

City of Nashua

v.

J.K.S. Realty, L.L.C. and L.J.J. Realty, L.L.C.

Docket No.: 25455-11ED

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, RSA 231:5 and RSA ch. 498-A. On May 14, 1997, the Governor and Council appointed a “Special Committee” to hold a hearing to determine “whether there was occasion for the laying out or alteration of a limited access highway, Broad Street Parkway and related streets and railroad lines in the City of Nashua.” The Special Committee made such a finding on February 17, 1998. On March 27, 1997, the City of Nashua designated the State of New Hampshire Department of Transportation as its agent to, “among other things, coordinate and prosecute all eminent domain actions relating to the highway [Broad Street Parkway] project.”

A Declaration of Taking (“Declaration”) was filed with the board on March 16, 2011, describing the property rights taken as follows:

Parcel 23 – 1.858 acres of land in fee out of a total of 7.344 acres, leaving a remainder of 5.486 acres of land;

Parcel 24 – 4.797 acres of land in fee out of a total of 10.364 acres, leaving a remainder of 5.567 acres of land;

Parcel 25 – 2.307 acres of land in fee out of a total of 5.258 acres, leaving a remainder of 2.951 acres of land;

Parcel 29 – 2.231 acres of land in fee; slope easement in the amount of 2,016 square feet and drainage easement in the amount of 3,802 square feet, out of a total of 2.9 acres, leaving a remainder of 0.669 acres of land encumbered by the easements (the “Property”). See Declaration with attached plans entitled “Exhibit ‘A,’ pages 1 through 3.”

The total “Taking” from all four parcels consisted of 11.193 acres of land in fee, a slope easement in the amount of 2,016 square feet and a drainage easement in the amount of 3,802 square feet out of a total of 25.866 acres in the before situation, leaving a remainder of 14.673 acres. See Condemnor Exhibit No. 1.

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 took a view of the Property on October 8, 2013 and proceeded to hold the hearing in the Board’s offices in Concord, New Hampshire. On October 10, 2013, the board reconvened and concluded the hearing. The Condemnor was represented by Brian W. Buonamano, Esq. and Lynmarie C. Cusack, Esq., and the Condemnees were represented by Arthur G. Greene, Esq. and Gerald R. Prunier, Esq.

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.

Board's Findings

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 and its view of the Property, the board makes the findings detailed below.

The Condemnor relied upon an appraisal prepared by David S. Rauseo, MAI (the “Rauseo Appraisal,” Condemnor Exhibit No. 2) with an effective date of March 16, 2011. The Rauseo Appraisal estimated the market value of the Property before the Taking to be \$2,380,000 and \$1,065,000 after the Taking resulting in damages in the amount of \$1,315,000.

The Condemnees relied upon a Summary Appraisal Report prepared by Russell W. Thibeault, President of Applied Economic Research and Report Addendum to the (the “Thibeault Report,” Condemnees’ Exhibit N combined) with an effective date of March 16, 2011. The Thibeault Report estimated the value of the Property before the Taking to be \$3,100,000 and the value after the Taking to be \$219,000 resulting in damages of \$2,881,000.

Before the Taking

The Property was acquired in one half (½) undivided interests from Fairmont Street Associates, Inc. in a related party transaction on March 13, 2000. The deed refers to the Property as containing four tracts of land situated on Warsaw Avenue, Fairmount Street and Baldwin Street. (Rauseo Appraisal at p. 22.) The Property consists of a 22.966¹ acre parcel of vacant land west of Baldwin Street (Parcels 23, 24 and 25) and a 2.9 acre parcel east of Baldwin Street

¹ The Thibeault Report utilizes a total area of 25.866 acres.

