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 ROCKLAND

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In the Matter of the Application of the THE VILLAGE OF HAVERSTRAW, to acquire certain real property located in the Village of Haverstraw, Rockland County, State of New York, and Designated on the Tax Map of the Village of Haverstraw as Section 27.18, Block 1, Lot 1.

DECISION/ ORDER/JUDGMENT

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AAA ELECTRICIANS, INC.

Index No: 6169/03

Claimant,

-against -

VILLAGE OF HAVERSTRAW,

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 Haverstraw (Village, Haverstraw, or Condemnor) of the real property taken by them in Eminent Domain from AAA Electricians, Inc. (AAA or Clamiants)took place before this Court on March 10, 19, and 20; April 28, and 29, and May 5 and 6, 2009. The following post-trial papers numbered 1 to 6 were considered in connection with the trial of this matter:

PAPERS	NUMBERED
AAA ELECTRICIANS PRE-TRIAL MEMORANDUM/EXHIBIT	1
VILLAGE PRE-TRIAL MEMORANDUM	2
AAA ELECTRICIANS POST-TRIAL MEMORANDUM/EXHIBIT	3
VILLAGE POST-TRIAL MEMORANDUM	4
AAA ELECTRICIANS POST-TRIAL REPLY MEMORANDUM/EXHIBIT	5

The subject property in this EDPL Article 5 claim is located at 183 West Street, Village of Haverstraw, County of Rockland, State of New York, and is identified as Section 27.18, Block 1, Lot 1 on the Tax Map for the Village. The subject property was taken in eminent domain by Order of this Court (Rosato, J.) dated November 14, 2003. Prior to title vesting, the subject property was owned in fee by AAA Electricians, Inc. Prior to this action, AAA Electricians, Inc. ("Claimant") accepted the Condemnor's downwardly revised offer for the taking of $2,596,150. Claimants now bring an action to recover additional damages incurred as a result of the condemnation.

It should be noted that the parties and the Court have previously conducted a site visit to the subject property. Claimant's property consists of approximately 18.9 acres, of which about 0.5 acres is underwater. In general, the subject property is level, except for a relatively small portion that slopes downward along the western edge. The subject property has approximately three hundred feet of direct frontage along the Hudson River. In addition, on the north side of the property, some frontage abuts a narrow inlet which flows westerly from the river. Furthermore, much of the subject property's eastern boundary abuts a narrow, irregularly shaped vacant upland parcel owned by Tilcon Minerals, Inc. This parcel is directly adjacent to the Hudson River. Due to its configuration and topography, Tilcon's upland parcel is not developed, which allows for the subject property to have unobstructed, expansive views of the Hudson River. Tilcon maintains a large rock-crushing operation on another property located immediately south of and adjacent to AAA's property. To the immediate west of the subject property is Haverstraw Transit, a school bus company, and beyond that, further to the west, is High Tor Mountain. To the north of the subject property, across the inlet, are village-owned industrial properties.

Access to the subject property is limited almost exclusively to vehicular traffic, with a single winding dirt driveway providing the sole entry. However, adjacent to the subject property, immediately across the inlet and within walking distance, is a dock which is actively utilized by a ferry service. The ferry provides transportation to and from the MTA/Metro-North train station located across the Hudson River in Ossining. In addition, municipal utilities such as sewerage and electrical service are available to the subject property.

AAA's property enjoys and is encumbered by several easements. One easement, consisting of a 0.08 acre four-sided parcel which abuts the inlet on the North side of the property, may be used for ingress and egress and for access to the Hudson River. This easement provides the only known direct access into the Hudson River. The subject property is also encumbered by an easement of necessity for ingress and egress over a northerly portion of the subject property. The purpose of the latter easement is to facilitate the maintenance of operations for the

removal of clay from the land under water.

At the time of title vesting, November 14, 2003, the subject property was vacant, and had been vacant for at least the previous 10 years. Parts of the parcel contained remnants of a once operational brick-manufacturing factory. These remnants consisted largely of numerous concrete slabs, along with a concrete bulkhead along the northeast corner of the property adjacent to the River.

FINDINGS OF FACT

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:

Claimant's first witness was Terry Rice, an attorney whose practice involves numerous zoning matters. Rice was formerly Village Attorney for the Village of Suffern, and has taught and written on zoning issues. He has been in the past, and was so recognized by this Court in the instant matter, as an expert on zoning issues. Rice acknowledged that the zoning on the subject parcel at the time of vesting was Waterfront Development ("WD"), which permits, as of right, only waterfront related uses. Based on an examination of the subject premises, and the Haverstraw Village zoning code, Rice's opinion was that the WD zoning classification permitted residential development of the property. As residential development is a permitted use under WD zoning, an applicant, seeking to build multi-family residential units, need only seek a special permit from the Zoning Board of Appeals, and pursue site plan approval and, if necessary, architectural approval, rather than seeking a zoning change to permit such development. The criteria for such a permitted use is somewhat general, according to Rice, with the Board simply conducting a public hearing on the application and voting on it. In Rice's expert opinion, based on State and local zoning law, the burden is on opponents of permitted uses, to show a significant negative impact from such development. As such, and given that such a use (multi-family residential) was already contemplated by the existing zoning as a permitted use, it was, in Rice's opinion, a "virtual certainty" that such an application for a special permit would be granted by the Board. The review process, prior to approval, would take approximately one year.

