City of Nashua

v.

Palm Square, LLC, Hampshire First Bank and City of Nashua

Docket No.: 26094-12ED

REPORT OF THE BOARD

This matter arises as a result of a RSA 498-A:5 acquisition of property rights taken 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 February 15, 2012 describing the property rights taken as 0.014 of an acre of land and six temporary construction (driveway) easements (to expire twenty-four (24) months from June 9, 2011) out of a total of 2.86 acres of land and improvements (the "Property"). (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 "condemnees." See Tax 210.12 and cases cited therein.

The board first viewed the Property and then held the just compensation hearing at its offices on May 14, 2013. The Condemnor was represented by Kevin H. O'Neill, Esq. of the State of New Hampshire Department of Justice and condemnee, Palm Square, LLC (the

"Condemnee"), was represented by Tony A. Marcotte, PE, a licensed civil professional engineer employed by a related company owned by the Condemnee.

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 $19,000.

The Condemnor relied upon an appraisal prepared by Marsha M. Campaniello, a certified general appraiser and Joseph G. Fremeau, an MAI appraiser (the "Fremeau Appraisal," Condemnor Exhibit No. 1) and Ms. Campaniello's testimony at the hearing. The Fremeau Appraisal estimated the value of the Property before and after the taking, based on a sales comparison approach and an income capitalization approach, to be $13,000,000 and thus determined no measurable change in the market value of the Property occurred as a result of the taking. A "pro rata" analysis was employed to calculate total damages in the amount of $19,000, rounded, based on the following analysis: $15,574 estimated value for the fee taking area; $1,000 estimated value of the pavement within the taking are; and $2,352 estimated value of the temporary driveway easements.

The Property consists of four parcels[1] totaling 2.86 acres and contains 140 garden-style apartment units, 96 storage units, and 9 commercial units (seven of which are leased). One of the units is leased to Eastabrook Grill restaurant, an entity in common ownership with the Condemnee. The Fremeau Appraisal determined the highest and best use of the Property before

[1] 56 Palm Street – 5,557 square feet, paved parking lot for 14 vehicles; 57 Palm Street – 100,698 square feet, improved lot; "Palm Street" – 8,250 square feet, paved parking lot contiguous with 57 Palm Street ; and 57 Pine Street – 10,068 square feet, paved parking lot for 21 vehicles. (Fremeau Appraisal, p. 57.)

and after the taking is as a multi-family apartment complex with complementary commercial uses (such as a restaurant, retail and offices). (Fremeau Appraisal, pp. 69-72.)

Based on the evidence, the board finds the Condemnor satisfied its burden of proving the damages from the taking were no more than the $19,000 estimated in the Fremeau Appraisal. The board therefore makes this the just compensation award for the reasons stated briefly below.

The Fremeau Appraisal uses accepted appraisal methodology and relied upon valid comparables to conclude there was no difference in the market value of the Property as a result of the taking. The board was persuaded of this fact both by the appraisal and Ms. Campaniello's testimony at the hearing which was entirely credible and well supported. As noted above, although Ms. Campaniello found no measurable change in value as a result of the taking, she did perform a "pro rata" calculation that is favorable to the Condemnee in that she estimated $19,000 for the taking. The facts presented indicate that the taking did not have a material impact on the utility and highest and best use of the Property and hence its before and after market value of $13,000,000.

The Condemnee did not present an appraisal of its own to establish the damages from the taking, but instead relied upon three letters with attachments (in Condemnee Exhibit A) which were sent to the Condemnor and the testimony of Mr. Marcotte. In these documents and through Mr. Marcotte's testimony, the Condemnee asserts damages in the range of "$75,000 to $85,000" resulting from the taking due primarily to the loss of one parking space. The board finds these letters are speculative and lack adequate probative value.

The board finds the loss of one parking space is not a compensable item of damage as the Condemnee did not have municipal approval for this space. As noted in the Fremeau Appraisal, p. 107, prior to the taking, the Property had 151 parking spaces. The taking effectively removed

one parking space. In fact, however, the Property was approved for development by the City of Nashua (on September 16, 2009) based on 148 parking spaces. The three extra spaces were gained by the Condemnee by eliminating a landscaped area which divided the parking lot in a north/south direction to the real of the building on 57 Palm Street. (Id.) Consequently, the board finds the loss of one parking space, based on the facts presented, is not compensable.

For all these reasons, the board finds the just compensation for the taking is $19,000.

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 Condemnees are the prevailing parties 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 Condemnees 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, Member

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Albert F. Shamash, Member

Certification

I hereby certify copies of the foregoing Report have been mailed this date, postage prepaid, to: Kevin H. O'Neill, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301, Condemnor; Palm Square, LLC, Tony A. Marcotte, PE, 9 Old Derry Road, Hudson, NH 03051, Representative for Condemnee; Hampshire First Bank, James Dunphy, President, Manchester Banking Center, 80 Canal Street, Manchester, NH 03101; and City of Nashua, Dorothy Clarke, Esq., P.O. Box 2019, Nashua, NH 03061.

Date: 7/19/13

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Anne M. Stelmach, Clerk