

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

PORTLAND NATURAL GAS)
TRANSMISSION SYSTEM,)
)
PLAINTIFF)
)
v.)
)
0.09 ACRES OF LAND, more or less,)
in the Town of Raymond, County)
of Cumberland, State of Maine;)
MARK H. ACKER and TAMMY E.)
ACKER,)
)
DEFENDANTS)

Civil No. 98-245-P-H

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On Monday, May 24, 1999, I conducted a bench trial on the issue of just compensation for the taking of temporary and permanent natural gas pipeline easements over the property of Mark and Tammy Acker. An Order of Condemnation has been previously entered. Based upon the evidence presented at trial, these are my Findings of Facts and Conclusions of Law.

The parties agree that Maine law governs the calculation of just compensation. The Law Court made clear in 1980 that there are two appropriate measures to value property in an eminent domain proceeding for partial takings. The “traditional measure” assesses “the value of the property actually taken” and adds to it “the diminution in value of the part that remains (severance damage).” Merrill Trust Co. v. State, 417 A.2d 435, 439 (Me. 1980). The second approach, “devised for the benefit of the condemnee,” id., is the “before and after test.” Id. There, the calculation is “the difference between the value of the entire tract immediately before the taking and the value of the

remainder immediately after the taking.” Id. The condemnee is entitled to pursue whichever calculation yields the higher value. Id.

The Ackers seek to proceed under the first calculation (the “traditional measure” described in Merrill Trust) and maintain that they should be paid approximately \$103,000, consisting of a \$55,000 reduction in value to their remaining property, \$3,620 for the easements actually taken by Portland Natural Gas Transmission System (“Portland Natural Gas”), and approximately \$44,000 that they claim is the value of landscaping trees taken from them by Portland Natural Gas. The parties agree that the temporary and permanent easements themselves are worth \$3,620. I find, however, that the Ackers’ calculation is duplicative and not in accord with the “traditional measure” described in Merrill Trust. Specifically, the landscaping value of the trees was derived by the Ackers’ forestry expert, Dr. Michael Cline. He based their landscaping value in part upon their location in relation to the Ackers’ house, the role that the trees performed in filtering noise, light and dust from a highway, and the values that the trees gave to the property. This landscaping value, however, is also recognized in the decline in the fair market value of the parcel that the Ackers retain, for their real estate appraiser, Fred Packard, found that the property was worth less largely because of the loss of the buffer that the trees had created. Moreover, Fred Packard testified that his firm had valued the whole property at \$235,000 before the taking in connection with bank financing. After the taking, he valued the property at \$180,000. Although he denied that his analysis amounted to a “before and after” analysis (the second approach described in Merrill Trust), that is clearly what his analysis amounted to. The \$55,000 is, therefore, an alternative measure of damages, but it cannot be added to the value of the easements and the value of the trees taken.

Portland Natural Gas's real estate appraiser, Leland Buzzell, valued the property at \$220,000 before the taking. I find Mr. Packard's pre-taking value of \$235,000 more persuasive. Unlike Mr. Buzzell's pre-taking appraisal, Mr. Packard's pre-taking appraisal was not prepared in connection with litigation and, from the testimony of both experts, I find that Mr. Packard's appraisal was based on a better analysis of comparable sales. Moreover, Mr. Buzzell testified that his pre-taking value is within a five per cent range. A five per cent increase would bring Mr. Buzzell's own figure up to \$231,000. I accept the \$235,000 figure of Mr. Packard as the fair market value of the entire property before the taking.

Mr. Packard testified that after the taking the Ackers' property is worth \$180,000. He testified that he reached this conclusion by deriving a fair market value of \$190,000 for the property remaining after the taking on the assumption that the Ackers would put in air conditioning so that the windows could be closed in the summer to reduce the noise and dust pollution from the highway and that

Mrs. Acker said it would cost \$7,500 to \$10,000 to install air conditioning. I find that the reduction from \$190,000 to \$180,000 in fair market value is not supported by the evidence. Mr. Packard did not initially refer to the air conditioning in his post-taking valuation of the property and I do not find the testimony sufficient to support the conclusion that the absence of air conditioning reduces the fair market value by \$7,500 to \$10,000. Mr. Packard also reduced the value of the property by an additional \$5,000 based upon speculation concerning risk to a well, relocation of a play area and erection of a fence, none of which are substantiated by the evidence.¹ I therefore adjust his after-

¹ Actually, Mr. Packard used the \$5,000 to revise his valuation of the comparables. For shorthand, however, I am referring to it directly in respect to the Ackers' property.

taking valuation figure up to \$195,000. Mr. Buzzell appraised the property after the taking as worth \$203,500. I find the Packard value more persuasive, as I have adjusted it. The adjusted Packard value is also within the five per cent range of Mr. Buzzell's figure. The loss for which the Ackers are entitled to just compensation is therefore \$235,000, less \$195,000 for a net of \$40,000.

In conclusion, I find that the Ackers have not presented evidence to support a calculation of damages based upon adding together the value of the property taken and the diminution in value of the part that remains. Instead, they have presented an adequate case for the use of the "before and after" test, which involves a comparison of the value of the entire tract before the taking to what remains after the taking. The Ackers have proven entitlement to just compensation in the amount of \$40,000. The Clerk shall enter judgment in favor of the Ackers in that amount. Any claim for attorney fees shall be submitted with a supporting legal memorandum as to the basis for such fees within seven (7) days. The response shall be filed within seven (7) days thereafter.

SO ORDERED.

DATED THIS 27TH DAY OF MAY, 1999.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE