To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

THE VILLAGE OF PORT CHESTER TO ACQUIRE TITLE TO CERTAIN REAL PROPERTY LOCATED IN THE VILLAGE OF PORT CHESTER, WESTCHESTER COUNTY, STATE OF NEW YORK AND DESIGNATED ON THE TAX MAPS OF THE VILLAGE OF PORT CHESTER AS SECTION 2, BLOCK 60, LOTS 9,10,11,12,13,14,15,16

DECISION/ ORDER/JUDGMENT

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DOMENICK D. BOLOGNA, BART A. DIDDEN, former owners of Block 60, Lots 9, 10 12 and 13, and DOMENICK D. BOLOGNA, former owner of Block 60, Lots 14 and 15, OPUS 113 CORP., owner of Block 60, Lot 17, PAUILLAC 115 REALTY CORP., owner of Block 60, Lot 18, 117 NORTH MAIN STREET CORP., owner of Block 60, Lot 19, CABERNET 119 REALTY CORP., owner of Block 60, Lots 2, 20 and 21, and AMARON 123 REALTY CORP., owner of Block 60, Lot 22,

Index No: 18221/03

Claimants,

-against -

VILLAGE OF PORT CHESTER,

Condemnor.

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LaCAVA, J.

The trial of this Eminent Domain Procedure Law (EDPL) Article 5 proceeding, challenging the valuation by the Village of Port Chester (Village or Condemnor) of the real property taken by the Village in Eminent Domain from Domenick D. Bologna, Bart A. Didden, Opus 113 Corp., Paullac 115 Realty Corp., 117 North Main Street Corp., Cabernet 119 Realty Corp., and Amaron 123 Realty Corp., (Bologna, Didden, Opus, Paullac, 117 North, Cabernet, and Amaron,

respectively, or Claimants), took place before this Court on May 7, May 8, May 9, and October 16, 2008, and in addition the following post-trial papers numbered 1 to 8 were considered in connection with the trial of this matter:

PAPERS	NUMBERED
POST-TRIAL MEMORANDUM	1
PETITIONER-CONDEMNOR POST TRIAL MEMORANDUM/EXHIBIT	2
EXHIBITS	3
REPLY MEMORANDUM	4
REPLY POST TRIAL MEMORANDUM	5
EXHIBIT	6
TRIAL TRANSCRIPT	7
TRIAL TRANSCRIPT	8

The instant property (the subject claim) consists of a series of parcels owned by some or all of the petitioners. The property appears generally on the tax map of the Village within Section 2, and Block 60. The individual parcels, which are the subject of the direct taking claim, are Lots 9 through and including 15, while Lots 17 through 19 are the subject of the consequential damages claim. Lots 9 and 10, formerly a vacant parcel, run along the west side of Abendroth Street, north of Adee Street, and directly behind 103 through 117 North Main Street. Lots 12 and 13 (likewise constituting a vacant tract), and lots 14 and 15 (housing retail businesses) are otherwise known as 103, 105, and 107, 109 North Main Street, respectively. Didden and Bologna originally intended to develop a CVS Store on Lots 12 through 15, although later the plans were extended to include Lots 16 through 19. Lots 9 and 10 were envisioned to provide attendant parking for the store, while street access was to occur through another parcel, Lot 2, located to the north of Lot 9. Finally, Lots 17, 18, and 19, which involve the consequential damages claim, are otherwise known as 113, 115, and 117 North Main Street, respectively. They, like lots 14 and 15, are also improved by retail establishments.

Based upon the credible evidence adduced at the trial, and upon consideration of the arguments of respective counsel and the post trial submissions, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Bart A. Didden testified that he is a long-time resident of Port Chester and, as such, has for many years had an interest in civic improvement and development of properties in the downtown areas of the Village. In 1993, he and his partner Dominick D. Bologna, purchased parcels 9, 10, 12, and 13, constituting much of

the direct claim herein, for the purpose of development of those parcels. Their partnership was by oral agreement, with no written instrument attesting to it, but Didden testified that he acted as "managing partner" with respect to development of the properties, and that they had a 50/50 interest split. Since approximately the 1970s, lots 14 and 15 were owned by Dominick Bologna individually, but were merged by him into his partnership with Didden for their development. The parcels constituting the consequential damages claim (lots 113, 117, and 115)were purchased in 1994, 1996, and 1997 respectively, by three corporations, Opus 113 Corp., 117 North Main Street Corp., and Pauillac 115 Realty Corp. Didden is the president of each of the three corporations. The parcels were all zoned C-2 Central Business Zone, meaning that commercial development of projects such as, for example, a CVS store, would be "as-of-right". The parcels were also located in the Marina Redevelopment Project Urban Renewal (MUR) District.

In 1995/96, one of the first attempts to develop the downtown partnership properties was undertaken. At that time, CVS was earnestly attempting to locate a retail site in the lower Connecticut/Port Chester area. After the failure of an application in Byrum, Connecticut, CVS began searching for alternate sites by utilizing the services of local real estate agents. Didden, using various agents and agencies, in turn, reached out to CVS for consideration of Didden/Bologna properties as the site for a CVS drugstore. CVS, however, eventually terminated any further discussions of the project, either because the footprint (developable area) of the Didden/Bologna assemblage was too small, and/or, as Didden conceded, because CVS indicated that they were "not interested in Port Chester".

In 1977, the Board of Trustees of the Village of Port Chester, New York ("Village Board") approved of an urban renewal plan in an attempt to redevelop the blighted downtown and waterfront areas in the Village. This original plan, and subsequent refinements of that plan, were, however, not acted upon until 1998, when Port Chester entered into a Land Acquisition and Disposition Agreement ("LADA") with developer G&S Port Chester, LLC ("G&S") for the proposed Modified Marina Redevelopment Project. To enable implementation of this project, Port Chester planned to acquire certain private properties pursuant to and in accordance with Article 2 of the New York State Eminent Domain Procedure Law ("EDPL"). On April 12, 1999 the Village Board, as required under the New York State Environmental Quality Review Act, completed the environmental review process and adopted the requisite Findings.

The Court notes that, on May 22, 1999, Port Chester, as required under §202 of the EDPL, published a combined Public Notice

of Availability for Public Examination of Redeveloper's Statement for Public Disclosure and Notice of Public Hearing in Port Chester's official newspaper. Since, however, the Notice of Public Hearing was not published the requisite number of times pursuant to §202 of the EDPL, and although an initial public hearing relating to the first publication was held on June 7, 1999 pursuant to §201 and 203 of the EDPL, thereafter, the Village was required to conduct a second public hearing on July 6, 1999.

Following these public hearings, on July 18 and 19, 1999 the Village Board pursuant to EDPL 204 published its Determination and Findings ("1999 Findings") specifying the public benefit to be served by the redevelopment, defining the planned redevelopment area, and espousing the benefits that it would create for the locality and the environment. The 1999 Findings stated that the urban renewal project's public purpose required the taking of the property involved therein "for the purpose of clearing and reconstructing this area to enhance public access to the waterfront, protect and encourage water dependant uses, promote the development of mixed use and commercial retail uses on the waterfront, remediate environmental problems, and have a positive impact on the existing and continued development of the Village waterfront and downtown business areas."

The project was planned to take place in phases, and as development occurred in one phase, the Village would acquire land through the power of eminent domain for the next phase. During land acquisition for the second phase, displaced tenants, businesses and private landowners began to raise many legal issues, including allegations that G&S was using illegal tactics in order to obtain these parties' agreements to settle without just compensation. These included the undertaking of wrongful evictions, the theft of mail, threats, and property damage. Some owners, petitioners included, as set forth below, challenged the project or the takings within it in federal court. By July 11, 2003, Port Chester had obtained all the land required for the second phase, and began to focus on acquiring properties for the third phase.

After unsuccessfully attracting interest from CVS in the mid-1990's, the partners continued, in a number of other ways, to pursue development of the parcels over the intervening years. These included attempts to locate a six-story office building on Lot 10; a parking lot to accommodate the lessees of five of the partnership parcels and another local businessman/friend from parcel 16; a hotel on some of the parcels; and even a Walgreen's pharmacy.

Then, in 2003, Didden and Bologna were approached by a broker on behalf of CVS. In March, 2003, after negotiations with G & S to

build a pharmacy in downtown Port Chester had broken down, CVS approached Didden through a business broker, Donald Rosen, who indicated that the chain was looking for site locations throughout the country. Conversations were had regarding development of Didden and Bologna's collection of contiguous parcels as a possible CVS pharmacy location. Having previously experienced the rejection of a prime opportunity when notified that CVS had determined that the size of the combined properties inadequately complied with the requirements of its corporate guidelines for store construction, the partners had begun to actively pursue the acquisition of additional parcels in order to enlarge the footprint of their assembled properties. Lots 18 (1996) and 19 (1997)had been previously acquired for such purposes. An agreement[1] was struck with the owner of lot 16 (Fred DeCesare) in December 2003 to sell his parcel to the partnership while moving his business, Village Appliance, further north to partnership lots 20 and 21. The acquisition of lot 16 would allow vehicular access to or from North Main Street and the construction of 10 additional angled parking spaces under one proposal(see Condemnor's W-5, in evidence). After a period of discussions and negotiations, CVS on January 12, 2004 signed a 25-year Ground Lease with the partners (renewable for additional periods of 10 years and, subsequently, 13 years, six months) which contemplated the building of a 12,150 square foot CVS Pharmacy on partnership lots 2, 9, 10, 12, 13, 14, 15, 16, 17, 18, and 19. The earlier purchases of lots 18 and 19 as well as the most recent purchase of lot 16 were vital to the amassing of properties necessary to effectuate the 2004 CVS lease agreement (see site plan, ex. A-1, Ground Lease, Claimant's #4, in evidence).

The partners had already begun, soon after they had been contacted by CVS in July of 2003, to take steps to have the CVS project approved by the Village. Having previously, in 1999, submitted plans for development of a "single-story retail establishment" at the site, Didden was able to amend those plans to add the proposed CVS store, and he resubmitted them to the Village. The Village Board of Trustees approved the plan in the summer of 2003, and the Village Planning Commission granted its preliminary approval in November, 2003.

Given that the properties were already zoned General Business, and that a CVS-type store was therefore permitted as of right, this preliminary approval left no procedural obstacles to development of the parcels. Nevertheless, word came from the Mayor's office

[1] The Court notes that this agreement was contingent on termination of the condemnation proceeding, and de-designation of the lots as part of the Marina Development Plan.

(which according to Didden was confirmed by the Mayor of Port Chester himself) that they would be required to meet with the preferred developer (G&S) prior to further action on the parcels. On November 5th, Didden, Bologna, and their attorney met with the developer, Greg Wasser and his attorney at the offices of G&S Investors, 15 North Main Street. At the meeting, the developer advised the partners that it would require either a payment of $800,000.00, or the awarding of a 50% partnership stake in the project to G&S to permit it to go forward; otherwise, the parcels would be taken by eminent domain.

Didden declined the above-mentioned offer, calling it "extortion", and the meeting was concluded. The following day (November 6, 2003) the Village commenced condemnation proceedings against two of the lots. Petitioner Didden failed to challenge the taking itself, although the condemnation proceeding was adjourned on consent several times. On January 16, 2004, he instead filed an action in U.S. District Court seeking monetary relief pursuant to 42 U.S.C. §1983, and injunctive relief to stay the condemnation proceedings. The District Court found in favor of Port Chester and G&S on all of Didden's seven claims. The finding was upheld in the Second Circuit Court of Appeals, and a writ of certiorari was subsequently denied in the U.S. Supreme Court. In January 2004, Didden also filed an application with the Village to remove the parcels from the Marina Project area (effectively by a zoning change), which application was not successful.

Despite the steps taken by the Village to accomplish the taking, and notwithstanding the ensuing litigation, the partners' efforts to engineer the placement of a CVS drugstore on their properties continued, and final site plan approval was granted in February, 2004.

Didden testified that, in the past, and while the parcels were under common ownership by the partners, egress from the rear of Lots 17, 18, and 19 was permitted onto Lots 9 and 10, although no written agreement to that effect existed. He recalled that a previous fire had led to a re-building of those lots closer to their rear property lines, which required rear exit in that manner, but that the post-taking building on Lot 9 and 10 prevented such exiting, both physically and/or upon threat of being charged with trespassing. Didden's engineer additionally determined that the existing exits are no longer, after the taking, Fire Code-compliant, and that interior fire corridors would need to be built for the premises to be in compliance with the Code. Although an objection to the admission into evidence of anything the engineer may have told Didden and to admission of the engineer's report was sustained, testimony by Didden was permitted (as an admission

against interest by the Village)to show that he had requested and been granted a courtesy visit by the Port Chester Building inspector and that he had reviewed the buildings and concurred with the engineer's assessment of the requirement of an interior fire corridor to bring the buildings into full compliance with Code. In addition, on May 16,2007, the Building Inspector followed up with a letter/report noting the violations on each property (see claimant's Exhibit #13, in evidence).

Finally, the Court would note that a judicial viewing of the subject premises was conducted on July 16, 2009. Present were the claimants, their attorneys, and attorneys representing the Village of Port Chester. The Court finally finds that, prior to and during the time that the parcels were assembled as set forth above, Didden, and Didden and Bologna, permitted the owners and/or occupants of Lots 17, 18, and 19, to exit from the premises on those parcels onto Lots 9 and/or 10, and that, following the taking by the Village of Lots 9, 10, 12, 13, 14, 15, and 16, the owners and/or occupants of Lots 17 and 19 may no longer physically exit the aforementioned premises onto Lots 9 and/or 10, and that the owners and/or occupants of Lot 18 may no longer exit their building without entry upon the Walgreen parking lot located at the rear of the drugstore.

CONCLUSIONS OF LAW

1. The right of an owner to just compensation for property taken from him by eminent domain is one guaranteed by the federal and state constitutions (Federal Constitution, Fourteenth Amendment; N.Y. Constitution, Art. 1, Subd. 7).

2. An Appraisal should be based on the highest and best use of the property even though the owner may not have been utilizing the property to its fullest potential when it was taken by the public authority. (*Matter of Town of Islip,* 49 N.Y.2d 354, 360 (1980); Keator v. *State of New York*, 23 N.Y. 337, 339 (1968); *Chemical* v. *Town of E. Hampton*, 298 AD2d 419,420 (2nd Dept. 2002).

3. The several parcels which are the subject of the taking herein, as well as the several parcels constituting the consequential damages claim, were joined in common ownership by the relationship of Didden and Bologna as partners to develop the parcels into a CVS pharmacy, by Bologna's ownership of some of the parcels, and by Didden's status as president of the several corporations involved as well. Despite previously asserting, in their Petition, that Didden and/or Bologna were the owners of all of the several lots at issue here, the Village now argues that the only support for Didden's assertion that he and Bologna agreed as

equal partners to develop a CVS on the subject parcels, was Didden's trial testimony, and that, even as corporate president, he lacked authority to pursue the development of the parcels. The Village, however, has failed to produce any evidence to the contrary in either respect.

Claimant cites to *Johnson v. State of New York*, 10 AD3d 596, 597-8 (2nd Dept. 2004), a case which involved, like the case at bar, several "...individuals holding title in various combinations to contiguous pieces of real property...", for which taking they together sought compensation. Therein, the Court held:

> There is no dispute that the subject parcels are physically contiguous. The Court of Claims determined that the subject parcels were owned by individuals as to whom there was no basis for finding a unity of ownership. However, there is evidence in the record that the individuals agreed that they would share equally in the expenses, gains, and losses with respect to the subject parcels. We conclude that such joint control over the subject parcels was enough to establish the parties' unity of ownership for valuation purposes…

See also *Erly Realty Dev., Inc. v. State of New York*, 43 A.D.2d 301, 304 (3rd Dept. 1974), cited in *Johnson*, which involved parcels held by a combination of individuals and corporations; the *Erly* Court stressed "close control of one ownership entity by the other is tantamount to actual ownership...."

Condemnor has also urged the Court to find that any oral partnership between Didden and Bologna was not valid for the purpose of the CVS development. Of course, a partnership may be entered into by an oral agreement between parties (*see* Partnership Law, §10). Further, a partnership may be for the sale or purchase of real property for purposes of speculation (*see Blair v. Scimone*, 26 A.D.2d 751 (3rd Dept 1966), citing *Schneider v. Brenner*, 134 Misc 449 (Supreme Court, NY County, 1922). Nor is an oral partnership for the purchase or real property violative of the Statute of Frauds (General Obligations Law §§5-701, 5-703; *see Fairchild v. Fairchild*, 64 N.Y. 471 [1876]), since the real estate interest of each partner is deemed personalty (*Walsh v. Rechler*, 151 A.D.2d 473 [2nd Dept 1989]; *Liffiton v.* DiBlasi, 170 A.D.2d 994 [4th Dept. 1991]; *Johnson v. Johnson*, 111 A.D.2d 1005 [3rd Dept 1985]). Clearly, these parcels, connected as they all are to Didden and Bologna, despite differences in the form of their ownership or

control, display a unity of ownership.

Further, it is not contested that the parcels are contiguous with one another. Finally, the single highest and best use of the several parcels was their assemblage for retail and/or commercial development. In *In re City of New York,* 25 N.Y.2d 146 (1969), the claimants' expert had testified that the vacant property had a highest and best use as the site for a high-rise apartment building, with a value of $3.25 to $3.35 per square foot. The city's expert testified that the land had a highest and best use as a site for one and two-family dwellings, with a value of from $1.50 to $.75 per square foot. Without a written opinion, the trial court awarded the claimants $2.90 a square foot, and the Appellate Division affirmed. The Court of Appeals reversed (25 N.Y.2d 146 at p.149) stating:

> Undoubtedly, the trial court based its award upon a determination that the highest and best use of the premises was as a Mitchell-Lama site....The city's expert gave uncontradicted testimony that an apartment building could be built on the site only if...a subsidy were obtained. Claimants' expert appraiser testified that the highest and best use of the land was for subsidized high-rise apartments. Finally, claimants' attorney characterized the testimony of his three expert witnesses as supporting a highest and best use as a Mitchell-Lama high-rise site.
>
> We have consistently held that a condemnation award should be determined according to the fair market value of the property in its highest and best use (*Keator* v. *State of New York*, 23 N.Y.2d 337, 339 [1968]). Generally fair market value is determined by reference to the sales prices of similar parcels in the area (see *Village of Lawrence* v. *Greenwood*, 300 N.Y. 231 [1949]). In using this method of valuation, the expert witness begins with the sales prices of the comparable parcels and makes adjustments upon them based upon his own experience to arrive at a probable market price for the subject premises for its highest and best use *(Latham Holding Co.* v. *State of New York*, 16 N.Y.2d 41 [1965]). It is likely that the expert would consider the availability of financing, costs of construction, taxes, possible profits and the

> like in arriving at his conclusion concerning the highest and best use of the land, and its probable market price.

4. It is acknowledged that in determining value, the reasonable probability of the development may properly be taken into account (*Matter of Town of Islip*, supra, 360-361). As the Court further stated in *City of New York, supra*:

> However, it must also be established as reasonably probable that the asserted highest and best use could or would have been made of the subject property in the near future. (1 Orgel, Valuation Under Eminent Domain, p. 141.) A use which is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award (*Triple Cities Shopping Center* v. *State of New York*, 26 A.D.2d 744 [3rd Dept. 1966], affd. 22 N.Y.2d 683 [1968]).
>
> We hold that upon a proper showing of probability that a Mitchell-Lama subsidy would have been granted, and upon proof that such a project could or would have been constructed upon the subject premises in the foreseeable future but for the appropriation, there is no reason to prevent the court from finding that this was the highest and best use of the land... Indeed, we have held that a particular best use of condemned property may be the basis of an award even though governmental activity in the form of issuance of zoning variances is required, provided it is established that the granting of such variances was reasonably probable. (25 N.Y.2d 146, quoting *Masten* v. *State of New York*, 11 A.D.2d 370 [3rd Dept. 1960], affd. 9 N.Y.2d 796 [1961]; *Genesee Val. Union Trust Co.* v. *State of New York*, 11 A.D.2d 1081 [4th Dept. 1960], affd. 9 N.Y.2d 795 [1961]; *Yochmowitz* v. *State of New York*, 25 A.D.2d 930 [3rd Dept. 1966], mot. for lv. to app. den. 18 N.Y. 2d 579 [1966]).

Since the Didden/Bologna properties were all located in the Village's C-2 Central Business Zone, and development of the parcels as a CVS pharmacy in such a district was "as of right", and since the partners eventually obtained all necessary approvals, there was

a reasonable probability that the CVS store could or would have been constructed in the foreseeable future but for the taking. Therefore, pursuant to *City of New York, supra*, this Court finds that use of the partnership parcels as an assembled property for development of a large retail store with parking, such as the proposed CVS, was the highest and best use of the land.

5. Claimant's Motion for Sanctions regarding Condemnor's Appraisal Testimony

During the course of cross-examination of condemnor's appraiser Bob Sterling, counsel for claimant inquired of Sterling whether he retained any draft appraisals of the subject properties. Sterling testified in response that he had prepared several drafts of his appraisals for the properties, some of which were shared with the Village and/or their counsel, but that at some point any such drafts were destroyed by him, either in subsequent editing or simply by disposing of them.

As condemnor properly points out, Sterling's ethical obligation pursuant to the Uniform Standards of Professional Appraisal Practice (USPAP) is the retention of written reports, which latter are defined as any communication of an appraisal transmitted to the client at the completion of an assignment. Upon such time as an appraiser such as Sterling forwards a draft appraisal to the client for review, such draft, under USPAP, must be preserved in the file, and must be provided for review of opposing counsel upon the completion of the appraiser's direct testimony.

Claimant asserts here that Sterling conceded that he completed draft appraisals for the client's review--reports (pursuant to USPAP) which he was ethically bound to retain in his file, and produce for cross-examination. Claimant also argues that Sterling was not able to produce copies of such draft reports from his files. To the extent that Sterling failed to comply with his obligations under USPAP to retain such reports, and was thus unable to produce such reports upon conclusion of his direct testimony, claimant's motion for a sanction is granted, and the Court elects to accord an adverse inference with regard to the destruction of prior draft appraisals by Mr. Stirling.

6. Valuation

The Ceiling and the Floor

The Court has found it useful in determining the true value of real property in tax certiorari and eminent domain proceedings to establish a valuation floor and/or ceiling below which and/or above

which this Court may not go, based upon certain well accepted principles.

This Court finds that the Ceiling, based on the claimant's appraisal, the appraiser's trial testimony, and the corresponding market values, and the Floor, based on the actual assessments set by the Respondent Assessor, the condemnor's appraisal, the appraiser's trial testimony, and the corresponding market values, are as follows (Ceiling and Floor, for each claim, in bold):

	Claimant	Assessment	Condemnor
Direct Taking	**$ 3,710,000**	**$ 1,251,046**	$ 1,045,000
Consequential Damages	**$ 430,000**		**$ 0**

a. Direct taking--Sales Comparison Method

Claimant asserts that it was error, as a matter of law, for condemnor's appraiser, Bob Sterling, to value the parcels separately. As set forth above, the Court has found that the claimants assembled the parcels, which it is not contested were and are contiguous, with a unity of use and ownership--they were held jointly by Didden and Bologna as partners, including the single parcel (Lot 16) where the partnership represented the true owner, and by Didden as corporate officer in three corporations, for the sole purpose of development of the property as a CVS Pharmacy.

Condemnor argues that no proper assemblage arose here because of the disparate ownership interests of the parties. Claimant, in response, cites to *Johnson v. State of New York, supra;* indeed Johnson states, as set forth above, that where there is an agreement that parties will

> share equally in the expenses, gains, and losses with respect to the subject parcels....such joint control over the subject parcels [is] enough to establish the parties' unity of ownership for valuation purposes (*see Guptill Holding Corp. v State of New York*, 23 A.D.2d 434, 437 [1965]).

Thus, as claimant properly points out, it was improper for condemnor's appraiser to value the parcels on an individual "as is" basis or for that matter in any form less than an assemblage. His

valuation methodology, therefore, must be rejected.

Claimant's appraiser, Jerome Haims, found that the highest and best use of the property was as an assemblage for retail development (which, in fact, was the claimant's intent), a finding which this Court accepts. However, he then valued the direct taking by using the sales method to establish a present value for the property, upon which he then employed a Discounted Cash Flow (DCF) analysis, by adjusting that price by 2% per year to arrive at a value for the property at the end of the lease term (i.e., the base term plus the two options for extension), which value he then discounted to get a reversion value.

Condemnor argues that this method -- the use of a lease for buildings not-yet-constructed, to support a discounted cash flow analysis -- is the type of capitalization of non-existent stream of revenue whose use was rejected in *Arlen of Nanuet, Inc. v. State*, 26 N.Y.2d 346 (1970). In *Arlen*, as here, the trial court was asked (and there, did) use a lease for a building which had not yet been constructed, as the sole indicia of value for a vacant property. Discussing a previous case, *Levin v. State of New York*, 13 N.Y.2d 87 (1963), the *Arlen* Court stated:

> We agreed with the State's position that such a method [a lease for a building not yet constructed, as also used herein] was impermissible but decided that the record did not support such a hypothesis. More specifically, although we held that executory leases and agreements -- relating to land vacant on the day of the taking -- may be given some weight as enhancing the value of the vacant parcels, we pointedly declared that it would be error to expand the weight of such evidence by treating those leases and contracts as if they represented an income flow already in being.

The *Arlen* Court (26 N.Y.2d, 352-3) went on, then, to note that the trial court in *Levin*

> did not fall into [that] error of valuing the property by capitalizing the net rental income as might have been proper if the building had been completed and rent had commenced....

While claimant cites approvingly to the valuation methodology utilized in *Levin*, as set forth above, *Levin*, and *Arlen* following it, clearly hold that, although such executory leases could be

given **some** weight, using solely an unrealized stream of income to value a premises is improper. Hence, to the extent that Haims relied **solely** on the CVS lease to determine market value for the taking claim, his methodology in that respect must be rejected as well.

Regarding the DCF analysis employed by Haims as the next step in his comparable sales method, such analysis is also flawed as largely speculative, since it is based on an unsupported assumption that the lease will be renewed twice for a total period of nearly 50 years. Claimant argues that the method is customary and accurate, but fails to adequately address the basing of the analysis on the executory contract, on estimated expenses, and on the lease renewal assumption. Upon analysis, the Court agrees that, based upon the aforementioned assumptions as it is, and employing the terms of a contract which was never executed, and for a premises never built, the DCF analysis in particular is faulty and it shall be rejected (see *Erie Blvd. Hydropower, L.P. v. Town of Ephratah Bd. of Assessors*, 9 A.D.3d 540 (3rd Dept. 2004); (see also *Orange and Rockland Utilities et al v. Town of Haverstraw,* 7 Misc. 3d 1017A (Supreme Court, Rockland County, 2006), striking appraisals with DCF holding periods of longer than 10 years; The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001), at p. 570, recommending DCF holding periods of 5 to 15 years.

However, in the course of his DCF direct taking valuation method, Haims did utilize five comparable sales to arrive at a base price per square foot, enabling the Court to conduct its own sales analysis. An examination of these properties indicates that the comparable property most nearly approaching the subject assembled parcels is Haims' Comparable 4, 309 Main Street, New Rochelle, which, coincidentally, is a CVS pharmacy. Haims adjusted this premises (and all his comparables) by 1% per month for time, reflecting his calculation of a market increasing in price at 12% per year. While Sterling asserted that 5% would be the proper adjustment for time in this period, this Court has recently held that the proper adjustment is closer to the former amount. (*See Mavis Tire Supply Corp v. Town of Ossining*, 25 Misc.3d 1231(A) [Supreme Court, Westchester County, 2009], approving of an annual rate of increase in value of 10%). Haims also adjusted this parcel for location (-5%), and size (- 10%), for a total of physical adjustments of 15%.

However, regarding the size adjustment, it is notable that Haims seems to have adopted a negative adjustment when a positive adjustment is actually in order (he is comparing a much larger parcel, subject to economy of size, to a smaller parcel, and thus must add to the value of the comparable to account for the size difference). Furthermore, he has employed the lot size of the

proposed development (35,000 square feet) rather than the actual area of the parcels taken in eminent domain (22,505 square feet). The Court thus adjusts for size by 25%, rather than -10%, which yields an adjusted price of $70.00 per square foot. When added to the cost of demolition ($5.00 per square foot), this in turn yields a final adjusted price of $75.00 per square foot.

The Court also notes that, besides the New Rochelle CVS location, Comparable 5, an automobile lot located at 1324-1412 East Boston Road, Mamaroneck, is in many ways highly comparable with the subject. Only a few miles from the assemblage, Haims adjusted 25% for time, -5% for location, 5% for size, and 5% for access (no demolition charge is required, as no structures are on the premises); the Court, for the reasons noted above, also calculates instead that no size adjustment is appropriate. This yields a final adjusted price of $51.00 per square foot.

While the Court has, as set forth above, also rejected condemnor's appraiser's methodology for his failure to consider the parcels as an assemblage, the Court does note that Sterling did employ a sales methodology, utilizing the same four comparable properties in deriving values for the two parcels --Lots 14 and 15 -- that he appraised separately. While the Court agrees that it would enhance its analysis to employ some or all of these comparables to arrive at a proper value pursuant to the sales method, the failure by Sterling to consider the assemblage of the several parcels involved here, and the small size of these lots in comparison to the subject, means that these comparables may not properly reflect the effect of plottage (that increment of value attributable to the combination of two parcels into one more economically-desirable parcel) gained by the assemblage. It should be noted that Sterling in fact conceded the plottage value of the proposed assemblage in his appraisal of Lots 9 and 10.

Nevertheless, the Court will employ Sterling's sales comparables, properly adjusted for, inter alia, the great differences in size, in its own market analysis together with the above calculations. While Sterling employed the above-mentioned four properties in his initial appraisals, to calculate the market values of Lots 14 and 15, and in his rebuttal appraisal, to value Lots 17, 18, and 19 (the consequential damages claim), he calculated their value per square foot based on the ground floor areas of the premises on those lots. In order to properly compare those properties to Haims' properties, namely by treating the subject wholly as a vacant lot due to the partners' intention to develop it by demolition of the premises present thereon, it is necessary to calculate value instead by land area. The sales prices of Sterling's comparables 1 through 4 were $200,000.00, $270,000.00, $400,000.00, and $340,000.00, respectively. The

unadjusted values, as a function of land area, rather than ground floor area, are thus $78.00, $154.00, $114.00, and $125.00 per square foot, respectively.

The Court accepts all of Sterling's adjustments except for size, due to the above-mentioned disparity in comparable lot sizes utilized by Sterling as compared to the vastly larger subject lot; as suggested by Haims, the Court applies a 25% adjustment to size based on this size disparity. This yields adjusted values of $81.00, $122.00, $104.00, and $85.00 per square foot. To this is applied a demolition cost of $5.00 per square foot per comparable, yielding final adjusted values of $86.00, $127.00, $109.00, and $90.00 per square foot. Taken together with Haims' most nearly comparable properties, whose final adjusted prices the Court calculated above to be $75.00 and $51.00 per square foot respectively, this yields an average value of $90.00 per square foot of land area. Due to the particular characteristics of some of the comparables, the Court elects to employ the amount of $100.00 per square foot as properly representative of market value here. Multiplying this amount by the ground area of the direct taking claim (22,505 square feet) yields a final market value of $2,250,000.00 rounded (r).

That this amount is within the proper range of values for the subject in a market analysis is clear from several checks. Sterling, as set forth in greater detail above, used the same four comparables to arrive at values in his initial appraisals (relating to Lots 14 and 15), and in his rebuttal appraisal (relating to Lots 17, 18, and 19.) In each case, his values are in the range of $135.00, $140.00, and $155.00 per square foot of ground floor area. Applied to the project as contemplated --*i.e.*, the proposed 12,150 square feet of retail area--those rates reflect market values for the CVS store in the range of $1,640,000 (r) at the low end, and $1,883,000 (r) at the high end, or within 20 to 30% of the Court's value.

Further, Haims, as set forth in greater detail below, performed a market analysis as a first step to determining value for the several parcels which are the subject of the consequential damages claim (*i.e.* Lots 17, 18, and 19), employing three comparable properties to reach his value conclusion. Notably, Haims calculated a value of $1,410,000.00 for the slightly-smaller retail area of the much older buildings on Lots 17, 18, and 19. In addition, the Court agrees with Haims, as again detailed below, that the most nearly comparable of these three properties to Lots 17, 18, and 19, and to the direct taking parcels as well, is 163 McLean Avenue, Yonkers. The Court generally agrees with Haims' adjustments, except as to size, since the proper comparison for this analysis is the area of the comparable (6,400 square feet) as

compared with the area of the proposed CVS store (12,150 square feet). The Court thus concludes that a -10 % adjustment for size is appropriate. This adjustment yields a final adjusted value of $179.00 per square foot, which for 12,150 square feet of retail area reflects a value of $2,175,000, again within 10% of the Court's value conclusion of $2,250,000.00.

b. Direct Taking--Income Capitalization Method

As set forth above, Haims' value conclusions were due to his sole employment of the DCF method in his market analysis[2]. Haims employed the DCF analysis, following a market analysis, to utilize the income capitalization method. Insofar as the DCF/income analysis represent the **sole** basis of his income analysis (*see Arlen, supra*), the Court must similarly reject his income conclusions as to value. Nevertheless, so long as the court is cognizant of *Arlen's* warning not to base an income analysis **solely** on executory contracts, Haims methodology is useful for a proper income capitalization analysis, particularly given the income-generating use of the property here. Haims calculated the present value of the cash flow, less the sole expense of a management fee of 1% (all other expenses were to the lessee), under the contract to be $5,501,357.00. He also calculated the property reversion value, based on the current value of $52.00 per square foot, to be $ 135.87, or (for the 35,0000 square feet of area) $4,755,450.00. Subtracting estimated selling expenses, calculated at 3% of value, yields $4,612,787.00. Application of a present value factor (discount rate) of 6% yields a final present value for the property reversion of $265,235.00, and a final present value of cash flow and property reversion of $5,766,592.00, or $5,770,000.00 (r). Given that Lots 9, 10, 12, 13, 14, and 15 contribute only 64.3% of the total assemblage, that represents a value, for those six parcels, of $3,710,000 (r).

Furthermore, Haims conceded in his appraisal to a separate conclusion of present value of cash flow and property reversion value, based on the assumption that the tenant did not exercise either of the two leasehold extensions provided for in the contract. This change yields an amount of $4,830,000.00 which, when adjusted for the percentage of area involved, gives a final value conclusion of $3,105,690.00. or $3,106,000 (r). Mindful of the admonition of *Levin* and *Arlen* that it is improper to base a

[2] It is actually unclear from the testimony, or the appraisal, whether Haims intended to offer separate market and income analyses, since, *inter alia*, he failed to reconcile what appear to be his market and income conclusions.

conclusion of value solely on an executory contract, and since the second analysis eliminates the assumed option exercise, the Court elects to utilize both analyses, and to compute an average DCF value of $3,408,000.00 pursuant to the two income capitalization methods.

It is also instructive that Sterling conducted an income analysis in regards to two of the three parcels -- Lots 14 and 15. The Court notes, as set forth above, that his analysis generally is flawed in at least two ways. First, and predominantly, Sterling failed to consider the assemblage value of all of the properties at issue. It would also appear, however, that Sterling failed to take the issue of condemnation blight into consideration in his valuation, an issue of significance since two of the eleven lease comparables were Port Chester properties, including one at 117 North Main Street, which is within the taking area. Nevertheless, the Court elects to employ the comparable leases Sterling offered for Lot 14 (the Lot 15 comparables are far too dissimilar to the subject) to conduct a separate income capitalization valuation.

Of the leases used by Sterling, the Court recognizes that the two most nearly comparable to the subject lots are 199 Irving Avenue, Port Chester, and 506 Main Street, New Rochelle (Leases 1 and 4, Lot 14.) Lease 1 has an annual gross rent of $17.10 per square foot; applying physical adjustments of 30% (the Court finds the property 20% less desirable than the subject, as opposed to Sterling's 10% adjustment) yields an adjusted net rent of $22.23 per square foot (r). Lease 4 has an annual gross rent of $20.89 per square foot; non-physical adjustments of - 2.5% reduce that to $20.37 per square foot, and physical adjustments of 20% (the Court finds the property 10 % less desirable than the subject, as opposed to Sterling's 0% adjustment) yield an adjusted net rent of $24.50 per square foot (r). The average of these two values is $23.37 per square foot, although the Court, due to the similarity of Lease 4 to the subject, elects to use $24.00 per square foot as the proper value.

Applied to the rental area of 2,500 square feet, this provides a potential gross income of $60,000. A 5% vacancy and collection adjustment ($3,000) gives an effective gross income of $57,000.00. Generally, Sterling's expenses are slightly overestimated -- the professional fees, for example, are projected at $1,500 and are too high by a substantial amount; expenses, including taxes, of $10,000 total give a net income of $47,000. Applying Sterling's capitalization rate of 9.00%, this yields a capitalized value of $522,222, which for the 2,500 square feet of the premises is a value of $210 (r) per square foot. Finally, application of this value to the 12,150 square feet of the CVS project yields a market value, pursuant to the Court's income capitalization method, of

$2,552,000.00 (r).

As set forth above, given the fact that these parcels are and were used to generate income, it is proper to weight a value conclusion by the income capitalization method more heavily than a sales valuation. The Court thus elects to weight its final conclusion on value as follows:

30% for the Court's own income method ($2,552,000.00);
30% for the Court's own sales method ($2,250,000.00);
and 40% for Haims' income method[3] ($3,408,000.00).

This yields a final market value of $2,850,000.00 (r).

7. Consequential Damages

As set forth previously, the Court has determined that both the direct taking and the consequential damages claim parcels, all contiguous to each other, were joined in common ownership by the relationship of Didden and Bologna as partners with each other, the partnership formed to develop the parcels into a CVS pharmacy, as well as by Bologna's personal ownership of some of the parcels, and by Didden's status as president of the corporate owners of the other parcels, and that the single highest and best use of the assemblage was their utilization together for retail and/or commercial development.

Claimants allege that Lots 17, 18, and 19 were damaged by the direct taking by condemnor of Lots 9, 10, 12, 13, 14, and 15. The consequences of the taking, they claim, arise in the change in the manner of exit to the rear from the former parcels. Prior to the assemblage, according to Didden, rear exit from Lots 17, 18, and 19 was permitted onto Lots 9 and 10. That permission was continued when all of the parcels were assembled in the hands of the partnership. Didden now asserts, however, and a judicial view has confirmed, that exit from the rear of 17, 18, and 19 is either hampered or eliminated by the subsequent building of the Walgreen's pharmacy, and or its operation, on Lots 9 and 10. In particular, the Court observed that the rear doors of Lots 17 and 19 were obstructed, making exit through those doors difficult or impossible. The Court also observed that the door from the rear of Lot 18, while not obstructed, exited onto the property now occupied by Walgreen's, specifically into a rear parking lot open to the public. Evidence was also presented, in the form of a letter from

[3] As modified by the Court, averaging his primary DCF conclusion on value of $3,710,000.00 (r) with his alternate DCF conclusion on value of $3,106,000 (r).

the Port Chester Village Building Inspector, that he found the three parcels in violation of the Village Code on May 16, 2007, due to the inability of the lots to utilize the above-mentioned rear doors except to enter onto the Walgreen's property. Finally, Haims' appraisal asserts that remediating the non-compliance would involve construction of a fire corridor in the buildings, which would reduce their interiors by 20%.

Condemnors argue that consequential damages are not available to claimants for two reasons. First, they assert that the taking did not in fact block exiting to the rear of Lots 17, 18, and 19; rather, it was the subsequent construction of the Walgreen's premises that caused that problem. Indeed, they argue, it was not until several years later that rear exit from the properties was affected at all. Nevertheless, the law is clear that, even where the taking leads only eventually to the diminution of access for the remainder parcel, that remainder still has suffered consequential damages from the taking. As stated in *Gengarelly v. Glen Cove Urban Renewal Agency*, 69 A.D.2d 524, 525 (2nd Dept, 1979):

> If the State's appropriation of highway-abutting land (true frontage), or the physical construction of the improvement itself, so impairs access to the remaining property that it can no longer sustain its previous highest and best use, then the State must pay consequential damages to the owner...a suitable means of access must be left an abutting owner or else he is entitled to compensation (*citations omitted*).

