STATE OF VERMONT

SUPERIOR COURT
ADDISON UNIT

CIVIL DIVISION
Docket No. 22-CV-02530

EAST PLANT REAL ESTATE, INC.
Appellant

v.

STATE OF VERMONT AGENCY OF TRANSPORTATION,
Appellee

Decision on Standard of Review

East Plant Real Estate, Inc., owner of property on which the Agency of Transportation seeks temporary and permanent easement rights for the purpose of restoring the drainage infrastructure beneath an adjacent highway, appeals a Decision resulting from an administrative hearing held by the Agency. The hearing officer determined a necessity "for the condemnation of the permanent and temporary easements from the affected landowner," and set compensation at $5,700.

In its Notice of Appeal, Appellant states that it is appealing both the determination of necessity for the easements proposed and the amount of compensation. The parties dispute the applicable standard of review to be applied by this court. Appellant seeks a *de novo* determination by the Superior Court on both issues. Appellee argues that the proper standard is an on-the-record review. Both parties have submitted memoranda of law on the issue.

The Agency invoked the administrative hearing process for "Minor Alterations to Existing Facilities" as set forth in 19 V.S.A. §518 and held an administrative hearing before a hearing officer. Consideration of the appropriate standard of review for both the necessity and damages determinations calls for analysis of multiple statutory provisions in Title 19 regarding "Highways" and the interaction of those provisions.

Title 19, Chapter 1: "State Highway Law: General Provisions"

Title 19 as a whole concerns highways. Chapter 1 sets forth general provisions, including §7a which is a provision granting authority to the Secretary to conduct hearings. It also authorizes the Secretary to appoint a hearing examiner to conduct the hearings, and specifies authority to employ procedures comparable to those used in court cases. §7a (b) provides that a person aggrieved by the decision of a hearing may have it reviewed "on the record" by the Superior Court pursuant to Vermont Rule of Civil Procedure 74 ("Appeals from Decisions of Governmental Agencies") "unless otherwise specifically provided by law." Thus, the Legislature created a "norm" that review of administrative hearings would be on-the-record reviews unless otherwise set forth in specific legislation. 19 V.S.A. §7a (b).

Title 19, Chapter 5: "Condemnation for State Highway Projects"

Chapter 5 of Title 19 lays out the procedure for condemnation of private property for state highway purposes. Where there is a proposed taking for a new project, if there is no agreement with the owner, the Agency must file a case for condemnation in the Superior Court. §504. A hearing is held in which there is a presumption of the Agency's determination of necessity (which can be overcome due to bad faith or abuse of discretion) but the court engages in *de novo* review of "the Agency's determination of the need to take a particular property and to take it to the extent proposed." §505 (a)(3). As to compensation, §511 ("Determination of damages") provides for a trial in the Superior Court, including entitlement to a jury trial. For new highway projects, therefore, a court trial is required for both necessity and compensation, and on the issue of compensation, the owner is entitled to a jury trial.

The situation is a little different where there are existing highway facilities as opposed to a new project. Chapter 5 has a special section, §518, entitled "Minor alterations to existing facilities." For activities that come within the scope of this section, when seeking a taking of a legal interest, the Agency may use an alternative procedure that involves a "quasi-judicial process" rather than having to file a condemnation case in court.[1] Under §518 (b), reference is made to §923, which is in Chapter 9. Specifically, §518 (b) states: "In cases involving minor alterations to existing facilities, the Agency, following the procedures of section 923 of this title, may exercise the powers of a selectboard."

Section 923 is found in Chapter 9 of Title 19, a chapter that addresses repairs, maintenance, and improvements of existing highways. Subchapter 1 of Chapter 9 is entitled "General Duties of Towns" and describes the responsibilities Towns have in caring for matters related to state highways within the town. It specifies duties of town officials related to such activities as removal of trees and growth, construction of sidewalks, curb cuts, making of crosswalks, traffic signals, warning signs for school zones and disabilities, and the like. It includes a Subchapter 5 entitled "Appeals and Minor Alterations." It addresses issues such as changes of the grade of a road adjacent to buildings, snow fences to avoid obstruction by snowdrifts, changes of road location due to floods, diversion of streams or construction of embankments to protect a highway, and establishment of drainage ditches to protect a highway.

Obviously, many of these activities could impact the property rights of adjacent owners. Section §923 entitled "Quasi-judicial process" sets forth the frontline procedure for town selectboards to use to address issues that may arise between town exercise of its responsibilities and affected owners. It provides that when there is an "interested person with a legal interest in property that could be affected by the proposed action," the selectboard of the town gives notice of the proposed activity and a time when the selectboard will inspect the premises. The selectboard then decides, after the inspection or at a later time after receiving evidence, on the necessity for the work or activity, establishes any conditions for accomplishing the work, and awards damages "if applicable." §923 (2) and (3). There is a specific subsection entitled

[1] The statute defines two categories of circumstances to which this provision is applicable. The issue of whether it is applicable to the activities and easements sought in this case has not been raised in the parties' memoranda.