(Parcel 29). Parcels 25 and 29 are impacted by “Stipulation” #6 of a “Rezoning Ordinance”² adopted January 22, 1985 (Id. pp. 152-155) that involves the requirement that the land remain as open space. Parcel 29 is non-contiguous and cannot contribute to the density of development of Parcels 23, 24 and 25. (Id. p. 64.) The Property is mostly zoned residential³ with the western portion zoned industrial. Mr. Rauseo considered the access to the Property as fair as the access is only via several side streets extending from Baldwin Street to the west or Fairmount Street to the north. The northern portions of the Property are partially isolated by a railroad line; an older narrow timber bridge (in need of replacement) provides one vehicle access for crossing the railroad on Baldwin Street which intersects with Amherst Street to the north; and a newer, two lane, bridge is located at Fairmount Street. Further, the Property is located within close proximity to the downtown area, although access along Amherst Street is heavily travelled and cumbersome. (Id. pp. 26, 27.) Mr. Thibeault considered the neighborhood as having “excellent access to both downtown and the Turnpike via Amherst and Broad Streets. Baldwin Street crosses the railroad tracks immediately north of the subject property via a primitive, but functional one-lane bridge with a wooden deck.” (Thibeault Report at p. 16-17.)

The approximate 22.966 acre western portion (Parcels 23, 24 and 25) contains 620.5 feet of frontage on Baldwin Street, 210 feet of frontage on Brigham Street and 50 feet of frontage at the end of the Hutchinson Street and Vilna Avenue right-of-ways. This portion is also located at

² Several of the Stipulations (1, 4, 7, 9 and 10) apply to the abutting former tannery property. The remaining Stipulations are still in effect and subsequent to rezoning and must be met before development on the Property can occur. (Id. pp. 33, 65.) The Property abuts a “former tannery and the Fimble Door property, which were found to be contaminated by inorganic heavy metals and dioxin exceeding safe limits. These areas are now contained” and the “contaminants did not leach” to the Property. (Thibeault Report at p. 22.)

³ Maximum density in the Residential C (RC) District is 3,485 square feet per unit or 12.5 units per acre; minimum frontage is 50 feet with the ability to build to a maximum of 12 stories. (Id. p. 65.)

the end of a paper street, Warsaw Avenue⁴, a narrow swath of unimproved land that extends northerly from its intersection with Fairmount Street. (Rauseo Appraisal at p. 39.)

The Baldwin Street grade slopes gently from the south and its frontage approximates that of the abutting roadway. At Hutchinson Street, Brigham Street and Vilna Avenue, the land slopes down steeply from its road frontage and access from these streets is not considered feasible without significant impact to buildable areas on the site. Adjacent to Warsaw Avenue, at the southwestern corner, the land is sloped down to the north. The land abutting the end of Warsaw Avenue continues a downward slope nearing 22%⁵; however, the slopes become gradual at a distance of 50 to 60 feet northerly from the end of Warsaw Avenue. Vilna Avenue is approximately 390 feet from the Property's southwestern bound; a 0.6 acres wetland area is approximately northeast of its frontage. The elevation is 50 to 55 feet below that of Warsaw Avenue. Slopes approaching 30% are common in the area which abuts the rear of residential properties on Brigham Street. To the northwest, the land slopes up (at an approximate grade of 14%) to railroad frontage. The slope encompasses the northernmost 200 feet of the site extending from the northeast corner for a distance of 800 feet in an easterly direction. From the northwestern bound (approximately 800 feet), the land slopes downward to the east to a 1000 to 1,500 square foot wetland with an area of 128 feet and the central portion then slopes up to the south by 10 to 15%. (Rauseo Appraisal at pp. 40, 41.)

⁴ There is an "implied easement" benefiting the Condemnees that allows access from the public portion of Warsaw Avenue to the Property line. (Rauseo Appraisal at p. 68.)

⁵ According to the Thibeault Report at p. 22, [t]he topography of the site is generally steep at its southerly border with the adjacent residential neighborhood, falling from an elevation of 180 feet at Warsaw Avenue, to 125 feet at the center of the site. The interior of the site is generally level. There is a somewhat steep area off Baldwin Street, dropping from an elevation of 160 feet to 140 feet at the site's interior. The topography is also steep adjacent to the railroad tracks and the former tannery site.

The land to the east slopes up steeply to a nearly level depressed area (0.80 of an acre) and is centered approximately 200 feet westerly from the Baldwin Street road frontage with an elevation of approximately 160 feet (10 to 20 feet lower than the Baldwin Street land frontage). At its southeastern portion, the land slopes up steeply to a nearly level plateau with an elevation of this area (1.5 acres) to be about 190 feet which approximates the Baldwin Street immediately to its east. (Id. p. 41.)

According to the Rauseo Appraisal, there are two wetlands on the site – a wetland approximating 1.5 acres located near the center of the western site and a wetland approximating $\frac{1}{4}$ acre in size located near the northern property bound adjacent to the abutting railroad for total wetlands of 1.75 acres. City land use regulations state these wetlands cannot be used to contribute to density in development. (Id. p. 42, 68.) The Thibeault Report states there are three significant wetlands on the Property: a 11,272 square foot pond located in the approximate center of the site; a 33,213 square foot wetland also in the center of the site; and a 10,028 square foot wetland adjacent to the railroad line for a combined total of 1.25 acres of pond/wetlands. (Thibeault Report at p. 22.)

Before the Taking, the Condemnees and the abutting “Tannery” owners were responsible for a \$300,000 developer contribution,⁶ as stated in Stipulation #2, for improvement (and possible replacement) of the Baldwin Street bridge as a potential access. Additionally, roadwork

⁶ Stipulation #2 states: “The Sargent Avenue extension or some other acceptable access design be paid for by the developer along with the dedication of land for its use at the City’s option. If the City decides to proceed with the Sargent Avenue extension, or some other acceptable access, then the Developer shall contribute an amount not to exceed \$300,000 for the design and/or construction.”

costs, engineering, permitting and demolition result in total estimated costs of \$425,000 to satisfy Stipulation #2.⁷ (Rauseo Appraisal at pp. 65-66.)

Stipulation #3 considers a construction limit of 150 dwelling units per year “until the Sargent Avenue extension or some other city acceptable access alternative is completed.” (Id. pp. 66, 155.) Mr. Rauseo determined this stipulation could be amended by planning board approval so long as the access was completed before construction and occupancy of the units.

Stipulation #5 involves the dedication of an “80 foot right of way abutting the railroad right-of-way along the entire length of the rezoned property[,]” which includes the entire railroad frontage land approximately 1,800 feet in length for a total of 3.3 acres (80 feet x 1,800 feet) which cannot be used to contribute to the density of the development. (Id. pp. 67, 155.)

Stipulation #6 requires that “Lots 101 and 102,” (a/k/a Parcels 29 and 25) remain as open space, which area covers the entire Baldwin Street frontage and prohibits a road or driveway through Parcel 29.⁸ Stipulation #8 requires a 50 foot conservation buffer be maintained between the Property and residential neighborhoods to the south, the terms of which have not been defined by ordinance. Without the ability to penetrate this buffer for access, the Property would not have access to the public road system. RSA 674:41 allows the planning board to grant approval to grant access to the site when the paper street is the sole access. They may, however, require improvements to Warsaw Avenue including upgrading to city standards and extension of full utilities. Development of these lots is not economically feasible and Warsaw Avenue may be best used as a secondary fire access. (Id. pp. 67-68.)

⁷ As part of the Broad Street Parkway project, this replacement will be done and thus is not considered a cost by Mr. Rauseo or Mr. Thibeault in the after Taking situation.

⁸ Both parties’ appraisers, however, assumed the Property could be accessed from Baldwin Street in both the before and after the Taking scenarios. (See Rauseo Appraisal at p. 67 and Thibeault Report at pp. 18, 27.)

