power to determine total just compensation for a taking and an apportionment among condemnees entitled to a share of that compensation. (See RSA ch. 498-A, in general, and RSA 498-A:3 and RSA 498-A:25, in particular.) The superior court's role with respect to just compensation for a taking is that of an appellate body. (See RSA-A:27 (Appeal on Damages).) Therefore, Wells Fargo's suggestion that the Deposit be placed in a superior court "escrow fund" until an uncertain time in the future is not appropriate under the applicable statutes governing the board's and the superior court's respective responsibilities and Wells Fargo cites no authority to the contrary.

Second, even if any authority did exist for Wells Fargo's argument that the board should abstain from ruling on the issues presented, the suggestion is impractical and will only cause further unnecessary delays. The Condemnor filed the Declaration for this taking almost 1½ years ago (on November 3, 2010) and People's initial request for the Deposit dates back to January 31, 2011 (when it filed and served its Answer). As noted at the hearing, Wells Fargo could have filed whatever superior court action it was contemplating well before the scheduled apportionment hearing on January 17, 2012. For unexplained reasons, it did not do so.

The board finds Wells Fargo has had more than ample notice of People's claim for over one year, but delayed filing anything of substance opposing People's claim until the day of the apportionment hearing when Wells Fargo filed its Answer. To the extent Wells Fargo is dissatisfied with the board's ruling, it has an available remedy should it decide to appeal it to the superior court.

Third, the board finds People's has met its burden of proving by a preponderance of the evidence that it is entitled to the Deposit. The board finds the evidence, as well as the equities, favor People's claim based upon the following findings supported by the record, including the Wells Fargo Answer.

The claim to the Deposit requires consideration of several encumbrances Davey placed on the Property. As stated above, Davey acquired the Property through two separate deeded transactions, one recorded in August, 1998 and one in September, 2002. (See Request No. 1.) Wells Fargo[3] encumbered the portion of the Property acquired in August, 1998 (on September 23, 2004). On October 21, 2005, however, Davey recorded a "Lot Merger & Commercial Site Plan" (the "Merger Plan") which shows the Property as consisting of two lots (identified and referred to by the parties as Lot 36 and Lot 37).

Wells Fargo's mortgage encumbers only Lot 36, a key fact admitted by Wells Fargo in the Answer (see ¶14). Also admitted by Wells Fargo is the fact "People's mortgage covers both Lots 36 and 37." (Id.) (Wells Fargo claims it never received notice of this Merger Plan from Davey and therefore did not record any further encumbrance to have its lien cover Lot 37 as well as Lot 36.[4] Whatever claims Wells Fargo may have against Davey (for failing to notify Wells Fargo of the Merger Plan) does not, and should not, impact the apportionment of the Deposit.)

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[3] As noted above, Wells Fargo, as used in this order, refers to condemnee FNMA and its interests in what People's refers to as the "FNMA Mortgage."

[4] Cf. Wells Fargo Answer, ¶15: "If Wells Fargo had been notified of the proposed merger, it would have filed an objection to the merger or would have reformed the mortgage so that it encumbered the entire property as it is known post-merger." Post-merger, the Property consisted of both Lot 36 and Lot 37. (The parties do not dispute the location of Lot 36 and Lot 37 are shown on Condemnee Exhibit F.)

With this background regarding the respective mortgage interests of People's (as to both Lot 36 and Lot 37) and Wells Fargo (as to Lot 36 only), the resolution of the question of how the Deposit should be apportioned becomes clear when the nature of the property interests taken by the Condemnor is examined. The board finds almost all of the damages flowing from the taking are attributable to Lot 37, not Lot 36.

The taking is comprised of: a fee taking of 0.19 acres (entirely on Lot 37), including "all rights of access, light, air and view over . . . the remainder of abutting lands"; a permanent drainage easement of 775 square feet (entirely on Lot 37); and a temporary driveway construction easement of 7,100 square feet (almost entirely on Lot 37). From Condemnee Exhibit F, Exhibit A to the Declaration and the other evidence presented, it is evident all but a very small part of the latter easement (367 out of a total of 7,100 square feet – or 5.169%) is physically located on Lot 37. In addition, this temporary easement is of very limited duration (set to expire one year after completion of the project). There was no evidence presented as to how, if at all, the market value of Lot 36 was materially impacted by the taking. Consequently, the board finds Lot 37, where the fee and the other easements are located, has been permanently altered by the taking. In contrast, Lot 36, at most, is minimally impacted for a very short period of time (by the temporary driveway construction easement).