In *Gengarelly*, claimant sought consequential damages for construction (of a parking lot which would block access to a loading dock) which had not even occurred yet. In numerous other cases, awards for consequential damages nave been granted and upheld, even where the taking is followed some time later by an improvement that reduces or eliminates the claimant's access. (See *Pollack v. State of New York,* 50 A.D.2d 201 [3rd Dept. 1975], aff'd 41 N.Y.2d 909 [1977]; *Cousin v. State of New York,* 75 Misc.2d 1096 (Ct of Claims 1972], aff'd 42 A.D.2d 1016 [3rd Dept 1973]; *Slepian v. State of New York*, 34 A.D.2d 880 [4th Dept., 1970]; *Red Apple Rest v. State of New York*, 27 A.D.2d 417 [3rd Dept. 1967]; and *Sukiennik v. State of New York*, 56 Misc.2d 148 (Ct of Claims 1966, aff'd no op. 29 A.D.2d 845 [4th Dept. 1968], all of which involve construction subsequent -- sometimes years later -- to the taking, which construction diminished the claimants' access to their properties, and which supported claims for consequential damages.)

In addition, condemnor asserts that, even if one were to

concede that physical obstruction of the rear exits from Lots 17 and 19 occurred as a result of the construction of the Walgreen's, it is also true that rear exit from Lot 18 is not physically prevented; rather, the only chance in circumstances is that rear exit from Lot 18 is now required to be made into a public parking lot adjoining (and behind) the Walgreen's store. Indeed, the Court observed during the judicial view that this was the case at the time of the view -- while exit from Lots 17 and 19 were obstructed, one could indeed exit from the rear of Lot 18 into the aforementioned public parking lot. The Court thus concludes that, while the taking, and the improvements that followed, have undoubtedly made exit from the rear of Lots 17 and 19 impossible or nearly so, it has merely meant that exit from the rear of Lot 18 is through a public parking lot to Abendroth Street.

Since the Village Building Code requires rear exit capability for the buildings on Lots 17 and 19 as they now exist, and such exit from Lots 17 and 19 is no longer available, those premises are now in violation of the Village Code, front exits thereto notwithstanding. The owners of Lots 17 and 19, therefore, have been consequentially damaged by the reduction in access caused by the taking.

As set forth above, Haims' appraisal calculated the "before" taking value of these parcels by the use of three comparables -- 823-25 White Plains Road, Scarsdale; 163 McLean Avenue, Yonkers; and 30-40 Westchester Avenue, White Plains. As also set forth above, Sterling used four sales in his market analysis for the "before" taking value -- 20 Broad Street, Port Chester; 526 Main Street, New Rochelle; 123 Wolf's Lane, Pelham; and 468 North Avenue, New Rochelle. The seven properties are similar in adjusted prices, with values of $168.91, $202.30, $32.62, $110.00, $147.00, $161.00, and $128.00 per square foot, for an average value of $150.00 per square foot. In the Court's consideration, the most nearly comparable of the properties is (as set forth above) the McLean Avenue site; the Court thus adopts a value slightly above the stated average, $165.00 per square foot. Multiplied by Sterling's total retail area of Lots 17 and 19 (2,610 and 2,100 square feet, respectively, totaling 4,710 square feet) yields a market value of $777,150.00 for the two parcels -- $430,650.00 for Lot 17, and $346,500.00 for Lot 19 -- which total amount the Court adopts as the "before" taking market valuation.

Sterling merely asserts that no part of Lots 17, 18, and 19 were taken at any time, hence no consequential damages accrued from the taking, and thus he made no "after" calculation. As set forth above, however, Haims performed an "after" taking analysis, adjusting the three comparables for the reduction of access due to the lack of a rear exit for the three lots, which deficiency also

violates the Village Code. As set forth above, due to the ability to exit Lot 18 from the rear and into a public parking lot, the Court will consider only the diminution in value to Lots 17 and 19 from the blocked rear exits to those two lots. Haims' adjustments, -20%, -25%, and -20% respectively, yielded values of $84.40 , $142.80, and $104.45 per square foot, or an average $111.00 per square foot (r). Adjusting Sterling's comparables in the same way -- by a -20% adjustment for each premises -- yields adjusted prices of $86.00, $115.00, $126.00, and $100.00 per square foot, which, when averaged with Haims' comparable properties, yields a value of $109.00 per square foot. Due to the comparability advantage of the McLean Avenue site, the Court again elects to employ a value slightly above the average, $120.00 per square foot. Multiplied again by Sterling's total retail area of Lots 17 and 19 -- 4,710 square feet--yields a market value of $565,200.00 for the two parcels -- $313,200.00 for Lot 17, and $252,000.00 for Lot 19 -- which total amount the Court adopts as the "after" taking market valuation. The difference between the pre- and post-taking values -- $212,000.00 (r) -- for Lots 17 and 19 represents the consequential damages due as a result of the taking.

8. Claimants Domenick D. Bologna, Bart A. Didden, Opus 113 Corp., Paullac 115 Realty Corp., and 117 North Main Street Corp., are therefore awarded the calculated cost of the loss from the direct taking, namely the amount of $2,850,000.00, together with the calculated cost of the loss from consequential damages, namely $212,000.00, for a total of $3,062,000.00, with interest thereon from the date of the taking, April 24, 2004, less any amounts previously paid, together with costs and allowances as provided by law.

CONCLUSION

Upon the foregoing papers, and the trial held before this Court on May 7, 8, and 9; October 16, 17, and 29; November 5; and December 17, 2008, it is hereby

ORDERED, that the claim by claimant for compensation for a taking conducted by the Village herein, pursuant to EDPL Article 5, is hereby granted; and it is further

ORDERED, that petitioner Village shall pay as compensation to claimants the amount of $3,062,000.00, with interest thereon from the date of the taking, April 21, 2004, less any amounts previously paid[4], together with costs and allowances as provided by law.

[4] The Court has been advised that advance payments were made for Lots 9, 10, 12, and 13 (in the total amount of $250,000.00); Lot 14 ($340,000.00); and

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
April 2, 2010

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HON. JOHN R. LA CAVA, J.S.C.

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Lot 15 ($385,000.00), for a total, for the six lots of the direct taking claim, of $975,000.00.