City of Nashua

v.

Forrence Millhouse, LLC and Peoples United Bank

Docket No.: 26679-13ED

REPORT OF THE BOARD

This matter arises as a result of RSA 498-A:5 acquisition of property rights taken for the laying out or alteration of a limited access highway, Broad Street Parkway and related streets and railroad lines pursuant to authority conferred on the "Condemnor" by various statutes, including RSA 230:45 and RSA 231:5. A Declaration of Taking ("Declaration") was filed with the board on May 29, 2013, describing the property rights taken as one hundred fifty-eight thousandths (0.158) of an acre in fee, more or less, and a temporary construction easement consisting of two hundred fifty-three thousandths (0.253) of an acre (to expire June 30, 2016). See Exhibit A to the Declaration.

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 "Property" is located at 3 Pine Street, Nashua, New Hampshire and is identified as Map/Lot 77/9. "Before the Taking," the Property consisted of 1.703-acres improved with a brick mill building containing 41,748 gross square feet and parking for approximately 39-44 vehicles. "After the Taking," the Property consists of a 1.545-acre lot improved with a mill building with 31,416 gross square feet and parking for approximately 22-27 vehicles.[1] (See Condemnor Exhibit No. 2, p. 4.)

The board viewed the Property and, subsequent to the view, held the just compensation hearing at its offices on October 7 and 8, 2014. The Condemnor was represented by Rebecca L. Woodard, Esq. of the State of New Hampshire Department of Justice and the Condemnee, Forrence Millhouse, LLC, was represented by William H. Barry, III, Esq. and Arthur G. Greene, as co-counsel.

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.

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, with the Condemnor bearing the burden of proof.[2] 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

[1] The parties' experts disagree somewhat regarding the square footage of the improvements in the Before and After scenarios. The board finds the differences are not material and will utilize the sizes as stated in Condemnor Exhibit No. 2 as they appear to be more detailed.

[2] 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."

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 lot maximally improved with a mill building and accessory parking areas. The mill building was constructed in six phases between 1851 and 1885, each measuring 42 feet wide and ranging from 769 to 775 feet in length; each phase is referred to as a "bay", with Bay 1 being the oldest and Bay 6 being the newest. Before the Taking, the property consisted of a total of 41,748 square feet with a building footprint of 32,424 square feet. Approximately 21,000 square feet of warehouse space was owner-occupied and the remaining 20,748 square feet was leased to a church, who occupied various parts of the Property (in Bays 4, 5 and 6) for many years and completed numerous improvements including interior fit-up and demising the space into classrooms, kitchen facilities, bathrooms, two apartments, offices and a sanctuary.

As a result of the Taking, a portion of the mill building (10,322 square feet) was razed, all of which was previously occupied by the church. After the Taking, the church relocated and the building is completely owner occupied.

In order to carry their burden, the Condemnor relied upon an appraisal prepared by Joseph E. Fahey, III, a New Hampshire Certified General Appraisal with Fremeau Appraisal, Inc. (See Condemnor Exhibit No. 2, the "Fremeau Appraisal".) As of the date of the Taking, Mr. Fahey determined the before and after market values of the Property were $940,000 and $660,000, respectively, a difference of $280,000. He concluded the highest and best use of the Property, in the Before, "is continued industrial/warehouse type uses. The site does not appear to offer any excess land for future building expansion. The most logical purchaser of the property is an owner/user who might occupy all the property or lease out one side or the other." Fremeau Appraisal, p. 38. Further, he concluded the highest and best use in the After scenario is "judged to be an owner-occupied warehouse with minimal finished area. The contributory value of some (bathrooms and offices on the 1st floor) finished areas in Bay 5 is judged more or less [to be] offset by the cost to demolish remaining interior partitions and improvements." Id., p. 40.

The Fremeau Appraisal utilized both the sales comparison and income approaches to value. In the sales comparison approach, Mr. Fahey utilized five comparable properties that ranged in size from 17,270 to 73,776 square feet, bracketing the Property with 41,748 square feet Before the Taking and 31,416 square feet After the Taking. After making what the board finds were generally reasonable and well supported adjustments, he arrived at market value indications of $940,000 Before the Taking and $660,000 After the Taking. In the income capitalization approach, he arrived at market value indications of $915,000 Before the Taking and $690,000 After the Taking. Mr. Fahey reconciled these value indications, placing most weight on the sales comparison approach, to a

market value conclusion of $940,000 and $660,000 in the Before and After scenarios, respectively. Id., pp. 58 and 77.

Mr. Fahey concluded, based on the differences in the Before and After opinions of market value, the Taking resulted in total damages of $280,000. Included in the damages is $220,000 for the part taken and $60,000 in severance damages "caused by decreased utility of the northern end (Bay 5) of the building due to the loss of parking to the remainder." Id., p. 77.

The Condemnee relied upon an appraisal prepared by J. Chet Rogers, LLC, a certified general appraiser. (See Condemnee Exhibit A, the "Rogers Appraisal".) The board finds it can place no weight on the Rogers Appraisal for several reasons.

In the Before scenario, Mr. Rogers arrived at separate market values for the warehouse, office, church space and apartments and added those separate market values together to arrive at his final opinion of the Property Before the Taking. This approach is known as a summation or cumulative appraisal, which is generally considered an improper appraisal methodology that contravenes an important aspect of the "unit rule."

> 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.

See The Appraisal Institute, Uniform Appraisal Standards for Federal Land Acquisitions at p. 54 (2000) and as quoted in State v. FIN-LYN Trust, BTLA Docket No. 26141-12ED (February 18, 2014). "In no event is it proper that the different uses be valued independently and merely added together to derive a value for the whole property." Id., p. 35. The approach utilized by Mr. Rogers, in effect, assumes that each segment of the Property has a different most likely buyer,

and that a warehouse user or investor would purchase the warehouse space; a church would purchase the church area; an apartment investor would purchase the apartment; and an office user or investor would purchase the office areas. That assumption is simply not credible.

Second, Mr. Rogers determined the Before and After market values of the Property were $1,823,800 and $978,000, respectively, a difference of $845,800. In addition, he estimated separate severance damages of $188,230 and a loss relating to the "temporary construction easement" of $38,000. Mr. Rogers arrives at an opinion of "total loss" of $1,072,030. Id. at 7.

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, 798 (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, 486-487 (1957). 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. (Emphasis added.)

As a result of the Taking, the lot size was reduced approximately 9% and the gross building area of the Property was reduced by approximately 25%. The Fremeau Appraisal estimates total damages of $280,000, or approximately 30% of its $940,000 opinion of market

value Before the Taking. The Rogers Appraisal estimates total damages of $1,072,030, which is 59% of Mr. Rogers' opinion of market value Before the Taking. Based on the methodology utilized in the Rogers Appraisal, the board finds the conclusions reached therein lack merit and are not credible. After reviewing the evidence as a whole, the board finds the Condemnor met its burden of proof and the $280,000 damages calculated in the Fremeau Appraisal results in just compensation to the Condemnees.

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 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 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

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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: Rebecca L. Woodard, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the City of Nashua, Condemnor; William H. Barry, III, Esq., Barry & Honorow, PLLC, 161 Kinsley Street, Nashua, NH 03060 and co-counsel, Arthur G. Greene, Esq., Law Office of Arthur G. Greene, 3 Executive Park Drive, Suite 9, Bedford, NH 03110, for Forrence Millhouse, LLC, Condemnee; and Susanne M. Stefani, Loan Servicing, Peoples United Bank, P.O. Box 820, Burlington, VT 05402, Mortgagee.

Date: March 16, 2015

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Anne M. Stelmach, Clerk