The fraction of the damages from the taking attributable to Lot 36 is de minimis under any reasonable calculation.[5] In addition, Wells Fargo has made no claim for a fraction of the Deposit,

[5] 5.169% of $3,700 (the temporary construction damage estimate in the Condemnor's appraisal) amounts to less than $200, or 0.225% of the amount of the Deposit ($85,000). This is de minimis by any measure.

such as, for example, a small (or large) share of the $3,700 allocation in the Condemnor's appraisal for the temporary easement.[6]

Although the Condemnor's appraisal makes a specific allocation of the estimated $85,000 just compensation damages between these three components of the take (the fee simple interest, the temporary construction easement and the drainage easement), the board is not bound by this allocation. (Cf. Request No. 25.) The board can reach different conclusions in the course of determining just compensation for the taking and fulfilling its statutory obligations. (See RSA 498-a:25 and RSA 498-a:26.)

As the board has repeatedly noted, the task is to consider and weigh all of the evidence presented, applying the board's "experience, technical competence and specialized knowledge" to this evidence and 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. Labrador Enterprises, LLC, BTLA Docket No. 20615-05ED (January 25, 2010) at p. 5 (and the statutes and case authorities cited therein).

In summary, and for all of these reasons, the board finds People's is entitled to receipt of the Deposit. Attached as Addendum A hereto are the board's responses to the Requests submitted by People's.

The board is sending Davey a "W-9" form with his copy of this order and is directing him to complete and return it to the Clerk. Upon receipt of a completed W-9 form from Mr. Davey, but not earlier than forty (40) days from the Clerk's date shown below, the Clerk will

[6] See Answer, p. 7, where Well Fargo enumerates what it is requesting the board to do with the Deposit. Nowhere does Wells Fargo claim it is entitled to any specific part of it. Rather, Wells Fargo simply asks the board to "[s]chedule a status conference for [sic] sixty days" or, "[i]n the alternative, deposit the funds into an escrow account with the Rockingham Superior Court once (Wells Fargo) has filed its petition and notified the [b]oard of the docket number" and "[h]old the $85,000.00 (Deposit) pending an Order from the Superior Court."

issue a check in the amount of $85,000, plus any accrued interest, to People's. Finally, since the parties have not notified the board they are willing to stipulate to the sum of $85,000 as the just compensation damages for the taking, the board will proceed to schedule a just compensation hearing in due course.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Chairman

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Albert F. Shamash, Esq., Member

Addendum A

The "Requests" received from People's are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "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 overly broad or narrow so 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 decision.

Peoples' Request For Findings of Fact and Rulings of Law

1. Joseph C. Davey, IV (hereinafter "Davey") is the owner of real property located in the Town of Plaistow, New Hampshire acquired by two deeds as follows: (a) deed recorded in the Rockingham County Registry of Deeds on August 8, 1998 in Book 3315, at Page 543; and (b) deed recorded on September 25, 2002 in Book 3845, Page 1002.

Granted.

2. The mortgage identified in the Condemnor's Declaration as being held by Federal National Mortgage Association (hereinafter "FNMA") was recorded on September 23, 2004 in the Rockingham County Registry of Deeds in Book 4366, at Page 494 ("FNMA Mortgage"), and specifically describes that portion of the Davey property acquired by deed (a) in 1 above.

Granted.

3. The mortgaged premises described in the FNMA mortgage is depicted as Lot 36 on a plan entitled "Lot Merger & Commercial Site Plan for Jay Davey, Map 27, Lots 36 & 37 in 71 Plaistow Road, Plaistow, NH" recorded in the Rockingham County Registry of Deeds as Plan#D-33159 on October 21, 2005 (hereinafter "Merger Plan").

Granted.

4. The mortgaged premises described in the mortgage to Community Bank & Trust Company recorded in the Rockingham County Registry of Deeds on August 11, 2006, at Book 4694, Page 1012 ("People's Mortgage") encumbers both parcels acquired by Davey by deeds (a) and (b) in 1 above and are shown as Lots 36 and 37 on the Merger Plan.

Granted.

5. People's now holds the People's Mortgage as the successor in interest by merger to Ocean Bank, which was the successor in interest by merger to Community Bank & Trust Company.

Granted.

6. The Promissory Note secured by the People's Mortgage remains outstanding with a current balance in excess of the sum (Eighty-five Thousand and No/100 Dollars [$85,000.00]) deposited by Condemnor commencing this action.

Granted.

7. No objection has been filed to the Condemnor's estimate of just compensation for the property interests described in its Declaration of Taking and Deposit of Damages, A Proceeding in Rem.

Neither granted nor denied.

8. The property interests described in the Declaration of Taking and Deposit of Damages, A Proceeding in Rem are:

(a) fee simple on .19 of an acre, more or less;
(b) access, light, air and view rights over (a);
(c) drainage easement; and
(d) temporary driveway construction easement;

Granted.

9. The property interests described in the Declaration of Taking and Deposit of Damages, A Proceeding in Rem are also depicted on its Exhibit A.

Granted.

10. The appraisal entitled "The Real Estate Appraisal of A 1.12+/- Acre Parcel of Commercial Land Improved with a 1,876+/- Square Foot Single Family Residence, Located at: 71 Plaistow Road, Plaistow, New Hampshire as of March 16, 2010" prepared for Condemnor ("Condemnor's Appraisal") indicates that the property interests to be taken are worth Eighty-five Thousand and No/100 Dollars ($85,000.00).

Granted.

11. Condemnor's Appraisal allocates the Eighty-five Thousand and No/100 Dollars ($85,000.00) as follows:

"Fee Acquisition:	$80,000
Temporary Easement:	3,700
Drainage Easement:	2,000
Difference:	(700)

Granted.

12. The entire Fee Acquisition and Drainage Easement interests are both located only on Lot 37 as depicted on the Merger Plan and are subject to the People's Mortgage and a certain Federal Tax Lien recorded in the Rockingham County Registry of Deeds on May 7, 2007 in Book 4796 at Page 369 ("IRS Lien") against all Rockingham County property of Joseph C. Davey, IV.

Granted.

13. The Temporary Easement is Seven Thousand One Hundred (7100) square feet.

Granted.

14. Three Hundred Sixty Seven (367) square feet, more or less, of the Temporary Easement is located on Lot 36 as depicted on the Merger Plan and is subject to (in order of recording): FNMA Mortgage, People's Mortgage and IRS Lien.

Granted.

15. Six Thousand Seven Hundred Thirty-Three (6,733) square feet, more or less, of the Temporary Easement is located on Lot 37 as depicted on the Merger Plan and is subject to (in order of recording): People's Mortgage and IRS Lien.

Granted.

16. In Paragraph 1(i) of the People's Mortgage Joseph C. Davey, IV assigns any claim for damages or any portion of any award from a condemnation action to the Mortgagor (People's) to the extent any indebtedness remains unpaid.

Granted.

17. The outstanding indebtedness exceeds the amount of the award therefore Joseph C. Davey, IV's entire interest in the award related to the property encumbered by People's Mortgage is assigned to People's.

Granted.

18. The IRS Lien was recorded after the People's Mortgage was recorded.

Granted.

19. The basic rule in determining the priority of IRS tax liens is "first in time, first in right". United States v. City of New Britain, 347 U.S. 81 (1954), therefor the People's mortgage has priority over the IRS Lien and must be fully satisfied before any funds are paid to the IRS on account of the IRS Lien.

Granted.

20. Under ordinary "circumstance, when a mortgage is duly recorded and clearly describes the secured loan and the mortgaged premises, priorities are simply a matter of first to record." **17-4 New Hampshire Practice: Real Estate § 4.03.**

Neither granted nor denied.

21. 498-A:25 provides that if there is more than one person entitled to compensation the Board shall apportion to each his proportionate share.

Granted.

22. As the holder of the only mortgage and first priority lien on the Fee Acquisition, People's proportionate share of the award is Eighty Thousand and No/100 Dollars ($80,000.00) for the Fee Acquisition.

Neither granted nor denied.

23. As the holder of the only mortgage and first priority lien on the Drainage Easement, People's proportionate share of the award is Two Thousand and No/100 Dollars ($2,000.00) for the Drainage Easement.

Neither granted nor denied.

24. As holder of the only mortgage and first priority lien on Six Thousand Seven Hundred Thirty-Three (6,733) square feet of the Seven Thousand One Hundred (7,100) square feet Temporary Easement, People's proportionate share of the award is .9483 percent of Three Thousand No/100 Dollars which is Two Thousand Eight Hundred Forty-four and 90/100 Dollars ($2,844.90.)

Neither granted nor denied.

25. The total of People's proportionate share is:

	$80,000.00
+	2,000.00
+	2,844.90
	$84,844.90

Neither granted nor denied.

CERTIFICATION

I hereby certify copies of the foregoing Order have been mailed this date, postage prepaid, to: David M. Hilts, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for Condemnor; Joseph C. Davey, IV, 108 Eagle Road, P.O. Box 922, Hampstead, NH 03841-0922, Condemnee; J. Laurence von Barta, Esq., Harmon Law Offices, P.C., counsel for Wells Fargo Bank, N.A., 150 California Street, Newton, MA 02458; Lizabeth M. MacDonald, Esq., Donahue, Tucker & Ciandella, PLLC, 225 Water Street, Exeter, NH 03833, counsel for People's United Bank; and Michael McCormack, Esq., counsel for Internal Revenue Service, United States Attorney for the District of New Hampshire, 53 Pleasant Street, Concord, NH 03301.

Dated: 3/23/12

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Anne M. Stelmach, Clerk