

State of New Hampshire

v.

NH Six Realty Trust, Charles C. Hajjar, Trustee and RBS Citizens, N.A.

Docket No.: 25473-11ED

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 May 18, 2011, describing the property rights taken (the “Taking”) as follows: a fee taking of four thousand eight hundred (4,800) square feet, more or less, and a temporary construction easement for a period of twenty-four months during project construction (to expire not later than January 1, 2020 or one-year after completion of construction) of one thousand one hundred (1,100) square feet, more or less. See Exhibit A to the Declaration. The “Property,” improved with a bank branch office with drive-up windows and accessory parking areas, consisted of 1.17 acres before the Taking and 1.06 acres after the Taking.

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 held the just compensation hearing at its offices in Concord, New Hampshire on May 8, 2012. The parties indicated a view of the Property would not be necessary.¹ The Condemnor was represented by David M. Hilts, Esq., State of New Hampshire, Department of Justice, and Condemnee NH Six Realty Trust was represented by Emile R. Bussiere, Jr., Esq. of Bussiere & Bussiere, P.A., and Joseph E. Olbrys, Esq.

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.

The Condemnor relied upon an April 3, 2012 summary appraisal by Jessie C. Tichko, a New Hampshire certified general appraiser employed by the Bureau of Right-of-Way of the New Hampshire Department of Transportation (the "Tichko Appraisal," consisting of Condemnor Exhibit No. 1 and Condemnor Exhibit No. 1-A, 'errata' sheets to that appraisal). The Tichko Appraisal estimated the same before and after values (\$1,100,000) and concluded there was \$0 in recognizable damages as a result of the Taking. However, the Condemnor deposited the sum of \$20,400 with the board, based on its internal "policy" of making nominal settlement offers (based on a "pro rata allocation" not to exceed \$20,000) and a landscaping cost estimate of \$370.

The Condemnee did not present an appraisal of its own. Instead, the Condemnee argued the just compensation award should be \$140,000, the difference in the before and after cost approach estimates in the Tichko Appraisal. (See Condemnor Exhibit No. 1-A, p. 3.)

Board's Rulings

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,

¹ The board nonetheless took a view of the Property (on June 7, 2012) during its deliberations.

pursuant to RSA 498-A:25 and RSA 498-A:26. See e.g., *Daly v. State of New Hampshire*, 150 N.H. 277, 279 (2003), citing *Edgecomb Steel Co. v. State*, 100 N.H. 480, 486-87 (1957); and *Lebanon Housing Authority v. National Bank of Lebanon*, 113 N.H. 73, 77 (1973).

To determine just compensation, 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.”) Further, 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); see also *Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack*, 139 N.H. 253, 256 (1994).

Considering the evidence as a whole, the board finds the Condemnor met its burden of proof that just compensation for the Taking is no more than \$20,400. The board finds the sales comparison approach in the Tichko Appraisal is entitled to some weight in determining just compensation, but no weight can be given to the cost approach calculations also presented in her report.

In her sales grid, Ms. Tichko analyzed three bank branch sales in New Hampshire during the past several years, albeit none of them in close proximity to the Property. Ms. Tichko made reasonable adjustments to these sales for location, size (0.63 acres, 1.15 acres and 1.48 acres) and other attributes and reconciled their indications of value (\$1,050,000, \$931,250 and \$1,102,500)

to the high end of the range (\$1,100,000). Ms. Tichko found no *measurable* difference in the before and after values of the Property using this sales approach.

The board finds, however, it is more reasonable to conclude some loss of value occurred as a result of the reduction in lot size (from 1.17 acres to 1.06 acres). Because the Taking did not adversely impact the overall utility of the Property as a bank branch or change its highest and best use, this loss of value is relatively modest in amount and far less than the \$140,000 claimed by the Condemnee. The board finds \$20,400 (the damage deposit by the Condemnor) is a reasonable upper bound for any loss of value. In other words, a reasonable buyer might be induced to pay more for a bank branch (with identical attributes, including building size) on a lot that is approximately 10% larger (0.11 acres), but not more than about \$20,400.

The board reached this conclusion after considering all of the evidence, including Ms. Tichko's testimony and the view taken of the Property. On the view, the board observed the location of the small amount of land taken in fee simple (0.11 acres) and the temporary construction easement, which are along the front boundary of the land. The board finds the Taking did not adversely affect the operation of the bank or its access and visibility from the roadway. No parking spaces were lost as a result of the Taking and traffic flow in and out of the branch is also unaffected.

The Condemnee did not present an appraisal or any expert or other witnesses of its own but contends the just compensation award should be much higher (\$140,000, the cost calculation in the Tichko Appraisal). The board does not agree. The board does not find it credible that a knowledgeable buyer of the Property would, in effect, have paid \$140,000 less for the Property after the Taking than before the Taking, given there was no actual impairment to the Property's utility as a bank branch and no change in its highest and best use.

The Condemnee's exclusive reliance on the Tichko cost calculations is misplaced. No appraiser, including Ms. Tichko, ever concluded the cost approach should be utilized to estimate the market value of the Property either before or after the Taking. The board finds using the cost approach to value the Property would be unsound and Ms. Tichko appears to have recognized this fact. As stated in her appraisal, Ms. Tichko made per square footage cost approach calculations as a "purely mathematical" exercise, not a reasoned conclusion regarding the diminution in value of the Property as a result of the Taking. (See Condemnor Exhibit No. 1-A.)

Whenever a size metric like lot square footage is applied, the physical taking of any land, however inconsequential, will yield a positive difference in the before and after values. This results mathematically from multiplying the average price per square foot estimated in the Tichko Appraisal times the acreage taken (yielding roughly \$140,000). But this calculation can be somewhat meaningless in the market since not every square foot of lost land necessarily diminishes the utility of a lot to an equal extent. Here, the loss of a relatively small amount of land (0.11 acres) on the periphery of the Property did not have the magnitude of impact on market value that a "pro rata" calculation based on loss of acreage might imply. The board has followed similar logic and made similar findings in other eminent domain cases. See, e.g., State of New Hampshire v. GCD, Inc., et. al, BTLA Docket No. 24732-10ED (June 7, 2011).²

In addition to this conceptual flaw in the Condemnee's arguments for a much larger just compensation award, the board finds no weight can be placed on its reliance on the cost approach for other reasons. First, the cost approach reflects a market value of the site at

² In GCD (pp. 3, 5 and 7-11), the board found the loss of approximately 10% of land on the periphery of a hotel property did not affect its highest and best use and considered the appraisal evidence that no "measurable damages" had resulted from the taking. The board found that applying the "pro rata" (mathematical) calculation to the loss of the land (based upon average cost per square foot) advocated by the condemnee would result in overcompensation for the taking. Instead, the board concluded a much smaller loss of value occurred, using its judgment and experience. In GCD (pp. 5-6), the board further held it was "not bound by the Condemnor's pro rata policy."

\$1,940,000 in the before scenario and \$1,800,000 in the after scenario, or \$700,000 to \$840,000 greater than the overall market value of the Property (land and improvements) as indicated by the sales comparison approach. This market value conclusion is simply not credible. In order for the board to give any weight to the value arrived at for the site, the board would have to find the Property's highest and best use is redevelopment for a retail use and not its existing use as a bank branch.

Second, the land sales utilized to estimate the value of the site were not appropriate for use in estimating the value of the Property as they have different highest and best uses than the Property (a bank branch as opposed to two retail uses and one fast food restaurant). While Comparable Sale #1 (Whitehall Road, Hooksett) is in close proximity to the Property, it was purchased for the development of a national drug store chain. It is well established that drug stores will pay premiums for development sites in close proximity to another drug store. The Property is not physically large enough to support this type of development. Therefore, this comparable has a different highest and best use and should not have been utilized. The board finds Comparable Sale #2 (208 Loudon Road, Concord) and Comparable Sale #3 (1050 Second Street, Manchester) are arguably in more desirable commercial neighborhoods than the Property, but no adjustments were made in the Tichko Appraisal for differences in neighborhood characteristics.

Third, the building is approximately sixty (60) years old, and “[w]hen improvements are older..., the physical deterioration, functional obsolescence, and external obsolescence of the structure are more difficult to estimate.”³ Ms. Tichko estimates physical depreciation at 30%,

³ The Appraisal Institute, The Appraisal of Real Estate (11th ed. 1996) at p. 339.

which may or may not be appropriate, but the board is not persuaded additional functional and external obsolescence was adequately accounted for in the Tichko Appraisal.

Finally, Ms. Tichko testified to the weaknesses of her cost approach, stating she placed “little to no weight” on it in arriving at her market value estimate for the Property. As stated in the Tichko Appraisal (p. 69), “[t]he Cost Approach’s primary weakness is in the estimate of depreciation, be it physical, functional or external in nature.... Another weakness is in estimating the land value.... The general rule for the Cost Approach is that it is most accurate when the improvements are not very old and sales of nearby similar lots are available. Due to these factors, the Cost Approach was only relied on as additional support only.” Based on the above, the board finds the cost approach is fatally flawed and therefore gives it no weight.

For all of these reasons, the board finds the total just compensation for the taking is \$20,400.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Merrimack 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 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 Condemnor is the prevailing party because the board’s award did not exceed the Condemnor’s offer (or deposit) of damages. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). 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

Albert F. Shamash, Esq., Member

Theresa M. Walker, Member

Certification

I hereby certify copies of the foregoing Report have been mailed this date, to: David M. Hilts, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, Condemnor; Joseph E. Olbrys, Esq., 30 Adams Street, Milton, MA 02186 and Emile R. Bussiere, Jr., Esq., Bussiere & Bussiere, 15 North Street, Manchester, NH 03104, counsel for Condemnee; and RBS Citizens, N.A., c/o Ellen Alemany, CEO, One Citizens Plaza, Providence, RI 02903, Mortgagee.

Date: 6/26/12

Anne M. Stelmach, Clerk