

State of New Hampshire

v.

Carol Harriman, et al.

Docket No.: 27126-13ED

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 October 2, 2013 describing the property rights taken (the “Taking”) as consisting of: a 2,275 square foot permanent drainage easement; temporary driveway easements totaling 1,575 square feet and temporary slope easements totaling 550 square feet for a total of 24 months (with each of these temporary easements to expire on December 31, 2016 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 is located on “Parcel 84” at 181 Newmarket Road (Route 108), hereinafter 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 easements described in the Taking and their relation to the Property and then held the just compensation hearing in its office at 107 Pleasant Street, Concord, New Hampshire, on October 21, 2014. The Condemnor was represented by Karen A. Schlitzer, Senior Assistant Attorney General in the Department of Justice for the State of New Hampshire and Steve Harriman represented his mother, Condemnee Carol Harriman. (None of the other named Condemnees attended the view or the hearing.)

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. Parties should expect at least four (4) weeks for completion of a requested transcript.

Board's Rulings

The board is authorized to determine just compensation for the Taking as provided in RSA ch. 498-A. Under New Hampshire law, where there has been a partial taking of private property, just compensation is measured by the difference between the before and after market values of the property. See, e.g., New Hampshire Dept. of Transportation v. Franchi, 163 N.H. 797, 798 (2012).

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.")] 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).]

The Condemnor relied upon an appraisal (the “Fremeau Appraisal,” Condemnor Exhibit No. 2), prepared by B. Alec Jones and Joseph G. Fremeau, MAI, of Fremeau Appraisal, Inc., to establish the before and after market values of the Property. This appraisal concludes there was no measurable difference in the market value of the Property before and after the Taking and estimates this market value was \$1.4 million.

The board, after weighing all of the evidence presented, finds the Condemnor met its burden of proving the Taking caused no measurable change in the before and after market values of the Property and therefore its nominal damage deposit of \$500 with the board (based strictly on a so-called “pro rata” calculation in the Fremeau Appraisal, pp. 41-43) is not unreasonable as a just compensation award. (See RSA 498-A:11 and RSA 498-A:25.)

The Condemnees presented no evidence, either in the form of an appraisal or other documents or testimony, to estimate market values (either before or after the Taking) and did not present a just compensation estimate of their own. Instead, Mr. Harriman cross-examined each of the Condemnor’s witnesses and presented his own testimony regarding concerns he has about the Taking.

The board will first present its own findings, based upon the probative evidence in the Fremeau Appraisal and the testimony of Alec Jones, and will then explain why Mr. Harriman’s concerns do not impact the determination of just compensation for the Taking.

The Fremeau Appraisal concludes the highest and best use of the Property, currently operated as a five-generation family farm (the “Bedard Farm”), was for future residential development and estimated its market value accordingly. The Property is zoned rural residential

and this zoning permits residential development of various types, including but not limited to “single family residence, manufactured housing, elderly (single family, duplex and multi-unit), and eldercare facility.” (Freneau Appraisal, p. 19.)

The parties do not dispute the Property consists of at least 186 acres and possibly as much as 215 acres. According to the Freneau Appraisal (p. 8), the lower estimate is based on information obtained from the records of the Town of Durham and State of New Hampshire Department of Transportation (“NHDOT”) and the higher estimate is based on the area identified in the deed. In the absence of a “metes and bounds survey” or a definitive “legal description,” the appraisal makes the “extraordinary assumption” that the Property consists of 186 acres and further concludes, based on upland topography considerations, that about 100 acres is likely suitable for development. (Id., pp. 8 and 28.)

The board finds the total acreage and useable acreage assumptions in the Freneau Appraisal are reasonable. More importantly, even if the Property turns out to be somewhat larger in size, Mr. Jones testified that this change would likely impact his market value opinion to some degree, but it would not affect his conclusion that the before and after market values of the Property did not change as a result of the Taking.

