

State of New Hampshire

v.

FIN-LYN Trust

Docket No.: 26119-12ED

Parcel W32

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for the laying out or alteration of a limited access highway (Interstate 93), pursuant to authority conferred on the “Condemnor” by various statutes, including RSA 230:45 and RSA ch. 498-A. A Declaration of Taking (“Declaration”) was filed with the board on May 9, 2012, describing the property rights taken (the “Taking”) as follows: a fee taking consisting of two and thirty hundredths (2.30) acres, more or less, a permanent drainage easement of two thousand nine hundred (2,900) square feet and a “Control of Access.” The “Property,” an unimproved parcel of residential land at 60 Indian Rock Road (Route 111) in Windham, consisted of 46.15 acres before the Taking and 43.85 acres after the Taking, encumbered by the easement. See Declaration with attached plans.

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 a consolidated just compensation hearing on September 3, 2013 in the Londonderry Town Hall, Londonderry, NH for the Property and another parcel owned by the Condemnee, BTLA Docket No. 26141-12ED.¹ The Condemnor was represented by John Conforti, Esq. and the Condemnee was represented by Mark G. Hodgdon, Esq. The board will issue a separate report for the other parcel.

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 of the board. Parties should expect at least four (4) weeks for completion of a requested transcript.

Board’s Rulings

The board’s task is to determine just compensation and therefore the board 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

¹ The board also commenced a hearing on September 3, 2013 involving a separate taking and a related party: State of New Hampshire v. Prolyn Corporation, BTLA Docket No. 26120-12ED.

(1973); and Edgcomb Steel Co. v. State, 100 N.H. 480 (1957).²

Integral to the process of awarding just compensation is a determination of the market value of the Property before and after the Taking, with the Condemnor bearing the burden of proof.³ In making market value findings, the board considers and weighs all of the evidence, including the respective appraisals of each party, 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 and arguments presented and its view of the Property, the board makes the findings detailed below.

² In Franchi (pp. 798-99), the supreme court noted:

In an eminent domain proceeding, the preferred method for determining condemnation damages for a partial taking is the "before and after method, whereby the value of the remainder of the tract after the taking is deducted from the value of the whole tract before the taking." Daly v. State, 150 N.H. 277, 280 (2003) (quotation omitted). The owner is entitled to have the land appraised at the most profitable or advantageous use to which it could be put on the day of the taking. Id. at 279. The landowner is compensated "not only [for] the fair market value of the property actually taken, but also...for the effect of the taking, if any, on the entire property, which is referred to as severance damages." Id. at 280 (quotation omitted). Use of the "before and after" method automatically accounts for severance damages. Id.

³ Pursuant to RSA 498-A:19, "[i]ssues of fact shall be determined upon the balance of probabilities and the burden of proof shall be upon the condemnor."

The Condemnor relied upon a May 17, 2013 updated appraisal by Jeffrey W. Leidinger, a certified general appraiser (“Leidinger Appraisal,” Condemnor Exhibit No. 1). Mr. Leidinger utilized the sales comparison approach and selected five comparable properties, including four in Londonderry and one in Hudson. Mr. Leidinger calculated just compensation for the Taking to be \$195,000, based on before and after market value estimates of \$2,170,000 and \$1,975,000, respectively.

The Condemnee relied upon a May 31, 2013 appraisal by Wesley G. Reeks, a certified general appraiser (“Reeks Appraisal,” Condemnee Exhibit A). Mr. Reeks also utilized the sales comparison approach and selected four comparable sales including two in Londonderry, one in Manchester and one in Hampstead. Mr. Reeks calculated just compensation for the Taking to be \$560,000, based on before and after market value estimates of \$2,400,000 and \$1,840,000, respectively.

The following pertinent facts are not disputed by the parties: the Property is an undeveloped parcel of land with extensive road frontage on Route 111 (Indian Rock Road); the land is within the Rural and Residential-A zoning districts, which permit primarily residential and agricultural uses; the parcel is irregularly shaped with rolling topography; and, while the land contains a significant amount of wetlands, portions are likely suitable for development.

