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 PUTNAM

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In the Matter of the Application of the Metropolitan Transportation Authority, relative to acquiring title in fee Simple absolute to certain real property for the project known as the WESTERN required for a commuter railroad project known as the

DECISION/ ORDER/JUDGMENT

BREWSTER NORTH STATION AND COMMUTER PARKING EXTENSION

consisting of that parcel of real property known as 20 Prospect Hill Road and also known as Section 56, Block 1, Lot 40, on the current Tax Map of the Town of Southeast, Putnam County, in the State of New York.

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LONGRIDGE ASSOCIATES, L.P.,

Index No: 1877/03

Claimant,

-against -

THE METROPOLITAN TRANSPORTATION AUTHORITY,

Condemnor.

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LaCAVA, J.

The trial of this Eminent Domain Procedure Law (EDPL) Article 5 proceeding, challenging the valuation by the Metropolitan Transportation Authority (MTA, or Condemnor) of the real property taken by them in Eminent Domain from Longridge Associates L.P.

(Longridge or Claimants)took place before this Court on August 16, 17, 18, and 20; October 18, 19, 20, and 21; and on November 5 and 12, 2010. The following post-trial papers numbered 1 to 6 were considered in connection with the trial of this matter:

PAPERS	NUMBERED
CLAIMANT'S POST-TRIAL MEMORANDUM OF LAW	1
CLAIMANT'S POST-TRIAL FINDINGS OF FACT	2
CONDEMNOR'S POST-TRIAL MEMORANDUM	3
CONDEMNOR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	4
CLAIMANT'S REPLY MEMORANDUM	5
CONDEMNOR'S POST-TRIAL MEMORANDUM OF LAW	6

The subject property consists of 52 ± acres of vacant land in the Town of Southeast, Putnam County, New York, more particularly described on the Tax Map of the Town as follows: Section 56, Block 1, Lot 40, and otherwise known as and located at 20 Prospect Hill Road. The property was taken by MTA in Eminent Domain As part of Metro North Railroad's Brewster North Station and Commuter Parking Lot Expansion Project. The purpose of the acquisition was the planned expansion of commuter parking facilities at Brewster North (now called "Southeast Station"), as well as construction of an intermodal transportation center, improved access to the station, and related projects. Title to claimant's property vested in Condemnor MTA on December 23, 2003. Claimant Longridge timely filed a claim on or about February 5, 2004.

It should be noted that the parties and the Court conducted a site visit to the subject property. The approximately 52 acre triangular-shaped parcel (zoned ED-2) is located on the east and south side of the MTA's Metro North Railroad (MNRR) Harlem Line railroad tracks, adjacent to and servicing the Brewster North Train Station; north of a separate railroad bed used for MNRR's New Haven Line; and on the west and south side of Interstate 84 (I-84). Access to the property, as described in more detail below, may be achieved from two locations: from the west, one would have to drive over an easement roadway extending across the MNRR tracks via independent way; while from the south, the property may be entered via North Main Street. The property is fairly level, consisting of generally open and gently rolling to flat land, while variations of only a few feet in elevation occur throughout its entirety. Wetlands exist in the area of the Tonetta Brook, which runs adjacent to I-84, on the east side of the subject. Additional wetlands lie to the west, adjacent to MNRR's rail line.

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

Robert H. Wilder testified as claimant's first witness. Wilder, the general partner of claimant Longridge and a real estate developer, described the original access to the subject as being from North Main Street, a Brewster Village road extending south to and from Route 6. Although the property also included 2500 linear feet of frontage on Interstate 84 to the east, creating an entry from the highway was considered unlikely due to state regulations surrounding interstate highway access. To enhance access, Wilder worked with the Town of Southeast, the New York State Department of Transportation, and the Metropolitan Transportation Authority to develop new access to the site directly from the I-84 / Route 312 interchange, via a newly-created street, Independent Way, running south to the site. The development also included a new train station (planned as the "North Brewster" station) with commuter parking. Once Independent Way entered the Longridge parcel, it was planned that it would connect (over a pre-existing farm road) to North Main Street, which then leads directly via its interchange with Route 6 into the Village of Brewster.

Wilder also arranged with two neighboring private land owners to donate portions of their property, and to make some financial contribution to expedite construction of the new road, which was called Independent Way. Although the road was built by the Town, the funding for most of the engineering work was paid for by Longridge. As part of the roadway development, the Town petitioned the New York State Department of Transportation (NYS DOT) for permission for the roadway to cross over the tracks and into the subject. NYS DOT declined, and the Town filed a petition pursuant to Section 90 of the Railroad Law for an administrative determination. The parties to the action included the Town, NYS DOT, MTA and the Consolidated Rail Corporation (Conrail, whose commuter line was the predecessor of MNRR and the then-operator of the commuter railroad franchise for MTA).

In a decision dated March 6, 1979, Administrative Law Judge F.E. Ueberwasser found that it was impracticable to construct the proposed access road across the tracks of the railroad above or below the grade, and recommended that the access road be constructed at grade. Thereafter, the MTA paved over its property up to claimant's land. Independent Way now crossed the railroad tracks and continued over MTA property for another 250 to 300 feet, where it terminated at the Longridge property boundary. After the MTA portion of the roadway was completed, a rubberized mat was positioned (by Conrail) to enable cars to pass over the tracks at

the crossing. Signals, switches, signs and gates were additionally arrayed at the location to facilitate safe passage of vehicular traffic to and from the subject via Independence Way.

Wilder testified that he never authorized anyone from the MTA and/or the New York State Department of Environmental Conservation (NYS DEC) to enter onto his property to map wetlands. He, in fact, had no knowledge that the property had been mapped until it was taken by MTA in eminent domain. Wilder asserted that, as a developer, he has experience with wetlands, and that he would have hired Tim Miller, a wetlands expert, to evaluate the wetlands status had he known about the mapping. Instead, the mapping was done without his permission, and he actively contested the finding, in the absence of his input, of significant wetlands on the property. Wilder also noted that Longridge owns a 46 acre parcel immediately opposite the subject property, on the eastern side of I-84, which was specifically purchased as a mitigation parcel (to mitigate any wetlands encroachment upon development of the subject parcel). The mitigation parcel also was immediately adjoining the Town park; the possibility of donating a portion of the mitigation parcel for park use would, in his opinion, make Town planning approval more likely, and thus assist any development plan by Longridge for the subject.

Wilder disclosed that, after construction of Independent Way, Longridge planned to develop the parcel for retail use. The Town's 2002 Comprehensive Plan specifically mentioned the potential future development of the Longridge parcel for retail use, and, in fact, Wilder had submitted preliminary plans for retail development. Longridge, however, had subsequently made a business decision to wait to see how the 450,000 square foot Brewster Highlands – Home Depot shopping center succeeded. He described the Town as being very pleased about the Highlands shopping center as witnessed by their having granted a zoning change to permit retail development. The Highlands Shopping Center, located only 1,000 feet from the subject, according to Wilder, successfully handled water and sewer requirements, including compliance with NYS DEC and New York City Department of Environmental Protection (NYC DEP) requirements.

Some time prior to the taking, Wilder noticed that the rubberized material between the tracks had been picked up, the crossing gates had been removed, and a metal guardrail had been put across Independent Way to prohibit any vehicular traffic from crossing the tracks. Wilder then wrote a letter, dated July 16, 2001, to Peter Kalikow, Chairman of MTA. Wilder received a response from the Metro North's Vice President and General Counsel which stated that Metro North acknowledged its understanding that the Town still holds the easement for the crossing, and that MNRR will

reopen the roadway and reactivate the automatic protective devices upon receipt of an appropriate request from the Town.

Tim Miller, a certified land planner, and the long-time Town planner for the Town of Phillipstown in Putnam County, was next called to testify for claimant. His area of specialty is in providing wetland impact and mitigation advice to property owners, and to government bodies and agencies as well. Miller stated that, at the time of his testimony, he was processing the necessary approvals for a shopping center in the Town of Southeast called "Stateline". He had performed land planning services for Wilder before, including work currently on an 800,000 square foot retail project, called the "Market Place", in the Town of Newburgh, and on a sixty-five unit residential development in the Town of North Salem.

Since he had been a planner on other projects within the Town, Miller stated that was familiar with the Town's zoning ordinance. In his opinion, the subject's ED-2 zoning was a highly desirable designation. The nearby Highland Shopping Center required a rezoning, which necessitated public hearings and decisions by the Town Board. The fact that it was approved indicated that the Town was not only likely interested in seeing economic development at Longacre as well, but also that, with the ED-2 zoning, such development could be accomplished more easily, since only a special permit was required for several already permitted uses including retail. He also noted that the comprehensive plan suggested serious interest on the part of the Town in the development of this property, especially for an office or retail use (the plan denoting the area as suitable for a "retail center"). And, in his opinion, the special permit standards in the Town were generally very easy to comply with. A well designed project that met the criteria for a special permit would not, in his planning experience, be denied.

Miller was also qualified by the court, based on his experience and training, as a wetlands expert. He expressed surprise that, prior to the taking, MTA had entered the subject on or about July 2001, had flagged wetlands and created a map , and that subsequently, DEC, upon application of MTA, in November 2002 (over a year before the taking) had prepared an additional wetlands map. In December 2003, at about the time of the taking, MTA subsequently procured, from DEC, the official wetlands map (which appeared, to Miller, to be the same map as that produced in July 2001). In his experience, wetlands mapping is generally done by the owner of the property. Once the site has been surveyed and flagged for wetland sites (this would also include conducting an aerial survey), a NYS DEC representative would come to the site,

and the parties would negotiate a final determination which would then be signed by the State. Such negotiations generally include some give and take between the state and the owner. To afford due process to the property owner, the protocol includes notice to the owner by the DEC before an official map is filed.

That did not occur in this case. MTA generated at least one, and likely several, surveys of the site, to create the 2003 DEC wetlands map. Having been created without input from the owner and by unauthorized entry by an outsider, Miller presumed that the 2003 map was inaccurate. However, upon examination of the several maps, he found several specific examples of inaccuracies on the MTA taking and wetlands maps. When he compared the taking map with its wetland delineations to the official DEC wetlands map, the taking map has wetlands indicated which, based on his personal experience with the subject, simply do not exist. He further noted that in his recent visits he found large areas of dry land that were never noted as such on the taking map, and which areas, due to the soil compositions, were irrefutably and unarguably dry. It was also his opinion that MTA had included, in the taking map, an area along the Metro-North Rail line as wetlands, that was not shown as wetlands on the prior wetlands survey, but subsequently did appear on the DEC wetlands map.

Miller referred also to another area at the southeast corner of the subject which should not have been included as wetlands because it was not connected with the larger wetland areas. This inclusion was, he stressed, very damaging to development of the parcel, because it caused an additional one hundred foot area to be improperly included as wetland, and thus potentially be undevelopable. Equally erroneous, and damaging, was the wetlands designation on the DEC wetlands map of a small sliver of land which extended into the center of the property; in itself it was a very tiny wetland piece, but the designation also improperly created a substantial area which was designated as adjacent wetlands, and which was therefore regulated. Miller stated that he would have delineated the wetlands accurately, but in a way which would have substantially minimized the amount of regulated area, and permitted more area to be developed.

According to Miller, even by MTA's own calculation there were twenty acres of dry land on which to locate a shopping center. In his opinion this was ample room to build such a shopping center. There were thus certainly grounds to apply for and receive a reasonable review of a shopping center development and, likely, get a site plan approval with permits. Even access through the DEC buffer is often granted, he noted. Miller also testified that any application for a permit to develop the Longridge parcel would

include a request to mitigate any encroachment on wetland areas; when filling wetlands, replacement could be made to avoid a net loss of wetlands area, including filling at a higher ratio (i.e. more land than originally designated wetlands). He opined that Longridge could have had mitigation on the subject property itself, because there were ample locations on the site for mitigation. But, even if that were not the case, the adjacent forty-six acre parcel also owned by claimant was a prime mitigation parcel because it was a large property; because it is near the wetlands affected; and because it adjoins the Town Park, and represents an offsetting of impacts that would be very attractive to a regulator such as the Town and/or DEC.

Miller stated that a well could have been drilled to provide drinking water, and that waste water treatment also could have easily been accommodated. He testified that, in his experience from other retail projects in Putnam County (one in Southeast and one in Patterson), wastewater was disposed of with an onsite system which was in compliance with the NYC DEP regulations. He also noted that the Highland Home - Depot Shopping Center on Independent Way, which was only approximately 1,000 feet from the Longridge property, had an onsite treatment system which had excess capacity.

Edward J. Ferrarone then testified as claimant's appraiser. He described the two access points to the property, one from the south which ran from the end of North Main Street in the Village of Brewster, along Tonnetta Lake Road and Prospect Hill Road about 650 feet to the property, and the second which ran on Independent Way over the MNRR tracks to the subject property. Ferrarone stated that either one of these methods of access were suitable as entry to the subject for traffic approaching a retail development. In his valuation analysis, Ferrarone first examined the highest and best use of the subject. He considered the actual zoning (ED-2), which he said was favorable, and the permitted uses thereunder. He next looked at what was physically possible for the site, considering that there were approximately twenty-five acres which could be utilized for development. He concluded that there was adequate land in which to construct a shopping center, that such a center could be supported by well-water, and that sewage disposal could be accomplished on the site in several different ways.

Ferrarone next found that a retail shopping center would be financially feasible based, among other factors, on the success of the adjoining Brewster Highlands mall, and the shortage of retail establishments in the area of the subject. He next examined the "maximum productivity" of the property, and determined that, because of the proximity of the subject to the I-84/Route 312 interchange (a four way on-off interchange), a retail shopping

center would produce the maximum result for a developer. Based on all of these factors, Ferrarone concluded that the highest and best use of the subject property was for retail development. This conclusion was supported by the Town's 2002 Comprehensive Plan, which specifically addressed development near the Brewster North Railroad station (such as proposed for the subject).

In Ferrarone's opinion, obtaining a special permit to allow retail development of a shopping center at the subject was likely, since the proposed retail development conformed to the Comprehensive Plan. Acquiring a special permit, he testified, was not an onerous additional burden on a developer. Ferrarone was aware that MTA had flagged wetlands, but he was also aware of Longridge's ownership of the mitigation parcel adjacent to the subject parcel on the east side of I-84. In his opinion, the wetlands issues would be addressed by hiring wetlands experts such as the previous witness Miller.

Ferrarone used a market approach to value the subject property. He sought as comparables relatively large parcels of land, with similar retail uses, which were near major highways or interchanges, in built up retail areas. While the subject had extensive frontage on I-84 but no access, it was still located, in his opinion, on a very well traveled road, an important quality for a shopping center. Comparable #1 was not a sale, but a long term ground lease for the Home Depot in the nearby Brewster Highlands development. At a sale price of $8,300,000, the 11.23 acre site was calculated to be $697,000 per acre. Comparable #2, located on Union Avenue in Newburgh, Orange County, near the I-87/I-84 interchange, was a 2004 sale of 108.6 acres at $11,100,000 - which he calculated to be $102,238 per acre. With wetlands and steep slopes, it was zoned I-B, which includes retail uses.

Sale #3 was a 2004, 19.46 acre sale involving part of the Terravest Corporate Park on International Way in the Town of Southeast,. Also containing wetlands, it was near (just north-east of) the I-84/Route 312 interchange, and sold for $2,000,000 plus $500,000 in considerations, which calculated to a value of $128,469 per acre. The planned use was a warehouse. Sale #4 for $1,075,000 was a 2003 transaction involving an 11.77 acre parcel on Route 6 in Southeast , calculated at $91,334 per acre, for use as a church and school. Sale #5, which was just south of Sale # 2, was a 2002 transaction for a 212,000 square foot retail complex. At 21.3 acres, the $9,600,000 sale was valued at $450,704 per acre. Comparable #6 was a 2003 sale at Mt. Kisco Commons in Westchester County. The 16.28 acre site was improved by a 200,000 square foot shopping center which the purchaser demolished for construction of a smaller, Target-anchored shopping center. The sale price of

$22,780,485 reflected a price of $1,399,293 per acre. Finally, Comparable #7 was a 2000 transaction involving a 28.51 acre site, the disused Baldwin Place Shopping Center in Somers, Westchester County. The improvement was demolished by the buyer and replaced by the 218,000 square foot Somers Commons Shopping Center. At a sale price of $7,200,000, this sale was calculated to be valued at $252,543 per acre.

Ferrarone adjusted these sales for time, and for such features as location, size, topography, zoning, utilities, and approvals. Comparables #2 and #5 were adjusted 25% to reflect what he determined was the less-desirable Orange County location; he also adjusted Mt. Kisco Commons -25% for location due to its perceived superiority over the subject. Most of his other adjustments did not exceed plus or minus 10%, except as relates to approvals, where he adjusted Comparables #1, #5, #6, and #7, to reflect the subject's failure to have approvals in place. Ferrarone's seven sales, as adjusted, ranged in value from $96,814 to $593,300, with a median of $146,984, and an average of $251,845. Relying most heavily on Comparables #2, #3, and #4, due to their similarity to the subject, Ferrarone calculated a value for the subject of $115,000 an acre, which in turn yielded a total value for the 52 acre taking of $5,980,000, which he rounded to $6,000,000.

Ferrarone also testified about the Town Comprehensive Report's description of the area of the subject property, as where the Town envisioned a more intense commercial use, possibly including a hotel/conference center, a transportation center, and associated retail activity, to take advantage of the proximity to the train station and I-84.

Mr. Ferrarone also prepared a rebuttal report to the report prepared by condemnor's appraiser Robert Sterling. In his opinion, the latter's appraisal report was fundamentally flawed because he both completely failed to recognize any access from Independent Way, and minimized the practicality of any access from the North Main Street approach to the property, effectively concluding that the parcel was landlocked and therefore undevelopable. He also differed with Sterling's highest and best use analysis, arguing that Sterling not only failed to recognize that retail uses are permitted by special permit, but appeared not to know that a special permit application does not impose any particularly onerous requirements on a developer, other than requiring the applicant to appear before the Planning Board as well as the Town Board.

Ferrarone was asked on cross-examination about sewage disposal at a retail shopping center developed on Longridge. In his opinion, one alternative was to make an arrangement with the

Brewster Highlands Shopping Center, and to make a connection to their on-site sewage plant; this would of course involve pumping the sewage. He had previously confirmed with the owner of this shopping center that they had excess sewer capacity, and that the mall plant could process sewage from Longridge. His preferred solution, he stated, was the construction of a package plant on the Longridge site itself. He was also asked about use of the mitigation parcel; Ferrarone testified that the parcel is an added benefit, since mitigation, if necessary, could occur on that parcel, but that mitigation could also occur on the subject site alone, leaving the mitigation parcel to be developed itself or to be used in bargaining with the town.

Condemnor's first witness was Graham Trelstad. While condemnor's counsel represented that Trelstad was the Southeast Town Planner, and he was presented to the court as a fact witness, who, actually, was merely employed by a firm which had been hired by the Town as its planning consultant. Condemnor also sought to introduce opinion evidence through Trelstad, but the Court ruled that his testimony would be limited to the facts of the permitting process, and he would be not allowed to offer opinion evidence. Trelstad then described the process for an application for a special permit, and, despite several attempts by condemnor's counsel to elicit expert testimony from Trelstad, the Court declined to permit Trelstad to provide any opinion evidence. On cross examination, Trelstad agreed that there were two points of access to Longridge, namely from Independent Way, east of the railroad tracks, but also from North Main Street. He also conceded that the Town moratorium on development, by its language, did not apply to Longridge.

Trelstad was asked several questions regarding the approval process of the State Line shopping center development (which claimant's witness Miller was the land planner for). This center, also in the Town of Southeast, received approval for every step required by the Town in the approval process, including the granting of a special permit such as would also be required for the Longridge parcel to be developed into a shopping center. Trelstad also was referred to the official minutes of the Town, present on its webpage, which indicated that between August 2004 and April 2010, the Town Board considered twenty-two applications for special permits, and granted all of them. He agreed that a shopping center or other commercial development application often includes improvements to local access roads, frequently through some government funding. And he was well aware the Town was interested in increasing taxable ratables in 2003, and that shopping center developments often substantially increase real property tax revenues, with very little municipal services required.

Alfred M. Santini, MTA's assistant chief engineer, was also called as a witness by condemnor. He was familiar with the grade crossing for Independent Way over the tracks, and testified that there had initially been gates, flashers, and control circuits installed at the crossing, parts of which had been replaced in 2002. A chain link fence was also installed, prior to 2003 when the parking lot improvements were made, and subsequently all the control circuits for the crossing were completely removed. Santini also confirmed that, while the tracks from the south to Brewster North were electrified in 2003, that was not the case north of the station where Independent Way crossed; to proceed north from Southeast, passengers must board a diesel-powered train. On cross-examination, he agreed that MTA had paved Independent Way east of the tracks, and he remembered when rubber mats were in place between the railroad tracks. He also conceded that, while the grade crossing was not on the federal list of such crossings, the process for requesting a crossing to be listed is merely the preparation of a form which is sent to the Federal Railroad Agency, whereupon the crossing is listed thereafter.

Santini testified that, of the thirty-three trains per day leaving Brewster North, only thirteen active trains per day actually cross Independent Way, all of these leaving the Brewster North station from a stopped position only 424 feet away (measured from the front of the engine stopped at the station) to the crossing, and all accelerating slowly as they left the station. The additional twenty trains reverse direction from north to south on sets of tracks located south of the crossing - to enter the train yard,, and hence do not pass the grade crossing. He also stated that, on MNRR's Harlem line in general, there were eleven other grade crossings south of the Southeast station, and twenty-four crossings north of it, for a total of thirty five grade crossings north of Grand Central Terminal. Santini further agreed that trains would generally pass the Independent Way grade crossing during rush hour, while prospective shoppers would probably cross to any shopping center on the subject at different times of the day. Finally, he stated that, if the Town asked to reactivate the Independent Way crossing, MTA could reinstall the signals, safety equipment and switching devices, which, in his opinion, would protect anyone who would be going into a shopping center.

Kevin Williams testified next for MTA. Williams was a consultant for MNRR in 2002 on the station improvement project whose role was to evaluate the impact of the parking and traffic. Williams stated his opinion that the Independent Way grade crossing was not a viable access for the MTA parking lot, based on the roadway grade on both sides of the tracks, namely the line of sight

coming down Independent Way to the subject property, and the line of sight coming from the subject property to the crossing. However, Williams was cross-examined extensively about this opinion, claimant pointing out that the topography of Independent Way, as it approached, crossed, and continued onto the subject, was essentially flat. Claimant sought to impeach Williams by using photographs contained in Ferrarone's appraisal, which show a picture looking across the MMNRR tracks, onto the paved eastern extension of Independent Way; and a picture of the entrance to the site from the crossing, which shows the paved extension of Independent Way on the east side of the track (looking east, towards the subject). Both of these photographs depict a flat area with little impact on line of sight for motorists. Claimant also pointed to a photograph in Sterling's appraisal for condemnor which likewise shows a flat crossing and flat easterly view, directly contradicting Williams' testimony.

Williams also opined that, since use of the grade crossing to access the subject was not viable, the only workable approach to the site was still via Independent Way, but over a bridge. However, when cross-examined about this opinion, it became clear that the bridge he was talking about was a pedestrian overpass to allow train passengers, who had already parked their cars in the lot located on the western or south bound platform side, to cross over the tracks and access the eastern or north bound platform of the station. And, Williams also stated his opinion that, not only were there two access points to the subject (Independent Way and North Main Street), but in fact he conceded to two additional, viable methods of access to the parcel.

Condemnor then called appraiser Bob Sterling. Sterling first conducted an analysis of the highest and best use of the subject. While he conceded in his report that the subject could accommodate all of the ED-2 uses in the areas outside of the wetlands areas, in his opinion the wetlands, the sloping topography, and the triangular shape of the property were serious obstacles to full development of the parcel. He found that only 39% of the property, located in the middle interior, was suitable for development. He further found that access was restricted due to the street being above the level of the subject, except for a driveway which is a permanent easement in favor of an adjacent landowner. And he also opined that the location was obscure and less favorable than other available sites with better access and visibility. In Sterling's opinion, the subject site should instead be held vacant until improved market conditions warranted its development.

Sterling then chose four nearby land sales of mixed use property that could not be developed. Sale #1, in the same Town,

was a June 1999 sale of 37.4 acres for $450,000. Sale #2, in East Fishkill in Dutchess County, was a January 2000 sale of 38.67 acres for $624,750. Comparable #3, a March 2001 sale in nearby Carmel, was for a property consisting of 51.55 acres, which sold for $220,000. And Sale #4, also in the same Town, was a June 2001 sale of 74.87 acres for $525,000. He described the properties in terms of qualities such as configuration, topography, wetlands, frontage, zoning, utilities, easement encumbrance, and noted sales prices per acre for each of $11,982; $16,156; $4,268; and $7,012, respectively. He then addressed intangibles such as property rights; financing, motivation, and market conditions (adjusting only the latter quality, time, at 20%; 20%; 15%; and 15%, respectively), which yielded adjusted prices per acre of $14,271; $19,387; $4,908; and $8,064, respectively. Making then small physical adjustments, he arrived at final adjusted prices per acre of $14,984; $15,510; $4,908; and $8,970, respectively. His conclusion on value was $13,500 which, when multiplied by the 51.40 acres of the subject, yielded $695,250, which he rounded to $700,000.

Claimant cross-examined Sterling with respect to several aspects of his methodology. Initially, Sterling was questioned about his knowledge of wetlands designations, due to his reliance on the wetland flagging of the subject by MTA without permission, authority, or input from the owner of the parcel. Sterling conceded that he was not a wetlands expert, and therefore he relied squarely on the mapping. Had a representative of the owner been present during this process, however, he agreed that the wetlands delineation might have been less, even significantly less. Sterling was unsure about the measurements of adjacent wetlands, nor did he know how a wetland determination was made. And he did not know that Independent Way had already been built on adjacent wetlands or wetlands when it was extended from the tracks into the Longridge property. He did not know that D.E.C. regulations and permissible uses are less severe for adjacent wetlands than wetlands areas. Sterling also conceded that he did not review any study or report to come to the conclusion that it was doubtful that development would be permitted in any wetland or adjacent areas.

When asked about mitigation of wetlands, he agreed that mitigation was something that he had never personally done. He agreed that mitigation can be done on site, but was completely unaware that wetlands mitigation can also be done offsite. Specifically asked whether the adjacent 46 acre property owned by Longridge on the other side of I-84 could have been used for mitigation, he responded that he did not have that expertise, although his file contained a copy of the Freshwater Permit Requirement Regulations, part 663, which clearly states that

mitigation may occur on or in the immediate vicinity of the site of a proposed project. Although he testified that he did not think that the 46 acre parcel could be used for mitigation, because he considered it a sheer wall of rock, he conceded that he never actually inspected the parcel, although he had driven past it, and also reviewed aerial and topographical maps of it. But when shown a copy of the Ferrarone appraisal, which contained a topographical map of the adjacent parcel showing that it was actually largely level, Sterling agreed to that topographical characterization, but then asserted that the parcel consisted of swamp land.

Sterling's file also contained a map prepared for the MTA by the same surveyor who prepared the acquisition map, showing that MTA had also entered and mapped wetlands on claimant's mitigation parcel, again without the consent of or input from the owner. This map showed over 26.2 acres of non-wetlands on the mitigation parcel. Further, Sterling's file, provided to claimant for cross-examination, disclosed that MTA had previously prepared a map of the subject, which had a wetlands delineation showing a smaller amount of wetlands on the subject (5.8 percent less wetlands, or 1.25 acres), and also a decrease in the buffer area, which would allow more land to be developed as of right (since it was non-regulated).

Sterling could not explain the subsequent re-mapping of claimant's property, also without permission; he recognized that increasing the amount of wetlands in the second map served to reduce the land available for development and thus lower its value. Knowing these facts, Sterling conceded, might have, in turn, changed his opinion as to the buildability of the parcel; they might also have altered his choice of comparables, from parcels that could not be developed to those that could, and thus it might have raised the value of the subject in his analysis. He noted the importance of concluding to a correct highest and best use, because the highest and best use defines the parameters of the comparable sales to be considered. Claimant pointed out that, since all of Sterling's comparable sales were on non-buildable land, none would allow a shopping center development with a special permit; none enjoyed the same valuable ED-2 zoning; and none had the possibility of being developed for any uses whatsoever. Sterling admittedly made no attempt to determine if the Town would, upon application and compliance with all regulations, grant a special permit for the subject for retail use, because it didn't fit into his highest and best use. Neither did he read the 2002 comprehensive planning report; in fact, he admitted that he wasn't even aware the comprehensive report existed when he made his appraisal.

Finally, claimant questioned Sterling's conclusions about

access to the subject parcel via Independent Way. He had testified that there was no operational road over the railroad tracks, and claimed that there had never been an operational public road over the tracks either. He was unable to reconcile that testimony, however, with the testimony of both claimant's planning expert Miller, and condemnor's MNRR engineer, Santini, that such access, supported by a grade crossing with rubberized matting, switches, flashing lights, guard arms, and signs definitely existed, along with Independent Way being fully paved across the tracks and directly into the Longridge parcel. Independent Way crossing the tracks was also shown on the official maps which Sterling had in his own file.

He also was aware (since it was in his file) of the above-mentioned responsive letter by Metro North's Vice President and General Counsel to Wilder, that MTA understood that the Town still held an easement for the grade crossing, and that MNRR would reopen the roadway and reactivate the automatic protective devices when they received a request from the Town. And Sterling was in possession of, but admitted that he did not take into account, the decision by the State Administrative Judge for DOT which directed that a grade crossing be put across the tracks at Independent Way. Finally, Sterling also attached an easement indenture to his rebuttal report, which provided that the easement and Independent Way right of way was conveyed to permit the construction and subsequent use by the public of a new roadway.

Yet, Sterling conceded, he did not consider any or all of these factors; rather, he assumed that it was not permissible or feasible to either build on the subject by avoiding the wetlands, or to fill in wetlands located on the subject, and replace those wetlands by use of the mitigation parcel. He further assumed that access to the subject, either via Independent Way or by North Main Street, was simply not practicable. These and other assumptions directed him to his highest and best use, which was to hold the property for future use, as well as to his valuation, which was achieved by the employment of comparable sales of property which could not be developed.

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 rezoning of the property 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 ED-2

(Economic Development-2) Zone. According to the uncontested testimony of petitioner's planning expert, Tim Miller, the planned development (as set forth in greater detail above) could have been constructed in the ED-2 zone "as of right", by a special permit. According to Miller, due to the Town's favorable view of economic development, particularly retail, the nearby Brewster Highlands Shopping Center development received a required rezoning after public hearings and a decision by the Town Board. With the ED-2 zoning of the subject, a special permit for retail use could be accomplished more easily. Miller also referenced the comprehensive plan, which demonstrated the Town's serious interest in the development of the subject, especially for office or retail use. Under the ED-2 zoning, retail development could be authorized by special permit, since it is already a permitted use. Miller also opined that the special permit standards in the Town are generally easy to comply with, and that a well designed project which meets the special permit criteria will generally be granted. This was the reason, he explained, that all of the recent special permit applications (22 in the preceding six years) had been approved. Thus, there was a reasonable probability that retail development, such as that proposed by Wilder, 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 retail center, such as that proposed by claimant, was one possible highest and best use of the land.

4. 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. The Court notes that 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 retail project on the parcel; expert testimony that the planned development was fully compliant with or could comply with existing municipal code requirements; that the wetlands areas, with or without the mitigation parcel, and even though they were mapped without its

consent or even input, nevertheless allowed for sufficient room for development of the parcel as planned; that access via a mandated grade crossing, as well as by an alternate route, existed; 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 it was 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 retail development.

In contrast, condemnor failed to present any expert proof that a special permit for the planned development was unlikely to be issued. While condemnor's appraiser asserted that it was his opinion that wetlands precluded development of the parcel, his assumption was based on an un-consented to entry onto the subject (and the nearby mitigation parcel) by MTA to map the wetlands, in a one-sided process inconsistent with normal wetlands proceedings such that the Court can have very little confidence in its accuracy. As claimant properly points out, the ability to build or not on the parcel, rises and falls on the determination of exactly how much of the subject is wetlands, where and how extensive those wetlands are, and where lands adjacent to them are situated as well. The opinion that the property could not be developed was also based on condemnor's appraiser's lack of knowledge of the process of utilizing a mitigation parcel, such as that owned by Longridge adjacent to the subject, to further the development of the subject. In any event he was also, based on his testimony, insufficiently knowledgeable about the mitigation parcel, even if he knew the process for mitigation, to determine whether the parcel was truly suitable for mitigation or not. Here too, based on the un-consented to mapping of that parcel by MTA, any decision that was made by Sterling, of the unsuitability of the parcel for mitigation, is equally flawed and unreliable.

In addition, condemnor's appraiser relied on lack of access to the subject to determine his highest and best use. From his testimony, however, he believed that there was no (and indeed had never been an) operational road over the railroad tracks. This was a belief irreconcilable not only with the testimony of claimant's planning expert, Miller, but also with that of condemnor's own witness, MNRR engineer Santini, that such access existed. Indeed, such access included not only a grade crossing with rubberized matting, but also switches, flashing lights, guard arms and signs, which had been installed by order of a State Administrative Law Judge. Further, Independent Way had also been fully paved across the tracks to the subject. That Independent Way continued across the tracks was also verified on official maps contained in

Sterling's own file, along with the Metro North's letter conceding that the Town held an easement for the grade crossing, and that MNRR would reopen the roadway and reactivate the automatic protective devices upon receipt of a request from the Town. Sterling also possessed in his file the decision by the State Administrative Law Judge directing the grade crossing to be put at the Independent Way intersection with the MNRR tracks.

These were the criteria apparently ignored by Sterling in arriving at his highest and best use of holding the property for future development. This criteria, wetlands encroachment and lack of access, were unarguably inconsistent with the actual facts in the case as cited above. As claimant accurately points out, based on these false assumptions - wetlands precluding development, and lack of access - Sterling did not even choose to speak to the Town about whether it favored such a development of the subject. He did not give any consideration whatsoever to development of the subject, and therefore chose as comparables properties that could not be developed. 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*, 89 A.D. 3d 988, 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, as set forth above, is that, based on the accessibility of the parcel, its generally level topography, and its significant size (approximately 52 acres, of which at least 40%, and arguably approximately 50%, is likely unaffected by the presence of wetlands), as well as the presence nearby of a significant wetlands mitigation parcel, the proposal to build a retail development was physically possible at the subject location. Further, the grant of a special permit for such development was deemed likely, given the expert testimony that retail development was a permitted use; that the Town was favorably disposed towards such a use; that the plan met or would meet all municipal requirements; and that such permits are routinely granted (indeed, for a period, were never denied). There was also testimony that there was a significant likelihood, based on the Town Comprehensive report, that a retail development on the subject would be economically profitable; that one significant potential cost, wastewater management, could be accomplished either by use of an on-site facility or connection to a neighboring project with its own on-site facility; 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 retail development, as of the date of the title vesting (*Cf., Gyrodyne, supra*).

5. 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, and the condemnor's appraiser's trial testimony and the corresponding market values, are as follows:

Claimant's Value	Pre-Vesting Offer	Condemnor's Value
$6,000,000 (Ceiling)	**$700,000**	**$700,000** (Floor)

6. Valuation

a. Condemnor's Appraiser's Methodology

As set forth above, Condemnor's appraiser rejected not only commercial, but all other proposed uses - residential, retail, hotel, and industrial - and selected "holding for future speculative use" as the highest and best use of the property. This was, as set forth above, based on the mistaken belief that both wetlands encroachment (for which mitigation was unavailable) and lack of access prevented development of the subject. Combined with what was, in his opinion, a poor location, Sterling thus chose only properties which could not be developed, which allowed him to arrive at a conclusion of value of $13,500 per acre. Multiplied by the 51.50 acres of the subject, Sterling concluded a market value of $695,250, rounded to $700,000. Given all of the above-mentioned factors, the Court is thus, in evaluating his analysis, hard pressed to credit his conclusion of value of $700,000 on the date of taking in 2003, and thus the Court simply rejects as unreliable an analysis which produced such a value. Sterling's comparables, as non-developable parcels, also cannot be adjusted to use in a commercial/retail analysis, and in fact he conceded this point when cross-examined, agreeing that his comparables were properties for current or future (speculative) mixed office and/or industrial

uses. Having determined that Sterling's methodology was in error to the extent that it chose holding for future speculative use as the highest and best use, and since he conceded that his comparables could not be used in an analysis for a commercial/retail highest and best use, the Court elects to base its analysis solely on the methodology employed by claimant's appraiser, namely his comparable properties, with adjustment by the Court as appropriate.

b. Ferrarone's Sales Comparison Analysis

As set forth in greater detail above, Ferrarone examined seven comparable properties in his market analysis. The first was actually a long term ground lease for the Home Depot in the Brewster Highlands development, on Independent Way about 1000 feet away from the subject; the second was a sale on Union Avenue in Newburgh, Orange County, near the I-87/I-84 interchange; Sale #3 was a sale on nearby International Way in the Town of Southeast, part of the Terravest Corporate Park; the fourth was a sale on Route 6 in Southeast for use as a church and school; Sale #5 was located near Sale #2, at Routes 17K and 300 in Newburgh; Sale #6 involved Mt. Kisco Commons in Westchester County; and the final sale was of the former Baldwin Place Shopping Center in Somers, also in Westchester County.

Ferrarone recognized the fact that several of the comparables (#2 and #5) were at a distance from the subject, in Newburgh, while the Mt. Kisco Commons sale, although closer, was in a more upscale market than the Longridge property. He thus employed significant adjustments (25% or -25) to account for these differences. His efforts and intentions notwithstanding, due to the disparate nature of the two Newburgh and the single Mt. Kisco comparables, the Court declines, except as noted below, to make full use of them in its own valuation analysis *(See, Matter of W.O.R.C. Realty Corp., supra*, where the Court noted that it is in the sound discretion of the trial court whether to accept evidence of sales "beyond the immediate vicinity of the subject property", quoting *Welch Foods v. Town of Westfield*, 222 A.D. 2d 1053, 1054 [4th Dept., 1995]; *see also, Bialystock and Bloom v. Gleason*, 290 A.D.2d 607 [3rd Dept., 2002], noting the reduction in evidentiary value for comparable properties requiring extensive adjustment due to geographic remoteness from the subject).

The Court accepts the calculation by Ferrarone of the sales prices of the seven comparables, and their per acre prices, as follows: Comparable #1, $8,300,000 sale at $697,000 per acre; Comparable #2, $11,100,000 at $102,238 per acre; Comparable # 3, $2,500,000 at $128,469 per acre; Comparable #4, $1,075,000 at

$91,334 per acre; Comparable #5, $9,600,000 at $450,704 per acre; Comparable #6, $22,780,485 at $1,399,293 per acre; and Comparable #7, $7,200,000 at $252,543 per acre. The Court also accepts Ferrarone's adjustments for time, at 9% per year, which yields adjusted per acre prices of $885,190; $97,370; $117,861; $96,814; $504,788; $1,483,251; and $330,713.

However, it is at Ferrarone's adjustments for location at which the Court departs from his approach. As condemnor properly points out, some of Ferrarone's location adjustments appear to be inappropriate. For example, as set forth above, he adjusted Comparables #2 and #5 25% to reflect what he determined was the less-desirable Orange County location. While it may be true, as he states, that Orange County in general, and Newburgh in particular, have a lower median income than Putnam County, the area within which both comparables are located is best described as a highly desirable retail location, as it not only has superior access to I-87 and I-84, but is also located at or near the location of several very large retail developments. The Court thus, balancing those two factors, elects to discard Ferrarone's 25% adjustment, and instead makes no adjustment of either sale for location, to reflect the fact that both comparables are, on balance, similar locations to the subject. Ferrarone also did not make any location adjustment for #7, the former Baldwin Place in Somers, a property which, in Court's opinion, is more similar to Mt. Kisco Commons than the subject. As he employed a -25% adjustment for Mt. Kisco's perceived location superiority over the subject, the Court elects to adjust the Somers property -15% for its location which while superior to the subject, is not quite as good as that of Mt. Kisco.

Ferrarone also did not adjust #1, the Brewster Highlands Shopping Center, for location, believing that it was equal to the subject since both are located on Independent Way. However, clearly the center, which is in sight of, and with easy access to and from, I-84, and which has no need of involvement with a grade crossing, is, in the Court's opinion, a considerably more desirable location than the subject, and therefore merits a -15% adjustment. Further, Ferrarone elected to adjust Comparable #4, the Route 6 parcel also located in the Town, 10%, based on his opinion that, although it was located close to an I-684 interchange, it was in a local neighborhood. However, the location is proximate to I-684, and does benefit from access on Route 6, a well-traveled road. Based on those considerations, the Court elects to adjust this sale -10%. Finally, while Comparable #3 is on the same I-84 cloverleaf as the subject, it is somewhat closer than the subject, is closer to the Brewster Highlands development, and situated in a generally more traveled area. Thus, where Ferrarone made no adjustment to the Terravest Corporate Park parcel, the Court makes a -10%

adjustment to Comparable #3.

The Court also accepts Ferrarone's other adjustments (for size; topography; zoning; utilities; and approvals). This yields net adjustments by the Court for Comparable #1 of -120%; Comparable #2 of -10%; Comparable #3 of 0%; Comparable #4 of -20%; Comparable #5 of -125%; Comparable #6 of -150%; and Comparable #7 of -140%. Ferrarone's seven adjusted sales ranged in value from $96,814 to $593,300 per acre, with a median of $146,984 per acre, and an average of $251,845 per acre. However, he placed most reliance on Comparables #2, #3, and #4 as most nearly similar to the subject and closest to it in value. These three sales Ferrarone valued at $111,976 per acre; $129,647 per acre; and $96,614 per acre, respectively, from which he derived a value of $115,000 per acre.

The Court concurs with Ferrarone on his particular reliance on Comparables #2, #3, and #4 as most nearly approximating the subject, and rejects comparables #1, #5, #6, and #7 where he adjusted -100% for approvals. The Court is of the further opinion that, of #2, #3,and #4, Comparable #2 and Comparable #4 are especially similar to the Longridge parcel and should be accorded the most consideration. Employing the Court's adjustments of -10% for Comparable #2; 0% for Comparable #3; and -20% for Comparable #4, yields adjusted values in the Court's analysis of $87,633 for Comparable #2; $117,861 for Comparable #3, and $77,451 for Comparable #4. The median of these three Comparables is $87,633 per acre, and the average is $94,315 per acre. Relying most heavily on Comparables #2 and #4 due to their similarity to the subject, the Court calculates a value for the subject of $85,000 an acre, which in turn yields a total value for the 51.5 acre taking of $4,377,500, rounded to $4,375,000.

Claimant Longridge Associates L.P. is therefore awarded the calculated cost of the loss from the direct taking, namely the amount of $4,375,000.00, with interest thereon from the date of the taking, December 20, 2003, 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 August 16, 17, 18, and 20; October 18, 19, 20, and 21; and on November 5 and 12, 2010, it is hereby

ORDERED, that the claim by claimant Longridge Associates L.P. for compensation for a taking conducted by the condemnor Metropolitan Transportation Authority herein, pursuant to EDPL Article 5, is hereby granted; and it is further

ORDERED, that condemnor Metropolitan Transportation Authority shall pay as compensation to claimant the amount of $4,375,000.00, with interest thereon from the date of the taking, December 20, 2003, less any amounts previously paid[1], 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 4, 2012

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

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[1] The Court has been advised that the pre-vesting offer of $700,000.00, by Metropolitan Transportation Authority to claimant, was accepted by claimant as partial compensation for the taking. *See* EDPL § 304 (A) 3.