The board finds this conclusion is amply supported by the evidence presented. The after value of the Property did not change from the before value because of the relatively small area of the easements and their location abutting the existing right of way already owned by the Condemnor. The easement areas and the land adjacent to them on the Property are located on a recognized and delineated flood plain and potential development of these areas and were restricted, both before and after the Taking, by the Wetlands Conservation, Shoreland Protection and Flood Hazard overlay districts. (Id., p. 26; see also Condemnor Exhibit No. 4, a photograph

shows portions of the Property nearest these easement areas and the adjacent farm land were subject to seasonal accumulations of standing water even prior to the start of any construction work pursuant to the Taking.)

The board has considered Mr. Harriman's testimony and his cross-examination of the Condemnor's witnesses regarding his concerns about the Taking. Mr. Harriman lives on the Property and continues to operate it as the Bedard Farm. One of the farm's fields borders the easement areas and he expressed concerns regarding the necessity of the Condemnor's project insofar as it involves installation of two 36-inch culverts underneath the roadway to replace an old 18-inch culvert used for drainage. He believes the culverts were designed primarily to allow "turtles" to cross safely under the roadway, an objective of the 'Department of Fish and Game' which owns neighboring parcels of land, and that the design of the improvements may cause more standing water to collect on his field.

The board examined these concerns in light of all of the evidence presented, including the testimony of the Condemnor's project manager, Ronald Grandmaison, employed by the NHDOT. Mr. Grandmaison was questioned at some length about the culverts and other aspects of the project. He testified this portion of the roadway has historically been subject to periodic flooding and standing water problems and the objective of the NHDOT project is to widen and improve the road, not necessarily to prevent any future flooding. His opinion, which the board finds credible, is that the project will not make the drainage problems alluded to by Mr. Harriman worse and hopefully will improve the situation. As the Condemnor's attorney further noted, if the Property suffers future harm as a result of the improvements undertaken by the Condemnor, other legal remedies (such as an inverse condemnation action) might be available to resolve such issues.

To the extent the Condemnees still question the necessity of the Taking, the board notes that none of them filed a preliminary objection, even though there is a well-established statutory process for doing so. See RSA 498-A:9-a, I(c), which allows every condemnee a 30-day time period to file a preliminary objection as “the exclusive method of challenging . . . [t]he necessity, public use and net-public benefit of the [T]aking.” As provided in paragraph II of this statute: “Failure to raise any matters by preliminary objection shall constitute a waiver thereof.” If they had filed a timely preliminary objection “concerning necessity, public use or net-public benefit,” that objection would have been transferred to the superior court for determination pursuant to RSA 498-A:9-b. Consequently, the board has no jurisdiction to reexamine the necessity of the project; the board’s jurisdiction and authority is simply to make a just compensation award for the Taking.

For all of these reasons, the board finds the Condemnor met its burden of proof in this eminent domain proceeding. The Condemnor deposited the sum of \$500 with the board at the time it filed the Declaration (presumably based on the somewhat lower “pro rata” calculations in the Fremeau Appraisal noted above). The board finds no higher just compensation award is supported by the evidence and arguments presented.

If either party seeks to appeal the \$500 just compensation award, 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 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

Albert F. Shamash, Member

Theresa M. Walker, Member

State v. Carol Harriman, et al.

Docket No.: 27126-13ED

Page 8 of 8

Certification

I hereby certify copies of the foregoing Report have been mailed this date, postage prepaid, to: Karen A. Schlitzer, Esq., State of New Hampshire, Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the Condemnor; Brother Paul Boucher, Doris Chenard, Henrie Chenard, Lionel Chenard, Robert Chenard, Rose Chenard, Leona Hibbard, Paul Soucy, Robert Soucy, c/o Peter Taylor, Esq., McNeill, Taylor and Gallo, P.A., 180 Locust Street, Dover, NH 03820, Carol Harriman, 48 Fifth Street, Dover, NH 03820, Arthur Bedard, 5830 North West 5th Street, Ocala, FL 34482, Raymond Bedard, 7755 NE Co Highway C314A, Silver Springs, FL 34488, and Jeanette Laroche, 221 Lower Elgin, Elgin, TX 78621, Condemnees.

Dated: November 14, 2014

Anne M. Stelmach, Clerk