

**City of Nashua**

**v.**

**Donzi Realty, LLC, The Nashua Bank and City of Nashua**

**Docket No.: 25456-11ED**

**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 and RSA 231:5. A Declaration of Taking (“Declaration”) was filed with the board on March 16, 2011, describing the property rights taken as 3.1 acre parcel of land, more or less. The parties agree this was a complete taking and includes a 32,765 square foot building located on the parcel (the “Property”).

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 proceeding, 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 then held the just compensation hearing at its offices in Concord, New Hampshire on June 5 and 6, 2012. The Condemnor was represented by Kevin H. O’Neill, Esq., State of New Hampshire Department of Justice, and condemnee Donzi Realty,

LLC (the “Condemnee”) was represented by: William Barry, III, Esq. of Barry & Honorow PLLC; and Arthur G. Greene, Esq. of Greene Lombardi Law Group PLLC.

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

### **Board’s Rulings**

Based on the evidence presented, the board determines the just compensation for the taking to be \$3.3 million. The bases for this determination, including the board’s market value finding as of the date of taking (March 16, 2011), are presented below.

The board is authorized 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. To 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.”)

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).

The Condemnor relied upon a March 27, 2012 appraisal by Martin S. Doctor of Fulcrum Appraisal Services (the “Doctor Appraisal,” Condemnor Exhibit No. 1). The Doctor Appraisal estimated the market value of the Property, as of March 16, 2011, to be \$2.6 million using the income approach. (He estimated a value of \$2,520,000, rounded, using the sales comparison approach, but relied more on the income approach. See Doctor Appraisal, Part III, p. 23.)

The Condemnee relied upon a May 9, 2012 appraisal by J. Chet Rogers, MAI (the “Rogers Appraisal,” Condemnee Exhibit B). The Rogers Appraisal estimated the market value of the Property, as of March 16, 2011, to be \$4.43 million using the sales comparison approach. (He also presented two variations of an income approach which ‘bracketed’ the value conclusion he arrived at with estimates of \$3,840,000 and \$6,400,000, respectively. See Rogers Appraisal, p. 49.)

Cognizant of these substantial differences, the board will first summarize the relevant facts pertaining to the Property and then present its findings regarding the most reasonable method of estimating market value as of the date of taking. The Property is located at 44 Broad Street, less than one-half mile east of Exit 6 of the F.E. Everett Turnpike (Route 3). On the view, the board observed the Nashua River abuts the back of the Property, railroad tracks border one side and a car wash borders the other. Because of the “topographical dropoff” of the site to the river, only about 1.5 acres of the 3.1 acre parcel is useable. (See Rogers Appraisal, Condemnee Exhibit B, p. 30.) The parties agree there is no excess land available for further development of the Property.

The parties generally agree the highest and best use of the Property was its use before the taking as a multi-tenant, retail/commercial building. (Cf. Doctor Appraisal, Part III, p. 4 and Rogers Appraisal, p. 37.) The building, originally constructed for an industrial use, was built

“circa 1970” but was renovated after the Condemnee purchased it in 1996. (Rogers Appraisal, pp. 30 and 31.) The board finds the building was in average condition and quality for its age and use.

The Property has “limited on-site parking.” (Doctor Appraisal, Part II, p. 14.) While the Condemnee pointed out the public parking spaces on Broad Street in front of the Property, this area lacks curbing or any other barrier and the spaces are adjacent to vehicular traffic, making them less desirable than off-street parking.

At the time of the taking, the total 32,765 square feet of rentable space in the building was divided into five rental units of varying size. (Rogers Appraisal, p. 41; Doctor Appraisal, Part III, p. 15.) Each rental space has its own entrance facing Broad Street and signage visible to passing traffic. Prior to the taking, the Condemnee occupied the largest rental space (15,795 square feet) and used it for its “outdoor power equipment” sale and repair business.

In examining and weighing the evidence, including the quality and quantity of data presented in the income and sales comparison approaches, the board finds the income approach provides the most credible indicator of the market value of the Property when adjustments are made to remedy shortcomings and limitations in the appraisals and other evidence presented. As noted above, Mr. Doctor relied primarily on the income approach and Mr. Rogers relied primarily on the sales comparison approach. The board used the income approach developed in the Doctor Appraisal as a starting point, but then made adjustments to the rental income, vacancy and collection and capitalization rate estimates employed.

