State of New Hampshire

v.

FIN-LYN Trust

Docket No.: 26141-12ED

Parcel W32A

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 June 20, 2012, describing the property rights taken (the "Taking") as: a fee taking of two parcels of land totaling twelve hundredths (0.12) of an acre, more or less, and "Control of Access." See Declaration with attached plans. The "Property" is an undeveloped parcel of land on Indian Rock Road (Route 111) in Windham which consisted of 0.49 acres before the Taking and 0.37 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 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. 26119-12ED). [1] The Condemnor was represented by John Conforti, Esq. and the Condemnees were 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 (1973); and Edgcomb Steel Co. v. State, 100 N.H. 480 (1957).[2]

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[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.

[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.

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.

Some background regarding the Property is germane to the board's findings and these facts are generally not disputed by the parties: the Property is an irregularly shaped parcel of unimproved land totaling 0.49 acres; is "arc-shaped," approximately 16 feet in width and 800 feet in length; and access from Route 111 is limited to two sections, one at the easternmost portion of the Property and the other at the westernmost portion. The Property is impacted by

[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."

what each party recognizes as "encroachments." These encroachments consist of an improved driveway and a sign, both of which benefit an abutting parcel improved with a grocery store (the "Shaw's Parcel"). (See Condemnor Exhibit No. 2, p. 5 and Condemnee Exhibit B, p. 28.) There are no other improvements on the Property. (See Condemnor Exhibit No. 2, p. 17 and Condemnee Exhibit B, p. 27.)

The Condemnor relied upon an August 2, 2013 updated appraisal by Jeffrey W. Leidinger, a certified general appraiser ("Leidinger Appraisal," Condemnor Exhibit No. 2). Mr. Leidinger determined the highest and best use of the Property, both before and after the Taking, "is to be acquired by an abutter to enhance the development potential of the parent lot(s) or to be purchased by the owner of 11-C-950 [the Shaw's Parcel] to eliminate the current encroachments imposed by the driveway and existing sign." (Leidinger Appraisal, p. 23.)

Mr. Leidinger utilized the sales comparison approach and selected four comparable properties, all of which are located in Windham. These four sales involved transfers of small parcels of land (2,000 to 16,988 square feet) between abutters. Unadjusted sale prices ranged from $0.40 to $3.60 per square foot; after adjustments for market conditions and physical characteristics, Mr. Leidinger reconciled this market data to $2.00 per square foot and estimated a market value of $43,000 before the Taking and $33,000 after the Taking, a difference of $10,000. [The Leidinger Appraisal did not impute any loss in value due to the encroaching improvements: "the property is appraised free and clear of the encroachments." (Id., p. 5.)]

Like Mr. Leidinger, Mr. Reeks also concluded the highest and best use of the Property was "assemblage with Map 11-C, Lot 950 [the Shaw's Parcel]." (Reeks Appraisal, p. 39.) Mr. Reeks utilized the sales comparison approach and selected three comparable properties, one each in Manchester, Nashua and Pelham. Similar to the Leidinger Appraisal, the comparable

properties utilized in the Reeks Appraisal were sales of small parcels of land (5,840 to 20,674 square feet) between abutters. Unadjusted sale prices ranged from $1.16 to $3.60 per square foot; after adjustments for market conditions and physical characteristics, Mr. Reeks used this market data to estimate a value of $3.60 per square foot before the Taking. The Reeks Appraisal utilized the cost approach to value the encroaching improvements, estimating values of $185,438 for the driveway and $14,375 for the sign. Mr. Reeks added his estimate of the land value ($77,260) to these values for the driveway and the sign to estimate a total market value of $277,000, rounded, before the Taking. (See Reeks Appraisal, pp. 46-52.)

Mr. Reeks utilized the same three comparable sales to estimate the value of the Property after the Taking and arrived at a slightly higher market value indication of $3.70 per square foot to compute a land value of $61,000. In his after analysis, Mr. Reeks assumed the driveway improvements were part of the Taking and therefore included only the value of the sign. He added the sign value to the land value to estimate a total market value of $75,000, rounded, after the Taking. (See Reeks Appraisal, pp. 53-55.)

In the Reeks Appraisal, the difference between the before ($277,000) and after ($75,000) market value estimates is $202,000.

Board's Rulings

While there was considerable conflicting expert testimony and legal arguments (relating primarily to valuation issues pertaining to the encroaching improvements), there is sufficient evidence for the board to find just compensation for the Taking to be $17,000. This finding is based on rounded market values estimates of $75,000 and $58,000 before and after the Taking, which were arrived at utilizing a $3.50 per square foot value to the land.

The board finds the selection of comparable sales by each appraiser and the respective adjustments to be generally well supported for the Property due to its relatively unique physical characteristics. The board also considered the commercial neighborhood and zoning and reconciled near the high end of the market values indicated by the comparable sales, finding a value of $3.50 per square foot is reasonable both before and after the Taking.

Turning to the issues presented by the existence of the driveway and sign on the Property, the board finds the Condemnor has no obligation, in connection with the Taking, to compensate the Condemnee for the encroaching improvements.[4] The board has consistently found no compensation is owed for property rights not owned by a condemnee, such as the encroaching driveway and sign improvements in this proceeding. See, e.g., State of New Hampshire v. JJAMBS, LLC, BTLA Docket No. 24771-10ED (July 12, 2012) ["a condemnor is not obligated to compensate condemnees for the loss of property rights they did not own before the taking," citing 2 Nichols on Eminent Domain §5.07[2][f] (3rd Ed. 2006)]. In brief, the board is not persuaded the Condemnor should be required to pay additional compensation to the Condemnee for improvements the Condemnee does not own.

Even if, for the sake of argument, a contrary conclusion could be reached, the board does not agree with Mr. Reeks' valuation methodology. The board finds it is improper to estimate the replacement cost of the components separately and then add them to the value of the land, an

[4] After commencing this just compensation hearing, the board was provided with some details regarding a "quiet title" action still pending in the Rockingham County Superior Court between the Condemnee and other parties (who are not named condemnees) where ownership rights are being contested, along with the encroachment issue pertaining to the Shaw's Parcel. Those contested matters, however, are beyond the scope of this eminent domain proceeding which involves only two parties (the Condemnor and the Condemnee) and an award of just compensation for the Taking.

approach that contravenes an important aspect of the "unit rule." See The Appraisal Institute, Uniform Appraisal Standards for Federal Land Acquisitions (2000 ed.) at p.54:

> A second aspect of the unit rule is that different elements or components of a tract of land are not to be separately valued and added together. For example, the value of timber, as an independent component, cannot be added to the value of minerals in the same property as an independent component, and this sum further added to the value of the land. Such a procedure results in a *summation* or *cumulative* appraisal, which is forbidden in appraisals for federal acquisitions, as it is in general real estate appraisal practice. The summation appraisal is an invalid procedure because the entire unit is being hypothetically sold in its entirety, not as separate parts individually.

In other words, the board does not find it credible a potential buyer would pay approximately $200,000 more for the Property before the Taking than after the Taking.

For all of these reasons, the board finds just compensation for the Taking to be $17,000.

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 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) 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, 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

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Anne M. Stelmach, Clerk