The two expert appraisers agree the Property’s highest and best use is for future residential development. (See Leidinger Appraisal, p. 21, and Reeks Appraisal, p. 40.) Additionally, the appraisers utilized two of the same comparable sales in Londonderry: the September 2010 sale of 24 acres on 44 Pillsbury Road for \$1,050,000 (\$43,750 per acre); and the

September 2010 sale of 38 acres at 34 Hovey Road for \$1,800,000 (\$47,368 per acre).⁴ Further, the appraisers agreed the most appropriate unit of comparison was sale price per acre and all of the comparable sale properties utilized by both appraisers were vacant parcels of land purchased for residential development. Finally, the appraisers agreed the location and the nominal size of the permanent drainage easement resulted in no measurable loss in value.

In the Leidinger Appraisal, the comparable sales provided an unadjusted value range from \$11,682 per acre to \$47,368 per acre. After adjustments for market conditions and various physical characteristics, the comparable sales provided a value range (before the Taking) from \$12,850 per acre to \$47,368 per acre and Mr. Leidinger reconciled these indications to a market value estimate of \$2,170,000, rounded (\$47,000 per acre X 46.15 acres). After the taking, the adjusted value indications ranged from \$12,850 per acre to \$46,433 per acre and Mr. Leidinger reconciled these indications to a market value estimate of \$1,975,000, rounded (\$45,000 per acre X 43.85 acres). (See Leidinger Appraisal, pp. 24-44.)

In the Reeks Appraisal, the comparable sales provided a much tighter range of unadjusted values from \$43,750 per acre to \$48,411 per acre. After adjustments for market conditions and various physical characteristics, the comparable sales provided a value range (before the Taking) from \$46,959 per acre to \$54,711 per acre and Mr. Reeks reconciled these indications to a market value estimate of \$2,400,000, rounded (\$52,000 per acre X 46.15 acres). After the taking, the adjusted value indications ranged from \$37,612 per acre to \$44,289 per acre and Mr. Reeks reconciled these indications to a market value estimate of \$1,840,000, rounded (\$45,000 per acre X 43.85 acres). (See Reeks Appraisal, pp. 42-60.)

⁴ See Land Sales L-2 and L-3 in the Leidinger Appraisal (pp. 26-28) and Land Sales 1 and 2 in the Reeks Appraisal (pp. 42-44).

Board Findings

While there was conflicting testimony regarding the relative desirability of the Property's location in Windham versus the locations of the comparable sale properties, as well as the appropriate adjustments for various physical characteristics of the Property compared to the comparable sales, the board finds there is sufficient evidence to arrive at a market value finding of \$47,000 per acre before the Taking and \$44,000 per acre after the Taking.

The board finds the most reliable indications of market value for the Property are the two sales in Londonderry utilized by both Mr. Reeks and Mr. Leidinger mentioned above.

Additional support for the board findings is found in: Sale No. 4 of the Leidinger Appraisal which was the November 2010 contract to sell 44.58 acres in Londonderry with a sales price of \$2,070,000, or \$46,433 per acre; and Sale No. 4 of the Reeks Appraisal (pp. 48-49) which was the August 2007 sale of 24.13 acres in Hampstead with a sales price of \$1,085,000, or \$44,965 per acre. The board finds these four sales have a very tight range of unadjusted market value indications (\$43,750 per acre to \$47,368 per acre), which is one indicator of the comparability of the sales selected. The board finds it can place no weight on Sale No. 1 in the Leidinger Appraisal (pp. 21-25) and Sale No. 3 in the Reeks Appraisal (pp. 46-47) due to their significantly different lot sizes (229.55 acres and 6.61 acres, respectively).

Based on this evidence, the board finds the market value of the Property before the Taking was \$2,170,000, rounded (\$47,000 per acre X 46.15 acres) and after the Taking was \$1,930,000, rounded (\$44,000 per acre X 43.85 acres). An adjustment to the per acre value after the Taking is appropriate due to the loss of access points along Route 111. This is likely to limit, to some extent, development scenarios for the Property and may result in increased infrastructure

costs, even if, in the final analysis, the Taking does not reduce the potential number of residential lots. (See, e.g., Reeks Appraisal, pp. 58-59.)

For all of these reasons, the board awards \$240,000 as just compensation for the Taking, the difference between the before value of \$2,170,000 and the after value of \$1,930,000.

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

Michele E. LeBrun, Chair

Albert F. Shamash, Member

Theresa M. Walker, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: John J. Conforti, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Mark P. Hodgdon, Esq., The Law Office of Mark P. Hodgdon, P.L.L.C., 18 N. Main Street – Suite 307, Concord, NH 03301, counsel for the Condemnee.

Date: 2/18/14

Anne M. Stelmach, Clerk