With respect to market rents, the board finds the estimates in the Doctor Appraisal (Part III, pp. 14-18) are generally more credible than the higher rates used in the Rogers Appraisal, with the exception of the 15,795 square feet of owner occupied space. The board determined this

space would have had a market lease rate of about \$9 per square foot (rather than the \$7.50 per square foot estimated by Mr. Doctor).

The board considered, but could not give weight to the higher rental estimates made by Mr. Rogers in his income approach. Mr. Rogers gave undue weight to the rentals at 14A Broad Street. The board finds 14A Broad Street is less comparable because it is a strip mall; it is also newer and in better condition and therefore is likely to draw a different quality of tenant. In addition, Mr. Rogers developed what he called “tainted market” and “fair market” rents in his income approach. The board, however, did not find his limited analysis using these concepts to be persuasive. (See Rogers Appraisal, pp. 41-46.)

On the other hand, the board finds the 10% vacancy and collection rate estimated by Mr. Rogers is more supportable than the higher 15% rate used by Mr. Doctor, who gave insufficient weight to the fact a substantial amount of the rental space is owner occupied and would have likely remained so except for the taking. The evidence presented further indicates the Condemnee had little relative difficulty attracting and retaining tenants for the Property.

Applying these two adjustments increases stabilized net operating income (“NOI”) to \$263,760, rounded. (Compare Condemnee Exhibit J, derived from Doctor Appraisal, Part III, p. 18.) The board finds this estimate to be more reasonable than the income approach estimates contained in the Doctor and Rogers Appraisals.

After examining the evidence presented regarding capitalization rates, the board finds 8% is more reasonable than the rates used by either appraiser (8.7% by Mr. Doctor and 7.6% by Mr. Rogers). The board finds Mr. Rogers’ lower rate is not sufficiently supported, relying as it does only on the “indicated cap rates” from the three sales he analyzed. (See Rogers Appraisal, p. 48.) As for the higher rate in the Doctor Appraisal, Mr. Doctor used three accepted methods

(market capitalization, mortgage equity and debt coverage) and reconciled them to arrive at his estimate. In doing so, however, the board finds he overestimated, to some degree, what the local bank interest rate was likely to be at the time of the taking. (Compare Doctor Appraisal, Part III, pp. 19-23; and Condemnee Exhibits D and F).

Applying an 8% capitalization rate to the estimated NOI results in a market value estimate of \$3.3 million, rounded ( $\$263,760 / 8\% = \$3,297,000$ ). The board finds this sum is just compensation for the taking of the Property.

The board considered, but did not employ, the comparable sales approach methodology presented in the Doctor and Rogers Appraisals. Each appraiser used this approach to estimate market value on the basis of an adjusted price per square foot of rentable space, but each appraiser made differing adjustments which the board finds are open to substantial question and revision. Mr. Doctor's estimate is an adjusted price of \$77 per square foot and Mr. Rogers' estimate is an adjusted price of \$135.18 per square foot, approximately 75% higher. (Doctor Appraisal, Part III, p. 12; Rogers Appraisal, p. 40.)

Each appraiser used three sales and one listing to develop his sales comparison approach estimate, but the board finds only two of the sales (427-29 Amherst Street in the Doctor Appraisal and 175 Amherst Street in the Rogers Appraisal) are sufficiently comparable to the Property to provide some indication of market value. The board agrees with the Condemnee the property it relocated to in anticipation of the taking (322 Amherst Street) is not a meaningful comparable because it is a different type of property with a different highest and best use. Unlike the Property, 322 Amherst Street consists of two buildings (a retail/warehouse building in front of an accessory warehouse), is not suitable for multiple tenants and has less accessibility and visibility, particularly to the warehouse. The magnitude of adjustments made by Mr. Doctor

(65%) is a further indication this comparable does not provide a credible market value estimate for the Property.

