State of New Hampshire

v.

Robert L. Ward and Kathryn Q. Ward

Docket No.: 26647-13ED

REPORT OF THE BOARD

This matter arises as a result of a RSA 498-A:5 acquisition of property rights taken for highway improvements, 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 January 9, 2013 describing the property rights taken (the "Taking") as a 3,050 square foot permanent drainage easement, a 2,400 square foot permanent slope easement and a 1,025 square foot temporary traffic control easement for nine months (to expire on September 30, 2020 or one year after completion of the construction of the project, whichever date comes first).

The Taking is depicted on Exhibit "A" to the Declaration and the location is on Parcels 4 and 5. These parcels are on the south side of Main Street/Route 4. Parcel 4 contains 8.2 acres of land and Parcel 5 contains 4.0 acres of land all presently undeveloped and these two parcels are collectively referred to in this Report as the "Property."

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 viewed the areas of the Taking lying on the Property and held the just compensation hearing in its office at 107 Pleasant Street, Concord, New Hampshire, on July 29, 2014.[1] The Condemnor was represented by Brian W. Buonamano, Esquire of the State of New Hampshire, Department of Justice and "Condemnees" Robert L. Ward and Kathryn Q. Ward represented themselves (pro se).

The hearing was digitally recorded by the deputy clerk of the board pursuant to RSA 498-A:20. Any requests for transcripts should be ordered directly through the clerk. 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 for the Taking. See RSA ch. 498-A. In making its findings, the board considers and weighs all of the evidence, including any appraisals, 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

[1] The Condemnees timely filed "Preliminary Objections" to the Taking which the board transferred to the Merrimack County Superior Court on April 18, 2013. On October 3, 2013, Superior Court Judge McNamara issued an order 'discontinuing' that proceeding, resulting in a remand to the board for a just compensation hearing. (See RSA 498-A:9-a and RSA 498-A:9-b.)

(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). After consideration of all of the evidence and arguments presented, as well as the view, the board makes the findings detailed below.

The Taking resulted from a culvert replacement project undertaken by the Condemnor to alleviate flooding in this area of Main Street/Route 4. The Condemnor relied upon an appraisal (the "Hughes Appraisal," Condemnor Exhibit No. 2) prepared by Thomas Hughes, a staff appraiser employed by the State of New Hampshire Department of Transportation ("DOT"). The Hughes Appraisal estimates values as of January 9, 2013, the date of the Taking, using the sales comparison approach to estimate the market value of the Property before and after the Taking and concluding these values were the same: $35,000. (See Hughes Appraisal, pp. 2, 26-28, 36, and 38-40.) The board finds the methodology used in the Hughes Appraisal was reasonable, this appraisal accurately takes into account all relevant factors affecting value and its conclusion that the Taking had "no measurable impact" on the market value of the Property is credible and supported by the evidence presented.

The Condemnees did not present an appraisal, a sales analysis or any other market value evidence of their own to rebut the methodology or contest the conclusions contained in the Hughes Appraisal to argue for a higher award of damages (than the $500 deposited by the Condemnor for the Taking). They explained they had contacted one appraisal firm to attempt to do so, but did not obtain an appraisal because this firm quoted a cost well in excess of the

amount ("up to $1,000") for which they would be entitled to reimbursement by the Condemnor under RSA 498-A:4, II (b).[2]

The Condemnees also did not present an estimate of their own regarding the damages from the Taking. Instead, they simply emphasized that, although Parcels 4 and 5 have been in current use for a long time, they had formulated a plan to develop Parcel 5 at some point in the future. This plan, also noted in the Hughes Appraisal at pp. 10 and 17, is evidenced by a special exception application conditionally granted by the Town of Andover Zoning Board of Adjustment in July, 2004, some nine years before the Taking, based on a "conceptual site plan" for "Andover Meadow Farm" (see Condemnee Exhibit A, Tabs 6 and 7.) The Condemnees do not dispute both Parcels 4 and 5 have been in current use for approximately 20 years and are located in the Town's Forest and Agricultural Zoning District. This zoning requires a special exception for the contemplated future uses of Parcel 5 (such as construction of a structure with a barn for the sale of "agricultural and woodland products," for example, id., Tab 7).

The board examined all of the documents and testimony presented and finds there is no evidence the Taking adversely impacted this potential future use of Parcel 5 (or the remainder of the Property) by the Condemnees. For example, the newly constructed guardrail (a primary concern of the Condemnees) was placed on the existing right of way already owned by the Condemnor (along Main Street, Route 4), not on the Property itself, and did not impact the Condemnees' property rights. The board heard credible testimony from the Condemnor's

[2] The board heard conflicting testimony regarding communications where the Condemnor arguably stated or implied they would be entitled to a maximum reimbursement of only $500 (rather than the $1,000 prescribed in this statute) should they decide to obtain an appraisal. (See, e.g., Condemnee Exhibit A, Tab 13.) Sifting through the testimony and documents presented, the board finds the Condemnees did learn, albeit only after inquiry through their representative on the Executive Council, that they would be reimbursed up to the $1,000 sum stated in the statute; based primarily on cost concerns, however, they decided not to obtain an appraisal of their own.

witnesses that this guardrail would not affect the Condemnees' ability to obtain 'curb cuts' onto the Property should they apply for them in the future.

Further, there is no evidence the limited areas affected by the permanent and temporary easements encompassed by the Taking materially impacted the development potential of the Property. These areas, by and large, are situated within the existing setbacks required by current zoning.

For all of these reasons, the board finds the Condemnor met its burden of proof and a damage award of $500 for the Taking is not unreasonable. [The Condemnor deposited this amount with the board at the time it filed the Declaration on the basis of the somewhat lower "pro rata" calculations in the Hughes Appraisal (pp. 39-40) and no additional amount is warranted based on the evidence and arguments presented.]

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Merrimack 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 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 Condemnor is the prevailing party. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). The Condemnor 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

Certification

I hereby certify copies of the foregoing Report have been mailed this date, postage prepaid, to: Brian W. Buonamano, 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: 9/30/14

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Anne M. Stelmach, Clerk