Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-288

JANUARY TERM, 2009

In re Olde Orchard Realty Partnership, L.P.	}	APPEALED FROM:
	}	
	}	
	}	Public Service Board
	}	
	}	
	}	Docket No. 7306

In the above-entitled cause, the Clerk will enter:

Olde Orchard Realty Partnership, L.P. appeals from a Public Service Board order denying its request for attorney's fees and costs incurred in litigating the underlying eminent domain proceeding. Olde Orchard contends that, in denying the request, the Board violated its common law and constitutional rights. We affirm.

This case arose out of the Vermont Electric Power Company's (VELCO) plan, known as the Northwest Reliability Project, to increase Vermont's electrical capacity by installing additional transmission lines along a 27-mile long corridor between New Haven and South Burlington, including a 1.9-acre strip of land owned by Olde Orchard along Route 7 in the Town of Shelburne. The strip in question is part of a 22-acre parcel containing seven apartment buildings with a total of 210 units. In April 2007, following Olde Orchard's rejection of a $217,000 offer to purchase an easement, VELCO filed a condemnation petition with the Board. A few months later, VELCO submitted pre-filed testimony together with a 60-page appraisal report by a state-certified real estate appraiser assessing the value of the easement at $60,000. In response, in early October 2007, Olde Orchard submitted the pre-filed testimony of its principal owner as well as that of an architect and a landscape architect in support of a property value "in the range of $3,840,000 to 5,120,000."

A few weeks later, VELCO announced that it had decided to re-route the line off of Olde Orchard's property to accommodate the concerns of another landowner. The parties agreed to stay the condemnation proceeding pending the Board's approval of the re-route. Approval was given in February 2008. VELCO thereupon moved to withdraw the condemnation petition, and Olde Orchard, in response, filed a request for attorney's fees and costs of approximately $45,000 incurred in the condemnation proceeding. In June 2008, the Board adopted a hearing officer's order and findings that Olde Orchard had adduced "no evidence that [VELCO] had acted in bad

faith or prolonged the litigation" and that disparities in property valuation estimates between parties are "not uncommon and do[] not constitute a special circumstance under which an award of litigation expenses is necessary or appropriate." Accordingly, the Board granted VELCO's motion to withdraw and denied Olde Orchard's request for attorney's fees and expenses. This appeal followed.

As the Board here recognized, we adhere to the American rule that each party is responsible for its own attorney's fees and costs absent an agreement or statute authorizing a fee award, neither of which was present here. Grice v. Vt. Electric Power Co., Inc., 2008 VT 64, ¶ 29. Equitable exceptions to the rule have been recognized only "in exceptional cases and for dominating reasons of justice" where, for example, a party has acted in bad faith or has required completely unnecessary or multiple litigation. DJ Painting, Inc. v. Baraw Enters., 172 Vt. 239, 246 (internal quotation omitted). The award of attorney's fees is a discretionary ruling which we will not disturb absent a showing that the lower court or tribunal failed to exercise discretion or exercised it for reasons clearly untenable or unreasonable. Burlington Free Press v. Univ. of Vt., 172 Vt. 303, 307 (2001). Findings by the Board will not be reversed absent a showing that they are clearly erroneous. In re East Georgia Cogeneration Ltd. P'ship, 158 Vt. 525, 531 (1992).

Olde Orchard asserts that VELCO acted in bad faith on the grounds that its $60,000 assessment was unreasonably low and was based upon a seriously flawed analysis, a claim allegedly supported by the fact that VELCO moved to withdraw its condemnation action within weeks of confronting Olde Orchard's own analysis; Olde Orchard dismisses VELCO's proferred reason for the withdrawal as "a pretext." The difficulty underlying Olde Orchard's claim is that the Board found no evidence of bad faith and, apart from alleging otherwise, Olde Orchard has made no showing that the Board's finding was clearly erroneous or an abuse of discretion. Although Olde Orchard claims that VELCO's analysis was seriously flawed, the record reveals that VELCO submitted a detailed study by a certified appraiser of the development potential of the subject property, in which the appraiser recognized the currently permitted zoning density (contrary to Olde Orchard's assertion) but concluded that the 100-foot strip in question was "unlikely ever to be developed" because of its physical features and existing setbacks and easements, and that the taking therefore would "not have any significant or measurable impact on the subject property." Although Olde Orchard's analysis advanced different assumptions, this does not demonstrate that VELCO's analysis was so seriously flawed that its submission was itself evidence of VELCO's bad faith.

Olde Orchard's related claim that VELCO's asserted reason for withdrawing the condemnation petition was pretextual is entirely unsupported. As for the large disparity in the assessments advanced by the parties, the Board was correct in observing that this is not uncommon in condemnation proceedings and does not justify an award of attorney's fees. See United States v. Bodcaw Co., 440 U.S. 202, 203 (1979) (observing that disparate assessments simply represented "the rather typical, oft-recurring situation where the landowner is dissatisfied with the Government's valuation" and did not justify award of attorney's fees). Accordingly, we find no basis to disturb the Board's conclusion that Olde Orchard was not entitled to attorney's fees under any of the recognized equitable exceptions to the American Rule.

Olde Orchard argues, alternatively, that we should adopt a categorical rule entitling a landowner to attorney's fees and costs where, as here, a condemnation petition is withdrawn.

Although statutory authority for such a rule may be found in other states, no Vermont statute authorizes attorney's fees in these circumstances and we decline to do so where the Legislature has not acted, particularly where it has seen fit to provide attorney's fees in other limited circumstances. See, e.g., 19 V.S.A. § 512(b) (authorizing an award of reasonable attorney's fees and expenses when landowner prevails in condemnation action by transportation board for state highway purposes); In re Spencer, 152 Vt. 330, 340 (1992) (presence of remedy in one statute and absence in a similar provision shows that the Legislature "knew how to provide for a remedy if it chose to" and "demonstrates a legislative intent not to provide for such a remedy").

Finally, Olde Orchard contends that denial of attorney's fees and expenses in these circumstance violates its federal and state constitutional rights. It is well settled that attorney's fees and expenses incurred by a property as the result of a taking "are generally not part of the just compensation to which he is constitutionally entitled" under the United States Constitution, Bodcaw, 440 U.S. at 203, and Olde Orchard has advanced no persuasive argument or authority to support its claim that the denial of such fees somehow violates Articles 9 and 4 of the Vermont Constitution. Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice