

State of New Hampshire

v.

David Poulin

Docket No.: 25466-11ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for highway purposes pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:14. A Declaration of Taking (“Declaration”) was filed with the board on April 13, 2011, describing the property rights taken as twelve hundredths (0.12) of an acre, more or less, and improvements thereon (the “Property,” also known as Parcel 121, 38 Wight Street). See Exhibit A to the Declaration.

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 “Condemnee.” See Tax 210.12 and cases cited therein.

The board commenced the hearing and viewed the Property’s location and comparable sales on October 17, 2012 in the City of Berlin and continued the hearing on October 18, 2012 at its offices in Concord. A request for continuance by the Condemnee was granted and the board

concluded the hearing on January 17, 2013¹. The Condemnor was represented by Stephen G. LaBonte, Esq. and the Condemnee represented himself.

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

Board's Rulings

The board finds the evidence submitted supports a just compensation award of \$55,000. The Property was a two-family residential built in 1929 with a two car garage used for storage. It consisted of 1,929 square feet of finished area and each unit had two bedrooms and one bathroom. The Property was located on the easterly side of Wight Street abutted by the St. Lawrence and Atlantic Railroad at the rear border.

The Condemnor relied upon an appraisal prepared by Pollyann Printy, a Right of Way Appraiser II employed by the State of New Hampshire Department of Transportation. The "Printy Appraisal" (Condemnor Exhibit Nos. 1 and 2²) estimated the market value of the Property to be \$25,000 as of the date of taking (April 13, 2011).

Ms. Printy testified the market was depressed at the time of the taking in Berlin showing a trend that two-family homes could be purchased for \$25,000. She testified sales from September 17, 2010 to April 13, 2011 were reviewed and stated "[t]wo-family, arms [sic] length, sales prices stabilized to the previously distressed low value of \$25,000 for market offer and closing price." The board finds the three sales she used in her appraisal were all distressed sales

¹ The hearing commenced and the view was taken with two board members (LeBrun and Shamash) present. Due to illness, Member Shamash was not present on January 17, 2013; thus, Member Walker reviewed the earlier record and sat on the hearing. Member Shamash did, however, listen to the recording of the hearing and reviewed all exhibits. All three board members participated in the deliberations to decide just compensation for the taking.

² Condemnor Exhibit No. 2 is a color copy of Condemnor Exhibit No. 1.

and therefore not reliable indicators of the market value of the Property as of the date of taking (April 13, 2011)³.

The Condemnee, Mr. Poulin, relied upon an appraisal prepared by Tammy M. McManus of Valley Appraisals, LLC (“Valley Appraisal”), Condemnee Exhibit A, estimating the Property’s market value as of December 21, 2010 to be \$70,000. Ms. McManus analyzed three comparable sales and two listings (“to show market trends”) all located within one mile from the Property. The comparable sales occurred between August 8, 2008 and August 6, 2010 and, after adjusting for size, quality of construction and condition, Ms. McManus arrived at an indicated value between \$65,584 and \$76,132. Of the three sales, Ms. McManus considered sale #1, 497 Main Street which sold on August 6, 2010 for \$72,500, the most comparable; she gave it the most weight and it required the least amount of adjustments when compared to the Property. Sale #2, located at 452 Madison Avenue, which sold for \$86,000 on August 28, 2008, and sale #3, located at 119 Roderick Street, which sold for \$56,000 on November 14, 2008 were given less weight but were considered supportive of the final estimate of value.

Mr. Poulin also offered into evidence an appraisal prepared by Stephen Bernard (“Bernard Appraisal”) who appraised 8 Wight Street, a 0.10-acre parcel of land improved with a two-family residence and located 100 feet from the Property. The Bernard Appraisal was performed for the same project as the Property and has an effective date of August 11, 2010. Mr. Bernard arrived at an estimate of value of \$70,000 for 8 Wight Street. He testified he performed several other appraisals for the project in Berlin and had made adjustments for sales of properties

³ Market value is defined as the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal. “The Yellow Book” (Uniform Appraisal Standards for Federal Land Acquisitions published by The Appraisal Institute, 2000 ed.), p. 30.

located in East Berlin, which he qualified by stating it depended “on the areas.” Mr. Bernard also testified it was necessary to use older sales in the City to find sales that were not under duress.

Mr. Poulin testified 8 Wight Street and the Property were very similar to each other, Mr. Bernard used one of the same comparable sales as Ms. McManus, 452 Madison Avenue, and both appraisers (Bernard and McManus) arrived at the same estimate of value, \$70,000. Therefore, Mr. Poulin concluded damages for the taking should be \$70,000.

In rebuttal, the State called George LeMay, an Appraisal Supervisor with the State of New Hampshire Department of Transportation who was acting as the review appraiser for the appraisals prepared on the Berlin project. Mr. LeMay testified the discrepancy in the value between the Property and 8 Wight Street was understandable as the properties were not in the same condition. He testified he observed deferred maintenance on the Property. He noted the front steps were in bad condition, there was peeling paint on the first floor enclosed porch, pieces of siding were missing on the rear of the Property, the garage roof was in poor condition and the heat was not working.

Mr. Poulin purchased the Property for \$32,000 on March 19, 2010 after it being listed on the market for only 15 days and, at the time of purchase, the Property was “frozen.” The Valley Appraisal supported improvements were made to the Property after the purchase including a “new furnace & hot water tank, updated electrical and plumbing, partial roof and general cosmetic work.”

The board finds, based on the photograph evidence in the Printy Appraisal and the Valley Appraisal, the Property’s exterior did suffer deferred maintenance. Mr. Poulin testified Mr. LeMay’s depiction of the lack of heat was a result of the tenant using an electric heater because

the tenant was responsible for utilities and had run out of oil. Thus, there was no evidence to support Mr. LeMay's assertion that the "heat was not working."

The board finds Ms. Printy predetermined the value of the Property based on a perceived \$25,000 value of two-family homes in the City relying primarily on her conversations with several brokers.⁴ Her appraisal and testimony lacked credibility and therefore the board could give them no weight. Mr. Bernard's testimony and the evidence in the Valley Appraisal contradict certain of Ms. Printy's observations and the board finds their use of older arm's-length sales not under duress to determine the fair market value of the Property was reasonable.

Further, the board finds the property description in the Printy Appraisal is inconsistent with the photographic evidence. For instance, at page 26, Ms. Printy states there were no appliances in the first floor kitchen and yet the photographs on page 20 depict a stove and refrigerator. Further, many photographs were taken after the April 13, 2011 date of taking (August 11, 2011) and thus the condition as of the date the photographs were taken would be significantly different prior to condemnation and abandonment of the Property.

The board has thoroughly reviewed both the Valley Appraisal and the Bernard Appraisal. The board finds the evidence supports the property appraised by Mr. Bernard (8 Wight Street) was in substantially better condition than the Property. However, the board has utilized Mr. Bernard's appraisal, as well as his testimony, as a test of reasonableness in analyzing the

⁴ Among other things, Ms. Printy stated: "I spoke with a couple of real estate brokers about investors that have purchased or are looking for two-family residential property. The feedback from the brokers is that buyers are looking to pay about \$25,000 for a two-family...."; "Most buyers were interested in spending no more than \$60,000 (09/10) for two-family properties and now (04/11) they don't want to pay more than \$25,000"; and "When the single-family and two-family markets stating [sic] selling bank properties and distressed sales for \$25,000, that set the market price in Berlin."⁴ (See Printy Appraisal, pp. 37-38.)

credibility of the Valley Appraisal for the Property.⁵ In the Valley Appraisal, as noted above, Ms. McManus gave sale number 1, 497 Main Street, which sold on August 6, 2010, the most weight. While the board finds this was reasonable, Ms. McManus made no adjustment for time or condition of the 2-car attached garage and only a minimal adjustment for building size differences. After applying more reasonable adjustments for these factors, giving some weight to sales #2 and #3 (with similar adjustments) and considering the March, 2010 purchase, repairs and improvements to the Property, the board finds the just compensation for the taking of the Property is \$55,000.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Coos 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 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). 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:

⁵ The board notes the date of the Bernard Appraisal was August 11, 2010 and the date of taking of the Property was April 13, 2011.

- 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

Albert F. Shamash, Esq., Member

Theresa M. Walker, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Stephen G. LaBonte, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, Condemnor; and David Poulin, 120 Enman Hill Road, Berlin, NH 03570, Condemnee.

Date: May 14, 2013

Anne M. Stelmach, Clerk