State of New Hampshire

v.

Robert L. Ward and Kathryn Q. Ward

Docket No.: 26647-13ED

ORDER

The board has reviewed the "Condemnor's" November 7, 2014 "Motion for Costs" (the "Motion"). The Motion is denied for the following reasons.

The Motion cites RSA 498-A:26-a, which provides: "If neither the condemnor nor the condemnee appeals from the award of the board as provided in RSA 498-A:27, the board shall award costs to the prevailing party." The Condemnor is the prevailing party inasmuch as the just compensation award did not exceed the nominal sum deposited with the board ($500). The Condemnor therefore contends costs should be awarded for two items: (1) the "filing fee" ($100) the Condemnor was obligated to pay when it filed the declaration of taking with the board (on January 9, 2013) in order to take possession and obtain title of part of the "Property" owned by the "Condemnees"; and (2) "witness fees" (totaling $628.53) of three employees "for time spent testifying at and attending the July 29, 2014 [just compensation] hearing." (See Motion, p. 4.) The board does not agree.

While a literal reading of the above statute gives some plausibility to the Condemnor's arguments, the Motion fails to recognize the well-established principle that an award of costs is discretionary, not mandatory:

> The award of costs lies within the sound discretion of the trial court. Amabello v. Colonial Motors, 120 N.H. 524, 525-26, 418 A.2d 1279, 1281 (1980). . . [See also] Medico v. Almasy, 108 N.H. 324, 325, 234 A.2d 527, 528 (1967) (prevailing party's entitlement to costs is *prima facie* only and not absolute).

Cutter v. Town of Farmington, 126 N.H. 836, 843 (1985) (italics in original). In Amabello, 120 N.H. at 525-26, the supreme court stated "the trial court possesses a broad discretion . . ." in deciding whether to impose costs at all and, if so, how much to award to the prevailing party in a civil proceeding. Employing this broad discretion, the board finds an award of costs for the two items claimed by the Condemnor is neither warranted nor equitable.

Insofar as the filing fee is concerned, this is an obligation imposed by statute, RSA 498-A:16-a, "for each condemnation proceeding brought before the board." The obligation arises at the time the Condemnor files the required declaration of taking pursuant to RSA 498-A:5, I. Filing of the declaration of taking is a critical step because a condemnor is not entitled to possession and does not obtain title to property until it is undertaken. (Id.) Possession and title, secured only with the declaration of taking and filing fee, are essential for the Condemnor regardless of the amount of the just compensation award and are therefore integral to the process of acquiring private property for a public purpose.

The board finds the filing fee should not be a recoverable cost in this eminent domain proceeding. This is especially true in light of the constitutional statutory and common law protections of private property rights and due process summarized below which are intrinsic and essential to such a proceeding.

Both the legislature and the courts have recognized that eminent domain, by its nature, involves the involuntary, indeed coercive, taking of private property by the government. See Fortin v. Manchester Housing Auth., 133 N.H. 154, 157-58 (1990):

> As a whole, RSA chapter 498-A, the Eminent Domain Procedure Act, protects the proprietary rights of individuals by imposing numerous procedural burdens on the condemning authority. . . . [C]ondemnation proceedings are intended to protect the proprietary rights of the individual who may be involuntarily deprived of property through the coercive power of the State.

Fortin relies heavily on State v. Garceau, 118 N.H. 321, 323 (1978), which held:

> Our State constitution provides that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." N.H.Const. pt. I, art. 12. . . . Long ago, . . . this court inferred a right to just compensation from our constitution's reservation of private rights, N.H. Const. pt. I, art. 12. [Citations omitted.] We read the constitutional requirement of just compensation as imposing on the condemnor the burden of proving by a preponderance of the evidence, at a trial under RSA 498-A:27 (Supp.1977), that the price it offers for condemned land does in fact justly compensate the condemnee.
>
> The justice and feasibility of placing the burden of proof on the State, or other condemning authority, was recognized by the legislature when, as a direct result of the reports of two "Interim Commissions to Study Laws of Eminent Domain," it enacted RSA ch. 498-A (Supp.1977). The House stated that "(this bill) proposes a single uniform procedure for the taking of property by any governmental authority, which should be faster, less complicated and more beneficial to the landowner." N.H.H.R. Jour. 1182 (1971). The Senate concurred, stating that the purpose of the bill was the unification and simplification of all statutes relating to condemnation so as to provide for a simpler, easier and more equitable way of land being taken and landowners being fairly heard and compensated. N.H.S. Jour. 1544-45 (1971). Chapter 498-A (Supp.1977) as a whole protects the proprietary rights of the individual by imposing numerous procedural burdens on the condemnor.

(Emphasis added.)

The Motion cites no instance where the Condemnor has previously either sought or obtained reimbursement of the $100 filing fee as a recoverable cost in an eminent domain proceeding. In the board's judgment, accusing the Condemnees of "unreasonable and dilatory conduct" (Motion, p. 3) well after the filing of the declaration of taking is not sufficient to grant

the Condemnor's request for recovery of the filing fee, one of the fundamental "procedural burdens" necessary to take possession and title at the start of this eminent domain proceeding.

The board is further persuaded by the principle, expressed clearly in Harkeem v. Adams, 117 N.H. 687, 690 (1977), that:

> [N]o person should be penalized for merely defending or prosecuting a lawsuit. An additional important consideration is that the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending [law]suits.

[Citation omitted.] [The Harkeem decision is cited in the Motion (p. 11) and in Fortin, 133 N.H. at 159.] In accord with this principle is Quirk v. Town of New Boston, 140 N.H. 124, 130 and 135 (1995) (no abuse of discretion to deny attorney's fees to a municipality when property owner filed a lawsuit to challenge what he believed was an unconstitutional "taking" of his property), where the supreme court quoted Harkeem and reasoned as follows:

> By bringing this lawsuit, the plaintiff tried to prevent unwanted interference with his legitimate property interests. He pursued his action by advancing reasonable, albeit mistaken, interpretations of the constitutional law of takings and equal protection. To allow the town to recover attorney's fees under these circumstances 'might unjustly deter those of limited resources from prosecuting or defending [law]suits' in the future. Harkeem, 117 N.H. at 690, . . .

Similar considerations militate against an award of costs in this proceeding: however "mistaken" they may have been (from the Condemnor's perspective in their opposition to the taking of their property), the Condemnees acted in good faith in objecting, through lawful procedural means, to an "unwanted interference" with their "legitimate property interests."

Turning to the claim for "witness fees," as noted above and in Tax 210.12, the burden of proof in an eminent domain proceeding is on the Condemnor to establish, by a preponderance of the evidence, that the amount offered [deposited with the board] will justly compensate the [Condemnees]. . . ." In the Motion, the Condemnor requests witness fees for three of its

employees chosen to attend the just compensation hearing to meet this evidentiary burden. The Motion identifies these three State employees as: Thomas Hughes, a "licensed appraiser" who attended the view and testified at the hearing regarding his appraisal; Laura Davies, a "Review Appraiser" who attended the hearing but did not testify; and Ronald Grandmaison, a "Project Manager" who attended the hearing and testified briefly regarding the construction project that necessitated the filing of the declaration of taking.

The record establishes each individual is a salaried State employee whose compensation is fixed and not dependent in any manner on participation in this eminent domain proceeding. The Condemnor therefore incurred no actual, out-of-pocket costs to induce them to attend the just compensation hearing, but has only submitted an imputed cost estimate (calculated using so-called 'hourly rates' based on their fixed salaries and time worked). These facts distinguish the three State employees from a third party expert or other witness who is paid to attend the hearing and is compensated for his time, either on a lump sum or hourly basis.

If any cost claimed "does not come under any of the cost provisions provided by" the court or board rule, it is proper to "vacate the award of costs." See Emerson v. Town of Stratford, 139 N.H. 629, 631 (1995). In prior rulings, the board has held that the fixed (salaried) compensation of government employees is not recoverable insofar as this item does not involve out-of-pocket costs.[1] The same principle applies here. Consequently, the board finds the

[1] See, e.g., FPG STIP Claremont, LLC v. City of Claremont, BTLA Docket No. 25017-09PT (June 28, 2011 Order) at pp. 1-2 (claim for time spent by assessor who was a municipal employee not a recoverable cost since "there is no indication his attendance at the hearing resulted in any additional out of pocket cost or expense"); accord: Guay v. Town of Gorham, BTLA Docket No. 24766-09EX (September 2, 2010 Order); and Stisi v. Town of Bartlett, BTLA Docket No. 24460-08PT (August 2, 2010 Order).

Further, even when an outside "expert witness" (an independent appraiser, for example) is hired at an out-of-pocket cost, cost recovery to the prevailing party is limited to those costs incurred and "made incidental to appearing and testifying." See State of New Hampshire v. The Reagan Trust, BTLA Docket Nos. 22503-07ED/22504-07ED/

witness fees claimed for State employees are not "actual costs" recoverable under either the board's rules (see Tax 210.13 and Tax 201.39) or the Superior Court rules (see Rule 45, formerly Rule 87).

Superior Court Rule 45(b) mentions "actual costs"[2] and the "witness fees" referenced in this rule as "Allowable Costs" pertain specifically to the attendance and mileage fees necessary to compel a witness to attend a proceeding pursuant to RSA ch. 516.[3] Tax 201.39(a) further provides: "All awards of costs shall be limited to reasonable costs." The Motion does not claim any of the three employees were issued subpoenas pursuant to that chapter or were paid any actual attendance or mileage fees; nor would it have been reasonable, on the facts presented, for the Condemnor to have compelled their attendance in this manner. As a result, the board finds the Condemnor's claim for witness fees for the three State employees is not an awardable cost.

For all of these reasons, the Motion is denied.

23968-08ED (December 22, 2009 Preliminary Order) at pp. 2-4 (granting condemnor's objection to part of costs claimed for condemnee's expert), citing Fortin, 133 N.H. at 158; State v. Wilson, 115 N.H. 99, 102 (1975); Appeal of The Ribblesdale, Inc., 128 N.H. 370, 373-74 (1986); and other decisions.

[2] In a sentence referring to "expert witnesses" and requires inquiry into whether "the costs were reasonably necessary to the litigation."

[3] The prescribed attendance and mileage fees are posted on the New Hampshire "Court Service Center" website: http://www.courts.state.nh.us/superior/servicecenters/checklists/checklistfiles/Subpoena%20Instructions.pdf.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Chair

_____
Albert F. Shamash, Member

Certification

I hereby certify copies of the foregoing Order have been mailed this date, postage prepaid, to: Matthew T. Broadhead, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; and Robert L. Ward and Kathryn Q. Ward, P.O. Box 111, 118 Main Street, Andover, NH 03216-0111, Condemnees.

Dated: 12/5/14

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Anne M. Stelmach, Clerk