State of New Hampshire

v.

Prolyn Corporation, et al.

Docket No.: 26120-12ED

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 of two tracts of land containing three and three hundredths (3.03) acres, more or less, and a permanent drainage easement of sixty seven thousand three hundred fifty (67,350) square feet, more or less. The "Property," an unimproved parcel of land, consisted of 28.229 acres before the Taking and 25.199 acres after the Taking. 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 "Condemnees." See Tax 210.12 and cases cited therein.

The board commenced the hearing on September 3, 2013 in the Londonderry Town Hall, Londonderry, N.H. and viewed the Property. The Condemnor was represented by John Conforti, Esq. and the Condemnees were represented by Mark G. Hodgdon, Esq.[1]

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 (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

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[1] The board also commenced a consolidated hearing on September 3, 2013 involving two separate takings and a related party: State of New Hampshire v. FIN-LYN Trust, BTLA Docket Nos. 26119-12ED and 26141-12ED.

[2] In Franchi (at 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.

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.

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 to value the Property and selected four comparable properties, including one in Bedford and three in Windham. Mr. Leidinger calculated just compensation for the Taking to be $335,000, based on before and after market value estimates of $3,105,000 and $2,770,000, respectively.

The Condemnees relied upon a May 29, 2013 appraisal by Wesley G. Reeks, a certified general appraiser, ("Reeks Appraisal," Condemnee Exhibit B). Mr. Reeks also utilized the sales

[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."

comparison approach and selected four comparable sales including one in Peterborough, one in Hooksett and two in Bedford. Mr. Reeks calculated just compensation for the Taking to be $910,000, based on before and after market value estimates of $4,940,000 and $4,030,000, respectively.

The following pertinent facts are not disputed by the parties: the Property is an undeveloped parcel of land at the intersection of Route 111 (Indian Rock Road) and Wall Street; is within the Professional, Business and Technology Zone ("PBT") which specifically does not permit "big-box" retail stores; is irregularly shaped and while the land contains a significant amount of wetlands, portions of the site are likely suitable for development. In addition, the Property has road frontage on Route 111, Wall Street and International Drive.

The parties' expert appraisers agree the highest and best use of the property is for future commercial development and both determined the most appropriate unit of comparison was the sales price per acre. Additionally, both appraisers utilized the same comparable sale property in Bedford (547 and 549 Donald Street, which sold for $3,950,000 in December, 2010 and January, 2011 and was subsequently improved with a grocery store).[4]

Three of the comparable sale properties utilized in the Reeks Appraisal were purchased for the development of grocery stores (Comparable Sale Nos. 1, 2 and 3), while Sale No. 4 was purchased for a mixed-use commercial development including a liquor store, Dunkin' Donuts, a bank, full-service restaurant and assisted living facility. The unadjusted sales prices ranged from $178,733 per acre to $325,936 per acre; after adjustments, the indicated per acre value of the Property was $158,954 per acre to $198,832 per acre and Mr. Reeks reconciled to a market value indication of $175,000 per acre. (See Reeks Appraisal, pp. 42-49.)

[4] See Leidinger Appraisal, p. 34, and Reeks Appraisal, p. 57.

In addition to the comparable sale in Bedford previously discussed, Mr. Leidinger used three sales in Windham: an 11.9 acre site improved with a retail greenhouse; a 7.12 acre lot in an industrial area; and a 28.359 acre site previously developed with a driving range. The sales prices ranged from $89,180 per acre to $178,733 per acre; after adjustments, the indicated per acre value was $89,180 to $120,496 and Mr. Leidinger reconciled to a market value indication of $110,000 per acre. (See Leidinger Appraisal, pp. 26-37.)

While there are reasons to question the selection of some of the comparable sales and various adjustments made by each appraiser, there is enough evidence for the board to arrive at a market value finding of $150,000 per acre for the Property, both in the before and in the after scenarios. The board finds the most reliable indicator of value is Sale No. 4 in the Reeks Appraisal because it is a mixed-use commercial development and not a big-box or grocery store, neither of which is a permitted use for the Property. Sale No. 4 sold April, 2011 for $2,555,000 ($273,555 per acre) and, after appropriate adjustments are made for market conditions and various physical characteristics, the board finds this sale provides a market value finding of $150,000 per acre for the Property. This finding results in a before value of $4,230,000 ($150,000 per acre x 28.229 acres, rounded).

Support for this market value finding is found in Sale Nos. 2 and 3 in the Reeks Appraisal (p. 57), and Sale No. 1 in the Leidinger Appraisal (p. 34). The board reviewed these sales as a test of the reasonableness of its market value findings. The board noted, however, that these properties were purchased for development of grocery stores. The Property, however, cannot be developed for such a use under the present zoning ordinance.

The board could not place any weight on the other comparable sales utilized in the Leidinger Appraisal for several reasons. First, Sale No. 1 was a listing (as of the effective date

of the Taking) and had not sold as of the date of the just compensation hearing. Sale No. 2 was not a land sale, had significant improvements as of the date of sale and was sold to a tenant. Further, both Sale Nos. 1 and 2 were owned by the State of New Hampshire who acquired them for a road improvement project; when the project was completed, they became 'surplus' properties. Consequently, it was unclear from the testimony if the asking price of Sale No. 1 represented market value and if the sales price of Sale No. 2 was the result of an arm's-length negotiation, whether it had been exposed to the market prior to sale and whether the buyer attributed any value to the existing improvements.

As noted above, the Taking consists of 3.03 acres in fee simple and a permanent drainage easement of 1.546 acres. The area encompassed by the drainage easement is located at the intersection of Wall Street and Route 111, the most visible area of the Property and, even though portions of the area are designated wetlands, the Taking diminishes the future development potential of the Property for commercial purposes.

While the Condemnees retain ownership of the area encumbered by the drainage easement, use of this area is significantly restricted and this area will be surrounded by a fence. In quantitative terms, and, on the facts presented, the board finds 80% is a reasonable estimate of the fee value for the taking of the permanent drainage easement. In this respect, the board does not agree with either Mr. Leidinger's conclusion that the permanent drainage easement did not impact market value or Mr. Reeks' conclusion that this easement resulted in a much larger loss of value.

The board finds the market value of the Property after the Taking is $3,600,000, rounded. The board arrived at this estimate as follows: $150,000 per acre x 23.9622 effective acres after

the Taking. [28.229 acres before the Taking minus 3.03 acre fee take minus 1.2368 effective acres for the drainage easement (1.546 acres times 80%).]

For these reasons, the board awards $630,000 as just compensation for the Taking, the difference between the before and after market value findings of $4,230,000 and $3,600,000, respectively.

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 Condemnees are the prevailing parties. 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, Chair

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Albert F. Shamash, Member

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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 Dept. of Justice, 33 Capitol Street, Concord, NH 03301-6397, counsel for the Condemnor; and Mark P. Hodgdon, Esq., Law Office of Mark P. Hodgdon, P.L.L.C., 18 N. Main St. - Suite 307, Concord, NH 03301, counsel for the Condemnees.

Date: 2/18/14

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Anne M. Stelmach, Clerk