Rice also testified that he examined the drawing of the proposed development prepared by claimant's engineer, Brian Brooker. Rice stated that Brooker's proposed development could be built on the subject parcel, since the number of units proposed was less than the maximum allowed by the Village zoning

law. He also was of the opinion that the plan complied with bulk requirements, since the maximum area of coverage of the premises as proposed was significantly less than the maximum area permitted for development. In addition, not only was the property essentially flat, but the plan also provided for sufficient parking as well. The specifics of Brooker's plan thus confirmed, for Rice, his initial opinion - that a special permit for claimant's proposed multi-unit housing development would be granted in a timely manner.

Claimant next called Brian Brooker to testify as an expert in the field of civil engineering. Brooker is an experienced residential and commercial land developer, and serves as the municipal engineer for several municipalities, including the Village of Haverstraw. He testified that, generally, to secure permission for the development of parcels like that proposed for the subject property, one is required to submit a special permit application, a site development plan application, and the plans themselves for review by the municipality. Brooker, in preparing his plan, insured that the plan conformed with code requirements. He concluded that the code would support a plan for 346 residential units, and that such plan would fully comply with bulk, parking, and other code requirements.

Claimant's appraisal expert, Robert von Ancken, testified that, in his opinion, the subject parcel was unique among properties located on the Hudson River. Because of its substantial size (18.9 acres), excellent location, superb views, and sewer and road access, it was his opinion that the highest and best use of the parcel was for development of condominium apartments. In fact, he was of the opinion that, since there were no special requirements that needed to be complied with in this case, a special permit sought for such use would be granted essentially as of right by the municipality. The value of the subject would, in Von Ancken's opinion, be significant, considering the very high demand that existed for waterfront residential land (it was his opinion that proximity to the water would double the price of such a lot), and that the Brooker plan already complied with the then-current municipal zoning requirements.

It was Von Ancken's opinion that, as vacant land, the proper method of valuing the parcel was by the market approach, and more specifically by arriving at a per-unit value for the development based on the nature of the housing (multi-residential) planned. This is because developers of such housing purchase land based on the number of units which can be placed on the property. However, due to the extreme shortage of developable land along

the Hudson River, Von Ancken was able to locate only one property he considered directly comparable, the Icabod's Landing parcel in Sleepy Hollow that, he noted, was reduced in value somewhat due to its proximity to a contaminated site. He admitted that this site, and his other, non-waterfront comparable properties, required extensive adjustments relative to the subject. Like the subject, the five comparable sales utilized by Von Ancken were vacant properties purchased for multi-family residential development. Two of the properties(one of which was waterfront) were purchases by Martin Ginsberg, the developer of the project eventually built on the subject. Von Ancken calculated a value of $47,000 per residential unit from his comparables. When that value was multiplied by the number of units (346) which could be built pursuant to the Brooker plan, his total value conclusion for the subject was $16,300,000.00.

Von Ancken was cross-examined extensively on the economic feasability of building the Brooker project on the subject. For example, he conceded on questioning that, while his opinion was that there was demand for residential development on both sides of the Hudson River, he had no actual data reflecting any such demand in the Village of Haverstraw. Nor did he conduct any studies of multi-family residences in the Village, and his own appraisal demonstrated that only two permits had been issued for such housing in the Village in the four years prior to the taking, and that a steep decline in town permits issued for such housing(from 135 to 0) occurred during that same period. Cross-examination also included introduction of two newspaper articles relating to the subject and the surrounding area. The first, quoting developer Ginsburg, included discussion of the pressure for new housing near the Hudson, the nearby commuter ferry service with rail connection, and the positive future expected for the municipality. The second article discussed municipal improvements in downtown Haverstraw.

Von Ancken asserted that all details relating to his comparable sales were confirmed, and that all properties were appraised at market value. Indeed, during cross-examination, he arrived at a slightly higher value for several of the comparable properties for various reasons including the financing involved or the actual number of units eventually constructed. These adjustments resulted in a narrower spread in his range of values. Von Ancken also testified that he discounted the undesirability of the Tilcon industrial and the school bus depot parcels adjacent to the subject, opining that they were neither close to nor easily viewed from the subject, and that the view of the former was, in any event, obstructed by a berm. Thus, in his opinion, neither parcel's proximity significantly impacted the

value of the subject.

The Village called, as its expert on valuation, Bob Sterling. Sterling testified that the only "of right" uses of the property, zoned WD (Waterfront Development) as it was, were waterfront-related uses, including boat launching and docking, recreational, fishing, and maritime uses, including maritime related educational, cultural, and scientific uses. He rejected these types of uses as highest and best for the premises because he found no evidence that there was a market demand for such uses. He likewise rejected use of the property for ferry service due to its limited river access, and the fact that such a use already existed immediately to the north of the subject. He also felt that the location was "too obscure" for new commercial or restaurant development.

While Sterling conceded that WD zoning permitted other uses, including multi family residential development, by special permit, he also rejected such a use as the highest and best for the subject property for several reasons. First, Sterling testified, he found, from a study of 61 residential sales in the Village in the one year from September 1, 2002 to August 31, 2003, that Haverstraw's median sale price was $200,000.00, which was too low to justify the construction of either sale or rental multi-dwelling housing at market rates. Further, based on the nature of the surrounding properties, including, for example, industrial uses such as Tilcon and commercial uses such as the bus garage, such housing would not conform to the other uses in the area. In addition, no luxury housing units or developments were present or even under development in the Village at the time of the taking. Finally, Sterling was of the opinion that access to the premises would be considered undesirable since such could be achieved solely by way of traversing two railroad grade crossings. Based on the status of the subject premises, namely that it was vacant industrial land on the vesting date and had been such for at least 10 years previously, and that there was a significant demand for light industrial uses in Rockland County on the vesting date, Sterling concluded that the highest and best use for the property was light industrial use.

Having established the highest and best use, to determine value before "demolition and cleanup" (see p.7), Sterling then employed the market approach. Sterling relied solely on the sales of seven vacant industrial and/or commercial properties located in Rockland County, all of which were already zoned to permit industrial, manufacturing, or laboratory office uses, and all of which possessed utilities at the times of the sales. Five of these seven were similar in size to the subject's 18.9 acres,

with two of the five being less than 1/3 smaller, one of them about 20% larger, and the remaining two less than 75% larger than the subject. Since the taken parcel was vacant, according to Sterling, he compared it and the comparable properties on a per acre basis. The unadjusted sales prices of the comparables in Sterling's analysis ranged from $50,676 to $134,146. To those, he made minimal intangible adjustments (in fact, adjusting each property 10% for market conditions alone), but significant physical adjustments (ranging from -30% to 20%). The adjusted prices of his comparable properties ranged from $54,134 to $115,062 per acre, which yielded an average of $85,006 and a median of $77,689. From this, Sterling concluded a value of $80,000 per acre, which for the 18.9 acres resulted in a value of $1,512,000, which Sterling then rounded to $1,500,000.

Sterling, however, did note a significant difference between the subject parcel and his comparable properties. While all of his comparables were vacant, and did not contain any items thereon which would hinder development, the subject contained a significant number of concrete pads (left over from the former industrial use), which would have hindered development of the subject. Thus, in order to make a proper comparison of the subject and the comparables, Sterling calculated that, to permit proper development, the cost of removal ("demolition and clean-up") of the industrial remnants would be $500,000. He then subtracted that cost from the previously-calculated value of $1,500,000, to arrive at a conclusion of value after demolition and clean-up of $1,000,000.

Claimant objected to the latter testimony by Sterling, arguing that, as an appraiser and not an engineer, architect, or builder, he was not qualified to render an opinion as to demolition costs. Claimant also argued that the cost estimate of $500,000 attributed to the clean-up of the concrete by Sterling was based on the bills and records of the Ginsburg Development Company (Ginsburg), attached to his appraisal, yet Sterling was unable to lay the proper foundation for the admission of those records. Claimant argued that the costs reflected in the Ginsburg records were not properly substantiated at trial when Ginsburg's employee, called as a witness to lay the foundation for their admission, admitted that he was not familiar with the purchases or work contained in the records. In short, claimant argued that Sterling's appraisal was defective insofar as it relied on unsubstantiated clean-up costs to justify a deduction of $500,000 from his estimation of value.

Sterling was also questioned by counsel for claimant about the preparation of his appraisal. In particular, Sterling was

questioned about whether he had actually only inspected the property one time for two hours, and whether he had prepared an appraisal without making a single note of that inspection, and while maintaining a file on the matter that was essentially empty. Sterling was also questioned about the existence of any prior or draft appraisals that may have been delivered to counsel representing the Village in the instant condemnation proceeding. He could not recall any such prior reports, but conceded that it was likely that he had submitted a draft report, that counsel for condemnor had likely commented on the report, and that Sterling had likely revised his report based on the comments of counsel. Sterling was unable to locate any such prior draft, asserting that it, like prior appraisals or draft reports produced in other cases, was, in all likelihood, routinely destroyed. Nor was Sterling able to locate or produce any comments by counsel that may have been made with regard to such draft report.

Claimant also questioned Sterling about alleged errors in his appraisal report. For example, in discussing the detrimental impact of the industrial Tilcon property to the south of the subject, Sterling asserted that the site operated 24 hour per day, seven days per week. Sterling, however, was then asked by claimant whether he was aware that Tilcon was closed two days each week, and that a municipal code precluded quarry operations at the site between 11:00 p.m. and 6:00 a.m. daily. Further, as noted above, Sterling discussed in his direct testimony the access problem caused by train traffic, and the requirement of traversing two railroad grade crossings which encumbered the sole entry route. On cross-examination, however, he admitted that he could not recall the number of trains that he observed on his only visit to the subject. Sterling's appraisal also noted that nearly 1/3 of the subject is located in a flood zone, which fact caused him to make negative adjustments in his analysis, but upon introduction of a FEMA flood map on cross-examination, he conceded that none of the subject was in fact in a flood zone.

