State of New Hampshire

v.

Velvic, LLC

Docket No.: 26651-13ED

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 a limited access highway (New Hampshire Route 10), 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 February 20, 2013, describing the property rights taken (the "Taking") as follows: a fee taking of a tract of land containing ninety-one hundredths (0.91) of an acre, more or less; limitation of access with one point of access reserved; a permanent slope easement of five thousand nine hundred eighty four (5,984) square feet, more or less; and a temporary driveway easement of one thousand one hundred ninety two (1,192) square feet, more or less to expire on November 1, 2024, or one (1) year after completion of the project, whichever date occurs first. The "Property" consisted of 6.3 acres improved with two small commercial buildings before the Taking and 5.39 acres after the Taking encumbered by the easements. 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 "Condemnee." See Tax 210.12 and cases cited therein.

The board held the hearing on October 22, 2013 in the Winchester Town Hall, Winchester, New Hampshire and viewed the Property. The Condemnor was represented by Brian W. Buonamano, Esq. and the Condemnee was represented by Linwood R. Patnode, Jr. and Erika L. Payne, representatives for Velvic, LLC.

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

Integral to the process of awarding just compensation is a determination of the market value of the Property before and after the taking. In making market value 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 (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 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).[1]

The Condemnor relied upon a June 13, 2013 appraisal by Jessie C. Tichko, a certified general appraiser, (the "Tichko Appraisal," Condemnor Exhibit No. 1). The Tichko Appraisal estimated the market value of the Property was $325,000 both before and after the Taking. Further, the value of the site was estimated at $252,000 both before and after the Taking, or $0.92 per square foot (based on 6.30 acres, or 274,428 square feet). (Condemnor Exhibit No. 1, p. 45.)

As there was no difference in the Tichko Appraisal in the before and after market value estimates, Ms. Tichko employed the "pro rata method" to calculate just compensation for the Taking. Based on the pro rata method, the just compensation for the Taking could be calculated

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[1] In Franchi, 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 after" method automatically accounts for severance damages. Id.

at $36,469 (0.91 acres, or 39,640 SF X $0.92 per square foot). However, because of the New Hampshire Department of Transportation's ("NHDOT") internal policy to "cap" just compensation at $20,000 if there is no measurable difference in the before and after values of the Property, Ms. Tichko stated the just compensation for the Taking was $20,000. (Id. p. 45.)

The Condemnee did not present an appraisal, but instead testified regarding the quantity, quality and value of the sand and gravel deposit located within the Taking. Mr. Patnode, the Property's manager, testified the companies he owns have been in the road construction and excavation business for many years and the Taking "conservatively" contains 29,000 cubic yards ("CY") of gravel. Further, he testified crushed gravel had a retail value of $12 to $15 per CY at the time of the Taking, averaging $13.50/CY. Mr. Patnode stated excavation and crushing costs would have been approximately $8 to $9 per CY, resulting in an "in the bank" value of approximately $145,000. In spite of these estimates, Mr. Patnode testified just compensation in the amount of $100,000 was reasonable.

Background

The board finds some background regarding the Property is an important consideration in this instance. The Property (6.3 acres in size before the Taking) was created through a subdivision in 2010. Prior to the 2010 subdivision, the Property was part of a larger parcel that was approximately 75 acres in size. The larger parcel had been operated as a sand and gravel excavation site for several decades and was acquired by P & H Sand and Gravel, LLC ("P & H") in November, 2004. According to Mr. Patnode, a partner in P & H, the excavation permits were updated subsequent to the November 2004 purchase and P & H continued with the sand and gravel excavation.

After discovering the high quality of gravel on the site, Mr. Patnode made a business decision to subdivide the larger parcel into two lots consisting of 6.3 acres and 68.7 acres, more or less. The subdivision was approved by the Town of Winchester Planning board on September 9, 2010 and recorded in the Cheshire County Registry of Deeds as Plan No. C13, D6-198. P & H sold the 6.3 acre lot in a non-arm's-length transaction to the Condemnee[2] in September 2010 for $303,000. The larger lot (68.7 acres) was sold to a non-related company (Mitchell Sand and Gravel, LLC) in September 2010 for $1,583,000. According to Mr. Patnode, the sale from P & H to Mitchell Sand and Gravel was an arm's-length sale; however, the sale price was effected by a continuing business relationship between the parties and Mitchell has a "right of first refusal" to purchase the Property if the Condemnee decides to offer it for sale.

Board Findings

For the reasons stated below, the board finds the just compensation as a result of the Taking is $65,000.

The board finds it can place little weight on the conclusions reached in the Tichko Appraisal for several reasons. First, the board disagrees with Ms. Tichko's highest and best use conclusion, which is "its current use as a small office and storage." However, its current use is actually a road construction company office and storage lot.

The board finds this is an important distinction as a construction company is the most likely buyer of the Property. Based on the access to the Property through an active sand and gravel pit and its location ("at the bottom of a surrounding sand and gravel pit…." Tichko Appraisal, p. 24.), a construction company may be the only buyer of the Property. Therefore, based on all the evidence and the board's own view of the Property, the board finds the

[2] Velvic, LLC, the Condemnee, is the parent company of Mr. Patnode's construction operation.

Property's highest and best use is as a commercial construction company office and equipment storage yard. Further, the board finds the likely purchaser of the Property would be a construction company, not a company looking for a site for general office or other commercial uses.

Second, the Tichko Appraisal relies on the sales comparison approach to estimate the market value of the Property in both the "before" and "after" the Taking scenarios. In both scenarios, however, Ms. Tichko places primary reliance on the September 2010 sale of the Property from P & H to the Condemnee. (See Tichko Appraisal, pp. 31 and 43.) Based on all evidence presented, the board finds the inclusion of this sale in her report is misleading and inappropriate as it is between related parties, was never exposed to the open market and its sale price most likely does not reflect market terms. While Ms. Tichko states "Mr. Patnode confirmed it was an arms length [sic] transaction," (Id., p. 6) this statement is contrary to the testimony of Mr. Patnode at the just compensation hearing and is not credible.

Third, the conclusion that the loss of 0.91 acres results in no measurable difference in market value is also not credible. The fee taking represents roughly 15% of the physical size of the site, and consists of marketable, useable gravel reserves. While Ms. Tichko testified at the just compensation hearing that the gravel reserves within the Taking had no market value[3], the board finds the likely buyer of the Property (a construction company similar to the Condemnee) would attribute some value to those reserves, even after taking into consideration permitting and excavating costs.

The board finds it is not bound by the Condemnor's pro rata policy or the ceiling of $20,000 contained in that policy. The policy is expressed in a 2005 agency memorandum

[3] Ms. Tichko's testimony was that sand and gravel excavation companies generally only purchased sites with a minimum of ten years inventory and the Property does not meet that minimum.

approved by the Department of Transportation Commissioner with the "support" of the Attorney General's Office. On its face, this memorandum expresses the Condemnor's settlement policy and approach for all takings where the Condemnor concludes there is no discernible difference in the before and after values of the property as a result of the taking. While questions can be raised regarding the fairness, equity and potential equal protection implications of the blanket ceiling contained in this policy memorandum (applied to large or small takings and high or low value properties), the board need not resolve such questions here. In each eminent domain proceeding, the board's task is to determine the just compensation to be awarded as a result of the taking, based upon its own findings of the before and after market values of the property, unencumbered by either party's customary practices or calculations regarding settlement value." See State of New Hampshire v. GCD, Inc. et. al., BTLA Docket No. 24732-10ED (June 7, 2011).

For all of these reasons, the board could place no weight on the conclusions reached in the Tichko Appraisal.

The Condemnee, however, credibly testified regarding the amount of the gravel deposits on the Property, the market value of those deposits and the associated permitting and excavating costs. The board finds the Condemnee's estimate of 29,000 cubic yards of gravel with a retail value of $12 per cubic yard and estimated excavation costs of $9 per cubic yard appropriate and credible ($12 - $9 = $3 per cubic yard X 29,000 = $87,000). However, the board finds the $87,000 should be further reduced by 25% to account for all risks associated with the excavation permitting of the Property and the time involved in actually excavating the gravel deposits.

Therefore, the board finds just compensation for the Taking to be $65,000 ($87,000 X .75 = $65,000, rounded).

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Cheshire 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. 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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Theresa M. Walker, Member

Certification

I hereby certify copies of the foregoing Report have been mailed, this date, to: Brian W. Buonamano, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the State of New Hampshire; and Linwood Patnode, Jr., Manager and Erika L. Payne, Velvic, LLC, 51 Payne Road, Winchester, NH 03470, Condemnee's Representatives.

Date: February 4, 2014

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Anne M. Stelmach, Clerk