Nor did the board find using the listings<sup>1</sup> and sales (some from other parts of Nashua and others from Merrimack and Manchester) in the Rogers and Doctor Appraisals helpful in arriving at a supportable indication of market value for the Property, especially where several sales involved differing mixtures of office, retail and restaurant space. Listings, by the very nature, are not generally probative of market value and are given far less weight than actual sales between willing buyers and willing sellers.

While, in theory, the board could have attempted to apply more appropriate time, size, location, quality, condition and perhaps other adjustments to the two remaining sales (427-29 Amherst Street and 175 Amherst Street<sup>2</sup>) to improve the degree of comparability to the Property, the board finds restricting a sales comparison approach and making adjustments to just two sales would be problematic at best and would be unlikely to lead to a reasonable indication of value. Therefore, the board relied solely on the income approach as discussed above.

For all of these reasons, the board finds just compensation for the taking is \$3.3 million. The board has responded to the Condemnee's "Request for Findings of Fact and Rulings of Law" in Addendum A to this Report.

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<sup>1</sup> Mr. Rogers used the listing price of \$3.2 million for 14A Broad Street, but the building is more than 1/3 smaller in size -- 20,152 square feet versus 32,765 square feet for the Property. (Rogers Appraisal, p. 39.) For his part, Mr. Doctor used one listing, 337 Amherst Street, where, within four months, the price was reduced by over 22% (\$400,000) from the price he used in the appraisal. (Doctor Appraisal, Part III, pp. 10-11.)

<sup>2</sup> The unadjusted prices per square foot of these two sales (\$114.32 for 427-29 Amherst Street and \$85.26 for 175 Amherst Street) have been noted. Although the board could give the sales comparison approach no operative weight, multiplying the approximate midpoint of these prices (\$100) by the size of the building on the Property (32,765 square feet) yields a value (\$3,276,500) that correlates with the value indication using the income approach (\$3.3 million, as discussed above).

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.

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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Chair

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Albert F. Shamash, Esq., Member

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Theresa M. Walker, Member

**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; William H. Barry, III, Esq., Barry & Honorow, PLLC, 161 Kinsley Street, Nashua, NH 03060 and Arthur G. Greene, Esq., Greene Lombardi Law Group, PLLC, 4 Bell Hill Road, Bedford, NH 03110, counsel for Condemnee; Mr. Tom Boucher, The Nashua Bank, 188 Main Street, Nashua, NH 03060, Mortgagee; and Paul R. Bergeron, City of Nashua, 229 Main Street, Nashua, NH 03061, Municipal Easement Holder.

Date: 7/27/12

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Anne M. Stelmach, Clerk

### **ADDENDUM A**

The “Requests” received from the Condemnee are replicated below, in the form submitted and without any typographical corrections or other changes. The board’s responses, stated below each Request, 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 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.

### **CONDEMNEE’S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW**

1. The highest and best use of 44 Broad Street, Nashua, New Hampshire (hereinafter referred to as the “subject parcel”) on the date of the taking was for the existing commercial multi-tenant retail sales/service use. **JCRA: 37 (Reference to Appraisal prepared by J. Chet Rogers, MAI, May 9, 2012). MSDA: Part II, Page 4 (Reference to Appraisal prepared by Martin S. Doctor, NHCG 488, March 27, 2012).**

#### **Granted.**

2. In determining the value of the subject property by the Sales Comparison Approach, the Condemnee’s Appraiser’s use of 175 Amherst Street, Nashua, New Hampshire, 501 D.W. Highway, Merrimack, New Hampshire, and 1875 So. Willow, Manchester, New Hampshire are valid comparables because said buildings are all multi-tenant retail buildings similar in size and use to the subject property. **JCRA: 39.**

#### **Neither granted nor denied.**

3. The City's Appraiser's use of Comparable Improved Sale #RB-1 is not a valid comparable because the building is a single use building containing only 9520 square feet of retail space with a detached 21,500 square foot warehouse building. **MSDA: Part IV, Pages 3-4.**

**Granted.**

4. The City's Appraiser's use of Comparable Improved Sale #RB-3 is not a valid comparable because of the 17,880 square foot building only less than one-third (1/3) of it is used as a retail space with the remainder of the building being utilized as office space. **MJDA: Part IV, Page 9.**

**Granted.**

5. The City's Appraiser's use of Comparable Improved Listing #RB-4 should be discarded because it is not a valid comparable because it is a listing, and not a sale.

**Granted.**

6. The market per square foot sales price of comparable buildings to the subject property, as adjusted for market conditions, location, size, and quality/condition, results in a mean square foot price of \$135.18 per square foot supporting a value for the subject property of 32,765 square feet x \$135.18 rounded to **\$4,430,000.**

**Denied.**

7. The Condemnee's Appraiser's vacancy rate of 10% which he utilized in determining the Net Operating Income for his Income Approach was based upon market data that he obtained from KeyPoint Partners which reported the retail space vacancy for 2011 in Nashua was 8.7%. **JCRA: 46.**

**Neither granted nor denied.**

8. The Condemnee's Appraiser utilized a CAP rate of 7.6% in determining the value of the subject property based upon the Income Approach was determined by said Appraiser by taking the average CAP rate from three market sales analyzed by him. **JCRA: 48.**

**Granted.**

9. The City's Appraiser utilized a CAP rate of 8.7% being the average of a so-called Market Extraction rate of 8.57%, a Mortgage Equity Technique Rate of 8.42%, and the Debt Coverage Ratio Method Rate of 8.89%. **MSDA: Part III, Pages 19-23.**

**Neither granted nor denied.**

10. None of the three methods utilized by the City's Appraiser relies upon market data, but on estimates of rental income, estimates of Loan-to-Value ratio, estimates of Financing Holding Period, estimates of Equity Yield, and estimates of Mortgage Interest Rates which are not accurate and/or are speculative.

**Denied.**

11. The City's Appraiser's estimated market rent for the four units in the subject property, excluding the Condemnee's unit, is \$195,737 (**JCRA: 42; MSDA: Part III, Page 15**).

**Granted. (The board notes, however, that the actual computation of market rent for these units in the Doctor Appraisal is not on the page stated above, but in Part III, Page 18).**

12. The tainted market rent for the Condemnee's 15,795 square foot unit to an arm's length third party would have been at \$11.00 per square foot similar to the contract rent paid by the flooring company yielding rental income of \$173,745 for said unit.

**Denied.**

13. If the market vacancy rate of 10% (**JCRA: 46**) is utilized in determining the Operating Income utilizing the City's Appraiser's Property Pro Forma Statement (**MSDA: Part III, Page 18**), it would result in Net Operating Income of \$244,356.

**Neither granted nor denied.**

14. Utilizing the City's Appraiser's CAP rate of 8.7% (**MSDA: Part III, Page 23**) and dividing the Net Operation Income of \$244,356 by said CAP rate would result in a value of the subject property of \$2,808,690. See Exhibit A.

**Neither granted nor denied.**

15. If the market vacancy rate of 10% (**JCRA: 46**) is utilized in determining the Net Operating Income utilizing the City Appraiser's Property Pro Forma Statement (**MSDA: Part III, Page 18**) resulting in Net Operating Income of \$244,356, AND utilizing the Market CAP rate of 7.6% as determined by the Condemnee's Appraiser (**JCRA: 48**), then the results of value of the subject property would be \$3,215,210. See Exhibit B.

**Neither granted nor denied.**

16. Utilizing the Market Vacancy Rate of 10% (**JCRA: 46**), the Market CAP rate of 7.6% (**JCRA: 48**), and the tainted market rental rate of \$11.00 per square foot for the Condemnee's 15,795 square foot unit (**JCRA: 42**), the value of the subject parcel would be \$3,810,947. See Exhibit C.

**Neither granted nor denied.**

17. The contract rents were depressed by the potential for the eminent domain taking at some unknown time in the future.

**Denied.**

18. The fair market rents for the subject property could have been \$18.85 per square foot (**JCRA: 43**), resulting in a potential gross income of \$587,926 (**JCRA: 43**) which could have yielded a Fair Market Income Approach Value of \$6,400,000 (**JCRA: 48**).

**Denied.**

19. The most accurate valuation of the subject property is by the Sales Comparison Method which results in a value of \$4,430,000.

**Denied.**

20. The Condemnee is awarded \$4,430,000.

**Denied.**