Parcel 25, consisting of 5.258 acres, can contribute to the density of development of the Property which can be developed into high rise buildings. The Rauseo Appraisal (p. 69) determined the highest and best use of the Property was multi-family residential, and estimated 195 to 215 units was considered feasible. (17.9 acres x development density of 11 to 12 units per acre, or 3,630 to 3,960 square feet per unit). The Thibeault Report determined the highest and best use of the Property was for high density multi-family residential development and accepted the development plans presented to the Nashua Planning Board by Maynard and Paquette Engineering Associates, LLC as well as the site development costs estimated by Ryan Charbonneau of Continental Paving. Maynard and Paquette indicated the Property could accommodate 320 units (Condemnee Exhibit D) in a mid-rise configuration (in five buildings). The units would be four story buildings with parking underneath. (Id. at pp. 5-6, 33, 41.)

The Property has access to municipal sewer and water and lies below the grade of the existing sewer line necessitating a sewer pumping station if it is developed. Further, natural gas is available to the neighborhood. (Thibeault Report at p. 22.)

After the Taking - Rauseo Appraisal

After the Taking, the Property consists of 14.673 acres of land in two non-contiguous remainders east and west of Baldwin Street. The eastern remainder, Parcel 29, is triangular in shape with 0.669 of an acre of land and a width of 270 feet on the northern bound and a north/south length of 215 feet. This parcel is impacted by a 3,802 square foot drainage easement and a 2,016 square foot slope easement. The entire easement area is subject to ponding after the Taking and the slope easement is estimated to be at 4:1. The western remainder (Parcels 23, 24 and 25) contains 14.004 acres of land and is irregularly shaped with a depth of 1,800 feet from east to west and a width that varies from 190 to 600 feet from north to south. The Broad Street

Parkway extends along the western remainder's northern bound and its "pavement will be approximately twenty feet above the low lying northernmost subject grade." The difference in grade lessens to the west and decreases to the east and near the northeastern bound of Parcel 25, the parkway is lower than the abutting grades to a maximum of 12 to 15 feet. Access is available via Baldwin Street; however, access via the Broad Street Parkway is controlled with no points of access granted.

Thus, the density of development is reduced in the after situation; the physical capability of the western remainder is hindered by its difficult access, long, narrow shape, varied topography and several wetland areas; the steep slopes at the Property's northern and southern bounds limit its remaining usable area to "a narrow central swath, which is also somewhat sloped;" and "central wetlands... may preclude a connection between the eastern and western buildable areas." (Rauseo Appraisal at p. 75.)

Stipulations 1, 4, 9 and 10 apply to the abutting former tannery property and are still in effect after the Taking. Stipulation #2 placed responsibility on the owners for a \$300,000 contribution towards improvement (and possible replacement) of the Baldwin Street bridge as a potential access. After the Taking, the Condemnees would be responsible to coordinate with the State of New Hampshire Department of Transportation or the City of Nashua for an alternate access, "a replacement of the timber Baldwin Street railroad bridge" with a likely contribution of \$150,000 for a prospective purchaser. Stipulation #5 (80 foot right of way abutting the railroad right of way along the Property's entire railroad frontage land) has little bearing in the after Taking. Likewise, Stipulation #6 which involves Lots 25 and 29 remaining as open space land does not appear to significantly affect the utility of the those lots. (Id. at pp.76-78.)

The northwestern bound is shared with an abutter; therefore, a single access drive off the parkway is planned for the location. The southernmost bound consisting of 2,475 feet is an “irregular combination of the noted road frontages and rear of several single family residences on Hutchinson Street, Brigham Street, Vilna Avenue and Warsaw Avenue.” The western bound abuts two service commercial and light industrial business uses.

The southern bound after the Taking is similar to the southwestern bound in the before Taking. At Brigham Street and Vilna Avenue, the land slopes steeply from the road frontage and thus access is not feasible.

Topography is mostly sloped and the subject land abutting the end of Warsaw Avenue continues a downward slope nearing 22% and at a distance of 50 to 60 feet northerly from Warsaw Avenue become gradual.

Vilna Road is nearly 390 feet easterly from the southwestern bound. Approximately 120 feet to the northeast of Vilna Road’s frontage is a 0.6 of an acre wetland area with an elevation 50 to 55 feet below the nearly level portion of Warsaw Avenue. Approximately 140 feet to the northeast, a 0.15-of an acre wetland area exists. The land slopes up steeply to the east and southeast from the wetland areas approaching 30%, which is common in the area.

To the northwest, the land slopes up at an approximate grade of 10 to 12% to the parkway road frontage. The slope encompasses the northwestern site area. At the site’s southeastern portion, the land also slopes up steeply to a nearly level plateau. The elevation of this ½ acre area is approximately 98 feet, which approximates Baldwin Street immediately to the east.

The Broad Street Parkway will have an elevation nearly 20 feet lower than Parcel 25’s southeastern existing grade near Baldwin Street. (Id. pp. 48-50.)

The designated open space land of Parcel 25 further reduces the buildable area of the Property by 5.258 acres. This land, however, can contribute to the density of development on the Property which can be developed with high rise apartment buildings.

After the Taking two areas of development (separated by two non-connective driveways due to wetlands located in the approximate center of the Property) are anticipated. As a result of the narrow shape, wetlands and difficult topography, a development of 125 to 135 units is considered feasible (12.5 acres x development density of 10 to 11 units per acre, or 3,960 to 4,356 square feet per unit). (Id. at pp. 75-79.)

After the Taking – Thibeault Report

The Taking parallels the railroad tracks and the Property will not have access to the Broad Street Parkway, “the intended use of the take area.” The Property will continue to have Baldwin Street access yet its frontage will be reduced from 620 to 381 feet. The narrow configuration of the Property remaining after the Taking imposes development constraints because the area taken encompasses a significant amount of the more desirable development land and soils and topography of the remainder are also less favorable for development resulting in higher development costs and fewer units in the after Taking scenario. More extensive fill and retaining walls will be necessary to create buildable sites as a result of the “best” land being taken and extensive manipulation required to create parking and unit construction.

Thus, the highest and best use of the Property after the Taking is for multi-family development of 160 units. (Condemnee Exhibit E.) If it is determined that high density residential use is not feasible, the highest and best use would revert to low density, single family residential development. (Thibeault Report at pp. 27, 45.)

Board's Rulings

For the reasons stated below, the board finds the value of the Property before the Taking to be \$3,100,000 and the value after the Taking to be \$219,000 resulting in just compensation in the amount of \$2,881,000.

Mr. Rauseo considered the highest and best use of the Property before the Taking to be multi-family development of 195 to 215 units or 11 to 12 units per acre. (Rauseo Appraisal at pp. 64-73.) In reviewing the comparable sales, he determined the most meaningful unit of comparison was the sale price per unit or apartment. Utilizing the sales comparison approach in the before situation, he analyzed and confirmed (with a grantor, grantee or broker) five transactions of vacant land sold for development of multi-family apartment buildings or condominiums which were considered to be the most recent and comparable transactions available. These sales occurred in Litchfield, Manchester and Dover. The adjusted unit sales prices formed a range of \$11,140 to \$17,927 per unit and Mr. Rauseo determined the upper end of the range, \$14,000 per unit (195 units - \$2,730,000; 215 units - \$3,010,000), was appropriate before considering "atypical" off-site development costs [\$495,000] (*Id.* p. 66), the Property's current use designation⁹ and recognizing the Property does not benefit from approvals. He estimated an effective parcel size of 17.9+/- acres without approvals. Thus, based on his analysis, Mr. Rauseo determined the market value of the Property before the Taking to be \$2,380,000. (*Id.* pp, 83-93.)

⁹ None of the Rauseo comparables were encumbered by current use typically requiring a 10% land use change tax. "However, the Uniform Appraisal Standards for Federal Land Acquisitions, Section A-13g, states that the appraiser 'should estimate the market value of the property as if free and clear, the indebtedness, or potential indebtedness, imposed under these programs is not be considered by the appraiser in estimating the property's market value.' Therefore, no deduction for the subject's Current Use designation is warranted." (*Id.* p. 93.)

In the after situation, Mr. Rauseo analyzed the same five comparable sales. The anticipated impact of the long, narrow configuration and topography of the Taking results in difficult topography, higher than average cost construction of retaining walls, possible under-building parking and walkout structures. Of the total western remainder size (14.005 +/- acres), Mr. Rauseo considered 12.5 +/- acres suitable to contribute to the Property's density; he anticipated two areas of development separated by the central wetland and access via two driveways; and estimated a density of development in the range of 10 to 11 units per acre. Thus, Mr. Rauseo determined the Property's development potential in the after situation to be similar to that in the before. He arrived at a range of adjusted unit sale prices of \$10,610 to \$16,931 per unit and determined the upper end of the range (considering the "relative rarity of the subject's vacant land" and "the requirement for a sewer pumping station") to be \$13,000 per unit (125 units - \$1,625,000; 135 units - \$1,755,000) before adjusting \$150,000 to consider the "likely contribution per Rezoning Stipulation #2." He determined no other adjustments were warranted and as in the before situation, no adjustment is made for current use. Mr. Rauseo determined it would take two to three years to develop the project, considering the time involved in development and approvals of plans and assuming risk and development costs, he estimated a \$475,000 discount for delayed use (Id. p. 101) and determined a market value after the Taking of \$1,065,000 for total damages of \$1,315,000.

Mr. Thibeault considered the Property's highest and best use in the before to be high density multi-family residential development. Mr. Thibeault based his site development costs both in the before and after Taking scenario on cost estimates developed by Ryan Charbonneau of Continental Paving, Inc. (See pp. 46-49 of Thibeault Report.) Further, Mr. Thibeault relied on site plans prepared by Maynard and Paquette Engineering Associates, LLC. The before

Taking site plan indicated zoning requirements and the site's physical characteristics would allow development of 320 multi-family units in five buildings (in four story buildings with parking underneath). (See Condemnee Exhibit D.) After the Taking, the size of the Property was reduced to 14.673 acres; Mr. Thibeault analyzed the Property in the after situation as a multi-family development of 160 units. He reviewed the Maynard and Paquette Engineering Associates, LLC plan (Condemnee Exhibit E) which identified the ability to place a "practical maximum" of 160 multi-family units on the Property as being physically possible and legally permissible. After the Taking, the inferior quality land represents a higher proportion of the land, thus the density is reduced by many of the same factors constraining development before the Taking (i.e., setback from residential areas, steep slopes, wetland areas).

The Thibeault Report analyzed and adjusted four comparable sales in the before situation based on capability of 320 units. The indicated value of the Property per unit before the Taking was in the range of \$9,100 to \$14,200 per unit and estimated the value of the Property per unit to be \$11,250 for a before the Taking value conclusion of \$3,600,000. This value was reduced by the contribution to access improvement for the replacement of the Baldwin Street bridge and additional demolition, engineering and construction costs, totaling \$500,000, which a likely purchaser would have to absorb. Thus, the before value estimated in the Thibeault Report was \$3,100,000.

Mr. Thibeault analyzed the same four comparable sales after the Taking and arrived at a per unit value of \$13,000¹⁰ after making further adjustments for physical characteristics, severe topography, wetlands and allowing for exceptional off-site access contribution costs of \$300,000.

¹⁰ Mr. Rauseo also utilized a \$13,000 per unit after value.

He thus arrived at a value after the Taking, before consideration of on-site development costs, of \$1,780,000.

As stated above, Mr. Thibeault relied upon on-site development costs developed by Ryan Charbonneau of Continental Paving, Inc. The total site cost per unit in the before situation was \$2,607,367 (\$8,148 per unit) and \$3,612,423 (\$22,578 per unit) in the after situation. On a per unit basis, these development costs nearly tripled in the after situation “because on-site costs are higher in absolute terms and they are spread across half as many units.” (*Id.* p. 62). To determine whether it was financially feasible to develop the Property in the after situation as a result of the dramatic increase in on-site development costs, Mr. Thibeault contrasted the supportable investment with the cost to construct units and the site development costs after the Taking. He analyzed the costs of rental two bedroom units and performed an income analysis which concluded the rental stream could support a total investment of \$118,600 per unit. He then computed the costs to bring the units to market using Marshall and Swift cost estimates arriving at a per square foot figure and added 15% for soft costs, resulting in a total estimate per unit construction before land and site costs of \$98,300. Subtracting the cost to construct the units from the supportable investment figure supported the fact it is not feasible to build multi-family units on the Property after the Taking due to the exceptionally high on-site income stream cannot support the required investment. (*Id.* pp.63-71.)

Thus, after the Taking, Mr. Thibeault has determined the Property’s highest and best use reverted to low density, single family residential use. The remainder lot easterly of Baldwin Street could not be used for residential use as it is dedicated open space by the Rezoning Ordinance. The highest and best use of the Baldwin Street westerly lot is to subdivide it into single family residential lots. Maynard and Paquette Engineering Associates, LLC examined the

land to the west of Baldwin Street and set forth its conclusions (see pp. 773-75). Based on the analysis, the highest and best use of the Property after the Taking is a “single family subdivision of the westerly side, consisting of a single lot accessed via Warsaw Avenue and 10 single family lots served by a *cul de sac* off Baldwin Street.” The highest and best use would be achieved by sale to a developer. In arriving at a value based on this highest and best use analysis, Mr. Thibeault estimated the retail lot values utilizing four residential lots which sold in 2010 and 2011. Based on the analysis, the indicated lot value was determined to be \$125,000 for the Warsaw Avenue lot and \$80,000 per lot for the other lots. He then utilized Maynard and Paquette Engineering Associates, LLC cost estimates of bringing the lots to marketable condition. Combining revenue and cost estimates resulted in net receipts of \$430,950 before developer’s profit of 24% indicating an after the Taking market value of \$219,000 rounded. The resulting damages, as estimated by Mr. Thibeault, are \$2,881,000.

As stated above, the board considered and weighed all of the evidence in making its findings. Paras v. City of Portsmouth, 115 N.H. 63, 68 (1975); see also Petition of Grimm, 138 N.H. 42, 53 (1993) (administrative board may use expertise and experience to evaluate evidence). Because just compensation is measured by the difference between the before and after market values of the Property, the board must evaluate the highest and best use of the Property both before and after the Taking. The board finds the Condemnor did not carry its burden of proof in this case¹¹ in estimating the damages resulting from the Taking. The board concurs with the findings in the Thibeault Report, finds the Maynard and Paquette Engineering Associates, LLC plans and Continental Paving cost estimates to be credible evidence and finds

¹¹ RSA 498-A:19 states “[i]ssues of fact shall be determined upon the balance of probabilities and the burden of proof shall be upon the condemnor.”

this evidence along with the testimony and the view of the Property support a finding in favor of the Condemnees.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Hillsborough 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 Condemnor 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

Michele E. LeBrun, Chair

Theresa M. Walker, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Brian W. Buonamano, Esq., and Lynmarie C. Cusack, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the City of Nashua, Condemnor; Arthur G. Greene, Esq., Law Office of Arthur G. Greene, 3 Executive Park Drive, Bedford, New Hampshire 03110 and Gerald R. Prunier, Esq., Prunier & Prolman, P.A., 20 Trafalgar Square, Suite 626, Nashua, New Hampshire 03063, counsel for the Condemnees.

Date: March 24, 2014

Anne M. Stelmach, Clerk