

State of New Hampshire

v.

James Lamontagne and Mortgage Electronic Registration Systems, Inc.

Docket No.: 26122-12ED

REPORT OF THE BOARD

This matter arises as a result of a RSA 498-A:5 acquisition of property rights taken for the laying out or alteration of the highway 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 16, 2012, describing the property rights taken (the “Taking”) as: ten thousand two hundred ten (10,210) square feet, more or less, in fee simple and two temporary construction easements totaling nine hundred seventy-five (975) square feet, more or less (to expire not later than January 1, 2022 or one-year after completion of construction). See Exhibit A to the Declaration. The “Property,” located at 24 Old Bridge Street, Pelham, NH, is improved with a single-family residence and consisted of 2.14 acres before the Taking and 1.91 acres after the Taking encumbered by the easements described above.

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.

By letter dated July 3, 2014, the board noticed the parties of a change in venue, proposing the hearing be held at the Londonderry Town Office rather than the county in which the property was taken. No objections were made.

The board viewed the Property and held the just compensation hearing at the Londonderry Town Office on September 23, 2014. The Condemnor was represented by Rebecca L. Woodard, Esq. of the State of New Hampshire Department of Justice and the Condemnee, James Lamontagne, was represented by Mark P. Hodgdon, Esq. of Mark P. Hodgdon, PLLC.

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.

As of the date of Taking, the Property was in the town's "Residential" zoning district, which requires a minimum lot size of one acre. The parties generally agreed that the Property, before the Taking, was subdividable by right into two lots. Further, the parties agreed the Property, after the Taking, was no longer subdividable by right.

The Condemnor relied on an appraisal report prepared by Jessie C. Tichko, a certified general appraiser, a Staff Appraiser with the New Hampshire Department of Transportation (Condemnor Exhibit No. 2, the "Tichko Appraisal"). Ms. Tichko concluded the highest and best use of the Property before the taking, as improved, was "its current use a [sic] single-family residence... with the potential for a subdivision of an additional one +/- acre building lot..." Id., p. 23. As a result of the Taking, Ms. Tichko concluded "the subject's highest and best use has changed and is a single-family residence on a 1.91 acre parcel. There is a loss of the potential subdivision of an additional one acre building lot..." Id., p. 42.

In order to estimate damages, Ms. Tichko arrived at estimates of market value for the Property, both before and after the Taking (May 16, 2012); the damages of \$75,000 are the difference between the “before” and “after” values (\$245,000 and \$170,000, respectively.) Utilizing the sales comparison approach to value, she compared the Property, before and after the Taking, to four comparable sales and made adjustments to account for various factors including date of sale, property rights, financing and physical characteristics (e.g., location, site size, age and condition, room count, garage, and “Potential 1 acre Lot”). In the before and after scenarios, the adjustments remained generally the same, with the exception of the potential one-acre building lot. (See Tichko Appraisal, pp. 31 and 52.)

The adjustment for the potential one-acre building lot was made based on an analysis of the sale of five residential lots in Pelham. The sale prices of the comparable lots ranged from \$100,000 to \$110,000, and after various adjustments were made, Ms. Tichko estimated the retail market value of the “potential one acre lot” was \$100,000. Recognizing costs would be incurred during the subdivision process, Ms. Tichko deducted various hard and soft costs from the retail value (\$100,000) and arrived at an opinion of the “[c]ontributory ‘as is’ value of a potential one acre lot” of \$70,000. Id., p. 29. This \$70,000 figure formed the basis of the adjustments made in the before scenario for the subdivision potential.

The Condemnee did not present an appraisal, and instead argued the Tichko Appraisal understated the contributory value of the potential one-acre lot for several reasons. First, Ms. Tichko reconciled to a retail value of \$100,000, which is the lowest sale price of the comparable sales. She reconciled at the low end of the range, which is inconsistent with statements she made including:

The subject's potential one acre lot is one of the last, if not the last, available residential building lot in the center of Pelham's village area in a desirable historic area with close proximity to the town offices, new library and major routes.

(Id., p. 28.) More importantly, however, the Condemnee argued the Tichko Appraisal did not appropriately consider the likelihood the Property would be rezoned by the town to a mixed-use or commercial district, which would have a positive effect on the market value of the potential one-acre lot.

The Condemnee argued this zoning change was neither "speculative nor remote" and was "underway" at the time of the Taking. (See James D. Lamontagne's "Memorandum" of Law, p. 2; see also Condemnee Exhibits B, C, D, E, F, G, H and I.) He presented information regarding several commercial land sales as evidence that commercial land sells for substantially more than residential land and the zoning change would have increased the retail market value of the potential one-acre lot. (See Condemnee Exhibit A.) The Condemnee estimates the potential one-acre lot would have a market value between \$150,000 and \$175,000 and, after subdivision costs were considered, would have an "as is" market value of \$94,600 to \$114,000. (See Condemnee Exhibit J.)

Board's Rulings

The board has the authority 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. See RSA 498-A:25; RSA 498-A:26; and e.g., Daly v. State of New Hampshire, 150 N.H. 277, 279 (2003); see also Lebanon Housing Authority v. National Bank of Lebanon, 113 N.H. 73, 77 (1973) ("the measure of damages in the final analysis and simply stated will be the difference in value before and after the taking (citations omitted).")

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).

The parties generally agree the just compensation resulting from the Taking is the market value of the Property’s loss of subdivision potential. The parties, however, disagree about whether the potential zoning change from residential to a more mixed-use, village center district was, as the Condemnor argued, “too speculative” to consider or if it was, as the Condemnee argued, “reasonably probable” and that it would have increased the market value of the one-acre lot.

The board finds merit in the Condemnor’s argument supporting the “reasonable probability” of rezoning (see Memorandum, p.1), and the Tichko Appraisal understates the damages resulting from the Taking because it does not consider the probable zoning change. The Condemnee presented convincing evidence the process of amending the zoning ordinance had been in progress for several years; the Property would be included in the newly created, more commercially oriented zone; it was likely to occur in the foreseeable future; and reasonable

buyers and sellers would have had knowledge of the likely change if the Property sold as of the date of Taking.

Based on its experience and judgment, the board finds the evidence presented supports a just compensation award of \$100,000. This is based, in part, on an “as is” market value opinion of approximately \$150,000 for the potential one-acre lot, and adjusted downward to account for hard and soft subdivision, marketing and holding costs.¹

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 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:

¹ In making these findings, the board considered the commercial land sales provided by the Condemnee, as well as the analysis contained in Condemnee Exhibit J. The board notes this methodology is similar to that utilized in the Tichko Appraisal, p. 29.

- 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, Tax201.18(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 45. 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

Theresa M. Walker, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Rebecca L. Woodard, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Mark P. Hodgdon, Esq., Law Office of Mark P. Hodgdon, PLLC, 18 N. Main Street – Suite 307, Concord, NH 03301, counsel for Condemnee, James Lamontagne; and David J. Rhein, Esq., Orlands Moran PLLC, P.O. Box 540540, Waltham, MA 02454, counsel for MERS, Mortgagee.

Date: 2/20/15

Anne M. Stelmach, Clerk