Sterling was also questioned as to why he had adjusted negatively for the presence of easements on the subject, even though he could not adequately attribute the existence of those easements to any other property owner. And claimant also questioned Sterling's claim of obstruction and his consequent dismissal of the availability (for viewing) of river frontage to the east, when it was clear that the owner of the parcel to the east (Tilcon) could make no use of the narrow, irregular parcel that might obstruct, in any meaningful way, the views in that direction from the subject. Claimant also questioned why Sterling had arrived at a median sales price of $200,000.00 from his study of 61 residential sales in the Village between 2002 and

2003, without visiting a single one of those 61 properties, and, instead, relying on sales data for the study to find highest and best use, without an analysis of whether any of the sales had river views, or even their proximity to the subject.

Finally, condemnor introduced evidence (namely, petitions) of several Village RPTL Article 7 tax certiorari proceedings, relating to the subject for tax years 1994 through and including 1999, and 2001, and also Haverstraw Town proceedings for 1994, 1995, 1997, and 1998. Condemnor noted that, for the Town petitions relating to tax years 1997 through and including 1999, and the Village petition relating to 1998, claimant alleged that the full value of the subject property was $500,000.00. Claimant also asserted in the 2001 petition relating to the Town that the full value of the property was $1,000,000.00. These petitions and proceedings were concluded by stipulations of settlement agreed-to by claimant and the taxing authorities, with those parties settling on assessments of $143,640, and $216,720 (for the Town and the Village, respectively), equating to a full market value for both municipalities of $1,200,000.00.

CONCLUSIONS OF LAW

The Court makes the following 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. 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 *In re City of New York,* 25 N.Y.2d 146, 149 (1969):

> 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]).

Here, the subject property was located in the Village's WD Zone. According to the uncontested testimony of both petitioner's zoning expert, Terry Rice, and petitioner's engineering expert, the planned development (as set forth in greater detail above) could have been constructed in the WD zone "as of right", and there was a reasonable probability that multiple-residence housing such as that proposed in the Brooker plan 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 parcel for development of a large multi-unit housing complex with parking, such as that proposed by claimant, was one possible highest and best use of the land.

4. 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. Sterling.

5. Highest and Best Use

In *In re City of New York, supra,* the Court also stated:

> 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]).

The appraisers herein did not agree as to the highest and best use of the property. As condemnor properly points out, the burden of proof is on the claimant to demonstrate that the

highest and best use asserted is a reasonable probability as of the date of the title vesting. (*ITT Realty Corp. V. State*, 120 A.D.2d 706 [2nd Dept. 1986].) Here, claimant presented extensive, expert proof on the feasibility of obtaining a special permit to allow a multi-dwelling residential project on the premises; expert testimony that the planned development was fully compliant with existing municipal bulk, parking, and other code requirements; and its appraiser's opinion that, under all of the attendant circumstances, and in light of several similar and proximate comparable properties, there was a reasonable probability of sufficient sales of dwelling units as to render it economically feasible to build such a project on the subject property. Consequently, claimants met their initial burden of demonstrating that the highest and best use of the property was for residential development.

In contrast, condemnor failed to present any expert proof that a special permit for the planned development was unlikely to be issued. Further, although arguing that "light industrial" was the highest and best use, Sterling agreed when questioned that residential use would be more profitable for a developer than the industrial use he proposed; in fact, he actually made adjustments during his value calculations to account for residential use of the properties. He also agreed that the subject property, by size and location, was unique, and that he was not aware of a single recent use of a waterfront property such as the subject for industrial purposes.

The criteria deemed most relevant by Sterling in arriving at his highest and best use (light industrial development) was that the property was in a largely (though not solely) industrial area; that the housing stock in the Village was older, smaller, and valued at a lower amount; that there were no luxury housing developments existing or planned in the Village; that access was a problem due to the railroad grade crossings; and that the property had limited actual frontage on the Hudson River due to the slim Tilcon parcel to the east of the subject. However, as claimant accurately points out, Sterling did not give any consideration to other waterfront residential parcels as comparables; he was inaccurate in his description of the access challenges posed by the railroad, exaggerating the frequency of railroad trains traversing the crossing; he overstated the potential effect of the Tilcon parcel in obstructing river views and access from the subject; he insufficiently considered the potential from waterfront residential development of the subject against the largely industrial character of the area adjacent to it; he inspected none of the properties whose values he relied on to conclude that the likely sales price for housing stock in the

Village was too low to support a high-price residential development such as that planned for the subject; he limited the search for such properties to the Village only, instead of extending it to the Town of Haverstraw or even elsewhere in Rockland County; and he gave too much importance to the minimal housing development taking place in the Village on the date of taking. The Court thus rejects his methodology on this issue. *(See Gyrodyne v. State of New York*, [Ct of Claims, Lack, J., June 21, 2010], *aff'd*, 2011 NY Slip Op 08562 [2nd Dept., November 22, 2011]).

Both appraisers sought to determine the highest and best use of the parcel by examining whether the proposed use was physically possible, legally permissible, economically feasible and maximally productive. The expert testimony adduced is that, based on the accessibility of the parcel, its generally level topography and its significant size - 18.9 acres - the proposal to build multi-dwelling residential units was physically possible at the subject location. Further, the grant of a special permit for residential development was deemed likely, given the expert testimony that the plan met the Village's bulk, parking, and other requirements; there was testimony that there was a significant likelihood that sales of the proposed dwelling units would be such that the project would be economically profitable; and the project was deemed to be a productive use of the subject. Consequently, the Court concludes, based on the expert testimony and other evidence presented, that claimant met its burden of demonstrating the reasonable probability of its proposed highest and best use, as a multi-family residential housing development, as of the date of the title vesting. (*C.f. Gyrodyne, supra*.)

6. Valuation

a. Condemnor's Appraiser's Methodology

As set forth above, Condemnor's appraiser, Bob Sterling, erroneously selected light industrial as the highest and best use of the property. Claimant contends that Sterling's comparables, as industrial uses, cannot be adjusted to residential uses, and in fact Sterling conceded this point when cross-examined, agreeing that his comparables could not be used in a residential analysis. Having determined that Sterling's methodology was in error to the extent that it chose light industrial as the highest and best use, and since he conceded that his comparables could not be used in an analysis for a residential highest and best use, the Court elects to base its analysis solely on claimant's appraiser's methodology, particularly his comparable properties.

b. 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, their appraiser's trial testimony, and the corresponding market values, and the Floor, based on the pre-vesting offer[1] and the actual assessments set by the Respondent Assessor in a compromise with claimant of several tax certiorari petitions, and the corresponding market values, are as follows:

Claimant's Value	Pre-Vesting Offer	Assessment	Condemnor's value
$ 16,300,000	**$ 2,596,150**	**$ 1,200,000**	**$ 1,000,000**

c. Calculation of value "per acre" versus "per unit"

Claimant's appraiser chose to value the subject as per each unit of multi-family residential housing proposed in the aforementioned Brooker plan. Condemnor's appraiser, however, chose to value the subject as per the number of acres contained therin. Condemnor now asserts that its chosen method of valuation is appropriate, citing to this Court's decision in *In the Matter of the Application of Baj v. The Assessor of the Town of Goshen*, (Supreme Court, Orange County, La Cava, J., June 3, 2008.) In *Baj*, petitioner arrived at a valuation for the subject parcel through an analysis of comparable properties with respect to the number of acres they contained (i.e. on a "per acre" basis.) Respondent, however, employed an analysis based upon each residential unit, by assuming full approval of the planned residential development (and the number of units planned) for all of the affected tax years. In actuality, for the first two of the affected years in *Baj* the plan had no approvals whatsoever, and even for the third year it had only partial approval of the development. In assessing respondent's proof of value, given no or only partial approvals, on a per unit basis, rather than on a per acre basis, this Court noted

[1]Based on the below analysis, the Court need not decide whether the Floor should consist of the initial pre-vesting offer or the revised offer.

> Petitioner has also argued, on a related point, that in incorrectly treating the subject as fully approved, Griffin also erred in analyzing the subject property and comparable sales by housing units rather than in acres as petitioner did. Indeed, absent final approval, any attribution of a unit count to the subject would be, at best, speculative. The Court concurs, and rejects Griffin's methodology insofar as it sought to value the subject parcel in light of housing units attributable to the parcel.

As set forth in greater detail above, claimant's zoning expert, Terry Rice, testified that, in his opinion, the WD zoning classification for the subject already permitted residential development, and therefore a plan for multi-family residential units need only seek a special permit (from the Zoning Board of Appeals), site plan approval, and, possibly, architectural approval, rather than a zoning change, to pursue development of such a project. According to Rice, based on his knowledge of State and local zoning law, the burden is on an opponent of an already permitted use, to show a significant negative impact would result from such development. Further, relating to the Brooker plan specifically, Rice was of the opinion that the plan could be built on the subject parcel, since the number of units proposed was less than the maximum allowed by the Village zoning law; since the plan complied with Village bulk requirements; since the maximum area of coverage as proposed was far less than the maximum area permitted for development; and since the plan provided for sufficient parking. Thus, it was Rice's opinion that it was a "virtual certainty" that an application for a special permit would be granted by the Board.

Nevertheless, and despite claimants' expert's opinion that the Brooker plan would have been approved if it were submitted, the fact is that the Brooker plan was not submitted to the Village for approval prior to the vesting date. As such, it is sheer speculation to assert that the plan as proposed would not only have been approved, but would have been approved by the Village in its then-current form, i.e. without any changes whatsoever, particularly as to the number of units permitted. As such, and as set forth in *Baj*, the Court declines to approve of valuation of the subject on a per unit basis, as pure speculation, and instead approves of such evaluation on a per acre basis. (*C.f. Matter of Village of Dobbs Ferry v. Stanley Avenue Properties*, 29 Misc. 3d. 1205 [A] [Supreme Court, Westchester County, 2010] - valuation by units proper, where extensive steps had been taken to secure approvals; where the Court found a likelihood that the number of units proposed would

have been approved; and where condemnor failed to present any authority to support a contrary holding.)

d. Sales Comparison Method Generally

As set forth previously, the Court has found it necessary to reject condemnor's appraisers' valuation method due to its reliance solely on an incorrect highest and best use, namely that the property was light industrial. Furthermore, as set forth in greater detail above, Sterling conceded during his testimony that his comparables were also light industrial parcels, that they could not be adjusted sufficiently for use as comparables in an analysis of residential properties, and thus his comparables can not be used further by the Court in its own analysis based on multi-unit residential use as the highest and best use of the premises. While claimant's appraiser, Robert von Ancken, did correctly conclude that the highest and best use of the subject was for a multi-unit residential development, and thus all of his comparables are devoted to that use, the Court finds that, based on von Ancken's testimony and the Court's own analysis, that claimant's comparables were not sufficiently adjusted to the subject property by von Ancken in his analysis. Nevertheless, the Court can and will employ those comparables, properly adjusted, to arrive at a proper value for the subject.

In arriving at a value for the subject parcel, von Ancken offered five comparable properties, three in Rockland County (Crystal Ridge, also located in the Town of Haverstraw, Pulte Homes in Airmont, and Hidden Ridge in Nanuet), Harriman Glen in Monroe in neighboring Orange County, and the final one, Icabod's Landing, a waterfront parcel on the east side of the Hudson River in Sleepy Hollow in Westchester County. Only the Airmont property was a similar size to the subject (at approximately 15 acres); two comparables were considerably larger at 44.0 acres or more, and two were somewhat smaller (at approximately 5 and 7 acres). All but the Airmont parcel had compatible zoning for multi-family residential development, and such use was the planned redevelopment use of each of those sites. The total sales prices ranged from $1,148,000 for the Nanuet parcel to $8,500,000 for the Monroe parcel and from $119,642 per acre for the Haverstraw parcel to $423,077 for the Sleepy Hollow property. The earliest sale was the Haverstraw parcel at 55 months pre-taking, while the nearest sale in time was that of the Monroe comparable, 8 months before the title vesting date.

Von Ancken first adjusted the comparable properties for the period between they were sold and the date of taking. In adjusting for time, von Ancken's appraisal considered Harriman

Glen, Hidden Ridge, and Icabod's Landing (sales eight, ten, and 15 months before the vesting date) as appreciating 1% per month, while Pulte Homes and Crystal Hill, 26 and 55 months pre-vesting, appreciated 22% and 52% respectively. However, during cross-examination, von Ancken conceded that, due to actual market factors in the municipalities in which the last three properties were located, adjustments of 10%, 7%, and 30% were actually more appropriate. The Court, based on the testimony and evidence presented, calculates as the proper time adjustment for these five parcels 8%, 10%, 10%, 7%, and 30%. Von Ancken had already calculated per acre prices for each of the properties; adjusting these figures yields the following:

	Harriman Glen	Hidden Ridge	Icabod's Landing	Pulte Homes	Crystal Hill
Sale Price per acre	$193,182	$156,978	$423,077	$289,494	$119,642
Time Adjustment	8%	10%	10%	7%	30%
Time Adjusted Sale Price per acre	$208,637	$172,676	$465,386	$309,759	$155,535

As a general matter relating to all of the comparables except Icabod's Landing, the Court notes that von Ancken testified that the desirability of a waterfront location is such, that properties fronting on the water command a premium of 50% over properties without such a location. However, nowhere in his testimony, nor in his appraisal, did von Ancken offer any data, statistics, or other evidence to substantiate such a variance in valuation. In fact, the only statistics offered in his appraisal are the offering prices of Harbors at Haverstraw, the development built on the subject after the taking, and the prices quoted therein show only a 30% variance between waterfront and non-waterfront properties. While the Court recognizes the obvious existence of valuation differences between waterfront and non-waterfront properties, in the absence of proof to support his opinion that the value of waterfront property exceeds that of non-waterfront property by 50%, and with the only proof of variation in value being a 30% difference in offering prices between such locations, the Court rejects von Ancken's opinion of

a 50% difference in value between the two as unfounded, and instead accepts the variance reflected in the offering prices of such properties in Harbors at Haverstraw, namely 30%.

Von Ancken then proceeded to make other adjustments to his comparable properties, as follows:

	Harriman Glen	Hidden Ridge	Icabod's Landing	Pulte Homes	Crystal Hill
Location	20%	20%	- 15%	-	-
River frontage	50%	50%	-	50%	50%
Size	- 5%	- 10%	- 10%	- 5%	-
Configur-ation/ topography	10%	-	-	-	2%
Zoning	- 20%	-	-	5%	-
Net Adj.	55%	60%	- 25%	50%	70%

The Court, as set forth in greater detail above, has determined generally that the adjustment employed by von Ancken for "river frontage"--is not supported by the record, and thus that the appropriate adjustment for "river frontage" should be the amount which is supported (30%). Further, the Court notes what may have been an error by von Ancken in compiling his data - the similarly sized (44.0 acres and 44.14 acres) Harriman Glen and Crystal Hill comparables are not adjusted to the subject by size by the same amount (- 5% and 0%, respectively). The Court determines here that the proper adjustment for size for both properties should be that employed by von Ancken for Crystal Hill, namely 0% or no adjustment.

As to individual properties and their adjustment, the Court determines that von Ancken's adjustments as to Harriman Glen are appropriate with the exception of that for zoning. This comparable was, in fact, sold with approvals already in place. As expert Terry Rice pointed out, however, the subject's zoning, WD, included residential as of right, and thus it needed only a special permit to move forward with the Brooker project, not a zoning change. Therefore, while von Ancken explained in his narrative that the presence of approvals in the comparable

required a negative adjustment in relation to the subject, he failed to explain why a downward 20% adjustment was warranted if the subject needed only a special permit for the project to proceed. In light of the comparative approval status between the comparable and the subject, differing only in that the subject requires a special permit, and that, in Rice's words, approval of such a permit was a "virtual certainty", the Court agrees that a negative adjustment is warranted, but disagrees that - 20% is the proper amount of adjustment to be applied. Consequently, the Court elects to use a - 10% zoning adjustment to reflect the comparison of Harriman Glen to the subject. Regarding the Hidden Ridge comparable, the Court determines that all of von Ancken's adjustments are appropriate except also for that for zoning. Hidden Ridge was sold without zoning approvals in place. As set forth above, the subject needed only a special permit. The absence of zoning approval, in the Court's opinion, makes the property slightly less desirable than one where only a special permit is required, hence an upward adjustment is required, which the Court calculates as 10%.

The Court takes a similar view of von Ancken's comparable #3, Icabod's Landing. The Court is, in fact, quite familiar with Icabod's Landing, since that was Land Sale # 2 in this Court's *In the Matter of the Application of Ferry Landing et al. v. Assessor of the Town of Greenburgh*, 20 Misc. 3d. 1145A (Supreme Court, Westchester County, 2008). In terms of location, Icabod's Landing is, in fact, strikingly similar to the subject, as both were waterfront parcels, they were formerly industrial properties, and they both were situated next to problematic industrial properties. These similarities dictate an adjustment for location less than that arrived at by von Ancken (- 15%), in an amount which the Court finds is - 10%. Similarly, von Ancken notes that the size of the Icabod's Landing parcel is 5.2 acres, with 1.8 acres unusable land. Von Ancken testified that he noted the size of parcels largely in relation to the number of units which could be built there, and thus he adjusted for size by - 10%, the same as for Hidden Ridge, which had a similar number of units planned, although the latter is 50% larger than Icabod's Landing. He also appears not to have realized that the unusable land at Icabod's Landing was actually underwater, and that the density caused by building 67 townhouses on the remaining 3.4 acres, would be far greater than the density of 56 townhouses on 7.36 acres at Hidden Ridge (i.e. 20% more townhouses built at Icabod's Landing on less than ½ the acreage of Hidden Ridge). The Court thus concludes that the proper size adjustment for Icabod's Landing is - 15%. Finally, as set forth above relating the Hidden Ridge property, in the absence of zoning approval, Icabod's Landing too requires an upward zoning adjustment

relative to the subject, which the Court likewise calculates as 10%.

Pulte Homes and Crystal Hill, like all but Icabod's Landing, should in the Court's opinion have been adjusted only 30% for lack of river-front location. The Court agrees with the remaining adjustments calculated by von Ancken as to both of these two properties, except as relates to zoning at the latter. Von Ancken testified that the sale of the Crystal Hill property was subject to appovals for zoning changes. As with Hidden Ridge and Icabod'd Landing, absence of zoning approvals, compared to the subject only requiring a special permit, requires an upward zoning adjustment which the Court calculates as 10%.

The Court thus concludes that the following adjustments are proper for the five comparables used by von Ancken:

	Harriman Glen	Hidden Ridge	Icabod's Landing	Pulte Homes	Crystal Hill
Location	20%	20%	- 10%	-	-
River frontage	30%	30%	-	30%	30%
Size	-	- 10%	- 15%	- 5%	-
Configur-ation/ topography	10%	-	-	-	20%
Zoning	- 10%	10%	10%	5%	10%
Net Adj.	50%	50%	- 15%	30%	60%

Applying these net adjustments to the above-mentioned time-adjusted sales price per acre yields the following net adjusted price per acre, which multiplied by the number of acres in the subject yields a total property value as follows:

	Harriman Glen	Hidden Ridge	Icabod's Landing	Pulte Homes	Crystal Hill
Time Adjusted Sale Price per acre	$208,637	$172,676	$465,386	$309,759	$155,535
Net Adj.	50%	50%	- 15%	30%	60%
Net Adjusted Price per acre	$312,956	$259,014	$395,578	$402,687	$248,856
# of acres	18.9	18.9	18.9	18.9	18.9
Total Property Value	$5,914,868	$4,895,365	$7,476,424	$7,610,784	$4,703,378

7. Assessment as Proof of Value

Condemnor points to the compromised assessment value of the premises prior to the vesting date as evidence of value of the subject premises. In particular, as set forth in greater detail above, the Village notes that claimant filed tax certiorari petitions relating to the subject for its Village taxes for the tax years 1994 through and including 1999, and 2001, and also proceedings for its Town taxes for the tax years 1994, 1995, 1997, and 1998. Claimant valued the property prior to 1999 at $500,000.00, and also asserted in the 2001 petition relating to the Town that the full value of the property was $1,000,000.00. Subsequently, all of the actions were concluded by stipulated settlements with assessments of $143,640 and $216,720 (for the Town and the Village, respectively), equating to a full market value for both municipalities of $1,200,000.00.

However, in support of its argument, condemnor cites to *In re Lincoln Square Slum Clearance Project, Borough of Manhattan, City of New York*, 15 A.D. 2d 153 (1st Dept. 1961), where the Court acknowledged that the statement of value contained in a writ is no more than an expression of an opinion of value by the owner, and that it likely "...bear[s] little relation to the true opinion of the owner...[a]n admission of an opinion is not

controlling as to the fact." This is particularly true given the paucity of knowledge as to the owner's grounds for his opinion on value, or whether he necessarily has any expertise on that subject. The same Court also noted that it might depend on whether the declaration were "...sufficiently close in time to the time of the taking...." Notably, only the 2001 Town petition might arguably be "close in time" to the taking, since the other petitions were four or more years before the vesting date.

In addition, in tax certiorari maters, it is the general rule that valuation of a property is based on its current condition on the taxable status date. RPTL § 301 (1) provides

> 1. The taxable status of real property in cities and towns shall be determined annually according to its condition and ownership as of the first day of March and the valuation thereof determined as of the applicable valuation date.

An exception to this method of valuation, however, does exist for the valuation of vacant land, which may be done at its highest and best use. *(Baj, supra; see also Matter of Gordon v. Town of Esopus*, 15 N.Y. 3d 84 [2010]; 10 Op. Counsel ORPS No. 45.--"The one apparent exception to the rule is in the case of vacant and unimproved land. There, if it is found that the land has no existing use beyond its potential sale for a further use, there is nothing improper in establishing its assessed value by considering its market value as enhanced by potential uses", citing to *Weingarten v. Town of Ossining*, 85 A.D. 2d 697 [2nd Dept. 1981]).

While there was testimony that prior to the taking the property was vacant for many years, it is unclear what the basis of that testimony was, or of the actual condition of the property and time it was in that condition. In fact, it is really only clear that most of the property was denoted or described as a disused brick manufacturing site. There is no evidence in the record as to whether the owner's expressions of value in the aforementioned petitions were opinions of value relative to the parcel's then current status as an abandoned former brick manufacturing premises, or in relation to the highest and best use of such premises; or whether there was proof that the land had "no existing use beyond its potential sale for a further use." Finally, the stipulation settling these matters was entered-into in early 2008, over four years after the vesting date, without any indication of how that value was agreed-to. For all of those reasons, the Court declines to give any weight to the tax certiorari petitions filed by claimant for the

subject, or the settlement of those matters by stipulation.

8. Final Conclusion of Value

Using the value derived from claimant's five comparables, the Court calculates a mean value of $6,120,163.00, rounded to $6,120,000.00, and determines the median value to be $5,914,868.00, rounded to $5,900,000.00. As indicated previously, the Court is especially familiar with comparable #3, Icabod's Landing, valued at $7,476,424.00, rounded to $7,480,000.00, and finds it to be particularly similar to the subject, albeit that the property is located in a superior location in Westchester County. Under all the facts and circumstances, in light of the evidence of value presented at trial, and the strong similarity of the subject to claimant's comparable #3, Icabod's Landing, the Court determines the value of the subject premises to be $6,500,000.00.

Claimant AAA Electricians, Inc., is therefore awarded the calculated cost of the loss from the direct taking, namely the amount of $6,500,000.00, with interest thereon from the date of the taking, November 14, 2003, less any amounts previously paid, together with costs and allowances as provided by law.

Conclusion

Upon the foregoing papers[2], and the trial held before this Court on April 14, 15, 16, 17, and 18, May 27, May 28, and 29, June 30, July 1, and 2, August 11, 12, 13, 14, and 15, October 6, 7, and 8, November 24, 25, and 26, 2008, and January 12, February 2, 23, 24 and 25, and March 18, 2009, it is hereby

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

ORDERED, that condemnor Village of Haverstraw shall pay as compensation to claimant the amount of $6,500,000.00, with interest thereon from the date of the taking, November 14, 2003,

[2] The Court acknowledges the assistance of Adam Kudovitsky and Melvin Monachan, summer interns and second year students at Pace University School of Law, in the preparation of this Decision and Order.

less any amounts previously paid[3], together with costs and allowances as provided by law.

Settle Order.

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

Dated: White Plains, New York
December 9, 2011

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

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[3] The Court has been advised that the pre-vesting offer of $2,596,150.00, plus $35,279.19 in interest at 6% from the date of title vesting to the date of payment (*See In re Village of Haverstraw*, 9 Misc. 3d 1120(A), [Supreme Court, Rockland County, 2005]), for a total of $2,631,429.19, made by the Village to claimant, was accepted by claimant as partial compensation for the taking. *See* EDPL § 304 (A) 3.