"Appeal," §923 (5), which provides than an "interested person" may appeal "using any of the procedures listed in chapter 5 of this title." The Chapter 5 procedures include:

- Court hearing for condemnation: §505
- Court hearing for damages with entitlement to jury trial: §513 (a) and (b)

It is noteworthy that selectboard members are usually lay persons in the community whose interests are aligned with those of the town, and the process does not call for the kind of legal and procedural protections of interests in property that are inherent in a court process. The appeal process allows for review in a court of law where property rights may be addressed according to both legal and procedural standards established by law.

Returning now to the cross-reference to §923 in the Chapter 5 special section, §518, for "Minor alterations to existing facilities," which is applicable to this case, the Agency is not required to file a court case but may 'follow the procedures' of the quasi-judicial process laid out in §923 and substitute the Agency itself for the selectboard. Again, §518 (b) states: "In cases involving minor alterations to existing facilities, the Agency, following the procedures of section 923 of this title, may exercise the powers of a selectboard."

The dispute between the parties over the standard of review for this case calls for this court to interpret how this cross reference most reasonably applies in the situation of a §518 (b) administrative hearing.

The cross reference allows the Agency to employ a "quasi-judicial process" with the Agency itself acting as the decision-maker in place of the selectboard. The Agency acts through its Secretary. Under §7a (a) cited above, the Secretary is authorized to conduct hearings, including through appointment of a hearing officer. The statute specifically states that the Secretary (or appointed hearing officer) has the powers of subpoenaing witnesses, administering oaths, taking testimony, allowing depositions, and ordering discovery. Fees are authorized in the same amount as in Superior Court. In short, the process, if done by a hearing officer appointed by the Secretary under the authority of §518 (b), §923, and §7a (a), is a form of quasi-judicial process that affords the interested person the protection of the legal procedures that would be available in a court of law. By specifically authorizing a quasi-judicial process to be conducted by the Agency, §518 (b) inherently incorporates the Chapter 1 provisions, including § 7a (a) which describes not only the authority of the Secretary and hearing officers to conduct hearings but also the procedures for doing so.

§7a (b) then specifies that an appeal from the hearing officer's decision goes to Superior Court to be "reviewed on the record." The interested person has already been afforded the procedural protections that apply when a hearing is held in a court of law. The on-the-record review then provides the process for assuring that applicable legal standards have been properly applied. This process thus includes both procedural and legal protections, and contrasts with the informal process used in local towns in which no procedural or legal protections are required during the frontline selectboard process.

Thus, the court concludes that the process for review for the determination of the taking of rights when the Secretary has held a §518 (b) hearing with all of the protections set forth in §7a (a) is established by §7a (b) as an on-the-record review.

The standard of review for the compensation portion of the appeal is governed by another provision of §518 (b). The last sentence of §518 (b) states, "Further, if an appeal is taken under subdivision 923 (5) of this title, the person taking the appeal shall follow the procedure specified in section 513 of this title."

§923 (5): "*Appeal.* If an interested person is dissatisfied with the award for damages, he or she may appeal using any of the procedures listed in chapter 5 of this title."

Thus, both §518 (b) and §923 (5) specify the appellant's right to invoke the procedures in §513 with respect to damages. §513 provides as follows:

> §513 (a): "A party dissatisfied with a decision of the Transportation Board as to the amount or apportionment of damages awarded may appeal to a Superior Court where the land is situated. . ."
>
> §513 (b): "A party appealing the award of the Board is entitled to a jury trial in the Superior Court upon demand."

Accordingly, as to the compensation portion of the appeal, the statutes are clear that the appellant is entitled to a jury trial, which is a *de novo* proceeding. An appellant may waive the use of a jury, in which case the trial would be a *de novo* trial before the court.

Order

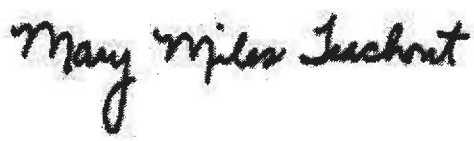
1. For the foregoing reasons, the court concludes that:

-- as to the declaration of taking rights in the Administrative Hearing Decision below, Appellant is entitled to an on-the-record review under Rule 74 of the Vermont Rules of Civil Procedure;

-- as to the determination of compensation, Appellant is entitled to a *de novo* trial, including the right to a jury trial upon demand or otherwise a court trial.

2. If the attorneys are able to stipulate to a scheduling plan for the case, they shall submit it by March 1, 2023. If no stipulation is submitted by that date, the court will set a scheduling conference to determine a procedural plan for the case.

Electronically signed February 13, 2023 pursuant to V.R.E.F. 9 (d).



Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned